



RULE OF LAW PROGRAM FOR SUB SAHARAN AFRICA

STAKEHOLDERS' WORKSHOP ON THE ALTERNATIVE POLITICAL ORGANIZATIONS AND CONSTITUTIONAL OPTIONS FOR BALANCING ETHNIC DIVERSITY AND ENHANCING UNITY, STABILITY AND DEVELOPMENT IN THE HORN AFRICA HELD AT THE SHERATON HOTEL, DJIBOUTI, 25th-29th JANUARY 2010

WORKSHOP REPORT

The workshop was convened as part of the Konrad Adenauer Foundation's initiatives of enhancing cooperation and building of mutual trust among various stakeholders in the Horn of Africa as a means to effective resolution of conflicts in the region with the ultimate goal of promoting peace and security in the region. It was convened under the aegis of the Rule of Law Program for Sub Saharan Africa.

The main objective of the workshop was to offer a platform to participants from the Horn of Africa to share, reflect and draw lessons and experiences on the various conflicts in the region with a view to coming up with different approaches and strategies of addressing the same. The workshop also sought to address the issue of balancing cultural and ethnic diversity as a means to enhancing unity, stability and development in the region.

In their welcoming and key note remarks respectively, Prof. Christian Roschmann, Director of the Konrad Adenauer Foundation's Rule of Law Program for Sub Saharan Africa and Mr. Abdi Elmi Achkir, the Director of the Cabinet of the Presidency of the Republic of Djibouti illustrated and underscored the importance of positive management of the existing diversities in the region as a means to attaining lasting peace, stability and security in the region.

Root Causes of Conflicts in the Region

The workshop began by trying to identify the root causes of conflict in the region. This session was led by Prof. Taban Taban Lo-liyong and Prof. Andreas Eshete who noted that conflicts in the region stem from the colonial era. Lack of proper management of diversities such as ethnic, cultural and religious was identified as one of the major challenges and causes of the conflicts in the region.

Further, they pointed out that ill-defined ambitions by the ruling class, diseases, poor governance, poverty, crises of legitimacy were some of the catalysts of conflicts in the region. Prof. Eshete distinguished the micro level from the macro level of conflict,

arguing that most conflicts in the region were not taking place between the people *per se* but rather between the people and their governments.

They both called for home-grown solutions to the conflicts as opposed to adopting foreign strategies that may not necessarily conform to the prevailing local factors on the ground. In order to succeed in this, people's participation in the various processes was deemed as essential.

Consequently they called upon stakeholders to grant the Sudanese and Somali people a chance to try and work out their own solutions.

In the ensuing plenary and group discussions, participants pointed out that the unequal distribution rather than perceived scarcity of resources, as well as a problem of identity were some of the other major causes of conflicts. They called for the building of mutual trust among the people, building of viable institutions based on strong and sound constitutional framework and functioning markets as some of the ways of resolving these problems.

Participants made it clear that mere coping and pasting of foreign models in addressing the conflicts in the region were hardly ever fruitful in the long run. Nonetheless, they acknowledged the important role that regional organizations and international partners can play particularly as regards supporting the broader reform agenda.

In a nutshell, the following were identified as some of the roots causes of conflicts in the region.

At the state level,

1. Poor governance

- Lack of accountability
- Lack of transparency
- Marginalisation of some people, group or community
- Lack of equitable justice
- Power in the hands of few
- Maladministration leading to deprivation
- Inequitable distribution of wealth and resources

2. Education

- Lack of quality education
- Failure of educational system to produce or provide good leaders
- Attitudinal problem

3. Intolerance

- Racial
- Religious
- Political

- Ethnical
- Gender inequality

At the community level,

- Ineffectiveness of law enforcement agencies
- Political use of ethnicity
- Scarcity of resources (water, agricultural land)
- Foreign interference

The State of the Rule of Law in the Horn of Africa

In his presentation titled “The State of the Rule of Law in the Horn of Africa – A *New Sudan*: Precondition of regional peace?” Prof. Manfred Hinz identified four main reasons for the persisting conflict in Sudan. These are Arabization, Islamization, Marginalization and Exploitation. By addressing power-sharing, wealth sharing and setting a timetable for the implementation and the holding of a referendum, he found the Comprehensive Peace Agreement (CPA) to be a valuable tool to encourage the rule of law in Sudan. He pointed out that CPA’s contribution to peace rather than unity was worth exploring because a peaceful Sudan could contribute immensely to the peace in the whole region. The re-appropriation of traditional governance and customary law as well as the revival of traditional conflict resolution mechanisms as envisaged in the CPA were seen as necessary conditions to bring about peace.

In the ensuing discussions, participants identified similarities between the situation in Southern Sudan and Somalia, and reiterated the important role that customary law and transitional justice can play in solving the conflicts. However as opposed to Sudan, they found Somalia’s historically clan-based society and its cultural orientation to be inconsistent with the centralist state structure hence the need to find a suitable home-grown solution.

Protection of Socio-Economic and Political Rights of Minorities

In his presentation, Dr. Markus Boeckenfoerde took participants through the technical aspects of drafting a constitution that will prevent conflicts depending on the prevailing circumstances. Using examples of culturally diverse countries such as Switzerland, he illustrated how national constitutions can be drafted in a way that facilitates the inclusion and protection of minorities within a democratic system. Rather than engaging in discussions on federalism, he called upon stakeholders to focus on the contents and to discuss the challenges of multi-cultural and multi-ethnic settings.

In a rejoinder, Ambassador Mohamed Warsame argued that in a country such as Somalia, there was need for the protection of the majority. He pointed out that there were major flaws in the decision-making process as well as in the framing of development assistance, due to the engagement of few Warlords pretending to speak

on behalf of Somalis as a whole. He stated that clans should be involved in the state-building process if it was to be successful.

Taking a social-anthropological approach, Markus Hoehne and Prof. Musa Abdel Jalil reiterated the importance of acknowledging and embracing national identities and ethnicity of various groups as another way of overcoming conflicts. Markus Hoehne called for an 'integration-through-difference' approach to create stable institutions that can promote peace and security in the Horn of Africa. Both panellists underlined that cultural and ethnic diversities *per se* were not a cause of conflict but rather their politicization ever since the colonial era because these identities have been found to provide convenient 'raw material' for mobilization and in-fighting. Drawing an optimistic picture Markus Hoehne pointed out Djibouti as an example of how ethnic diversity could actually warrant peace and stability.

On his part, Prof. Musa Abdel Jalil called for the reshaping of politics of identities in Sudan. He demonstrated how efforts to homogenize identity in Sudan through Arabization and Islamization have failed and called for a bottom-up approach to the drafting of a new constitution that will effectively address diversity.

The Role of Regional and Sub-regional Organizations in Strengthening the Rule of Law and Protection of Minority Rights

Prof. Stefan Brüne, gave an insight into IGAD's efforts towards resolving some of the conflicts in the region as well as its efforts towards the promotion of cooperation and integration of States in the Horn of Africa. He drew three possible scenarios for the region's future:

1. A positive scenario in which an efficient regional economic bloc provides a basis for a common foreign and security policy in the region
2. A moderate scenario, assuming member states' hesitant preparedness to cooperate on issues regarding national interest, allowing for processes of coordination and agreement procedures among states only
3. A negative scenario, with power remaining in the bilateral state sphere where cooperation is limited to temporary (bilateral) alliances only

Prof. Brüne clarified that IGAD like most other regional bodies can only be as strong as its member states. Consequently, he pointed out that IGAD is currently a very weak institution, mainly assisting member states in pooling resources and offering a platform for cooperation. He noted that IGAD aimed at overcoming the region's neo-patrimonial governance structures that are characterized by informal decision-making processes thereby opening the doors for corruption.

Recently, IGAD adopted 'A Peace and Security Strategy 2010-2015' in an attempt to define a roadmap towards the adoption of peace and security in the region by addressing both intra- and interstate conflicts along the lines of its core concepts of subsidiarity, interest convergence, constructivism and promoting a gradualist approach. Currently, IGAD's major challenge is dealing with member states' reluctance to embrace any new regionalist collective approach that might limit their

own freedom of action while at the same time satisfying donors' demands in the absence of a proper political strategy.

As a way forward, participants reiterated the need to manage diversity in the region in a more positive and proactive manner.

To achieve this, they suggested the following;

- 1) Citizenship should be the primary factor when considering one's nationality and eligibility as a member of any state.
- 2) There is need for a constitutional framework that ensures equitable distributional of national resources preferably through decentralised form of governance. This will alleviate the fears of minority groups and guarantee their rights.
- 3) There is need for formation of effective and accessible legal institutions that will promote and protect the rights of all citizens in a fair and just manner.
- 4) Legal pluralism should be encouraged in order to give different communities the chance to exercise their own customary practices regarding conflict resolution. Thus, customary law should be harnessed and reconciled with statutory law.

On how the crisis in Somalia can be addressed, participants proposed the following;-

- 1) Promote dialogue and reconciliation among various stakeholders and harmonize bottom-up and top-down reconciliation approaches in an inclusive manner and encourage the Somali Transitional Government (TFG), Somaliland and Puntland in that direction.
- 2) Introduce post-conflict transitional justice program to address people's concerns in particular marginalized minorities and the women in order to restore confidence and hope to the people of Somalia.
- 3) Strengthen legal and law enforcement institutions to promote justice and the rule of law.
- 4) Address poverty and humanitarian crisis in Somalia and introduce rehabilitation recovery, reconstruction and development projects.

APPENDICES

I. WELCOMING REMARKS BY PROF. CHRISTIAN ROSCHMANN, DIRECTOR, RULE OF LAW PROGRAM FOR SUB SAHARAN AFRICA

M. le Directeur du Cabinet de la Présidence, M. Secrétaire Général du Ministère de Justice,

Welcome to this important conference held by Konrad Adenauer Foundation, a conference which has a long title but is in essence on development and stability in the Horn of Africa. Let me first say a few words about the Konrad Adenauer Foundation – who we are and why we are holding this conference in Djibouti and then why this conference is important.

The Konrad Adenauer Foundation is a German political foundation, close to the Christian Democratic Union, we are active nationally and internationally, we are deeply involved in development work. We have country representatives in a number of African countries and we have sector programs. This program is a rule-of-law sector program which means that it deals exclusively with rule-of-law issues but does it Africa-wide. We hold conferences and workshops and do publications and counselling.

We are holding this conference in close cooperation with the government of Djibouti. We believe that Djibouti as a country can play an important role in the development and peace process in the Horn of Africa in two respects.

First, Djibouti is a success story in itself of how to deal successfully with ethnic diversity in a politically sensible and thence economically advantageous way and it can therefore serve as an example for other countries in the region.

Second, it can because of its political and economic position serve as a mediator and facilitator for other countries in the region, a role that is emphasized by its position as host of IGAD headquarters.

Now, let me say a few words on the importance of this conference. In the Horn of Africa, more countries are ridden by problems of fragmentation than in most other parts of the world. And too many countries are not just fragmented, they are also fractured and some are subject to internal strife.

If we look at countries like Switzerland, one of the most successful countries in the world has ever seen and the richest countries in Europe, we see that internal ethnic diversification does by no means necessarily lead to conflict. On the contrary, it can lead to stimuli as many countries show from Switzerland to India and Canada. This is why this conference puts an emphasis on exploring avenues of harnessing ethnic diversity to resolve conflicts and to further development.

One of the key issues, we believe, of dealing with ethnic diversity in a productive way is showing ways of increasing wealth, of making people richer by cooperation instead of confrontation. When people believe that they gain more by cooperating than by working against each other, they will start to cooperate. We are aware that this is a long process but it is a process that begins with numerous minor and seemingly insignificant acts that cumulatively build trust and hope in the long run. Development and through it stability is therefore another important theme of this conference.

But there will be neither peace nor development without functioning institutions, the rule of law, in national as well as international, regional, contexts. The conference will also highlight this important aspect.

All three aspects however are intricately interwoven and cannot be dealt with separately in practice. This is why we have brought them together in this conference.

I hope this conference will be a success which means it will carry us a bit further towards prosperity, stability and peace.

I would like to give my special thanks to the government of Djibouti for giving this conference vital support.

I also would like to thank the Max Planck Institute and its representatives for its advisory and logistical support.

II. CULTURAL AND ETHNIC DIVERSITY AS AN INSTRUMENT FOR CONFLICT RESOLUTION BY MARKUS HÖHNE

I Intro

I appreciate the agenda set by Prof Roschmann in his introduction to this workshop. He mentioned that the aim of this meeting was to learn about 1) Integration of differences, 2) reflect about economic development and the creation of wealth, which together with 3) stable institutions could lead to peace and development in the Horn of Africa.

Against this background, it is now my task to elaborate on the question how cultural and ethnic diversities could (or could not) be integrated peacefully, and what we can learn from a few concrete examples about these issues.

Let me start with a few critical remarks about ethnic groups/ethnicity, which are the form of cultural identity most commonly discussed with regard to Africa.

II Qualifying ethnic groups and ethnic/cultural diversity

Three clarifications:

1) There is nothing 'natural' about ethnic groups

It is well established knowledge in social anthropology, and in fact in related social sciences, that 'ethnic groups' and nations/nationalities do not exist since time immemorial. They are not natural givens. It is questionable if human beings were always organized or belonged to groupings that reasonably can be called ethnic/national. Let me stress that what we call 'ethnic groups' are very often quite recent social and cultural manifestations (there are exceptions to this rule, though).

Ethnic groups usually feature commonalities in language, culture, and religion, often refer to common (partly fictive/mythical) descent, and sometimes reside in a more or less clearly defined territory. However, none of these features provide you with a complete 'check list' of features that must be there in order to be an ethnic group. There are for instance many Irish people who consider themselves Irish and may even be fierce Irish nationalists, without speaking Gaelic, the old (and recently revived) Irish language. Germans may speak one language and dispose of a similar stock of customs, but may adhere to different Christian sects (that fiercely fought each other some centuries ago) or even be basically atheists. Moreover, Germans resided in a number of small kingdoms and counties, each with their own head and administrations, and different currencies and legal arrangements until the late 19th century. The idea to belong together in one state under one rule did not come at all natural to many ethnic Germans 100-150 years ago. In Africa, ethnic groups were often only defined by the colonizers. It served their aim to gain control over the land and its resources, and to divide and rule. Certainly groups sharing cultural features and distinguishing themselves from others existed already in many cases; yet, differences/similarities were frequently manifest in differences/similarities of status and/or occupation. People in Africa did not necessarily define themselves as Hutu, Tutsi, Kikuyu and so forth in the rigid sense these ethnic divisions were employed by colonial and post-colonial governments. Over a period of half a century, probably, these differences became entrenched in the minds of Africans and non-Africans alike. Nonetheless, there is nothing 'natural' about them. Even Somalis, who shook the Horn in the second half of the 20th century with their nationalism, appear in old (pre- and early colonial sources) not as an ethnic or national unit. It is very probable that Habr Awal in the north did not know anything about, or did not perceive themselves related to Laysan or Abgaal in the south in the early 19th century.

2) 'Ethnic' is a relational category

Ethnic identity is based on sameness (within) and difference (toward the outside). This means that ethnic groups do not exist in isolation. Only in relation to and interaction with other groups that are perceived as different and perceive themselves as such can ethnic identities exist. Therefore, as the social anthropologist Frederik Barth emphasized more than 40 years ago, ethnic groups constitute themselves at the boundary. They are defined through interaction, and not by a 'hard' cultural core. In fact, aspects of culture can change, and certainly the persons manning an ethnic

group change (through death, assimilation, migration). The persistence of such a group hinges on ascription and self-ascription in contexts of social interaction. Another aspect that was stressed by Guenther Schlee, has to be added here: Due to their 'relational existence', ethnic groups basically 'recognize and understand each other'. Mutual recognition and understanding does not mean love and peace. To the contrary, 'old enemies' know each other often best, and copy each others behavior and strategies in their conflict (Somaliland and Puntland and their respective supporters are cases in point, in my view).

3) Cultural/ethnic differences do not cause conflict

Despite these qualifications about the historical and sociological relativity of ethnic groups, they certainly exist and play a great role in politics and societies today, in Africa and elsewhere. Still, this does not mean that ethnic and cultural diversity within a given territory would lead 'automatically' to conflict. In fact, as Guenther Schlee outlined in the first chapter of his book 'How enemies are made' (on display here), there is no evidence whatsoever that great ethnic diversity actually leads to frequent and/or particularly violent conflicts. To the contrary, some of the fiercest conflicts in history and in recent time erupted among people who were culturally quite similar. I already referred to the religious wars in Germany in the 17th century. The American Civil war is another case in point. Also the war in ex-Yugoslavia in the 1990s pitted people against each other who spoke the same language (Serbo-Croatian) and shared many cultural traits. Religion, in fact, only became a decisive marker distinguishing the Muslim Bosnians, who, after years of socialism, would have counted as atheists for Muslims in many other countries in the world. Also Somalia was perceived as maybe the only true post-colonial nation-state inhabited by ethnically and culturally homogenous population until the 1980s. Between the 1940s and 1970s, many Somalis presented themselves as fierce nationalists struggling for a Greater Somalia in the Horn. Over the last two decades, as everybody here knows, Somalia fell apart in civil strife driven by people who were ethnically extremely similar. Today, many Somalis are dispersed as refugees throughout the world. Those who reside as citizens in various states in the Horn, such as Djibouti, Ethiopia and Kenya, often prefer to stay partitioned. Cultural similarities and a common identity persist, but territorially and politically, Somalis are fragmented.

III Examples for dealing with ethnic/cultural diversity in the Horn

I will be brief here, since my colleague, Dr Muusa Abdel Jaliil, will provide us with some more in depth research on this issue in a short while. I only mention that in Kenya, a central national state has been established, under one party rule. Behind the façade of party rule, it was, however, a state controlled mostly by the presidents' own group between the 1960s and circa 1991. Only in the early 1990s, a multi-party system was introduced. After having successfully conducted the first democratic elections in 2002 Kenya was praised as example for other African states. Five years later, the next elections ended in violence between various ethnic groups whose militant members mercilessly killed each other. Up until today, it is not really clear how to deal with this legacy of structural inequalities and recent violence.

An initially very innovative example of how to deal with ethnic diversity is provided by Ethiopia. For decades, the people of Ethiopia, who belong to dozens of ethnic groups, have been under imperial autocracy and later, socialist dictatorship. For almost a century, the rulers belonged to one group (Amhara) that appeared superior to all other groups. It bolstered its domination through politics of language and culture. Once the rebels of the TPLF and EPLF took power in Ethiopia and Eritrea, respectively, in 1991, a new umbrella organization, the EPRDF (Ethiopian Peoples' Revolutionary Democratic Front) was established that incorporated a number of ethnic guerilla movement in Ethiopia. The new multi-ethnic government proposed a federal constitution in 1994 that came into force in 1995. In its article 39 it grants 'every nation, nationality and people in Ethiopia an unconditional right to self-determination, including secession'. The division of the polity in nine federal states, five of which are ethnically largely homogenous (Somali, Oromo, Afar, Amhara and Tigray) seemed initially a way to integrate ethnic diversity peacefully. However, already in the early 1990s tensions over power sharing had escalated within the EPRDF; many of the previous ethnic movements left. They were replaced with willing allies by the dominating members of the TPLF. Since the mid 1990s, Ethiopia became increasingly a single-party state dominated by one faction, closely (but not exclusively) related to one ethnic group. The constitutional provisions on secession are null and void. In 2005 the EPRDF was so sure of itself that it allowed free multi-party elections. When it turned out that the opposition parties had won a large share in power, the results were rigged. Violence erupted and dozens, possibly hundreds of people got killed between June and November 2005. Tens of thousands were jailed. Besides the issue of power-sharing at the level of the nation state, ethnic federalism in Ethiopia led to a number of conflicts at the level of regions and districts over boundaries. Access to resources was contested (particularly in contexts where pastoral nomads resided in neighboring districts/regions). Identities were partly renegotiated (e.g. Borana, Gabra, Garre in south-eastern Ethiopia). Ethnic federalism also privileged group rights over individual rights. It 'froze' identities and their dynamic interrelationships by binding members of an ethnic group territorially to their federal state.

In Somalia, ethnic diversity was suppressed by fierce nationalism and irredentism. Only in the context of the state collapse and the civil war, some ethnic differences between so called majority groups of 'pure' Somalis and members of minority groups, e.g. Bantu/Jareer, Asharaf who allegedly are of different descent gained relevance. This had positive and negative aspects. Many members of these minority groups were attacked, robbed, raped and killed with impunity. On the other hand, one in refugee camps in Kenya, they were treated preferentially and many were accepted for resettlement in the US or elsewhere.

In sum, it turns out that nationalism as well as ethnic federalism did not succeed to overcome ethnic/cultural diversity or to integrate this diversity peacefully in the long-run.

IV Integration through difference, political organization and constitutional options

Still, I maintain that diversity is not the cause for these problems. The causes have to be sought rather regarding political and economic mismanagement and injustices. Economic inequalities and political marginalization frequently lead to conflict. Ethnic and cultural identities provide convenient 'raw material' for mobilization for fighting. However, there are examples how ethnic diversity can actually be the guarantee for stability and peace. The fact that certain ethnic groups predominantly follow certain occupations helps peaceful and beneficial co-existence in parts of West Africa. Occupational niches can be filled in local and regional markets, and interdependencies develop that tie people of different faith, culture and language together. This works at least at the local level. However, when it comes to the level of the state, conflicts frequently arise since power is often monopolized instead of shared. And occupational niches do not exist at the level of government. A socio anthropological example where differences were peacefully integrated in a hierarchical system even within a state is the Indian caste system. It certainly is not without blemish, but it can be recognized as a system that allowed for centuries of peaceful integration and co-existence of different groups in a hierarchically organized polity. This example, however, can certainly not be transferred to the Horn of Africa.

Yet, a form of political organization that in fact is endemic in the Horn is based on integration through religion. In large parts of Sudan (the north) as well as Somalia, ethnic and clan differences can potentially be bridged through invoking common religio-political orientations. Even if some in the West do not like to hear it: the Islamic courts movement in Somalia, and probably even more so the infamous Al Shabaab are examples for integration clan difference.

However, at least the later is certainly not a positive example of establishing peace and stability. Contrary to the praise of Al Shabaab by some of the speakers yesterday, I would say that this militant movement owes its growth and strength external interventions and counter-terrorism activities of Ethiopia and the USA. Secondly, it certainly does not enjoy the legitimacy of most people under its control. To the contrary, Al Shabaab rules through terror in many places. This does not seem a viable option for the future of Somalia. But, to repeat this point: it integrates members of different clans, and in its ideology clearly aims at a religious nation/umma, which is one option to integrate differences.

What is left, finally? I would like to end with a very brief sketch of an idea that originated in Europe, in Germany, in particular, but may be worth thinking about with regard to integrating differences elsewhere as well.

The post-second world war generation in West-Germany – sometimes referred to as the 1968 generation – had to face the fact that its parent generation had been involved with the Nazis. Many West-German students in the 1960s even perceived the Federal Republic of Germany established after the war as illegitimate since they saw clear

continuities between the Nazi and the post-war German state. In fact, being German seemed to many a kind of contiguous disease. They rather identified as class and/or with revolutionary movements elsewhere. One way to accept the post-war republic as a developing democratic state, and at the same time not to forget the horrors of the Nazi past, was constitutional patriotism. This idea was developed by the philosopher Dolf Sternberger and later taken up by Jürgen Habermas – a leftists thinker himself, who, however, despised of the narrow-mindedness and turn to violence of the students movement of the 1960s. Constitutional patriotism would provide people with a collective identity that found its roots in the potentially universal values of liberal democracy, rather than the aggressively particular values of the ethnic group/the nation. This would be the basis for a post-national identity based on constitutional principles and the will of the people to actively engage within their own polity. The state is not legitimate as ‘natural casket’ for the nation/ethnic group, but as guarantor of law and security toward free and equal citizens that participate in the political affairs through elections and other forms of active political participation. The concept was criticized for its neglect of the emotional band between people and state – that is frequently expressed in national anthems, myth of common origin etc. However, defenders of the idea stressed that a common political culture and common experiences and history can replace ethnic/national framework of reference.

In conclusion, I suggest to reflect about a political framework for people in the Horn of Africa that is post-national and post-ethnic, but still binds the citizens of a state together that is not just perceived as ‘*mandeeq*’ (lactating milk camel) or resource generator, or as means of exploitation, but as an institution shaped and shared by its members – the ordinary citizens (and not only the elite, as Dr Bulxaan rightly reminded us yesterday).

III. INSTRUMENTS OF CONSTITUTIONAL LAW TO PROTECT SOCIO-ECONOMIC AND POLITICAL RIGHTS OF MINORITIES BY MARKUS BÖCKENFÖRDE



Controlling Majority Rule

"If it be admitted that a man possessing absolute power may misuse that power by wronging his adversaries, why should not a majority be liable to the same reproach? Men do not change their characters by uniting with one another; nor does their patience in the presence of obstacles increase with their strength. For my own part, I cannot believe it; the power to do everything, which I should refuse to one of my equals, I will never grant to any number of them."

Alexis de Tocqueville, "Tyranny of the Majority," Chapter XV, Book 1, *Democracy in America*



Constitutional Instruments

- A. Creating viable means for implementing socio-economic and political rights
- B. Creating options for self-governance of minorities
- C. Creating options to participate



A. Creating viable means for implementing Human Rights

- I. Effective Implementation of individual rights and non-discriminatory provisions
 - a. Viable drafting
 - b. Protection against majoritarian alterations
 - c. Viable judicial review mechanism
 - d. Viable implementing commission





a. Viable drafting

Everyone has the right to [...] as regulated by law

Everyone has the right to [...]. Details are regulated by law.

Everyone has the right to [...] subject to public order or public morality.

Everyone has the right to [...] subject only to such limitations as are prescribed by law and are necessary to protect public safety or the fundamental rights and freedoms of others.

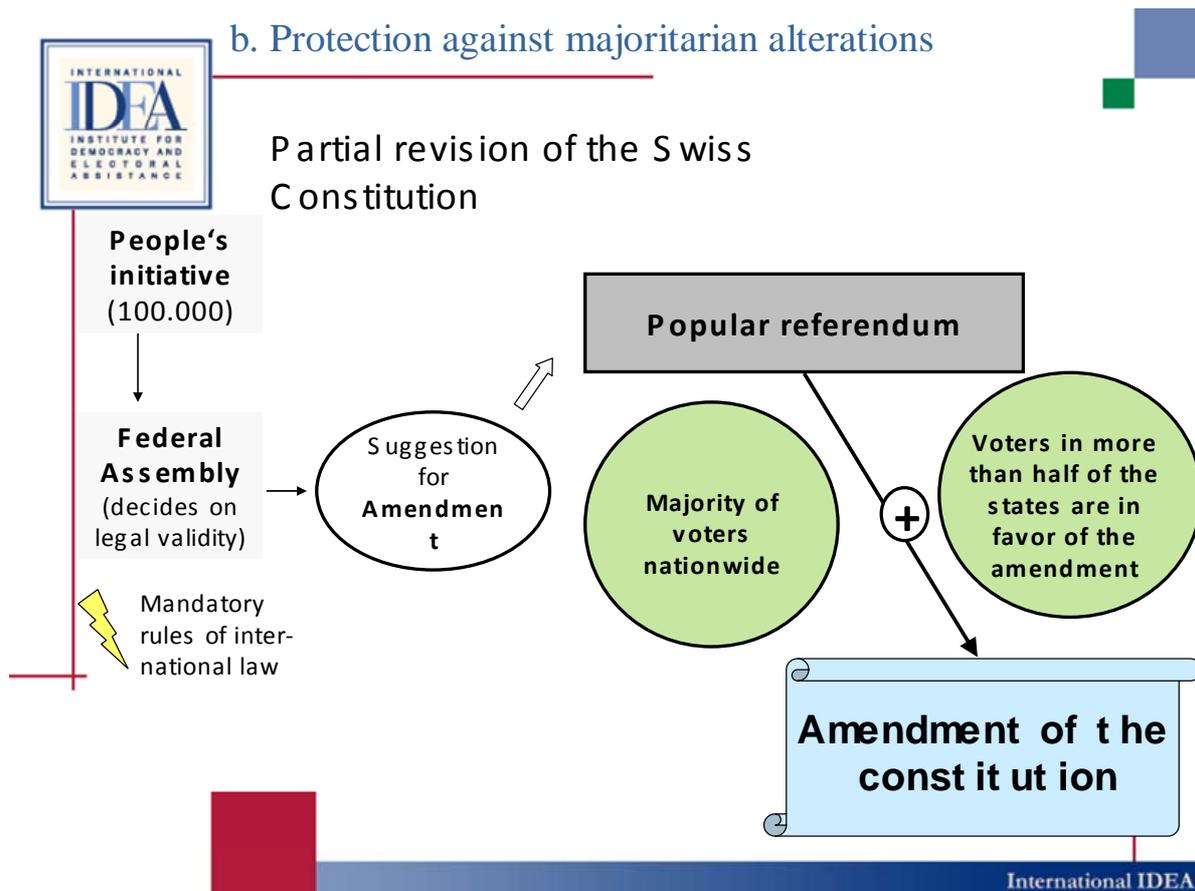
International IDEA



b. Protection against majoritarian alterations

In November 2009, the Swiss people voted in a popular referendum for an amendment of the constitution. Due to the popular decision (57,8%), a new provision was inserted into the Swiss Federal Constitution which entered into force immediately. The new Article 72(3) stipulates: “The construction of minarets is prohibited.”

International IDEA



b. Protection against majoritarian alterations

Constitutional Options to prevent dynamics as happened in Switzerland

(i) Inclusion of immutable constitutional provisions protecting fundamental rights / minority rights

Constitution of Namibia, Article 131
Entrenchment of Fundamental Rights and Freedoms
No repeal or amendment of any of the provisions of Chapter 3 [Fundamental Rights and Freedoms] hereof, in so far as such repeal or amendment diminishes or detracts from the fundamental rights and freedoms contained and defined in that Chapter, shall be permissible under this Constitution, and no such purported repeal or amendment shall be valid or have any force or effect.

Constitution of Brazil, Art. 60 (4)
No proposed constitutional amendment shall be considered that is aimed at abolishing the following:
[...]
IV—individual rights and guarantees.

International IDEA



b. Protection against majoritarian alterations

Constitutional Options to prevent dynamics as happened in Switzerland

(ii) Reference to Human Rights Standards superior to the Constitution

Constitution of Bosnia-Herzegovina, Article II (2)

International Standards. The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other laws.



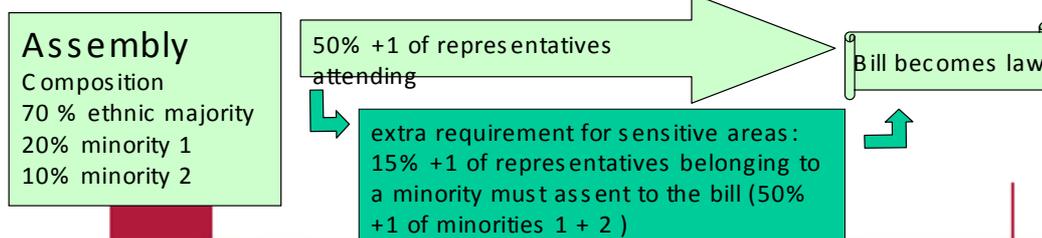
b. Protection against majoritarian alterations

Constitutional Options to prevent majority legislation against minorities

(i) Double majority voting in the legislature

Constitution of Macedonia Article 69 (2)

For laws that directly affect culture, use of language, education, personal documentation, and use of symbols, the Assembly makes decisions by a majority vote of the Representatives attending, within which there must be a majority of the votes of the Representatives attending who belong to communities not in the majority in the population of Macedonia. Any dispute regarding the application of this provision is resolved by the Committee on Inter-Community Relations.





c. Viable judicial review mechanisms

Independent and representative highest courts

Jurisdiction and powers to check individual executive and judicial decisions for conformity with constitutionally protected fundamental rights

Easy access for aggrieved citizens to apply

International IDEA



c. Viable judicial review mechanisms

National Interim Constitution, Art. 121

[...]

(3) Southern Sudan shall be adequately represented in the Constitutional Court.

Constitution of Bosnia and Herzegovina, Art. VI (1)

Composition.

The Constitutional Court of Bosnia and Herzegovina shall have nine members.

a. Four members shall be selected by the House of Representatives of the Federation, and two members by the Assembly of the Republika Srpska. The remaining three members shall be selected by the President of the European Court of Human Rights after consultation with the Presidency.

International IDEA



d. Viable implementing commission

Human Rights Commissions

Constitution of Ethiopia, Art. 55 (14)

Powers and Functions of the House of Peoples' Representatives
[...]

14. It shall establish a Human Rights Commission and determine by law its powers and functions.

Constitution of Zambia, Arts 125, 126

Article 125

Establishment of Human Rights Commission and its Independence

- (1) There is hereby established a Human Rights Commission.
- (2) The Human Rights Commission shall be autonomous.

Article 126

Functions, Powers, Composition, Procedure, Etc. of Human Right Commission

The functions, powers, composition, funding and administrative procedures, including the employment of staff, of the shall be prescribed by or under an Act of Parliament.

International IDEA



d. Viable implementing commission

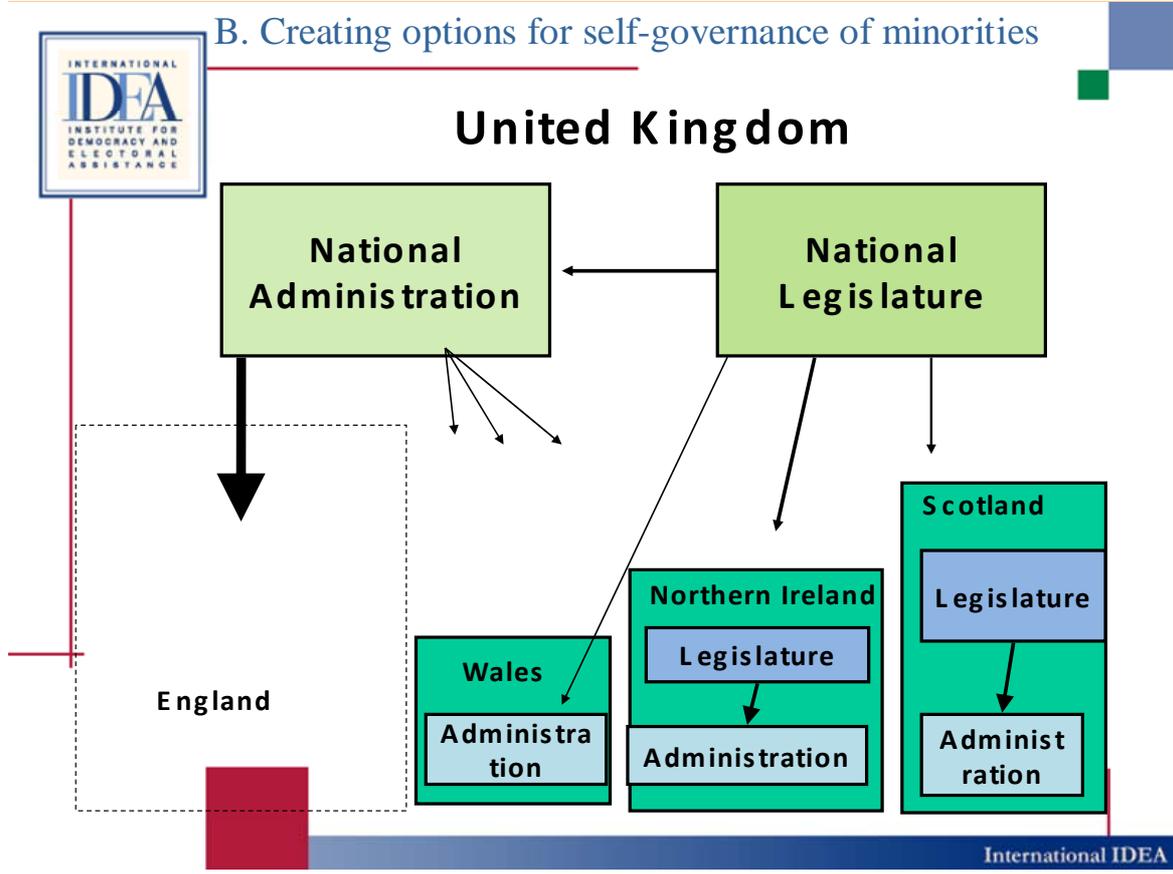
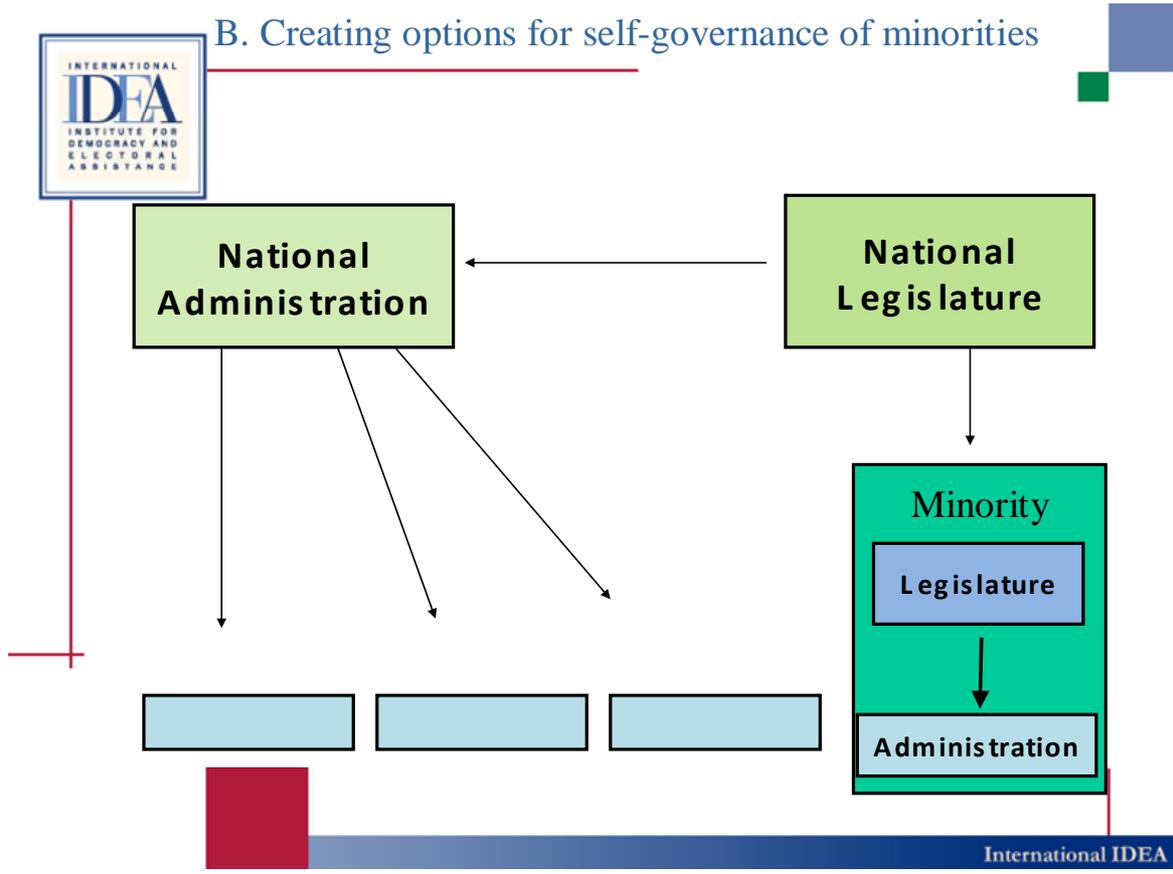
Human Rights Commissions

Constitution of Uganda, Arts 51 - 58

regulates

- Composition and Appointment (who qualifies for membership and who appoints)
- Functions (mandate, e.g. independent investigations of violations)
- Independence (no direction or control from other institution)
- Removal
- Expenses (e.g. independent accounting)
- Staff (e.g. support team of field officers, research assistance, etc.)

International IDEA





B. Creating options for self-governance of minorities

Transfer of autonomous rights in the constitution

Constitution of Indonesia, Article 18A

(1) The relationship between the authority of the central government and that of the regional authorities of the provinces, regencies and municipalities, or between the authority of the province and that of the regencies and municipalities, shall be regulated by law having regard to the particularities and diversity of each region.

Constitution of Finland, Arts 75; 120

Art. 75 Special Status of the Åland Islands. The Åland Islands have self-government in accordance with what is specifically stipulated in the *Act on the Autonomy of the Åland Islands*.

Art. 120 Special legislation for the Åland Island. The legislative procedure for the *Act on the Autonomy of the Åland Islands* and the *Act on the Right to Acquire Real Estate in the Åland Islands* is governed by the specific provisions in those Acts.

International IDEA



B. Creating options for self-governance of minorities

Transfer of autonomous rights in the constitution

Constitution of Tanzania, Chapter IV. (Arts 102-107;)

The Revolutionary Government of Zanzibar, the Zanzibar Revolutionary Council and the House of Representatives of Zanzibar

Constitution of Tanzania, Art. 98 (1)(b)

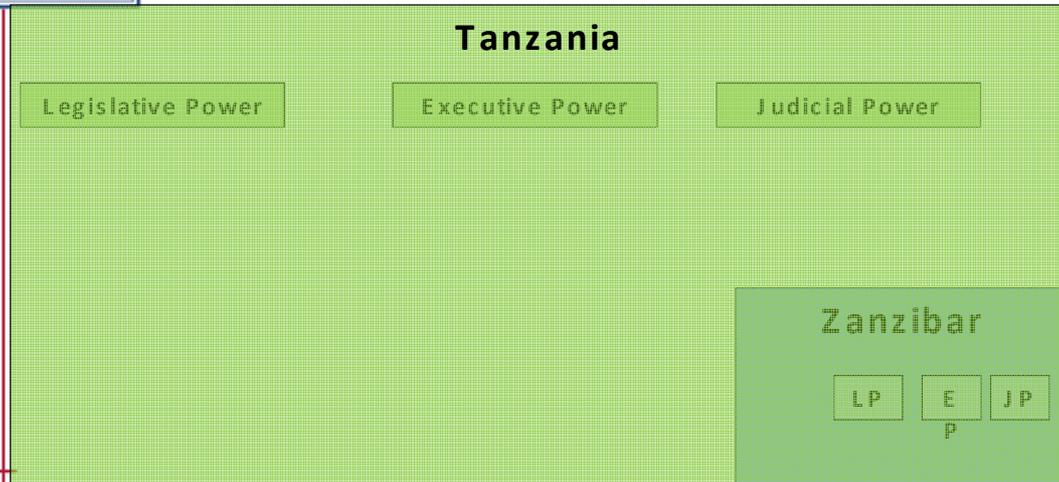
Matters the amendment of which requires to be supported by two-thirds of all Members of Parliament from Mainland Tanzania and two-thirds of all Members of Parliament from Tanzania Zanzibar

International IDEA

B. Creating options for self-governance of minorities



Constitutional Setting in Tanzania



International IDEA

C. Creating options to participate



Composition of the Executive → equal and fair participation

Civil servants ⇒ Public Service Commission

Cabinet

Presidency

Model 1: Sudan

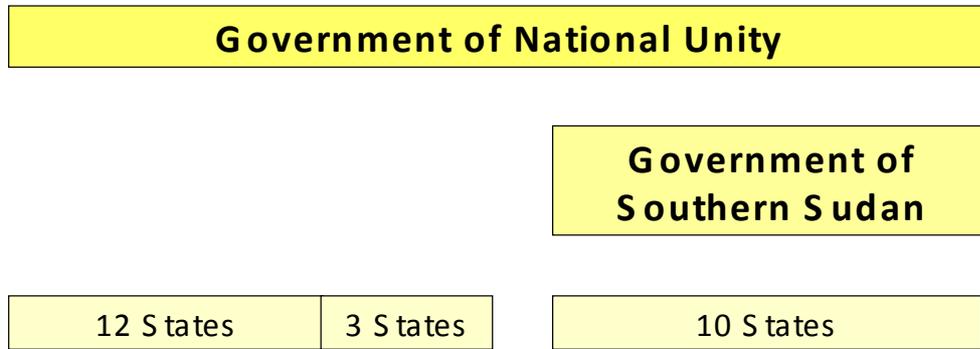
Model 2: Bosnia and Herzegovina

International IDEA



C. Creating options to participate

Model 1: Sudan

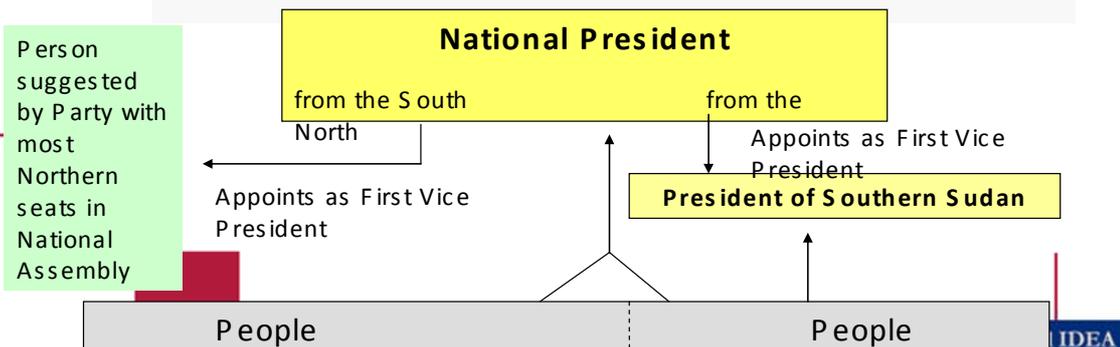


C. Creating options to participate

Model 1: Sudan

Interim Constitution of Sudan, Art. 62 (2)

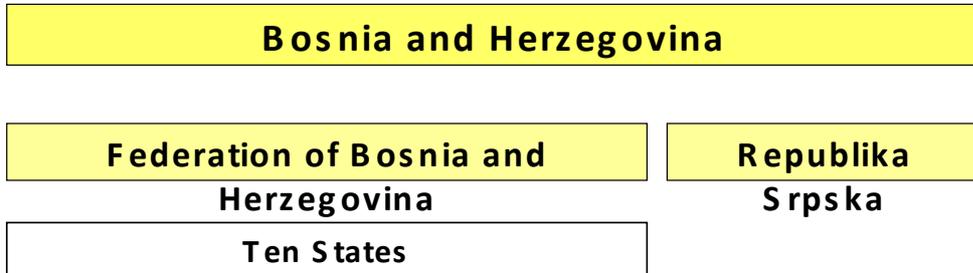
The elected President of the Republic shall appoint two Vice Presidents, one from Southern Sudan and the other from Northern Sudan. If the elected President is from the North, the position of the First Vice President shall be filled by the person who has been elected to the post of President of Government of Southern Sudan, as the President's appointee to the said position. In the event that a person from the South wins the Presidential elections, the elected President shall appoint the First Vice President from the North upon the recommendation of the party that won the highest number of northern seats in the National Assembly.



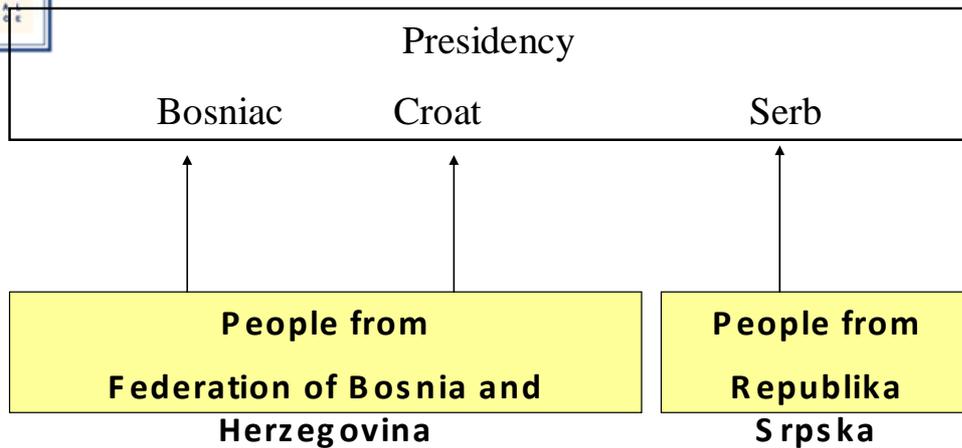


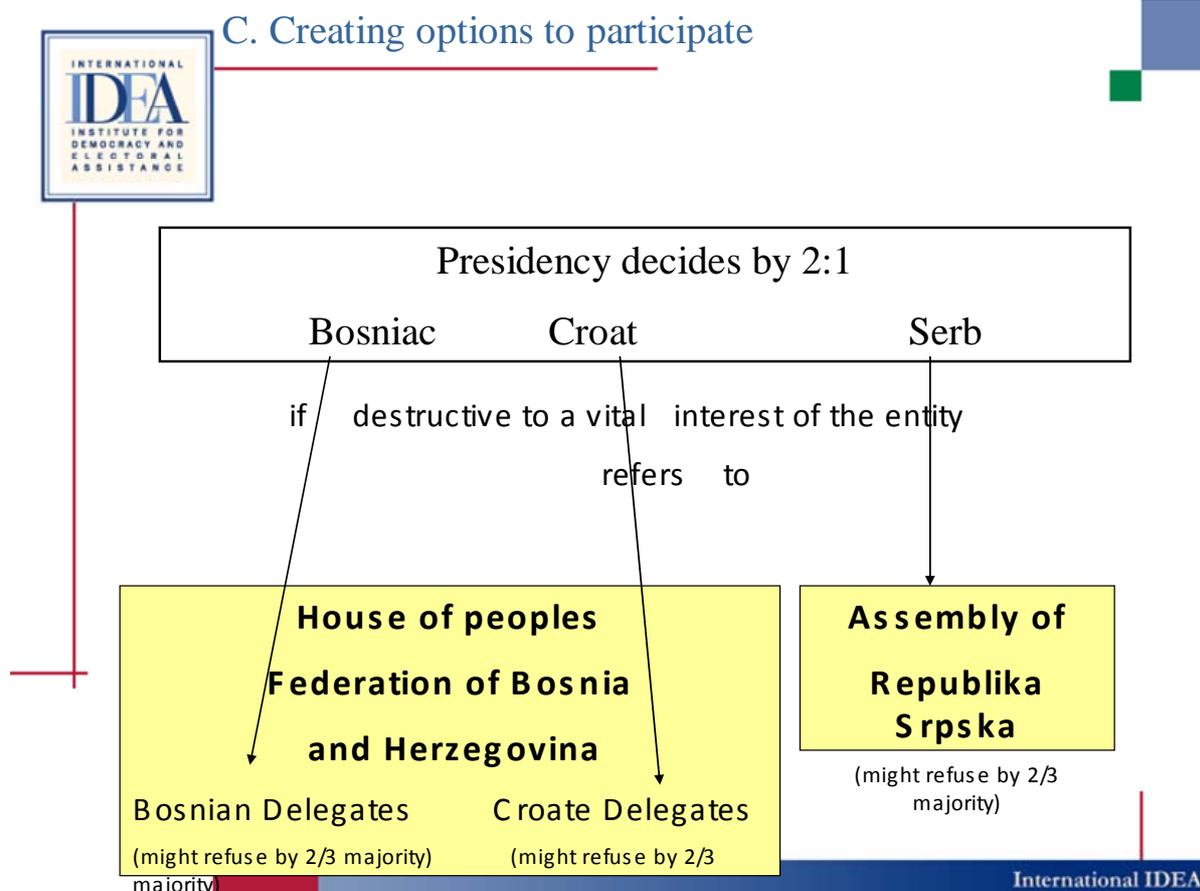
C. Creating options to participate

Model 2: Bosnia and Herzegovina



C. Creating options to participate





IV. WORKSHOP SYNOPSIS

The Horn of Africa is unique from the rest of Africa in the sense that it is the only region in Africa in which secessionist aspirations are most successful (Eritrea) and the constitutions of two countries foresee secession (Sudan and Ethiopia), while in the neighboring Somalia, the former British protectorate of Somaliland is equally adamant about its declaration of independence. Further, there are more countries in the Horn of Africa that have adopted federal constitutions (Ethiopia, Sudan and Somalia) than in the rest of Africa.

Ever since most of the countries in region gained independence from the colonial powers almost half a century ago, the region has become synonymous with hunger and perennial wars for liberation, self-determination, interethnic (inter-Clan) conflicts and full scale inter-state wars. While Ethiopia, which has been home of most inter-ethnic conflicts in Africa is going through a period of relative calm, the same cannot be said of the current situation in Somalia and Sudan. With the outbreak of the post-election violence in 2007 and the emergence of numerous militia groups such as 'Mungiki' in Kenya (the last bastion of stability in the region) seems to bring to the fore the extent of ethnic tension and dissatisfaction, and lack of understanding of the underlying root causes.

The prevalence of multidimensional conflicts have crippled the ability of the population in the region to work towards political stability and sustainable development.

Given that some of these conflicts enjoy the support of governments or kinship groups in one country for rebellious groups in others, it is essential to think of these conflicts in a larger regional context than in isolation, and put together efforts to prevent and resolve conflicts through a regionally coordinated approach. Nevertheless, regional efforts without the establishment and respect of the rule of law, is likely to lead to regional instability and escalation of conflicts.

It is in this context that this workshop is convened in a bid to contribute towards a better understanding of the co-relations between the perennial ethnic conflicts, political instability, underdevelopment and the lack of rule of law in the Horn of Africa. In addition, the workshop is intended to promote the determination to increase cooperation among the states of the region and Non State Actors in response to the aspirations of their long-suffering people. Without understanding the root causes of the wide spread sense of injustice, it will be impossible to transcend ethnic and national differences, so that the conditions for regional peace and security are established and maintained without prejudice.

The often emphasized sovereignty and territorial integrity of the states in the region are meaningless if the welfare, well-being and justice among its diverse people cannot be constitutionally guaranteed and effectively enforced. Thus, the long-term purpose of this workshop is to contribute to the enhancement and to inculcate a culture of cooperation instead of competition among the diverse ethnic groups.

The workshop will address *inter alia*,

1. The root causes of conflict in the Horn of Africa
2. The state of the Rule of Law in the Horn of Africa
3. Instruments of constitutional law to protect socio-economic and political rights of minorities
4. Cultural and ethnic diversity as an instrument for conflict resolution
5. The Role of Regional and Sub-regional Organizations in Strengthening the Rule of Law and Protection of Ethnic Minority Rights

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VI. GROUP PHOTO



VII. CONFERENCE PROGRAM

January 25th 2010

Arrival

Dinner

January 26th 2010

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|-----------|---|
| 0830-0900 | Registration |
| 0900-0910 | Welcoming Remarks by Prof. Christian Roschmann, Director, Rule of Law Program for Sub Saharan Africa |
| 0910-0945 | Introductions |
| 0945-1015 | Keynote address and Official Opening of the Workshop by Mr. Abdi Elmi Achkir, Director of the Cabinet of the Presidency of the Republic of Djibouti |
| 1015-1030 | Question & Answer Session |
| 1030-1100 | Health Break & Group Photo |
| 1100-1330 | Session 1 - Presentation and Plenary Discussion Chair: Prof. Christian Roschmann |
| | The root causes of conflict in the Horn of Africa |
| | Panellists: |
| | 1. Prof. Taban Taban Lo-liyong, Juba, Sudan |
| | 2. Prof Andreas Eshete, Addis Ababa, Ethiopia |
| 1330-1500 | Lunch break |
| 1500-1730 | Session 2 - Presentation and Plenary Discussion Chair: Mr. Peter Wendoh |
| | The state of the Rule of Law in the Horn of Africa |
| | Panellists: |
| | 1. Prof. Manfred Hinz, University of Namibia |
| | Health break |
| | Dinner |

January 27th 2010

0830-1100 **Session 3 – Presentation and Plenary Discussion**
Chair: Dr. Christoph Jaeger

Instruments of Constitutional Law to Protect Socio-Economic and Political Rights of Minorities

Panellists:

1. Dr. Markus Boeckenfoerde, IDEA, Stockholm, Sweden
2. Ambassador Mohamed Warsame, Mogadishu, Somalia

1100-1130 **Health break**

1130-1400 **Session 4 – Presentation and Plenary Discussion**
Chair: Mr. Ismail Mustafa

Cultural and Ethnic Diversity as an Instrument for Conflict Resolution

Panellists:

1. Mr. Markus Hoehne, Max Planck Institute for Social Anthropology, Germany
2. Prof. Musa Abdel Jalil, Khartoum, Sudan

1400-1530 **Lunch break**

1530-1800 **Session 5 – Presentation and Plenary Discussion**
Chair: Dr. Christoph Jaeger

The Role of Regional and Sub-regional Organizations in Strengthening the Rule of Law and Protection of Ethnic Minority Rights

Panellists:

1. Prof. Stefan Brüne, IGAD

Health break

Dinner

January 28th 2010

Session 6 - Plenary Discussion

Chair: Prof. Christian Roschmann

0830-1100 The Way forward: Options and Solutions

1100-1130 **Health break**

1130 - 1300 Conference Summary and Wrap-up

1300-1430 **Lunch Break**

1430-1830 Excursion

1930 Farewell Dinner

January 29th 2010

Breakfast

Departure