



PEACE NEGOTIATIONS
POST-CONFLICT CONSTITUTIONS
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KEY DECISIONS AND CONSIDERATIONS FOR DECENTRALIZATION IN SUDAN: IMPLEMENTATION OF ASYMMETRIC FEDERALISM

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Public International Law & Policy Group

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Executive Summary

The effective implementation of asymmetric federalism in decentralized states requires clear legislative mandates and a significant degree of institutional coordination. Coordination between levels of governance is often facilitated through the establishment of joint commissions and informal fora (India, Denmark, and Finland), as well as through additional intergovernmental agreements (Canada). In addition, some states, such as Denmark and Finland, enable intergovernmental representation at national/sub-national levels of the executive and legislative branches of government, with varying degrees of participatory oversight, and voting rights. Other states also permit autonomous regions to enter into horizontal agreements with one another, subject to national legislation (Spain and Italy). Although many states stipulate in their constitutions that their constitutional court is the appropriate entity to adjudicate intergovernmental disputes (India, Spain, and Belgium), several defer first to specialized entities and alternative dispute resolution, emphasizing that judicial action is a measure of last resort (South Africa, Belgium, and Switzerland).

Numerous states enshrine the process for the creation and modification of autonomous areas within their permanent constitution. Some also enable provinces to self-organize into autonomous areas on the basis of shared historic, cultural, linguistic, or economic characteristics (Ethiopia, Spain). Regardless of whether a state's constitution allows sub-national areas to initiate the process to obtain autonomy, approval is almost always sought at both the national and sub-national level, often through the passing of legislation (India) or through the use of referenda (Ethiopia). By contrast, the case of Iran demonstrates how the failure to properly define the borders of an autonomous area, including the method by which to modify those borders, can contribute to regional tensions.

Regardless of the scale of the transferral of power, state practice highlights the importance of ensuring new regions – or regions seeking to acquire increased autonomy or powers – have the institutional capacity to assume such power. In this regard, Spain provides a useful case-study of how to effectively implement a phased approach to establishing autonomous regions. In addition, states that implement a phased approach tend also to set benchmarks by which to measure a new region's capacity to assume powers, such as the ability to generate revenue as well as the transfer of public employees between levels of governance. Some

states have also opted to establish commissions specifically tasked to oversee the transfer of power and implementation of decentralization more generally (South Africa and Spain).

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KEY DECISIONS AND CONSIDERATIONS FOR DECENTRALIZATION IN SUDAN: IMPLEMENTATION OF ASYMMETRIC FEDERALISM

Statement of Purpose

The purpose of this document is to present key considerations for the implementation of asymmetric federalism within Sudan as a decentralized state. It pays particular attention to the coordination of different levels of autonomous regions, including resolution of jurisdictional and other conflicts; the establishment or modification of new autonomous areas; and the assumption of powers.

Introduction

The Juba Agreement for Peace in Sudan (“JPA”) establishes Sudan as a federal state¹ and outlines a system of asymmetric federalism, wherein specific powers and competences are afforded to Blue Nile and South Kordofan/Nuba Mountains/West Kordofan² – the “Two Areas” – and the Darfur region.³ However, the Darfur Track and Two Areas Track Agreements do not allocate the same powers to each autonomous area: the Two Areas are granted 61 separate exclusive powers,⁴ while the Darfur region is granted 28.⁵ In addition, the JPA does not explicitly identify the Two Areas as a region, but rather as an autonomous area, although it does provide for two possibilities: (i) that South Kordofan State/Nuba Mountains and West Kordofan State form one region, or (ii) that West Kordofan State remains a stand-alone state.⁶ This raises several uncertainties, including (i) the extent and consequences of any differences between the internal governance of the Two Areas and Darfur region, as well as the significance of not identifying the Two Areas as a region; (ii) whether the Two Areas and Darfur region will enjoy any horizontal relationships with each other, or with states/regions in the rest of Sudan; (iii) how powers will be assumed by each autonomous area; and (iv) whether the current framework permits or precludes the establishment of new autonomous regions/areas, and how the parameters of new regions/areas may be decided.

The JPA does not attempt to address the system of decentralization in the rest of Sudan and defers decisions on the powers and relationship between the

¹ Art 10.2 Agreement on National Issues, Juba Peace Agreement.

² Article 7 of Chapter 3, Title 3, Juba Peace Agreement.

³ Art 25.2, Chapter 1 Title 2, Darfur Track Agreement.

⁴ Art 9, Title 3, Chapter 3, Two Areas Track Agreement, Juba Peace Agreement.

⁵ Art 30, Title 2 Chapter 1, Darfur Track Agreement, Juba Peace Agreement.

⁶ Art 7.3 Title 3 Chapter 3, Two Areas Agreement, Juba Peace Agreement.

national level government and regional level governments to the convening of a Governance Conference.⁷ Both the Constitutional Charter 2019 and the Sudanese Bar Association Draft Interim Constitution 2022 establish three levels of governance in Sudan: federal, “regional/state,” and local,⁸ and the JPA is incorporated into both the 2019 Constitution (Article 79) and 2022 Interim Constitution (Article 85). The 2019 Constitution describes Sudan as a “decentralized state” (Article 9(1)(a)), whereas the 2022 Interim Constitution describes Sudan as a “federation,” although both documents leave the specific delineation of structures and powers to subsequent legislation.

To date, the only implementing legislation on decentralization to have passed is the 2020 Law on Regulating Decentralization (“2020 Decentralization Law”), which entered into force on 24 November 2020 (after the signing of the JPA on 3 October 2020). This broadly sets out the levels of governance in Sudan, enumerates the exclusive powers of “states/regions” and concurrent powers with the central government, and establishes a central regulatory authority on decentralization. Although the 2020 Draft Law on Local Governance (“2020 Draft Local Governance Law”) seeks to repeal and replace the 2003 Law on Local Governance, at the time of writing it had not yet entered into force.⁹ Finally, on 2 March 2021, the Chair of the Sovereignty Council issued Constitutional Decree 6/2021, which establishes the “federal regional system” of Sudan, holding that a federal regional system of governance will be implemented following the forthcoming system of governance conference, which will address the regions’ “numbers, borders, structures, competencies, powers, and levels of governance and administration, without conflicting with the Juba Peace Agreement 2020.”¹⁰

This combination of agreements, constitutional documents, and domestic legislation raises questions on the future of asymmetric federalism in Sudan. These key decisions and considerations for stakeholders in Sudan are enumerated in Section I of this memorandum, which consists of a Decision Tree structured around (1) coordination of levels of governance; (2) creation or modification of autonomous areas; and (3) assumption of powers. Section II of the memorandum examines some of these key decisions through a corresponding assessment of comparative state practice.

⁷ Art. 10.1, National Issues, Juba Peace Agreement.

⁸ Article 9, Constitutional Charter 2019 (as amended); Article 15, Draft Interim Constitution.

⁹ This paper refers to the 2020 Decentralization Law and 2020 Draft Local Governance Law only insofar as they relate to asymmetrical federalism in Sudan, specifically the operation of the Darfur region and Two Areas.

¹⁰ Constitutional Decree 06/2021 (Sudan), Article 3.

Section I: Decision Tree on the Implementation of Asymmetric Federalism

Coordination of Levels of Governance

- In what areas will sub-national governments interact?
 - Policy planning?
 - Standardization of procedure?
 - Service delivery?
- Under what circumstances will one sub-national government be able to intervene in the affairs of another?
 - When actions taken by one prejudice the other?
 - Upon the request of the sub-national government?
 - Upon the request of the central government?
- Which entity or entities will be responsible for ensuring coordination?
 - Will the entity or entities ensure coordination:
 - Between the Darfur region and Two Areas
 - Between the Darfur/Two Areas and the central government
 - With respect to other sub-national entities, such as states or regions
 - What will be the membership of the coordination entity?
 - Will states, regions, and central government be represented, and if so, according to which division?
 - How will members be selected?
 - How will this entity accommodate the different powers and competences afforded to the Darfur region and Two Areas?
- How will jurisdictional conflicts (between the Darfur region and central government; between the Two Areas and central government; between the Darfur region and Two Areas; between the Darfur region and other levels of sub-national governance; between the Two Areas and other levels of sub-national governance) be addressed?
 - If a mechanism or entity is established to ensure coordination, will the same entity or mechanism address jurisdictional conflicts, for instance through a sub-commission?
 - Will states, regions, and central government be represented in this mechanism, and if so, according to which division?
 - How will members be selected?

- How will the autonomy of the Darfur Region and Two Areas be safeguarded?
 - How will disputes specifically over the allocation of powers between the central government and sub-national governments be resolved? And horizontally between sub-national governments?
 - What enforcement powers will be available to the mechanism or entity established?
 - Will resolution of jurisdictional conflicts on security matters be treated similarly as other issues?
- What other formal and informal mechanisms will contribute to coordination and cooperation?
 - Consultations between central government and autonomous areas?
 - Consultations between Darfur region and the Two Areas?
 - Consultations between either of these and other sub-national areas?
 - Intragovernmental commissions?
 - How will members be selected?
 - Will there be special considerations for security matters?

Considerations for Sudan

Presently, both the Juba Peace Agreement and Decentralization Law 2020 provide for some forms of coordination between levels of governance, as well as limited provisions on the envisaged methods for dispute resolution.

- Article 24 of the Decentralization Law 2020 establishes the Higher Council of Decentralized Governance as the regulatory mechanism for decentralization, and Article 25(b) lists one of its competences as “[t]aking the initiative to undertake structural amendments in the structure of the decentralized governance.” Article 27 establishes the Ministry of Decentralized Governance as the executive body of the Higher Council, and Article 27(q)-(r) include among its list of competencies: “Adjudicating conflicts between the different levels of governance and working on finding the appropriate solutions, in coordination with the relevant parties”; and “Contributing to supporting plans of the states to achieve developmental balance.” However, there is no mention of this Higher Council in either the 2003 Local Governance Law or the 2020 draft Local Government Law.

- Article 31(1) of the Constitutional Charter 2019¹¹ provides that the Constitutional Court shall have the power to “adjudicate constitutional disputes,” which could arguably extend to disputes between levels of governance, although this is not explicitly stated.
- In addition, Article 33.1 of Title 2, Chapter 1 of the Juba Peace Agreement provides that in the event of a conflict between the provisions of the law of the Darfur Region, the federal law, and the powers of local governance, “the law that shall prevail is that which most effectively deals with the subject matter of the law [...]”, having regard to, *inter alia*, the sovereignty of the nation, accommodating the autonomy of the Darfur Region, and the need for national standards and norms. No such corresponding provision exists in the Two Areas Agreement.
- The Juba Peace Agreement provides for the signatory parties to hold 25% of seats in the Transitional Legislative Council (Article 6.2 Agreement on National Issues), and the 2020 Decentralization Law provides that a state’s Transitional Legislative Council shall be composed of forty-eight members in the states of Khartoum, Al Jazirah, and South Darfur, and thirty-two members in all other states (Article 18(1)). Article 25.6 of Title 2, Chapter 1, also provides that 40% of power in Darfur region is reserved for the components of the Darfur Track; 30% for the components of the transitional government, 10% for other movements signatory to the JPA, and the remaining 20% to other stakeholders.

However, the current framework would benefit from several amendments that could reasonably be implemented without contradicting the terms of the Juba Peace Agreement or the Constitutional Document 2019.

- Stakeholders may wish to consider establishing thematic commissions or joint councils (such as those established in France and Finland) to monitor and regulate national and sub-national government activities, as well as encourage cooperation between levels of governance.
- The present framework is silent on the capabilities of states/regions to interact with one another without interference from the central government. State practice from Denmark, Italy, and Spain provide instrumental

¹¹ Corresponding provision Article 60(1) in the Sudanese Bar Association Draft Interim Constitution 2022.

examples for how such inter-regional coordination can be both protected in the constitutional framework as well as built out in policies.

- Stakeholders may wish to consider whether and to what extent the specific allocations of power in Darfur between components of the Darfur Track and the transitional government would be replicated in other (autonomous) regions, and if so, according to which criteria. Stakeholders may also find it helpful to review the state practice of Denmark, in which a central government representative holds participatory rights in the executive and legislative of the autonomous area of Greenland, but no voting or veto rights. This may be particularly instrumental if seeking to balance the need for central oversight with regional autonomy.
- The present legal framework does not clearly set out how to resolve disputes between levels of governance, including disputes involving the Darfur Region and Two Areas. Although the 2020 Decentralization Law establishes the Higher Council, the membership of its executive body tasked to resolve disputes (the Ministry for Decentralized Governance) is overwhelmingly composed of ministers of the central government, which may threaten its perceived legitimacy and ability to objectively assess disputes.
 - Stakeholders may wish to clarify which entity can adjudicate over disputes and the remedies it can offer, as well as how best to enumerate this in the legal framework. Several states, such as India and Spain, identify the constitutional court as the appropriate entity; while others, such as Belgium and South Africa, have established specialized entities. Switzerland's emphasis on alternative dispute resolution also provides a useful model, especially for transitional contexts in which the judicial system may be undergoing reform.
 - Stakeholders may also wish to consider what relationship any new entity will have with the Higher Council, or with the entity that may replace the Higher Council, including how this relationship will be regulated.

Creation or Modification of Autonomous Areas

- Will the framework for decentralization provide for the possibility for other states/regions to assume autonomy and/or increased powers?
 - If yes, will this be constitutionally protected?
 - If yes, according to which qualifying criteria?

- Who will have the right to initiate the process of obtaining autonomy and/or increased powers?
 - Local/state governments?
 - How will the affected populations approve the request?
 - Referenda? By what majority?
- Will the framework provide for the possibility to modify the boundaries of autonomous areas?
 - If yes, will this be constitutionally protected?
 - On what basis will boundaries be (re)drawn?
- Who will have the right to initiate the process to modify boundaries?
 - States/regions?
 - In agreement with any other affected states/regions?
 - How will the affected population(s) approve the request?
 - Referenda? By what majority?
- Will the regional and/or central government approve the request to modify boundaries?
 - How? Through approval by the regional and/or national Legislative Council??
 - By what majority?

Considerations for Sudan

- The Juba Peace Agreement and Constitutional Document 2019 do not explicitly address the grounds on which a region or autonomous area can be established or modified. In addition, although Article 25(b) of the 2020 Decentralization Law proposes a Higher Council of Decentralized Government to “undertake structural amendments in the structure of decentralized government,” it does not specify a process or outline any limitations for the creation of additional states. In its present form, this Law therefore does not appear capable of addressing the technicalities of a return to regional governance.
- Following negotiations on constitutional and governance structures in Sudan, stakeholders may wish to follow the practice of states such as Iraq, Ethiopia, Spain, and India, which have all opted to protect the right to form autonomous areas and regions within their respective constitutions. These

constitutions also outline the grounds on which the process can be initiated, qualifying criteria, and the permission(s) required at either central and/or regional levels. International practice also indicates that constitutional provisions can also protect the rights of affected communities when the modification of borders is proposed.

Assumption of Powers

- If new autonomous areas or regions are established, or if existing areas or regions assume additional powers:
 - On what basis will they assume powers?
 - Immediate grant of autonomous powers?
 - Graduated transfer of powers?
 - According to which time-frame?
 - Will this approach be taken for all new autonomous areas/regions, or will it be decided on a case-by-case basis?
- How will the framework provide for the assumption of new or modified powers?
 - Constitutional provisions?
 - At the initiation of the affected area(s)/region(s), the head of state, or both?
 - Through the passing of legislation through the regional and/or national Legislative Council(s)?
 - By what majority?
- Will the affected area(s)/(region(s) be required to fulfill criteria before being granted new or additional powers?
 - Based on financial/administrative/institutional capacity?
 - Based on cultural, linguistic, historical, economic, or other shared identity?
 - Will the same criteria be used for areas/regions of all sizes?

Considerations for Sudan

- Under the Juba Peace Agreement, the Two Areas acquired expansive autonomy immediately, whereas the Darfur Region came (back) into existence in April 2021. Although the Juba Peace Agreement's implementation matrix sets out extensive steps for implementation of the terms of both the Darfur Track and the Two Areas Track, it does not refer to

any benchmarks, criteria, or capacity considerations. These are also omitted from the 2020 Decentralization Law. The current framework therefore does not address any of the technical issues that should be considered when regions or areas are assuming new or increased powers.

- Stakeholders are encouraged to consider the extent of autonomy granted to each region, and upon which criteria this autonomy will be granted. If a return to a regional system of governance is implemented, stakeholders are also encouraged to consider establishing institutional coordination mechanisms to enable sub-national governments to assume (greater) fiscal powers.
- Stakeholders may also wish to implement a phased approach to the assumption of powers, both in relation to the autonomous areas already established under the Juba Peace Agreement (Darfur Region and Two Areas) as well as for the envisaged return to regional governance for the rest of Sudan, regardless of whether the rest of Sudan will be symmetrically or asymmetrically decentralized.
 - For instance, stakeholders can consider setting benchmarks for both national and regional governments to meet (such as the transfer of public employees from national government to regional government, or from state government to regional government) before the full transfer of powers is completed, such as in the case of Spain. This would also allow for different regions to assume powers according to their institutional capacities, rather than imposing a unilateral standard across all regions.
 - The modification of spending of the total national budget allocated to central/state/regional authorities can also be used as a benchmark.
- The current system would also benefit from establishing executive councils or committees specifically tasked to monitor the implementation of the transfer of powers between levels of governance, such as in those instituted in both South Africa and Spain. Alternatively, stakeholders may find it more appropriate to establish bilateral joint commissions with membership divided between levels of governance, tasked to oversee specific thematic aspects of the transfer of powers, such as in the case of Spain.

Section II: Comparative State Practice on the Implementation of Asymmetric Federalism

Coordination of Levels of Governance

Sub-national governments in federal systems frequently need to cooperate with each other and with the national government to implement policy across a wide range of areas. Such coordination generally involves (1) actions taken by the national government; (2) mechanisms established for sub-national governments to independently coordinate their activities; and (3) judicial mechanisms to resolve disputes between different levels of governance.

Coordination Between National and Sub-National Governments

Although national governments often play a central role in coordinating the activities of sub-national governments, the manner in which they engage with their sub-national counterparts varies widely.

- In Canada, the national government and the regional government of Quebec (a Canadian region afforded special status under the Canadian Constitution) interact as quasi-independent sovereigns: they have signed various intergovernmental agreements including with respect to the collection of national and local taxes; labor laws; the provision of health services; parental leave; and the management of natural resources, including oil. These agreements provide the framework through which the two tiers of government coordinate their actions and cooperate effectively on issues affecting their respective interests.¹²
- In India, various national commissions coordinate the activities of national and sub-national governments across a range of policy areas.
 - The Finance Commission, for example, comprises five experts appointed by the president of the national government. It is responsible for assessing national gross tax revenues and making recommendations regarding the distribution of those revenues among sub-national governments.¹³

¹² *Quebecers: Our Way of Being Canadian (Secrétariat aux affaires Intergouvernementales Canadiennes (Secretariat for Intergovernmental Canadian Affairs) 2017, available at [https://www.sqrc.gouv.qc.ca/documents/relations-canadiennes/politique-affirmation-en.pdf](https://www.sqrc.gouv.qc.ca/documents/rerelations-canadiennes/politique-affirmation-en.pdf).*

¹³ N.K. Singh, *Local Public Finance and Capacity Building in Asia: Ch. 8, Fiscal Federalism in India* (OECD, Dec. 22, 2020), available at <https://doi.org/10.1787/a944b17e-en>.

- The Finance Commission issues recommendations every five years to the national parliament, which is tasked with passing legislation on the basis of those recommendations. While sub-national governments enjoy nominal fiscal independence, the Finance Commission enables the national government to exercise significant influence over the finances of its sub-national counterparts.¹⁴

Some states have opted for national representation in the legislature and/or executive of autonomous areas, or regional representation in the legislature and/or executive of the national government. Other states rely on informal political arrangements for coordination, for instance through the establishment of joint councils.

- In Denmark, the central government appoints a representative (*Rigsombudsmand*) in the autonomous province of Greenland to observe both the executive and legislative branches of the provincial Greenland government.¹⁵
 - Although this representative may actively participate in debates and lobby on behalf of the Danish government, they have no voting or veto rights within either branch of the provincial government.
 - Similarly, Greenland is represented in the state's executive branch. The members of parliament from Greenland serve on the Danish Foreign and Security Policy Committee together with representatives from the Faroe Islands.¹⁶
- In Finland, the Åland Delegation is a joint council that facilitates coordination between the central Finnish government and the autonomous Åland Islands.¹⁷
 - The Åland Provincial Governor, a representative of the central government approved by the Åland Parliament, heads the delegation.¹⁸ Other members of the delegation include a vice-chair, three members elected by the upper house of Finland, and three members elected by the Åland Parliament.

¹⁴ INDIA CONST. art. 281.

¹⁵ The Greenland Home Rule Act No. 577 of 29 November 1978, art. 17 (Denmark, 1978).

¹⁶ The Greenland Home Rule Act No. 577 of 29 November 1978, art.12 (Denmark, 1978).

¹⁷ Farimah Daftary, *Insular Autonomy: A Framework for Conflict Settlement? A Comparative Study of Corsica and the Aland Islands*, EUROPEAN CENTRE FOR MINORITY ISSUES (ECMI), 17 (2000), available at http://www.ecmi.de/download/working_paper_9.pdf.

¹⁸ Act on the Autonomy of Åland (1991/1144), sec. 55 (Finland, 1991).

- The delegation's responsibilities include fiscal coordination and resolution of disputes related to new fishing lanes and transfer of land between Finnish government and Åland authorities.¹⁹

Coordination Between Sub-National Governments

Several federal states have enacted constitutional provisions permitting sub-national governments to coordinate in specific policy areas without the involvement of the national government.

- Italy has five autonomous regions, including one, Trentino-Alto Adige/Sudtirol, with greater autonomy than its counterparts.
 - Article 117 of the Italian Constitution provides that regions may establish joint bodies to improve cross-regional functions, and these bodies need only be ratified by regional law (i.e., without requiring the approval of the national government). Article 117 also provides that in the areas falling within their responsibilities, regions may enter into agreements with foreign states and local authorities of other states, according to the structures provided under national legislation.
 - Regions can coordinate functions in all areas over which they have exclusive authority (i.e., those areas over which the national government is not given authority in Article 117(a)-(s)). This includes administrative relationships between regions and the majority of land use regulation (Article 117).
- In 2007, Denmark underwent a radical reform of its regional governance structure. It replaced sixteen counties with five regions, covering 98 municipalities. This move sought primarily to vest these newly formed regions with more power and autonomy over nature and environment, business, tourism, employment, education, and culture.²⁰
 - The regional development plan provided for the creation of regional councils, each of which can appoint up to two regional growth fora consisting of representatives from the business and education sectors, the parties of the labor market, and politicians from regions and municipalities. These growth fora are tasked with monitoring

¹⁹ Act on the Autonomy of Åland (1991/1144), Sec. 56 (Finland, 1991).

²⁰ The Danish Ministry of the Interior and Health, Department of Economics, *The Local Government Reform in Brief*, 29-30 (2005) available at <https://english.im.dk/media/22359/the-local-government-reform-in-brief.pdf>.

opportunities for cross-regional/municipal possibilities for growth and to coordinate sub-national government policies.²¹

- In Spain, the statutes that provide for the establishment of Autonomous Communities (Article 144 Constitution) may also stipulate the circumstances, requirements, and terms under which the Autonomous Communities can reach agreements between themselves for the management and rendering of services in matters reserved for Autonomous Communities (Article 145(2) Constitution).
 - There is nothing in the Constitution that suggests that cooperation agreements must encompass all Autonomous Communities.
 - Cooperation agreements between Autonomous Communities for matters that extend beyond matters strictly pertaining to those Communities requires authorization of the national parliament (*Cortes Generales*) (Article 145(2) Constitution).

Resolving Conflicts Between Levels of Governance

In asymmetric federal systems, disputes between sub-national governments – or between sub-national governments and the national government – are generally adjudicated by the national judiciary. Generally, the resolution of such disputes will depend on whether national law or sub-national laws have primacy in areas where both national and sub-national governments may exercise concurrent powers. In other words, if national laws are supreme over sub-national laws, then the former should nullify sub-national laws in the event of a conflict. Conversely, if sub-national laws are supreme over national laws, then national laws should not apply within a specific locality.

- In India, the Constitution provides that the Supreme Court (which also acts as the court of last resort) has jurisdiction over any dispute between (1) the national government and one or more of its constituent states (Article 113(a) and (b)); and (2) between two or more states (Article 113(c)).
- Similarly, in Spain, the Constitutional Court has jurisdiction over conflicts of jurisdictions between the state and the Autonomous Communities, as well as between the Autonomous Communities themselves (Article 161(1)(c) Constitution).

²¹ The Danish Ministry of the Interior and Health, Department of Economics, *The Local Government Reform in Brief*, 29-30 (2005) available at <https://english.im.dk/media/22359/the-local-government-reform-in-brief.pdf>.

- The national government may also contest the provisions and resolutions adopted by the Autonomous Communities. Although this will bring about the automatic suspension of the provision or resolution contested, the Constitutional Court must either ratify or lift the suspension within five months (Article 161(2) Constitution).
- The 2005 Constitution of Iraq provides that “(i)n case of a contradiction between regional and national legislation in respect to a matter outside the exclusive authorities of the federal government, the regional power shall have the right to amend the application of the national legislation within that region.”²² As a result, Iraq’s regional governments have control over certain policy fields related to oil production, taxation, and education.

Some states have established specialized courts and entities to resolve legal disputes:

- In Belgium, the Constitutional Court is tasked with resolving disputes between federal and sub-national governments.²³ Belgium has also established a “Concertation Committee,” which includes national and regional officials.²⁴ This body is tasked with resolving disputes regarding the adverse effects of actions taken by different levels of government. The Committee does not review the legality, but the “actual advisability (*opportunité*) of an executive or legislative measure.”²⁵
- In South Africa, where there is disagreement between the National Assembly (directly elected) and the National Council of Provinces regarding legislation affecting the provinces, such legislation must be sent to a mediation committee.²⁶ If the disagreement is not resolved, the legislation

²² IRAQ CONST. art. 121, section 2.

²³ Patrick Peeters and Jens Mosselmans, *The Constitutional Court of Belgium, Safeguard of the Autonomy of the Communities and Regions 69-102* (University of Toronto Press, 2017) available at https://www.jstor.org/stable/10.3138/j.ctt1whm97c.7#metadata_info_tab_contents.

²⁴ Members of the Concertation Committee include the federal Prime Minister, five federal-level ministers, and six members of the canton governments. See *1980 Ordinary Act of Institutional Reforms*, art. 31. (Belgium); Griffiths et al., *Forum of Federations: Handbook* footnote 25 at 65 (2020).

²⁵ The Committee has the ability to stop any action for sixty days while it tries to reach a compromise. See Griffiths et al., *Forum of Federations, Handbook*, footnote 25 at 65 (2020) .

²⁶ SOUTH AFRICA CONST. art 78 (1996): (1) The Mediation Committee consists of (a) nine members of the National Assembly elected by the Assembly in accordance with a procedure that is prescribed by the rules and orders of the Assembly and results in the representation of parties in substantially the same proportion that the parties are represented in the Assembly; and (b) one delegate from each provincial delegation in the National Council of Provinces, designated by the delegation.

requires a two thirds majority in the National Assembly in order to pass.²⁷ Furthermore, all levels of government are required to exhaust “every reasonable effort to resolve any disputes through intergovernmental negotiations” before involving the judiciary.²⁸

- Switzerland also encourages the judiciary to be used as a last resort. The Constitution provides for mediation and arbitration between the cantons, or between a canton and the federation, as the primary means of resolving disputes.²⁹
 - This approach to dispute resolution is also reflected elsewhere in the Constitution, which provides that “[t]he Confederation and the Cantons [] support each other in the fulfillment of their duties and [] generally cooperate with each other” (Article 44(1)), and that the Cantons “owe each other a duty of consideration and support [and] shall provide each other with administrative assistance and mutual judicial assistance” (Article 44(2)).
 - Nevertheless, if mediation or negotiation is unsuccessful, Switzerland’s high court has the power to resolve disputes.³⁰

Creation or Modification of Autonomous Areas

Establishing Autonomous Areas

- In Belgium, autonomous regions were established entirely at the federal level through a constitutional amendment.³¹ This amendment does not provide for the creation of additional autonomous regions.

²⁷ SOUTH AFRICA CONST. art 76 (1996).

²⁸ SOUTH AFRICA CONST. art 41(3). The Constitutional Court can even refer the case back to the government bodies if it feels that this requirement has not been met. SOUTH. AFR. CONST. secs. 41(3) and (4).

²⁹ SWITZERLAND CONST art. 44(3) (“Disputes between Cantons or between Cantons and the Confederation shall wherever possible be resolved by negotiation or mediation.”).

³⁰ The Swiss Constitution also provides for inter-cantonal treaties and cooperation. See SWITZERLAND CONST. art. 48(1). Cantons may conclude inter-cantonal treaties known as concordats. These concordats cannot violate federal law and the confederation must be notified of all such concordats. See SWITZERLAND CONST. art. 48(3).

³¹ BELGIUM CONST., art. 5. For further reading, see *Belgium: From Regionalism to Federalism*, which describes the process of the constitutional amendments, available at https://hooghe.web.unc.edu/wp-content/uploads/sites/11492/2022/03/2003_Belgium_from-regionalism-to-federalism.pdf. The unique structure of federal governance in Belgium allows for the representation of local interests at the national level. There are strong relations between the federal parliament and the regional parties. At the federal level, parties are split on a linguistic basis. This leads to a regional party executive who controls both the federal and regional level policy decisions. See Wilfried Swenden, *Belgian Federalism: Basic Institutional Features and Potential as a Model for the European Union* 10, 15 (The Royal Institute of International Affairs, 2003), available at <https://www.chathamhouse.org/sites/default/files/public/Research/Europe/swenden.pdf>.

- In India, Article 2 of the Constitution provides that parliament can admit into the Union, or establish, new states on terms and conditions it sees fit.
 - Article 3 elaborates that by law, parliament can form a new state by separating territory from any state or by uniting the territory of two or more states, in whole or in part; or by uniting a territory to a part of a state.
 - However, any bill introduced to this effect must have been on the recommendation of the president, and to the extent that it affects the “area, boundaries or name of any of the states”, the bill has been referred by the president to the legislature of the affected state so that it may “express[] its views” (Article 3). Bills are passed by a simple majority (Article 100(1)).

- By contrast, the Constitution of Iraq provides that its provinces (referred to as “governorates”) have the right to organize into autonomous regions without approval at the national level.³² Nonetheless, the Constitution stipulates that national legislation – rather than the governorates – should define the procedure to form an autonomous region. Kurdistan, Iraq’s only autonomous region, was created by the Constitution.³³

- Ethiopia’s Constitution enshrines the right of “Nations, Nationalities and Peoples” within the state to form their own regions, and requires the affected regional government to organize the necessary referendum. The Constitution explains that once “the State Council [regional legislature] [...] transfer[s] its powers to the Nation, Nationality or People that made the demand,”³⁴ the region will achieve autonomous status.³⁵ The approval of the regional legislature is therefore a *de facto* requirement in order for a territory to obtain independent regional status.

- In Spain, the Constitution provides that the right to initiate the process towards self-government – to become an Autonomous Community – lies with (i) all Provincial Councils; or (ii) with the corresponding inter-island body; provided either the Provincial Council or the inter-island body encompass two-thirds of the municipalities whose populations represent at least majority of the electorate of each province or island (Article 143(2)).

³² IRAQ CONST. art. 119.

³³ IRAQ CONST. art. 117-18.

³⁴ ETHIOPIA CONST. art. 47(3).

³⁵ ETHIOPIA CONST. art. 47(3).

- This option is available to bordering provinces with common historic, cultural and economic characteristics, and island territories and provinces with historic regional status (Article 143(1)).

Modification of Autonomous Areas

The modification of an autonomous area typically entails some form of federal action, either through national legislation or a constitutional amendment.

- In Belgium, the legislature has two options for modifying the borders of its autonomous areas.
 - The first is a constitutional amendment, which requires a two-thirds majority vote by the House and the Senate.³⁶
 - The second is an explicit legal modification provision,³⁷ which not only requires a two-thirds majority vote by the House and the Senate but also a majority vote of each linguistic group in the House and Senate.³⁸
- In India, Article 4 of the Constitution provides for the parliament’s ability to increase or diminish the area of any state, and to alter the boundaries and name of any state.
 - The same restrictions as to the creation of new states also applies here: any bill introduced to this effect must have been on the recommendation of the president, and to the extent that it affects the “area, boundaries or name of any of the states”, the bill has been referred by the president to the legislature of the affected state so that it may “express[] its views” (Article 3). Bills are passed by a simple majority (Article 100(1)).
- By contrast, the Constitution of Iraq creates the autonomous region of Kurdistan without specifying either Kurdistan’s precise borders or a way to

³⁶ BELGIUM CONST. art.195. This also requires that the current House and Senate be dissolved, with a new legislature elected to vote on the proposed amendment. The amendment can go beyond merely modifying the borders of the autonomous area, and can instead modify the entire federal regime.

³⁷ BELGIUM CONST. art. 5. Such modification is limited to changing the boundaries of the autonomous areas, bringing them directly under the federal executive power, or subjecting them to a specific statute.

³⁸ BELGIUM CONST. art. 4. This is notable, as it does not directly require local input, but instead requires approval by the language groups in the national legislature to function as a proxy for the regional interests. However, as discussed above, in Belgium there is a tighter relationship between regional and national powers.

modify those borders. This has contributed to the ongoing conflict between Iraq and Kurdistan, both of which contest the region of Kirkuk.³⁹

Assumption of Powers

Asymmetric sub-national government arrangements require legal and institutional structures at a national level that permit various sub-national governments to exercise different types of governmental authority. These structures depend on (1) the character of the national state, and whether it is a federal or unitary state; (2) the extent of powers devolved to sub-national governments; and (3) the capacity of sub-national governments to assume governing responsibilities; and are complemented by (4) oversight and implementation mechanisms.

Federal vs. Unitary States

Asymmetric sub-national governing arrangements are generally established through constitutional provisions and/or national legislation. In federal states, where constitutions tend to explicitly delegate specific powers to all sub-national governments, some form of constitutional amendment is necessary to allow specific sub-national governments to assume greater autonomy.

- Part XI the Indian Constitution⁴⁰ describes powers exercised by regional governments, with the exception of the State of Jammu and Kashmir, which is afforded a special status under Article 370⁴¹ and exercises its governing authority based on the Instrument of Accession.⁴²

In unitary states, where constitutions typically do not explicitly allocate specific powers to sub-national governments, constitutional amendments may not be necessary to establish sub-national governments with some form of special status.

³⁹ See Michael Knights, Kirkuk: The City That Highlights Iraq's War Within A War (BBC, Oct. 17, 2017) *available at* <https://www.bbc.com/news/world-middle-east-41656398>. The Iraqi Constitution provides that a referendum be held on the status of Kirkuk, but the referendum has never been held and instead the Kurds' held their own referendum on independence. See IRAQ CONST. art. 140 (Second).

⁴⁰ INDIA CONST. Part XI.

⁴¹ INDIA CONST. art. 370.

⁴² Instrument of Accession of Jammu and Kashmir, *available at* https://cjp.org.in/wp-content/uploads/2019/08/instrument_of_accession_of_jammu_and_kashmir_state.pdf.

- Spain has passed legislation authorizing sub-national governments to assume a wide range of powers, provided that these do not conflict with the powers assigned to the national government in the Spanish Constitution.⁴³
 - As a result, the governments of different so-called “Autonomous Communities” (regions) in Spain have assumed divergent powers without the need for constitutional amendment.⁴⁴
- Similarly, in Italy, the Constitution provides that autonomous regions can initiate the process to assume additional special forms and conditions of autonomy (Article 116), provided they relate to the areas specifically designated to them (Article 117(3)(2)(1)). This process, advanced through legislation, must then be approved at the national level by both houses of parliament with an absolute majority, and upon agreement between the national state and region concerned (Article 116).

Extent of Powers Devolved to Sub-National Governments

The types of powers assigned to sub-national governments in “special status” regions should also inform the framework through which decentralization is implemented at a national level.

- States aiming to grant specific regions or areas greater autonomy and powers should ensure that constitutional provisions or applicable national legislation permit the creation of sub-national political bodies.⁴⁵
- The assumption of greater fiscal powers by sub-national governments – the ability to collect revenue and to spend that revenue on sub-national government functions – typically requires some form of institutional coordination between national and sub-national authorities.

⁴³ *Spain: Quasi-Federal Country* (OECD, Oct. 2016), available at <https://www.oecd.org/regional/regional-policy/profile-Spain.pdf>; *Spanish Autonomous Communities and Competences*, Association of Accredited Public Policy Advocates to the European Union (Mar. 20, 2015) available at <http://www.aalep.eu/spanish-autonomous-communities-and-competences>; Eric Solsten and Sandra W. Meditz, *Spain: A Country Study* (US Department of the Army, 1988), available at <http://countrystudies.us/spain/78.htm>.

⁴⁴ *Spain: Quasi-Federal Country* (OECD, Oct. 2016), available at <https://www.oecd.org/regional/regional-policy/profile-Spain.pdf>. The regional government of the Basque territory for example has assumed almost complete spending and revenue autonomy.

⁴⁵ The Philippines provides a cautionary tale in this respect: although it attempted to authorize the autonomous region of Bangsamoro to create a local parliament through the Bangsamoro Basic Law in 1987, that law has been challenged ever since due to purported conflicts with the Philippines Constitution. See *Asymmetric Territorial Arrangements in Decentralized Systems* (Melbourne Forum on Constitution-Building, Oct. 2018), available at <https://constitutionnet.org/sites/default/files/2019-10/asymmetric-territorial-arrangements-in-decentralized-systems.pdf>.

- This has been particularly important in Uganda, where sub-national governments depend largely on intergovernmental transfers to fund their operations.⁴⁶
- Similarly, decentralization of administrative functions – the delegation of government authority to semi-autonomous agencies operating on a sub-national level – often involves the creation of national institutions to ensure the effective delivery of public services.⁴⁷

Capacity and Sequencing

Regardless of the nature and aims of decentralization, there is an overarching need to ensure that sub-national governments have the capacity to exercise the authority conferred upon them.

- The decentralization process in Spain provides a valuable case-study in this regard: During Spain’s transition, the government adopted a phased approach to the transfer of power from the central government to Autonomous Communities; the first stage enabling applications for autonomous status.
 - Spain granted pre-Autonomous Community status to Catalonia and the Basque regions, which have special linguistic identities.⁴⁸ The pre-autonomy decrees provided for power-sharing assemblies comprising members of Spanish Parliament and representatives of local and municipal entities.⁴⁹
 - Though primarily administrative in function, pre-autonomy allowed Spain’s regions to gradually ease into full-Autonomous Community status.⁵⁰ Each Autonomous Community government was given legislative, executive, and administrative competencies.⁵¹

⁴⁶ U.S. Agency for International Development, *Democratic Decentralization Programming Handbook* 21 (2021) available at <https://urban-links.org/resource/usaiddemocraticdecentralizationprogramminghandbook/>.

⁴⁷ U.S. Agency for International Development, *Democratic Decentralization Programming Handbook* 19-21 (2021) available at <https://urban-links.org/resource/usaiddemocraticdecentralizationprogramminghandbook/>.

⁴⁸ Carles Viver Pi-Suñyer, *The Transition to a Decentralized Political System in Spain*, Forum of Federations, 4-6, 8 (2010), available at http://www.forumfed.org/pubs/occasional_papers/OCP4.pdf.

⁴⁹ Carles Viver Pi-Suñyer, *The Transition to a Decentralized Political System in Spain*, Forum of Federations, 6 (2010), available at http://www.forumfed.org/pubs/occasional_papers/OCP4.pdf.

⁵⁰ Carles Viver Pi-Suñyer, *The Transition to a Decentralized Political System in Spain*, Forum of Federations, 4-6 (2010), available at http://www.forumfed.org/pubs/occasional_papers/OCP4.pdf.

⁵¹ Robert Agranoff & Juan Gallarín, *Toward Democracy in Spain: An Examination of Intergovernmental Relations*, 27 *Publius* 1, 3 (Fall 1997).

- Spain later authorized its Autonomous Communities to assume a wide range of powers (and define their territorial borders) by passing sub-national legislation (a Statute of Autonomy), provided these powers did not conflict with the powers conferred on the central government by the Constitution, and provided the national legislature (the *Cortes Generales*) approved it.⁵²
- To ensure greater continuity, negotiations on the transfer of powers between the central government and the Autonomous Communities required approval from both the central parliament and the community legislature in the affected Autonomous Community.⁵³
- Article 150(2) of the Constitution additionally provides that the state may transfer or delegate to the autonomous communities powers which “by their very nature lend themselves to transfer or delegation.” In each case, the law enabling this transfer of powers will also provide for the appropriate transfer of financial means, as well as specify the forms of control that the state will retain.
- Different sub-national governments have since acquired different powers on different timelines, based on differing sub-national political contexts and the varying capacities of sub-national institutions.⁵⁴

The progress of a transition to a federal system of government can also be measured by the transfer of government personnel to different levels of government. The transfer of personnel often reflects a shift in governing responsibilities, with lower levels of government assuming responsibility over more functions over time.

- Federal constitutions frequently allocate authority over a list of issues to regional or local governments. In many transitional states, regional and local governments lack the capacity, resources, or infrastructure to immediately assume all of these responsibilities.
- As regional and local government capacity to take over constitutional responsibilities from the central government, the number of public

⁵² SPAIN CONST., art. 146.

⁵³ Robert Agranoff & Juan Gallarín, *Toward Democracy in Spain: An Examination of Intergovernmental Relations*, 27 *Publius* 1, 3-4 (Fall 1997).

⁵⁴ *Spain: Quasi-Federal Country* (OECD, Oct. 2016), available at <https://www.oecd.org/regional/regional-policy/profile-Spain.pdf>; *Spanish Autonomous Communities and Competences*, Association of Accredited Public Policy Advocates to the European Union (Mar. 20, 2015), available at <http://www.aalep.eu/spanish-autonomous-communities-and-competences>; Eric Solsten and Sandra W. Meditz, *Spain: A Country Study* (US Department of the Army, 1988), available at <http://countrystudies.us/spain/78.htm>.

employees in lower level governments typically increases, while the number of central government employees may decline.

The percentage of spending of the total national budget allocated to the central versus regional authorities, as well as fiscal transfers from the central state to the federal constituent units, can also be useful benchmarks during a unitary to federal transition.

- In Spain, the percentage of government spending that was allocated to the Autonomous Communities increased as the Autonomous Communities assumed their constitutional powers. In 1981, Autonomous Community government spending accounted for less than two percent of all government spending. However, this increased to approximately 15% by 1990.⁵⁵

Oversight and Implementation

States also often create transitional executive councils or committees to facilitate gradual and peaceful transitions involving the transfer of powers.

- South Africa established the Transitional Executive Council (TEC) as a negotiated and temporary institution to manage the government during the transition and prevent conflicts among the various government sectors.⁵⁶
 - The TEC's responsibilities included: (1) monitoring development, policy objectives, and targets in relation to regional and local governments; (2) proposing amendments, repeals, or enacting federal legislation governing regional and local matters; (3) educating the public at regional and local levels on the upcoming electoral processes; (4) advising on all transitional matters relating to the powers and duties of regional or local governments; (5) monitoring service provision at regional and local levels; and (6) helping regional and local governments make information requests during the transition.⁵⁷
- Rather than establishing one institution with oversight and implementation responsibilities, Spain relied on bilateral joint commissions, composed of

⁵⁵ Robert Agranoff, *Federal Evolution in Spain*, 17, *International Political Science Review*, 385, 389 (1996).

⁵⁶ Farhana Paruk, *The Transitional Executive Council (TEC) as Transitional Institution to Manage and Prevent Conflict in South Africa*, UNISA (1994) available at <https://uir.unisa.ac.za/bitstream/handle/10500/1301/dissertation.pdf>.

⁵⁷ *Transitional Executive Council Act* art. 14 (South Africa, 1993).

representatives of both the central authority and Autonomous Communities, to negotiate and oversee the transfer of key services.

- The joint commissions also evaluated the economic resources available to facilitate the transfer of services from the central government.⁵⁸
- Spain also formed joint commissions to determine the number of civil servants for Autonomous Communities and arrange levels of financing from the central government.⁵⁹
- Sector-specific committees worked with the bilateral commissions to assess proposed service transfers. The committees provided transfers to the central government for ratification. This step reduced reliance on bilateral commissions and resulted in greater uniformity in the delivery of service provisions.⁶⁰
- These implementation mechanisms allowed the central government to match its resources with the needs of new federal constituent units.⁶¹

Conclusion

Implementing asymmetric federalism requires states to undertake a full-scale assessment of the legal, institutional, and policy-related mechanisms that such a process entails. State practice provides numerous examples of how states can enshrine the creation and modification of autonomous areas in their permanent constitutions, including the way in which such actions are approved by both the central government as well as the populations affected. However, state practice widely demonstrates the necessity to facilitate a smooth transfer of power, and most states have established avenues for dispute resolution, joint committees on cooperation and implementation, and numerous safeguards that protect the rights of both national and sub-national governments to approve decisions that affect their populations and the constitutional structure of the state.

⁵⁸ Carles Viver Pi-Suñyer, *The Transition to a Decentralized Political System in Spain*, Forum of Federations, 16 (2010).

⁵⁹ Carles Viver Pi-Suñyer, *The Transition to a Decentralized Political System in Spain*, Forum of Federations, 15 (2010).

⁶⁰ Carles Viver Pi-Suñyer, *The Transition to a Decentralized Political System in Spain*, Forum of Federations, 17 (2010).

⁶¹ Carles Viver Pi-Suñyer, *The Transition to a Decentralized Political System in Spain*, Forum of Federations, 17 (2010).