

A stylized map of South Sudan composed of a grid of grey dots of varying density, creating a halftone effect. The map is centered on the page.

# PEOPLE-CENTERED CONSTITUTION-MAKING IN SOUTH SUDAN

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Building consensus on a permanent constitution is an important step towards the creation of a new political order. Participation in such consensus-building must extend beyond the elites to include South Sudanese citizens at large. The Revitalized Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS) of 2018 prescribes a participatory people-centered constitution-making process. This discussion paper gleans lessons from the past and takes stock of the present to formulate recommendations for an inclusive, credible path to a permanent constitution for South Sudan.

## Action points for people-centered constitution-making

- **Inclusiveness of public participation must be promoted by constitution-making bodies.**

Only an inclusive process that is reflective of the breadth of South Sudanese society will make the permanent constitution a legitimate living supreme document of social contract and rule of law enhanced by best practices.

- **Public participation and civic education must go hand in hand.**

Only a well-informed public will be able to meaningfully participate and feed into the institutional process of constitution-making. Adequate resources must be allocated and accessible mechanisms for civic education and public participation developed.

- **Institutions must be adequately prepared to do their job.**

Rigorous planning, sufficient and timely resource allocation, and adequate staffing (including 35% women representation) of constitution-making organs are a necessary requirement for a credible constitution-making process. Donors can support technical expertise of staff in constitution-making bodies.

- **Lessons should be learned from history and academic research.**

Constitution-making bodies should draw on empirical research on substantive constitutional issues such as federalism and land tenure. Archives of past dialogues, including the recently concluded National Dialogue, contain the views of the people. The Obasanjo report and past UN Panel of Experts reports offer important lessons for the future.

- **Donors must focus on process over events.**

The integrity of the constitution-making process and the preparation of elections is vital if the election event is to foster sustainable peace and stability for the country. Critically, the incomplete implementation of transitional security arrangements and high levels of local violence must be addressed before a participatory constitution-making process can be concluded and credible elections can take place.

## People-centered constitution-making in South Sudan

On 12<sup>th</sup> September 2018, the Revitalized Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS) was signed by representatives of the two main warring parties to the conflict, political parties, and civil society delegates in Khartoum, Sudan. The comprehensive peace agreement prescribes a people-centered constitution-making process which is to lead up to the first general elections in an independent South Sudan.

This discussion paper explores key criteria for South Sudan's permanent constitution-making process to result in a 'lived' document owned by the people of South Sudan upon which to build an inclusive, democratic, socially just polity. It assesses the extent to which the provisions for the permanent constitution-making process spelled out in the R-ARCSS have been met at this stage of the process, outlines factors currently hampering the full implementation of the RARCSS provisions in the permanent constitution-making process, and points to ways to facilitate a people-centred permanent constitution-making process. The discussion paper reflects on the constitutional history and the national dialogue, from which lessons are garnered for analysis of the current situation of constitution-making process and recommendation for what could be done better. The main argument is that this process should bring the people of South Sudan together in a spirit of dialogue, create room to allow them to build consensus on core national issues, and allow ownership of the constitution-making process and the constitutional document which shall serve as a framework for the political and economic future of the people of South Sudan.

## R-ARCSS and the roadmap to a permanent constitution

The mandate of the Revitalized Government of National Unity (RTGoNU) is encapsulated in article 1.2.5 of the Revitalized Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS). The RTGoNU has been authorized by the parties to initiate and oversee the writing of permanent constitution within 24 months during the 36 months of transitional period in accordance with Chapter IV of the R-ARCSS. The parameters in this chapter of the peace agreement provide for supremacy of the will of the people, adherence to constitutionalism, attention to good governance, respect for human rights, adoption of federal system, guarantee of basic needs of the citizens, equitable economic growth, protection of communal rights, preservation of ethnic diversities, affirmative action, gender equity, participatory democracy, national unity, sustained dialogue, defense of territorial integrity, and promotion of international cooperation, so that peace and stability could durably prevail in South Sudan.

Chapter VI of the R-ARCSS centres on the process of making a permanent constitution for the Republic of South Sudan. It spells out principles and the key issues these raise, from federalism to human rights; define timelines for the various phases of the process and its conclusion; prescribe adequate consultations with all stakeholders including the political parties, CSOs, women groups, youth and faith-based groups, and the citizenry at large, as well as civic education, to ensure the process is led and owned by the people of South Sudan, while taking into consideration lessons learned from South Sudan's common law, constitutional history and experience, and the revitalized peace agreement. To this end, the Reconstituted Government of National Unity is to provide for a representative composition of the NCRC and adequate budgets for full implementation of the R-ARCSS.

From 25 – 27 May 2021, the Reconstituted Joint Monitoring and Evaluation Commission (RJMEC) and the Max-Planck-Institute (MPI) hosted representatives of stakeholders and parties to a workshop to design a roadmap for the constitution-making process in line with the provisions of the peace agreement. The workshop addressed questions surrounding the drafting of the constitutional text, the composition and mandate of the reconstituted National Constitutional Review Commission (NCRC) and the National Constitutional Conference (NCC), and the modalities of public participation and civic education. The workshop report is detailed on institutional and legislative aspects of the constitution-making process but remains vague on the operationalization of public participation as prescribed by R-ARCSS. More so, no clear distinction is made between public participation and civic education. The workshop report containing the final resolutions reads:

“5. The institutions/mechanisms involved in the Permanent Constitution-making process shall give due regard to inputs received through public participation/consultation. Civic education and public participation within the Permanent Constitution-making process shall be multi-phased and multi-faceted. The R-NCRC shall consider public submissions throughout the Permanent Constitution-making process. 6. In facilitating and promoting civic education and conducting public participation/consultation, the R-NCRC shall ensure that appropriate means and methods are used as the context requires. The chosen forms of civic education and public participation/consultation should not exclude any parts of the public for reasons of physical ability, level of education, language, geographic location, religious beliefs, ethnicity, political affiliation, or any other reasons.”

Overall, implementation of the peace agreement remains far behind schedule. The interim chair of RJMEC at the Governors’ meeting in Juba on 23rd November 2021 warned that time was running out. He called on the Reconstituted Transitional Government of National Unity (RTGoNU) to speed up the enactment of necessary legislation, including the Permanent Constitution-Making Process Bill 2021, fully constitute the Judicial Reform Committee and make funds available for the completion of the Transitional Security Arrangements which provides for the unification of former warring factions in the South Sudan People’s Defense Forces (SSPDF). Across the political spectrum, at home and abroad, the incomplete implementation of the transitional security arrangements is seen as the most critical obstacle to a credible participatory constitution-making process and free and fair general elections.

### A history of elite-driven constitution-making in Sudan

The constitutional history of South Sudan offers valuable lessons for today’s constitution-making process. Prior to the abortive permanent constitution-making process in an independent South Sudan, the constitutional documents guiding the political systems under which South Sudanese lived, were conceived as elite projects that primarily aimed to entrench the rule of these elites. Therefore, these constitutions failed to contribute to lasting peace and stability in Sudan, and later the semi-autonomous region of Southern Sudan and eventually independent Republic of South Sudan.

Failure to incorporate the ethnic, cultural, and linguistic diversity of the people of Sudan in the political system created by the country’s first interim constitution of 1956 would provoke civil war. The first interim constitution of the Sudan did not recognize the demand for recognition of the unique diversities of the people of Southern as expressed in the 1928 Rejaf Conference on the adoption of vernacular

languages, and in 1947 during the Juba Conference on the participation of Southerners in the interim national government after the exit of the Anglo-Egyptian condominium rulers from the Sudan. The denial of federalism by the condominium authority and the northern ruling elites in Khartoum provoked the lawmakers from constituencies of Southern Sudan to boycott the parliamentary sittings in 1958. Ultimately, failure to recognize the political rights of all communities of the Sudan triggered the first civil war.

Sudan's first civil war was ended by the Addis Ababa Agreement of 1972. Its content was largely informed by the resolutions of the 1965 Roundtable Conference in Khartoum and the Recommendations of the 12-Man Committee on how to govern the Sudan and accommodate its diversity of the regions. Competitive parliamentary elections in Southern Sudan subsequently took place 1978 and 1981 under the framework of the 1973 Permanent Constitution of the Sudan and the organic law for the regional government in Juba. The votes saw different presidents of the High Executive Council and Speakers of the People's Regional Assembly brought into power with due consideration of provincial balance of representation under one-party system of the Sudanese Socialist Union (SSU). Parliamentary organic law and regional balance enshrined in the Addis Ababa agreement fostered unity among South Sudanese across ethnic boundaries and facilitated issue-based mobilization of South Sudanese for a common cause, namely in opposition to the regime in Khartoum. The church, through the Africa Council of Churches and the South Sudan Council of Churches, played a critical role in mediation and implementation of the Addis Ababa agreement. Some church officials even served as government officials during the implementation of the Addis Ababa agreement.

This brief period of a semblance of regional balance and accommodation in the (regional) governance of Southern Sudan was not to last. The abrogation of the special constitutional arrangement in 1982 provoked renewed civil war, more intensive and longer than the previous one. In 1992 and 1998 the Government of the Sudan (GoS) promulgated new constitutional orders, introducing symbolic federalism and political Islam across the country. The ruling junta and Islamists in Khartoum allocated ten (10) federal states to Southern region. But persistent and growing calls for secularism and inclusion of the marginalized regions in the government pushed the international community to intervene. The right for self-determination by the people of Southern Sudan was then accepted by the warring parties. Hence, the 2005 Comprehensive Peace Agreement (CPA) became the turning point for power and wealth sharing between Khartoum, Juba and the states guided by the Interim Constitution of the Sudan (2005) with special secular and decentralized consideration enshrined in the 2005 Interim Constitution of Southern Sudan.

The 2005 Interim Constitution of Southern Sudan was drafted by a small technical committee whose members were preoccupied with preservation of supremacy of the CPA. In other words, the constitution was drafted by an elite to protect the interests of the elites who formed the main signatories of the CPA.

A people-centered permanent constitution-making process was only initiated in 2012 after the Republic of South Sudan had become an independent state in 2011. The newly established National Constitutional Review Commission (NCRC)<sup>1</sup> in 2012 was tasked to conduct a nationwide civic education campaign, carry out public consultations, organize the national constitutional conference and then furnish the Constituent Assembly with a constitutional bill to be adopted before the President of the Republic assent

<sup>1</sup> The NCRC had 60 members comprising SPLM (26), Other Political Parties (22), Women (1), Civil Society (6), and Faith-based Groups (3), in addition to Chairperson and Deputy Chairperson. It had a secretariat that developed the budget, rules of procedures, strategic plan, civic education manual, among other requirements. The NCRC was to consider the resolution of the "All South Sudanese Political Parties Conference" in Juba (13th - 17th October 2010), which called for inclusive permanent constitution-making through people-driven process.

to it. On behalf of civil society, the church was to spearhead national consultations of citizens in the constitution-making process, an extension of its strong role it had played during the CPA negotiations with encouragement from the late Dr. John Garang. The nascent permanent constitution-making process was brought to a standstill by the eruption of the civil war in 2013 and again in 2016. Yet, efforts by political leaders to monopolize the constitutional process and sideline the church were already apparent in 2012. The church was tasked with civic education but not recognized in the composition of the National Constitutional Review Commission. Civil society was to be eliminated from the decision-making process on the one hand, but on the other hand was welcome to play a leading role in civic education to promote and legitimize an elite-driven constitution-making process.

It is crucial that civil society remains actively engaged in seeing through implementation of agreements which they facilitated; the process of R-ARCSS implementation at large, and the permanent constitution-making specifically. The church especially historically has a strong role to play, enjoys leverage with the elites and credibility in society. Yet, civil society must be cautious to avoid instrumentalization and politicization by partisan political elites which will undermine trust and societal cohesion. Ultimately, perceptions that civil society act as agents of elites questions the legitimacy of civil society itself.

### The national dialogue: elite politics upstaged by grassroots voices

The voices of civil society on how to attain a peaceful future for South Sudan have been heard across the country since the renewed outbreak of war in July 2016. But until today, these voices have not been acted upon by the elites who steer the political fortunes of South Sudan. In December 2016, President Salva Kiir launched the national dialogue which was to “end all violent conflicts in South Sudan, constitute national consensus, and save the country from disintegration and foreign interference.” (Mohajer & Deng 2021)

The delegates to the national dialogue identified federalism and devolution of resources as the popular demand of the people but with application of criteria of population size, territorial viability, communal harmony, economic value, and skilled personnel for establishment of states and counties with strong local government. The unique advantage of traditional tribal authority was recommended too with administrative boundaries as they stood on 1st January 1956 (based on Anglo-Egyptian condominium districts). Regional, ethnic and gender inclusion in the power sharing portfolios at national and sub-national tiers of government was recommended too. The delegates called for proper separation and balances of powers of the three arms of government (legislative, executive, and judicial). They recommended bicameral legislature comprising the national assembly and the senate. Presidential system, conditioned on limitation of the powers of the president, was also regarded as desirable option for governance. Establishment of an independent constitutional court was strongly recommended. The delegates lamented the militarization of politics, adversarial power struggle and erosion of indigenous ethical values, and expressed their wish to see all these in the permanent constitution.

In sum, the national dialogue was initiated and steered by the government, yet it produced outcomes that in crucial aspects were detrimental to elite interests, even threatened the political survival of the country's top leaders. The final report of the dialogue steering committee and key recommendations drawn from the over 200 grassroots meetings have not been acted upon. Yet, even if the report is gathering dust in some government offices, its findings remain instructive for the path to a political future for South Sudan. All actors should revisit the lessons learned from the national dialogue during the permanent constitution-making process and ensure that the voices of the people gathered are reflected in a new constitutional dispensation. Only a constitutional text that is informed by a bottom-up-process can achieve a new social contract for the people of South Sudan.



## Lack of progress dampens outlook for permanent constitution-making process

Not much progress has been made to push forward the permanent constitution-making process. Several hampering factors have played into this situation. Delays in the implementation are due to an interplay of various factors. Each delay in the reconstitution of one of the organs of the transitional government, each delay in concluding one phase of the process has repercussions for the overall progress with the implementation of the peace agreement and the move towards democratic elections under a new constitution. As a result of incessant delays at each turn of the implementation process, the constitution-making process is already far behind schedules. Many citizens exhibit skepticism that the process will stay on track to allow for elections scheduled for 2023. Indeed, many citizens in Juba appear doubtful that elections will take place anytime soon.

There was reluctance by some of the parties and the government to respond positively to the recommendations of R-JMEC for kickstarting the process by speeding up the organization of the constitutional workshop. Enacting the legislations for constitution-making process is a time-consuming exercise because of the tedious parliamentary procedures for lawmaking, a situation that is already exacerbated by the late inauguration of the Reconstituted Transitional National Legislature (RTNL) in August 2021 instead of having this done concurrently with the formation of the RTGoNU in February 2020 or earlier than that in May 2019 as stipulated in the R-ARCSS. The Ministry of Justice and Constitutional Affairs has also been slow to present legislative bills to the Council of Ministers and subsequently to the RTNLA. More so, lack of funding for the constitution-making process through


RTGoNU has undermined morale of staff in many institutions. Likewise, the apparent lack of progress and a perceived lack of political will for peace on behalf of the principal leaders of the R-ARCSS has seen international partners' willingness to fund the RTGoNU progressively reduce.

Finally, the experience of the national dialogue sets the stage for the constitution-making process. The frankness of grassroots voices received during National Dialogue has contributed to government reluctance to engage in wide consultations of the population. Expectations of government willingness to enable and adequately fund civic education and meaningful public participation are low. Other actors must thus become active to ensure public participation and civic education throughout the process. Civil society organisations, from traditional institutions in rural areas to non-governmental organisations in Juba, is crucial and must be facilitated by the international community and its members. The importance of the church and its institutional structures cannot be overstated in this regard: it is uniquely positioned to reach the grassroots everywhere. The collaboration between church structures and broader civil society should be purposefully strengthened.

## Conclusions

Despite the difficulties faced, still the R-ARCSS remains the supreme document guiding the constitution-making process that should culminate in establishing a suitable type and tiers of federal system of government of the people.<sup>2</sup> Decisions taken during the initial stages of constitution-making, regarding the process itself and the substance of the text, should be considered as critical for ushering in people-centered and living supreme law with incorporated bill of human and community rights that will provide

<sup>2</sup> Paragraph 5 of Preamble of R-ARCSS expresses the cognizance of the parties that federalism is popular in South Sudan and should be adopted so that more powers and resources trickle down to local units of governance.



a framework for a united, peaceful, just, equal, and prosperous South Sudan where the rule of law reign with more devolution of powers and resources.

Lessons learnt from constitutional history and the national dialogue initiative, combined with the reform agenda of the R-ARCSS implementation, should inform the process of drafting a permanent constitution for an independent South Sudan. The previous constitutions were written by few elites appointed by the top political leadership with disregard for inclusivity, transparency, popular participation, and ownership. The process was often hurried without adequate time for exhaustive deliberations to reach consensus on the core concerns. Women, youth, civil society, academia, and the private sector were mostly left out.

A people-centered constitution will be a crucial foundation to avoid the popular uprisings, armed rebellions, military coups, civil wars, and chronic

underdevelopment that have shaped South Sudan's past. Inclusive representation will mitigate risks of capture of the process by elites, sectarian interests, or even external actors. Substantive civic education and meaningful public participation in the making of the permanent constitution will further South Sudan's prospects of a peaceful future in a viable state that is owned by its people.

A constitution must unify the people of South Sudan while recognizing the economic, social, cultural, and collective rights of citizens in their unique and specific diversities for a common good. No constitution may settle every issue of nation-state building. Rather the constitution must provide a framework of principles within which there must be room for flexibility for compromise reached on the contentious issues of the time among the people of South Sudan. South Sudanese and their international partners must join hands to achieve the goal of writing a people-driven constitution.



## Recommendations

### **Public participation and civic education must go hand in hand.**

Only a well-informed public will be empowered to meaningfully participate and feed into the institutional process of constitution-making. The delegates in the constitution-making organs and the media have responsibilities of both listening and talking to the people, to educate them on the process and amplify their voices for them to be recorded in the outcome of the process.

### **Inclusiveness of public participation must be promoted by constitution-making organs.**

Rather than wait for public submissions, constitution-making organs and partners should exert deliberate efforts to engage with and gather the voices of political parties, civil society organizations, professional associations, traditional leaders, faith-based leaders, media practitioners, trade unions, women groups, youth aspirants, and persons with disabilities on the pertinent constitutional matters. An inclusive process that is reflective of the breadth of South Sudanese society will make the permanent constitution a legitimate living supreme document of social contract and rule of law enhanced by best practices.

### **Lessons can be learned from history and academic research.**

Power and wealth sharing arrangements have favored the elites and warring parties. A people-centered constitution must provide direction for sustainable solution to the root causes of the conflicts in South Sudan. Civil society and academia should provide and the constitution-making bodies should draw on public submissions of sound empirical academic research on substantive constitutional issues such as federalism, land tenure,

administrative boundaries, and local authorities to enhance evidence-based understanding and inputs during constitution-making process.

### **Revisit the archives of past dialogues and inquiries.**

The parties, stakeholders and partners should revisit the archives containing the views of the people of South Sudan on how their country should be governed. The most recent of these is the 2020 report of the National Dialogue, which collates answers from grassroots consultations to what went wrong and the way forward . President Obasanjo's report on the African Union Commission of Inquiry into the root causes of the conflict in South Sudan as well as the human rights violations documented in reports of UN Panel of Experts deserve consideration.

### **Institutions must be adequately facilitated to do their job.**

Rigorous planning, sufficient and timely resource allocation, and adequate staffing (including 35% women representation) are a necessary requirement for a credible constitution-making process. International partners and subject-matter experts with a keen understanding of South Sudan may strengthen the technical expertise of the constitution-making organs through capacity-building and knowledge transfer on constitutionalism and the rule of law.

### **Donors must focus on process over events.**

Donors appear keen to see South Sudan move towards elections swiftly. Yet the integrity of the constitution-making process and the preparation of elections is vital if the election event is to result in sustainable peace and stability for the country. Critical issues, most importantly the incomplete implementation of transitional security arrangements, as well as the high levels of local violence, must be resolved before a participatory constitution-making process can be concluded and credible elections can take place.

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