



ELEVATE: Irish Research Council International Career Development Fellow (co-funded by Marie Curie Actions)

PROJECT OUTPUT: POLICY PAPER

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Dispute resolution where territorial self-government is used as a conflict management mechanism

Introduction

This paper outlines recommendations for designing dispute resolution processes where territorial self-government has been used as a conflict management tool. Based on an analysis of the success of Constitutional Courts, or equivalent bodies, in resolving such disputes in existing cases it outlines how such Courts can be structured to maximise their ability to settle disputes between relating to the TSG arrangements. It also outlines how an additional political arbitration committee might be useful.

The importance of dispute resolution

Territorial self-government (TSG) regimes are increasingly used, in combination with other mechanisms, such as central power-sharing or bills of rights, as a conflict management tool in ethnic and ethnonational conflicts. TSG involves the allocation of an independent public policy role to a sub-state geographic unit. The use of such institutional design is widespread and they are used in many cases where there has not been identity conflict– and even when it is used as a conflict management mechanism it can be designed to produce diverse regions rather than ‘ethno-TSG’. However, this paper focuses on these cases of ‘ethno-TSG’, where TSG is used to provide the level of political autonomy necessary to contain ethnic nationalism and to allow for ‘heterogeneous policy tastes’. The paper makes no judgement as to the appropriate division of powers between different levels of government, instead it focuses on resolving disputes regardless of the division of powers.

Where there are multiple layers of government it is important to ensure that there are clear mechanisms to resolve disputes as to where specific powers reside. Where TSG is used as a conflict management mechanism the arrangements provided for in the peace agreement represent an uneasy compromise with some conflict parties, usually the minorities, seeking high-levels of autonomy, up to independence or union with a neighbouring kin-state, and other groups, often the majority, seeking to limit this autonomy to protect against state disintegration. Given that peace agreements are usually an unhappy bargain between these positions it is likely that parties will seek to interpret any ambiguity to support their desired position, raising the likelihood of disputes between groups.

Where different levels of government act in ways which negate the activities of others, government may be ineffective or even paralysed. In the post-conflict environments it is especially significant that these failures are avoided. As Cammett and Malesky (2012) argued, effective government and improved public service delivery can increase citizen satisfaction with the state and undercut motivations for dissent or conflict. Such improvements can be particularly positive where they negate real or imagined inequalities between different groups. Improved governance can also undermine the ability of groups to monopolise resources, preventing them from increasing their power and challenging the state. Thus, where TSG is used as a conflict management tool dispute resolution between the different levels of authority is vital to prevent the re-emergence of violent conflict.

Research

In order to develop recommendations for dispute resolution, where TSG is used as a conflict management mechanism, this research examined four existing countries (UK-Northern Ireland, Macedonia and Bosnia and Herzegovina, Moldova-Gagauzia) where TSG has been used as a conflict management tool. Legal cases where the Constitutional Court or equivalent bodies were asked to act as arbiters of disputes between conflict parties were analysed. The official decisions by the Courts, political party and NGO reaction, and media coverage were studied. Twenty-one semi-structured interviews with representatives of governments, political parties, international organisations, NGOs, and local academics were used to supplement these existing documents.

This data was examined to assess whether the relevant Court or body was successful, whether the issue was removed as a source of conflict between the parties. The assessment sought to isolate what factors contributed to the Courts' ability to resolve the issue and where the Courts were not successful the examination sought to establish what led to these failures in order to develop recommendations for developing dispute resolution mechanisms in similar contexts.

Research findings

Across the four cases Constitutional and Supreme Courts have struggle to be effective arbiters of disputes. Evidence of centralising bias, courts increasing the power of the central government or limiting the powers of the TSG units, undermines the alleged neutrality of courts. In Northern Ireland, Bosnia and Herzegovina, the Former Yugoslav Republic of Macedonia, and Moldova there is evidence that using the constitutional or supreme court as the arbiter has provided the central government with an advantage where disputes between the TSG unit and the central government have occurred.

- In the so-called Brexit case, UKSC5 [2016], The UK Supreme Court was reluctant to interpret devolution laws in a manner which recognises the legal and political conventions which regulate the division of powers. This ruling suggests that difficulties facing TSG regions are seen as secondary to the 'real problems' facing the state as a whole. This indicates that where there is no history of TSG and the state is traditionally centralised the organs of the state, including the courts, will be quick to reinforce this pattern.
- In Moldova, the use of the Constitutional Court, and later administrative courts, as arbiters of disputes between central authorities and the Autonomy favoured the central

government. The weak capacity of the Autonomy to draft and frame complaints led to the Courts rejecting them for technical reasons. Conversely, the State Chancellery had a strong capacity to review the acts of the Autonomy and refer them to local administrative courts for review.

- The use of Constitutional Courts in Bosnia and Herzegovina and the Former Yugoslav Republic of Macedonia was problematic as it showed centralising bias and divisions on the Courts. The Courts consistently interpreted peace agreements in such a way as to minimise the independence of the TSG units. These rulings were usually majority decisions in which the judges from the communities which had requested TSG dissented.

Recommendations

These research findings have underlined the importance of creating independent courts, carefully designing the appointment process for judges, access and communicating decisions, and the potential utility of a separate dispute resolution committee.

Constitutional and Supreme Courts' independence

If Constitutional or Supreme Courts make centralising decisions, they will not be trusted by the TSG units and will not be able to act as successful dispute resolution mechanisms. Dependence on central political institutions for financial and administrative supports can lead to such centralising tendencies. To avoid this Constitutional and Supreme Courts must be design and legally established in such a way as to maximise their independence.

- Independence can be developed by linking the salary of judges, support staff, and advisors to the remuneration of equivalent actors in other institutions such ministers and civil servants in government departments. This will prevent the central government from being able to reduce salaries as a form of punishment or inducement to reach specific decisions connected to particular cases.
- Constitutional Courts should also be able to allocate their assigned budget as they deem fit. This will allow them to secure the administrative, technical, and expert support necessary to carry out their functions.
- Constitutional Court judges should not hold other positions which could cause a conflict. They must not hold political office or positions within the security services. It may be desirable to make an exemption which allows judges to hold academic positions to ensure that judges are aware of the most recent legal research and can assist in the development of future legal scholars.
- Judges should be appointed for long non-renewable terms. The non-renewability of terms is necessary to ensure that judges do not allow a desire to please those charged with selection to influence their decisions. Terms should be sufficiently long to ensure that judges do not need to secure future employment after they finish their term on the Constitutional Court. This will guarantee that their decisions are not influenced by a need to secure political patronage or support to access additional positions.

- Appointment until judges reach domestic retirement age is a straight forward way to deal with this issue. A slightly extended retirement age may be considered to reflect the fact that judges are likely to be appointed later in life due to the extensive experiences necessary and to ensure the Court can benefit from this experience. Adequate pensions should be provided to ensure judges do not need to secure additional financial support after retirement. These may be tied to pension rates for other comparable positions, as was recommended above in relation to salaries.

Appointment procedures

Judges are often found to share preferences with the actors who appoint them. This highlights the importance of ensuring that the appointment procedure provides for input from different conflict groups. Courts should also reflect the diversity of society as a whole. Specific educational or experience requirements should also be required.

- In traditional federal systems assigning the federal units a role in appointing Constitutional or Supreme Court judges is associated with guaranteeing the Court protects the rights of these units vis-à-vis the central government. Where ethno-federalism is used as a conflict management tool it may be appropriate to follow this traditional wisdom. However, it is important to remember that in post-conflict societies not all federal units may be as eager to protect their independence. Units where the majority group(s) have only agreed to federalism as part of a compromise peace agreement and they favour a stronger central state may select judges with centralising tendencies.
- The forms of TSG used in post-conflict societies vary greatly and may include asymmetric autonomy. In such arrangements it may not be appropriate to design appointment procedures based on geographic unit. Instead central power-sharing arrangements or veto mechanisms may offer suitable ways to guarantee that conflict parties, particularly that are in a minority nationally, have a voice in appointments to the Constitutional or Supreme Court.
- Appointment procedures should ensure that individual judges or groups of judges are not excessively associated with one conflict group. Whether judges are appointed by a territorial unit associated with a specific conflict group or by a central institution there should be a procedure which requires that they are endorsed by different identity groups. Rather than being representative of specific conflict groups all judges should be broadly acceptable and the Court should be viewed as a single collegial body, (recommendations for rules which encourage collegiality will also be addressed in the next section).
- The background of the judges should be reflective of the diversity of the society. Diversity should not only be thought of in terms of the conflict groups. Consideration should also be given to whether the Court includes judges from other groups which are traditionally subject to domestic exclusion or discrimination. Positive discrimination may be permitted to guarantee that judges from these groups are appointed.

- Specific educational attainment and levels of experiences should be stipulated as requirements for appointment to the Constitutional Court. Such requirements can help establish the Court's identity as a group of legal scholars. It will ensure they have the necessary intellectual independence to carry out their work and will increase the likelihood that they refrain from making political decisions.

Other rules and procedures

How the Court communicates its decisions, who has access to it, and any international involvement will also affect whether the Constitutional or Supreme Court can successfully resolve disputes where TSG has been used as a conflict management tool. Rules and procedures should encourage collegiality. Access should ensure minorities granted TSG can use the Courts to protect their autonomy. International involvement should be targeted at building domestic capacity.

- Decisions should be made in private and Courts should not publish voting records broken down by individual judge. This is necessary to avoid judge coming under undue pressure to act as proxies for their identity group. It will also prevent groups from questioning the legitimacy of decisions based on the identity of the judges. Transparency can still be achieved by allowing public access to sittings where arguments are made by the different parties and relevant documentation or records.
- The role of dissenting opinions should be carefully considered. A more collegial approach to decision-making can be facilitated through the prohibition of the publication of dissenting opinions. Where judges are permitted to publish dissenting opinions, they are incentivised to focus on the writing of these opinions as soon as it becomes apparent that they are in a minority. Consequently, they do not contribute to the language of the final decision, cooperating improve its quality, but they focus on writing their dissent in order to make their personal opinion known to the public. In contrast, where separate opinions are forbidden, and most notably in the Court of Justice of the EU, the decision-making process is a truly collegiate one, and all judges cooperate in the drafting of the final decision.
- Groups granted TSG as part of a conflict management accord must have access to the Constitutional or Supreme Courts to enforce the agreed arrangements. Formal rules which ensure sub-state units have recourse to these Courts to protect themselves against central government over reach are important.
- The disparity of legal and technical capacity between the central state and a TSG unit which is less developed may also mean that only the central state can effectively access the Constitutional or Supreme Court. This is particularly important for cases where the TSG unit is peripheral and under-developed. In these cases, the provision of autonomy must be accompanied with programmes which develop these capacities if the Constitutional or Supreme Courts are to be used as an effective arbitration mechanism.

- International, regional, and non-governmental organisations can assist in ensuring Constitutional or Supreme Courts act as successful dispute resolution bodies. They should focus their efforts on providing training and technical support. Direct intervention, such as the placement of international judges on Courts, should be discouraged. This limits the domestic legitimacy of the Courts. Furthermore, such international intervention will not be neutral. International actors have their own interests and their intervention is likely to advance these interests, at the expense of domestic considerations.

Alternative dispute resolution committees

Even where judicial review operates effectively it should be restricted to the most serious issues, particularly where higher courts are involved. There is a danger that the judiciary can become politicized. Dispute resolution committees can insulate the judiciary from controversies. Such committees can also be directly designed to address potential difficulties in the implementation and operation of the TSG, and potentially other aspects of a peace accord.

- Dispute resolution committees should have a term of approximately four to seven years. The potential for disputes during this period is very high. Any ambiguity in the design of the new arrangements will be exposed and conflict parties may have alternative understandings as to what the ambiguous elements were intended to provide for. During this period disputes may also have severe consequences. Trust between the conflict parties will still be very low and violence may still be considered a legitimate tool.
- Such committees can have remits which allow them to be used to resolve disputes over any aspect of a peace agreement rather than only addressing controversies related to TSG. TSG is usually part of a wider package of measures, reforms, and institutions aimed at managing a conflict. Difficulties in the implementation or operation of any specific element can undermine other aspects and can lead to the failure of the accord.
- These committees may be mandated to issue recommendations instead of or in addition to binding decisions. Recommendations may be more appropriate during the initial stages of a dispute, while binding decisions may be necessary if disputes continue and become more serious. Committees should be permitted to monitor the enactment of their recommendations or decisions and to verify whether implementation is satisfactory.
- Committees should be able to question politicians and have access to any additional information which can assist them including advice from domestic or international experts. Reasons for decisions and recommendations should be clearly explained to help the public to understand the committees' work and protect against politically motivated criticism.

- Unlike judges, members of these committees may have direct links to political parties and may have previously held positions in these political parties or other conflict organisations. While this may make reaching decisions or drafting recommendations challenging it ensures that the committee considers the views of different groups. Links to political parties will also facilitate the implementation of decisions or recommendations.
- These committees may have international members or an international chair. This will allow international mediators to continue to play a constructive role in the post-agreement period of the peace process. International members should be chosen based on their previous experience and expertise. This can increase the status of the committee and make non-implementation of their recommendations or decisions less acceptable.

Conclusion

Territorial self-government (TSG) is at the heart of many current and proposed conflict settlements. TSG provides territorially concentrated groups, usually those that are minorities within the wider state, with autonomy over a range of matters. This can provide such groups with security against discriminatory state practices and official recognition. Yet such arrangements are often unhappy compromises and the compromise nature of such measures and the post-conflict context in which they operate can lead to disputes. The successful resolution of these disputes is essential to maintaining peace and stability. Constitutional and supreme courts are frequently tasked with arbitrating these disputes.

These courts must be carefully designed to help them to fulfil this role. The Courts independence must be guaranteed, appointment procedures crafted to provide for diversity and legal experience and expertise, meaningful access for different conflict parties must be preserved, and collegiality should be encouraged. Dispute resolution committees should also be used to protect the new institutions and to prevent to politicalisation of the judiciary. The international community can provide support and assistance through training and capacity development programmes.