



# 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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### **The unresolved aspects of the Revitalised Peace Agreement and their implications on constitution-making in South Sudan**

*Joseph Geng Akech*

#### *Summary*

*This Review identifies and problematizes certain key aspects of the Peace Agreement likely to derail constitution-making process. These four conundrums are:*

- *whether transitional justice should be preceded by or run concurrent with the constitution-making;*
- *how enablers of popular participation in a post-conflict constitution-making can be prioritised;*
- *whether a consensus on the system of governance can be reached before designing a new constitution; and*
- *the best practices for diminishing elite capture of the constitution-making process.*

*The Review recommends the SPLM to lead these debates since it led the struggle for independence with a vision to create a prosperous state. The debate should enjoin partners and South Sudanese think tanks, such as the Sudd Institute, Ebony Centre, and the Law and Development Centre of the University of Juba, among others. Evidence-based dialogue on these aspects may diminish prospects for disagreement by the parties and stakeholders during constitution-making.*

#### **Introduction**

**T**his Review identifies and discusses certain unresolved aspects of the Revitalised Peace Agreement which are likely to derail the constitutional design process. The aim is to show their implications and potential impacts on constitution-making process. The Review urges parties to the Agreement, policy analysts, and researchers to be seized with these key aspects prior to the commencement of constitution-making.

The call to engage early on these issues is to diminish prospects for disabling disagreements among parties to the Peace Agreement. Difference in opinion on key issues highlighted below may threaten gains made in building durable peace and political stability in South Sudan. There is, therefore, a need for consensus in the lead up to crafting a ‘permanent’ constitution which many South Sudanese expect to address critical issues that instigated political instability and fractured their communities. This is because the expectations are always high in all post-conflict social engineering experiments. The people deservedly expect that a post-conflict constitution would turn a new leaf of stability, promote socio-economic progress, and yield strong institutions capable of dispensing good governance and the rule of law.

This begs the question; what are the key unresolved issues likely to impede achievement of these goals?

This Review proceeds in three sections. The first outlines the context underpinning constitution-making. This is important to remind a reader of the premise that birthed the process. The second section highlights key constitutional design questions while demonstrating their potential impact on peace and political stability. The last section makes recommendations on the dialogue process to address the key questions.

## **I. Why the new constitution for South Sudan?**

The country does not have a consensual governing document. What exists is a rework of the Interim Constitution of Southern Sudan, 2005, which was hurriedly re-shaped as a placeholder for a final and a consensual constitution.<sup>1</sup> The process of developing what is known as the ‘permanent’ constitution started in 2012 with the Constitutional Review Commission (i.e., Akolda Commission), but it was prematurely ended by a sudden conflict in December 2013.<sup>2</sup> However, the Revitalized Agreement on the Resolution of the Conflict in South Sudan (R-ARCSS) re-instated the parameters for crafting a peoples-led constitution.<sup>3</sup>

Up until the writing of this Review, only the constitution-making legislation (Constitution-Making Process Bill) had been drafted and presented in parliament for consideration. For the sake of clarity, constitution-making entails the following:

- Convening (this is where actors negotiate terms and principles to guide the process);
- Drafting (text formulation and crafting);
- Deliberation and adoption (involves popularizing the text for public buy-in); and
- Ratification (formal debate and adoption through a constituent assembly or by a legislature).

As all these processes come into play, several key questions, as presented below, ought to be addressed. By ‘key questions’, I mean the unresolved aspects of constitution-making that are consequential to the resulting constitution.

## **II. The key questions of constitutional design in South Sudan**

### **Question 1: *Should local peacebuilding be preceded by or run sequential or concurrent to constitution-making?***

One of the key pillars of the Revitalised Peace Agreement is the transitional justice mechanisms of ‘three-mutually but independent mechanisms’<sup>4</sup> comprising the Commission for Truth, Reconciliation and Healing (CTRH), the Hybrid Court for South Sudan (HCSS), and the Compensation and Reparation Authority (CRA). The grand aim of these mechanisms is to champion reconciliation, local peacebuilding, and judicial accountability. These mechanisms have not been operationalized just yet, even though they play an important role in creating an enabling environment leading to the constitution-making

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<sup>1</sup> M Deng ‘Constitutional transformations: Failure and opportunity in post-independence South Sudan’ (PhD thesis, The University of Queensland, 2020) 2

<sup>2</sup> J Akech ‘The intricacies of constitution building in South Sudan’ (2022) <<https://ancl-radc.org.za/node/655>> (accessed 2 September 2022).

<sup>3</sup> See Chapter 6 of the Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS).

<sup>4</sup> J Akech ‘Rethinking transitional justice in South Sudan: Critical perspectives on aspects of justice and reconciliation’ (2020)14 *International Journal of Transitional Justice* 585

process. This is for the simple fact that reconciling and healing the wounds of conflict are paramount to community/social cohesion.

The question thus boils down to: should transitional justice be preceded by constitution-making, or should the two processes run concurrently? What is the implication of either singular or pluralistic approach? Why is this important debate not taking place among political actors, policy analysts, civil society, and international actors?

I pose these questions because there is need to have timely, sustained and inclusive research and dialogue which would inform policymaking and facilitate consensus building.

**Question 2: *What are the enablers of popular participation in a post-conflict constitution-making? Are these enablers present in South Sudan?***

Constitution-making is complex and requires calm and inclusive processes involving all sectors of a society. Embarking on a constitutional design in a conducive environment is a quintessential approach for enhancing popular participation of the people. This is, however, possible if certain enablers are put in place. These include, but not limited to the following:

- *Peace and security*—people must be at peace with each other, able to freely move and engage with one another as a community, group or individuals without fear and intimidation.
- *Political pluralism*—constitution-making is a political process in which ideas are traded among and between political actors, civic groups, civil society and the people. This requires everyone to play by the same rules and in a levelled playing field where persuasion, rather than coercion, is the method by which ideas get traded in the ‘political marketplace’.
- *Improved social services for the citizens*—access to social services is an enabler of social harmony which in turn promotes active public participation in the political process of constitutional engineering. The current deteriorating social conditions are barriers to extensive participation of the people who may have to choose between hunting for food for their families and participating in constitution-making process. It is a fact that most people are doing *jeri-jeri* (hustling) to make ends meet in the down spiralling economic situation facing South Sudan.<sup>5</sup>

These conditions have an impact on the constitution-making process. My argument, thus, is to promote these enablers which are *ipso facto* conditions for increased public participation in constitution-making.

**Question 3: *At what stage and by what mechanism should the system of governance be addressed?***

The Revitalised Peace Agreement puts forward certain propositions yet to be nuanced to the context and realities. One such proposition is the adoption of federalism. The peace agreement leaves the type of federalism, and whether the country shall adopt a presidential or parliamentary system of governance to be discussed and agreed upon by the people and political actors. Other ideas floated include the notion of ‘rotational presidency’ which might not serve the purpose of political equality since such could be attained through a proportional system in which minorities access power through political parties. It is also

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<sup>5</sup> The term “jeri-jeri” is a pigin Arabic (Arabic/Juba) for hustling.

important to remind ourselves that the three regions are not homogenous, and it does not follow that a president merely represents all interests – ethnic or political – in a given region.

Evidently, the questions of governance to be settled through constitution-making are a mouthful yet no meaningful debate has commenced. If the constitution-making process commences today, what shall the drafters do as regard the system of governance? One would hope that a consensus on these matters be reached before commencing the constitutional drafting. This debate, as I have recommended below, could be led by the SPLM since it has a pivotal role not only in the peace process, but also in claiming the liberation agenda that culminated in independence.

**Question 4: *How can constitution-making process escape elite capture to be truly people's-led?***

Elites are always on the lead (because they are (supposedly) either the leaders or sponsors of a political process)) in a constitutional design. Elite's leadership is different from elite capture. The latter is to arrogate to oneself decisions that create an unfair advantage to the detriment of others. Some form of elite capture is already arguably witnessed in the peace agreement which grants the parties signatory to it some veto power, including expected strong representation in all institutions of constitution-making.<sup>6</sup>

What is the implication of an elite capture *vis-avis* discussions on governance and the notion of people-led process? How can this prospect be diminished? On this, and other questions posed earlier, I offer some views below.

**III. Addressing the key questions—methods and approaches**

I have asked several questions thus far. These questions are meant to trigger the much-desired debate that should inform the constituting-making process. I now make two recommendations in respect of these questions.

*First*, the SPLM should shoulder responsibility to re-organise itself and champion these debates. The reason for this suggestion is that it is the SPLM which mobilised the populace to fight the war of liberation, and it is they who also brought the suffering (governance failures) to the people they liberated. If the SPLM intends to finish its liberation project of economic emancipation, political empowerment, peace and security for all, it must lead these debates. To do so would require it to:

- Re-organise its structures and vision by bringing on board its much resourceful, yet abandoned, unutilised and ostracised talented youth and comrades to lead the dialogue at both national and grassroots; and
- Commission research and studies by collaborating with think-tanks such as the Sudd Institute, the Ebony Centre and the Law and Development Centre of the University of Juba.

*Last*, the international community is a strategic partner of choice in the promotion of peace, rule of law and constitutionalism. They should join the dialogue as South Sudan forges a

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<sup>6</sup> Institutions of constitution-making include: (1) Constitutional Drafting Committee (CDC), reconstituted National Constitutional Review Commission (NCRC), Preparatory Sub-Committee for the national conference, National Constitutional Conference (NCC) and the Constituent Assembly.

peaceful, and prosperous future. Indeed, a peaceful, stable, and democratic South Sudan is a boon for regional and world peace. In this context, the international community, including other key partners, should support round-table dialogues, radio talk-shows, and civic engagements to promote inclusive idea-sharing and build consensus leading to the constitution-making process.

In short, the lack of debates on these questions prior to commencement of the constitutional crafting could jeopardise the much-needed compromise and consensus on sticky issues such as the system of governance. This underscores the centrality of all decks on board.

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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.

### **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 designs and transitional justice. He can be reached via [josephgakech@gmail.com](mailto:josephgakech@gmail.com).