

Mechanisms to Settle Constitutional Disputes and to Complete Necessary Legislation

An Overview with Recommendations for Sudan

1. Overview of Existing Mechanisms

Mechanisms to settle constitutional disputes and to complete necessary legislation are an important issue in the implementation and operation of any multi-layered system of government.

In the context of self-determination conflicts and self-governance regimes they assume additional significance as failures to settle constitutional disputes or complete necessary legislation not only have an impact on the effectiveness of government but also have repercussions for the perception of a particular institutional structure designed to resolve a self-determination conflict.

Comparative analysis suggests that, although there is a wide spectrum of individual mechanisms, one can distinguish four specific categories of relevant mechanisms: judicial review and arbitration processes, co-optation, joint committees and implementation bodies, and direct intervention by the international community (see Table 1).

Table 1: Mechanisms for Dispute Settlement and Legislation Drafting

Mechanism	Primary Purposes	Example
Judicial Review and Arbitration	<ul style="list-style-type: none"> • Resolve constitutional disputes • Consider constitutionality of new legislation 	Bosnia and Herzegovina Bougainville Brussels Crimea Macedonia Mindanao Northern Ireland Southern Sudan South Tyrol
Joint Committees and Implementation Bodies (including ad-hoc bodies sponsored by international organisations)	<ul style="list-style-type: none"> • Agree interpretation of specific agreement provisions • Coordinate policy implementation and implementation legislation 	Bougainville Brussels Macedonia Mindanao Northern Ireland Southern Sudan South Tyrol
Co-optation	<ul style="list-style-type: none"> • Ensure representation of sub-state officials at the centre 	Brussels Mindanao
Direct Intervention by the International Community	<ul style="list-style-type: none"> • 'Enforced' implementation in adversarial local conditions 	Bosnia and Herzegovina

For obvious reasons, constitutional *disputes* will need to be resolved in a judicial review and arbitration process. However, other mechanisms might be useful to prevent such disputes from arising. At the same time, judicial review and arbitration processes are appropriate when it comes to considering the constitutionality of legislation for the implementation of existing agreements.

The need for joint committees and implementation bodies often arises from two sources – to find common interpretations for specific aspects of agreements and regulations and to coordinate the implementation of specific policies at national and regional levels, including the joint drafting of implementation legislation. An example of the committees created for establishing consensual interpretations of agreement former is Bougainville. The coordination of policy implementation and drafting of legislation is the purpose of committees that can be found in Macedonia (inter-ethnic relations), Mindanao (development), Northern Ireland (cooperation between Northern Ireland and the Republic of Ireland and among all

entities party to the British-Irish Council) and Southern Sudan (constitutional review, application of Shari'a law, human rights, elections, referendum, fiscal and financial allocation). Such bodies normally hold regular meetings (as in Bougainville, Macedonia, Mindanao, Northern Ireland, Southern Sudan); and they can be in their nature domestic, centre-periphery bodies (Bougainville, Macedonia, Mindanao, Southern Sudan) or reflect the international dimension of a particular self-determination conflict (Northern Ireland). They may be prescribed in agreements between the conflict parties (Bougainville, Mindanao, Northern Ireland, Southern Sudan) or arise from actual needs (Macedonia).

Co-optation, adopted in Belgium and the Philippines, is a mechanism to ensure the representation of regional officials (from Brussels and the ARMM respectively) at the centre. In all cases, regional and officials are *ex officio* members of relevant national government departments. This arrangement is symbolic and emphasises the special relationship between central government and autonomous region. In the case of Mindanao it is also necessary as the entity is an artificial construction from an administrative point of view and does not fit into the pre-existing structures of authority (not dissimilar to the 'south' in Sudan). Co-optation thus becomes a potential mechanism to overcome this kind of administrative 'abnormality' and ensure that the special circumstances of the autonomous regions are borne in mind in the process of national law and policy-making. Co-optation is notably absent in the similar cases of Crimea and Southern Sudan, but well-compensated for in the latter through extensive power-sharing mechanisms. In Crimea, the Representative Office of the President of Ukraine acts, in part, as a coordination mechanism with oversight, but no executive powers.

Unique to Bosnia and Herzegovina – is the direct intervention of the international community as a mechanism to coordinate law and policy-making. In both cases, powerful international officials retain significant powers enabling them to intervene directly into the political processes of the two entities. There is also an international representation in the Human Rights Chamber of the constitutional court of Bosnia and Herzegovina. This unusual degree of post-conflict intervention results primarily from the unprecedented involvement of the international community in the process of resolving the two underlying self-determination conflicts and the responsibility that international agents thereby assumed for post-conflict state construction, as well as from the particularly bitter nature of the disputes concerned that created highly adversarial circumstances on the ground.

2. General Conclusions on the Use of Mechanisms to Settle Constitutional Disputes and to Complete Necessary Legislation

Mechanisms to settle constitutional disputes and to complete necessary legislation are often written into peace agreements. They then become part of the overall implementation and operation process of such agreements. While their establishment is thus ensured, their effective use cannot be guaranteed this way, nor is it always practically necessary to have them. On the other hand, there are a number of cases in which mechanisms to settle constitutional disputes and to complete necessary legislation are established subsequent to the conclusion of peace agreements when actual need for them arises.

In either case, the proper and effective functioning of such mechanisms is heavily dependent on the commitment of all parties involved. This includes ensuring that parties are adequately represented on the bodies created. It is also important to make sure that procedures are put in place that enable compromises acceptable to all parties are found.

Furthermore, using a variety of different mechanisms for their appropriate purposes ensures that they can function efficiently, address relevant problems in a timely manner, and ensure the commitment of all parties to the process and its outcomes.

Different mechanisms can, moreover, be used to provide necessary checks and balances. Judicial review and arbitration can function as a means of both dispute settlement *and* providing input into the working of other mechanisms, while these other mechanisms can be used to arrive at agreed constitutional revisions.

3. Recommendations for Sudan

Sudan's Comprehensive Peace Agreement provides for two types of mechanisms to settle constitutional disputes and to complete necessary legislation—judicial review and arbitration processes and joint committees and implementation bodies. The latter cover a variety of issues, including constitutional review, application of Shari'a law, human rights, elections, the referendum, and fiscal and financial allocation. Wide-ranging power sharing mechanisms compensate for the absence of specific co-optation mechanisms. It is unlikely that direct international intervention by the international community (in whichever shape or form) would be acceptable to the parties either now or in the future.

Bearing these constraints in mind, for the success of the current process in Sudan the following steps appear essential:

- Identify areas of discrepancy, contradiction, and gaps in the current institutional setup and the legislation on which it is founded
- Clarify priorities and establish a realistic timeframe for completion of the current process that is reflective of its complexity and urgency
- Devise a process by which necessary issues can be addressed in a consensus-oriented process by the parties
- Build this process and its institutions on, and integrate it into, the existing mechanisms under the CPA, DPA, ESPA, and INC, thus creating a single political/judicial process dealing with implementation issues
- Ensure that the relevant institutions are adequately resourced (including qualified personnel and advisors)
- Provide for overall coherence and comprehensiveness of the process in terms of delineating competences of institutions and bodies involved, clear channels of communication between them, an overall coordinating body, and clear mechanisms ensuring transparency and accountability of the process