



Sudan People's Liberation Movement Democratic Change



THE ALTERNATIVE

Draft

**Constitution of the
Republic of South Sudan, 2013**

EXPLANATORY NOTE

(Second Draft)

EXPLANATORY NOTE

A Constitution is a covenant between the people of a country among themselves and between them and their government. Therefore, it must be a consensual document. In any constitution three fundamental questions have to be settled from the outset. First, should the country be a centralized or decentralized state, and in the latter case which kind of decentralization. Second, should the head of state be the same as the chief executive or should the two offices be separate. Third, what is the manner of election of the head of state and chief executive.

In this draft and based on the diversity of South Sudan, its tribal nature and its experiences our answers to these questions are as follows.

1. South Sudan should be run as a federal state, not only to cater for its diversity but also because we believe it is the only system of governance that is capable of releasing the full potential of the country;
2. The country shall be better run with the head of state (The President) separate from the chief executive (The prime Minister). Again, the myth that a President assisted by a Prime Minister is powerless is dispelled herein as is in the case of other countries such as Uganda, Rwanda, Chad, Egypt and India.;
3. The head of state and the chief executive should be elected by Parliament. In a tribal society like ours, presidential elections nationwide tends to pit the tribes of the country against each other as we have seen in Kenya and other African countries. On the other hand, members of Parliament are better placed to make a better choice of their leaders. It is not true that Presidents elected on the basis of country-wide elections are more popular or tend to establish more stability than those elected in Parliament. South Africa, for instance, is a presidential system but with the President elected by Parliament.

Consult the attached paper (the case for a parliamentary system) for details.

Other matters that need to be highlighted in this draft include:

1. To ensure the consensus of the country on this important covenant, the Constitution is to be approved through a referendum (Article 200);
2. The issue of land is dealt with more comprehensively than before (Chapter 9);
3. Consistent with the federal system adopted, it is necessary to have two chambers of Parliament (Article 73), and a separate and independent Constitutional Court (Articles 146 - 148);
4. Some terminologies regarding the legislature have been changed. For example, the “National Legislature” becomes what it actually is, “Parliament”. The “National Legislative Assembly” becomes the “National Assembly” as its functions go beyond legislation only, and the “Council of State” becomes the “Senate”.
5. Eligibility to the office of a federal minister has been set (Article 113) which was not the case with the transitional constitution;
6. Positions of the Attorney General and the office of Public Prosecutions have been introduced as a judicial organ separate from the Ministry of Justice to ensure that politicians (The Minister of Justice) do not control the course of justice (Articles 144-145). The Minister of Justice does not have any prosecution powers;
7. The affirmative action for women (25%) has been specified only for representation in the legislature and in the independent institutions and commissions as this cannot be guaranteed in the executive branch because, in a system where the government is formed by the party with majority members in the National Assembly, that party may not have enough women to be appointed as ministers. Of course, the objective of that affirmative action will not escape the attention of those in charge and they will endeavour to realize it if conditions allow.
8. The “Fire Brigade” is replaced by its more appropriate designation, “Civil Defence”; and
9. The general election is to be conducted and completed not later than on June 30, 2015.

Comments chapter by chapter

1. Chapter 1

The definition of South Sudan is given here differently from traditional way. The old definition based on the borders is a legacy of the past stemming from the fact that South Sudan was a Regional Government twice (1972-1974 and 2005 – 2011). The countries that ruled South Sudan, the United Kingdom, Egypt and the Sudan, do not have their borders defined in their constitutions. Of course, the United Kingdom has no written Constitution as such, however, the other two countries have a long history in constitution-making, but at no time were their borders defined in their constitutions.

The definition of South Sudan provided here (Article 1 (2)), is borrowed, mutasis mutandis, from the Kenyan Constitution 2010.

2. Chapter 3

This chapter is about the Federation and the states. It focuses on the most important principles concerning the distribution of powers between the Federal and state Governments. In keeping with the spirit of true federalism, the powers and administration of the states, are a matter for the states; and better left to states' constitutions. Only issues common to the states are mentioned here.

With regard to administrative units below the level of the state level, it is considered appropriate to revert to the old naming: province, district and locality. "County" is taken from Britain smacks royalty and connection to the nobility. "Payam" has defied a single meaning. There are those who say it is a Dinka word meaning a new village, others state that it is a word from the language of the Luo tribal group meaning a place. Yet, a third opinion claims it the name of an administrative unit in the Kush Kingdom. Whatever the interpretation, the name is not commensurate with the aspirations of the people for national unity. South Sudan has never been a part of the Kush Kingdom. The only connection to it was in the minds of those who advocated for the "New Sudan from Nimule to Wadi Halfa". As for "Boma", it is said that it was the first location the SPLA captured during the war of liberation. Fine. Unfortunately, the inhabitants of the area do not call that place as such!

3. Chapter 7

This chapter deals with the judiciary, the third arm of government. Only principles related to the independence of the judiciary are included here. Details are left for the judiciary to expound on. To ensure the independence of the judiciary, it is suggested here that the Parliamentary bills legislating on the judiciary be presented to them for comment before being passed into law.

For its special nature as the custodian of the constitution, the Constitutional Court is dealt with in more details than the other courts. It is an important court in the defence of the constitution, as such appointment of its members is left to the organs of justice, not the politicians. This is vital to ensure its independence from political manipulation.

4. Chapter 10

Many details on the civil service are left out to be included in the laws. The independent institutions and commissions mentioned are left to a minimum. If need arises for more, the constitution provides for that.

It is also debatable whether an important issue like weeding out corruption should be dealt with by a commission or by a special organ under the now independent Attorney General. Our experience for the last eight years since the Anti-Corruption Commission was formed tends to point for a different approach.

5. Chapter 11

Apart from the Armed Forces and National Security which are national in nature, the concurrent nature of the other law enforcement agencies is taken care of to consolidate the federal system.

SPLM-DC
September 2013.