

THEME II TEMPLATE

The Distribution of Powers and Responsibilities in Federal Countries

Preface

The handbook will provide a complete, accurate, objective, and balanced description and analysis of the distribution of powers and responsibilities in each country's federal constitution and actual federal practice. The handbook will be suitable as a practical resource for practitioners as well as teaching and research tool for scholars. Each 35-40 double-spaced chapter about a country (including references and any tables) is to reflect, as best as possible, consensus views on the country's distribution of powers as well as conflicting views where there is no consensus. The chapters will not be platforms for authors' political or ideological views and/or particular reform proposals. Instead, each chapter is to be developed by the Country Coordinator as a collaborative effort with other academic and non-academic experts in his or her country. The Country Workshops, especially, are intended to allow authors to develop a consensus-oriented description and analysis of his or her country's distribution of powers and responsibilities by soliciting the views and ideas of practitioners and other scholars and by receiving supportive and critical comments from them. Country Coordinators will write their chapter by using the template as a guideline and checklist so as to provide maximum comparability across all country chapters.

It is important that each chapter focus on the key, essential features of the country's constitutional and actual distribution of powers and responsibilities, and that each author address the following crucial issues and terms of reference at the appropriate places in his or her chapter.

- Why was the country's constitutional distribution of powers constructed the way it is, and what were the principal philosophical, historical, cultural, and/or political reasons for doing so?
- What, if anything, is unique or different about the country's constitutional distribution of powers compared to the distributions found in other federal constitutions around the world?
- What is the role or function of the constitution's distribution of powers in the actual exercise of exclusive and shared powers in the country's federal system; that is, how and in what ways do actual practices conform to and/or depart from the constitution?
- How has the distribution of powers and responsibilities evolved over time, and why?
- Is the distribution of powers and responsibilities generally compatible or incompatible with the country's society, political culture, and economy, and is the distribution of powers supported by an underlying federal society or political culture in the country?
- Is the distribution of powers and competences generally compatible or incompatible with the capacity or ability of the country's federal, regional (i.e., cantonal, provincial, state), and local governments to carry out their constitutional responsibilities and respond to their citizens democratically and adequately?

- What are the major reasons for the success, partial success, or failure of the country's distribution of powers and responsibilities?
- Where is the country's debate, if any, about the distribution of powers going, and what are the likely future trends for the allocation and sharing of powers in the country's federal constitution and federal practices?
- Overall, can certain powers and responsibilities be said to be typical for federal governments, for constituent states or provinces, and/or for local governments across federations, or is the distribution of powers and responsibilities mostly particular or idiosyncratic to each federation?

I. The Federal Constitution in Historical-Cultural Context

- A. Creation of the federation (especially with respect to the distribution of powers)
 1. Very briefly, what are the basic characteristics of the country today: (a) population size, (b) land area, (3) predominant language or languages, (4) predominant ethnic/nationality or racial group or groups, (5) predominant religious group or groups, and (6) per capita GDP in U.S. dollars?
 2. How and when was the current federal constitution drafted and approved for implementation, and who or what body approved it?
 3. Does the federal constitution embody or reflect a civil-law tradition, a common-law tradition, a combination, or something different?
 4. Was the federation created by the integration of previously independent or established political communities, or by the creation of constituent governments from a previously unitary state? Or, were both processes involved in your country?
- B. Creation of the federal constitution, especially regarding the distribution of powers
 1. What principal aims or objectives did the drafters of the federal Constitution try to achieve with regard to federalism and democracy through the constitution (e.g., peace and security, common-market prosperity, liberty, cultural/linguistic/religious accommodation, and/or national unity)?
 2. Does the constitution emphasize individualism and individual rights, or does it emphasize communalism and communal rights?
 3. Does the constitution mandate an official language or languages?
 4. Does the constitution mandate an official religion or religions or otherwise give special status or privileges to any religion?
 5. Does the constitution explicitly or implicitly require or proclaim a principle such as *Bundestreue* (i.e., federal loyalty), or Duties of Citizens?
 6. Were the drafters of the federal constitution significantly influenced by a particular political theory, by a particular religious orientation, by a particular ideological orientation, and/or by the federal constitution of one or more other countries?
 7. Were the drafters of the constitution significantly influenced by external powers (e.g., colonial power, occupying military power, or super-power seeking influence)?
 8. Were the drafters of the constitution significantly influenced by centrifugal or centripetal pressures, especially with respect to the distribution and sharing of

powers?

9. Is the current federal/national constitution the first constitution or first federal constitution for the country? If not the first, what were the significant changes from the previous constitution?
10. What other country-specific factors are important for understanding the distribution-of-powers choices made by the framers of the current constitution?

II. Constitutional Distribution of Powers and Responsibilities

- A. In terms of the distribution of powers, is the federal constitution generally oriented toward:
 1. Dual federalism,
 2. Cooperative federalism,
 3. Union-dominated or regulatory federalism,
 4. Collusive federalism,
 5. Competitive federalism, or
 6. Some combination of the above?
- B. Does the federal constitution's distribution of powers generally establish a centralized, decentralized, or non-centralized federal system?
- C. Does the federal constitution formally recognize and empower any types of local governments as the third order of government? If yes, why? If not, why not?
 1. If not, are local governments creatures of their constituent state, province, *Land*, canton, or republic?
 2. If not, do local governments generally possess any autonomy or self-government?
- D. Does the federal constitution assume that the federal or national government possesses inherent plenary powers, some of which are devolved or granted to the constituent states or provinces, does it assume that the constituent states or provinces possess inherent plenary powers, some of which are delegated or granted to the federal or national government, or does it assume that both the union and its constituent states or provinces possessed inherent co-sovereign powers at the time of federation such that the constitution serves to define and clarify the distribution and sharing of powers between them?
 1. Does the federal government possess inherent, plenary powers or only limited, constitutionally delegated powers?
 2. Do the constituent states, provinces, *Länder*, or cantons possess inherent, plenary powers or only limited, constitutionally delegated powers?
 3. Do local governments of any type possess inherent, plenary powers of self-government or only limited, constitutionally delegated powers of administration and/or self-government?
- E. Does the federal constitution provide a one-, two-, or three-list system for the distribution of powers and responsibilities among the federal, constituent, and/or localities?
 1. How extensive and detailed is each list?

- F. What is the federal-state-local distribution of functional powers in the federal constitution, and in each case, which powers (like the following) are exclusive to one or another order of government, which powers are concurrent—and why?
1. Citizenship, immigration, and naturalization
 2. Suffrage, voting, elections, and political parties
 3. Language policy and culture
 4. Religious policy and culture
 5. Economic policy-making:
 - a. Economic union
 - b. Monetary policy
 - c. Fiscal policy
 - d. International trade and commerce
 - e. Interstate/inter-provincial or nationwide internal, domestic trade and commerce
 - f. Intrastate/intra-provincial (i.e., within a state or province) trade and commerce
 - g. Insurance
 6. Communications (domestic and international)
 7. Transportation (domestic and international air, land, and sea)
 8. Natural resources
 9. Energy (gas, coal, hydro, nuclear, etc.) and provision to citizens (e.g., electricity)
 10. Agriculture
 11. Environment
 12. Social welfare, Labor, unemployment, and workers' compensation
 13. Health care
 14. Education (primary, secondary, and college or university)
 15. Internal security, law and order, and policing
 16. Civil and Criminal law, and organization of Courts
 17. National defense
 18. Foreign affairs and international relations
 - a. Negotiation and implementation of treaties (federal, regional, and/or local)
 - b. Impact of treaties on the distribution of powers in the federal system
 19. Aboriginal/indigenous peoples affairs
 20. Others
- G. What is the federal-state-local distribution of operational powers in the federal constitution, and in each case, which powers are exclusive to one or another order of government, and which powers are concurrent?
1. Governance autonomy, that is, does each order of government have its own independently elected officials or does one order of government appoint some governing officials for another order of government?
 2. Territorial autonomy, that is, can the boundaries or borders of any order of government in the federation be changed by one or more other orders of government, with or without that government's consent? Can a constituent state, province, *Land*, canton, or republic be abolished by the federal government? What other assurances of territorial integrity exist in the constitution, or not?
 3. Tax autonomy (i.e., own-source revenues): income, consumption, and other taxes.

4. Borrowing, deficit spending, and debt autonomy (or dependence).
 - a. If a constituent state, province, *Land*, or canton incurs debt, must it pay off the debt itself, or does the federal government assume responsibility for all or some of the debt?
 6. Regulatory autonomy, namely, the scope and objects of regulatory authority of each order of government.
 7. Redistributive autonomy, namely, the authority of each order of government to redistribute money, land, and/or other resources from one sector of the population to another sector of the population.
 8. Legislative autonomy, namely, the authority of each order of government to legislate within its constitutional realms of functional and operational authority.
 9. Executive and administrative autonomy, namely, the authority of each order of government to hire and fire its own officials and otherwise administer its own affairs.
 10. Judicial autonomy, namely, the authority of each order of government to adjudicate issues within its own courts on matters pertaining to its constitutional realms of functional and operational authority.
- H. Do the federal government and/or the constituent governments possess a constitutional spending power that, essentially, allows that government to expand its scope of functional and/or operational power beyond what is formally stated in the constitution by making grants-in-aid, sharing revenues, or incurring tax expenditures for another order of government?
- I. Does the federal constitution specifically mandate that one or another order of government carry out any specific functional or operational duties or responsibilities?
1. To what extent, if any, does the federal constitution require one order of government to execute or administer the legislation or policies of another order of government (e.g., *Länder* implementation of federal law and policy in Germany)?
- J. Does the federal constitution specifically prohibit any functional or operational powers or activities to one or another order of government?
- K. Does the federal constitution invest the federal government and/or the constituent states or provinces with any comprehensive or limited implied powers (e.g., the “necessary and proper” or “elastic” clause for the federal government in the U.S. Constitution)?
- L. Does the federal constitution give the federal government any functional or operational powers which the federal government has not exercised either voluntarily or under pressure from the constituent states or interest groups?
1. Likewise, does the federal constitution give the constituent governments any functional or operational powers which all or many of the constituent governments have not exercised either voluntarily or under pressure from the federal government, other constituent states, or interest groups? (For example, constituent governments might have an income-tax power but choose not to levy an income tax, or constituent governments might have authority to levy a death tax but not do so because of competition from other states.)

- M. Does the federal constitution explicitly or implicitly recognize residual or reserved powers? If yes, with which order or orders of government do the residual or reserved powers lie, and why? If not, why not?
1. How extensive and important are the residual or reserved powers? Are they inconsequential or have interpretations of residual or reserved powers significantly affected or shaped the federal-state/provincial-local balance of powers in the federal system?

III. Logic of the Constitutional Distribution of Powers and Responsibilities

- A. Is there a fundamental logic (theoretical, philosophical, cultural, economic, fiscal, and/or political) to the distribution of powers and responsibilities in your country's constitution, or is the distribution of powers and responsibilities mostly the outcome of political bargaining and interest-group compromises? That is, why are powers and responsibilities distributed the way they are in your country's federal constitution?
- B. Is the constitutional distribution of powers and responsibilities basically symmetrical or asymmetrical, and why?
1. Where the allocation of powers to constituent states or provinces is symmetrical, what mechanisms are used to maintain symmetry?
 2. Where the allocation of powers to constituent states or provinces is asymmetrical, what mechanisms are employed to enable asymmetry?
- C. Does the constitutional distribution of powers and responsibilities represent a system of shared powers and responsibilities? Do the federal or national government and the constituent governments form a unit for the purposes of programs on a subject for which governance is shared between the two, or has the pattern and style of distribution of powers and responsibilities created a "vertical" federation instead of a "territorial" one?
1. Alternately, does the constitutional distribution of powers emphasize dualism in which each order of government exercises its powers independently of other orders of government and performs its functions with little or no involvement of other orders of government?
- D. Does the constitutional distribution of powers and responsibilities to the federal or national government reflect the principle that the state or government has positive social-welfare obligations or the principle that the state or government is best kept limited in its powers and responsibilities (e.g., the social welfare versus night-watchman view of the state)?
1. In turn, does the constitutional distribution of powers and responsibilities to the constituent states, *Länder*, provinces, cantons, or republics reflect the principle that the state or government has positive social-welfare obligations or the principle that the state or government is best kept limited in its powers and responsibilities?
- E. Does one or another order of government have principal responsibility for allocative, redistributive, and/or regulatory powers, or are all these types of powers distributed

among and/or shared by the federal government and the constituent governments?

IV. Evolution of the Constitutional Distribution of Powers and Responsibilities

- A. Is the constitutional distribution of powers and responsibilities subject to change or redistribution by (1) constitutional amendment, (2) collective action by the constituent states, provinces, *Länder*, cantons, or republics; and/or (3) amendments or statutes enacted unilaterally by the federal legislature?
 1. If yes, what changes have been made in the constitutional distribution of powers by one or more of these mechanisms, and why?
 2. What role, if any, is played by the people in altering the constitutional or actual distribution of powers and responsibilities (e.g., direct democracy)?
- B. Is the constitutional distribution of powers and responsibilities subject to change or redistribution by the federal courts (e.g., Constitutional Court or Supreme Court) and/or constituent states' courts?
 1. If yes, what changes have been made in the constitutional distribution of powers by the courts, and why?
- C. In addition to any constitutional, legislative, judicial, or other formal governmental changes in the distribution of powers, how has the constitutional distribution of powers evolved and changed over time in actual practice, and why?
 1. How has the relative importance of different subject matters changed over time?
- D. Has there been an increased federalization of the polity requiring or resulting in some redistribution of powers and responsibilities?
- E. Has there been a trend or deliberate process of decentralization or devolution in the polity requiring or resulting in some redistribution of powers and responsibilities, particularly of fiscal competences?
- F. Has the federal center become weak under a regionalized polity and the simultaneous, concurrent emerging autonomy of the constituent states, *Länder*, provinces, cantons, or republics?
- G. Has membership in any super-federal entities (e.g., the European Union) or international organizations produced constitutional, statutory, or political changes in the distribution of functional and operational powers in the federal system?
- H. What have been the principal motivations and forces for any changes that have occurred in the distribution of functional and operational powers over time (e.g., political parties, interest groups, economic developments, international developments, war, and/or ethno-religious conflict)?

V. Maintenance and Management of the Distribution of Powers and Responsibilities

- A. Is the maintenance and management of the distribution of powers essentially cooperative, conflictual, collusive, or competitive, and why?
- B. In terms of the distribution of functional and operational powers and responsibilities, what are the principal areas of
 - 1. Cooperation and sharing.
 - 2. Collusion.
 - 3. Conflict.
 - 4. Competition (distinguish between conflict and cooperation as necessary).
 - 5. And why?
- C. How extensive is the concurrent jurisdiction and what rules govern conflicts of laws in areas of concurrent jurisdiction?
- D. Is there sufficient clarity in both the distribution and the sharing of powers so that each order of government knows and understands its powers and responsibilities in specific policy fields as well as its responsibilities for exercising or implementing shared powers?
- E. Does the federal constitution or federal practice require the federal, constituent, and/or local governments to cooperate to carry out joint tasks with respect to certain powers and responsibilities?
- F. Do conflicts or controversies over the distribution of powers and responsibilities concern the nature and substance of the distribution or the manner in which the federal and/or constituent governments exercise their respective competences?
- G. Is there transparency in the constitutional or actual distribution and sharing of powers and responsibilities so that citizens can determine who does what and hold officials of the various orders of government accountable for the exercise of their respective powers?
- H. What is the relative importance of the following actors or institutions in the maintenance and management of the distribution of powers and responsibilities in the federal system?
 - 1. Executives (federal, state/provincial and/or local).
 - 2. Legislative bodies (federal, state/provincial, and/or local).
 - 3. Courts (federal, state/provincial and/or local).
 - 4. Intergovernmental institutions.
 - 5. Political parties (national, regional, and/or local).
 - 6. Interest groups (national, regional, and/or local).
 - 7. Other instruments of conflict management and intergovernmental collaboration.
- I. What is the scope and interplay, if any, between formal institutions of federalism and informal political mechanisms in resolving controversies or conflicts over the distribution of powers and responsibilities?
- J. If formal intergovernmental institutions have been established to maintain or manage the distribution of certain powers and responsibilities in the federal system, are those

institutions relatively independent of federal and constituent-state influence or pressure, and how easy or difficult is it for those institutions to have their decisions implemented by the federal and/or constituent-state governments?

- K. Does the federal constitution require or permit the federal government to monitor the exercise of the powers and responsibilities placed under the jurisdiction of the constituent states or provinces?
- L. Is there transparency in decision-making about the constitutional or actual distribution and sharing of powers and responsibilities so that citizens can determine who is making decisions and hold officials of the various orders of government accountable?
 - 1. What roles, if any, do citizens play in maintaining, managing, and/or changing the distribution of powers and responsibilities?
- M. What happens when the federal government believes that the government of a constituent state or province is not functioning in accordance with the constitutional distribution of powers and responsibilities?
 - 1. Can the federal executive give directives or orders to the executives or legislatures of constituent states or provinces?
 - 2. Can the federal legislature give directives or orders to the executives or legislatures of constituent states or provinces?
 - 3. Can a federal court give directives or orders to the executives, legislatures, or courts of constituent states or provinces?
 - 4. Can an intergovernmental institution give directives or orders to executives, legislatures, or courts of constituent states or provinces?
 - 8. Can the federal government appeal to a court or some other institution to compel compliance from a constituent state or province?
- N. Are there constitutional provisions for exceptional or emergency situations that allow the federal government to intervene directly in the legislative, executive, administrative, and/or financial responsibilities of constituent states or provinces?
- O. Are there constitutional provisions for exceptional or emergency situations that allow the federal government to remove or suspend regional or local officials or take over the governments of constituent states or provinces?
- P. What recourse or appeal is available when one or more constituent states or provinces believe that the federal government is not functioning in accordance with the constitutional distribution of powers and responsibilities?

VI. Adequacy and Future of the Distribution of Powers and Responsibilities

- A. Overall, does the actual distribution of powers and responsibilities in the federal system largely conform to, or deviate from, or perhaps even violate the constitutional distribution of powers and responsibilities?

- B. Does the constitutional and/or actual distribution of powers and responsibilities strike an adequate and politically acceptable balance between an effective federal or national government and effectively empowered constituent governments? If yes, why? If not, why not?
- C. Is the constitutional and/or actual distribution of powers and competences generally compatible or incompatible with the capacity or ability of the country's federal, regional (i.e., *Land*, cantonal, provincial, state, and republic), and/or local governments to carry out their constitutional responsibilities and respond to their citizens democratically and adequately? That is, can each order of government actually carry out its duties? If yes, how and why? If not, why not?
1. In particular, do the constituent states or provinces and/or local governments possess sufficient constitutional or statutory authority to raise revenues adequate to fulfill their responsibilities?
 2. Even if the constituent states or provinces and/or local governments possess sufficient constitutional or statutory authority to raise revenues adequate to fulfill their responsibilities, do they actually have the fiscal capacity to do so?
 3. Even if the constituent states or provinces and/or local governments possess sufficient constitutional or statutory authority, as well as fiscal capacity, to raise revenues adequate to fulfill their responsibilities, do they actually have the political will to do so?
 4. If the constituent states or provinces and/or local governments do not possess sufficient constitutional or statutory authority, or the fiscal capacity, to raise revenues adequate to fulfill their responsibilities, does the federal government engage in fiscal equalization, promote regional economic development, and/or provide grants-in-aid to such constituent states and/or local governments?
 5. Do the constituent states or provinces and/or local governments possess sufficient constitutional or statutory authority to fulfill their responsibilities administratively?
 6. Even if the constituent states or provinces and/or local governments possess sufficient constitutional or statutory authority to fulfill their responsibilities administratively, do they actually have the administrative capacity to do so?
 7. Even if the constituent states or provinces and/or local governments possess sufficient constitutional or statutory authority, as well as administrative capacity, to fulfill their responsibilities, do they actually have the political will to do so?
 8. If the constituent states or provinces and/or local governments do not possess sufficient constitutional or statutory authority, or the capacity, adequate to fulfill their responsibilities, does the federal government engage in technical assistance, loan personnel, provide training, or offer other aid intended to enhance administrative capacity?
- D. What changes, if any, are likely to occur in the constitutional and/or actual distribution of powers and responsibilities in the federal system in the foreseeable future?
1. If changes are likely to occur in the distribution of powers and responsibilities, are those changes likely to centralize or decentralize powers and responsibilities?