Devolution

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A. The Concept of Devolution—From Political Principle to Constitutional Form

1. Although the term devolution has become increasingly commonplace in constitutional and political discourse, the concept itself defies easy definition. Its use in European languages dates to around the 15th Century and can be traced to the Latin *devolvere* (to roll down). It was used as a metaphor to describe the downward transfer of power, although primarily in the context of dynastic succession, most obviously in the War of Devolution (1687–1688). Today the term has morphed to describe not dynastic transfers of power but transfers of power from constitutionally superior to inferior governmental entities.

2. In the period post-1945, the term devolution has taken on a new and more specific constitutional meaning, and it is this concept which is the focus of this article. The post-war concept of devolution describes a specific form of decentralized constitutional model whereby power is delegated from a central point to a regional (or local) tier (*→ decentralization*). This devolution of power provides the opportunity for the devolved entity to engage in autonomous policy making and will (usually) include legislative authority.

3. Although they feature on Ron Watts’ spectrum of *→ federalism*, unlike true federations, devolved states comprise of governments which remain creations of, and therefore constitutionally inferior to, the central state (*Watts 8*). The majority of such entities are created by statute rather than the constitution itself, although a formal constitutional framework is not uncommon. In many cases there is significant variation between the powers devolved to individual sub-state entities and in some, devolution applies only to a part of the state’s territory. In practice, as the examples below demonstrate, although devolution is constitutionally discrete from classic federalism, the practical distinction between many devolved and federal models of government has become increasingly blurred.

B. The Development of Devolution as a Constitutional Form

4. The earliest examples of modern constitutional forms of devolution can, perhaps surprisingly, be dated to early modern federations. In these early examples, the concept of autonomous governments inferior to the *→ central government* was used to establish territories outside the federal norm, often to ensure that the federal capital was not subject to overt control by one state (eg Mexico, Australia and the US). However, the recent expansion of devolution has little connection to these early examples.

5. Prior to 1945, very few devolved systems of government existed. A few European models briefly appeared in the early part of the 20th Century, but few survived the cataclysm of 1939–1945. The short-lived Second Spanish Republic (1931–1939) introduced a devolved model but the Spanish Civil War (1936–1939) severely limited its operation. Only three regional statutes were established (in Galicia, Catalonia and the Basque Country), but only the devolved Catalan government could be regarded as functional during the period. A number of specific examples were also introduced to address (often violent) demands for increased autonomy or independence, including the Åland Islands (1920–present), Iceland (1904–1940), the Irish Free State (1922–1937) and Northern Ireland (1922–1972). In contrast to this patchy adoption of devolution in the period prior to 1945, devolved systems of government (although often not recognized as such) now exist across all four continents. Devolution as a constitutional concept is thus largely a post-war phenomenon.
6. The large number of devolved models created in the post-1945 period have been used to achieve a wide variety of both political and constitutional goals. In a number of cases, (including Spain, Italy and South Africa) the aim was explicitly constitutional with power being divided in line with the Jeffersonian principles of dividing public power as a ‘bulwark’ against authoritarian takeover (Jefferson) (→ authoritarianism). These devolved systems emerged from a period of authoritarian or minority rule and like the federations of Germany and Austria were specifically designed to prevent such a repetition but for political reasons stopped short of creating a classical federal model. In some cases, devolved systems have been created to accommodate micro-nationalist or indigenous demands for self-government within existing states (eg United Kingdom and Portugal). Other states (eg Italy and Indonesia) recognized the inability of large states to deliver the growing requirements of regional economic policy and social welfare. Such demands led to the creation of sub-national entities capable of both delivering and developing such policies. In many cases these drivers overlapped within the same state. The overall impact from these very different drivers are very different forms of devolved state.

7. At one end of the scale, some devolved entities exhibit constitutional independence that is close to full sovereignty (eg Åland Islands, Faroe Islands, Greenland) while some are little more than local governments (→ local government), albeit with some form of policy autonomy (South Africa). In addition, the political reality in some states (Iraq and South Sudan) means that constitutional devolution, as imagined in the constitution, does not exist on the ground.

8. The huge spectrum of constitutional entities that could be classed as ‘devolved’ makes discussion of devolution as a comparative form difficult. This article therefore focuses on those systems which exhibit the concept of classic devolution discussed above. Devolution, as defined below describes self-governing, democratic governments with autonomy (usually legislative) within a non-federal constitutional structure. Many classic federal states do exhibit such characteristics but for reasons of space are specifically excluded from this analysis and are discussed elsewhere (→ types of federalism).

C. Constitutional Devolution

9. A number of devolved systems are formally incorporated into the constitutions of their parent states. In these constitutionally embedded systems of devolution the constitution creates the framework for the devolved state. Unlike federal models, however, these systems still require some form of statutory framework to implement the devolved elements of the constitution. In addition, the constitutional status of the sub-state entity remains inferior to that of the central level.

1. Italy

10. Italy became the first European state to adopt a national system of devolution under the post-war constitution of 1948 (Constitution of the Italian Republic: 22 December 1947 (It)) (Italian Constitution). This created five ‘special’ peripheral regions (Friuli-Venezia Giulia, Sardinia, Sicily, Trentino-South Tyrol and Valle d’Aosta) under Art. 116 and laid the foundations for the creation of a system of ‘ordinary regions’ throughout the rest of the country under Art. 115. However, although the Italian state was the first in Europe to create a constitutionally entrenched system of devolved regions, the implementation of these elements of the constitution were to take several decades. Although the constitution created the ‘special’ regions, further legislation was required to create their ‘ordinary’ compatriots. In the event, the highly polarized political climate of post-war Italy meant that no legislation was forthcoming. In particular, the Christian Democratic Party did not wish to create potentially powerful regions, many of which would likely be governed by their left wing opponents. It was not until the political rapprochement of the early 1970s that
regional devolution became a reality in much of Italy with the establishment of the 15 'ordinary regions' listed in Article 131 of the Italian Constitution.

11. Although the devolved structure of the Italian state is established by the constitution, in common with many devolved systems, the structure is not uniform. Each region has an individualized relationship with the state through its regional statute (Art. 123 Italian Constitution). The creation and amendment of these is a matter for the region concerned (subject to the limits of the constitution). Enactment and subsequent amendment of the regional statutes requires the support of an absolute majority in the Regional Council, although a referendum (→ direct democracy) is required if 20 per cent of the Regional Council members (or two per cent of voters) request it (Art. 123 Italian Constitution). In practice, aside from the special regions, most regional constitutions follow a very similar pattern as the key institutions of each region are established in the Italian Constitution itself (Art. 121 Italian Constitution) and are limited to a Regional Council, a Regional Cabinet and a Regional President.

12. Since the establishment of the ordinary regions in 1974, Italian devolution has gone through several changes all leading to greater regional autonomy. The last successful reforms, in 2001, saw regional legislative autonomy expanded through the introduction of a 'subsidiarity clause' granting regional autonomy in all areas not expressly granted to the state level (Art. 117 Italian Constitution). This replaced a previous positive definition of regional jurisdiction through a restrictive and defined list. The post 2001 reforms also introduced the concept of concurrent powers and explicitly devolved implementation of European Union (EU) law to the regional tier in areas of devolved authority. Importantly, it also requires that Italy’s regions (and autonomous provinces) participate in the EU legislative decision-making process through the offices of the Italian state.

13. In practice there are few areas in which the central state does not have some role. This has been increased through judicial interpretation of concurrent powers which have consistently favoured national unity over regional divergence (for example, Judgment No. 282/2002 (It); Judgment No. 338/2003 (It)). Despite this, areas such as education, culture and health are now under regional authority, although the financial reliance of the devolved regions on central funding significantly curtails their practical autonomy.

14. Autonomous regional (and local) taxation is provided for in the constitution (Art. 119 Italian Constitution), but this must be exercised within the constraints laid down by national legislation. Central government plays the major financial role through a combination of block and hypothecated funding. The details of the financial relationship are laid down in statute (Law No. 42 of 2009 (It)) (see → fiscal federalism). This statute requires that the financial resources of the devolved regions match their responsibilities but it remains a statute of the Italian state. The result is that Italian ordinary regions raise only around 20 per cent of their revenue independently and this is largely accounted for in their un-mandated responsibilities in the field of health. Financing of the special regions is defined in their regional statutes and includes significant proportions of taxation raised locally.

15. Despite their limits, the 2001 reforms marked a significant increase in devolution for ordinary regions in particular. Most specifically since 2001, only the → Constitutional Court of Italy (Corte costituzionale della Repubblica Italiana) can rule on the constitutionality of regional legislation, whereas previously the Regional Commissioner could submit such laws to the national parliament for a ruling on whether they breached national interests. Now,
both regions and the central government may submit laws to the Constitutional Court within 60 days of publication.

16. Further devolution was proposed in 2006 and 2016 as part of wider (controversial) constitutional reforms, but on both occasions the proposals were conclusively defeated in constitutional referenda. Nevertheless, there remains strong support for further devolution particularly in the former territories of the Venetian Republic. It seems unlikely that the pressure for further devolution in Italy will reduce in the coming years.

2. Spain

17. Despite Spain’s famed regional diversity, the Spanish state has a history of centralized and authoritarian unitary government. It is hardly surprising therefore that its two periods of democracy (1931-1939 and 1976-present) saw significant moves towards devolved government. The diverse nature of Spain and the oppression of regional identities under authoritarian rule meant that regional demands must be addressed if the peripheral regions and nations of Spain are to remain part of a democratic Spanish state. The modern transition to democracy, which began a year after the death of the dictator Franco in 1975, therefore had regional devolution at its heart.

18. The Constitution of the Kingdom of Spain: 6 December 1978 (Spain) is the framework in which the current devolved model of strong regionalism operates. However, the Spanish model is unusual, as the constitution itself does not create the regional system but rather outlines a method by which it can evolve.

19. In essence, the Constitution of Spain (Spain) (Spanish Constitution), and the transitional provisions that accompanied it provided three mechanisms by which existing Provinces (or collections thereof) could become devolved regions. Art. 143 of the Spanish Constitution provides for a route to ‘low autonomy’ devolved regional government, which could be converted to ‘high autonomy’ after a period of five years. However, a specific exception in the second transitional provision allowed for those regions which had been granted autonomy under the Second Republic (Galicia, Catalonia and the Basque Country) to move swiftly to the ‘high autonomy’ route. In what was expected to be a little used process, an additional and very onerous ‘fast track’ method to high autonomy was also provided under Art. 151 of the Spanish Constitution, to satisfy provincial regionalists.

20. However, upon the constitution’s ratification, in 1978, a number of peripheral regions, led by Andalusia, immediately set about utilizing the Art. 151 route. This led to concerns that the Spanish periphery would be devolved while the core remained centralized. This could have the effect of making all regional issues, a centre/periphery debate. In response, the main political parties agreed, under the first autonomic pact (of 1982), to abandon the organic approach to regional devolution envisaged by the constitution. Instead they replaced it with a centrally driven policy of café para todos (‘coffee for all’) whereby a single model of ‘low’ autonomy regions was created (alongside the ‘high’ autonomy examples of Galicia, Catalonia and the Basque Country/Euskadi). Regions at the heart of Castilian Spain, where support for regional devolution was low, were granted regional autonomy under this policy as a means of balancing the centripetal forces of the periphery. However, the → Constitutional Court of Spain (Tribunal Constitucional de España) ruled that a limited form of Art. 151 had to be granted to all those regions that had already started the process (and were able to satisfy the conditions) as the legislation introduced to limit such moves was unconstitutional (STC 76/1983).
21. The result was the current structure which divides Spain into 19 Autonomías (17 regions plus the two autonomous cities of Ceuta and Melilla on the northern coast of Africa). Over time the distinctions between the ‘high’ and ‘low’ autonomy regions have been eroded with similar powers now existing across all 17. Nevertheless, significant differences remain, as explored below.

(a) Spanish Devolution Today

22. Each Spanish Autonomía enjoys an individual constitutional relationship through a regional statute created under Title VIII, Chapter III of the Spanish Constitution. These statutes require both national parliamentary and regional approval both for their creation and amendment, although the exact procedures differ depending upon the region concerned. The current statutes of autonomy largely date from the 2000s when the central government attempted to create a single model of ‘high’ level regions (with the exception of the autonomous cities which enjoy only administrative autonomy). This has seen a considerable alignment of regional competences across regions. All 17 devolved regions now have legislative power over the exclusive regional powers laid out in Art. 148. These include, planning, regional economic development, cultural policy, local language teaching, research, tourism and health.

23. However, beyond this, some significant variations remain. Using the mechanism of ‘high autonomy’ found in Art. 151 of the Spanish Constitution, several regions have acquired additional authority in fields such as policing (Catalonia, Navarre and Euskadi) and civil law. Catalonia, Aragon, the Balearic Islands, Euskadi, Galicia and Valencia all have regional civil codes with varying degrees of comprehensiveness. However, the extent of actual devolution can be misleading with national legislation in areas such as education and health meaning that devolved authority is often largely administrative. In addition, although a number of regions have negotiated additional devolved powers, many Autonomías have not utilized them. In the field of policing for example, although a number of regions have responsibility for regional policing, the national police force acts as a de facto regional force in most cases. The only exceptions are the regions mentioned above.

24. Variations also exist in relation to the financing of the devolved regions but these differences are less pronounced. Regions have the ability to raise their own → taxes in areas in which the central state has not exercised its authority. However, there are very few areas where such taxation is possible. Regional levies on national taxes are permitted but these have only been utilized in exceptional circumstances (for flood recovery in Euskadi, for example). The few regional taxes that do exist are used as policy levers not as a means of → public finance (Hopkins 217).

25. The only exceptions to this general rule of national taxation are the forales regimes of Navarre and Euskadi which are recognized/constituted in the regional autonomy statutes. In these cases, taxation is collected by the provinces (Euskadi) or the region (Navarre) rather than the central state. These historic tax regimes date back to the incorporation of the Basque provinces into the Spanish crown. The exact legal status of the current forales regime remains a bone of contention with many Basques seeing them as directly founded on the historic rights which predate the constitution. The Spanish state by contrast sees them as part of the devolved state and entirely based upon the autonomy statutes of the two regions concerned despite their historic lineage. In practice, the constitutional disagreement has had little impact upon their operation.

(b) Spanish Devolution—A Continuing Crisis?
26. The current Spanish model is far from settled. Galicia, Euskadi and Catalonia in particular have consistently pushed for more autonomy from the central state. Although the financial crash in Spain, which was caused at least partially by heavy regional borrowing on the basis of property tax receipts, has weakened the hand of many regions, pressure has grown for reforms to Catalonia’s status in particular. This led to a new Catalan regional statute being approved by the Spanish Parliament in 2006. Although the statute represented a significant retreat from the original demands of Catalan authorities, the Constitutional Court has rejected even this compromise (Judgment No. 31/2010 (Spain)).

27. This decision has led to a significant and continuing constitutional crisis. The court’s interpretation of the Spanish Constitution would appear to deny the possibility of a settlement acceptable to all sides leading to a surge in support for independence in Catalonia. This apparent instability in the Spanish devolution settlement is reflected in other devolution models, particularly that of the UK, examined below.

3. South Africa

28. Devolution and federalism have had a chequered history in the Republic of South Africa. Although both the former British Colonial authorities and the apartheid era government had implemented various forms of federalist administration, these were tainted with the racist ideologies which had been a central feature of the regimes.

29. For this reason there was significant debate on the role of sub-national governments during the construction of South Africa’s post-apartheid constitution. Although the divisions within the country are complex, in general the African National Congress, which represented the vast majority of the population, supported a unitary system while other parties supported a devolved or federal system, both for the Jeffersonian reasons explored above and in the case of Kwa-Zulu, as a reflection of micro-nationalist/tribal identities within the Republic. The resulting system, laid down in Articles 103–150 of the Constitution of the Republic of South Africa: 18 December 1996 (S Afr) (South African Constitution), is thus a compromise between these two extremes.

(a) Devolution in South Africa

30. Like the earlier model established in Italy, the South African system of devolution created a provincial tier of government across the whole territory of the Republic. However, in the South African example the constitution creates a uniform system of nine provinces across the whole state, with no provision for ‘special’ or ‘high autonomy’ variants (Art. 103 of the South African Constitution). This uniformity of structure, and federal features such as the National Council of Provinces (NCOP) has led some commentators to describe South Africa as a federation (eg Griffiths 2005). However, there is no recognition of this within the constitution itself which does not list either federalism or devolution as foundation principle of the South African State. The centralized nature of the system confirms South Africa as a form of devolved state characterized by some as ‘strong regionalism’ rather than a federation (Klug 2010).

31. Although each province has its own provincial constitution as required by Art. 144 of the South African Constitution, in practice the South African Constitution itself lays down the details of the system which clearly establishes the provinces as inferior units. Although provinces in the South African system possess → legislative powers, this is extremely circumscribed. All powers by default lie at the national level.
32. Exclusive provincial powers are listed in Schedule 5 but the list is exceedingly short and of minimal import. By contrast, a more significant list of concurrent powers (including agriculture, economic development, transport, health services, non-tertiary education, culture, environment and conservation) are listed in Schedule 4 (South African Constitution). Provincial powers in these fields are extremely constrained by the limits imposed under Art. 146 of the constitution. These provide for national law to apply in areas of concurrent jurisdiction if such national uniformity is required for national security, economic unity, the common market and effectiveness amongst other reasons (Art. 146, s. 2). In practice, these exceptions are so broad as to exclude provinces from the legislative scene with most statutes being promulgated at the national level.

33. In addition to their lack of legislative authority, the provinces also suffer from a lack of financial independence. The financial framework is established by an ordinary statute (Intergovernmental Fiscal Relations Act No. 97 of 1997 (S Afr)) (IFRA) as mandated by the South African Constitution (Art. 214, s. 1(a)). The annual Division of Revenues Act allocates financial resources to the provinces through the consultative procedure laid down in the IFRA and must ensure an ‘equitable division of revenue’ although this concept is not defined. This act is produced after consultation with provincial leaders through the national Budget Council but the bill itself remains the prerogative of the minister while the National Assembly makes the final decision (the NCOP has no role in this process). A small amount of provincial taxation also exists, although this is once again governed by a national statute, under Art. 228, s. 2(b). Controversy exists as to the extent that the current Act (Provincial Tax Regulation Process Act No. 53 of 2001 (S Afr)) restricts provincial taxation authority.

(b) The Future of South African Devolution

34. It is superficially tempting to see South Africa as a strongly devolved or even federal state. For example, unlike Spanish comunidades autónomas and Italian regioni, South African provinces are represented at the national level through the Council of Provinces, which is required to approve any legislation in the areas laid down in Schedule 4 of the South African Constitution. In practice, lack of legislative freedom and financial autonomy allied to the fact that South Africa remains dominated by a single party (the African National Congress) means that provincial power remains reliant upon the national level for it to be effectively utilized.

D. Statutory Devolution—Universal Models

35. The above examples embed significant elements of the devolved state within the national constitution, with statutes being required to provide elements of the final model, or the specifics of individual regional practice. In a large number of states, these constitutional frameworks are minimal or non-existent, although as the examples studied below make clear, this does not mean that the devolved entities themselves lack autonomy. Indeed, in the examples of the United Kingdom and Indonesia, the devolved entities exhibit levels of autonomy far in excess of some constitutionally devolved models.

1. Indonesia

36. As one of the world’s largest unitary states (unitary state), it is hardly surprising that Indonesia has adopted a devolved model of governance as part of its post-1998 transition to democracy. In addition, the long history of opposition to Indonesian rule in a number of peripheral provinces (notably West Papua, East Timor and Aceh), posed a real risk of secession in the democratic era. In the event Timor-Leste did secede in 1999 but special
autonomy was granted to both Aceh (2001 and 2006) and West Papua (2001) as part of Indonesia’s dramatic shift towards a highly devolved state.

37. However, the story of devolution in Indonesia has not always been a positive one. The model of devolution has been fluid and at times confused. As a result, it has flowed both in the direction of extensive decentralization and more recently towards a greater role for the central government. When this is coupled with a weak structure for the defence of the → rule of law the result is a complex and unsettled system which would appear somewhat unfinished.

(a) The Constitutional Framework

38. Despite the recognition of ‘regional’ autonomy in the 1945 Constitution (Art. 18 of the Constitution of the Republic of Indonesia: 18 August 1945 (Indon)), both the Sukarno regimes (1945–1967) and the long years of dictatorship that followed imposed a strong unitary model of governance upon the country. Although provinces existed under the brutal Suharto regime (1967–1998) they became little more than mechanisms to deliver central government policy and ensure loyalty to the authoritarian regime.

39. The fall of the Suharto regime after his death in 1998 led to a dramatic shift from one of the world’s most centralized state to one of its most devolved. The current Art. 18, introduced in 2000, dramatically expanded upon the 1945 original and confirmed the introduction of the three varieties of democratic ‘regional’ government (provinces, districts and cities) established under the Regional Autonomy Law of 1999 (Law No. 22 of 1999 (Indon)). Collectively these entities are defined as the regional level and are equal in status, under the national level.

40. This system was to prove short lived. Within four years the pro-democratic euphoria, which had led to the swift creation of over 400 local legislative entities, had relented and pressure grew for a degree of co-ordination amongst the large numbers of local laws which had emerged. This resulted in the 2004 Autonomy Law (Law No. 32 of 2004 (Indon)) which re-established the role of the province as a level of government above the local and empowers it to ‘guide and supervise government affairs in districts and cities’. This statute, in combination with the special autonomy statutes (see below) provides the current statutory framework for devolution in Indonesia.

(b) The Indonesian Model

41. The 2004 Autonomy Law created legislatures at both the local (city/district) and the provincial levels (now structured by Law No. 27 of 2009 (Indon)). Regional executives (governors, regents or mayors) are directly elected under Art. 18(4) of the Constitution but, since 2004, provincial governors occupy a dual role as both the head of the regional executive and the central government’s representative in the province.

42. The jurisdiction of these institutions is extensive and all regional governments may enact legislation in all fields not reserved to central government. These are laid out in Arts 10(3) and (4) (Law No. 32 of 2004 (Indon)) and are limited to foreign affairs, defence, security, fiscal/monetary policy, religious affairs, the judiciary and immigration. However, Art. 10(5) somewhat undermines this wide-ranging devolution by allowing national legislation to also be introduced in any other area, in effect nullifying the local and provincial autonomy outlined elsewhere in the Law. In addition, the law on Law Making (Law No. 4 of 2004 (Indon)) provides a clear hierarchy of laws that places provincial and local laws at the lowest level under both national statutes and executive decrees (peraturan
Nevertheless, as explored below, the practicalities of Indonesian constitutionalism means that extensive legislative autonomy remains.

(c) Special Autonomy Regions

43. The two exceptions to the general theme of centralized devolution described above are the special autonomy arrangements granted to Papua and Aceh (Law No. 21 of 2001 (Indon) and Law No. 11 of 2006 (Indon) respectively). These grant greater autonomy to these separatist regions, particularly in the field of natural resource management, customary law and, in the case of Aceh, criminal and civil law. In both cases, the application of these statutes has proved controversial. For example, in Papua, it is not clear how the statute interacts with the 2004 Indonesian Regional Statute (Law No. 32 of 2004 (Indon)). Although the 2001 statute creates a Papuan Assembly to protect the rights of indigenous Papuans, it remains a moot point whether the authority of this body applies to the geographical entity of Western Papua (which comprises two provinces since 2010) or the province which bears this name.

44. The two provinces of Jakarta (Law No. 29 of 2007 (Indon)) and Yogyakarta (Law No. 3 of 1950 (Indon)) have special autonomy statutes of long standing. They largely operate as part of the ‘ordinary’ provincial system with small differences which pre-date the democratic reforms. Yogyakarta, for example, retains the Sultan as its head of province while Jakarta has specialized planning authority in relation to its status as the national capital and a regional base for a number of international organizations (Butt and Lindsey 178).

(d) Indonesian Devolution in Practice—A Work in Progress

45. Despite the statutory reforms in favour of centralization, the practicalities of Indonesian governance continue to ensure that the operation of devolution remains very different from the structure laid down in statute. In particular, although local and provincial legislation (perda) are statutorily inferior to national legislation and subject to both political/administrative review by the Ministry of Home Affairs (Ministerial Regulation No. 53 of 2007) and → judicial review by the Supreme Court they are rarely overturned. The only exception to this has been the central government’s active rule in reviewing revenue raising at the local and provincial levels (Butt 184).

46. This failure of the → judiciary to ensure provincial compliance with the national legal order was most publicly demonstrated by the Supreme Court’s refusal to strike down the Tangerang City Perda No. 8 of 2005 (Indon) which made ‘appearing to be a prostitute’ a criminal offence, leading to the → detention of a number of innocent women. In line with their practice in other cases challenging regional legislation, the Supreme Court refused to assess the substance of the legislation, (Judgment No. 16 P/Hum/2006) (Indon) (Butt 188).

47. The result has been a confusing proliferation of contradictory laws at the provincial and local level, leading to confusion in the Indonesian legal system and a serious threat to the rule of law (Butt and Lindsey 186). Without a method of resolving such conflicts and ensuring compliance with the national legal order, devolution in Indonesia has created an unnecessarily complex model of sub-national law.

E. Statutory Devolution—Asymmetrical and Post-Colonial Models
48. In many cases, devolution has been introduced through statute as a means of addressing alternative national identities within a single state. This can be particularly true when these territories are physically far removed from the metropolitan state and in some examples has been used to provide a post-colonial settlement within the former colonial state apparatus. Such models of devolution are extremely diverse and bound only by the asymmetrical nature of the wider state structure.

1. The United Kingdom

49. The United Kingdom is properly described as a union state, founded upon three treaties, namely the Treaty of Union (1706/1707), the (Irish) Act of Union (1801) and Anglo-Irish Treaty (1921). Today it consists of one principality (Wales), one province (Northern Ireland) and two kingdoms (Scotland and England). These historic identities remain strong (and in the case of Northern Ireland, highly contested). Although democratic devolution has been a recent innovation in most of the UK, these territories have a long history of legal and constitutional distinctiveness.

50. Despite this, until the 1990s, only Northern Ireland (in the period 1922–1972) had enjoyed a measure of democratic devolution, as a result of the Anglo-Irish peace treaty of 1921. Even here, the collapse of law and order in the province led to the imposition of direct rule by London in 1972. From this point until 1998, the UK was governed as a unitary state with deconcentrated administrations for the three peripheral territories.

51. Although there is a long history of micro-nationalism in Scotland and Wales, it was not until the 1990s that such demands were met. Driven by a Scottish Constitutional Convention, led by civil society, which developed a common platform for a devolved model of government amongst most opposition parties in the 1990s, the resulting proposal received overwhelming support in the Scottish referendum held in 1997. A lesser form of (primarily administrative) devolution proposed for Wales was also implemented after receiving a positive, though narrow, result in a similar Welsh referendum.

52. In Northern Ireland, the Good Friday Peace Agreement of 1999, (Agreement Reached in the Multi-Party Negotiations (United Kingdom–Ireland) (signed 10 April 1998, entered into force 2 December 1999) (1998) 37 ILM 751) which ended the civil war in Northern Ireland (commonly referred to as ‘The Troubles’), included a devolved settlement for the province utilising a complex consociational model of governance to ensure both communities (Nationalist and Unionist) would be represented in both legislative and executive decision-making.

53. Despite the extensive level of autonomy granted to the devolved regions of the UK’s periphery as a result of these settlements, England (which comprises over 80 per cent of the UK’s population) has remained stubbornly unitary despite several attempts to create an English regional tier. Recent reforms have seen a weak form of executive decentralization (termed ‘devolution’ by the UK government) applied to selected city regions in parts of England.

(a) The UK Devolution Settlement Today

54. The current UK devolution settlement is based upon three Acts of the UK Parliament, each of which has been amended several times since their initial Royal Assent. These are the Scotland Act 1998 (UK), the Government of Wales Act 1998 (UK) and Northern Ireland Act 1998 (UK) (now complemented by the Northern Ireland Acts 2006 and 2008 (UK)). As the United Kingdom has no codified constitution these acts have no formal constitutional status (→ codified / uncodified constitutions). However, a convention has evolved whereby amendments require the consent of the legislatures concerned. Northern Ireland is
something of a special case with several suspensions being deemed necessary to move the
peace process forward.

55. Scotland has the highest autonomy of the three devolved authorities, enjoying
legislative freedom over a wide range of domestic matters. Like Northern Ireland, these
powers are defined negatively with all powers being in the hands of the devolved
parliament unless specifically reserved by UK statutes (Scotland Act 1998, Schedule 5
(UK)). In Scotland’s case, devolved authority includes both civil and criminal law, education,
policing and health amongst a long list. However, important powers remain ‘reserved’ to
Westminster; including most taxation, monetary and fiscal policy, foreign affairs, defence
and social security (Scotland Act 1998, Schedule 5 (UK)).

56. Welsh devolution was originally a far weaker variant than that proposed for Scotland.
In 1998 this largely consisted of devolving the → executive powers of the UK government
minister responsible for Wales (the Secretary of State for Wales) to the Welsh Assembly. The
structure of the Government of Wales Act was thus very different from its Scottish and
Northern Irish counterparts. In particular, it positively defined the areas in which the
assembly was able to exercise authority. Legislative power was thus secondary in nature
and required the UK parliament to actively pass statutes which authorized such powers.

57. Increased support for devolution in Wales led, in 2006, to a fundamental shift in the
nature of the Welsh settlement. The Government of Wales Act 2006 (UK), although still
retaining the positive devolution of powers found in the 1998 Act, now explicitly grants
power to the Welsh Assembly in 20 broad fields. Originally, the legislative authority was
limited to ‘matters’ within these fields, which had been specifically devolved to the
assembly through executive orders of the UK government (after a request from the
assembly). This rather cumbersome process was abolished in 2011 when, after a further
referendum, all 20 subjects listed in Schedule 5 to the Government of Wales Act were fully
devolved to the Welsh Assembly. These are limited by a number of exceptions contained
within the schedule and can be further enhanced or restricted by an Order in Council of the
UK executive.

(b) UK Devolution in Transition

58. The UK’s model of devolution has not proved static. Significant reforms have seen
increased powers granted to all the devolved authorities. Changes to the political landscape
in Scotland have, however, put extreme pressure on the current model. The re-election of a
Scottish Nationalist Party government in 2011 led to a referendum on the subject of
Scottish independence. Although this failed, the fact that 45 per cent of voters expressed a
desire to leave the UK changed the nature of Scottish politics. As a result, a package of
reforms (including new powers relating to tax and social security) was introduced as a
result of promises made by the UK government during the referendum campaign (Scotland
Act 2016 (UK)). These have received only a lukewarm reception from the Scottish
government. It therefore seems unlikely that the issue will disappear in the near future.
Uncertainty over the UK’s future relationship with the European Union (despite Scotland’s
traditionally pro-European stance) has merely added to the feeling of uncertainty. In
practice, devolution in the UK has proved to be a process rather than a settled
constitutional structure.

2. Portugal (Madeira and the Azores)
59. In Portugal, the constitution establishes autonomous governments for the island regions of Madeira and the Azores (Constitution of the Portuguese Republic: 2 April 1976, Part III, Title VII (Port)). These operate under regional constitutions, known as political and administrative statues which, although drawn up by the legislatures concerned, are subject to approval by the National Assembly of the Republic.

60. Although the Portuguese Constitution emphasizes the unitary nature of the Portuguese state (Art. 6), the Azores and Madeira have extensive autonomy under the respective 'Political and Administrative' Statutes (Art. 226 s. 1). These grant extensive legislative autonomy over a wider range of policies areas and extensive financial autonomy including the power to collect and alter regional taxes (eg Statute of the Azores, Law No. 2 of 2009, Arts 19–20 (Port)).

61. These powers were enhanced in the wake of controversial constitutional reform secured in 2009. The new statutes removed the position of the Minister of the Republic (ministro da república). This position had operated as a governor of the islands with the ability to veto decisions of the islands’ legislatures. This power has been removed and the institution replaced with a less intrusive representative of the Republic, who has the power to reject executive decrees and delay legislative decisions but not veto them entirely (Art. 230 of the Portuguese Constitution).

3. French Overseas Territories

62. A number of European states have used forms of devolution to address the governance of overseas territories in the post-colonial era. France, for example, has classified her remaining overseas territories as either départements et régions outer mer (DROMs) or collectivités d’outre-mer (COMs).

63. The COMs include French Polynesia, Saint Pierre and Miquelon, Wallis and Futuna, Saint Martin and Saint Barthélemy (Constitution of the French Republic: 28 September 1958, Art. 74 (Fr) (French Constitution)). However, the actual powers granted to the devolved entities vary dramatically. Some have less power than their DROM cousins while, in the special case of French Polynesia, the devolved authority is extensive and includes most matters outside the fields of justice, university education, currency, foreign affairs, security and defence.

64. New Caledonia enjoys a similar but unique status, agreed under the Noumea accords of 1998 (Art. 74-1 and Title XIII of the French Constitution). These saw the creation of a specific status for the territory as part of the attempt to resolve the, at times violent, demands for greater autonomy. This has seen greater power granted to the New Caledonia government with a referendum on full independence planned for 2018. Many of these territories, although remaining part of the ‘one and indivisible republic’ (including sending delegates to the French and European parliaments), increasingly operate, and are recognized, as quasi-independent entities. New Caledonians and French Polynesians, for example, now have formal ‘regional’ → citizenship alongside their French (and EU) nationality and both governments sit on the Pacific Island Forum as associate members.

65. The DROMs are granted autonomy through Art. 73 of the French Constitution. This empowers the local authorities with the ability to alter French law to adjust to local realities in addition to the domestic (administrative) powers of a local and regional government. In all cases, the French government retains the power to intervene through the Prefect (the
state representative to the region) (Art. 72 of the French Constitution) who retains a significant administrative role.

4. Papua New Guinea

66. Papua New Guinea, on paper, looks like a system of devolved government, however its operation does not reflect the constitutional formalities. The devolution of authority to the provinces is administrative and more correctly seen as a form of decentralization.

67. Bougainville, however, is something of a special case. Granted devolution under the Constitution of the Autonomous Region of Bougainville Act 2004 (Papua NG), the region enjoys authority in almost all areas of domestic policy as listed in Article 290 of the Constitution of the State of Papua New Guinea: 16 September 1975 (Papua NG). This model emerged from the peace process brokered by New Zealand after a bitter civil war. The end of this process will see an independence referendum take place if the Bougainville government can show its ability to self-govern. This is expected to take place in 2018.

F. Devolution in Federal Systems

68. Although the expansion in devolved models of government has been experienced primarily in unitary states, devolution has a major role to play in a number of federal ones. In fact, the earliest surviving forms of devolution can be found in the early modern federations as a way of incorporating territories deemed unsuitable for statehood within the federal model.

1. Australia

69. The Australian Capital Territory (ACT) has long operated as a devolved entity but in 1978 the concept was expanded to the Northern Territory and later Norfolk Island (1979). These territories have many similarities with their state brethren and in some cases are treated equally. For example, in the Council of Australian Governments (COAG) the two mainland territorial representatives are treated as if they represent states. However, differences remain. For example, although states have equal representation in the Senate (twelve per state), mainland territories have only two each.

70. More importantly, all the powers held by territorial authorities are delegated from the Commonwealth (federal) level and can be withdrawn or overruled by the Australian legislature (Commonwealth of Australia Constitution Act: 9 July 1900, s. 122 (Austl)). The political costs of interference mean that the Commonwealth only infrequently interferes with the management of territories but it can and will do so. Most recently, in 2015, in the wake of Norfolk Island’s financial difficulties and a failure of the regional and federal governments to resolve their differences, the Commonwealth unilaterally and abruptly abolished the devolved government through ordinary legislation, against the wishes of the local population (Norfolk Island Legislation Amendment Act No. 59 of 2015 (Austl)).

2. The United States of America

71. In the US forms of devolved authority apply to a number of former colonial possessions including Puerto Rico, American Samoa, Guam and the Marianas Islands. This use of devolution also extends to the US mainland, where Washington DC is accorded a measure of ‘Home Rule’ through the devolution of power from Congress (District of Columbia Home Rule Act 1973 (US)). In each case, the relationship between the devolved entity and federal government is unique to the territory concerned. Again, in common with the devolved states examined above, the US devolved entities have evolved considerably in the post-war period and in no case (with the possible exception of American Samoa) could their status be regarded as settled. The status of Puerto Rico in particular has been the subject of several
controversial and inconclusive referenda that show dissatisfaction with the current devolved status but little consensus as to a preferred alternative. The treatment of the District of Columbia has also proved a consistently controversial topic with federal taxes applying within the District despite its lack of representation in Congress.

G. Devolution: Constitutional Process or Constitutional Form?

72. Devolution has proved to be a fluid model of government within the federalist spectrum (Watts 8). Amongst some regions (or their equivalents) there has been pressure for further devolution of power either for individual regions or the regional tier as a whole. In Europe, in particular, this situation has now reached its apogee in the ‘national’ regions of Scotland and Catalonia where pro-independence governments hold power. In both cases, referenda (or in the Catalan case, a regional election acting as a referendum) resulted in small majorities in favour of staying with the parent state.

73. Similar movements pressing for greater devolution for peripheral devolved regions have been seen in both European (eg Northern Italy, Faroe Islands and the Azores) and in non-European (eg West Papua, New Caledonia and Bougainville) devolved systems. The conclusion appears to be that, although often created as something of a halfway house between periphery demands for full constitutional federalism (or independence) and central government desires for a unitary state, the fluid nature of devolved systems does not always result in stability.

74. Those favouring federalism or regional/national independence are not mollified by concessions short of their demands and the lack of constitutional certainty around devolved models can lead to demands for further reform. Only in those cases where regional devolution largely reflects the demands of the local populations, has devolution proven to be relatively stable as an answer to political demands for autonomy.

75. By contrast, in states where regionalist demands are weaker or where the regions themselves are politically peripheral, the direction of constitutional travel has been in the opposite direction. Indonesia and Australia have reduced devolved autonomy (at least formally in the Indonesian example). In these cases, regionalist demands are limited in their political power and the political costs to the central government do not outweigh the perceived advantages of centralization. In these cases, the lack of constitutional protection matters. Although the Australian Commonwealth government has a long history of ambivalence towards state governments, the constitutional strength of the states means that, even when backed by a popular federal mandate, they cannot be overridden easily. Norfolk Island did not have this luxury in its conflict with the federal authorities, leading to its abolition as a territory in 2015. It is inconceivable that such a fate would befall an Australian state, no matter how politically weak.

76. Devolution is a pragmatic principle developed to respond to the particular needs of specific states. Yet, although it has a long constitutional history, the differences that exist within the model are such that it is difficult to recognize common elements, beyond the basic constitutional frame examined above. Created to embed democracy (Indonesia, Italy and Spain); to satisfy the demands of regionalists (Spain, Portugal, UK, Indonesia, Papua New Guinea) or to assist with the management of large or disparate states (Indonesia, France), amongst other reasons, the systems thus developed are focused on the specific needs of the individual state (or regions within it).
77. A few commonalities are evident. Most exhibit powers in the economic and social fields with few (usually with strong regionalist/nationalist movements) also having powers in the fields of law and order or police. Education is also rarely ceded by the central state. Beyond these generic comments, however, similarities are few. Many exhibit features which are in practice closer to classical federal states and some even form alliances with them (eg the European Network of Regions with Legislative Power) rather than their devolved cousins.

78. Although in many cases devolution as a constitutional structure may, in the fullness of time, be seen more as a waiting room for independence or formal federation rather than a constitutional model in its own right, in other cases it remains a key feature of the state although the specific nature of the model may change. Although sometimes it appears that devolution is something of an unhappy compromise for intractable disputes, it nevertheless remains a flexible tool capable of squaring seemingly impossible constitutional circles.

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