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Do You Want to Follow Our Footsteps, South Sudan? Considerations for a Constitutional Transplant¹

EXECUTIVE SUMMARY

1. Constitutions are like “commodities” that are traded in international “markets” attracting various “buyers.” The appropriate “market” and “commodity” are based on local dynamics, needs, and aspirations of the buyer.
2. South Sudan’s “constitutional buyer” will most likely opt for “markets” such as Kenya or Uganda for decentralisation, or Ethiopia and Nigeria for an ethnic federation. The buyer might even try Swiss’s confederal system if there is a desire to institutionalize the six-person presidency of the revitalised peace agreement. Another possible “market” includes Somalia’s clan system.
3. Resolving conundrums to craft a functioning political system will inevitably lead to constitutional borrowing or transplant from some of these markets
4. The “tourists” will need a map to guide the search for suiting markets. This requires early and careful awareness of social and cultural harmonization.

I. The Challenge

On May 10, 2022, the Ebony Center for Strategic Studies issued **Ebony Policy Brief 2022-2** entitled *Creating A Constitution for South Sudan*. We acknowledged the important insights of Dr. Joseph Geng Akech in the crafting of that document. Over the intervening six months, we at the Ebony Center have worried that serious interest in solving the enduring

¹ The Ebony Center is pleased to further the quest for constitutional reform in South Sudan by collaborating with Joseph Geng Akech in this endeavor.

governance crisis in South Sudan has dissipated. As so often happens, there is a burst of discussion and debate on a specific issue, and then the subject is forgotten.

In the hope of stimulating a durable commitment to improved governance in South Sudan, we join here in collaboration with Dr. Geng Akech in an effort to re-ignite a serious discussion about how to move coherent governance forward. We believe it is time for action.

It should be obvious that alleged “political elites” who claim to be interested in constitution-making in South Sudan ought to be aware of the complexities in that difficult process. In addition, it is reasonable to assume that they are both surprised and disappointed by the lack of public interest—civic engagement—in the all-important pre-drafting phases of that essential task. This surprise and alarm was heightened for us several weeks ago when the Ebony Center’s Development Policy Forum (DPF) posted a “Weekly Review” that Dr. Geng Akech had previously published with the Sudd Institute. In that piece, he warned that certain “unresolved aspects of the peace agreement threaten to undermine constitution-making”.²

Dr. Geng Akech was trying to alert those who ought to be paying attention to constitution making that a number of critical yet complex *pre-conditions* require careful attention before the actual drafting of a constitution can begin. Central among these logically prior issues to be addressed are: (1) the type of federalism to be embraced; (2) the obvious tension between substantive and procedural justice; and (3) the complete absence of participatory enablers ready to step in and shepherd the difficult process forward. In other words, aside from momentary eruptions of opinions and historical nostalgia, where are the necessary change agents? Why is there so much talk and so little action?

The answer, perhaps, is that constitution making is more difficult than most of the “experts” imagined it to be. To overcome that hurdle, we here offer guidance on the necessary early steps.

II. Hard Choices

Several difficult decisions face the process of importing constitutional templates.

A. From Constitutional Principles to Textual Specifics

The revitalized peace agreement, like other pre-constitutional negotiated roadmaps, is nothing more than a collection of elites’ aspirations and globally recognized principles of constitutionalism. Those ideas serve as a *springboard* to guide drafters when it comes time to create the necessary language in the “constitutional design theater.”

² JG Akech ‘The unresolved aspects of the Revitalised Peace Agreement and their implications on constitution-making in South Sudan’ *Sudd Institute* (21 September 2022), available at https://www.suddinstitute.org/assets/Publications/633825ac26826_TheUnresolvedAspectsOfTheRevitalisedPeaceAgreement_Full.pdf (last accessed 21 October 2022).

But therein lies the great difficulty. From where, exactly, should South Sudan's constitutional architects borrow to assure us that the transplant is best suited to our circumstances? How should this process of borrowing good models proceed? Who should—and *who will*—have the authority to decide which possible transplant seems the most suitable? Who will decide who has that authority? How will that important decision be reached? Notice that the search for answers to these questions will require help from our peers—both near and far. Given the obvious risks, we may need help from various “political insurers.”

These difficult choices of how—and from whom—to borrow are foundational to the “constitutional value chain” into which our new constitutional democracy might emerge. Constitutional scholars have proposed the “IKEA theory” of constitution making. That is, we gradually get accustomed to things we identify with or expend time creating.³ Relating this theoretical notion to the problem of constitutional transplantation is to ask whether a *kuchipo*, *anyuak*, *a jieeng*, or *Zande* will identify with the resulting constitution if it somehow contradicts their collective identities, values, and norms? We soon realize that a lack of congruence between any particular constitutional transplant and traditional local values, perceived “realities,” and general aspirations could impair the essential trait of constitutional legitimacy. Might a constitution actually aggravate political raptures?

B. The Market for “Constitutional Transplants”

The constitutional scholar Günter Frankenberg observes that constitutions are commodities traded in globalised markets in which:

The buyer may shop for a complete political regime, such as a constitutional monarchy or a parliamentary democracy, or items more limited in scope, such as a rights catalogue, a two-chamber-system, an institutional arrangement for constitutional review or a presidential system, or only a single item, such as the political-question doctrine or the right to equal treatment. And shoppers have the choice between finished products, prêt à porter, disassembled products to be put and screwed together at home or inspirational ideas requiring a high degree of constructive elaboration.”⁴

With this idea at hand, the important question becomes, which “markets” will attract our South Sudanese “buyers”? The most likely “markets” include Kenya or Uganda if decentralization is desired, Ethiopia or Nigeria for their ailing (ethnic) federation, or will our “constitutional tourists” opt for the Swiss confederal complexity in view of constitutionalising the six-person

³ Günter Frankenberg. 2010. “Constitutional transfer: The IKEA theory revisited,” *International Journal of Constitutional Law*, Vol. 8(3):563-579.

⁴ Günter Frankenberg. 2013. “Constitutions as commodities: Notes on a theory of transfer,” *Comparative Law Review*, 4, p. 17.

presidency established by the revitalised peace agreement? In addition, there is Somalia for its unique clan system.

C. From Abroad to Home—Tools of Constitutional Transplant

Scholars of constitutional transplant concede that constitutional ideas, values, norms, and templates tend to fertilise across a multitude of boundaries.⁵ In that regard, South Sudan is not an exception in the marketplace of a globalised constitutional world. South Sudan must surely rely on her peers and socio-political “insurers.” There are feasible mentors for appropriate templates and inspiration to resolve the issues pointed out above. The question for South Sudan is, therefore, not whether it will borrow ideas and templates from across the international landscape. The question is, which “commodities” available to us seem the most appropriate?

Indeed, common talk about federalism is often dominated by the apparent need to walk in the shadow of others who have a “better” federalist system.⁶ Some commentators even suggest borrowing “ethnic federalism” as an ideal model—despite the obvious ills in Ethiopia where it was tried.⁷ On the other hand, the “friends” of South Sudan—some of whom are intimately involved in the country’s political process—are more likely to encourage emulation of their systems of governance.⁸ In effect, the many friends and observers naturally regard their system as “perfectly suited” for South Sudan.

How will constitutional drafters deal with this problem?

- **Mimicking Allies**

Historical and contemporary socio-economic and political events tend to shape nation-state interests and self-images of what they want to be. South Sudan’s friends and allies are many, some are even “political guarantors” or “insurers of stability” as is evident in the revitalised peace agreement. There are strong incentives to mimic others. We note that emulation in constitutional design is not necessarily bad. The essential question is, rather, which country’s shadow does South Sudan wish to stand in?

- **Experts’ Toolbox of Templates**

The social engineers in the “constitution-making laboratory” are the experts—with important backing from international and domestic sponsors. In their design templates we can find a menu of idealized concepts that have come to dominate globalised constitution-making. Others have mistakenly called these concepts “standards of civilization.” These standards include

⁵ *ibid.*

⁶ The Revitalised Transitional Government of National Unity (RTGoNU) has established a Ministry of Federal Affairs to study different models of federalism. Suggestions have been to review various models such as ethnic, territorial and fiscal federalism. See also JG Akech, “What type of federalism should South Sudan adopt and why?” *Africlaw* (2022), available at <https://africlaw.com/2022/01/12/what-type-of-federalism-should-south-sudan-adopt-and-why/> (last accessed 4 October 2022).

⁷ Yonatan Tesfaye Fessha. 2017. “The original sin of Ethiopian federalism,” 16 *Ethnopolitics*, Vol. 16, pp. 232-245.

⁸ See the “mimicking allies” section below concerning Uganda, Sudan, Kenya and the “Troika” (US, UK and Norway).

attractive ideas such as the rule of law, democracy, human rights, and good governance. Too often, these endearing concepts have remained mere words in constitutions into which they have been implanted without the proper cultural meshing and justification. The glittering allure of globalisation, technologies, and trade serves to accelerate often-unwarranted transplantation.

III. In lieu of Recommendations—Considerations

Because constitutional transplants are cross-cultural imports, embodying alien values and norms, there is an obvious risk of tension with “indigenous” values and cultural norms. This obvious prospect can be addressed and ameliorated by devoting attention to **proper contextualisation**. There are very few genuinely “new ideas under the sun”—all societies observe others, learn, and adapt accordingly. Some novel ideas are rejected, while others are found to be useful. Harmonization is adaptive and smart behavior.

Constitutional transplants can be either solicited in an effort to emulate peers, or they can be pressed on “buyers” by others from economically and politically powerful “sellers.” There are international constitutional elites whom Frankenberg calls “expert legal tourists.” These are individuals forum-shopping in the “marketplace” of constitutional ideas, values, and templates. The choice of “tourists” and “destinations” should not be random. Rather, they must reflect legal expertise and socio-cultural suitability.

Where the “legal tourist” go is also important. This choice requires a map of “political-games” that can guide the selection and movement. As we suggest earlier, the choice of the ideal type of federalism requires a proper “search-map.” Are the tourists going to the Federal Democratic Republic of Ethiopia—and nation haunted by ethnic federations? Or are they going to Switzerland for a confederate system with its six-person presidency? Or will the adventure lead to Kenya, Uganda, Nigeria, or Sudan ?

Whatever the destination, the journey needs to be studied well in a “constitutional design laboratory” where possible transplants are assessed, deconstructed, critiqued, and contextualized.