



THE SUDD INSTITUTE

RESEARCH FOR A PEACEFUL, JUST AND PROSPEROUS SOUTH SUDAN

P. O. Box 34, Juba, South Sudan • Tel: +211 (0)956 305 780
Email: thesudd.institute@gmail.com • www.suddinstitute.org

Weekly Review

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Constitution-making is not a Race against Time

Joseph Geng Akech

Introduction

The debate on constitution-making in South Sudan is gaining momentum with three proposals in the limelight. The first is the Sudd Institute's proposal which calls for certain precursors to be addressed for there to be a smooth political transition through democratic elections. The second is an appeal to delink constitution-making from the hysteria introduced by time constraints linked to the peace agreement timelines. The third proposal is by the Ebony Centre for Strategic Studies, which recommends constitution-making through an elite-led Constitutional Convention. The Ebony's authors contend that a new constitution could be promulgated by December 2022. This Weekly Review discusses these propositions and contends that:

- The constitution-making process should be delinked from elections and other legal and institutional reforms outlined in the peace agreement.
- This is because South Sudan does not have the requisite wherewithal and necessary enablers to embark on a constitution-making process unless it addresses the Sudd Institute's 'fundamentals.'¹
- The legitimacy of the resulting constitution will only be realized if the process is inclusive of all South Sudanese, constituencies, and groups.
- Prioritizing certain aspects of peacebuilding and security would pave the way for elections to be held under the new elections Act with consensus that an elected government shall steer the 'permanent' constitution-making process.
- This would allow the government to utilize the remaining window under the Transitional Period to (a) prioritize people-to-people reconciliation and national healing, (b) register political parties, (c) review necessary legislation, including electoral laws, (d) return and resettle displaced persons, and invest in socioeconomic programs, including immediate humanitarian assistance to the affected population² and (f) conduct national census to delineate the constituencies in preparation for national elections.

The making of a constitution

¹ See A T. Mayai, M LeRiche & W Underwood 'Democratic elections in South Sudan' (2022) <https://www.suddinstitute.org/assets/Publications/621decbd2b89e_DemocraticElectionsInSouthSudan_Full.pdf> accessed on 13 May 2022).

² The return and resettlement of refugees might not be a precondition but a desirable policy for the holding of elections. This is due to the fact that return must be voluntary, dignified and organized. Similarly, some refugees might not be willing to return home unless certain conditions prevail.

A constitution is a ‘power map’ of a state.³ It guarantees the aspirations of the people—in both present and future. Whilst not a utopian document—dreaming for a situation not yet in the present—it also must address the contemporary evils from which the people wish to escape. Early political thinkers talk of a “social contract” to emphasize any dialogue leading to a consensus and compromise amongst various constituencies, interest groups, and varied stakeholders. That view of a constitution has not changed as evident in the constitution-making corpus. There, three interlinking approaches of design are discussed.

The first approach proposes constitution-making to be people-centered. The approach places people’s participation at the center of initiation, adoption, and ratification of the constitution. Involvement of the people is indispensable to peace and national unity because every South Sudanese must be included in the important affairs of their country. The fact that sovereignty is vested in the people is not artifice or cosmetic; it is the foundation of a popular democracy and strengthens vertical accountability.

The second approach of constitution-making fronts elites’ role and consensus. It argues that it is in fact the agreements of elites that are eventually codified into constitutional provisions. In this context, elites are the leaders, and they make decisions for their constituencies (supposedly in a representative democracy) and are thus entitled to lead the process. One of the instructive examples of elite-led process is the Philadelphia approach in which a few elites, including James Madison and others gathered to draft the U.S Constitution.

The third approach is constitutional design through diffusion theories. Here, an existing constitutional template or extensive transnational borrowing is undertaken to mimic the entire or substantial part of the domestic constitution. This approach is inevitable, although the scale and scope differ from one country to another.

In light of the above theoretical frameworks of constitutional design, the question then arises: what is the way forward for South Sudan? Before I put forward recommendations in response to this question, it is befitting to survey and comment on the existing proposals.

Certain fundamentals are precursors to political transition

One of the first alarm bells was rung by the Sudd Institute, calling for constitution-making to precede certain fundamentals. According to the authors, a coordinated, return and resettlement of the displaced, legal, and institutional reforms and political parties’ registration, form precursors to a conducive environment for constitution-making.⁴

An elite-led constitution-making through Constitutional Convention

On the contrary to the Sudd’s proposal, the Ebony Centre for Strategic Studies makes a proposition in its recent public brief, suggesting the need to abandon—in its entirety—the process outlined under the Revitalized Agreement on the Resolution of Conflict in South Sudan (R-ARCSS).⁵ It proposes, instead, a Constitutional Convention of fewer than 300 people to write the constitution. This is a bold, courageous but a people-depriving

³ C Bell ‘Introduction: Bargaining on constitutions - Political settlements and constitutional state-building’ (2017) 6 *Global Constitutionalism* 23 (suggesting that post-conflict elites’ bargains tend to chart the way-forward for constitution building as a power map [negotiated framework] of governance and power sharing). See also; K Prempeh ‘Africa’s “constitutionalism revival”: False start or new dawn?’ (2017) 5 *International Journal of Constitutional Law* 502; CM Fombad ‘Constitutional reforms and constitutionalism in Africa: Reflections on some current challenges and future prospects’ (2011) 59 *Buffalo Law Review* 1012 (referring to a constitution as a ‘power map’).

⁴ See note 2 above.

⁵ See Ebony Centre for Strategic Studies ‘Creating a constitution for South Sudan’ (2022) on file with the author.

recommendation given that it advances an elite-led constitution-making model. It is also overly ambitious by calling for a new constitution to be adopted by December 2022.

The appeal to separate constitution-making from R-ARCSS

Another perspective is a call by the wider public and some scholars to arrive at an effective constitution.⁶ This appeal argues that the constitution-making process should be delinked from the implementation of the R-ARCSS.⁷ Broadly, the constitution-making needs to be inclusive of South Sudanese people, and other stakeholders. Their effective participation could enhance popular acceptance of a constitution by and amongst South Sudanese. This calls for addressing the Sudd Institute's fundamentals for a successful transition. The timelines set out in the R-ARCSS are ambitious and untenable, thus, separating constitution-making from the R-ARCSS would give time to consolidate the building blocks of a consensus, bottom-up constitution-making.

The way forward: Recommendations for South Sudan's constitution-making

The time left under the R-ARCSS is not sufficient to deliver a new constitution that meets the standards of a legitimate constitution. Often, a constitution-making responds to the past and current challenges to achieve desirable future goals. The aspiration for a new constitution is longstanding, as evident in the independence declaration in which South Sudanese 'recall [their] long and heroic struggle for justice, freedom, equality to establish a system of governance that upholds the rule of law, justice, democracy, human rights and respect for diversity.'⁸ Constitution-making in South Sudan should, therefore, strengthen peace and national unity and usher in a consensual constitutional democracy. While these goals are emphasized in the R-ARCSS, they are not necessarily the only premise upon which constitution-making rests.

While the three proposals discussed above appear different, they are in fact reconcilable and relatable. For instance, the Sudd's proposal differs with my suggestion in minor ways.⁹ The Ebony's position is a short-term remedy whose viability in relation to underlying aims of a constitution is in doubt. Therefore, the Review proposes three strategic policy choices to overcome challenges standing in the way of constitution-making in South Sudan.

First, constitution-making should not be rushed. It is not a race against time, but a race for democracy. Comparative examples on constitution building in post-conflict contexts are instructive.¹⁰ The lessons are that consensus building amongst political parties, constituencies and other stakeholders is paramount to the legitimacy (popular acceptance) of a constitution and could foster peace and national unity. A constitution is not an idol; it does not enhance good governance or constitutionalism by itself. It requires political pluralism, culture of non-violent politics, institutions of accountability, and oversight for a constitution to deliver intended outcomes.

⁶ See M Deng 'South Sudan's constitution-making process is on shaky ground: how to firm it up' (2022) <<https://theconversation.com/south-sudans-constitution-making-process-is-on-shaky-ground-how-to-firm-it-up-177107>> (accessed 31 June 2022); See also note 9 below & JG Akech 'What stands in the way of a new South Sudan post-conflict constitution' (2021) <<https://theconversation.com/what-stands-in-the-way-of-a-new-south-sudan-post-conflict-constitution-171145>> (accessed 31 June 2022).

⁷ See note 1 above.

⁸ See the Independence Declaration document read out on 9th July 2011 by the Speaker of South Sudan National Legislative Assembly.

⁹ See JG Akech 'The 'permanent' Constitution need not be a prerequisite for holding elections in South Sudan' (2022) <https://www.suddinstitute.org/assets/Publications/62381348c74ef_ThepermanentConstitutionNeedNotBeAPrerequisite_Full.pdf> (accessed 31 June 2022).

¹⁰ One can cite the Uganda's and Kenya's constitution-making processes in which the former underwent more than two years of bottom-up civic consultations whereas the latter implemented referendum on the constitution.

There is a need to have a consensus on the model of federalism South Sudan should adopt, delineate powers of federal government, whether to adopt parliamentary or presidential system of government, whether to maintain, expand or contract the current ten states and three administrative areas, and whether to mimic the same arrangement for the judiciary in relation to structure of the courts. All these require time, and it is therefore imperative to be patient.

Second, prioritize picking the ***low-hanging fruits*** which are the building blocks of a successful constitution-making process. The country is bitterly divided and there has been no meaningful reconciliation nor accountability for rights abuses. Critical law reforms—election and security laws—, establishment of Constitutional Court, reform of judiciary and other rule of law institutions, have not been acted upon. This includes the list of ‘precursors to elections’ or ‘fundamentals’ raised by the Sudd Institute that are instructive to create a conducive environment for people-led and consensus constitutional design process.

Finally, there should be a ***robust strategic plan for engaging the international community*** to assist South Sudan to manage its vast resources, and draw from its expertise, and comparative experiences. The major role of the international community in post-conflict context is to facilitate political and security stabilization, building democracy and legal order, including constitution-making. The international community has extensively engaged in and with the people and government of South Sudan in the peace processes through mediation and financing and has attempted to influence the parties to the conflict to adopt peace and democracy. Their engagement is not to hand down a constitutional template; rather, it is for South Sudan to tap into their vast resources and to help address the building blocks of a successful constitutional engineering.

About Sudd Institute

The Sudd Institute is an independent research organization that conducts and facilitates policy relevant research and training to inform public policy and practice, to create opportunities for discussion and debate, and to improve analytical capacity in South Sudan. The Sudd Institute’s intention is to significantly improve the quality, impact, and accountability of local, national, and international policy- and decision-making in South Sudan in order to promote a more peaceful, just and prosperous society.

Author’s biography

Joseph Geng Akech is an Adjunct Assistant Professor of Law at the University of Juba. He holds a Doctor of Laws (LLD) in constitutional law from the University of Pretoria, South Africa. Joseph has published in human rights, constitutional design and transitional justice. E-mail; josephgakech@gmail.com.