

What Constitution Do We Need In South Sudan?

Tuesday 5 February 2013

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1. Introduction

South Sudan fought for decades against Khartoum regimes since August 18, 1955 for many reasons. Chief amongst causes of liberation struggle was to have federal system of governance in place so that the black African people in the South exercises their own political leadership and access to fundamental services at grassroots level. This objective was acknowledged in the then Addis Ababa Peace Agreement of 1972 signed between Southern Sudan Liberation Movement led by General Joseph Lagu and the Khartoum administration under President Gaffar Numeri respectively.

The Southern region was granted self-autonomy in what is famously known as Higher Executive Council with its two levels of government namely, Executive and the People Regional Assembly seated in Juba. Judiciary was centralised for reasons best known to the partners in the said agreement and there are living references to give us wisdom if at all important for any purpose.

After 11 years of peace internationally observed as lacking strong guarantees, Khartoum government broke the peace agreement in 1983 and declared September Islamic sharia which also contributed to the second civil war. Again, our revolutionary forces both military and political wings led by Sudan People Liberation Movement and Army SPLM/A with support from various political forces continued their struggle with different opinions on the so-called total transformation of the Sudan or New Sudan ideology on one side and strong voices of separatists calling for total separation of South Sudan on the other.

The dream for the latter was realized on 9 July 2011, when we joyously celebrated the independence of South Sudan in presence of international community. On top of these voices are President Gen. Salva Kiir Mayardit and his Deputy Dr. Riak Machar Teny and others. Objectively, the reason of taking you through this brief political background of how our country came about is due to the history of constitutional development in South Sudan, is critically in a dilemma as we were part of the former Sudan that has never produced stable constitution. We pray that history should not repeat itself in South Sudan.

Our young nation had no good constitutional foundation since interim period. The question available everywhere now is what constitution do we need in South Sudan as the new beginning of a prosperous, democratic and developmental state? And the author took up this interesting question to give some answers and your views are also expected and address them to the National Constitutional Review Commission for consideration during public consultation exercise expected to take place in due course.

Historically, the first phrase of constitutional making process in South Sudan was Interim Constitution of Southern Sudan, 2005. This constitutional process was dictated by the Comprehensive Peace Agreement CPA of 2005 and the said Interim Constitution was drafted by politically appointed committee in order to meet compatibility with the National Interim Constitution of the Sudan 2005 as the supreme law of the land. There was no public consultation made and therefore a politically motivated constitution and not a legal process.

The second phrase of constitutional development was Transitional Constitution of the Republic of South Sudan, 2011. The drafting of this constitution was too similar with the former one, except this is Transitional Constitution of an independent South Sudan. The President issued Presidential Decree No: 002/2011 for the formation of the technical committee to review the Interim Constitution of Southern Sudan, 2005.

The said technical committee was tasked to review the interim constitution of 2005 in order to transit us from interim to the transitional level where we will prepare our own permanent constitution. Yet, there was no consultation made and again a politically motivated transitional constitution 2011 which is now the supreme law of the land with unlimited powers of the President which is against principles of constitutionalism. With these two political gaps in our country, it is proven that there has never been a democratic foundation of constitutional development in South Sudan. In other word, the two constitutions totally lack legitimacy from the people of South Sudan. And now is the golden opportunity for us to begin new face of constitutional foundation in a consultative manner.

2. NCRC Mandate and the Role of all Actors

The year 2012 marks a new dawn of hope for South Sudan in the gentle promise of constitutional governance. President Kiir Mayardit a year ago issued Presidential Decree No: 03/2012 for the appointment of permanent and part-time members of the National Constitutional Review Commission referred herein as NCRC. According to Article 202 (6) of the Transitional

Constitution of South Sudan, it states “the Commission shall review the Transitional Constitution and collect views and suggestions from all the stakeholders including any changes that may need to be introduced to the current system of governance through conduct of a nation-wide public information programme and civic education on constitutional issues. Therefore, this is a good sign of restoring and upholding principles of constitutionalism and our President is seen to be on the lead unless interrupted otherwise.

In swearing in ceremony of the NCRC members on 24 January 2012, President Mayardit summarised the whole processes of constitutional making as he said “the permanent constitution will reflect the aspiration of our people and will lay the basis for effective governance and help our country to develop in peace and prosperity...this constitution is to be document of all people of South Sudan”. However, our President is fully aware that the constitutional making process is the unique moment in our country to decide what kind of nation we want.

With these few words, I am of the opinion that we the people of South Sudan want a flexible and people-driven constitution which shall serve as our national soul. Some legal scholars described the constitution as national soul in the sense that it can play an important role in forging a common identity and creating institutional spaces where citizens interact on an equal basis with their leaders without fear or preferential treatment of classes of people. According to Justice Ismail Mahomed, a renowned constitutional lawyer and a former Chief Justice of South Africa, he said, “the constitution is nothing less than a ‘mirror reflecting the national soul’”. Perhaps most of us concur with him too and this philosophy must happen in South Sudan.

In fact, others could not know why and how constitutions are made? Allow me to inform you that there are only two reasons. First, constitutions are made as a result of peoples’ decision to make a break from the past and finally constitutions are also made when people say enough is enough from the political echelon. Where are we in South Sudan in our constitutional making process? I think we are breaking from the past and therefore we must make a new beginning for our country. This essential argument was supplemented by my senior colleague Advocate Dong Samuel Luak, Secretary General of South Sudan Law Society in his lecture organised by International Republican Institute on the question of what constitution do we want in South Sudan? This question raises an eyebrow and stimulates the author to expand it for your understanding and benefit.

The second proposal according to resolutions of the political parties youth leadership academy adopted in Juba last week on 27 January, 2012 with assistance from the author is that we need the constitution with federal system of government through parliamentary elections. This is to correct the current misused of a decentralised system of governance that had so much disadvantaged other societies in term of services delivery. As we speak, the resources allocation to the states’ government is made uniform regardless of geographical size, population density and priorities of the state government. This observation is supported by a research conducted by Sudd Institute and released in September 2012, entitled mapping social accountability: an appraisal of policy influence on service delivery in South Sudan, 2006-2011. Consequently, it’s further proven beyond doubt that there can never be provision of fundamental services in this system of governance. As the saying goes, if you fail to win the game; then change the table.

Thirdly, with federal system of government to be adopted, the constitution must reduce institutions and other independent commissions to a reasonable number to ensure competent delivery of services in a manageable and accountable structure. In other word, formation of a lean government at the national level and devolve other structures to the states. The current institutional structure at all levels of government is a duplication of the same which causes large bureaucracies with huge cost of spending agencies which has resulted to the present economic situation. That is why our government have imposed austerity budget.

Indeed, we are correctly in a difficult financial situation best described by senior economist Mr. John Maynard Keynes when he said “we have involved ourselves in a colossal muddle, having blundered in the control of a delicate machine, the working of which we do not understand. The result is that our possibilities of wealth may run to waste for a time-perhaps for a long time”. In South Sudan, everything is almost a priority but there is no money to implement such developmental projects and therefore we do not understand, for our public funds have been a waste for ages now.

The fourth proposal is that we need the constitution that limits powers of government and the President in particular without prejudice to the legitimacy of other institutions. In the forthcoming constitution, it should be clearly spelt out what types of powers to be given to the president. For instance current powers of the President under Article (101) of the Transitional Constitution of South Sudan, 2011 to remove an elected State Governor or dissolve State Legislative Assembly, are more similar to the constitution of France and India. The question is does that meet the doctrine of separation of powers in a constitutional governance agreed like the case of South Sudan or not?

Again as part of limitation of powers, we want the separation of the Attorney General Chamber and Directorate of Public Prosecution DPP from the Ministry of Justice as normal practice now in most civil laws jurisdiction and South Sudan cannot be an exception. The genuine reasons are to ensure independence of these two legal institutions in discharge of their duties without political interference. In practice, there is no Attorney General in South Sudan but the Minister of Justice is vested with powers of the same and just renamed to be the chief legal advisor of the government.

Article 135 (2) of the Transitional Constitution of 2011 says “the Minister of Justice shall be the Chief Legal Advisor and the prosecuting authority at all levels of government, and shall perform such other functions of legal nature as may be prescribed by law. How can the said Minister be a politician and the same time a body of legal personality? I am afraid that although the Minister of Justice, for example may know those who are corrupts in this country as being provided with lists of corrupt officials for prosecutions by the South Sudan Anti-corruption Commission; yet it is impossible mission for the Minister to institute legal proceedings against them for lack of independence in his or her job character as influenced by political color.

Last but not least, we need the constitution that will emanate from citizenry as promise by the President Mayardit on January 24, 2012 and in accordance with the mandate of the NCRC respectively. It is clear that constitutions worldwide enjoys wider legitimacy if they emerge from inclusive, representative and participatory processes that allow all political forces to participate in its production from scratch. Finally, we call upon the political leadership to exert political will to implementing the constitution to serve the later and spirit of the people of South Sudan.

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