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OPTIONS FOR DECENTRALIZATION IN SUDAN: EXCLUSIVE AND CONCURRENT POWERS

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Options for Decentralization in Sudan: Exclusive and Concurrent Powers

Executive Summary

The Sudanese governing and related draft documents that comprise the framework on decentralization are broadly consistent in their articulation of Sudan as a decentralized federal state, and the structures and exclusive and concurrent powers of levels of governance are stipulated across these documents. However, the documents do not address the full spectrum of decentralization issues, which has resulted in several jurisdictional gaps. This is most notable in the areas of the division of powers and harmonization mechanisms for adjudicating jurisdictional conflicts between levels of governance. International best practice provides several models for how to address these gaps, and states such as Canada, Pakistan, and India have explicitly and exhaustively outlined the various roles and responsibilities of each level of governance. In Sudan, the attempts of the governing and related draft documents to address this have been obstructed by provisions that enable the central government to exercise broad oversight and regulatory functions of sub-national governments. The effect of this is that even powers explicitly listed as exclusive to sub-national governments remain controlled by the central government, as it is often central executive bodies that hold crucial decision-making powers.

A second jurisdictional gap is the lack of an independent body to regulate jurisdictional conflicts between levels of governance. Some states, such as Belgium and South Africa, have established mediatory bodies of mixed membership, with power split between central executive and sub-national bodies or reserved for democratically elected individuals only. However, in Sudan, the 2020 Decentralization Law envisages a "Higher Council" to undertake far-reaching tasks, including the adjudication of jurisdictional disputes. However, no further guidance is provided on how these disputes will be adjudicated, and the predominantly central executive membership of the Higher Council - headed by the Ministry of Federal Governance - enhances the risk of undue central state influence in sub-national governance issues.

Although the governing and related draft documents attempt to delineate the roles and responsibilities of levels of governance, significant central oversight is still retained over core issues such as funding, division of powers, and harmonization mechanisms. The framework in Sudan would therefore benefit from amendments that guarantee autonomy to sub-national governments over sub-national issues, as well as procedural safeguards to protect this autonomy.

Table of Contents

Options for Decentralization in Sudan: Exclusive and Concurrent Powers

Statement of Purpose

This paper outlines key issues and considerations in the exclusive and concurrent powers of local, state/regional, and central government, and proposes options for their application to the current Sudan context.

Legal Basis for Delineating Exclusive and Concurrent Powers in Decentralization

Both the 2019 Constitutional Charter and the 2022 Draft Interim Constitution endorsed by the Sudanese Bar Association leave substantive aspects of decentralization to "the law" (in articles 19.2 and 15(2) respectively). Similarly, aside from extensive provisions on the structure of the Blue Nile and South Kordofan/Nuba Mountains area and Darfur region, the Juba Peace Agreement makes no specific arrangements on the parts of the country not covered by these agreements, save for a handful of references to concurrent powers. The Juba Peace Agreement notes that the system of government will be federal and will have three levels of government, and that a conference on the system of governance will review the administrative division of the regions and levels of governance, as well as their structures, powers, and jurisdictions.[1] Constitutional Decree 06/2021 subsequently provides for the establishment of a federal regional system following the System of Governance Conference, where the "numbers, borders, structures, competencies, powers, and levels of governance and administration" of regions will be addressed.[2]

In domestic legislation, the 2020 Law on Regulating Decentralization outlines concurrent and exclusive powers of state and central governments, identifying that local governments will assume "mandated powers, in accordance with the law of local governance or any other law, provided that they do not contradict with any of the federal or state-level laws."[3] However, the 2020 Draft Law on Local Government failed to enter into force prior to the October 2021 coup, and the 2003 Local Government Law currently in force reflects outdated standards for local governance.

[1] *Juba Agreement for Peace in Sudan*, Title 2, Ch1 at 25.3.
[2] Article 3, Constitutional Decree 06/2021 (Sudan).
[3] *Law on Regulating Decentralization 2020* (Sudan) Art 5(4).

Process Considerations

Division of Powers

- Sub-national governments generally retain powers that are distinct from the national government and exercise those powers through independent local government institutions. The powers assigned to various tiers of government reflect the goals of policymakers in terms of how deeply they aim to achieve political, administrative, and fiscal decentralization. However, the ability of sub-national governments to actually exercise their delegated powers depends on the funding streams available to them stipulated under applicable national laws.

- At a minimum, sub-national governments are typically tasked with supervising the delivery of basic services such as local public transportation, sanitation systems, and public infrastructure.[4] Sub-national authorities also generally retain some control over healthcare, zoning policy, and education.[5] Beyond that, the types of powers delegated to sub-national governments, and the institutions designed to exercise those powers, vary widely.

- In states aiming for extensive political, fiscal, and administrative decentralization, higher echelons of sub-national government (for example, regional or state governments rather than provinces and localities) are vested with powers to administer their own judicial systems, independently levy taxes, supervise local elections, and regulate municipal government. States wishing to avoid the dilution of centralized political authority tend to limit local government power by clearly defining its administrative and fiscal responsibilities, and reserving residual powers to the national government.

  <u>Comparative State Practice</u>

- In Pakistan, successive governments between 2001 and 2019 devolved considerable administrative responsibilities to provincial and municipal governments, including control over local level infrastructure services,

[4] Elliot Bulmer, *Federalism: International IDEA Constitution-Building Primer 12* at 4 (International Institute for Democracy and Electoral Assistance (International IDEA), 2nd ed., 2017) at Table 4.1.
[5] Elliot Bulmer, *Federalism: International IDEA Constitution-Building Primer 12* at 4 (International Institute for Democracy and Electoral Assistance (International IDEA), 2nd ed., 2017) at Table 4.1.; *see also* Pakistan: Federal Country, https://www.sng-wofi.org/country-profiles/PAKISTAN.pdf (Nov. 2019).

disaster management, environmental protection, and policy and administration of health care services.[6] Political control over major policy initiatives remains rooted at a national level, leaving execution to local governments.[7]

- By contract, Switzerland has decentralized political power together with administrative and fiscal responsibilities to cantons (regional governments).[8]
    - Cantons are vested with residual powers[9] and largely retain control over taxation,[10] healthcare, law enforcement, regulation of businesses, extraction of national resources, and public education.
    - Cantons have their own constitutions, which broadly lay out their respective competencies and responsibilities.[11] Most cantons have separate legislatures, executive branches, and judicial and law enforcement systems, and they retain the power to organize further sub-units of local government.[12]
    - The national government is solely responsible for foreign relations, monetary policy,[13] regulating immigration, administering national civil and criminal law, applying customs duties, and regulating various services (such as higher education, telecommunications, and transport of energy) that operate on a national level.[14] Cantonal and municipal governments assume control over the delivery and administration of

[6] The Punjab Decentralization Law, the most recent decentralization law adopted by the government of Pakistan, is representative in this regard. *See* Annex 1 & 2, Punjab Local Government Act 2019, available at http://punjablaws.gov.pk/laws/2735.html

[7] Markus Böckenförde, *A Practical Guide to Constitution Build: Decentralized Forms of Government*, Institute for Democracy and Electoral Assistance (2011) at 33.

[8] *See* Ch. 1, Sec. 2, Art. 47 of Constitution fédérale de la Confédération suisse (The Federal Constitution of the Swiss Confederation of 1999).

[9] Ch. 1, Sec. 2, Art. 43 of Constitution fédérale de la Confédération suisse (The Federal Constitution of the Swiss Confederation of 1999), ("The Confederation undertakes tasks that the Cantons are unable to perform or which require uniform regulation by the Confederation.")

[10] Thomas Fleiner, *"Swiss Confederation," Distribution of Powers and Responsibilities in Federal Countries* at 7 (2005), available at http://www.forumfed.org/libdocs/Global_Dialogue/Booklet_2/BL2-ch-Fleiner.pdf. In fact, Cantons retain control over two-thirds of the states' income and expenditures. In fact, Cantons retain control over two-thirds of the states' income and expenditures.

[11] Ch. 1, Sec. 2, Arts 51-52 of Constitution fédérale de la Confédération suisse (The Federal Constitution of the Swiss Confederation of 1999).

[12] Thomas Fleiner, *"Swiss Confederation," Distribution of Powers and Responsibilities in Federal Countries* at 7-8 (2005) *available at* http://www.forumfed.org/libdocs/Global_Dialogue/Booklet_2/BL2-ch-Fleiner.pdf.

[13] Ch. 1, Sec. 2, Arts 99-100 of Constitution fédérale de la Confédération suisse (The Federal Constitution of the Swiss Confederation of 1999).

[14] *Separation of Powers*, Swissinfo.ch, available at https://www.swissinfo.ch/eng/separation-of-powers/29288762 (last updated June 30, 2022); *See supra* note 74 at Arts. 90 (nuclear energy) 91 (transport of energy), 92-93 (telecommunication services, radio & television).

most public services, with the national government facilitating coordination between cantonal governments where necessary.[15]

Framework legislation divides government competencies exclusively to either the national government or sub-national governments ("exclusive powers") and specifies certain functions that should be exercised by both national and sub-national authorities concurrently ("concurrent powers"). Implementing laws should provide for the assignment of residual powers (*i.e.*, those powers not explicitly allocated as exclusive or concurrent). State practice varies with respect to the allocation of such residual powers, often according to the context in which decentralization laws were enacted.

- States modeled on confederations or federalist systems typically place a greater emphasis on the sovereignty of sub-national governments and reserve residual powers to the highest tier of local government (for instance: regional or state governments).
    - Argentina, Switzerland, and the United States enumerate the national government's exclusive powers, provide for specific concurrent powers, and reserve residual powers (those not enumerated as an exclusive or concurrent power) for sub-national governments.[16]

- States that have traditionally operated with strong central governments and have enacted decentralization laws in reaction to local demands for autonomy tend to reserve residual powers at the national level.
    - Canada enumerates the powers of both sub-national and national governments and leaves residual powers to the national government.[17]
    - India similarly reserves residual powers to the national government, but further provides that sub-national governments may statutorily transfer certain competencies to the national parliament.[18]
        - In both cases, the central government's decentralization initiatives aimed to meet demands for greater autonomy by sub-national cultural communities without weakening the ability of the national government to adopt nationwide laws.

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[15] Ch. 1, Sec. 2, Arts 89 (energy policy) and 87 (railway infrastructure) of Constitution fédérale de la Confédération suisse (The Federal Constitution of the Swiss Confederation of 1999).
[16] Markus Böckenförde, *A Practical Guide to Constitution Building: Decentralized Forms of Government*, Institute for Democracy and Electoral Assistance (2011) at 29.
[17] Elliot Bulmer, *Federalism: International IDEA Constitution-Building Primer 12* at 4 (International Institute for Democracy and Electoral Assistance (International IDEA), 2nd ed., 2017) at 16.
[18] Elliot Bulmer, *Federalism: International IDEA Constitution-Building Primer 12* at 4 (International Institute for Democracy and Electoral Assistance (International IDEA), 2nd ed., 2017) at 14-15.

Considerations for Sudan

- Numerous provisions of the Juba Peace Agreement address the relationship between regional/state governments and the national government. For example, Title II (Darfur Track) envisions a "regional-federal system of governance" applicable across Sudan.[19] It further describes the "exclusive executive and legislative powers" of the Darfur regional government[20] as well as the concurrent powers shared between the national and Darfur regional governments.[21] Title III (Blue Nile and South Kordofan/Nuba Mountains) includes similar lists of exclusive and concurrent powers,[22] and specifies that "powers in the state/regions of Blue Nile and South Kordofan/Nuba Mountains and West Kordofan (in their current status)" shall consist of an executive authority, a legislative authority, and a judicial authority.[23]

- However, there are gaps and inconsistencies amongst the constitutional documents and domestic legislation regarding the framework applicable to state/regional government competencies and their relationship with the national government. Differences exist between the exclusive and joint powers granted to the national governments and state governments under (i) the various tracks of the Juba Peace Agreement, as compared to (ii) the Annexes to the 2020 Decentralization Law. Notably, the 2020 Decentralization Law (which refers only to "states" and not to "regions") generally reserves control over healthcare and health policy to the states, whereas the Darfur Track Agreement provides that "health policies" should be an area of concurrent powers between the national government and the Darfur regional government.[24] Similarly, the 2020 Decentralization law vests control over "development policies of the state" with state government, whereas the Darfur Track Agreement lists a range of "commerce, industry, and industrial development" under concurrent powers.[25]

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[19] *Juba Peace Agreement* Track II, Art. 25.
[20] *Juba Peace Agreement* Track II, Art. 30.
[21] *Juba Peace Agreement* Track II, Art. 31.
[22] *Juba Peace Agreement*, Title III, Arts. 9-10.
[23] *Juba Peace Agreement*, Title III at Art. 26. Title III, Arts. 27-51 further address the competencies of each branch of local government in the relevant regions. Tracks V & VI refer to various levels of regional government, but do not provide details as to their structure or competencies.
[24] Compare *The Law on Regulating Decentralization of 2020, Republic of Sudan, Annex A (public services)* with *Juba Agreement for Peace in Sudan Between the Transitional Government of Sudan and the Parties to Peace Process*, Title II, Ch. 1, Art. 31.
[25] *Compare The Law on Regulating Decentralization of 2020*, Annex A (economy and finance) with the Juba

- In general, the 2020 Decentralization Law envisions a system (like that in place in Pakistan) whereby significant administrative and fiscal powers are entrusted to sub-national (state) governments, but political power is retained at a national level. Article 7 of the Law states that the "transitional prime minister shall appoint governors of the states" who in turn serve as the highest tier of state government. Similarly, under the 2003 Local Government Law, local unit commissioners - heads of the executive arm of local government - are directly appointed by state governors, who are directly appointed by the prime minister. The governor and the directly appointed local unit commissioner in turn appoint the executive of the local unit. These direct appointments effectively result in a structure where the national government retains the capacity to set policies and pass legislation, but the implementation of that legislation is carried out by central government appointees to lower tiers of government.

The 2020 Draft Law on Local Government makes several departures from the 2003 Local Government Law:

- Although the Draft Law closely follows the exclusive powers reserved to local units in the 2003 Law on Local Government, it provides for slightly more expansive exclusive powers and competencies in infrastructure, such as regulating and monitoring the implementation of urban construction projects; issuing building permits; establishing and maintaining local public utilities; and recommending land plans for residential, agricultural, industrial, and investment purposes. The 2020 Draft Law has also removed obligations on local units to promote the establishment of Islamic traditional schools (for instance in Chapter 5 Art 4 of the 2003 Law).

- The 2020 Draft Law notably omits the provisions contained in Chapter 7 of the 2003 Law, which required local units to promote a range of social and cultural affairs. All powers and competencies listed are exclusive, and span across infrastructure, health, power to prepare and issue local orders, educational affairs, and agriculture, livestock, and natural resources (annexed Table 1). However, some powers and competencies contain the phrasing "with the competent authorities," which is not defined.

Agreement for Peace in Sudan Between the Transitional Government of Sudan and the Parties to Peace Process, Title II, Ch. 1, Art. 31.

- Consolidated councils with both executive and legislative powers replace the former separation of local units (executive) and legislative councils. In addition, Article 14(2) of the 2020 Draft Law stipulates that board members of each council are elected through open constituencies and electoral colleges in addition to direct appointments, rather than exclusively through direct appointment by state governors. Article 14(3) additionally requires 40% women representation on each council.

Despite these improvements, the 2020 Draft Law still retains several provisions that indicate a level of central influence that may threaten the local councils' ability to operate autonomously:

- The Draft Law divides councils into municipal councils, city councils, and rural councils (Article 8). Amongst other criteria, it specifies that the populations of municipal councils must be at least 10% of the total state population, of city councils at least 7% of the total state population, and of rural councils at least 5% of the total state population. However, the Draft Law contains no provisions on the division of powers between these levels of local government, which may suggest that very small rural councils have equal executive and legislative powers to significantly larger municipal councils. In addition, although Art 14 increases the number of council members as populations increase, the differences are negligible and range only from 24 members for populations between 100,000-200,000, 28 for populations between 201,000-400,000, and 30 for all populations exceeding 400,000.

- The Draft Law does not explain under which circumstances a board member is either elected or appointed under Article 14(2), nor does it explain who or what entity is responsible for direct appointment. This uncertainty increases the possibility of arbitrary direct appointments that circumvent democratic principles and public participation in local governance.

- Article 31 of the Draft Law provides that the Executive Director will be head of the executive body of the council. Article 3(j) defines an Executive Director as an "employee appointed from the higher leadership ranks of the National Authority for Local Government Officers," referring to the sole central department/apparatus for local government administrators - local bodies for such administrators have never been created. The involvement of an Executive Director at any level of a council's affairs therefore undermines the independence of local councils and risks replicating national state structures in local governance. Article 31 proceeds to list eight specific responsibilities assigned to the Executive Director, including preparing budget proposals, initiating projects for local orders, presiding over the council's security committee, and keeping documents and studies relating to the council; indicating the wide scope of control and oversight afforded to the post-holder.

Options

- Notwithstanding the transitional nature of the present governing documents, stakeholders may wish to clarify the division of exclusive and concurrent powers to prevent jurisdictional conflicts that threaten the stability of decentralized governance.

- Stakeholders may wish to consider providing additional constitutional guarantees of autonomy and independence for state/regional government and consider how best to increase public support for the selection and appointment of governors. Although direct appointments in transitional states have the benefit of effecting change more quickly than selection procedures and elections, they risk polarizing diverse populations, who will likely view the replication of central government structures in sub-national units with skepticism.

- The 2020 Draft Law on Local Government would benefit from further clarification regarding the division of power between various levels of local government. This clarification could also include how any variance in executive or legislative powers will be determined, and what measures will be taken to guarantee councils of all population sizes equitable participation in governance processes.

- The 2020 Draft Law on Local Government would further benefit from amendments to strengthen the autonomy of local councils by providing for stronger guarantees of independence in framework legislation. For instance, amendments could provide further clarity on the utilization of elections and direct appointments of council members, as well as on additional procedural safeguards to prevent undue central government influence over local matters. Without these amendments, powers reserved exclusively for local governments essentially remain, to a large degree, under central control.

Funding

The ability of sub-national governments to exercise their assigned powers rests significantly on their access to funding. In general, delegating powers to sub-national governments while denying them appropriate levels of revenue results in ineffective delivery of services and can generate distrust of governance institutions. Some states have chosen to fund sub-national governments by enacting policies aimed at fiscal decentralization, empowering sub-national governments to raise revenue through local taxation initiatives, administrative regulations, local law enforcement measures, and borrowing in equity markets. Others have reserved powers over revenue collection to the national government, while guaranteeing specific budgetary allotments to sub-national governments to fund their various activities.

- Most decentralized states have granted sub-national governments some degree of autonomy to raise revenues through a variety of means, most prominently taxation, user charges, royalty payments, and regulatory fines. Taxes are the most common revenue stream available to sub-national governments, including taxes levied on businesses and individual income.[26] Property taxes in particular are a typical revenue stream, given their potential to match tax burdens with expenditure benefits (*i.e.*, spending on improved local services tends to result in increased property values).[27] User charges, *i.e.*, fees collected through the delivery of services such as transportation and utilities, are another common mechanism through which sub-national governments fund the delivery of basic services. Royalty charges, whereby sub-national governments are entitled to a portion of fees levied on extractive industries (these are typically shared with the national government) can also be an important source of revenue for localities with

[26] *Democratic Decentralization Programming Handbook* at 19 (U.S. Agency for International Development, 2021).
[27] *Democratic Decentralization Programming Handbook* at 19 (U.S. Agency for International Development, 2021).

natural resources, such as oil, as they can fund projects to offset any resulting environmental damage.[28]

Comparative State Practice

- In Uganda, sub-national governments have historically been unable to generate independent revenue streams and therefore depend largely on transfers from the national government to fund their activities.
    - This system of intergovernmental transfers was initially mired with inefficiencies, due to weak monitoring and evaluation systems and inaccurate estimates with regards to the costs of delivering services.[29]
    - Recent reforms, however, have improved the situation. Local governments now submit regular reports to the ministry of finance detailing their funding needs and accounting for expenditures. The national government in turn provides local governments both with unconditional grants directed at the delivery of general public services, as well as with conditional grants tied to particular activities of local government. The national government has also turned to international organizations to direct funding to local authorities for discretionary projects.[30]

- In the United States, sub-national governments (both at a state/regional and municipal level) generate revenue in part through various forms of engagement with the private sector.
    - Sub-national governments across the United States regularly raise funds for the delivery of general services by issuing uncollateralized bonds and other debt instruments.[31] These bonds often fund capital projects such as schools, highways, or sewer systems, and are sold to investors in public markets.[32]
    - Municipal governments also regularly fund the delivery of specific services through public-private partnerships, whereby private

[28] *Democratic Decentralization Programming Handbook* at 19 (U.S. Agency for International Development, 2021).
[29] *Democratic Decentralization Programming Handbook* at 21 (U.S. Agency for International Development, 2021).
[30] *Democratic Decentralization Programming Handbook* at 21 (U.S. Agency for International Development, 2021).
[31] Municipal Bonds, Investor.gov, U.S. Securities and Exchange Commission, https://www.investor.gov/introduction-investing/investing-basics/investment-products/bonds-or-fixed-income-products-0#:~:text=What%20are%20municipal%20bonds%3F,schools%2C%20highways%20or%20sewer%20systems.
[32] Municipal Bonds, Investor.gov, U.S. Securities and Exchange Commission, https://www.investor.gov/introduction-investing/investing-basics/investment-products/bonds-or-fixed-income-products-0#:~:text=What%20are%20municipal%20bonds%3F,schools%2C%20highways%20or%20sewer%20systems.

investors invest capital in, for example, a highway in exchange for the right to levy tolls for a specified duration.[33]

Considerations for Sudan

- Both the Juba Peace Agreement and the 2020 Law on Decentralization explicitly provide regional/state governments with the ability to independently generate revenue within their respective jurisdictions.
    - Annex A of the 2020 Law on Decentralization (listing exclusive powers of state governments) categorizes the "financial affairs of the state," the "general budget of the State," and the imposition of "direct and indirect taxes within the state" as part of the responsibilities of individual states.
    - The Juba Peace Agreement similarly provides that with regards to the Darfur region and autonomous area of Blue Nile and South Kordofan/Nuba Mountains, the regional government/autonomous authority has the power to collect taxes, business profits, service fees, foreign grants/aid, loans, tourism fees, and other categories, and to retain 40% of funds raised from those sources.[34]
    - The Juba Peace Agreement also specifically endows Blue Nile and South Kordofan/Nuba Mountains with the power to negotiate with international organizations directly, including to "conclude contracts or agreements for foreign or national loans," as well as issue their own financial instruments.[35]

- In contrast, Article 26 of the 2003 Law on Local Government provides relatively few options for local units to independently generate revenue. As a result, local units are required to rely on specified shares of states' value added tax, grants and loans as approved by the state, and profit arising from state projects (Articles 26(d)-(f)). This further compromises the ability of local governments to operate autonomously from state/central government influence. The 2020 Draft Law on Local Government to some extent attempts to reverse this reliance on central government by providing a much more extensive list of options for independent generation of revenue

[33] *Democratic Decentralization Programming Handbook* at 21 (U.S. Agency for International Development, 2021).
[34] The Juba Peace Agreement further stipulates that the "government of the Darfur Region/States shall have the exclusive authority to determine how best to spend revenue generated or received." Juba Peace Agreement Title II, Ch. 2, Art. 16.2).
[35] Juba Peace Agreement at Title III, Ch. 3, Art. 20.

(annexed Table 1), with the revenue linked to or approved by the central government no longer a major source.

- Although the governing documents allude to the possibility of funding the activities of sub-national governments through intergovernmental transfers, none of the relevant provisions provides details on how such transfers should be effectuated. The Juba Peace Agreement, for example, broadly states that the national government shall transfer funds necessary to meet the needs of the regional governments, but does not specify a mechanism for assessing those needs.[36] Similarly, the 2020 Decentralization law lists "the state share of national revenue" as a source of income for state governments but does not provide a benchmark for establishing the share of national revenue to which each state is entitled.[37]

Options

- In light of the socio-economic impact of the conflict in certain regions, intergovernmental transfers are likely to be a primary source of funding for local governments as they develop their capacity to obtain independent sources of revenue (for instance from taxation and royalties). Stakeholders may therefore wish to consider establishing a system of intergovernmental transfers, which will require developing structures to ensure transparency, both with regards to funding allocations by the national government as well as corresponding expenditures by subnational governments. As such, stakeholders can consider specifying formulae through which the central government will transfer funds to regional governments, clarifying procedures used to determine the funding needs of the regions, and establishing monitoring and evaluation systems to supervise the disbursement of those funds.

Framework Legislation and Harmonization Mechanisms

Decentralization typically requires a legal framework at a national level that clearly delineates rights and responsibilities across both vertical and horizontal tiers of government (*i.e.* between sub-national governments and their national

[36] Juba Peace Agreement at Title II, Ch. 2, Art. 15; *see also* Title III, Ch. 3, Art. 21.
[37] The 2019 Constitution is even more general: it simply provides that subnational governments are entitled to a "fair distribution of power and wealth" (Art. 69.8). Similarly, the 2022 Draft Interim Constitution lists as a task of the transitional period "Reform of state agencies during the transitional period to ensure their independence, nationalism, professionalism, and fair distribution of opportunities in them, while maintaining the conditions of eligibility and efficiency" (Art 7(5)).

counterpart, as well as among sub-national governments themselves). Such legal frameworks are typically implemented through constitutional provisions or via national legislation and help ensure that national and sub-national governments work effectively in tandem. In devising laws on the division of governance authority, policymakers can clearly address the interaction of national and sub-national laws alongside the competencies of sub-national governments relative to the national government.

Comparative State Practice

- 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."[38] As a result, Iraq's regional governments have control over certain policy fields related to oil production, taxation, and education.

- Similarly, Canada and Austria have passed legislation providing that local laws take precedence over national laws in specific policy areas such as the administration and distribution of state pension funds.[39]

State practice also varies widely as to the administration of laws passed by local/state governments, and the relationship of local/state laws to statutes enacted by national government. Notably, some states entrust the interpretation and adjudication of sub-national laws to a sub-national judiciary ("separated systems"), whereas other states entrust it to the national judiciary ("integrated systems"). In either case, national law typically specifies the administrative structure of the judiciary.

- *Integrated systems:* In France and Germany, national courts are tasked with applying laws passed by both the national government and regulations enacted by sub-national governments. The highest court in each locality (or region) acts as the court of last instance with respect to applicable sub-national law, whereas only specific courts of appeal have jurisdiction to deliver binding interpretations of national law.[40]

[38] Article 121, Section 2, The Constitution of the Republic of Iraq of 2005.
[39] Markus Böckenförde, *A Practical Guide to Constitution Building: Decentralized Forms of Government*, Institute for Democracy and Electoral Assistance (2011) at 27-28.
[40] Markus Böckenförde, *A Practical Guide to Constitution Building: Decentralized Forms of Government*, Institute for Democracy and Electoral Assistance (2011) at 31-33.

    - In France, the *Tribunal des Conflits* acts to resolve disputes between administrative courts, which exercise jurisdiction over regulations enacted by sub-national governments; and civil courts, which have general jurisdiction over laws passed by the national government.[41]

- *Separated systems:* The United States has separate court systems to adjudicate disputes under sub-national and national law. Each state has its own constitution, laws, and regulations. Disputes arising under those bodies of laws are generally entrusted to state courts. However, federal (national) courts may exercise jurisdiction over disputes involving parties from different states, or where the dispute involves a question of federal law; and the Supreme Court (the highest court in the national judiciary) is empowered to deliver binding decisions with respect to conflicts between state and federal law.
    - Whereas the integrated model generally results in a greater degree of predictability in judicial decisions, the separated model may be particularly appropriate in contexts where local governments operate according to different legal traditions.

In both systems, national law should specify both the administrative structure of the judiciary (integrated or separated), as well as the process for resolving conflicts between national and sub-national laws. Generally, the resolution of such conflicts 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.

Some states legally require national and sub-national authorities to coordinate on policy creation and implementation.

- In South Africa, for example, 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.[42] If the disagreement is not resolved, the legislation

[41] Tribual Des Conflits, *available at* http://www.tribunal-conflits.fr/.

[42] 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

requires a two thirds majority in the National Assembly in order to pass.[43] Furthermore, all levels of government are required to exhaust "every reasonable effort to resolve any disputes through intergovernmental negotiations" before involving the judiciary.[44]

- Belgium established a "Concertation Committee," which includes national and regional officials.[45] 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."[46]

- In Germany, the Constitutional Court has formulated and consistently upheld required coordination (or "federal comity") between national and state governments, although this is not mandated in the Constitution.[47]

Considerations for Sudan

- The 2019 Constitution describes the contours of a national judiciary, including the creation of a "judicial authority" with "jurisdiction to adjudicate disputes and issue rulings in accordance with the law," as well as a constitutional court "competent to oversee the constitutionality of laws" (Art 30). These provisions are mirrored in Arts 36, 37, and 39 of the 2022 Interim Constitution.

However, the adjudication of disputes between levels of governance is unclear:

- While Track III of the Juba Peace Agreement provides for a distinct judiciary in the Blue Nile and South Kordofan/Nuba Mountains autonomous area, it does not address its relationship with the national judiciary.

represented in the Assembly; and (b) one delegate from each provincial delegation in the National Council of Provinces, designated by the delegation.

[43] SOUTH AFRICA CONST. Art 76 (1996).

[44] 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).

[45] 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).

[46] 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) .

[47] The principle of federal comity in Germany requires the national and state (*Laender)* governments to consider "the concerns of the other side" when formulating policies. See Griffiths et al., *Forum of Federations, Handbook*, footnote 25 at 156 (2020).

- The 2020 Decentralization Law establishes a "Higher Council" as the regulatory mechanism for decentralization (arts 24 and 25), and the Ministry of Federal Governance is established as the executive body of the Higher Council (art 27). The Ministry has the power to "[adjudicate] conflicts between the different levels of governance" and work on "finding the appropriate solutions, in coordination with the relevant parties." However, no guidance is provided on how conflicts will be "adjudicated," nor whether there are additional processes for conflicts in which no "appropriate solution" can be found by the Ministry.

- The Higher Council is composed of the transitional prime minister; eight federal ministers; and three people with "expertise and competency in governance and administration," with no indication as to how these individuals are selected, by which body, or according to which selection criteria. The Higher Council is also composed of the state governors, who are directly appointed by the transitional prime minister (Article 7). This concentration of central entities in the membership and executive of the Higher Council vests significant oversight and regulatory powers in the central government, increasing the likelihood of central influence over sub-national matters. There is also no mention of this Higher Council in the 2020 Draft Local Government Law, despite the fact that it is marked as the regulatory body for all decentralization.

- Although the Juba Peace Agreement repeatedly refers to "traditional systems of government" and "traditional judicial mechanisms,"[48] there are no provisions describing the competencies of these institutions. Native Administrations are referred to in Article 11 of the 2020 Draft Law on Local Governance, which outlines that representatives of governors will "manage the affairs" of the Native Administrations, and are empowered to facilitate their traditional mediation and negotiation functions under local legal traditions. Nothing further is provided on the interactions between Native Administrations and local councils. In addition, Article 27(p) of the 2020 Decentralization Law identifies "sponsoring and improving the Native Administration and working on regulating it" as one of the powers of the Ministry of Federal Governance (executive of the Higher Council), enhancing the likelihood of further central government influence in community matters.

[48] *See,* Juba Peace Agreement Track 2, Arts. 20, 23.

Options

- The 2020 Decentralization Law may benefit from amendments to the Higher Council, which currently affords the central government far-reaching powers over sub-national governance. For instance, an alternative independent body responsible for mediating conflicts between levels of governance could be established in its place, similar to the mediatory bodies established in Belgium (the Concertation Committee) and South Africa (the Mediation Committee).

- Comparative state practice provides several examples for composition of such an entity. One option could be to balance it between federal ministers and state governors (such as in Belgium), or to limit membership only to democratically elected representatives from each level of governance (such as in South Africa). International best practices also dictate that the perceived legitimacy of such an entity is increased when subsequent legislation or regulations outline its powers, competences, and internal processes of this body.

- The framework may benefit from affording additional protections to sub-national legislatures in the governing documents. For instance, this could be effected through providing for additional constitutional protections in the next permanent constitution. Although both the 2020 Draft Law on Local Government and the 2020 Decentralization Law outline exclusive and concurrent powers of local and state government (in relation to national government), constitutional acknowledgment of the supremacy of local or state law in areas outside the exclusive authority of federal government would enhance the independence of sub-national governments.

- Stakeholders may wish to consider clarifying the powers and competences reserved to Native Administrations, including by outlining the relationship between these administrations and local, state, and central governance. Stakeholders are also encouraged to review the far-reaching powers of the Higher Council specifically in relation to Native Administrations, for instance by amending the 2020 Decentralization Law.

Conclusion

It is important for stakeholders to be mindful of the jurisdictional gaps created by the deficiencies noted in the 2020 Decentralization Law and the 2020 Draft Law on Local Governance, which may potentially destabilize governance structures and enhance the fragmentation already present in the system. These deficiencies are compounded by the issuance of Decree 06/2021, which provides for the establishment of a "regional" system of governance, in contrast to the state-level of governance identified in the 2020 Decentralization Law. Stakeholders are encouraged to prioritize public consultation at all levels of governance prior to constitutional and state structure negotiations, with a view to amending and clarifying the roles and responsibilities between and among central and local/state/regional governments. In this respect, addressing the provisions that enable significant central government influence over sub-national matters will be key.