



# THE SUDD INSTITUTE

RESEARCH FOR A PEACEFUL, JUST AND PROSPEROUS SOUTH SUDAN

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## Policy Brief

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### Understanding the Imperative of a People-Centered Constitution in South Sudan

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#### Summary

*As South Sudanese warring parties are set, albeit begrudgingly, to embark on implementing the peace agreement they signed last August, a sense of cautious optimism is being expressed, and rightly so. For over two years now, the war has heavily inflicted on the young nation untold level of damage and suffering, and so it makes a complete sense that there is a great longing for peace, stability, and prosperity.*

*Putting the country on the path towards peace and stability, however, requires genuine resolve and commitment not only on the part of the signatories to the peace deal but also of the South Sudanese citizenry. Moreover, both the region, which helped mediate the peace talks and the international community that provided the needed resources and relevant support to the process would do well to ensure that the post-conflict recovery agenda succeeds. To turn the tide against the bitter and acrimonious atmosphere the war has created, a collaboration of all different camps involved is an avoidable necessity that should be fully observed. That is, overcoming the difficult situation whose deep wounds are still raw demand that South Sudanese from all walks of life need to fully embrace the window of opportunity the peace deal provides and use it strategically to further the gains of independence.*

*Of course, doing this undoubtedly requires that a well-considered constitution – one that puts the citizens at the center, is drafted and promulgated. This process stands to greatly benefit from past constitution making experiences, especially the mistake of making the process an exclusive exercise by a few legal experts and to the exclusion of the rest of the country. To avoid the repeat of the past mistakes, there is a need to avoid viewing the constitution-making process as a technical and special domain of the elites but rather as a broad-based and participatory endeavor.*

*It should be born in mind that this reasoning directly resulted in many insurgencies that have and continue to rock old united Sudan since independence. Lack of a political consensus with respect to how state power could be shared and exercised led to a seemingly constant contest of legitimacy and credibility as different groups compete for supremacy and control. This time around, South Sudanese need to not only be involved in the making of the new constitution but also to be convinced that the constitution is a document they have bought-into and a contract between them and their state.<sup>1</sup>*

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## **I. Introduction**

The eruption of what essentially has been a deadly military confrontation rocking South Sudan since mid-December 2013 came as a shocking surprise to many, though not to those who closely followed the internal dynamics unleashed by struggle for political power and control within SPLM. Admittedly, this situation created precarious conditions for millions of South Sudanese caught up in its way. Recently registered milestones such as the return of the SPLM/A – IO leader Dr. Riek Machar to Juba on April 26, 2016 and the resultant formation of the Transitional Government of National Unity (TGoNU) by President Kiir in line with the peace agreement, have sparked a sense of optimism that the dogging nightmare might finally be coming to an end.

It would be an understatement to suggest that this unwarranted confrontation has certainly dealt a heavy setback to the nation in terms of innocent lives lost, property destroyed, massive displacement of the citizens from their homes, particularly in war-affected areas and battered social relations, among others. There is also the massive damage that the war brought not only upon the relationships between the citizens of different ethnic nations but also between the citizens and the state. Given this underserved immeasurable damage, there are voices that really doubt the nation's ability to emerge out of this situation. Without downplaying the challenges the war has unleashed, it is fair to state that South Sudan can and needs to weather this situation. As a matter of fact, addressing the damage of the war is most probably the only path to ensuring future viability of the country.

To do this, South Sudanese from all walks of life seriously need to collaborate so as to collectively address their common challenges and advance their strategic interests and aspirations in a rather unified fashion. In their many years of long and arduous political and military campaigns for nationhood, the people of this young nation demonstrated their resilience and ability to rebound after a catastrophe. However, it is to be noted that a mere recognition of people's ability to withstand destruction does not justify the suffering, nor will it surely provide some kind of solace or ushering in peace and stability. In other words, in order for South Sudan to turn a new page on its dark legacy of war it has to strategically address its multi-faceted nation building and state formation challenges head on. It is an understatement to say that both the political leadership as well as the masses dropped the ball immediately following the signing of the Comprehensive Peace Agreement (CPA) in 2005 when it came to confronting the egregious past left behind by the war.

Arguably, this long overdue nation's corrective journey must in earnest start with the adoption of what could be called a people-centered constitution – one that attempts to the extent possible to comprehensively address the interests, dreams and aspirations of the citizens. Recognizing the fact that it is not possible to even think of a South Sudanese nation without putting its rightful owners, the citizens, in the driving seat, at least in terms of their basic needs being addressed, it is high time for those entrusted to discharge public leadership responsibilities together with the

populace to embark on forging much needed consensus on what really constitutes the national aspiration of this young republic. But given the painful and unbearable conditions this senseless war has unleashed with devastating consequences on the underserving, ordinary South Sudanese people, the quest for an immediate and speedy resolution of the crisis could not have been more urgent. In a nod to affirm the necessity of ensuring that peace and stability return to South Sudan at the earliest time possible, this special report contends that every South Sudanese has the solemn responsibility to do their bid in whatever way they could to ensure that a meaningful, commensurate pressure is sufficiently brought to bear on the warring parties to give a high priority to the implementation of the peace agreement and embark on the much-needed national reconciliation.

While it acknowledges significant strides towards the implementation of the Peace Agreement, this analysis takes the view that the implementation of the Peace Agreement must clearly provide a roadmap with respect to how a better future could be achieved, if the dream of breaking out of the vicious violent cycle is to be attained. In order to prevent the country from relapsing into another aimless and destructive conflict in the future, the paper argues that it is extremely important for the people of South Sudan to once again rise up as they did in the recent past to collectively address their common challenges head on, through a people-centered constitution. To hammer home the imperative of having a citizen-centered constitution, the paper explores South Sudan's historical context and constitutional imperative, presents an overview of South Sudan's constitution-making experience, arguing that the previous elite-focused process might have played a role in the conflict itself. Moreover, it identifies the opportunities the conflict presents for reforms as well as examining some potential hindrances that stand in the way of the nation's ability to cleverly craft and pragmatically promulgate such a broad-based, credible and legitimate constitution. In a bid to circumvent the envisaged encumbrances, the analysis enumerates some strategic modes through which a viable escape route out of current myopia might be found. Finally, it concludes with justification as to why the constitution ought and must be viewed as an essential mediating instrument critical in managing conflicting national interests and priorities.

## **II. Historical Context**

In order to understand what might have enabled what clearly appeared like a very timid or even piecemeal approach to a very difficult process of transition from war to a shaky peace in South Sudan to occur, it is vital to assess the historical context from which the world's youngest nation evolved. Doing this is extremely important as it attempts to shed more light with respect to the difficulties that quickly beset and still holds hostage the process of building a peaceful, just and prosperous South Sudan. To appreciate why it is essential for South Sudan to adopt a robust and progressive constitution, it is necessary to briefly examine the historical context from which the country emerged. Since time immemorial, South Sudan has had untenably rocky relations with those who often frequented this vast and natural resources-rich country with ill intentions. The start of these exploitative ventures first came in the form of incursions into the area by both the foreign accessories of the Ottoman Empire and their Northern Sudanese counterparts in the 1820s. Later at the turn of the 19<sup>th</sup> century, the Anglo-Egyptian Condominium Government, which ruled the country for nearly six decades, exacerbated the misery and plight of the South Sudanese people through the institution of its infamous policy of separate but unequal regional

development, whereby the South served as extractive venture. Following the demise of the colonial administration in the mid 1950s, successive post-independence Northern-led regimes unscrupulously perpetuated this unconscionable foreign policy with a pronounced zeal, and this obviously entrenched unacceptable level of abject poverty and disenchantment among South Sudanese.

As a result, the cumulative effects of the legacy of these colonial and North Sudanese-controlled oppressive regimes are that of suppression, marginalization, oppression and humiliation of the inhabitants of the region. Unrelentingly though, the people of South Sudan resisted and eventually overcame this inhumane treatment by unequivocally demanding their freedom effectively achieving their hard-won independence in July 2011. Following the attainment of independence, this young nation that just emerged out of the ashes of successive Sudan's north-south civil wars, was supposed to embark upon the daunting tasks of state-formation and nation building but it did not with far reaching consequences.

The processes of nation-building and state-formation are indeed wide and encompassing undertakings, which deal with establishing sound systems of good governance, reconciling war-torn communities and consolidating peace, forging a national identity, providing a national vision for development and transformation, ensuring the existence of rule of law and public order, developing an economy that is both vibrant and sustainable among other things. Ensuring the achievement of all these is truly a daunting mission that requires deliberate and strategic mobilization of the citizenry as well as the resources to combat combined effects of the war as well as the systematic marginalization of the South Sudanese by the aforementioned regimes from political, socio-economic, and educational opportunities.

Given the enormity of the challenges facing the new Republic of South Sudan, as it attempts to build itself from the ashes of more than a century old constant neglect and underdevelopment by the forces mentioned above, there is an urgent need now for the country's leadership to decisively undertake initiatives that are cleverly designed to spur development. Recognizing the fact that peace dividends – which essentially can be measured in terms of the level of socio-economic development, stability, security, among others, are not just going to come top-down but also from the bottom-up, and determining the sense of strategic direction ought to bring onboard the grassroots whose issues and challenges can not be sufficiently addressed without their invaluable inputs into the constitution.

As the preceding discussions demonstrated, it is an open secret to suggest that the South Sudanese dream of having an independent, sovereign state came about as a direct result of an egregious legacy of mismanagement and misrule of Sudan by external colonial forces whose main focus was looting of the natural resources that the country is endowed with, as well as by the northern-based elites that attempted but spectacularly failed to achieve their chauvinistically calculated Arab and Islamic preoccupations. Under various Khartoum based administrations, the then Southern region was severely neglected and practically marginalized from all critical spheres of governance and administration, and this treatment gradually evoked strong resentment, which eventually led to the two intermittent and ferocious north-south civil wars, the last of which was ended by CPA in 2005.

Of course, it is not only the South Sudanese who were mistreated in the Sudan. The regions such as Darfur, Blue Nile, Kordofan, all of which are currently experiencing deadly wars between them and the exploitative and repressive Khartoum-centered National Congress Party led regime

also saw their share in terms of marginalization and underdevelopment. Given this history, it makes a perfect sense that a people long oppressed and excluded from the center where state affairs were run without their consent and contribution can now transform into a system that treats every individual citizen and groups equal. In a sense, a liberated South Sudan could do better by guaranteeing everybody their rights, duties and responsibilities as doing this provides a better chance of ushering in peace and stability. Considering the fact that mistreatment pushed South Sudanese to fight for years to earn a sense of respect and dignity from their once time compatriots in Northern Sudan, it is difficult to understand any other way of ensuring the emergence of peaceful, just and prosperous society without fair and equal treatment of all citizens before the law—a broad-based constitution.

### **III. The Constitutional Imperative**

To appreciate why it is essential for South Sudan to adopt a constitution with a broad-based appeal and support, it is appropriate to examine the monumental significance of the constitution in the life of a state. It is an established conventional wisdom that to have a stable constitutional order, particularly one that entrenches democratic governance and rule of law, a country must work tirelessly to forge a consensus among its citizens with respect to their collective national aspirations. In a sense, a constitution is the main avenue through which a nation arrives at a consensus as to how it should be governed. At the dawn of independence, South Sudan was expected to seriously embark on important processes of nation-building and state formation, among others. Owing to what can be described as cumulative and unfinished business, the country's political leadership unwisely prioritized procedural matters of state formation over the critical issues of nation building.

For sure the imperative of having things such as national anthem, coat of arms, flag etc., cannot be underestimated, as these are important symbols of national unity. But more should and clearly needed to have been done immediately following the outcome of the plebiscite on unity versus separation that was conducted in January 2011. To both register their disapproval of the way they have been mistreated in their own country for far too long, as well as to signal a new political dispensation for there would be a new country, South Sudanese voted in record numbers at home and abroad, in favor of independence. Following this outcome, it was certain that South Sudanese had voted for a country of their own. What was required of the would be the world's newest nation's leaders was to concretely rally the public behind them in order to chart a new course – one whereby the essential pillars that would ground the new state were to be determined. Sadly, the work that the political leadership decided to engage in was not more than simply tinkering on the edges with procedural matters, which are not less important but certainly not sufficient on their own. This preoccupation with what might be termed as basic South Sudanese symbols of national unity led one commentator to ask an important question, which is, “if we work so hard to usher in an independent South Sudanese state what did we do to ensure that there are South Sudanese?” To inattentive mind, this question smacks of sheer ignorance, for how can someone surely fail to see South Sudanese, the very people who made countless sacrifices and efforts to eventually establish their own sovereign, independent nation?

As a matter of substance, the point raised by the commentator is in place. What it tries to underscore is the fact that, while it was extremely important for South Sudan's political class to ensure that the new state was accorded all the procedural attributes it deserves, they seriously

neglected to invest in cementing the gains made. After the overwhelming vote that paved the way for independence, it is difficult to understand why there was no national dialogue critical in defining the parameters within which a consensus can be found. As a new nation born out of the aforementioned background, the Republic of South Sudan was expected to avoid what can be termed as Sudan's original sin that has and continues to plague it to this very day. After attaining independence in 1956 from the British colonial rule, the leaders of the independent Sudan, who by design happened to only come from the northern region, had a chance to correct the infamous divide and rule policy employed by the Anglo-Egyptian Condominium government. Instead of reconciling the much-divided country, they were hell bent to broaden the socio-economic, cultural, political, and educational imbalances created by the foreign administrators, unwisely and unilaterally imposing on the new nation a false sense of national identity that was based on Arab and Islamic orientation. It is this artificial uniformity, which had to be enforced by a sheer brute force due to the fact that there was no agreement with respect to the overarching national identity and this situation is largely responsible for the insurgencies that have and continue to dog the country to this very day. As a matter of fact, South Sudan's eventual exit from the now rump state, Republic of Sudan in 2011, is a living testimony to the fact that no amount of injustice can stop people's determined will to fight for their dignity and liberty.

As part of Sudan, the former Southern region together with the other peripheral areas has always been short-changed by the manipulative Khartoum based elites, a situation that eventually led to ferocious campaigns that culminated in independence in 2011. At the center of Sudan's woes that originated from independence days and subsequently spanned nearly 60 years has to do with mismanagement and exclusion of others from socio-economic, political and cultural fields. To establish their strong hold on power, the self-nominated masters of Sudan resorted to controlling decision-making and policy formulation processes in a self-serving manner that set the course of rebellion against them. In this regard, constitution-making processes were selfishly designed and extremely controlled to ensure that others were completely alienated from cardinal governance centers. Obviously, the predictable outcome of this misguided style of management is wars that have continued to this day.

Moreover, lack of serious engagement of the citizens in the running of the affairs of the state bred disenchantment, and this has been providing fertile ground for endless insurrections that have and continue to plague the country. While the history of mismanaged and exploitation in the Sudan helped to inspire South Sudanese people to essentially fight for their liberty with respect to them determining their own life choices and destiny, it does not appear like lessons were necessarily drawn from this northern dominated botched governance experience, an outcome which partly explains the genesis of the current nightmarish situation South Sudan is currently suffering from. Having fought successive northern-led regimes for over two decades, South Sudanese under the auspices of SPLM/A, to the extent possible forged a collective sense of alienation, which certainly helped them to be united against the Khartoum based elites. Beyond the collective destiny over and against the northern-driven oppression, it is not clear what else provides unity among South Sudanese as fellow compatriots. In a sense, the need to have a people-centered constitution can help in addressing this apparent lack of a meaningful social contract.

As a state born out of the aforementioned misrule by many successive Khartoum based regimes, it was fair to expect that lessons of failure of leadership in the Sudan were going to sufficiently

guide how the South Sudanese nation was going to discuss and design its governance structures and destiny. To give itself a chance of charting a different course – one that ensures the capability to managing diversity, South Sudan had to draft and promulgate a well-vetted constitution. Sadly, it did not do so, and the price for this apparent mishap is abundantly clear. In a sense, a case could be made that the ongoing war in the country somewhat stemmed from ostensible lack of both clarity of purpose and consensus necessary to steering the country towards peace and stability. Pressured by the urgent need to give the world's youngest nation a constitutional order and legal framework, the semi-autonomous Government of Southern Sudan hastily formed an ad hoc body whose job it was to review the Interim Constitution of Southern Sudan, 2005. Working under a tight deadline, the committee did its best under the prevailing situation to produce the Transitional Constitution of the Republic of South Sudan, 2011. But as expected of a rushed and not thoughtful process, the resultant transitional constitution is ridden with inherent defects, among which the glaring one is the centralization of the judiciary and administration of justice in the country.

A question may be asked as to why a constitution-making process should be seen as crucial in building a stable nation-state. To appreciate why it is fundamental, appropriate and sensible to argue that South Sudan's path towards stability and prosperity ought, and must start with having a constitution that enjoys popular support and broad base appeal, let's briefly explore in general terms some of the key functions of the constitution within the context of democratic governance and rule of law. The constitution of any country has a primary function to properly define the basic structure of the government according to which the people are to be governed. In this regard, the constitution is used as a critical instrument to define and structure the three main organs of the government, namely, the legislature, executive and judiciary. Given the expected delineation of powers and authority given to each branch of the government, clear checks and balances are set in motion and this helps to guide how the three branches relate to one another. The constitution of a country not only defines the powers allotted to each of the three main branch, but it also significantly sets a clear demarcation in terms of the responsibilities assigned to each of them.

It effectively regulates the relationship between these organs as well as the relationship between the government and its people. Since the country's constitution stands superior to all the laws framed within the country's territorial precincts, any law enacted by the ruling government has to be in conformity with the concerned constitution. As such, the citizens would, in turn, be abiding by not just the law, but also working in sync with the demarcations laid out in the constitution. In a sense, the constitution does not simply provide a recipe for an efficient government, but it also deals with limitations of political power. Since 'power corrupts and absolute power corrupts absolutely', a constitution is established to restrict the abuse of power by those who are mandated to conduct governmental functions. The constitution of a country lays down the national goals, which form the fundamental edifice upon which the nation rests. Besides giving citizens the rights they are entitled to from the state, the constitution also defines the duties and responsibilities the citizens are required to adhere.

Having highlighted in general terms some of the main functions for which constitution is needed above, it is now important to explore two critical tasks that a well-considered constitution can be expected to play in South Sudan. As a country that emerged out of a poorly governed Sudan, South Sudan has no other option but to create a better system to both fulfill the aspirations for

liberty and dignity long expressed by its citizens and to enhance governance as it moves towards democratization and stabilization.

The first of these tasks has to do with creating a political community. When democracy is invoked, it really means the presence of a political community, which should best be understood as being comprised of diverse groups that constitute the country's population that have accepted to live together. The reality of colonialism or neocolonialism of the South Sudanese populations is that it brought these diverse groups to accept one another forcefully but now that they live in a country of their own, they need to reach a consensus on what constitutes a political community. One of the notable reasons that colonial states struggle to gain legitimacy is precisely embedded in the way they are constituted, which is often done using brute force, non-consensual basis. From this, it can be concluded that forming a political community on non-consensual basis has far reaching consequences in terms of instability and perpetual friction, as was the case with Sudan.

As a country that commits itself, at least in the rhetoric of the liberation struggle, to democratic governance, South Sudan would do well if it uses the making of the constitution to have some serious conversations on the nature of the political community it seeks to nurture. Trying to draw some useful insights from Sudan, the country from which it emerged, South Sudan knows too well that a stable state cannot be built by force but rather through negotiation and dialogue, and this is precisely what an elaborate constitution-making process guarantees.

Second and the final task, has to do with establishing the rules for exercising and distributing state power. Although the ongoing conflict in the country may have not directly resulted from a poorly mismanaged constitution making process, as it was limited to internal power dynamics, which could have been addressed through the party governance instruments such as the constitution among others, it provides an opportunity for a new start. Among the important tasks that a constitution provides is allowing the different constituencies in the country to deal with each other directly as they attempt to agree on the rules that will govern how state power is allocated and exercised. Of course, it is not always possible to have the constituencies represented, as there are often impediments, which prevent this from happening, but the new constitutional system ought and should aspire to be responsive in terms of ensuring the coverage of diverse interests. In order to promote peace and stability in South Sudan, the constitution making process must ensure that the interests of various groups are identified and addressed. Doing this would mean that constitution making, which is certainly a subset of the larger process of constitution building is taken within the broader context of constitution building. For clarification purposes, the subject of constitution building, which speaks to the process through which a political creature commits to the creation and adherence of a system of values and government, will be discussed later.

#### **IV. Transitional Constitution and its Implication on Governance**

Historically speaking, South Sudan has a very scanty experience when it comes to both constitution building and constitutionalism and this might partly explain why constitution-making process seems to suffer in terms of getting the attention it really deserves. As part of Sudan, the former Southern region, now the Republic of South Sudan, always felt short-changed by Khartoum, and this precisely was what fundamentally precipitated the deadly wars the latter



waged against the former, events, which culminated in independence. To fit the character of a mismanaged state, Sudan's political elite made sure that constitution making process was exclusively seen as their domain alone and this situation understandably alienated the citizenry, particularly from the periphery and caused them to rebel against the state they saw as unjustifiably too exploitative and oppressive. In fact, what came as a result from this strong sense of alienation were intermittent insurgencies that have continued to this very today, and probably would not stop until the country wises up and ensures that all its inhabitants are treated fairly and equally.

Having emerged from the aforementioned Sudanese exploitative and oppressive state, South Sudan surely had a good mirror to help guide it from developing a system totally different from the one it left behind. Sadly, this was not done as expected, and the evidence of this apparent failure by the new country's political leadership, perhaps with indifference of the citizenry, clearly speaks for itself. It could be argued that the fact the country was quickly plunged into a civil war barely before reaching even its third anniversary of independence is a strong indictment against those who were entrusted with managing the state affairs. After the signature of the CPA, which defined what the agenda in terms of ensuring peace, stability and development, was.

To chart this CPA-determined course, NCP and SPLM, the two signatories of the accord that successfully ended one of Africa's longest running wars, embarked on the task to provide a new constitutional order and legal framework by drafting Sudan's National Interim Constitution and Southern Sudan Interim Constitution in 2005. Given the pressure that was on the parties to form the Transitional Government of National Unity (TGNU) and Government of Southern Sudan (GOSS), the processes that produced the aforementioned constitutions were extremely rushed, exclusive, opaque and perhaps not very thoughtful, the effect of which would come to be experienced in South Sudan later. Whatever the shortcomings that resulted in the drafting and eventual promulgation of the interim constitution, these pale in comparison to the inherent weaknesses found in the Transitional Constitution of the Republic of South Sudan, 2011 as the former is far more democratic than the latter. Using the case of a genuine urgency to avoid broadly engaging the citizens both in terms of soliciting their top priority issues, upon which governance could be based, as well as educating them on the system of governance to be adopted as it success depends on their cooperation and support.

Due to an apparent lack of deliberate efforts on the part of SPLM-led South Sudanese political leadership, governance during the interim period was characterized by strong fixation on the relations between Juba and Khartoum. Given some bad experiences the South has had with Khartoum, particularly with regard to the history of broken agreements, there was a justification for South Sudanese to all agree and closely watch whatever moves came out of Khartoum with a view to counter it. While this was completely understandable as nobody was prepared to see the gains brought about by the CPA redialed back, single preoccupation with this was costly, as that enabled a serious disregard to other pressing matters. Key among these neglected issues was the urgency to have a national dialogue so as to determine a sense of direction with respect to how to design and shape a better future.

With South Sudan solely focusing on the CPA implementation, particularly the conduct of referendum, no sufficient attention was given to serious issues around which a national consensus could have been built. Concerning the CPA's successful implementation, everybody agreed that

the signature provision that could not be compromised was the issue of plebiscite, which held the key to and definitely paved the way for South Sudan's eventual independence. No doubt, South Sudanese dream of having a sovereign, independent nation is a noble, legitimate and dignified cause, worthy of all the sacrifices made by successive generations and one that stands to be made by both the current and future posterity in the defense of homeland. To both crown and cement the gains made with the attainment of independence, the urgent priority was to kick start the critical processes of nation building and state formation, and this work should have started with constitution-making process. Unfortunately, this was not done as expected. Instead of being proactive in terms of anticipating the challenges ahead and taking them head on, the country's leadership decided to adopt a reactionary approach. This meant that most of what consumed time during the interim period was responding to the machinations of the National Congress Party-led government of Sudan. The government of Southern Sudan went to sleep over future aspirations.

Few months before the declaration of independence on July 9, 2011, it seemed to have dawned on the country's political elite that separation was real and they were required to act. They surely did. To embark on this journey, an ad hoc committee was hurriedly formed to review the then interim constitution of the semi-autonomous region of Southern Sudan. Finding itself under severe time pressure, and perhaps unprepared for the job at hand, the committee sprang into action, produced constitutional text that enabled the nation to barely beat the looming deadline by just a couple of days when the Southern Sudan Legislative Assembly adopted the Transitional Constitution of the Republic of South Sudan, 2011. Signed by President Kiir on July 9, 2011 into law to further add to the jubilation of a victorious people, who through persistent efforts and immeasurable sacrifices exerted over a sustained long period, ultimately managed to establish their own nation, and the constitution surely provided the needed constitutional order and legal norms. However, little was known at that time about this important document in terms of how it might sufficiently help in charting a better course forward. To those few South Sudanese who have had the honor of putting their hands on the document, it provoked strong reactions.

According to these sources, there are concerns with the constitution, which render it insufficient to be used as an effective instrument of governance. Among the key issues that spell challenges for the constitution include ambiguous provisions that are left too open for interpretation, unjustified centralization of the judiciary, and entrenched, unrivalled powers of the executive branch over and above its other arms of the government. As this situation was not daunting enough, existence of inherent weakness in the constitution got carried over into the next process dubbed as 'constitutional review process, certainly crowding out any real prospect for a thoughtful endeavor in this regard. As time went by, the realities of governance set in and some of the aforementioned concerns came to pass. The trigger in terms of how the expected weaknesses inherently built into the Transitional Constitution surfaced was in regards to their application. To show how some of the aforementioned defects in the constitution might have seriously challenged the quality of governance in South Sudan, it would be sufficient to briefly examine the problem of vague provisions. Moreover, the challenge of constitution making process in South Sudan as defined by the Transitional Constitution is also explored. As outlined in article 202 of the constitution, President Kiir appointed the first batch of the members of the National Constitutional Review Commission (NCRC) on January 24, 2012. The action of constituting the constitutional body sparked strong reactions from the civil society organizations

(CSOs), which felt under-represented, as there was only one member from this important sector in the newly formed agency.

In a move designed to put pressure on the executive Mr. Dong Samuel Luak, the only appointee representing CSOs decided to agree with his colleagues not take the oath until more people from the sector are included. After a number of meetings, the executive blinked and six more others were added. Besides the CSOs complaint, it turned out also that the political parties were unhappy because of a similar issue of not having been given their right share in the NCRC. Like the situation with the CSOs, the President did try to address this issue by appointing more members in February and May of 2012. While these additions did not completely erase what appeared like a persistent grumbling from quarters that felt short-changed, the real challenge to the work that NCRC was tasked to carry out was lack of resources. Finding itself in a situation that had become too familiar whereby the government would have no problem in forming agencies but could not resource them so that they fulfill their mandates. It would take the NCRC to remain dormant for well over half of its constitutionally given one year during which it was expected to wrap up the review process, submit the constitutional text and exploratory note to the President.

By the time the much needed assistance arrived from some of the government's partners such as USAID, which was able to refurbish a facility owned by the South Sudanese Judiciary to help the constitutional review entity performs its envisaged work, NCRC tenure was nearly running out. Unlike the funding situation, extending the NCRC tenure was not a problem. In February 2013, the National Legislative Assembly (NLA) amended the Transitional Constitution and gave the NCRC a period of two more years that was backdated to the start of January 2013 to December 31, 2014. The NLA's decision of further granting a couple of years to the NCRC was a bit realistic than the one taken by the reviewers of the Interim Constitution of Southern Sudan that gave a one-year period.

Another area where the practice in terms of applying the Transitional Constitution proved a bit more problematic concerned the exercise of executive powers enshrined in the constitution. Article 101, section R gives the president authority to remove an elected governor and can dissolve elected state legislative assembly when this is done to circumvent a threat to national security. Furthermore, section S of the same article cited above authorizes the chief executive to appoint a caretaker governor whose sole duty would be to organize gubernatorial or legislative assembly elections in the event these become vacant. As a matter of principle, nothing seems wrong with the constitution conferring powers to the national executive, as this is one sure way of avoiding any situation that might pose a serious threat to the entire country emanating from any state. Where this becomes a particular problem, comes from two main grounds. First, what constitutes the phrase national security threat seems very vague and this makes it possible for people to apply this provision very selectively and surely enough, this is exactly what appeared to have happened. Second, the well-established pattern of the government under sourcing its own agencies is believed to have played a role in terms of enabling what appears like a blatant violation of the constitution. Notable example of this situation has to do with the National Electoral Commission having failed to establish its High Committees in the states in order to organize by-elections for the deceased MPs as well as conducting elections for the removed state governors.

In the context of what was clearly a simmering power struggle within South Sudan's ruling SPLM, ostensible selective application of article 101 (R) appeared. In January 2013, President Salva Kiir removed Chol Tong Mayay, former governor of Lakes state who was elected in 2010. Although no apparent reason was given for his removal, it seemed to have been strongly established that this has to do with intra-communal conflict in the state, particularly a violent conflict that occurred in the state capital Rumbek. Meanwhile, Jonglei state was more of a troubled spot of any place in South Sudan. Besides the said conflict that might partly explained the firing of the governor, two other factors are also suspected as having contributed to President Kiir's decision to relieve Mr. Chol Tong from his post. First of two has to do with alleged closeness of Governor Chol with Riek Machar, then vice president of South Sudan, who was strongly seen as wanting to openly challenge President Kiir as the next SPLM Chairperson. Second, were some internal differences that fitted Governor Chol and his supporters on the one hand, and on the other the rest of the State SPLM leadership being led by Chairperson Daniel Awet Akot, a senior SPLM member who had also served as state governor before the 2010 elections and deputy speaker of Southern Sudan Legislative Assembly until independence in 2011. The second time an elected governor would lose his position came about six months later. In a move widely viewed a critical juncture that might have helped sparked the ongoing conflict in the country, President Kiir removed Governor Taban Deng Gai as part of that wholesale dissolution of the cabinet on July 23, 2013. As it was the case with Chol Tong's removal, no reason was cited. However, some circles view this decision as having been seriously informed by the power contestation between Salva Kiir and Riek Machar, which surely had reached its peak.

Taken at the time of bitter power wrangles within the SPLM, the decision to remove the aforementioned governors was seen as simply being motivated by party's infighting politics. Critics of the move would quickly list a number of state governors that should have also been affected due to the fact that their states did experience deadly conflict. Whether one agrees with the reason given for the dismissal or not, the fact that the constitution seems to have been violated adds another layer in terms of lack of commitment on the part of the government to totally abide by constitutional provisions. As a document that aspires to entrench democratic governance, the Transitional Constitution stipulates in article (S) that president should appoint a caretaker governor in the event that an elected governor is removed. With this being clearly spelled out by the constitution, it is very difficult to speculate as to why both the executive and legislature would blatantly ignore to fully fund the National Elections Commission for more than two years after its establishment. Although it may just be a conjecture, it seems plausible to conclude that what might explain non-sourcing the electoral body has to do with lack of commitment by the government to regular elections as needed. Elections to replace the outgoing governors were to be conducted in 60 days. The government made absolutely no effort to implement this constitutional clause.

## **V. Conflict as an Opportunity**

While violent conflict is often undesirable due to the unjustifiable destruction it brings upon innocent civil population and the threat it presents to the state existence, there might be a very small way the recent violence could be seen as an opportunity. To meaningfully understand and to hopefully try to turn this costly conflict in the country into an opportunity, South Sudanese would really do well if they engage in soul-searching exercise of asking themselves as to whether there is anything they could have done to ensure that things turned out differently. More

importantly, the next question should be about what could be done now both to implement the current agreement, as well as making sure that no return to war under any circumstances. Given the critical role leadership plays in any society, it must be tempting to apportion more blame to the political leadership under auspices of the ruling party, SPLM. Holding this view might be right, but it would certainly be partly so. The truth of the matter is that there is surely plenty of blames to go around to cover the leaders as well as ordinary citizens for not paying enough attention to avoid things from spiraling out of hand as they eventually did, a result of which is clearly responsible for the dire situation the country now finds itself in. As things stand, of course, it can be said that no amount of blame game would be sufficient or decisive in turning the new page. Instead, what seems seriously needed now is for people to soberly understand what actually enabled the situation to move as it did and figure out what could be done to avoid any repeat of this mess again in the future.

To chart a better course forward, South Sudanese must try to completely unearth facts about what might have allowed things to falter. It would be insincere to suggest that people do not know what did not work. To find answers regarding the challenges that account for the state of affairs in South Sudan, one has to look at the legacy of war. Due to the long and arduous war that South Sudanese waged various regimes in Khartoum, the society was seriously fractured as Khartoum used counter-insurgency strategy. Given this reality it can be maintained that different communities found themselves on different sides of the conflict, and this sadly inflicted the indelible damage South Sudanese have had to experience. These wounds were created when these groups turned against one another as the internal liberation contradictions, Khartoum's counter-insurgency operations, and the leadership driven splits divided them. To turn over a new page of its dark history, South Sudan has to humbly and genuinely look inward, unearth the truth about what happened, acknowledge the terrible human rights violations committed, and apologize to those affected. Of course, it goes without saying that no amount of apology or even criminal prosecution could provide any meaningful solace, as doing this would not adequately do justice in terms of curing the insurmountable suffering and pain caused.

Furthermore, to better deal with the aforementioned war legacy, which has now been compounded by the recently concluded conflict, the country's leadership needs to revisit the liberation rhetoric espoused. As a way to mobilize the public behind it so that it can seriously mount ferocious military and political campaigns against the Khartoum based elite, SPLM/A leadership succeeded in lifting people's expectations quite high. Part of the campaign strategy was to sell the would-be SPLM led government as a better alternative. Unsurprisingly, this strategy worked as a result, and the majority of South Sudanese by and large were able to rally behind the leadership. With the SPLM government in place and running the affairs of the South Sudanese state, the expected peace dividends have remain elusive with the government struggling to provide basic services to the citizenry.

## **VI. Challenges**

While it is essentially unquestionable that South Sudan surely needs to draft and adopt a well-considered constitution – one that puts the citizens at the center in terms of guaranteeing their individual and collective interests, dreams and aspirations, it is also true that the prospect of this nature faces a number of challenges. In order to better understand these challenges so as to design how best to deal with them, it is appropriate to explore them here in some detail. Chief

among these are issues such as elite war-induced self-preference, lack of good constitution-making experience, liberation entitlement mentality that breeds a strong desire for accommodation, poorly understood state-society relations, misguided understanding that views constitution-making process as a purely technical exercise, lack of key infrastructure, biased political consideration for recruitment and lack of resources for mobilizing public support and outreach. Essentially it is an indisputable fact to state that South Sudan direly needs to convene a national dialogue if it is to sincerely confront its myriad of challenges head on. The context in which this much needed discourse will take place is, of course, through constitutional debate. But as previously mentioned, the prospect of a meaningful dialogue faces real, practical hurdles that can only be overcome with strategic leadership and unity of purpose. In a sense, to get South Sudan out of the current quagmire it finds itself in and toward a better future, it is incumbent upon both the country's political leadership and citizenry to work together as it was the case during the war with the rump state, Sudan.

As already discussed, having a constitution that comprehensively helps in mediating different competing national interests and priorities is of paramount significance. More importantly, to establish a strong national foundation starts with building a consensus on the nature of state-society relation, national identity and cohesion. It is an established fact that the processes of nation building and state formation are wide and encircling endeavors, hence to undertake them requires the existence of a robust and progressive agenda as well as collaborative efforts on the part of the citizenry. This agenda can only be realized if there is a deliberate, strategic sense of direction, which by necessity needs to be grounded in the constitution. Capable of managing its multifaceted challenges of nation building and state formation, it must be noted that this project surely faces a number of insurmountable odds as already identified previously. Owing to long and laborious liberation struggle that generations of South Sudanese waged against various Khartoum based regimes, there emerged some dynamics that certainly make it difficult to easily forge progressive, united public efforts when it comes to building a sound national edifice.

As a result of the war-induced mindset, particularly among the elites, there is unjustifiable self-preference that tends to entrench the feeling that self-interest trumps public service. To be sure, the root of this ostensible self-serving attitude might have to do with what could be called Khartoum hangover effect. Viewing the state as their extractive colony, Khartoum base elites might have succeeded in cultivating a culture of me first outlook as the last nine years experience showed in South Sudan. Given how poorly public resources have been managed by some individuals who seem to perceive themselves as inseparable from the state, any matter of public significance has been and continues to be disregarded. On this list of the neglected public issues, is the constitution. Both its framing and the subsequent utter disdain it has received in terms of disrespect from the very people who drafted it and eventually enabled its passage is simply remarkable. In other words, experience of oppression and lack of deliberate attempt to put the people of South Sudan at the center when it comes to strategic issues; tend to have a combined effect of withdrawal by the public and the elites believing that they are the only ones who count.

Further compounding the matters, are experiences relating to recent constitution making process in the Sudan. For all intents and purposes, a closer examination of the learned experiences of the botched Sudan's elite-driven constitution-making undertakings that essentially attempted to control state power by political parties, one gets a sense of hubris. Seen from this perspective, it appears that the self-regarded special ones seem to harbor a very illogical sense that constitution-

making process is simply an exercise, which amounts to deal making only among the political parties elite. This elitist attitude, which wrongly views constitution making as purely a technical exercise that requires literacy and special knowledge is quite pronounced.

## **VII. Modes of Overcoming Challenges**

To state the fact that the envisaged South Sudan's strategic goal of adopting a well-considered constitution really faces a series of challenges is certainly stating the obvious. As discussed above, these challenges are multi-faceted and many, but make no mistake these could be overcome with fortitude and strategic leadership. Towards this end, it would be best to consider doing the following in order to circumvent any pitfalls. First, it would both be judicious and extremely important to consider forming a small-sized committee of experts whose sole purposes are to engage ordinary South Sudanese citizens in order to foster a better understanding among them with respect to the relevance of the constitution in their lives, as well as enabling the committee to fully comprehend what the magnitude and nature of the challenges confronting the society are. Instead of narrowly defining the constitutional parameters, essentially limiting the task constitution making to only reviewing the document ridden with a myriad of inherent weaknesses as is currently given to the NCRC, South Sudan would definitely be served well if the job of writing what, for lack of better words, is commonly referred to as 'permanent' constitution, is given to a small committee of technocrats. Doing this guarantees that a two-way, real learning opportunity exists. The importance of this committee-public interaction is to the extent possible, create a better process as to the realities that the constitution is needed for are concerned. After the constitutional text is duly drafted, the document would need to be made available to the public for review and reaction before it is presented to the relevant institutions for their consideration. Following the debate and subsequent passage by all the relevant government institutions, the resultant text should be judged against the principles for which it was set up to advance in the first place.

## **VIII. Conclusion and Recommendations**

Given the imperatives highlighted above as justifying why South Sudan must undertake a well-thought out constitution-making process, it is extremely important that if and when it is undertaken, this exercise ensures to put the citizens at the center. The Transitional Constitution confirms the fact that state sovereignty derives from the people's sovereignty. This in a sense implies that ensuring state stability requires a sustained focus on the people as this has the potential to ultimately cement national foundation.

The surest way of accomplishing this monumental task would be to carefully draw a charter that establishes the parameters within which affairs of the state are run. To properly ground social contract between the citizens and their government, it is important to see the constitution as a mediating instrument capable of handling the complicated governance issues.

To realize this dream, the resultant document must be subjected to an open and transparent public vetting, as doing this will lend it both the legitimacy and credibility it needs. In terms of the outlook, the constitution should be thought of as the only basis upon which conflicts facing the nation are addressed. As the mother of all laws, respect for the constitution by all, regardless

of socio-economic standing, political weight and influence, is of paramount significance, as doing this would go a long way to ensuring peace and stability in South Sudan.

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### **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.

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