Decentralization of Education: Legal Issues
Ketleen Florestal and Robb Cooper, 1997

Every major effort to decentralize basic education throughout the world has involved changes to the law. That is not to say that decentralization requires changes in legislation, because some decentralization efforts have not included any changes in the law whatsoever, but effective decentralization most often requires some legislative changes.

**Deconcentration, Delegation and Devolution**
The key feature of deconcentration is that the people being given more responsibility and decision-making power are part of the central government and continue to act under its supervision. In delegation, on the other hand, public corporations or regional agencies are usually the bodies receiving power. These organizations may or may not be significantly controlled by the central government, and there are few examples of delegation in decentralization of basic education.

When powers are devolved, local governments or other local bodies that are associated with the local governments are given the power to regulate the delivery of basic education. Devolution has four key features:
1) The body that exercises responsibility is legally separate from the central ministry
2) The body acts on its own, not under the hierarchical supervision of the central ministry
3) The body can exercise only the powers given to it by law
4) The body can act only within the geographic limits set out in the law.
Additionally, the central ministry has no responsibility for the actions of the local body unless the law specifies otherwise. This has important consequences for the financing of basic education.

**The Question of Formal Control**
An important question in any decentralization effort is how much control the central government will have over the local body. If the central government exercised tight control, the situation would be that of deconcentration, not [delegation] or devolution. On the other hand, if the center exercised no control, the local body would have its own political power and the result would be a federal state. Normally, central government control is defined within these two extremes.

“Generally, local bodies can act only within the limits of the law that established them or regulate them. The decisions of the local body may be subject to annulment under certain conditions specified in the law. Alternatively, the controlling body may have the power to force the local body to reconsider its decision. The law may also provide an emergency scheme, under which the local authority’s powers would be repealed if it failed to act in a manner consistent with the law. In either case the law would determine whether remedial action could be taken by the central ministry or by a court” (p5).

When considering devolving decision-making authority, policymakers may consider balancing the autonomy of the local bodies with some central or judiciary control. Since the different functions of the education system are largely interdependent, the actions of the local bodies may already be limited by the actions of the central authorities. Still, “a careful balance must be struck between the need to provide safeguards against local bodies taking arbitrary actions and their need to maintain autonomy” (p. 5). However, planners must be aware that placing limits on the powers of local authorities may affect their willingness to take on new functions.

**Context and Pace of Decentralization**
There are many variations of how decentralization takes place, but they can be summarized into three broad categories:
1) Educational reform is undertaken as part of an overall decentralization program.
   a) Provisions on the decentralization of education may be included in overall legislation mandating governmental decentralization.
2) The decentralization of government has already been provided for (or taken place), so local and regional government structures already exist legally and in practice.
a) It may be necessary to create parallel structures for education if existing local bodies are not well suited to carry out education functions.

3) Decentralization is confined to the education sector.
   a) In this case, the task goes beyond creating new laws and regulations.

**Legislation for Decentralization**

Once the objectives are determined and the context understood planners must define the legal instruments that will be used to carry out the decentralization. In selecting these instruments two sets of questions must be addressed:

1. *Which aspects of the reform must be addressed in the law itself and which can be left to decrees or regulations?*

There can be several sources of rules in the legal system of any given country. Aside from the constitution, the law is the highest source of rules. Because laws are adopted by parliaments or national assemblies, enacted according to formal steps, and then published they should contain only the basic principles of the decentralization. Government decrees or ministerial regulations and orders can be used to modify administrative and procedural problems that arise in the decentralization process. They are more flexible than laws, but there are often limits as to what can be dealt with by decree rather than by law. Normally, decrees are intended to facilitate the application of laws and to deal with procedural matters, rather than to act as laws in themselves.

2. *Which other laws must be taken into account or modified in order to implement the reform?*

Decentralization legislation should have three basic features:

- It should be comprehensive, clearly defining the rights and obligations of each actor involved.
- It should be flexible, allowing for efficient implementation.
- It should be realistic, taking into account implementation constraints.

The new legislation should not conflict with the constitution or with other existing laws. Education decentralization may not only require modification or enactment of legislation specific to education but also may affect other laws, thus creating possible conflicts. Common sources of conflict are:

- General principles of individual rights and freedoms, as well as specific requirements concerning basic education, set out in constitutional acts or human rights charters.
- Inconsistencies between the objectives of the decentralization law and other laws, such as labor or tax laws (p. 15).

To address these conflicts it may be necessary to modify various statutes, laws, and decree-laws dealing with the establishment of autonomous bodies, teacher status, taxation, labor relations and social security.

**Constitutions and Similar Instruments**

Constitutional provisions that guarantee freedom of worship, instruction in a particular language, or maximization of human potential may impact efforts to decentralize education. Other norms that need to be taken into account are those contained in international human rights instruments, such as the Covenant on Economic, Social, and Cultural Rights of 1966.

**Labor Laws**

Decentralization legislation may also need to include changes in statutes or laws regulating the status of teachers as civil servants and their labor rights. Changes in teachers’ status may also modify their degree of academic freedom. With decentralization, the status of teachers as public service employees must be reassessed, taking into account the power that local authorities have over them.

**Tax Laws**

Conflicts may arise when the provision of funds remains with the ministry of education, while delivery of basic education becomes the responsibility of local entities that are under the jurisdiction of another
Another related issue is that of granting power to manage resources. When schools have no control over financial resources, they have little ability to develop their activities and programs. Similarly, uncertainties may result from a void in the law.

**Items to Include in the Decentralization Legislation**
1. Students and School Choice
2. Teacher Employment, Certification, and Academic Freedom
3. Curriculum and Instruction
4. Assessment of Learning
5. Facilities
6. Funding

**Students and School Choice**
With regard to students, there are three basic questions that must be addressed in the decentralization plan.

- Who may attend a particular school?
- If students are given a choice of which school to attend, how will equity issues be addressed?
- Who will determine the minimum age of entry, the age of graduation, appropriate disciplinary measures, student attire, and advancement and graduation requirements?

If local schools are allowed to make admission decisions, the bases for those decisions should be addressed in the law. A mechanism to ensure that students’ rights of entry into the system are upheld must be established. Sanctions, such as partial withholding of funds or probation for accreditation, may also be considered.

If choice is allowed, the law must address the related equity issues. Questions to be addressed include how choice is publicized, how students are selected, and what happens to those students who do not get their choice.

If decision makers choose to allow local schools to establish entry and leaving ages that reflect the needs of the local community, the law must allow for that variance. Likewise, if national authorities set policies regarding student attire or discipline, they must make clear whether local authorities can deviate from those norms.

**Teacher Employment, Certification, and Academic Freedom**
Some of the questions that may be raised in connection with teacher certification include:

- Who will set the standards for the initial training of teachers? Who will provide this training?
- Who will hire and fire teachers?
- Will teachers have to become certified? Who controls the certification process? Is there more than one route to certification?
- Will teachers have tenure? How will they be granted tenure? What protection will it afford them?
- Will teachers’ unions be recognized? If so, what will be their role?
- Will teachers enjoy academic freedom?
- How will teachers be evaluated, promoted and fired?
- Who will be responsible for in-service training? Who will pay for it?

**Curriculum and Instruction**
Concerning curriculum and instruction some of the important questions to ask are:

- Are there constitutional requirements regarding the curriculum? If so, does the constitution allow for deviations from those requirements, and will local authorities be authorized to make such deviations?
- Will the central ministry have the authority to determine the curriculum and other aspects of instruction? If so, will local authorities have the power to deviate from those requirements?
- Will the central authority have a legal obligation to accept local decisions on the curriculum?
- If local authorities have the ability to establish the curriculum or to deviate from the one established by the center, what is their legal accountability regarding national standards?
• Who will select textbooks and other instructional materials?
• Will the central ministry mandate the length of a school day and the number of hours devoted to a specific subject?

Central control of the curriculum is often seen as a means of promoting certain national objectives on languages and national values. If decentralization allows local authorities to have discretion over the curriculum, there should be a mechanism that allows the local entity to seek waivers. The law should ensure that the central authority recognizes or validates the curriculum decisions by the local authority.

Assessment of Learning
Regarding learning assessment the following question may be asked:
• Who will determine the standards that are used to assess student learning?
• What allowances will be made for local and regional variations?
• Will local authorities have the power to develop or select alternative forms of assessment?
• What decisions or actions will be based on the results of assessment?
• Will students have some recourse if their learning does not meet standards?

A national assessment system may help students move from one region of the country to another. It may also provide a way to measure regional disparities while at the same time limiting the possibility of local authorities manipulating assessments to show good results.

However, several concerns arise regarding assessment. First, it is unlikely that there will be a “one size fits all” assessment tool. The law should recognize this and allow each function to be assessed differently. Second, using assessment to determine the effectiveness of the decentralization may lead to corruption of the assessment process. In this case, the law must ensure the integrity of the testing process. Third, if assessment in a particular language will be required, the choice of the language of instruction will be limited and schools will be constrained in their use of local or regional languages or dialects. The law must address whether waivers may be granted for local or regional variations in assessment and what alternative forms of assessment are available.

Another legal issue raised by assessment is whether students have recourse if they do not achieve stated curriculum goals. The law should make it clear that educational goals are just goals, not guarantees, and that students do not derive rights from the formulation of these objectives in the law. (However, this may then lead to the issue of accountability of the education system.)

Finally, the legal consequence of failure to achieve a particular standard of assessment must be considered. For example, should continued funding of a school be based (in whole or in part) on its students’ attaining a certain level of achievement? Should the certification or recognition of a school depend on test scores? Should waivers or alternative assessments be available to local entities? While there are no right answers to these questions, they must be addressed in decentralization law.

Facilities
Without local control over property, local authorities may have little true autonomy. Questions that should be addressed include:
• Who will own the school facilities?
• Will the central ministry have the power to establish uniform facility standards?
• Who will be responsible for the maintenance and repair of school and other buildings?
• How are equity issues addressed with respect to facilities?

If ownership of facilities is to be transferred to local authorities, it is important that they be given the resources (both human and financial) to enable them to carry out their responsibilities. A transfer would also require that the facilities be properly priced (unless they are transferred cost free). Health and safety concerns provide strong reasons for maintaining central standards in the design and construction of school buildings, as well as a central capacity to ensure that standards are maintained. The final legal issue
concerning facilities revolves around equity. Any decentralization effort should ensure that students in diverse settings have comparable facilities.

**Funding**

Early resolution of funding issues is fundamental because no aspect of decentralization can succeed without proper attention to funding. Among the questions that need to be asked are:

- What source of funding will be available to the authority responsible for implementing each aspect of the basic education system?
- If the central government is to continue to fund the local entities responsible for primary education, what assurance will the local bodies have that the funding will be secured? How will central resources be allocated to the various local bodies? What freedom will local authorities be granted in the use of the funds?
- If local bodies are to be responsible for securing their own funds to finance primary education, what sources will be made available to them? If local authorities are to be given the power to tax, is the tax base sufficient to yield enough revenues for this purpose?
- Under which financial and budgetary rules will local authorities operate? Are these rules in place, or do they have to be issued?
- Who will oversee and audit the finances of local authorities?
- How will equity concerns be addressed? Will the central allocation system make sufficient allowances for differences in need among regions? What mechanisms will be used to compensate for possible inequitable results of local funding?