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A Nation in Transition: South Sudan's Constitutional Review Process

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Summary

- ❖ The one-year mandate that the transitional constitution gave the National Constitutional Review Commission (NCRC) to write and submit to the President of the Republic a draft constitutional text and explanatory report to be tabled as required has disappointingly elapsed without producing the expected deliverables.
- ❖ NCRC's failure to timely secure a budget and premises vitally necessary for its operations and activities meant that the constitutionally mandated deadline had to pass without any significant progress made, and this seriously calls into question the commitment on the part of the government to the process leading to the production of the country's permanent constitution.
- ❖ The nation's top leadership has to prioritize the development and production of a people-centered constitution by urgently providing the NCRC with all the necessary financial, technical resources and assistance and to ensure that the process has public participation as its bedrock.
- ❖ The NCRC needs to understand that it has been entrusted with a huge responsibility to technically facilitate and guide the process leading to the attainment of the constitution, but the final power of validating and legitimating the resultant outcome rests with the people as sovereign.
- ❖ The legitimacy of the constitution is extremely important, and can only be assured if public participation, scrutiny and input are given due priority in the process. This means that the process needs to necessarily stay open and accessible to ordinary citizens, so that they can have a say with respect to determining how the country should be run and governed.

- ❖ Production of a publicly debated constitution is advanced if all the stakeholders genuinely see each other as legitimate and work collaboratively to secure their collective needs and interests.
- ❖ The culmination of the constitution making exercise needs to happen when the document thus produced through a sound and participatory process, is eventually sent for ratification through a constitutional referendum. This is because the highest organ of the state, vested with exclusive power to enact and to amend the country's foundational law is its people

Introduction

South Sudan's attainment of independence on July 9, 2011 was a momentous achievement that fulfilled the people's long-held aspiration and desire for an independent, sovereign state. In fact, independence was just the beginning of a long journey towards statehood for the newly established republic. Following the overwhelming vote in favor of separation, the then Government of Southern Sudan in what appeared like a race against time constituted a Technical Constitutional Review Commission to help revise an interim constitution in order to give the new independent state a workable constitutional framework.

Working within a short period of time - only four months under severe time constraints, the constitutional review body reworked the Interim Constitution of Southern Sudan (2005) and produced the Transitional Constitution of the Republic of South Sudan (2011). Of course, this process took place in an environment that was completely devoid of public participation, scrutiny, and input. Nearly two years into a transitional period, which was formally ushered in when the former semi-autonomous Southern region successfully extricated itself from the rest of Sudan, the quest for a permanent constitution is still under way.

However, the public does not seem to know much about this crucial process with respect to the progress made thus far or lack thereof. To help close this apparent knowledge and information gap, this policy brief examines the work of the National Constitutional Review Commission (NCRC). The brief does so by reviewing the constitutionally mandated process in terms of the structures and systems put in place to guide the work leading up to the production of well-considered constitution. Finally, it recommends the need to have a very elaborate, publicly scrutinized and debated constitution-making process, with a referendum on the constitution being the final stage of the exercise.

Overview of the Constitution Making Process

Promulgated hurriedly so as to help meet the constitutional needs of the world's newest nation, the process that produced the Transitional Constitution understandably lacked popular consultation and input. Properly understood, South Sudan's Transitional Constitution, with all its shortcomings, is just a placeholder until a well thought through Permanent Constitution is in place. With the goal of providing the young nation with a more people-driven constitution in focus, the Transitional Constitution outlines a process to be undertaken in as far as achieving this objective is concerned in articles 202 and 203. To help in leading this process, the Constitution identifies four stages through which the constitution-making exercise will pass before the promulgation of its resultant supreme document. These stages include the National Constitutional Review Commission, the National Constitutional Conference, the National Legislature and the assent of the president.

Although each of the institutions the Transitional Constitution tasks with ensuring the development and production of South Sudan's Permanent Constitution deserves attention, the work of the NCRC is extremely important and therefore, warrants a close examination. Unlike the other three, all of which, except that of the assent of the president, are expected to review, debate and adopt the content of this essential document, the NCRC as per Article 202, sections 6, 7, and 8 of the Transitional Constitution, is charged with conducting a nation-wide public information sharing and civic education programs on constitutional issues, soliciting experts' assistance, collect views and suggestions from all relevant stakeholders, and review the Transitional Constitution.

With the second anniversary of independence just under six months away, the road and the destination towards a permanent constitution remains very unclear littered with serious uncertainties. There are a number of factors, which account for this. Despite the great deal of excitement and euphoria created by the attainment of a republic, preparations in anticipation of the daunting task of shouldering the challenges of nation building and state formation seem seriously lagging behind. Equally important is the effect of the thorny, unresolved outstanding post-independent issues between South Sudan and Sudan which in large measure, is responsible for the economic quagmire the country is currently going through, particularly in the wake of oil shutdown, apparent lack of political direction and will to chart and follow a more sustained, strategic path that is critically needed to properly anchor national foundation.

The National Constitutional Review Commission: One Year in Review

Instead of starting with a small team of nonpolitical experts whose job it is to review and draft the constitutional text, the Transitional Constitution, perhaps unwisely, begins with a larger bulk of politicians, essentially formulating it as the National Constitutional Review Commission (NCRC), which currently comprises 55 members. To be sure, 44 of this 55-member body represents political parties, with the remaining 11 being shared 7, 2, 2 by the civil society organizations, faith-based groups, and a supposedly non-party affiliated Chairperson and Deputy Chairperson, respectively. This composition surely leaves a lot to be desired about the nature and quality of the constitutional text that will emerge. Little is known about the technical profiles of the members of the commission, turning the sojourning entity into an economically and politically accommodating venture for politicians, an orthodoxy the leadership seems to have long established. The politicization of this process is clearly evident in the extent to which the NCRC was constituted. For instance, exactly within six months as the Transitional Constitution calls for in article 202 (1), President Kiir appointed 40 members of NCRC by a decree on January 9, 2012. Although section 4 of this January presidential decree states that "The Commission shall consist of a Chairperson, Deputy Chairperson and 43 other Commissioners" making it appear that the number is fixed, additional appointments to the Commission was done in February, May, and July 2012 bringing the total number to 55.

Although the Transitional Constitution put in place an agenda and a timeframe through which a new constitution can be completed, disappointingly, aspirations have not matched with realities on the ground. A window of one year that the Transitional Constitution gave to the NCRC elapsed without any significant progress. As a matter of fact, during its first year of existence, the NCRC as per its own progress report only managed to conduct a couple of workshops and a conference, adopted a plan of action and internal rules of procedure. Reasons for the NCRC's underperformance include, among others, lack of key resources like premises and budget.

Despite the timely institution of the Commission, however, this action was not immediately accompanied by the release of the critically needed resources. Six months after its establishment, the Commission's budget was approved in July 2012. This budgetary delay coupled with lack of premises from which to operate meant that the NCRC had to simply spend half of the time it was given to do its work dormant.

Going forward from here, the issue of premises for NCRC's operations is reportedly addressed. A facility belonging to the National Judiciary has been given to the NCRC to use until its work is complete. Unfortunately, the said facility was not ready for use right away, as it seriously needed renovation. USAID is funding the repair work that was expected to be over by the end of January 2013 as well as the maintenance of this office space. In terms of financial resources, the picture is not clear. The Commission's current budget runs out at the end of June this year, and to suggest what will happen in the next fiscal year's budget would be wildly unfounded.

As an entity that was given a life span of one year, the NCRC now awaits the nation's legislative body to amend the Constitution in a move that will renew both its mandate and term. The NCRC is asking to be given nine months, beginning January 9, 2013 in order to complete its work. The big question, of course, is how a body that literally spent a full year without accomplishing much of what it was tasked can be trusted with even a shorter period, especially in the absence of necessary resources?

Currently, the National Legislature, which is on recess, is scheduled to return to the national capital and convene an extraordinary session on February 21, 2013 to attend to this important national matter. Granted that the request for the renewal of the NCRC's mandate and term is accepted, it is not clear as to whether the tasks at hand – civic education program about the constitutional issues, public participation, solicitation of ideas and suggestions from constitutional experts, reviewing of the Transitional Constitution, and drafting of the new constitutional text, would be achieved in time without stretching the transitional period.

Recommendations

Given the need to have a publicly scrutinized and debated constitution to provide a sound legal framework as well as lending more credence and legitimacy to government institutions as far as their mandates, powers, and functions are concerned, it is difficult to

see how the legislature would fail to endorse the proposed extension. To that effect, it is strongly recommended that:

- The National Legislature should pay a very close attention and seriously consider how realistic the nine-month period, which the NCRC is asking for its work at hand, is. In its consideration of this matter, all options including extending the mandate at least a year or longer even if doing so means extending the transitional period. The focus here should not just be about meeting the deadline at all cost, but rather about proper anchoring of the process in order to ensure long-term sustainability, wider participation and the production of quality constitution that all citizens can accept as legitimate and fair, therefore meriting their subscription.
- The government needs to prioritize and expedite this process over other issues by providing the Commission with all the necessary financial and technical resources it needs in order to succeed in terms of advancing this endeavor. In a way, if a successful completion of the constitution-making process is to be realized in South Sudan – one with genuine and sufficient public participation and input, it needs to be given an urgent and sustained attention.
- The composition of the Commission, given the task it is given to do, should be reconsidered. The current size is quite large and bloated with senior government officials who are already busy with the work of their institutions, and this lends little window for progress as it has a serious human resource implication, with a potentially low production. Equally concerning, eighty per cent of the Commission's membership (44 of 55) represents political parties, and this unnecessarily politicizes the process that otherwise needs to be both non-partisan and technical.
- To give the constitution the legitimacy it needs in order for it to serve as an essential governance instrument, there is a need to include a constitutional referendum as the last stage of this crucial process. Activities that engage the ordinary populous have been extremely limited; essentially posing concerns over neglect of the governed in this important process, presuming that constitution making is a purely legal matter.

Conclusion

The exercise of developing a constitution is usually seen as the first step towards establishing proper parameters through which governance and institutional challenges are addressed. For South Sudan, the need for a publicly discussed constitution cannot be emphasized enough. This is because the recently concluded over two-decade Sudan's north-south second civil war has left the new republic's communities seriously fractured. The role of the constitution therefore, is to help provide a post-war arrangement that has national reconciliation, security, peace and unity as its essential pillars.

With the constitution serving as a cornerstone of a legal norm and the rule of law, it makes more sense that the process leading to its production is necessarily people centered. This means that public participation must be enlisted in all related endeavors pertaining to the constitutional text, with a constitutional referendum mandated as the final stage that decides on the validity of the constitution. This is because the four stages enshrined in the Transitional Constitution seem to seriously lack or limit the spirit of inclusivity and openness. Given the way the composition of the National Constitutional Review Commission, the National Constitutional Conference, and National Legislature are drawn up, it might be difficult to sincerely conceive of these institutions as in any way reflective of the diverse groups that make up South Sudan.

In a nutshell, political parties, with SPLM having the lion's share, dominate these bodies. To address this politicization of a rather technical exercise, giving the people a final say with respect to their constitution is ultimately the right thing to do. There exists a special relationship between the constitution and the people, and the latter therefore, has the final say when it comes to adopting the supreme law of the land. In other words, having the people as the final authority in deciding the fate of the constitution is the process that makes this foundational document a social contract. Properly understood, the constitution can only reflect the will of the people if it is indeed approved by them, not by some select few.

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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