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Creating A Constitution for South Sudan¹

EXECUTIVE SUMMARY

1. It is urgent that South Sudan adopt a constitution as a necessary first step to rescue the country from its economic and political chaos;
2. Seventy delegates to a Constitutional Convention, seven individuals from each of the ten states, would produce a Draft Constitution that would then be ratified by the majority of the Council of States;
3. At least three of the seven delegates from each state must be women;
4. The Constitutional Convention would be chaired on a rotating basis by three legal scholars selected by the Delegates from among three African countries—Botswana, Ghana, Mauritius, Namibia, and South Africa.
5. The Constitution should be modeled after countries that allow for a multi-party parliament, a weak central government, strong states with their own parliament, a Prime Minister from the party with the most seats in the Legislative Assembly, and a President elected by the Council of States. The Constitution of Germany offers a possible model, subject to modifications as appropriate by the Delegates. Several African countries may also have plausible models;
6. The Constitutional Convention would start its work on July 9, 2022, and would present its final product to the Council of States within 100 days (by October 17, 2022). The Council of States would have until December 1, 2022 to ratify the Constitution.

I. Terms of Engagement

A constitution represents the fundamental aspirations and foundational commitments among members of a political community—a nation-state. A constitution says: ***this is how we do things here***. Of equal importance, a constitution clarifies and documents the moral and legal commitments of a people: ***this is what we stand for, and this is how we propose to get along***. Put differently, a constitution conveys commitments to a set of shared ethos, values, and norms amongst citizens (“horizontal” obligations), and with their government and the international community (“vertical” obligations).

¹ Prepared by Ebony Center’s VEST Team. We acknowledge valuable comments on an earlier draft from Dr. Joseph Geng Akech.

There are two serious difficulties in constitution crafting. The first difficulty is the mistaken belief that *constitutions are forever*. The obvious danger of this view is that it gives rise to an imagined permanence that threatens to lock-in—to freeze in place—current political and economic advantages (and disadvantages). Fear of this unwanted lock-in stands as a major barrier to constitution crafting. Fortunately, constitutions are *not* forever. This does not mean that constitutions should be amended, dismembered, or abrogated with ease. Rather, it means that certain elements—the basic structural attributes—should not be easily changed.

The second difficulty in constitution crafting is the mistaken belief that a constitution is a *zero-sum arrangement*—more for one group means less for another group. These two false beliefs—permanence and unfair advantage—imperil all efforts to create a national constitution. These phenomena become more complex in a post-conflict and fragile social context in which a political community—a state—is divided, polarized, or unwilling to engage all members of society.

In sum, constitutions are meant to be modified as conditions require, and in accordance with democratic processes. Indeed, they are changed according to a set of procedures codified in the constitution itself, or by agreements in a post-conflict pact. As for the concern that a constitution simply reallocates relative advantage among a population, it must be seen that a constitution is the only way to escape a perpetual Hobbesian war of “all against all.” No one wins in such conditions of conflict and suspicion. In fact, the purpose of a constitution is to create a stable equilibrium in which everyone will be better off—and no one will be worse off—than was possible under the *status quo ante*. In economic jargon, a constitution is a Pareto-superior political equilibrium. A constitution lifts all people out of their Lockean “state of nature”—an unwanted condition of undesirable and mutually degrading livelihood prospects. A constitution that achieves these results will have been carefully crafted through inclusive and transparent processes—a necessary condition for it to be accepted and consistent with shared community aspirations.

These desirable attributes are the result of great care in constitution crafting. There are five common practices and conditions for creating a durable and beneficial constitution.

1. All present and future government revenues arising from any source, and all government spending decisions, must be removed from all deliberations. This *economic firewall* must be secure and inviolate;
2. Existing *political factions* must not be allowed to play a role in crafting a constitution;
3. The crafting process must proceed in *sequenced phases*, with the easiest issues decided first, then proceeding to address the more difficult challenges as trust and goodwill gradually emerge;
4. All decisions must receive the approval of a *super-majority* (two-thirds plus one) of all delegates;
5. The guiding imperative of all decisions must be to assure a *no-regrets* outcome.

These five conditions are elaborated below.

A. Economic Firewall

All constitution crafting necessarily involves decisions and choices from within a well-known structure of economic advantage. After all, most of the political elites in a country—the ones that might be expected to play a major role in creating its constitution—are likely to be better off economically than the typical villager out in the bomas and payams. Not only are these elites favored economically, they also play a role in setting economic policies that may benefit them personally. This fact alone is enough to require that all matters of revenue generation and expenditure be off limits to constitutional debates.

This separation is necessary to assure the integrity of the entire crafting process. Indeed, the great fear among the general population is that the elites who are creating the constitution will lock-in their current economic advantages.

This concern is doubly pertinent in South Sudan where the general absence of a real (non-oil) economy means that the presidency exert undue influence over government spending decisions. The current lack of discipline over public finances has seriously undermined government integrity and transparency. Those who “control” government and governing are a threat to those who do not “control” government and governing. The danger is obvious. At the present time, South Sudan is plagued with a *winner-take-all* economy. The new constitution must rectify this condition by establishing strong guarantees of transparency, accountability, and equity.

B. Political Factions

The greatest difficulty will come in preventing existing political factions—and ethnic groupings—from influencing the crafting of a constitution. The reasons for this ought to be obvious. The current political and ethnic fractures that have paralyzed South Sudan since the 2011 independence must not be allowed to extend their stranglehold into the crafting of the country’s constitution. The procedures for creating members of the Constitutional Convention spelled out below are intended to protect against this problem.

C. Sequencing

One standard “best practice” for accomplishing complex tasks is to start with the relatively easy ones first. As participants learn how to compromise and negotiate toward shared goals, it will become easier to address the more difficult challenges. As the process moves from easy to difficult tasks, it is important to keep in mind that constitutions *are not forever*—they can be modified. The process of modification must always be more difficult than is the rule for normal legislation.

D. Super Majority

All actions requiring voting must be carried out by a super-majority rule. This is usually understood to entail a two-thirds plus one vote. Such super-majorities have the advantage of creating widely shared ideas about how best to proceed. Super-majorities also reassure the broader public that the emerging rules had wide assent among delegates.

E. No Regrets

The final requirement is that the process should seek to minimize post-adoption regret. The philosopher John Rawls proposed a rule for minimizing regret from behind a “Veil of Ignorance.” The veil of ignorance works as follows: delegates are asked to consider their position on any single issue by suspending their current interests, and by wishing to be certain that once they have voted in a certain way, they would not wish to change their vote should their ultimate situation differ. Put in practical terms, the veil of ignorance seeks to induce a Dinka/Nuer male delegate to express an opinion on some issue—and to vote in light of that opinion—while holding in mind that he might emerge from the Constitutional Convention as an Azande/Bari female. That is, the veil of ignorance asks each delegate to imagine being unsure to which interest group (ethnicity, political affiliation) he/she might belong once the constitution is adopted. In common terminology, the veil of ignorance asks each delegate to imagine “walking a mile in another person’s shoes.”

If the veil of ignorance metaphor can be put into effect, the potential for post-adoption regret—second thoughts—is minimized. All parties will have successfully “left their personal, political, and ethnic interests at the door.”

II. Models

South Sudan is fortunate—over 170 countries have constitutions that offer guidance. There is no need to re-invent the wheel. This does not mean that South Sudan must adopt a constitution from elsewhere. Rather, it means that there are valuable templates that can be consulted to help narrow the scope of possible disagreements.

A. General Considerations

As suggested above, the purpose of a constitution is to establish a set of rules to live by. In the case of South Sudan, with its decade of political and economic dysfunction, this is of singular importance. The multitude of ethnic identities and political factions poses a challenge in this regard—each group imagines that its ways of life are correct or superior. The immediate task, therefore, is to foster consensus in the shared benefits under a constitution that acknowledges the multiplicity of ethnic commitments across South Sudan.

This is not unique to South Sudan. Indeed, the colonial history of much of Africa left artificial boundaries and locational oddities that created tensions and often conflict. Slowly, newly independent countries have managed to create systems of governance that recognized many differences, but harnessed that ethnic richness to the greater benefit of the nation-state.

B. Structural Considerations

The starting point must be concerned with the macro-structural attributes of a nation. Some nations have constitutions that lead to the creation and durability of two dominant political parties, with other political voices occupying the fringes of one of the two main parties. Britain and the United States are examples of this structural feature. But their differences are profound. Britain is a monarchy with a parliamentary structure (the “Westminster” system), while the U.S. combines the head of state and the head of the government in a single elected president. Neither offers a useful model for South Sudan.

Two other democracies come to mind—France and Germany. Neither is a monarchy, both give rise to multiple parties, though in Germany one party has long held dominance. But their structures are very different. France is a unitary state with weak regional politics, a strong centralized presidency, and a weak Prime Minister. Germany resembles the British parliamentary model in how it elects its leaders, but with strong independent states, and a weak—almost ceremonial—president. Other examples can be found.

South Sudan should adopt a structure similar to that found in Germany—a weak center, strong states with their own parliaments, and a multi-party parliament at both levels.

III. The Constitutional Convention

The Constitutional Convention should consist of seventy (70) individuals, seven each from the ten states in South Sudan. Each state delegation must have at least three women.

The Council of States shall nominate fifteen candidates from among the residents of each of the ten states. At least seven of these candidates must be women. The members of the Transitional National Legislative Assembly shall then choose from among each state's fifteen nominees to select each state's Convention Delegates—with at least three women among the seven delegates from each state. Each state delegation shall then elect its co-chairs—one of whom must be a woman.

The first act of the Convention shall be to select three Constitutional Counselors from a list of recognized legal experts from the following nations: South Africa, Botswana, Mauritius, Namibia, and Ghana. Each country is judged to be among best democracies in Africa. These three individuals will be ex-officio (they will not have a vote), but would preside over—and guide—the Convention. The three individuals would take turns chairing all meetings of the Convention.

The drafting process should start with models from successful democracies that resemble the German and other African models. With such guidance, and with expert assistance from the three constitutional advisors, the process will have promising guidance.

The Constitutional Convention would start its work on July 9, 2022, and would present its final product to the Council of States within 100 days (October 17, 2022). The Council of States would have until December 1, 2022 to ratify the Constitution. If ratification fails, the draft would be returned to the Convention for necessary modification. Delegates would have thirty days to revise and resubmit the Draft to the Council of States.