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POLICY BRIEF

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The Challenge of Constitutionalism and Separation of Powers Doctrine in South Sudan

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Summary

- *The Republic of South Sudan, although fairly nascent as an independent state, aspires to become a democracy that embraces constitutionalism.*
- *Constitutionalism is simply a commitment to restrain the power of state and government to the will of people. This is because the government cannot be trusted to use such power wisely and so it becomes necessary to restrain such power using various mechanisms that are mutually reinforcing with the constitution and making the government commit to the tenets of its provisions.*
- *There are fundamental doctrines of constitutionalism including sovereignty, separation of powers and entrenchment of the rule of law that serve as safeguards to any abuse of state power.*
- *Looking at the practice of constitutionalism in South Sudan, it is practically nonexistent because the government whose powers the constitution seeks to limit actually made the constitution and therefore imposed limits on the sovereign instead.*
- *All the doctrines of constitutionalism being sovereignty, separation of powers, and constitutional amendment process are essentially violated systematically and so they fail to meet the merit of constitutionalism.*
- *Having learned lessons in South Sudan over the last 10 years, constitutions matter and the need to limit excessive powers of the government as a whole and the executive in particular, is critical for stability and sustainability of the entire system and the preservation of people's rights and sovereign power. As such, the next constitution should impose unrelentingly limiting powers on the government and a rigorous countervailing mechanism that shall nurture checks and balances in the government. This is essential and timely, as the Agreement on the Resolution of Conflict in South Sudan (ARCISS) gets implemented.*

1 Introduction

This paper aims at exploring the practice of the concept of constitutionalism in South Sudan. Particularly, it assesses the extent to which the doctrine of separation of powers is practiced as it relates to vertical and horizontal power relationships in South Sudan. In order to understand this, one has to look at how major decisions that affect the relationship between the central government and the states, as well as the power play among the executive, the legislature, and the courts, have been made since 2005. This understanding is desired for a country that attained statehood only recently. This suggests that all the institutions and structures of governance and even the relationships between the citizens and the state, as well as inter-governmental relations, are new or being formed. As well, the country has been deeply involved in a self-destructive conflict and the agreement that has just been reached affords it an opportunity to self-examine and revitalizes social and political relations that have been torn.

Like all the states in Africa, South Sudan has a new constitution, which theoretically contains social contract between the state and the citizens, as well as the rules that govern state institutions and the relationships inherent therein, as well as applicable limitations on the exercise of power. A critical observation of power relationships in South Sudanese tells us that the constitution is not followed to the letter and spirit, showing an apparent divorce between practical decisions and the supreme law. Starting from the top political leadership to the common man on the street, there is a general agreement on the fact that both the constitution and the subsidiary laws that form the legal framework in the country are not observed or adhered to. A simple question that ought to be asked is why the constitution is not followed? This paper tries to answer this question and aims at exploring the possibility of achieving constitutionalism in South Sudan.

To set a stage for a meaningful discussion, we start with the definition of the constitution and constitutionalism so as to disentangle the theoretical and philosophical meanings underpinning those concepts. We then investigate the written laws and how they are practiced in South Sudan. The final part of the paper concludes with actionable recommendations.

2 Understanding the Constitution and Constitutionalism

In order to give this discussion some structure, it is important to establish a common understanding of what is meant by the constitution and its derivative, constitutionalism. Most people understand the constitution as a written document that contains the rules that govern both social and institutional relationships. However, practice has shown that not all constitutions are written. Stanford Encyclopedia defines the constitution as a set of norms (rules, principles or values) creating, structuring, and possibly defining the limits of, government power or authority (Stanford Encyclopedia of Philosophy, 20014). Duchacek was quoted in (Fombad, 2007) as defining a constitution as what has sometimes been described as a "power map," which derives its whole authority from the governed and regulates the allocation of powers, functions and duties among the various agencies and officers of government as well as defines their relationship with the governed. Thomas Paine was quoted in (McIlwain, 2007) as saying that "a constitution is not the act of a government, but of a people constituting a government, and a government without a constitution is power without right" (McIlwain, 2007). Bolingbroke was also quoted in (McIlwain, 2007) proclaiming that "by constitution we mean...that assemblage of laws, institutions and

customs, derived from certain fixed principles of reason, directed to certain fixed objects of public good, that compose the general system, according to which the community hath agreed to be governed.”

While various definitions of a constitution exist, it is important to underline the fact that a constitution is a law that governs the allocation of power and relationships—alternatively, a code of conventions, rules and regulations governing institutions and customs. The constitution more often than not is a written canonical book that contains the rules that govern both social and institutional relationships. The question that arises is whether the writing of these rules enhances the practice of observing the constitution. Answering this question is the subject of the discussion that underlies constitutionalism, but before we get to that, it is important to explore South Sudan’s constitution.

The Republic of South Sudan, as previously stated, has a written constitution, which is said to be the mother of all laws. This constitution is believed to derive its authority from the will of the people of South Sudan, hence its status as the supreme law of the land. As a superlative law, South Sudan’s constitution is thought to have a binding force on all persons, institutions, organs and agencies of government throughout the country¹. Understood as such, the authority of government at all levels is assumed to arise from the constitution and the law and so all the subsidiary laws are expected to conform to the constitution and any law that contradicts the constitution is null and void. This is at least what the written constitution says and our objective in this paper is to understand its application. Before we get into the specifics of what the constitutional practice has been in South Sudan, it is important to underscore the concept of constitutionalism within the global context. This will help us in properly evaluating the existence or nonexistence of such practice in South Sudan.

According to Stanford Encyclopedia, constitutionalism in its richer sense of the term is the idea that government can/should be limited in its powers and that its authority depends on observing these limitations (Stanford Encyclophedia of Philosophy, 20014). Francis Mading Deng defines constitutionalism as a “mechanism for controlling, regulating, and managing the exercise of power in a process by which people, individuals, groups, pursue material and other values through institutions using resources with outcomes and effects” (Deng, 2008, p 9)². To him, this is a process governed by fundamental assumptions that set the rationality for participation in the shaping and sharing of values and determine who occupies what position or gets what, when, and how, from the system (Deng, 2008). Sammy Adelman says “by constitutionalism I refer not only to constitutions themselves, but to a much broader aggregation of legislation, doctrine, conventions and non-state law which significantly affects the structure, powers, administration and accountability of all important organs of the state and affect relations between the state and the citizen” (Adelman, 1998).

Stanley Katz suggests constitutionalism is a consciously contrived mechanism for yoking limitations on government to the will of the people in a dynamic, geographically distributed manner (Katz, 2000). To Katz (2000), constitutionalism is a dynamic political process and not a fixed mode of distributing power, rights, and duties, and so a constitutional legitimacy is

¹ See the Transitional Constitution of South Sudan 2011

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validated by political and social realities than by formal legal criteria (Katz, 2000). Somewhat in agreement with Katz, Deng (2008) expands on Katz's point in a more emphatic way, saying that, "constitutionalism in Africa must be seen not as a process that begins and ends with the mere elaboration of a constitutional document, but rather as a living process that is constantly evolving with the participation of its people to promote their ownership of the governing frameworks and make them reflect the political, economic, social, and cultural dynamics of the continent and its populations" (Deng, 2008). Katz (2000) believes that constitutionalism is a "commitment to limitations on ordinary political power and revolves around a political process, one that overlaps with democracy in seeking to balance state power and individual and collective rights; it draws on particular cultural and historical contexts from which it emanates, and it resides in public consciousness" (Katz, 2000). Deng (2008) provides further elaboration on this point arguing that, "constitutionalism is not limited to the legal frameworks that are the specialty of experts, but embraces the totality of how the society and the state that emanate from it stipulate overriding goals and value-objectives, regulate the process by which those objectives are pursued, and provide incentives to reinforce positive behavior and disincentives to discourage negative conduct" (Deng, 2008).

What Deng and Katz appear to share is the greater point that the constitution confers legitimacy and power on the government, but the government cannot be trusted to use such power wisely and so there is need to constrain such power using the mechanics that are mutually reinforcing with the constitution and making the government to commit to the tenets of its provisions. In driving this point home, Deng quoted one of Africa's pioneering leaders, Julius Nyerere as having said that, "we refuse to put ourselves in a straitjacket of constitutional devices – even of our own making. The constitution of Tanzania must serve the people of Tanzania. We do not intend that the people of Tanzania should serve the constitution."³ What Nyerere is suggesting is that the constitution should be made to serve the will of the people and when it fails to do so, it must change. This is to say that constitutionalism is a dynamic process that lives on and requires constant adjustments to social changes.

This ties in very well with Deng's prescription of the guiding principles in constitutionalism, stating specifically that, "the overriding goal that guides the process of decision-making and action ought to be that of human dignity, defined as the broadest shaping and sharing of all values, material, and nonmaterial" (Deng, 2008). This is crucial because Deng believes in constitutionalism that emanates from people's culture and worldview saying, "if an African nation's constitution and its attendant governing framework are to embody the soul of that nation, as they are expected to do, they must reflect the essential cultural values and norms of all of the nation's peoples and build on their worldview as the starting point for constitutionalism" (Deng, 2008). To properly understand constitutionalism, one has to investigate its constituent elements.

3 Doctrines and Elements of Constitutionalism

³ H.W.O.Okoth-Ogendo, "Constitutions without Constitutionalism: Reflections on an African Political Paradox," in Douglas Greenberg, (eds) et-al, *Constitutionalism and Democracy: Transitions in the Contemporary World* (New York: Oxford University Press, 1993), pp.65-82.

Charles Fombad (2007) believes that constitutionalism encompasses the idea that a government should not only be sufficiently limited in a way that protects its citizens from arbitrary rule, but also that such a government should be able to operate efficiently and in a way that effectively compels it to operate within its constitutional limitations. In this respect, constitutionalism has certain fundamental values that are well defined, lending mechanisms to hold government accountable. For the purposes of this study, we focus on sovereignty, the separation of powers, and the control of the amendment of the constitution (Fombad, 2007).

Sovereignty is defined as the possession of supreme (and possibly unlimited) normative power and authority over the government and those persons or institutions through whom that sovereignty is exercised (Stanford Encyclopedia of Philosophy, 20014). Sovereignty is a critically important concept in the practice of constitutionalism because when we talk about sovereignty being vested in the people, this is to say that normative power is not with the government, but with the citizens. As such, people's sovereign authority is thought to be ultimate and unlimited because a thing that gives powers cannot have limited power. However, a government institution such as the executive, the legislature and the courts, through which that sovereignty is exercised, is constitutionally limited and subordinated (Stanford Encyclopedia of Philosophy, 20014). This makes sense and one can even go further to say that because the people have ultimate sovereign authority, they also have the power to change both the constitution and the government.

The doctrine of separation of powers is the second element in modern constitutionalism and it derives from suspicion and distrust of power in general and the concentration of power in particular. Lord Acton made an observation centuries ago that, "all power tends to corrupt, and absolute power corrupts absolutely" as quoted in (Fombad, 2007). The doctrine of separation of powers, in its simplest and probably extreme form, basically requires that the three branches of government, namely the executive, legislative and judiciary, should be kept separate from each other (Fombad, 2007). The modern doctrine of separation of powers does not require a rigid watertight separation of the three powers but rather a system in which the risks of a concentration of powers, and the attendant dangers that go with it, can be forestalled through limited interference by each of the three powers in each other's domain (Fombad, 2007).

Lastly, the third element is entrenchment of norms imposing limits upon government power, either by law or by way of constitutional convention. This implies that those whose powers are constitutionally limited such as the institutions of government, must not be legally entitled to change or expunge those limits at their pleasure (Stanford Encyclopedia of Philosophy, 20014). This explains why most written constitutions contain articles prescribing the procedures used for amending them. In fact, these principles invariably require something more than a simple decision on the part of the government to beseech a change. This is perhaps the reason some countries subject their constitutions to referenda. In this respect, entrenchment does not only facilitate a degree of stability over time, it is arguably a requirement of the very possibility of constitutionally limited government (Stanford Encyclopedia of Philosophy, 20014). If a government is given a blank check to change constitutional constraints as it wishes, then the idea of constitutional limitations on the government becomes void. In order to actually enable the enforcement of constitutional limitations on government, power must be dispersed but not concentrated in one place or one person's hand. This brings us to constitutional practices in South Sudan

4 Constitutional Practices in South Sudan

The objective of this section is to highlight what the practice has been in respect to the constitution in South Sudan so as to identify the gaps with the aim of providing actionable recommendations. The data used to inform findings in this paper came from three different studies. The first study was the Comprehensive Evaluation of the Government of Southern Sudan (GoSS), which the Office of the President commissioned in 2011 to review the structures and systems of the GoSS during the CPA era. The second was a study DFID commissioned in collaboration with the Accountability Sector Working Group in 2014 to assess the operational environment of the accountability institutions in South Sudan and the last study was commissioned in 2015 by the British Council to look at the country's political economy as it relates to access to justice and peace program. The constitutional practices are evaluated by looking at the three elements of constitutionalism as discussed above, including the concepts of sovereignty, separation of powers doctrine, and the process of amending and entrenching constitutional norms in South Sudan.

On sovereignty, more broadly, both the interim constitution (2005) and the transitional constitution (2011) are essentially progressive documents, of course, in principle. The bills of rights that grant fundamental freedoms are enshrined and the concepts of sovereignty and separation of powers are clearly spelt out. For example, Article 2 of the Transitional Constitution (2011) states that sovereignty is vested in the people and shall be exercised by the State through its democratic and representative institutions established by the Constitution and the law. While this purposive provision explicitly tells us where sovereignty lies, it does not tell us how this is advanced in practice. One serious problem with both the transitional (2011) and the interim constitutions (2005) is the question of legitimacy. It is seriously questionable whether these documents were the making of the sovereign out of their free will. One can argue that the government made both constitutions absent of popular consultations, and therefore lack broad legitimacy.

The interim constitution was essentially a translation and codification of the Comprehensive Peace Agreement (CPA). While the SPLM, as the negotiating partner of the CPA, was endowed with some degree of legitimacy, it would have been thoughtful had the drafting of the interim constitution been subjected to wider consultation and acceptance among the people of South Sudan. Understandably, the circumstances then would have not allowed such inclusive process. Where the excuse cannot be made regards the transitional constitution. The development of this document was exclusively made as an issue that was entirely in the domain of the experts, political leaders, and the legislators, so it was not subjected to wider public scrutiny it deserved and therefore, a number of provisions became a source of discontent or to be exact, instability.

As the preceding discussions have shown, the constitution is a general convention that includes the rules and procedures as well as limitations on the powers of the government. If the making of such a covenant is a monopoly of the government, then it fails to be a citizenry driven covenant; it becomes a canonical book of rules and orders that limits the powers of the public and instead gives all the powers to the government. This is perhaps the reason the provisions of this important document are not keenly observed. The government whose powers the constitution seeks to limit actually made the constitution and therefore imposed limits on the sovereign. This being the case, one can conclude that the claim of Article 2 of the transitional constitution of

South Sudan is false. The practice suggests that sovereignty is actually vested in the state and the few elites that draw benefits from it.

Similarly, the implementation of the doctrine of separation of powers in South Sudan is at best very weak and at worst nonexistent. In this study, the concept of the separation of powers can be discussed both vertically and horizontally. The vertical separation of powers relates to intergovernmental linkages or the relationships among the central, state, and local governments. The horizontal separation of powers regards the separation of legislative, executive, and judicial functions of the government. In other words, it looks at the relationships between branches of government. This section examines each of these relationships separately.

The difference between the interim constitution and the transitional constitution on the issue of intergovernmental linkages is the fact that in the transitional constitution, the president has been given more powers to interfere with both the executive and the legislature at the state level. As well, the judiciary has been centralized in the transitional constitution. Through the interim period, there were no serious problems on the vertical relationships of the state and central governments. States had their own constitutions and all the three branches of the government were present. This relationship changed with the transitional constitution in 2011. Now, the state governors are removed and appointed by the president and even the legislature can be dissolved should this become necessary, politically. This has obviously created a very serious crisis of governance at the state level. One can even argue further that the growing governance crisis is exacerbated by this anomaly in South Sudan's constitution.

This is a problem because political dynamics in each state should be handled at that level in order to allow state-level institutions to mature and progress towards achieving political resilience. The political processes in the states are no longer handled at that level; they have all become president's responsibility. Knowing the many responsibilities of the president, most state processes are stalled awaiting decisions of the president. As a result, states have become part of the central government and 80% of the governors elected in 2010 have been removed and replaced by presidential orders. Though these powers are constitutionally sanctioned, they contradict the very same constitution and perceptibly, not on par with the doctrine of constitutionalism and the doctrine of separation of powers in particular.

The same situation is replicated between the states and local governments. Governors appoint and remove commissioners at will and the local government politics does not occur at the local level; it is done through intensive backdoor lobbying in the state capitals. In fact, rumors have it that commissioners pay or promise some form of gratuities to the governors in order to get or keep their jobs. This kind of a system is obviously unsustainable. Politics and administration should be allowed to evolve and mature at different levels in order to engender continued support of and trust in the constitution among the citizens. This practice obviously leaves the citizens out entirely, a situation that could be regarded as usurpation of people's sovereignty.

At the local level, not only does the state government meddle greatly in the affairs of counties, the county and state governments actually subordinate the traditional leadership. While the traditional leaders draw their legitimacy through local popular support, both county and now state authorities are appointees and so are the payam and boma administrators. This is why the claim that sovereignty is vested in the people is false in the South Sudanese context. If this were

true, traditional leadership would not have been subordinated without its consent and so on this, the practice is contrary to the will of the people who are supposedly the givers of power to the state.

At the horizontal level, the doctrine of the separation of powers is quite clear in the constitution. There are different mandates for both the legislature and the executive with the courts having the mediating and interpretive powers. The executive executes and enforces governmental functions and the laws while the legislature has the power to legislate and provide both administrative and financial oversight functions. This ideally is how a democratic government that embraces the principle of constitutionalism is supposed to operate. The practice in South Sudan has been disappointing at best and nonconforming at worst.

As discussed previously, the principal objective of the doctrine of separation of powers is to limit the power of government and assumes that the three branches of government will check each other's powers to ensure neither branch accumulates excessive powers. In South Sudan, there is an executive that has nearly absolute powers and a legislature that is absolutely weak. The power of the executive is both a function of constitutional mandate and blatant usurpation. The assessment of government in 2011 shows clearly that the assembly in all three critical oversight functions failed to live up to its name. On its legislative powers, the assembly does not actually make laws; it endorses laws that are made by the executive.

The way laws are made in South Sudan is that executive agencies of the government draft the laws, send them to the Ministry of Justice where they are reviewed and sent to the Council of Ministers for debate and approval and thereafter they go to the parliament for endorsement. This obviously does not merit the separation of powers. The executive, a body that is envisaged, as its name suggests, as having the power to execute policies and enforce laws, now has actually taken over the legislative powers of the legislature. To the extent that this is already an anomaly, the parliament is further limited by an article of the constitution which says, "no member of the National Legislative Assembly, outside the context of the deliberations of the draft general budget, shall introduce any financial bill or move any amendment to a bill having the object or effect of abolishing, imposing or increasing any tax or imposing any charge upon the public revenue or reserves, save with the prior consent of the National Council of Ministers"⁴. This is to ensure that the parliament does not pass laws that did not go through the executive. All laws inherently obligate the government to commit financial resources to enforce them, hence it is not clear where the justification for limiting the power of the assembly to do this, comes from. This contradicts Article 83 (2) of the same constitution, which states that a member of the National Legislature may table a private member bill before the House to which he or she belongs on a matter that falls within the competences of that House. To be sure, private member bills are rarely tabled in South Sudan.

The Ministry of Justice, an executive institution that is in charge of enforcing laws and prosecuting those who do not abide by these laws, has now taken the legislative powers. As a result, institutions that are seen as having powers to check excessive powers of the executive such as the Anti-Corruption Commission, Audit Chamber, and Fiscal and Financial Allocation and Monitoring Commission and other important institutions of government are operating without

⁴ See South Sudan Transitional Constitution 2011 Article 89 sub article 1.

sufficient establishment acts because the Ministry of Justice has not passed their establishment acts to the council of ministers and to the parliament. This is not a power allocated to it by the constitution—it is power grabbed.

On the financial oversight function, the legislature does not feature very well on this either. Looking at the budgetary books from 2006 to 2010, it is evidently clear that the government was overspending consistently, a violation of the appropriation acts and the constitution. Yet, the assembly did not take any serious action to end this wild public expenditure, which was taxing on the public resources with little to show for in terms of returns. While many government institutions complain about not meeting their annual plans because the Ministry of Finance allegedly does not release funds, the budget books tell a different story. Most institutions are spending above their approved budgets. How could the assembly allow such reckless spending to persist when it has the power to allocate resources to different institutions according to the law? It could simply withhold funds for government institutions that are not spending according to budgetary allocations contained in the appropriation acts. Again, the executive has usurped the power of the legislature to allocate resources. What is an appropriation act when the executive does not abide by its provisions and instead operates to the contrary? Understandably, revenue does trickle in slowly, but a well-disciplined government that lives by the principles of constitutionalism would allocate such meager resources equitably across all institutions of the government, with strict oversight from the legislature. The legislature approves government budgets year after year without purposeful intent to tame the government to use public resources wisely.

Another important oversight function of the legislature is to oversee the line ministries through their quarterly reports on the programs and projects. The law also requires that each minister report on the work of the ministry to the parliament annually. Interviews with the members of parliament clearly show that this function has not been fulfilled, even at the minimum degree possible. Almost all the committees are complaining about none communication and lack of reports from the line ministries on their work⁵. The Assembly is expected to invoke its constitutionally given powers to summon ministers and other government officials for questioning on non-reporting, but this power is rarely used, often with futile outcomes. One of the common excuses given is that ministers are so busy that they find no time to come to the Assembly for questioning. In some cases, according to some senior Assembly officials, the ministers would skip their appearances in the Assembly by calling the Speaker to intervene and postpone a scheduled meeting. As a result, there is justifiably a clear sense of frustration in the Assembly with the ministries for non-reporting and obstruction of accountability processes. Owing to this, there seems to have developed a bad blood between the lawmakers and those in the executive, which stands in the way of proper communication, with potential to hamper effective administrative oversight.

When you think it is the legislature that has these problems, the judiciary is far worst than the legislature. In an interview with the top leadership in the judiciary, so many challenges affect the judiciary. First, the judiciary believes that they are treated as another government department and not the third branch of the government. Hence, there is a feeling that the judiciary is treated with contempt by the other two branches, especially the executive. For instance, the judiciary

⁵ Interviews with Chairpersons during the Comprehensive Evaluation in 2011

only spends between 2% and 5% of its annual budget because the executive does not release money. This is consistent with the findings of the Assessment of the Operational Environment of Accountability Institutions in South Sudan (2014) where all the accountability institutions were consistently under spending because the Ministry of Finance does not give money allocated to these institutions.

Another challenge is the question of judicial authority. Judges complain that the rule of law is yet to take hold in the country. This is because there is no respect for law and for the judiciary. In fact, the judiciary is seen as merely a governmental department and not a third branch of the government. Recent removal of the Deputy Chief Justice by Presidential Decree is a case in point. The courts face serious problems when it comes to cases involving high-level officials. Judges have settled many cases but the executive does not implement their judicial decisions. The role of the judiciary is to administer justice, but once it has passed judgment, it is up to the executive to implement and enforce. Sometimes, judicial decisions are overturned without due process at all levels of government. Thus, the country cannot have an effective judiciary when its decisions are not binding on citizens and the government.

Looking at the third element of constitutionalism, which is basically about entrenching values of living by the constitution, it is obviously nonexistent. Before one adopts any values, they must first exist and as discussed in the foregoing sections, the important elements of constitutionalism are nonexistent in South Sudan. That said, Article 199 of the Transitional Constitution (2011) prescribes the procedure that is followed to amend the constitution. It states specifically that the constitution shall not be amended unless the proposed amendment is approved by two-thirds of all members of each House of the National Legislature sitting separately and only after the introduction of the draft amendment at least one month prior to the deliberations. Although this provision is good in safeguarding arbitrary changes in the constitution, however, it does not sufficiently protect the interests of the states and local governments. For example, when the interim constitution was amended in 2011, the position of the states was compromised when powers were given to remove and appoint governors, as well as dissolving state assemblies⁶.

5 Conclusion and Recommendations

In this study, we have addressed the question of constitutionalism in South Sudan, arguing primarily that South Sudan is yet to internalize this concept. This is because two critical elements of constitutionalism, namely the separation of powers and the concept of sovereignty have not been observed keenly. The executive possesses excessive powers and both the courts and the legislature have not been able to bring pressure to bear sufficiently on the executive. In fact, the very idea of limiting the powers of government, which lies at the heart of constitutionalism, remains a distant dream in the country.

One can only speculate that part of the challenge in achieving constitutionalism in South Sudan regards the legitimacy and the relevancy of the process that brought about the constitution. As well, the divorce between the manner in which the state makes decisions and how decisions are traditionally made contributes greatly to this disconnect between the instruments of the states such as the constitution and regulations and people's reception of these instruments. Thirdly, the

⁶ See the powers of the president under Article 101 of the Transitional Constitution 2011 sub articles **r** and **s**

duality between the modern state and the traditional society is significantly hindering the acceptance of the state and its instruments of governance. Fourthly, the political leadership in the country does not necessarily believe in the concept of modern state and its instruments of governance, in turn affecting the rigor with which these instruments pursue the state's reach and acceptance by the population. Lastly, the failure of the state to exert control over the population, both in terms of monopolizing the use of force as well as lack of investment in social services that are desired by the population, weakens its ability to permeate the society in a meaningful way and therefore lack of acceptance of the rules that govern the state.

In order to break from this habit of acting outside the constitution and grabbing powers from the sovereign, we recommend the following.

1. Since the Agreement on the Resolution of Conflict in South Sudan affirms the need to work on the new constitution, this process should break from the past by first of all initiating the process of negotiating the relationship between the state and the citizens. This can be done through popular consultation. Once this process is completed, the states and local government should negotiate their power relationship. This process now moves from states to the national level where powers are negotiated between states and the national government. This way, the process is truly in the hands of the sovereign.
2. The making of the constitution is an essential element of peace and reconciliation as well as the promotion of national unity. As such, it should not be a business of political parties, but that of the people and so different ethnic and regional groups must actually negotiate the nature of state and system of government that is to be instituted in South Sudan. The system must be entirely grounded on both the traditional values of the people of South Sudan and their cultural norms. This is important because it should not be the government that tells the people how it should look; it is the people that create the government and determine how it should look. No creature decides how it should look and what features it should have; it is absolutely a discretion of the creator, the people in this case.
3. Having learned these lessons over the last 10 years, constitutions matter and the need to limit excessive powers of the government as a whole and the executive in particular is critical for the sustainability of the entire system and the preservation of people's rights and sovereign power. As such, the next constitution should impose unrelentingly limiting powers on the government and a rigorous countervailing mechanism that shall nurture checks and balances in the government.
4. It should be borne in mind that the integrity and legitimacy of the constitution depend on general acceptance of the same. To achieve this, the vertical linkages between different levels of government must be clearly spelled out with sufficient safeguards, with each layer having veto powers to resist any attempt by the other to alter the relationship unilaterally.

References

Adelman, S. (1998). Constitutionalism, Pluralism and Democracy in Africa. *Journal of Legal Pluralism* , 42, 73-88.

- Awolich, A. A. (2013). *Federal Democracy: A Strategic Institutional Choice for South Sudan* . The Sudd Institute. The Sudd Institute.
- Deng, F. M. (2008). *Identity, Diversity and Constitutionalism in Africa*. Washington DC, DC, USA: United States Institute of Peace .
- Diamond, M. (1981). *The Founding of the Democratic Republic*. USA: Ann Stuart Diamond.
- Fombad, C. M. (2007). *Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa* . *The American Journal of Comparative Law* , 55 (1), 1-45.
- Katz, S. N. (2000). *CONSTITUTIONALISM AND CIVIL SOCIETY* . The Jefferson Lecture . University of California at Berkeley .
- Loveland, I. (2012). *Constitutional Law, Administrative Law, and Human Rights: A critical introduction*. Oxford, London, UK: Oxford University Press.
- Lynne, G. (2007). *Doctrine of Separation of Powers*. University of Zambia, Faculty of Law. University of Zambia.
- Malwal, B. (2015). *Sudan and South Sudan: From One to Two*. Palgrave Macmillan.
- Manning, J. F. (2011). *SEPARATION OF POWERS AS ORDINARY INTERPRETATION* . *Harvard Law Review* , 124 (8), 1939-2040 .
- McIlwain, C. H. (2007). *Constitutionalism: Ancient and Modern*. Indianapolis, Indiana, USA: Liberty Fund Indianapolis.
- Mojapelo, J. P. (2013, 4). Forum. Retrieved from Sabar: <http://www.sabar.co.za/law-journals/2013/april/2013-april-vol026-no1-pp37-46.pdf>
- Standford Encyclophedia of Philosophy. (2014, 10). *Constitutionalism*. Retrieved 12 9, 2015, from Standford Encyclophedia of Philosophy: <http://plato.stanford.edu/entries/constitutionalism/>
- Sweet, A. S. (2009). *Constitutionalism, Legal Pluralism, and International Regimes*. Faculty Scholarship Series (1295).
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