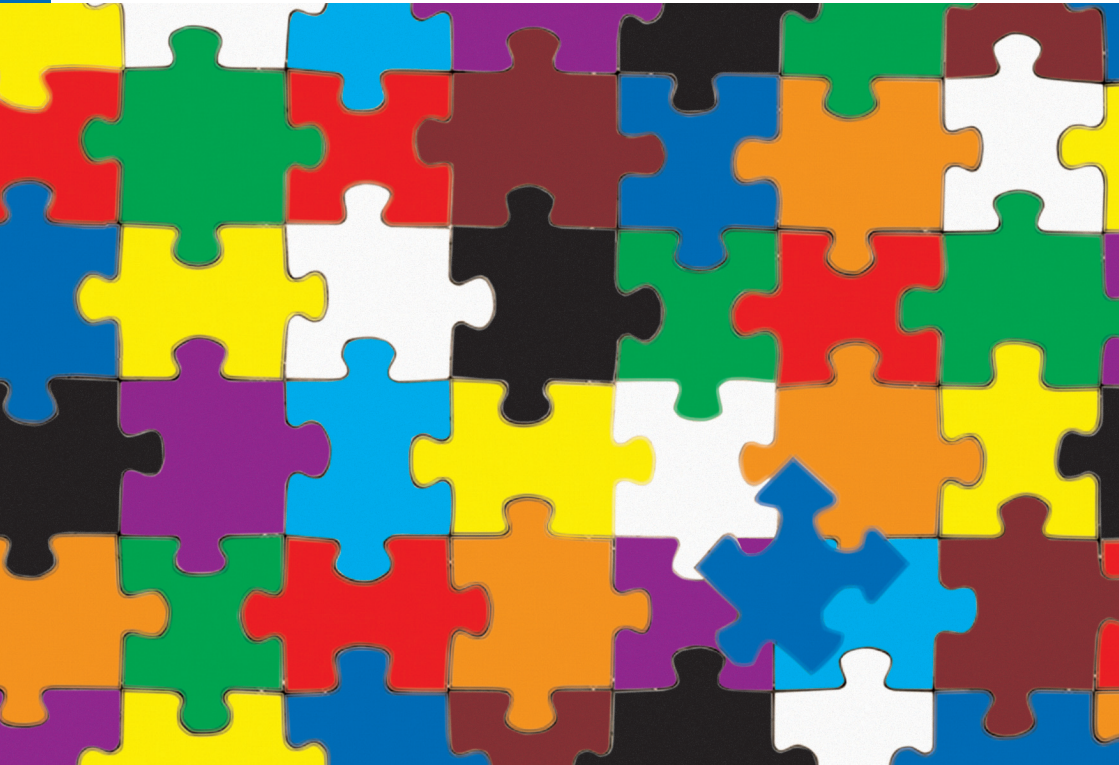


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OHNE FREIHEIT ERMÜDET
DER MENSCHLICHE GEIST,
VERFALLEN KULTUR UND
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DIE WIRTSCHAFT.
GEISTIGES LEBEN BRAUCHT
FREIHEIT GENAUSO, WIE DER
KÖRPER DIE LUFT ZUM ATMEN.

Leon Louw

Devolution as a Guarantor of Peace



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Leon Louw

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Preliminary

Philosopher Karl Popper formulated the philosophy of 'critical rationalism' in reaction to the convention of devoting substantial space in philosophy texts to defining terms, supposedly to obviate ambiguity, yet never succeeding. He concluded that elaborate attempts at linguistic precision added more words than clarity, and we should not invest too many intellectual resources in analysing and defining terms. Accordingly, he at best encouraged relying on words and phrases with established and generally recognised meanings. Notwithstanding Popper's profound insight, there is a need to define terms when considering devolution because of sloppy ways in which core words and phrases are used almost without exception in literature on devolution and related concepts such as federalism, confederalism, democracy, freedom and other checks and balances against the concentration and abuse of centralised political power. The lack of terminological clarity and consistency makes it very difficult to communicate theories in the Popperian sense. The uncommon degree of confusion surrounding these concepts is reflected in the extent to which there has been misdirected research resulting in dubious conclusions. There are, for instance, studies purporting to show conclusively that devolution coincides with more and less prosperity, peace and freedom respectively.

The original title of this paper was *Decentralisation as a Guarantor of Peace*. When I communicated with a constitutional law scholar about it, he'd understood 'decentralisation' in the town and regional planning, and industrial policy sense, instead of what jurists and political scientists more commonly call 'devolution'. Switching to 'devolution' reduces the risk of miscommunication only slightly because devolution has diverse meanings, two of which need to be distinguished unambiguously: entrenched devolution of legislative power (the subject of this paper) as opposed to *ad hoc* decentralisation or delegation of administrative functions. Devolution has many forms and goes by various names such as 'grass roots democracy', 'regionalism', 'provincialism', 'federalism' and 'confederalism'.

'Federalism' and 'confederalism' tend to be used loosely, even as synonyms. Opinions on the difference, if any, between 'federal' and 'confederal' vary substantially. A common assumption is that 'confederations' are more extreme forms of federalism (that is, with more devolution). Another view is that confederations are alliances between sovereign states. This paper follows the convention of regarding countries as confederations if federal units have the right of secession (regardless of the degree of devolution). *De facto* is distinguished from *de jure* devolution, which constitutes 'federation'. *De facto* is generally as desirable as *de jure* devolution, albeit more vulnerable to subversion by virtue of the natural propensity of people in power to want and seize more of it unless constitutionally constrained.

There has been no attempt of which I am aware either to rank federations according to how 'federal' they are (how much power is devolved), or to distinguish between *de facto* and *de jure* devolution, that is, whether devolution is constitutionalised. This *lacuna* makes it almost impossible to establish the significance of devolution empirically. Even so, there are studies that purport to do so.

The discourse on devolution tends to occur as if devolution is a stand-alone concept rather than one of the checks and balances against the abuse and over-concentration of power. It should be considered alongside such checks and balances as the rule of law, due process, referenda and elections. This paper argues that the prospects of peace are enhanced and the risk of inter-group and geographic conflict reduced to the extent that there are institutional mechanisms (checks and balances) to proscribe the power of some over others. In other words, where power constitutes a real or perceived threat to freedom, conflict is more likely. Conflict can often be ameliorated by increasing freedom at the expense of power. The single most effective way to limit power is to devolve it. This means neither that devolution is a guarantor (in the literal sense) of peace, nor the only contributor to it. What devolution guarantees is that conflict is less likely, especially if devolution is accompanied by related checks and balances.

This paper argues that freedom and power are juxtaposed by definition, and that devolution *per se* increases freedom to the extent that it usually means, as is illustrated below, that more people live according to their own wishes instead of the dictates of others. This fact is seldom recognised. Jurist Clint Bolick in *Grassroots Tyranny: The Limits of Federalism* (Reason, 1993) argues compellingly that there are substantial threats to liberty even with devolution, that second and third tier governments often curtail liberty excessively. However, he does not question the conflict-reducing nature of devolution.

Devolution Defined

There is much to be learnt from the popular and scholarly discourse on political institutions and their relationship with country performance regarding peace, prosperity and freedom. This paper is less concerned with what has already been addressed adequately than with *lacunae* and anomalies in contemporary literature with a view to promoting more rigorous use of terminology and reaching better conclusions about the contribution of political institutions such as devolution to the course of events.

I have been a student of political institutions and systems since becoming intimately involved with South Africa's transition from apartheid to democracy du-

ring the mid-1980s¹. Being a role-player in the realities of creating a constitution for a conflict-ridden country, forces one to get beyond rhetoric, clichés, platitudes and generalisations to a translation of abstract concepts into practical, concrete and unambiguous terms. My books, papers and submissions during South Africa's transition and subsequently have been concerned primarily with clarifying concepts and identifying which respective characteristics are associated with countries that succeed or fail at achieving peace, stability and prosperity. To the extent that these ideals might be achieved by institutions that curtail rather than enhance personal liberty, I have paid special attention to the relationship between them and liberty.

Notwithstanding classical liberal assumptions to the contrary, the two do not necessarily coincide. Indeed, the evidence suggests to a distressing degree that less liberty may promote more stability and maybe also more peace and prosperity, at least in the short term, also depending on other variables².

The contribution of devolution to peace can be hypothesised *a priori* or established, at least in principle, by comparing federations with non-federations. There are at least two recognised, but not entirely consistent lists of countries considered to be 'federal' (Appendix 1). Federalism is usually presumed to exist when powers are devolved constitutionally to second tier governments, normally called 'provinces' or 'states'. What I had hoped to do in this paper was to correlate the degree of devolution and federalism – they are not the same thing – with outcomes. Apart from the obvious challenge that there might not be enough examples for purely statistical analysis, I encountered a much bigger problem, which is the absence of an index ranking countries according to how federal they are. The organisational structure of the federations listed in Appendix 1 is summarised in Appendix 2. What qualifies for inclusion of lower tier government structures is that they are federal, namely that they have devolved powers to legislate. This is what is meant by the 'devolution of power'. *Decentralisation* of non-legislative functions is often also called *devolution*, which is unfortunate because it blurs the often crucial distinction between the two concepts. And they are often used interchangeably with *delegation* which undermines the ability of the word to describe 'passing down' of a legislative or executive power or function, the difference being that

- 1 Since core aspects of this paper are derived from personal experience it does not always observe customary de-personalisation.
- 2 This observation is notwithstanding the fact that I value liberty above other societal goals, a position that seems to me to be shared by very few people. There is an unwarranted and near-universal assumption by protagonists of philosophical models that all virtue happens to coincide with whatever they espouse. My objective in this paper is not to have my personal predispositions compromise my analysis.

the former two refer to the default *locus* of a power or function, and the latter to the discretionary reallocation thereof. To a casual reader, these distinctions may seem pedantic or trivial, but they can be of enormous importance, especially for conflict-reduction.

South Africa's apartheid experience is one of many that illustrates the point. Some 'homelands' were nominally independent and others had varying powers and functions devolved to them. However, the South Africa government never behaved as if there was more than *ad hoc* delegation. It established an elaborate 'secretariat' to control what each homeland did with its 'independence'. It maintained control over homeland finances by convoluted mechanisms, and threatened to cut-off funding if any homeland stepped out of line. It sent its formidable army into two of them when there was real or threatened destabilisation. Since there was no real devolution let alone independence, I asked a South African government minister if his government believed in its own policies – and suggested that, if they did, they would want homelands to be genuinely independent countries, behaving like, for instance, the 'BSL' countries (Botswana, Swaziland and Lesotho), which are what homelands would have become had they been truly independent. Whether genuine independence or devolution could have legitimised the homeland component of apartheid is an interesting 'what if' mind game which is not of immediate relevance. The point is that that South Africa's homeland experience was a virtual controlled experiment illustrating the differences between confederalism, federalism, devolution, decentralisation and delegation, as well the importance of whether institutions are *de jure* or *de facto*. That the homeland policy not only failed to avoid conflict but probably exacerbated it, illustrates how important it is for devolution to be more real than apparent, and more substantial than trivial. That post-apartheid South Africa has political stability and inter-group peace without much devolution, is probably attributable to the extent to which other checks and balances are in place. South Africa has, for instance, a Bill of Rights with strong protection of first generation (classical liberal) rights, and has amongst the world's highest scores on relevant indices such as the rule of law, independence of the judiciary, civil liberties, impartial judges, enforcement of contracts and the like.

Some countries, like post-apartheid South Africa, are nominally federal in that there are constitutionally entrenched powers located at the second tier of government called 'provinces'. However, these powers are very limited and, more significantly, in practice, there is virtually no internal policy diversity for two reasons:³

3 Words like 'devolution', 'delegation' and 'decentralisation' imply *passing down*, and are not strictly speaking correct words for powers and functions that are not passed downwards by central authority. Most federations have powers delegated upwards from what become second

1. The ruling party, the African National Congress (ANC) is in power in all provinces and maintains centrally imposed party uniformity similar to what it inherited from its apartheid regime predecessor⁴.
2. There is a surviving legacy of apartheid homelands that consists of a national mindset or ethos according to which it is presumed that there should be national uniformity, to which end there is an elaborate set of mechanisms, much like apartheid's homeland 'secretariat', to prevent diversity 'harmonisation'.

The effect of this is that South Africa, like some other nominal federations, does not enjoy potential benefits of internal diversity or the 'demonstration effect'. Not only are there very few exclusive provincial powers, but the government has decided for undisclosed reasons to replicate government functions at all levels, so that there are, for instance, housing departments for national, provincial and local government, with predictable confusion and needless cost. Consumer affairs structures are duplicated nationally and provincially. National and local government police forces have overlapping responsibilities, which, in turn, overlap with dedicated traffic departments. Thus the country, like so many others, incurs the full cost of duplication and harmonisation without enjoying detectable benefits.

Like other pseudo-federations, South Africa has needlessly big government, occasioned by the addition of harmonising structures and processes, instead of having less government at national level which would have been the case had 'concurrent' powers and functions been devolved. For devolution to achieve one of its most significant virtues, getting more done with cheaper and less government, and reflecting regional diversity, there must be *de facto* devolution. One of the lessons I have learnt from the South African experience, and observing that of other federations, such as Germany and the USA, is that *de facto* devolution is more important than *de jure* devolution, not just for better government, but also for peace, to which I return below.

Another complication as far as understanding the substance of devolution or federalism is concerned is that some countries have constitutionally delegated powers and functions, including exclusive powers and functions, to third tier 'local'

tier governments. A better term for describing the *locus* of powers and functions (where they reside) by virtue of a treaty or constitution may be 'located' or 'allocated'.

- 4 The South African government does participate in international meetings of federal countries, which suggests that it regards the country as being a true federation. Senior members of the ruling party occasionally suggest that there should be more devolution, and occasionally the opposite, the abolition of provincial legislatures. The Constitutional Court has upheld constitutional federalism by declaring liquor licensing to be an exclusive provincial competence and attempts by central government to regulate liquor licensing to be unconstitutional.

governments known by many names such as 'villages', 'towns', 'communes', 'communities', 'cities', 'boroughs' and the like.

Although devolution to local government is not normally regarded as a form of 'federalism', some countries, such as Sweden, have more local autonomy and diversity than the intermediate regions in many federal states. USA and Swiss local governments (especially bigger 'cities') often have degrees of autonomy exceeding that of federal states in some countries. Cities often have further devolution⁵ to a fourth tier. The fourth level of government has a multiplicity of names internationally. In Johannesburg, for instance, there are fourth tier 'regions' in some big cities, and within these there are fifth tier sub-regions called 'suburbs'. Some cities, like Toronto, are highly centralised 'unicities' or 'megacities', whilst others, like Berlin (until recently) are (or were) decentralised with various 'councils' and 'mayors' in a single metropolitan city. In some countries, such as the UK, there are cities formally linked to 'satellite' cities around them, and there are others with 'metropolitan' super-structures such as the Greater London Council.

In short, what is to be regarded as devolved or federal is a complex and debatable matter. Such lists of 'federal' countries as have been compiled are not only inconsistent⁶, but inclusion appears to be exclusively what appears on constitutional paper, not what happens in practice. Until there are recognised criteria for deciding which countries are devolved, empirical analysis remains difficult and dubious.

De Facto and de jure Devolution

That is not the end of it. For obvious reasons domestic and international conflict is more likely when there is real world interference with the autonomy of regions by national governments or countries by other countries, regardless of nominal legal arrangements (to which we return below). There are countries that are nominally 'unitary' states such as Sweden and the United Kingdom, which have a greater degree of *de facto* internal diversity and devolution than many nominal federations. Is federalism a purely *de jure* phenomenon, or should *de facto* devolution be regarded as federalism, especially since the latter often entails more devolution?

As if that were not confusing enough to render empirical analysis almost impossible, it should be remembered that many former communist countries were

5 Words like 'devolution', 'delegation' and 'decentralisation' imply *passing down*, and are not strictly speaking correct words for powers and functions that are not passed downwards by central authority. Most federations have powers delegated upwards what become second tier governments. A better term for describing the *locus* of powers and functions (where they reside) by virtue of a treaty or constitution may be 'located' or 'allocated'.

6 Appendix 1.

nominally federations, though they were seldom regarded as such by Western scholars and therefore not included in lists of federations. This was because of the assumption that they were *de facto* internally uniform 'unitary' states subjected to 'central planning'. It turns out from post-communist access to information about Soviet era realities that there was much more devolution and diversity under communism than notorious communist propaganda admitted, not just in communist federations, but also in non-federations, especially China, where there was and increasingly is a degree of internal regional and local diversity that is hard for people in the West to comprehend.

The recent 'marketisation' index of Chinese provinces reflects them as having a wider range of economic and jurisprudential systems than exists between all the world's countries⁷. The degree of economic freedom in China's economically freest province, Guangdong, is similar to that of the world's freest economy, Hong Kong, and its economically least free province, Qinghai, is less free than the world's least free economies, Myanmar and Zimbabwe. Most of China's economic growth and development occurs in its Special Economic Zones (SEZs), which probably have the freest economies on earth by a significant margin. Yet China is not included in lists of 'federations', and as far as I could establish, is universally regarded as a non-federal 'unitary' state. This is apparently because it was and, to some extent still is, classified as a communist country. Were federalists to regard it as federal, they could claim it as another example of a country that maintained relative peace and stability despite substantial internal diversity and a history, like Switzerland's, of internal and international conflict, including the extreme oppression of the Cultural Revolution and the Great Leap Forward.

Similar recent attempts at classifying the economic systems of India's states suggest that it too has a greater degree of internal diversity than most western federations, despite having been nominally subjected to socialist central planning and uniformity for many decades. Such comparisons have been made possible by contemporary attempts at ranking second tier government systems. Two of the western democratic federations that have been classified are Canada and America, where differences are smaller than regional differences in China⁸.

7 Chinese provinces have been ranked (www.cerdi.org/colloque/IDREC2001/Fangang.pdf) along lines similar to the Economic Freedom of the World Index (www.freetheworld.com). Comparable indices include the Economic Freedom Index (www.heritage.org/index), the Country Risk Guide (<http://www.prsgroup.com/crg/crg.html>), the Global Competitiveness Index (<http://www.weforum.org/en/initiatives/gcp/Global%20Competitiveness%20Report/index.htm>), and the Freedom in the World Index (<http://www.freedomhouse.org/template.cfm?page=15&year=2006>).

8 Recent classifications include the USA, Canada and Arab states (www.freetheworld.com).

In the circumstances, there is a serious political science *lacuna* regarding what can reasonably be called federalism and, more significantly, how to rank federations. Until this *lacuna* has been filled, the best that can be done is to rely on trite knowledge and intuition, which is notoriously subjective and fallible.

Standard literature also distinguishes between 'federalism' and 'confederalism', the idea being, as has been mentioned, that confederalism exists where there is a looser federation, especially one where federal states have, at least in theory, a right of secession. The Soviet Union (USSR) was a confederation to the extent that some of its states had the constitutional right to secede, a right which was used with alacrity when the Soviet Union collapsed. The Soviet (con-) federation was a two-tier federation in that the Russian federation was a federation within a federation. Much confusion and conflict resulted from *de facto* and *de jure* distinctions between federal components with and without exit rights. The *de jure* versus *de facto* issue is

The Soviet Union (USSR) was a *de jure* confederation in which there was no *de facto* right of secession until the collapse of the soviet empire. As soon as the likelihood of invasion for seceding states ended, many left the soviet confederation. That left the subsidiary 'Russian Federation', itself a member of the Commonwealth of Independent States (CIS), consisting of 11 former Soviet Republics. The Russian Federation is itself a constitutionally complex matter with 88 'federal subjects', comprising autonomous and semi-autonomous 'republics', 'provinces', 'territories', 'autonomous districts', 'federal cities' (Moscow and St Petersburg) and 'federal districts' (Appendix 3).

Degrees of Devolution, Diversity and Federalism

The preceding analysis suggests that the question as to which of the world's countries have devolution, and which have federalism or confederalism, may have one, two or three answers depending on whether 'devolution' is institutionalised and how much of it there is. The relevance of all this is that, in the absence of clarity on what arrangements, from the EU to Iraq, are regarded as *true* federations, it is difficult if not impossible to make empirical comparisons between federations and unitary states.

Not only must there be a plausible working definition of federalism, but there would also have to be other considerations before the propensity of federalism to ameliorate conflict can be assessed empirically, such as some idea of relative propensities for conflict. If there is no real risk of inter-regional conflict in the USA or South Africa as there is in, say, Belgium, Switzerland and India, internal peace in the USA cannot be regarded as one of the benefits of its federalism, but the immaculate conversion from conflict and instability to enduring peace, stability and prosperity in Switzerland certainly can be ascribed to the creation of the Swiss 'confederation'.

Most countries are simply too small to be federations. A small homogeneous country like Malta does not 'need' devolution or federalism for internal conflict-reducing purposes (though it might benefit economically and socially from devolution). In the absence of countries being ranked according to (a) how federal they are and (b) what their propensity for internal conflict is, we are confined to a *priori* analysis, casual (intuitive) observation and anecdotal evidence, which is what characterises extant literature. I had hoped to rank countries according to criteria (a) and (b) provisionally for this paper, but soon realised that a tentative list requires a more elaborate analysis than I could do with limited time and resources.

The consensus amongst students of federalism and the evidence they advance is compelling to the effect that there is more peace in internally divided countries, especially ones with large populations, when they are devolved.

The lack of an unambiguous list of federations, or clarity on what distinguishes federations from alternatives, and the lack of an index ranking countries by *degree* of federalism, is instructive in that it indicates not just the degree to which analysts have relied on intuitive assumptions and popular axioms – some of which are, as I have tried to show, profoundly mistaken, but that there has been no serious scholarly discourse on the matter. Constitution drafters continue writing national constitutions without having reliable data on the world's experience. This might be considered intellectually shameful, but for the fact that other indices we take for granted are themselves much more recent than is generally recognised. Analysts have become so accustomed to countries being classified and ranked according to their political and economic systems, and other criteria, that it is easily forgotten that these classifications have been produced for only about a decade.

It is clear from this analysis of the concepts involved, that there is an institutional matrix with *de facto* and *de jure* on one axis and federalism, devolution, decentralisation and diversity on the other. Typically, even scholars blur these distinctions. Even in this paper these concepts could not always be distinguished rigorously.

	A. De jure	B. De facto
1. Federalism	1A. The <i>constitution</i> allocates exclusive powers, especially to second tier governments.	1B. Power is allocated as in 1A, but by central government <i>discretion</i> .
2. Devolution	2A. Power is passed down by <i>law</i> to lower tiers of government (regions, districts, local governments, communities, etc).	2B. Power is passed down as in 2A, but by <i>discretion</i> (from any higher to any lower tier).
3. Decentralisation	3A. Government affairs are run by central government through <i>legally constituted</i> decentralised structures.	3B. <i>Discretionary</i> decentralisation.
4. Diversity	4A. Cultural, economic, social, legal and other forms of diversity are provided for in central government <i>laws</i> .	4B. Diversity is accommodated as a matter of administrative <i>practise</i> .

In an insightful paper on *Federalism – Some Lessons from a German Debate* (2002), Gerhart Raichle of the Friedrich Naumann Foundation's Liberales Institut suggests seven 'aspects' of federalism. They are:

1. **Subsidiarity.** The idea is that decisions should at higher levels of government only where they cannot feasibly be made at lower levels, or by individuals privately. Raichle regards this as 'so universal that it can be safely said that every *liberal solution of a problem contains an element of subsidiarity*, ie an element of giving people more power over their own destiny' (his emphasis).
2. **Diversity.** He suggests that 'a federalist dispensation will facilitate taking account of regional peculiarities'. The most obvious conflict-reducing capacity of devolution is the accommodation of plural societies where local differences in culture, race, language, religion and the like would be conflict-provoking under conditions of centralisation or uniformity, but, he points out, devolution accommodates all forms of diversity.
3. **Discovery.** Devolution allows for competition between policies, which is, for reasons described by Friedrich Hayek, the best if not only way of 'discovering' which ideas are superior (see 'demonstration effect' below under **Devolution and Prosperity**).
4. **Distribution of Power.** Devolution is one of the most effective 'checks and balances ... required to effectively control power'. Devolution is the 'vertical separation of power' and virtuous for the same reasons that horizontal separation widely regarded as an important constraint against excessive power.
5. **Responsibility.** With localised power, voters get credit for successful decisions, but also carry responsibility for sub-optimal decisions. Expedient error-correction is more likely when the *locus* of power is closer to the people effected by it.
6. **Taxation.** Raichle argues that devolved power without fiscal 'congruence' is a 'sham'. Fiscal federalism, as the concept is known, is a complex issue of immediate relevance primarily to the extent that the more the power to tax is centralised, the more likely it is that there will be redistribution to areas national politicians prefer from those they don't, which is conflict-provoking. Nigeria is an example of the problem in that there has been endless conflict about the fact that most central government revenue is taken from the oil-rich Delta states.
7. **Supranational confederation.** The EU is the best-known and the African Union the latest example of sovereign countries passing power 'upwards' to new supranational institutions. Raichle is concerned about the potential for

abuse when power but does not go so far as to regard the process as inherently illiberal in that centralisation is the opposite of devolution which he regards as inherently liberal. As explained elsewhere in this paper, centralisation is the process whereby most *liberal* federations and quasi-federations were established. Political history is more commonly a history of smaller units joining into bigger ones, with devolution being the most effective way of retaining a degree of the earlier autonomy.

Raichle epitomises the *liberal* predilection for federalism, where its principal virtue is its contribution to liberty. Its propensity to advance other virtues, such as prosperity, cultural integrity and diversity, and, of course, to ameliorate conflict, may be more significant. It means that liberals can 'sell' liberalism (devolution) to non-liberals because of its ability to serve ends which liberals share but are not innately liberal. The Friedrich Naumann Foundation has been involved with the promotion of federalism in Pakistan, and a federal constitution for Iraq is seen by many as its only potentially peaceful option. In these cases peace is the principal issue. Economic considerations were paramount in the establishment of the EU and AU, and security was the stimulus for the Swiss confederation. The fact is that devolution has multiple benefits and it is important to demonstrate and explain each if devolution is to be maintained where it exists, to be properly conceived where it is being introduced, and promoted where it is needed.

Devolution and Freedom

Freedom House (FH) has been ranking countries according to how much 'freedom' they enjoy since 1973. Yet, as far as I could establish, FH does not include federalism *per se* as being freedom-enhancing. It is, perhaps, easy to understand why. FH would be under severe attack by unitary states, especially small ones, were they penalised for not being federal, yet regarding non-federations as inherently less free in at least some significant senses is entirely justified. That federal devolution entails more freedom is clear from a great deal of discourse on federalism.

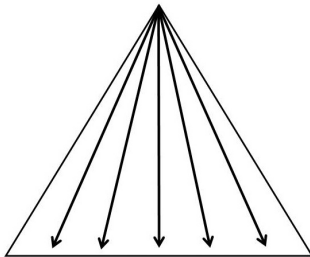
Already in 1944 the great Austrian economist-philosopher, Ludwig von Mises, observed and explained the tendency for federalism and thus freedom to be eroded by virtue of the natural propensity of governments to extend powers and functions to the limits allowed by their constituencies.¹² Even so, most commentators do not equate federalism *per se* with freedom. Where the issue is addressed explicitly, the

12 *Omnipotent Government: the Rise of the Total State and Total War*, New Haven (1944), Arlington (1969), and Libertarian Press (1985).

tendency is to dismiss classifying countries according to whether they are federal as pointless on the grounds that federalism supposedly *'doesn't concern itself with such things as civil rights. England, France and the United States are scattered into different categories despite the fact that they generally treat their citizens alike. The Netherlands and Sweden are lumped in with Saudi Arabia and Iran despite the enormous difference in how much power the monarch wields.'*¹³ Protagonists of this misconception reveal less about federalism than about their failure to grasp the essence of federalism.

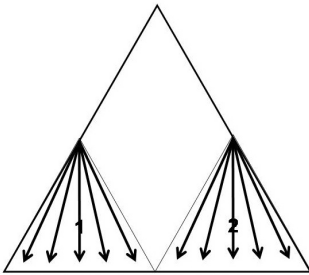
This paper argues that devolution not only promotes peace (which is the consensus of federalist literature), but that it does so primarily *because* (a) there is more freedom *per se* with devolution, and (b) freedom is the central variable that reduces conflict. Just as we have countries classified and ranked politically (Freedom House), economically (World Economic Forum, Country Risk Guide, Heritage-WSJ, Fraser-Economic Freedom Network), and in many other senses such as corruption (Transparency International), there is a need for a *'Devolution Index'*. Pending such an index, we remain confined to a *priori* analysis of the role of devolution as an institutional contributor to liberty, peace, stability and prosperity, and tentative empirical analysis.

The theoretical case for regarding devolution as implying more freedom can be demonstrated by way of the diagrams shown below. The first triangle depicts a centralised unitary state. It shows that, by definition at least (without regard for *de facto* devolution), there is a one-size-fits-all and necessarily large government (relative to the functions of government) – a classic top-down regime. In it, the entire triangle is filled in order to accommodate the hierarchical system implicit in centralisation.

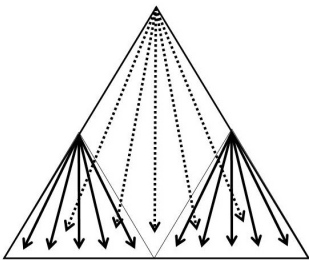


13 This is a quotation from one of the recognised scholars in the field, which got lost during editing and was not found before going to press.

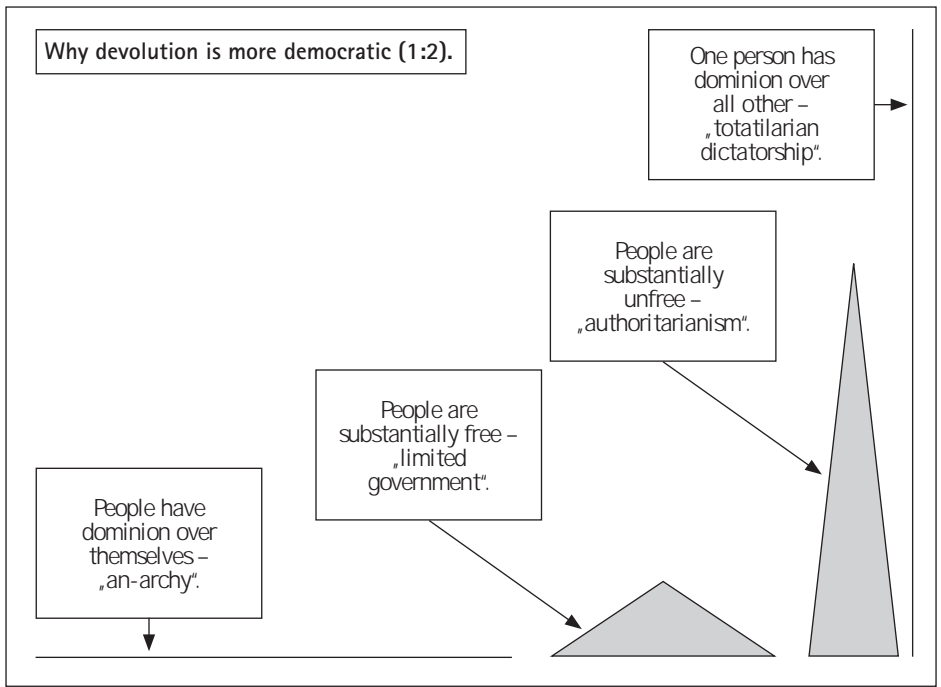
The second triangle depicts what government would look like were there two countries instead of one. The blank area between the two lower triangles is not filled with hierarchical structures.



The third triangle depicts a devolved system where there is less government in the area between the smaller triangles than in a unitary state, and more than in separate countries. The principle can perhaps be better understood *reductio ad absurdum*. If there is devolution down to the individual there will be no government at all. The bigger a county's population, the bigger its government will have to be relatively, unless powers and functions are devolved.



The next diagram depicts the full range of hypothetical alternatives from zero government (left) to a single despot (right). That devolution is more democratic is illustrated in the diagrams above, and can be readily understood *reductio ad absurdum*. If *all* power is devolved *maximally* (ie to individuals who have dominion over themselves), there is, by definition, zero power in the hands of government and 100% of how people are governed is decided („voted“) by themselves. Hypothetically full devolution is a flat line where none are above others (as in the diagram). Dictatorship is a vertical line where there is one person at the top and all others fall beneath. Between the two is the real world, represented by triangles – flatter and thus more democratic with more devolution.



Devolution and Peace

According to one of the doyens of federalism, the late Daniel Elazar, *‘federalism has become an aid to peace-making, at least since the end of World War II’*. Much of the literature on federalism presupposes that the principal purpose of federalism is to ameliorate the prospect of conflict in internally divided countries. The propensity of federalism to promote peace may be its most distinctive virtue, but there is more to it than that. The word has its origins in Latin words imputing trust, good faith, covenant, treaty and the like, specifically *foedus* meaning alliance or league (also covenant or treaty), *fides* meaning faith or trust, *foederare* meaning ‘to league together’, and its noun *foederationem*, in other words, federation.

The term has been extended to describe a multiplicity of institutional arrangements, ranging from pseudo-autonomous geographic entities, like former communist federations, to organs of civil society, such as trade union federations and the federal structure of political parties. It is not always clear what, if anything, all arrangements called federations have in common, including substantial differences between federal governments, with which this paper is concerned. As far

as countries are concerned, federations are more commonly independent states getting together, such as the USA, and occasionally consist of unitary states in which power is devolved, such as Ethiopia.

That federations are more commonly independent states getting together suggests that their peace-promoting propensity may often be secondary. Federations tend to be formed by entities at peace with each other, the most obvious contemporary example being the EU. Sometimes the impetus for federation is less to do with promoting internal peace and accommodating diversity than the formation of alliances for protection against external threats, of which Switzerland is the archetypal example. 'Ethnic federations' are a varia

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its use of force. In all eleven cases, the dynamics of American federalism provide a superior explanation to realist and liberal alternatives. Silverstone finds that 'federal asymmetry' is 'of enduring importance for questions of war and peace' because 'the clear concentration of pro-military, interventionist, unilateralist opinion in the American South and West' are countermanded by 'the concentration of anti-interventionist, multilateralist opinion in the Northeast, the northern Midwest, and in the Pacific Northwest' (<http://www.isanet.org/archive/silverstone.html>). Perhaps the most instructive aspect of Silverstone's essay is that he surveys the scholarly literature and concludes that 'a serious short-coming in democratic peace literature is the dearth of research on how institutional variation among different types of democracies will affect conflict decision making and the likelihood of constraints on the use of force'.

Countries for which devolution could mean the difference between peace and conflict are all countries with internal tension or conflict. Countries without internal inter-group or inter-regional stresses despite considerable heterogeneity could also derive substantial benefits from increased devolution. Not only is it likely to yield significant social, cultural and economic gains, but the world's experience suggests that future problems can be avoided or contained. That devolution offers their best chance for peace and prosperity is so obvious that it is extraordinary that devolution, along with related checks and balances, is not universally regarded by all role players as the *central* issue around which to negotiate. This is not the place to address each country-specific complexity, but there are some general observations worth making.

At the time of writing there are reports of a Belgian media hoax to the effect that Wallonia has seceded. Its serious purpose is reported to be to gauge public reaction to the prospect. The historical context is that, in response to escalating inter-group tension, Belgium was divided into three regions (Brussels, Flanders, Wallonia) and three communities (Flemish, French, German) in 1980 and the Flemish and Walloon regions and Flemish and French communities were granted 'autonomy', and separate Flemish and Walloon regional governments were established. The German community was granted autonomy in 1983 and Brussels gained autonomy in 1989. Devolution was successfully employed to promote peace, and more devolution, or even secession, may be necessary to keep the peace. Scottish and Welsh devolution has been employed in the UK to avoid mounting tensions between Britain's constituent 'countries'. Curiously, the obvious potential for addressing Northern Irish problems by way of *intensive* Swiss-style devolution has not been appreciated or exploited. High degrees of devolution, at times to very small communities of the kind found at times during Swiss history, hold the most promise for peace and stability in Israel-Palestine, Sri Lanka, Pakistan-Kashmir-India,

Myanmar and elsewhere. The potential contribution of devolution is recognised in conflict-ridden Nigeria, but there does not appear to be sufficient willingness on the part of those wanting to enjoy supposed benefits of centralised power to 'let things go' so to speak. In particular, Nigeria's role players are not ready to accept real economic and fiscal federalism of the kind that China has albeit merely *de facto*. Speaking of China, its extreme degree of internal regional diversity is such that one must assume the communist regime never gained centralised power of the kind popularly assumed, and that it is a matter of time before formal *de jure* devolution becomes inevitable – hopefully before lingering attempts at centralised power precipitate conflict.

Canada is a well-known example of the conflict-reducing capacity of devolution. Although it has and benefits enormously from fiscal federalism and a degree of economic policy devolution, the full potential benefits are frustrated by a national formula whereby tax revenues are redistributed from wealthier to poorer provinces, the effect being to reduce incentives for poorer provinces to adopt high-growth policies. The levels of autonomy necessary to keep Quebec happily within Canada may not yet have been appreciated. Reverting to Africa, it is, of course, riddled with heterogeneous societies as a consequence of the arbitrary way in which colonial boundaries were established. Sudan, Somalia, Ethiopia, Senegal and Zimbabwe are amongst Africa's many obvious candidates for devolution, and, in some cases, full secession, as the best response to internal conflict. Intensive devolution - much more than is under consideration - is the obvious response for serious consideration in Iraq. Why full separation of seemingly wholly incompatible regions of Iraq is not more commonly suggested is unclear to the present author.

There are some of the countries in which devolution could make a decisive contribution to achieving the twin ideals of peace and prosperity. There are many others, and what this and other analyses hope for is that they help role constitutional players elevate devolution to the status it deserves as they grapple with global and local conflict.

Devolution and Prosperity

There has been on-going discourse about 'fiscal federalism' (devolved taxing power) and whether federations tend to be more prosperous. I examined studies in both directions - some suggesting that the evidence supports the view that federations tend to be more prosperous and/or to have lower tax rates; others suggesting that the evidence shows the opposite to be true. The simple explanation for discrepancies between irreconcilable conclusions purporting to be based on adequate empirical

data properly evaluated is that there is insufficient clarity on which federations can reasonably be compared with non-federations (a) where they have enough else in common for federalism to be regarded as a decisive variable, (b) where there are enough examples for statistical relevance, and (c) where there is insufficient clarity on what precisely constitutes federalism.¹⁴

'Fiscal federalism' literature is generally concerned with whether fiscal decentralisation coincides with higher economic growth and other measured benefits. Fiscal policy is, of course, only one aspect of economic policy. It enjoys most attention because data on tax and spending at various levels of government is more copious and accurate than on other aspects of economic policy, some of which may be more important determinants. The idea is that fiscal devolution is likely to have such benefits as enabling local and regional governments to establish regimes that are better suited to their circumstances, and that competition between them is likely to lead to better policies, especially through the 'demonstration effect', which presupposes that people can see what succeeds best under comparable conditions. I did a fair amount of proverbial 'number crunching' and considered what others have done, some of it more elaborate than appears to me to be justified by the paucity of data.

There is not much evidence either way. Average growth rates for five-year intervals from 1970 to 2002 in the 25 countries generally called federations was 3.28%, and 3.53% for non-federations with populations exceeding one million, a difference of 0.25%. This suggests a small edge in favour of non-federations. However, if one varies the analysis slightly in legitimate ways, such as the inclusion of mini-states, the inclusion of only plural societies, the inclusion with federations of countries with high degrees of *de facto* devolution and so on, the advantage increases, vanishes or reverses. The logic of, for instance, omitting mini-states (< 1 m population) from the list of non-federations is obviously that only bigger countries can feasibly be federations. Or so one might assume, but the problem is that small countries like St Kitts and Nevis (39,000), Micronesia (111,000) and Comoros (700,000), which all have smaller populations than single cities in bigger countries, are included in the list of federations. If China is regarded as devolved (whether or not it is called a federation), which its extreme internal diversity certainly justifies, and the *per capita* growth rates of the world's populations living under devolved systems is compared with that of people living under centralised systems, the evidence for federalism would be overwhelming, given the population sizes and high growth rates of China and India.

14 As explained above, what weight to attach to *de facto* and *de jure* devolution and to degrees of devolution.

The full range of plausible analyses is not presented here. Suffice it to say that the data can be analysed legitimately (as opposed to manipulated) in ways that produce varying, inconclusive and sometimes contradictory results. Unfortunately, the most appropriate analysis has not been done, comparing the relative performance of countries with more devolution with that of ones with less. As stated previously, this is a serious *lacuna* in the fields of analysis in various disciplines, including political science, sociology and economics, and should be done as an important contribution, not just to constitution planning, but also as a guide to governments on whether to devolve and decentralise powers and functions.

Most of the writers on federalism have the view, though with weak empirical support, that federalism and devolution has benefits exceeding costs.

Intuitively, federations probably perform better (by most measures) than they would were they not federations, because they, for the most part, are federations to avoid internal conflict and accommodate diversity. In other words, they would, but for being federations, be more likely than other countries on average to be unstable and conflict-ridden if they had non-federal systems.

Devolution and Democracy

The first formally documented federations were Greek federal unions during the fourth century. There were earlier federations in practice going back to pharonic Egypt and Samaria, but no formal theory of federalism that survives. Greek federations were analysed *inter alia* by classical historian, Hans Beck.¹⁵ Two features of Greek federalism were democracy and ethnicity. Federalism and democracy were essentially two sides of a proverbial coin for practical and philosophical reasons, so much so that there was no distinguishing terminology for federal institutions because they were synonymous with democracy. Lamentably, that understanding of the intensively democratic nature of federalism did not survive as an omnipresent consideration in the creation of modern democracies.

Early democracy, such as in ancient Greece, was feasible only when power was sufficiently localised for people to be in charge of their own affairs. Thus, „democracy“ connotes *essentially* such things as people controlling their own lives, limited power, and the will of the majority. To the extent that it essentially means these characteristics, devolution *and* referenda are more ‘democratic‘ because:

15 Hans Beck, *Polis und Koinon. Untersuchungen zur Geschichte und Struktur der griechischen Bundesstaaten im 4. Jahrhundert v. Chr.* Franz Steiner Verlag, 1997

1. mathematically more people get what they want/vote for,
2. power is limited to the extent that it is devolved, and
3. power is limited to the extent that voters vote on issues (direct democracy).

Understanding why and how devolution is more democratic, and defining the *essentials* of liberal democracy (Appendix 4) so that more democracy means more liberty, does not *per se* tell us how much devolution there should be. These two tables show by way of simple arithmetic why devolution is more democratic. They show that more people get what they vote for when there is devolution.

Area 1 (50 people)	Area 2 (50 people)
51 vote 'yes' 49 vote 'no' 51 % majority	

Area 1 (50 people)	Area 2 (50 people)
10 vote 'yes' 40 vote 'no' 80 % majority	41 vote 'yes' 9 vote 'no' 82 % majority

Devolution an Ethnicity

Much has been written about devolution and ethnicity. There is, as far as I can tell, not much to be added on the matter. Many or most protagonists of federalism have 'ethnic federation' in mind. The idea is that, where there are high geographic concentrations of ethnic groups, inter-group conflict can be avoided by allocating sufficient power over conflict-provoking issues to each group to minimise their resentment of others. Classic conflict zones of the world, such as Rwanda, the Middle East, Northern Ireland and Iraq, cry out for intensive federal devolution. The reasons why devolution reduces the prospect of inter-group conflict are apparent from the preceding analysis.

Devolution and World Government

National and international federalists tend to emanate from opposing paradigms. It is not immediately obvious how ideological adversaries could both espouse fe-

deralism. The explanation is that fault-lines occur according to whether federalism is likely to centralise or devolve power. Paradoxically, federalism is presumed to be all about the devolution of power, yet most federations arose by virtue of the opposite, the centralisation of previously decentralised power. Whether federalisation devolves or centralises power depends on whether federalism is the result of independent states combining into a federation, like the USA, or whether power is passed from the government of a unitary state to federal entities, as with Scottish and Welsh devolution. The EU is, or will be, a federation by virtue of centralisation and Nigeria by virtue of decentralising power from a single military government.

Protagonists of world government are for global federation. This paper espouses the view that more freedom is one of the virtues of devolution. However, global federalists, like Immanuel Kant, regard federation as necessary because there is supposedly too much freedom. According to this view there can 'be no true international law as long as states do not abandon their present condition of unlimited freedom and accept a common federal constitution, that is, a government which has sufficient power to ensure universal peace and the independence of each member state' (<http://www.jef-europe.net/index.php?id=1627>). This profoundly pessimistic conception of human nature and international relations is that free people and free countries are inherently engaged in the notorious Hobbesian 'war of all against all'.

The optimistic liberal Misesian conception is that collaboration more typically characterises interaction between free people and countries. The proverbial proof of the pudding is in the eating; clearly the vast majority of interactions between free people and free countries is peaceful. The view that humans are typically aggressive is as odd as it is self-evidently mistaken. When I encounter it I suggest that people conduct 'research by opening their eyes! All they need do is look. At any given time, the overwhelming majority of personal and international interactions are peaceful. Pessimists contend that this is so only because people fear reprisals by law enforcement agencies and countries. They point to looting when law and order break down. Whatever the reason may be for the phenomenon that individuals usually interact peacefully, the fact is that so do the governments of most countries, most of the time, in the absence of a Kantian world federation.

One of the curiosities of the pro-federal literature is the conspicuous divide between protagonists of federation as a means for limiting centralised power and federation as a means of increasing it. Both sides share the view that federalism promotes peace (see e.g. *World Federalist Movement*, website, www.wfm.org).

Conclusion and Proposals

It seems clear *a priori* that devolution is conducive to peace, simply because it reduces the real or perceived need for resistance to domination. Devolution has additional benefits, such as accommodating diversity, the demonstration effect and more freedom. Empirical verification is difficult in the absence of indices ranking countries according to how devolved they are. There should also be an index ranking countries according to their propensity for conflict. It will then be possible to demonstrate the conflict-reducing propensity of devolution. Policy makers will benefit enormously if they have better information on the costs and benefits of devolution.

Appendix 1 – Federations of the World

Appendix 1 provides two popular lists of federations, and shows differences between them.

Appendix 2 – Federal Characteristics

and provide a summary of the institutional nature of countries in the lists. What is most noteworthy about the lists is that countries with virtually no real world devolution are included and ones with extreme devolution and/or diversity are excluded.

Appendix 3 – Russian Federation

This Appendix shows the complex nature of the Russian Federation, which was much more complex as the USSR. It illustrates the extraordinary lengths to which supposedly centralist communists, denying differences between people, were willing to go to achieve peace.

Appendix 4 – Checks and Balances

This Appendix is a summary of checks and balances against the excesses and abuse of power. Some are obviously more important than others, and not everyone will agree that all are likely to provide more protection than opportunity for abuse. Devolution is one of these checks and balances, and certainly one of the most important if there is to be peace and stability.

Appendix 5 – Selected Bibliography

These are selected readings. Scholarly literature is omitted because (a) it is readily accessible to academics and (b) this paper is intended for lay intellectuals and policy makers.

Appendix 1

Federation lists

Federations	
Forum of Federations ¹⁶	Wikipedia ¹⁷
Argentina	Argentina
Australia	Australia
Austria	Austria
Belgium	Belgium
Bosnia & Herzegovina	Bosnia & Herzegovina
Brazil	Brazil
Canada	Canada
Comoros	Comoros
Ethiopia	Ethiopia
Germany	Germany
India	India
—	Iraq
Malaysia	Malaysia
Mexico	Mexico
Micronesia	Micronesia
Nigeria	Nigeria
Pakistan	Pakistan
Russia	Russia
St. Kitts and Nevis	St. Kitts and Nevis
South Africa	—
Spain	Spain
—	Sudan
Switzerland	Switzerland
United Arab Emirates	United Arab Emirates
USA	USA
Venezuela	Venezuela

¹⁶ <http://www.forumfed.org/federalism/cntrylist.asp?lang=en> (2006)

¹⁷ <http://en.wikipedia.org/wiki/>, (2006)

Appendix 2

Federation characteristics

	Federation	Federal units
1	Argentina	23 provinces; 1 district
2	Australia	6 states; 1 district/territory; 1 major territory; minor territories
3	Austria	9 states (<i>länder</i>)
4	Belgium	3 communities (linguistic); 3 regions
5	Bosnia & Herzegovina	2 entities; 1 district; 1 internationally supervised district
6	Brazil	26 states; 1 district
7	Canada	10 provinces; 3 territories
8	Comoros	3 islands
9	Ethiopia	9 regions; 2 chartered cities
10	Germany	16 states (<i>länder</i>)
11	India	28 states; 7 territories
12	Iraq	18 governorates; 1 autonomous region;
13	Malaysia	13 states; 3 territories
14	Mexico	31 states; 1 district
15	FS Micronesia	4 states
16	Nigeria	36 states; 1 territory
17	Pakistan	4 provinces; 4 territories
18	Russia	48 oblasts; 21 republics; 10 okrugs; 7 krays; 2 autonomous cities
19	Saint Kitts and Nevis	2 islands; 14 parishes
20	South Africa	9 provinces
21	Sudan	26 states
22	Switzerland	26 cantons; 2890 autonomous communities
23	United Arab Emirates	7 emirates
24	United States	50 states; 1 district; 1 territory; unincorporated territories
25	Venezuela	23 states; 1 dependency; 1 district

Sources: Ann L. Griffiths (Editor) & Karl Nerenberg (Coordinator), *Handbook of Federal Countries*, 2005.

Author's research

Appendix 3

Composition of the Russian Federation

21 republics (*respubliki*) – nominally autonomous with own constitutions, presidents and parliaments; each is an ethnic homeland.

48 provinces (*oblasts*) – administrative units with federally appointed governors and elected legislatures

7 territories (*krais or krajs*) – similar to oblasts; less autonomous

1 autonomous province (*avtonomnaya oblast*) – a Jewish autonomous province.

9 autonomous districts (*okrugs*) – more autonomous than oblasts; less so than republics; also usually ethnic homelands

2 federal cities (*federalnyye gorods*) – major cities with regional status and autonomy.

Appendix 3

Democratic Checks And Balances

(See 9 for Devolution)

This is a list, with minimal commentary, and in no specific order, of recognised and proven constitutional and democratic mechanisms (checks and balances). *See the Endnote for an explanation of why constitutions should have checks and balances.*

The reason for these checks and balances not to be ordered is important. Which will be more or less important varies enormously according to context. Devolution, for instance, may be of the highest priority for an internally divided country. An independent judiciary might be of greatest importance for a country with a history of political interference and patronage.

The ideal combination of checks and balances may be thought of as those an informed individual would want if his/her worst enemy were in power. The point is illustrated by the application of the you-divide-I-choose wisdom of Solomon to constitutionalism. Political rivals could draw lots to decide who is to write the constitution. They do so subject to a single condition: the other side will govern.

1. Direct Democracy (Referenda)

- 1.1 Optional (by government decree)
- 1.2 Initiatives (by citizens petitions)
- 1.3 Obligatory (required by constitution eg amendment of entrenched clauses or specified laws)
- 1.4 Recall

2. Elections

- 2.1 President/Prime Minister
- 2.2 Politicians
- 2.3 Specified government officials
- 2.4 Limited term of office

3. Voting Systems

- 3.1 Universal and equal franchise
- 3.2 Secret ballot
- 3.3 Multiple choice –
 - 3.3.1 List
 - 3.3.2 Transferable vote
 - 3.3.3 Cumulative vote
 - 3.3.4 Alternate elections

4. Proportional Representation

- 4.1 At all levels
- 4.2 In prescribed bodies (eg Cabinet, school boards)

5. Bicameralism

- 5.1 National and geographic houses
- 5.2 Equal powers (for initiation, adoption, veto)

6. Separation Of Powers

- 6.1 Legislative
- 6.2 Administrative
- 6.3 Judicial
- 6.4 Autonomous agencies

- 6.4.1 Central bank (for stable money)
- 6.4.2 Ombud(sman)/Public Protector
- 6.4.3 Human Rights Commission
- 6.4.4 Auditor-General
- 6.4.5 Law Commission (including screening of laws)
- 6.5 Delineation of functions (the maintenance of clear boundaries between the functions of departments and agencies, vertically and horizontally).

7. Independent Judiciary

- 7.1 Vertically:
 - 7.1.1 Small Claims/People's Court
 - 7.1.2 Magistrates/Lower Courts
 - 7.1.3 Common Law/Customary Courts
 - 7.1.4 High/Upper Courts
 - 7.1.5 Constitutional Court
 - 7.1.6 Supreme/Appeal Court
- 7.2 Horizontally:
 - 7.2.1 Local/Municipal/Magisterial Districts
 - 7.2.2 Regional High/Upper Courts

8. Bill Of Rights

8.1 Civil liberties –

- 8.1.1 Association/disassociation
- 8.1.2 Religion/values/lifestyle
- 8.1.3 Speech/press/broadcasting
- 8.1.4 Assembly/protest
- 8.1.5 Due process/procedural fairness (administrative and judicial):
 - 8.1.5.1 Notice of charge
 - 8.1.5.2 Right to be present
 - 8.1.5.3 No detention without trial
 - 8.1.5.4 *Habeas corpus*/bail
 - 8.1.5.5 Right to be heard/*audi alteram partem*
 - 8.1.5.6 Right to be silent
 - 8.1.5.7 Right to cross-examine

- 8.1.5.8 Access to information
- 8.1.5.9 Access to justice/remedies (accessible and affordable/free courts)
- 8.1.5.10 Right to trial by jury of peers
- 8.1.5.11 Expedition („justice delayed is justice denied“)
- 8.1.5.12 Presumption of innocence
- 8.1.5.13 Right to assistance/representation/counsel
- 8.1.5.14 Impartiality
- 8.1.5.15 Right of review/appeal (at least from 1st instance; to independent court)
 - 8.1.5.15.1 Right of review (on procedure)
 - 8.1.5.15.2 Right of appeal (on merits)
- 8.1.6 Movement/residence
- 8.1.7 Informed adult consent
- 8.1.8 Rule of law, not men (see below)
- 8.1.9 Right to privacy
- 8.1.10 Right to security
 - 8.1.10.1 of person
 - 8.1.10.2 of property
 - 8.1.10.3 of conscience

8.2 Economic freedoms –

- 8.2.1 Property rights
 - 8.2.1.1 Owner’s/proprietor’s discretion (condition/right of admission)
 - 8.2.1.2 No expropriation/confiscation (except possibly for place/route-bound infrastructure)
- 8.2.2 Freedom of contract
- 8.2.3 Freedom of enterprise/entry/competition
- 8.2.4 Right to work (freedom of employment/self-employment)
- 8.2.5 Balanced budget

8.3 Social rights (2nd/3rd/4th generation rights) -

Note: So-called „1st generation“ rights protect the individual against abuse of power by the state or the majority. Social, or „2nd/3rd/4th

generation“ rights are benefits that are considered to be desirable. They can be in 1st generation form, so that measures, such as unreasonably burdensome licensing laws, which inhibit the attainment of those rights can be challenged. Or they can be in the form of legal obligation on the state (and therefore on fellow citizens) to „deliver“ the rights. One is a *negative* obligation to desist (the state must not harm its citizens); the other a *positive* obligation to act (the state must supply goods and services).

Since 2nd generation rights are dependent on availability of resources, they cannot be absolutely justiciable – 1st generation rights are directly justiciable because they require of the state no more than cost-free inaction. 2nd generation rights in the 1st generation form would mean that (a) no law or action may deprive citizens of the right to pursue the satisfaction of those rights relatively freely, and/or that (b) the state is obliged to create an enabling environment.

Second generation rights are e.g. housing, education, employment, health care, and pensions. Third generation rights are e.g. a clean and safe environment. Fourth generation rights are e.g. the right to happiness and feelings of security (absence of fear etc).

8.4 Political rights (Democratic processes described above and below)

9. Devolution Of Power

- 9.1 Regional level
- 9.2 District level
- 9.3 Local level
- 9.4 Community level

(Specified in the constitution and entrenched in the „subsidiarity“ principle that only powers that cannot be realistically exercised at lower levels are exercised at higher levels)

10. Democratic Culture/Values

- 10.1 Civil society
- 10.2 System above party

11. Sunset Clauses

(For transitional powers e.g. affirmative action. Also the idea that all legislation should specify its own „shelf-life“, or be subject to a default shelf-life, to

insure that measures do not outlast their usefulness or purpose, and that their efficacy is monitored and reviewed.)

12. Secession

(By adequate majority in referendum)

13. Ombudsman

14. Subsidiary Constitutions

(For regions and even districts/communities)

15. Head of State

15.1 Titular President (with executive Prime Minister)

15.2 Executive President

15.3 Head of State powers

15.3.1 Formalistic function

15.3.2 Limited powers/suspensive veto/reference to Constitutional /High Court

15.2 Appointment:

15.4.1 Party leader

15.4.2 Electoral college

15.4.3 Election/plebiscite

15.4.2 Rotational (alternating through cabinet and/or elected)

16. Entrenched Clauses

(Minimum vote/referendum)

16.1 Constitutional amendment

16.2 Specified law /rights (e.g. cultural/group rights)

17. Minority Victimisation

(Judicial test of „minority“ and „victimisation“)

17.1 Class/minority actions

17.2 Public interest actions

18. Government Equivalence

(Government not to exempt itself from laws/regulations, except as specified in the constitution, for e.g. the right to tax)

19. Term Limits

(Maxima for the numbers of terms/years specified politicians/officials might serve, or be re-elected. Negative considerations are [a] that term limits are a restraint on the right of voters to choose whomever they wish, and [b] that if some officials, such as judges and magistrates, do not have tenure, their independence is compromised.)

20. Rule of Law

Many elements of the rule of law are specified above. A constitution can, or perhaps should, be explicit about the rule of law being basic law. In other words, all laws and practices will have to be consistent with the rule of law. The rule of law is essentially the absence of the „rule of man“. The rule of law is not the same as or a synonym for freedom. The term is commonly used as if it is. Whilst it *per se* is no guarantee of freedom, it does make freedom much more likely, because the absence of an ability for those with power to wield it arbitrarily or capriciously minimises real or suspected abuse of power, corruption, patronage, nepotism or discrimination. Accordingly, the elements of the rule of law *not* mentioned above in relevant contexts are:

- 20.1 **Certainty** – People's rights and obligations being clearly and unambiguously stated in laws made in accordance with the Constitution, which itself must be consistent with the rule of law
- 20.2 **Non-retroactivity** – Retroactive law is law to which people could not have known they were subject, which means they were not being ruled by law, but by subsequent arbitrary discretion.
- 20.3 **Objective criteria** – Where legitimate powers are delegated in accordance with the separation of powers, they must be accompanied by objective criteria according to which the powers must or may be exercised. To be objective, the powers must also be accompanied by the objectives for which the power is delegated, otherwise the manner of implementation would be „the rule of man“.
- 20.4 **General application** – Laws must apply equally to all, and must not discriminate unfairly.
- 20.5 **Accessibility** – The right of citizens to know in advance what the law is, and to find out with relative ease. A popular modern view is that laws should also be drafted in „plain“ language.

Endnote – why checks and balances?

Constitutional checks and balances are generally presumed to be a virtuous end in themselves. They provide *per se* desirable protections against the abuse of power.

They tend to be resented by people in power because they inhibit their ability to „get on with“ the business of government. Governments of the day, and their constituents tend to want laws and administrative actions to „have teeth“. The demands of due process appear to be needlessly costly and cumbersome.

However, what is seldom appreciated is the extent to which constitutional checks and balances are practical *and* expedient, even for those in power. Firstly, they protect those in power from unrealistic expectations and demands of their constituencies. Secondly, they have been shown by the world's experience to be among the most decisive factors in generating peace and prosperity, and thus the political popularity of those in power. There is now unambiguous statistical evidence that constitutional democracies with more, rather than fewer, constraints on the use and abuse of power outperform all other systems of government. The evidence is that the more there are of the checks and balances mentioned above, the better for all concerned.

Thirdly, those in power at any given time might, as individuals, themselves need the protection of such checks and balances. They might, for instance be falsely accused of anything from sedition to a petty offence. Fourthly, should those in power, or some of them, lose power (for whatever reason), the presence of an excellent constitution will ensure them the best prospect of regaining it.

Appendix 5

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