JUBA UNIVERSITY LECTURES 2013

MY MOTHER WILL NOT COME TO JUBA

SOUTH SUDANESE DEBATE THE CONSTITUTION

Akolda Ma'an Tier • Ambrose Riiny Thiik • Ben Lou Poggo
David Deng • Gabriel Shadar • Henry Swaka • Jacob Akol
Joanna Oyediran • Jok Madut Jok • Marcia Dawes
Merekaje Lorna • Paleki Matthew Obur • Zacharia Diing Akol

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My Mother Will Not Come To Juba

South Sudanese debate the making of the constitution

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Contents

Introduction 5

1. Consulting the Nation 7

Akolda Ma'an Tier 7
Jok Madut Jok 11
Zachariah Diing Akol 11
Henry Swaka 13
Marcia Dawes 14
Discussion 16

2. Equality, Ethnicity and Representation 18

Jacob Akol 18
Joanna Oyediran 22
Paleki Matthew Obur 22
Ben Lou Poggo 24
David Deng 25
Discussion 28

3. Rights, Responsibilities and the Rule of Law 30

David Deng 30
Merekaje Lorna 37
Gabriel Shadar 37
Ambrose Riiny Thiik 38
Discussion 40

Introduction

South Sudan achieved independence on 9 July 2011. Almost two years later it still lacks a permanent constitution. The country is governed according to a Transitional Constitution, which was ratified by the Legislative Assembly on the eve of independence, on 7 July 2011.[1] This document is based on the Interim National Constitution (INC) of Southern Sudan,[2] adopted in 2005 in the framework of the Comprehensive Peace Agreement (CPA), the agreement that ended the north-south civil war and paved the way for South Sudan's independence.

A National Constitutional Review Commission was established in January 2012, six months after independence. In 2013 it was granted a further year's extension of its mandate. Concern has been growing among South Sudanese regarding the absence of public debate on central questions of the future constitution. In early 2013 Luka Biong Deng, a member of the drafting committee of the 2005 Interim Constitution, wrote 'What we want to achieve with this constitutional review process is to lay down a foundation that will enable…our state and nation not to fail.' In February 2013 a report by Zacharia Diing Akol for the Juba-based Sudd Institute stated: 'One year after the decree issued by the President of the Republic of South Sudan effectively forming the National Constitution Review Commission, little is known about progress... The process seems to be considered as the reserve of an exclusive select few… The public has…not participated in the making of the supreme law of the country.'[3]

In March 2013, in response to these concerns, the Rift Valley Institute (RVI) and the Centre for Peace and Development Studies (CPRDS) organised three evenings of public lectures and discussions at the University of Juba. The talks focused on key aspects of the constitution-making process. They were the third in an annual series of lectures on topics of national interest organized by the RVI at Juba University.

The 2013 lectures featured leading public figures, including the Chair of the Constitutional Review Commission, government ministers, legal experts, civil society activists and representatives of women's groups. The presentations covered

1. The Transitional Constitution of the Republic of South Sudan, 2011.

2. The Interim Constitution of South Sudan, 2005.

3. Akol, Zachariah Diing, 2013, "A Nation in Transition: South Sudan's Constitutional Review Process", Sudd Institute Policy Brief.

the composition of the Review Commission, the role of civil society, freedom of speech, the role of ethnicity, the rights of women and disabled persons, the judicial system, systems of land tenure, term limits on political office and the question of popular participation in the consultative process.

Regarding popular participation, one discussant from the floor remarked: 'My mother will not come to Juba; she is waiting where she is—*but she is waiting for you*.'

The lectures and discussions were vigorous. They attracted a substantial attendance from students, activists, political leaders and members of the international community. For many present, it was their first opportunity to engage in dialogue with those involved in the constitution-making process. As Jok Madut Jok, the Chair of the first evening's session, remarked, the size of the audience was a sign of the high level of public interest. 'South Sudan,' he said, 'is confronted by a number of very daunting challenges, from security to national unity to political unity to nation building… they are all rooted in this particular subject: constitution making.'

The present publication includes presentations from all three evenings at Juba University, with highlights from the discussions that followed.[4]

4. The presentations are also available as podcasts on the Rift Valley Institute website http://www.riftvalley.net

1. Consulting the Nation

Akolda Ma'an Tier

Akolda Ma'an Tier is the Chair of the South Sudan Constitutional Review Commission

From Transitional Constitution to permanent constitution

Let me restate the obvious. Before 2011, South Sudan was a part of Sudan—but its status was unique. It was governed under three constitutions: the Interim National Constitution (INC) of 2005, which applied to the whole of the Sudan; the Interim Constitution of Southern Sudan, which applied to southern Sudan; and a constitution for each of the ten states of southern Sudan.

These constitutions, by and large, implemented the Comprehensive Peace Agreement of 2005 (CPA), which ended the armed conflict of 1983-2005. The INC, the Interim Constitution of Southern Sudan and the CPA embodied the right of the people of South Sudan to decide in a referendum whether to remain in Sudan, or, alternatively, to secede and form a new state.

On 9 January 2011, Southern Sudan voted for secession and for a new state, after an interim period of six months. A new state needs a new constitution. So South Sudan adopted the Transitional Constitution of 2011, a modified form of the Interim Constitution of Southern Sudan. As the name implies, the Transitional Constitution is provisional, not final. It remains in force until a permanent constitution is adopted. In using the expressions 'transitional constitution' and 'permanent constitution', Southern Sudan is an heir to the earlier Sudanese constitutions of 1956, 1964 and 1985, which used these expressions.

How the Review Commission works

Constitutional review in South Sudan is unique. It is not the work of one institution. It is a shared responsibility, involving the National Constitutional Review Commission (NCRC), the National Constitutional Conference, and the national legislature. Let me just talk briefly about these three stages in the making of a permanent constitution for Southern Sudan.

> 'Even though it is called a permanent constitution, it is subject to future amendments. You cannot tie future generations to what we have adopted now. So even if you are not happy with the way things are going you can come back and amend the constitution.'
>
> **Akolda Tier**

The Transitional Constitution does not fix the number of commissioners. It merely requires the President of the Republic to appoint members and he did this on three separate occasions in 2012: 9 January, 28 February and 28 May. The total number of the commissioners is now 55, a very big size.

The criteria for appointment are two. Knowledge of and familiarity with the constitutional issues is one criterion. The other is that the Commission must reflect the diversity that you see in Southern Sudan. Accommodation of these two criteria was not easy. If you are looking for a person with knowledge of constitutional law, he may not reflect the diversity. And if you are emphasizing the diversity of the population in South Sudan, you may miss out the competence in constitutional matters.

It may not be easy to speak of competence: who is competent and who is not competent. As to diversity, the commissioners are drawn from political parties, civil society organisations, women's organisations, faith-based organisations and people with special needs. Excluded from these affiliations are the Chairperson and the Deputy Chairperson: they are not affiliated to any of these social groupings.

Not all commissioners serve full-time: nine serve full-time, 46 are part-timers. That can create a problem, because a part-time member does not have to attend all the meetings—and they are the majority. So if, by accident or design, a good number is not there, there will be no quorum.

The procedure we have adopted is to divide the commissioners into six groups for the purposes of working on the revision of the Constitution. Five of these committees work on themes in the constitution such as the division of power, human rights, etc. And the sixth deals with civic education on constitutional issues. The first seven parts of the Transitional Constitution have already been distributed to these five thematic groups, which means that only six are remaining, the approach being that once they have finished the revision, a plenary is called. If they approve it, then the next part of the constitution will be given to them.

According to the internal procedural rules of the Commission, decisions are made by consensus or, failing that, simple majority. It means that, as in the game of football, teamwork in the Commission is indispensable. And, like the game of

football, when a team plays well the whole team is praised—but if they don't perform well it is the manager alone who will be held accountable. And so that is probably what is awaiting the Chairman of the Commission: if they do well all of us will be praised; if we don't the blame will probably fall on my neck.

'Like the game of football, when a team plays well the whole team is praised—but if they don't perform well it is the manager alone who will be held accountable.'

Akolda Tier

Delays in the process

Let me now address the mandate of the Commission. It has four main tasks: one, to review the Transitional Constitution and propose changes, including changes to the present system of government; two, to conduct civic education; three, to receive submissions from the public; and four, to prepare a constitutional text and explanatory report, with the help of constitutional experts. So there is room here for us to rely on constitutional experts, because if you look at the composition of the Commission, there may be something missing.

In the beginning, the time frame for the Commission to finish these tasks was one year, ending on 9 January 2013. It is very clear that these functions cannot be carried out without money and without premises. If you don't have premises, where would the ordinary people send their submissions? And the time ran out without the Commission having dealt with these substantive issues. So on 26 February, the Parliament extended the mandate of the Commission, to end on or before 31 December 2014.

It was not until February this year that we were able to acquire premises. The judiciary gave us one of their houses, and USAID came in and built a big hall, which can seat about 60 people, and also offices for the Commission. But the question of money is still outstanding: even though it has been approved by Parliament, the question of the budget of the Commission up to now is still outstanding.

Let me return to the process itself. Assuming that the Commission has prepared a draft, then it goes to the next stage, the National Constitutional Conference, which has to be convened by President Salva Kiir Mayardit. The same groups that are represented on the Commission are again represented here: political parties, civil society, women's groups and people with special needs. In addition, new groups will be represented, including professional associations, war widows, veterans, war

wounded, business leaders, trade unions, traditional leaders, academia and other categories to be determined in the future.

The function of the Conference is to debate and approve the draft constitutional text sent by the Commission. They approve it by simple majority. And assuming that they approve it, then it goes to the final stage, the national legislature, which consists of two houses: the National Assembly and the Council of States. The two houses will sit jointly to debate the draft, but then they vote separately. No specific majority of the legislature is prescribed in the constitution to approve the constitutional draft, be it a simple majority or a two-thirds majority.

The role of Parliament

The involvement of Parliament is well intended. It compensates for the principle of democratic legitimacy missing in the Commission—we are not democratically elected—which will also be missing in the Conference. There is no democratic legitimacy in these two institutions. Parliament, it is always assumed, reflects the will of the people. But even this is not correct. The two houses of Parliament consist of members who were partly elected and partly appointed—and as long as you have a partly appointed body, you cannot say that it reflects the will of the people. Some members, in fact, were elected in constituencies in the north, not in South Sudan, but because we have all been pushed here[1], they have been brought to be members of the Parliament of South Sudan, even though people of South Sudan did not elect them.

To sum up, then, what will come from the Commission will not be irrevocable, since there are two other stages. So a minority view in the Commission may become a majority view in the Conference or in Parliament, or both. Views that are rejected by the Commission, should they get majority support in the Conference or in Parliament, will overrule whatever the Commission had approved.

There is an assumption in the review process that the Conference is going to approve the constitutional draft and that Parliament is going to approve the constitutional draft. But supposing these two stages—the Conference, the Parliament—do not approve the constitutional draft, where do we go from there? There is no clue in the present constitution about how

1. Following the independence of South Sudan the government of Sudan gave South Sudanese living in Sudan a nine-month deadline to leave the country.

you proceed to prepare a permanent constitution. The assumption is simply that once it is drafted by the Commission, it goes to the Conference, then the Conference approves it, and then it goes to the Parliament, and the Parliament approves it, but that is a dangerous assumption.

One thing is clear here: if the draft is rejected in the Conference, or if it is rejected in Parliament, the Transitional Constitution continues. It lasts until it is replaced by a permanent constitution. And even if we assume that a permanent constitution does emerge through these three stages, future constitutional changes cannot be excluded. Even though it is called a permanent constitution, it is subject to future amendments. You cannot tie future generations to what we have adopted now. So even if you are not happy with the way things are going—pressure here, pressure there—once that pressure is lifted later on you can come back and amend the constitution and produce what you think is suitable for your people.

Jok Madut Jok

Will there be a popular consultation?

This description of the process is very clear, but it leaves a question about the perception we have that there was going to be a process of consultation throughout the country, to be debated under trees and in beer-parlours and wherever, resembling what the Kenyans did with their constitution. Apparently, from the mandate, it seems that this stage is not there.

Jok Madut Jok is Undersecretary in the Ministry of Culture and Director of the Sudd Institute

Zacharia Diing Akol

An unnecessarily politicized process

The total number of people who constitutite the Commission is 55. Forty-four of the 55 represent political parties, with SPLM, the ruling party, having 26. This leaves 18 others for the other political parties. There is a problem here. This, unnecessarily in my view, politicizes the process.

Zacharia Diing Akol is Director of Training at the Sudd Institute

The process would have best been left to a few experts, people with technical background, since we have two other bodies through which the text of the document would be vetted:

‘The current composition of the Commission is an elite-driven process, especially driven by politicians. Ordinary citizens don’t feature very well in this.’

Zacharia Diing Akol

the National Constitutional Conference and the Parliament. I think it is unfortunate. In light of the economic hardships that the country is going through, it would have made sense if the Commission was reduced from 55 to probably 15 or so, and the participation of political parties totally eliminated. Their representations could be made in the larger body, the National Constitutional Conference, which I think will have about 600 people: enough room to represent everybody.

Another problem with the current composition of the Commission is that it is an elite-driven process. You pick up the list and you will not be surprised to see ministers, deputy ministers and MPs there. What is that for? Are they afraid that, if the work were left to a few technocrats, their interests would not be guaranteed—or are they saying that they know best what is in the interest of the eight million plus South Sudanese?

The other problem that I see is that ordinary citizens don’t feature in this. I wrote a policy brief [2] that argued for another, final stage in this process:a constitutional referendum. We know very well this country emerged not because of the wars that we won on the battlefield but through a negotiated settlement. This enshrined the principle of a plebiscite—the right to vote in a referendum which was exercised by the South Sudanese in large numbers. I think that it makes sense, when we are talking about a foundational document that lays out a legal framework and legal norms for the country, that we give that responsibility to the citizens.

The politicians will have their share; they will run the institutions of the government. But the constitution is larger than just determining who gets what power with respect to the institutions and the personalities that run them. The constitution is a social contract that regulates relations among the people, and between the people and their government and the government entities. It also enshrines the responsibilities and duties that are to be carried out. So there is an issue of legitimacy at stake, and I think we can address that if we open up the process and allow the ordinary South Sudanese citizens to weigh in on the final constitutional document.

2. Akol, Zachariah Diing, 2013, “A Nation in Transition: South Sudan’s Constitutional Review Process”, Sudd Institute Policy Brief, available at http://www.suddinstitute.org/publications/show/a-nation-in-transition-south-sudan-s-constitutional-review-process/

Henry Swaka

Should there be a referendum?

Henry Swaka is the Vice Chair of the South Sudan Civil Society Alliance

Why was this Commission not funded from the beginning? Don't blame the shut-down of the oil[3]; South Sudan received billions of dollars in oil revenue before this took place. I think that process was not planned very well. We just heard from Professor Akolda that the Commission got an office only recently—when its mandate was finishing. So what have these people been doing from January 2012 up to this moment? I think time has been wasted. If we wanted a good country with a good constitution, I think we would have established this Commission and funded it from the very first day.

If we want to put this country right, we need to think of the poorest citizen in South Sudan. What does that person need so that they can also benefit from the services and contribute to the building of this nation?

'For our politicians to succeed in politics, and to build up this nation, we need to think of South Sudan first and our political parties second.'

Henry Swaka

The constitution is not accessible. It's necessary for people to have the document to read through and make their suggestions or comments. I personally had access to this document only in August last year—and I'm sure many more people have never seen a single article of it.

With the CPA, we circulated the information through the media, but it's not happening with the constitution—and this is the supreme law of our land. Why is it not done? How much does it cost to actually do these programmes on radio? You're not going to be able to reach out to every individual in South Sudan, but if you disseminate the information through the media, I think that you will be able to reach a larger audience.

My brother Zacharia proposed a referendum—but I would oppose a referendum because again it will be highly politicized. We may have two versions of the constitution, neither of which is necessarily wrong or right. We need to bring what is good from this version and take what is good from the other version, but if you say 'Let's go for a referendum', then you are going to miss a lot of good things.

To build up this nation, we need to think of South Sudan first and our political loyalties second.

3. Following a protracted dispute with the government of Sudan, in January 2012, the government of South Sudan stopped the flow of oil through the pipeline to refineries in Sudan, denying both countries revenues from oil exports. Oil exports were resumed in April 2013.

Marcia Dawes

Marcia Dawes is the Deputy Chief for the Rule of Law and Security Institutions Programme in the United Nations Mission in South Sudan (UNMISS)

It's important that we work together

I think it's important to recognize what the Commission has done so far. The Commission has been working hard to start preparing civic education and public participation. It is very challenging, as everyone else here has pointed out: there is no funding, there are logistical requirements, there is the rainy season that's coming. That's something that we all have to be aware of. The international community is willing to help as much as possible.

But this is difficult, and there are many challenges. It's important that we work together—national and civil society, women's groups, the government, the Commission, the international community—to be able to reach everyone and explain what the current constitution is. And we want people to have the opportunity to debate the draft and discuss the different aspects, so that there is some form of ownership and people understand that the Commission is there.

Akolda Ma'an Tier

The real representatives of the people

One of the complaints I have heard is that the constitutional review process is politicized. This may be negative or it may be positive. After all, a constitution is an agreement between the political parties. The two problems are that not all the politicians in Parliament are elected and that there is inequality in the membership of the parties. If they were evenly balanced, or if they could form an alliance and outweigh one of the parties, there would be nothing wrong with this. Political parties are the real representatives of the people.

This idea of writing a constitution with the assistance of civil society is a new way of making a constitution. In the past, it was simply the responsibility of the political parties to write a constitution for themselves. With states like South Sudan, everybody considers himself equal to a political party. This is a problem, and it has been very much politicized. In this initial stage of drafting, the new constitution should really have been left to the experts—then you give it to the Conference to endorse it,

add something, or take something out. But if you give it to this big body to draft it, there is likely to be a delay.

There is also the question of whether we should have distributed copies of the constitution. Well, cost is a factor. Even if we had the budget, how many copies are we going to produce for the people? Southern Sudan has about eight million people: are you going to produce eight million copies? Already, the members of the Commission have copies of the Transitional Constitution of Southern Sudan, and they have copies of the constitutions of relevant countries: Kenya, South Africa, Ghana and India—because if you are going to review the constitution, you review it in the light of other constitutions. You cannot just produce it from your head; you have to see how a particular issue has been dealt with elsewhere and you introduce changes in the light of your findings in those particular constitutions.

The vast majority of the inhabitants of Southern Sudan cannot read or write—maybe 84 per cent. So if we consider the request to distribute copies to the general public, it may be a very small percentage of the population who could benefit. The only way you can approach them is face-to-face. But in what language? English is not spoken by everybody. If you do it in the vernacular languages, many of the vernacular languages do not even have a word for 'constitution'. Communicating with ordinary people, either orally or in writing, is fraught with difficulties.

Coming to the idea of a referendum, this is not included in the process as prescribed in the Transitional Constitution. We know they had a referendum in Kenya, but on what issues? The Transitional Constitution has 203 articles. Are the people going to decide on all 203? In Kenya, they selected only controversial issues, those for which there was no consensus in the Technical Committee that drafted the constitution—and it was those controversial issues that were referred to in the referendum. The thing is, when you refer a document with over 203 pages to a referendum, how are voters going to decide?

Don't confuse this with the referendum on separation from Sudan. That was a simple choice: to be a part of Sudan or an independent state. But if you put complex issues of the constitution – and so many of these – in a referendum, you may get a shock.

'This idea of writing a constitution with the assistance of civil society is a new way of making a constitution. In the past, it was simply the responsibility of political parties. But in South Sudan, everybody considers himself equal to a political party. This is a problem.'

Akolda Tier

Discussion

‘My mother will not come to Juba’

Discussion from the floor included remarks on the make-up and politicization of the Review Commission, the role of civil society and the accessibility of the process to people outside South Sudan’s political centres. On the question of civic education and popular consultation, one participant put it like this: ‘My mother will not come to Juba; she is waiting where she is—but she is waiting for you.’

Onyoti Adigo*, the leader of the opposition in the National Assembly, turned to the audience and asked whether they felt they had been consulted; there was a loud chorus of ‘No!’ The making of a constitution, he said, had to include all the people and be done in public; it should not be ‘decided by one political party who think they are clever. That is why you were not given funds to do your work!’*

One of the speakers from the floor rejected the assertion that all the political parties and representatives of civil society were participating. With only nine full-time members of the Commission, he said, the reality was ‘that six people, maybe, are from the ruling party’, leaving only three others. And when it came to approval of the constitution by the National Assembly, added another member of the audience, ‘the Parliament is almost 90 per cent SPLM. Where is the guarantee that party interests will not overrule national interests?’ Another speaker commented: ‘The Chairman said the constitution is an agreement between political parties. I totally got confused—I thought the constitution was an agreement between the government and the citizens.’

Judge Ambrose Riiny Thiik*, former Chief Justice of South Sudan, expressed disagreement on a number of points. He took issue with* ***Zacharia Diing Akol‘s*** *claim that independence had come through referendum, not from the war: ‘This is mistaken, my friend,’ he said, ‘absolutely mistaken. We could never have arrived at the negotiating table. Independence had been spoken about since the 1950s but to no avail. People went to prison because they called for federation in the old Sudan, to no avail. They were not prepared to let go! It was the war that brought them to the table. That is why we had the right and the chance to vote on the referendum day.’*

The former Chief Justice also addressed the issue of elitism in the process. ‘If it is a technical committee,’ he said, ‘it will have to be elitist, I think. That is why there is public education—for the ordinary citizens as well as the elite – so they can bring in their suggestions or participate in the debate of the constitution.’

‘We really ought to have waited for a longer time,’ he concluded, ‘before we got to the stage of drafting a permanent constitution. Everything is so fragile in our situation and I personally would have thought that this was a process that should have been delayed.’

The issue of consultation aroused anger in the audience. One civil society activist described how, during debate on the Interim Constitution, he had been ejected from proceedings ‘until further notice—which did not come—that is, until the consultation was concluded.’

One speaker commented on what he called the ‘very serious mistakes’ that were committed in the process of creating the same Interim Constitution. ‘This is reflected,’ he said, ‘in the system of governance we have had in this country since 2005.’ Another, however, said it was time to look forward, not back: ‘We should not get stuck on processes that have already passed. I would recommend that we concentrate on what the Commission should do moving forward.’

‘The Chairman said the constitution is an agreement between political parties. I thought the constitution was an agreement between the government and the citizens!’

2. Equality, Ethnicity and Representation

Jacob Akol is the Director of Gurtong Trust Media, and Chair of the Association for Media Development in South Sudan

Jacob Akol

The Foundations of the constitution

The constitution of a country is the foundation of its stability. Like a building, if the foundation is faulty, the parts will not hold together, walls and floors will begin to crack, and if the fault is not identified and corrected in time, the whole building will crumble.

African states at the moment of independence ought to have significantly reformed or demolished colonial structures as soon as they became independent. What was needed was a redesigned constitution to act as a foundation for accommodating ethnic communities and nationalities within colonial borders, but nations largely failed to come up with adequate reforms in their constitutional development. This was a mistake.

Take ethnic realities. Constituents within colonial borders have territorial rights. Here in South Sudan, we know which are the territories of the Dinka, the Anuak, and so on. There are also linguistic rights, cultural rights—and to ignore these realities or brush them aside as tribal trivialities is not to do any better than the colonialists. But that is what independent Africa did—and, in most cases, it continues today. We have simply failed to acknowledge and address the varieties of small nations that make up an African state within the old colonial borders.

Botswana's constitutional precedent

I want to give three constitutional examples to consider, starting with Botswana. Botswana has been touted as a good example of stable constitutional crafting—in particular through its recognition of the House of Chiefs. In 1970, Sir Seretse Khama, who was the first President of Botswana—and incidentally himself a paramount chief—declared that 'a nation without a past is a lost nation, and a people without a past are people without a soul'. But what if there is an historical distortion of the face of the nation?

In 1966, the constitution of Botswana endorsed a colonial law, which handed over the whole of Bostwana to eight tribes belonging to one ethnic group, the Tswana. Addressing a visiting South Sudanese civil society delegation, of which I was a member, Professor Lydia Nyati-Ramahobo of the University of Botswana told us: 'The Chieftainship Act defines the tribes and chiefs and leaves them to the eight Tswana-speaking tribes at the exclusion of others.' You should put this in the context of South Sudan to understand the wrong that is being done in Botswana and that might be done here.

'Diversity need not divide a country. A government that involves the grassroots is more likely to prevent wars within national borders—and may even prevent secession itself.'

Jacob Akol

Territory is also defined in terms of those tribes. 'Chiefs of the eight Tswana-speaking tribes are recognized,' the professor continued, 'and rule over all other tribes of different ethnic groups within their territory. Only these eight tribes have group rights to land, and sovereignty of the soil on behalf of the Queen and currently on behalf of the government of Botswana.'

Now remember that these laws were made way back during the colonial period—but they have been taken over and endorsed by the government of Botswana. So, while these eight chiefs were sovereign on behalf of Queen Victoria, they are now sovereign on behalf of the government of Botswana. There is an Act that bars the courts from hearing issues of chieftaincy and closes all other legal forums other than *kgotla*, local tribal courts where it is exclusively the Twsana chiefs who preside over cases of disputes regarding chieftaincy. The customary law used in *kgotla* is ethnic Tswana law. These are exclusionary definitions and have therefore resulted in an exclusionary chieftainship structure, which is still in operation today.

I should tell you that the professor's comments prompted one member of our South Sudanese delegation to remark: 'Imagine Her Majesty legalizing the domination of the Dinka or the Nuer or the Zande over all other South Sudanese groups and making them legal owners of the whole of South Sudan—and imagine that the law was then endorsed by the government of the independent Sudan. That would mean war!'

The House of Nationalities

As a second comparison, let me move now to an event in November 2000, when a group of South Sudanese intellectuals met in Kenya, where they discussed the concept of the House

of Nationalities. These intellectuals included people who are now ministers in the government of South Sudan, including Peter Adwok Nyaba and John Luk Jok.[1] These were the people who defined the concept of the House of Nationalities. This was followed by a conference from 17-19 January 2003, which was attended by over 800 participants, where agreement was reached to make the House of Nationalities a reality.

'The right to self-determination... up to secession'

Now I turn to a third example: the Ethiopian constitution, which contains an important paradigm shift in constitution-making. The opening of the Ethiopian constitution of 1994 reads:

> We, the nation, nationalities, and Peoples of Ethiopia: Determined to build by the exercise of our right to self-determination for ourselves and of our own free will, a single political community which is based on our common consent and the rule of law so as to ensure lasting peace, an irreversible and thriving democracy and an accelerated economic and social development for our country Ethiopia; Strongly convinced of the necessity of respect for the fundamental rights of individuals and of the nations and nationalities as well as the even development of the various cultures and religions for the attainment of these objectives... Recognising that our common destiny needs to be based upon the rectification of historically distorted relationships and promoting common interests.[2]

Article 39 of the Ethiopian Constitution, the 'Right of Nations, Nationalities and Peoples' duly states: 'Every nation, nationality or people in Ethiopia shall have the unrestricted right to self-determination up to secession.' Some people will say this is going too far, but nevertheless, it is included.

> Every nation, nationality and people shall have the right to speak, write and develop its language and to promote its culture, help it grow and flourish, and preserve its historical heritage. Every nation, nationality or people in Ethiopia shall have the unrestricted right to administer itself; and this shall include the right to establish government institutions within the territory it inhabits and the right to fair representation in the federal and state governments.[3]

1. John Luk Jok is Minister of Justice in the government of South Sudan. Peter Adwok Nyaba is Minister of Higher Education

2. Constitution of the Federal Democratic Republic of Ethiopia, 1994, Preamble

3. Ibid, Art. 39

Personally, I think this provision is a paradigm shift that applies to other African countries. Although the right to self-determination up to secession would be subject to democratic procedures, the fact remains that an ethnic community would have the democratic right to be part of the unity of the greater nation, or secede if they genuinely desired to do so. Diversity, in short, need not divide a country. A system of government that effectively involves participation at the grassroots is more likely to prevent wars within national borders, and may even prevent secession itself. The biggest attraction of secession is its denial.

Diversity and unity

Post-colonial Africa has failed to face the realities of our ethnic diversity. Accepting this reality has often been seen as a threat to national unity, and a divisive endorsement of tribalism. I beg to differ. We must accept that these cultures have values, which need to be channelled towards national unity and development. Without those cultures being developed in that way, in no way shall we unite, and in no way shall we actually develop. There is a cultural gap in development in Africa and we will repeat this in South Sudan if we ignore it.

The House of Nationalities is not a substitute for legitimate ethnic representation at the national level. But our constitution should state clearly that South Sudan is multi-lingual, multi-cultural and multi-national. It should establish a true House of Nationalities or Congress of Ethnicities. After all, when you look at it, how many are we? We may be around 60 to 70 different ethnic communities: is a house of 70 such communities impossibly large?

You may say that this is an endorsement of tribalism—but I don't think so. Refusing to recognize the reality of our diversity in the years since independence has not lessened tribalism—if anything, tribalism has got worse. People may say, 'This thing is unfair: how can you represent the smallest tribe, which has got only 300 people, and the largest with a thousand times that number, with a single person in each case?' But larger ethnic communities will be reflected in the Constituent Assembly—people forget this—in which representation will be based on population, so they are not left out at all.

'Accepting the reality [of ethnic diversity] has often been seen as a threat to national unity, and a divisive endorsement of tribalism. I beg to differ. We must accept that these cultures must have values, which need to be channelled towards national unity and development.'

Jacob Akol

The House of Nationalities or Congress of Ethnicities will be like the Congress of the United States: two people from each of the states, no matter how small or how large the state, always go to the Congress. Thus, the heavily populated states of California and New York send exactly the same number of men and women to Congress as do tiny Hawaii or Rhode Island. So there is no reason why we can't do it.

People will say, 'But it is expensive—how can you have these two houses and so on?' But salaries and perks for the House of Nationalities and other representative bodies should reflect the average national income. Public service is not for those who want to get rich. Anyone who wants to get rich should be told to consider a career in business.

Joanna Oyediran is Sudan Program Manager for the Open Society Initiative for Eastern Africa

Joanna Oyediran

An area of vagueness

Often, in relation to constitution building, there is a lot of discussion about accommodation of different political interests. An important question for us, however, is how do you accommodate the interest of different ethnic groups, in a country with the level of diversity of South Sudan?

Section 167 of the current Transitional Constitution addresses the issue of traditional authority and customary law as follows: 'The institutions, status, and role of Traditional Authority, according to customary law are recognized under this constitution.' (Traditional Authority is spelled with a capital 'T' and a capital 'A'.) 'Traditional Authority,' it goes on, 'shall function in accordance with this constitution, the state constitutions, and the law. The courts shall apply customary law subject to this constitution and the law.'

This is quite vague—perhaps, one could argue, deliberately so...

Paleki Matthew Obur is the Director of South Sudan Women's Empowerment Network

Paleki Matthew Obur

Women and the Constitution

The Transitional Constitution of the Republic of South Sudan, as we all know, is, overall, gender-sensitive, with clear commitments to gender equality. It has also introduced an affirmative

action policy that reserves 25 per cent of all the legislative and executive organs for women. But this provision does not extend to other executive appointments, such as the Commission's various chambers, Board of Directors, or the judiciary, which is a gap that needs to be addressed in the constitution.

The preamble of the Transitional Constitution recognizes that the cost of the struggle of the peoples of South Sudan, and its independence, was borne by both men and women. It records a struggle for equality and a determination to achieve it. Let me pick up on some specific articles in the constitution.

Article 5, for example, reads: 'The sources of legislation in South Sudan shall be (a) this constitution, (b) customs and traditions of the people, (c) the will of the people, and (d) any other relevant source.' We should consider adding to this article, 'relevant international law and customs'. The Constitution should embrace the standards set by the Maputo Protocol[4], the Banjul Charter[5] and other such treaties. Since South Sudan has not ratified all these protocols and conventions, we are not bound by explicit obligations—but by making reference to them in our constitution, we can ensure that the overarching objective of these treaties is not undermined.

On affirmative action, Article 16, Section 4, expresses equality between the sexes, in addition to a 25 per cent minimum quota. The advocacy and activism of women should now focus on increasing that quota to a more preferred level. IGAD states are currently considering a 50/50 representation of the sexes in public life, while other conventions suggest something between 30 to 35 per cent.

Despite these provisions in South Sudan's constitution, there is still a very low involvement and representation of women in various government organs and commissions. In the Constitutional Review Commission, for example, there are 14 out of 55 who are women, which is just 25 per cent. Poor representation leads to gender blindness and gender-related issues are pushed to the side.

In terms of limiting the impact of harmful customs and traditions, Article 16 stipulates 'laws to combat harmful customs and traditions which undermine the dignity and status of women'. Here we should use, as I said , the language of the Maputo Protocol.

At the moment, as we speak, in the NCRC, there are 14 out of 55 who are women, which is just 25 per cent. Poor representation leads to gender blindness and gender-related issues are pushed to the wayside.'

Paleki Matthew Obur

4. African Union, **'**The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' ("Maputo Protocol") 11 July 2003, Maputo, Mozambique, available at http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol%20on%20the%20Rights%20of%20Women.pdf

5. Organisation of African Unity, 'African Charter on Human and Peoples' Rights ("Banjul Charter")' 27 June 1981, available at: http://www.unhcr.org/refworld/docid/3ae6b3630.html

Finally, let me refer you to Article 15, which says: ‘Every person of a marriageable age shall have the right to marry a person of the opposite sex and to found a family according to the respective family laws, and no marriage shall be entered into without the free and full consent of the man and woman intending to marry.’ Unfortunately, the phrase ‘marriageable age’ is not defined in the Transitional Constitution, so we should add, ‘No person should enter marriage under the age of 18’. The Transitional Constitution enjoins that ‘marriage is between a man and woman of marriageable age who freely and fully consent to the union. The marriage will be performed in accordance with the family laws of the parties. This provision therefore enshrines plural marriage laws.’ Yet there is no family law in South Sudan, so the constitution leaves it to customs and traditions to govern our family matters—and these customary laws do not protect or promote women’s rights.

Ben Lou Poggo

Ben Lou Poggo works for the Ministry of General Education and Instruction

Disability and representation: no room for discrimination

The constitution is the supreme law of the nation and it ought to address issues related to justice, full human rights and inherent respect for dignity. These are areas where people with disabilities are often left out. When these issues are not discussed properly, the needs of persons with disabilities are ignored and they are instead considered objects of pity and sympathy.

There is a general consensus that persons with disabilities are given little attention. I would like to see that the Interim Constitution does not just look at the four articles specifically dedicated to them, i.e. Article 14, Article 30, Article 139 and Article 169. I want to urge the constitutional review commissioners to look at the issue of disability across the board. I can tell you that in the five thematic working groups, we have just one blind person representing those with disabilities. How would this one person address all issues of disability in one thematic working group, when in fact issues of disability cut across the board?

We need to look at other constitutions across Africa, and even elsewhere. Kenya, for example, has 15 articles addressing all the issues of disability, so that there is no room for either

people to exploit or discriminate against people with disabilities. Let the five thematic groups look at the constitution of Kenya, and, in particular, look at those areas where the areas of disabilities are effectively addressed, to emulate what is there in our constitution.

When people look at persons with disabilities, they always think, 'Aha, that one is blind, that one is the physically disabled' and so on. But I must tell you, disability happens to all of us. When you reach the age of 45, if you don't get reading glasses, you are disabled, because you will not be able to read print. That is the reality. Others have accidents and become physically disabled. We must avoid thinking that disability is an issue that affects a minority—and that if we are not part of that minority, we don't need to care about it.

'My urge here is that we need to look at other constitutions across Africa where there is no room for people to exploit, discriminate or do other things to persons with disabilities.'

Ben Lou Poggo

David Deng

Land, community, and the Constitution

David Deng is the Research Director for the South Sudan Law Society (SSLS)

The fundamental premise of nation-building in South Sudan is that we are going to build our governance systems based on the cultures, customs, and traditions of South Sudanese people. Through this, we as South Sudanese can find strength in our diversity and avoid some of the negative repercussions of ethnicity and tribalism. I want to look at this through the lens of land rights.

I came to Juba in 2008 working with the Land Commission on land policy and Land Law. These laws and policies are now on the verge of being enacted—the land policy, at least. In my investigations this idea that land belongs to the community was coming up again and again; everyone I talked to said 'land belongs to the community, it's in the CPA.' This resonated with me, and I thought it's a very comforting notion to think of people who are living on the land being in control of their land and resources, and of using the efficiency of customary law and customary land tenure to alleviate some of the burden on government.

I began to write on this issue and conducted advocacy on land rights. But now, after about five years, I've seen that there is a need to assess it more critically, not necessarily to try to defeat this idea of building a system upon our cultures, but at least to

> 'We now have a system where we have formally recognized customary land tenure. I wonder the extent to which we have assessed the risks inherent in that. When someone's ethnicity determines their rights, what are the risks?'
>
> **David Deng**

problematize it and to see where are the risks and how can we avoid those risks.

There are two examples that occur to me. One, if we look at South African apartheid, here's a government which told people where to live based on their ethnic identity: the Zulu are to live here, white people here, coloureds here, Indians here. This was justified as an outgrowth of custom and tradition, that this was the way Africans customarily lived. We all know the repercussions: decades of oppression.

Similarly, in the United States—maybe I should mention here that I am half-American and half-South Sudanese—in the United States, you had segregation before the Civil Rights movement in the 1960s, where there existed this notion of 'separate but equal'. So there would be different facilities, different areas where blacks and whites would go. The idea was that both would be equal, there would be no discrimination in terms of the quality of the services. But this was impossible to apply in practice, and what happened was that discrimination entered into the system, and eventually this idea of 'separate but equal' was found to be inherently discriminatory.

That brings me back to South Sudan. We now have a system—at least with respect to land—where we have formally recognized customary land tenure. The customary laws by which we as South Sudanese organize our land ownership, land use and access to land have been formally recognized in the Land Act of 2009, and put on equal footing with other forms of land ownership—whether it's leasehold, freehold, or whatever. I wonder how much we have assessed the risks that are inherent in that. When someone's ethnicity determines their rights, what are the risks?

For example, if you look at customary land tenure critically, you see that in fact it leads to a lot of exclusion and discrimination. If someone from Bahr al-Ghazal wants to settle in Lainya County, you'll find that people don't like this idea. They think that their community land is meant for their community members. If there is an overriding factor such as war or a crisis of some kind, maybe they'll accommodate people in their area for a period of time, but generally speaking, there is not a sense that people have freedom to settle wherever they want. This is problematic. It is something that needs to be addressed intelligently, rather

than us blindly adopting this idea that a system based on ethnic identity will solve our problems.

There is something that I've observed, and that other people have probably seen too, which is the lack of knowledge that we have about each other as South Sudanese. We don't mix with each other across tribal or ethnic lines. We all base our opinion of each other on rumours and stereotypes—the Dinka are this, the Kakwa are this, the Bari are this—and there is not a real knowledge of each other, which I think is a prerequisite to building a system where strength can be found in ethnic diversity. First we have to know each other. I don't know if that's always been the case, or if it's something that is a product of the war, but I see that as a factor that needs to be addressed moving forward.

'There is not a real knowledge of each other, which I think is a prerequisite to building a system where strength can be found in ethnic diversity. First we have to know each other.'

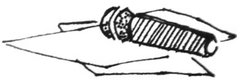
David Deng

Balancing individual freedom and the good of the community

I think this constitutional review process gives us an opportunity to revisit some of the fundamental premises that we've adopted, and which I think need to be assessed more critically, both in terms of the constitution itself and governance more broadly. The question is, how do you balance a system based on indigenous culture with the need to preserve fundamental freedoms, such as freedom to move and settle wherever you choose? How do you avoid sacrificing individual rights in the interest of the community's good? Because when that's done, inevitably it's those with less negotiating power in society who suffer: the disabled, women, the elderly, minority groups—these are the ones who suffer when community good is put ahead of the individual.

Personally, I think that change is inevitable. I don't know how many people have gone out to the payams—to the rural areas. I think a lot of people like to live in urban areas—but if you go out to the payam and you see what's actually there, you see that in the payam headquarters, there's typically a little market place and you'll find economic migrants, local government officials from all over South Sudan. There's a little bit more flexibility regarding who can settle there in the payam headquarters, whereas out in the rural areas beyond, things are still very much governed by customary law. Your identity, your tribal affiliation determines your right to settle in these rural areas.

Development – roads, trade, telecommunications – will bring South Sudanese into contact with one another. We are at the beginning of a process that will replicate itself on an increasingly larger scale. We'll find that, as this country develops, as local economies develop, as cell phone coverage is extended, South Sudanese will come into increasing contact with one another. I have confidence that these things will begin to break down the walls that are separating people. The question is how government can support this process and avoid some of the pitfalls that are inherent in it, and I think that requires a critical assessment of some of these fundamental premises that we've based our nation on. I think the constitutional process provides an opportunity for that.



Discussion

'Our common enemy is ignorance of each other'

There were contributions from the floor on a range of themes discussed during the evening, including patriotism, ethnicity, language, education and the rights of minorities. One speaker complained that the ruling SPLM appeared to 'assume that the constitutional process will guarantee that they will remain in power, and elevate the president to a Supreme Leader'. 'The process is not democratic,' she concluded.

***Jacob Akol's** proposal for a 'House of Nationalities' was contested by one speaker, who said it would introduce 'a serious element of confusion in the country'. Such a body, he said, would be no more than a 'Parliament of tribes', in which different cultures could even come to blows, because 'how you handle yourself may be an insult to me'. Another speaker from the floor wondered whether large communities, such as the Dinka and the Nuer, would 'buy the idea of having just one or two representatives there, speaking on their behalf'.*

*A third speaker disagreed, saying that, since a good constitution should 'reflect the national unity of the people of that country, as well as cultural diversity of that nation', a system had to be found to bring every group into decision-making. 'Federalism,' he said 'means alliance: a coming together of cultural diversity but unity of purpose.' **Jacob Akol** responded to the debate by saying that the label 'Parliament of tribes' trivialized the issue.*

Such a body, he insisted, would help people see their own faces in 'the mirror that is the constitution'. 'We are a rich nation,' he said, 'because each community brings a value—and the Anuak are equal to the Dinka, the Shilluk, the Zande. All our development currently is based on other people's cultural values.'

On the question of ethnicity, one person stated that 'it is a reality and is it not unique to us'. 'We should be very proud of that,' she said; 'it is our wealth, our strength. When I stand here with my Bari ethnicity, I am equal to someone who has Dinka or Shilluk or Anuak ethnicity. We will compete with our intellect and experience. That is my understanding of what equality of representation means.'

There was much discussion of state languages: in particular, their number, provenance, and reflection in the constitution and formal education system. ***Paleki Obur*** *observed that, while a variety of national languages should be formally acknowledged, a state language policy would be a 'directory of discrimination': 'If we pick Dinka as the state language of Jonglei, what about the Anuak and the Murle?'* ***Ben Lou Poggo*** *described current Ministry of Education policy as one of encouraging the teaching of pupils' mother-tongue in the first three years of primary education, giving children 'a foundation of that language and therefore a cultural linkage to their tribal inclination'. It was a worry, he said, that 'some of our own children are not able to speak their mother-tongue'.*

Above the ethnic and linguistic debates, however, for one participant, the constitutional debate was ultimately a question of patriotism. 'When we went to the bush to fight,' she recalled, 'we had one common agenda and we had one common enemy, and this is what glued us strongly as a movement. Where did we lose that? Today, the country comes later and self-interest comes first. Our manifesto in the bush said that the "New Sudan" would practice equality and justice in all its forms, regardless or faith, religion, sex, ethnicity and race; there would be equal and just distribution of natural wealth, power-sharing and development. Today, we need to examine ourselves.' Another member of the audience agreed: 'our common enemy is ignorance of each other, so perhaps we should go about dispelling that.

'When we went to the bush to fight, we had one common agenda and we had one common enemy, and this is what glued us strongly as a movement. Where did we lose that? Today, the country comes later and self-interest comes first.'

3. Rights, Responsibilities and the Rule of Law

David Deng is the Research Director for the South Sudan Law Society (SSLS)

David Deng

Local justice and dilemmas of accountability

In the context of the justice system in the constitutional development process, the question I want to pose to people is this: what should be the role of customary law in the new Republic of South Sudan? To answer that, I present the findings of a 10-month assessment that the South Sudan Law Society conducted with Pax Christi on local justice systems in six rural counties.[1]

The term 'local justice system' is a very broadly defined term. It includes both customary courts and statutory courts, to the extent that they exist in counties, but also in more informal dispute resolution mechanisms, such as mediation by families, friends, neighbours, local government or police. So we took a very expansive definition of what constitutes a local justice system.

We operated in six counties: Budi, Ikotos, Akobo, Pibor, Renk and Nasir. We had a series of legal aid clinics, where we offered free legal advice, mediation and legal representation. This was free of charge to people who otherwise wouldn't be able to afford it. In terms of research component, we did interviews but we also undertook a very big survey of more than 1500 households in these six counties.

Chiefs and local politics

What should be the role of customary law in the new republic? Let me briefly refer you to Article 5 of the Transitional Constitution, where customs and traditions are cited as a source of law in South Sudan. In Article 166, too, one of the objectives of local government is stated to be to incorporate traditional authority and customary law. And Schedule B places the administration of traditional authority and customary courts under the state government. So it's a decentralized system.

1. Deng, David, report forthcoming.

There are strengths and weaknesses in this approach. We know that local justice systems operate at low cost, because they incorporate traditional systems of governance that predate the state. And they work quickly because they don't have complicated judicial procedures, relieving the burden on government. The government of South Sudan is now trying to incorporate traditional authority for the same reason that the colonial government worked through Indirect Rule: because it was easy, it was expedient. Customary courts are also geographically and culturally accessible: you have customary courts at the county, payam and boma levels in most locations. Also, because they're applying the customs and norms of local groups, they tend to be more accessible than statutory courts. They're also durable.

While I was in Akobo, there was insecurity in the area and all the payam courts had relocated to the county seat and were still hearing cases. When the insecurity subsided, they simply went back to the payams to continue hearing cases. This shows the importance of customary courts in terms of providing a means of dispute resolution in areas that are subject to conflict. It's worth noting that the goal of customary courts is to reconcile the disputing parties and try to find a mutually acceptable outcome, whereas in statutory courts, the tendency is to have a winner and a loser.

What about weaknesses? Well, because customary courts are decentralized, they fall under the states and local governments, whereas the judiciary is centralized under the Supreme Court. So you have an inconsistency between the two systems. The customary courts also mix executive and judicial functions, so chiefs act as both local administrators and judges. This mixture of roles is a factor that makes them subject to political interference. Customary courts come under county commissioners, so there's a lot of room for political decision-making and influence over adjudication processes. There is also a problem with weak enforcement, particularly at payam and boma levels. Within country headquarters, you find a strong police presence, so customary courts and statutory courts can enforce their decisions with relative ease—but when you go to the payam and boma levels, that police presence drops off, so chiefs are subject to harassment, beating, intimidation, which affects their ability to process cases.

'Justice is lacking in current approaches to resolving these problems. A culture of impunity makes it easier for people to think they can do anything and get away with it.'

David Deng

> 'The government of South Sudan is now trying to incorporate traditional authority for the same reason that the colonial government worked through Indirect Rule: because it was easy, it was expedient.'
>
> **David Deng**

Crimes that local courts can't handle

We identified two crises of accountability in local justice systems. One is that there is a certain class of crimes for which the justice system is totally unable to hold people accountable, mostly crimes relating to large-scale inter-ethnic conflicts and associated crimes such as cattle theft, abduction and sexual violence. There is almost total impunity for these crimes. The second is an injustice that arises within the justice system itself. If you look at marital disputes, sexual crimes, people are able to appeal to customary courts to have these disputes resolved, but the manner in which they are resolved sometimes imposes unfair costs on those who have less negotiating power in local societies—poor people, minority groups, women, children, etc.

The government's approach thus far has been an extreme version of the carrot and the stick. On the one hand, we have peace and reconciliation conferences, blanket amnesties, bending over backwards to try to bring people in; on the other hand, you have harsh military interventions, forced disarmament, military campaigns against armed groups. But there is nothing in the middle, in terms of reasoned and transparent adjudication or prosecution. Justice is, quite simply, lacking in the current approaches to resolving these problems. And that lack of justice provides an incentive to revenge killings: where people take matters into their own hands. The culture of impunity also makes it easier for people to think they can do anything and get away with it.

The statistics of disputes

In our survey, we looked at ten different types of dispute. We asked how often these disputes had occurred over the last two years, and whether people complained or appealed to an authority to try and resolve these disputes. And if they did complain, we looked at who they complained to, the levels of satisfaction, their experiences with different complaint mechanisms.

We found that the most common dispute was theft: 38 per cent of our 1,520 households had experienced one or more incidences of theft in the past two years. In terms of homicide rates, one out of five households within these six counties had one or more people killed in the past two years. Just think of

that! Imagine that in this room, one out of every five of us had a loved one killed in the past two years. When we asked, 'Did the person who experience this dispute complain to anyone?', what we found was that, people were much more likely to complain about spousal neglect, adultery and rape within the context of local justice systems. They were far less likely to complain about incidents of theft, physical assault, abduction and homicide, which suggests that local justice systems are ill equipped to deal with these matters.

We also compiled statistics for crimes for which we found a general impunity: inter-ethnic homicide, cattle theft and abduction. In Akobo, you had more than a quarter of households who had experienced one or more killings in the past two years, followed by Nasir, Budi and Pibor. The overwhelming majority of homicides were perpetrated by individuals from another village—and when you combine this finding with the anecdotal evidence, there is strong evidence that this crime is usually perpetrated between ethnic groups and across county lines.

Also, all six of our counties had international borders, with Kenya, Uganda, Ethiopia or Sudan. This means that people could easily escape across the border, and that they can use cross-border trade as a way to generate revenue and to buy weapons and supplies. It may also be a motivating factor behind cattle theft, because cattle are a common form of cross-border exchange.

'In terms of homicide rates, one out of five households within these six counties had one or more people killed in the past two years. Just think of that! Imagine that in this room, one out of every five of us had a loved one killed in the past two years.'

David Deng

Historical grievances, forced marriage, gender-based violence

Let me turn to the question of historical grievances, which can arise from any number of sources. There are colonial era land disputes, atrocities committed during the war, even individual families can have blood feuds with one another—but these past crimes that go without a transparent justice process manifest themselves again in contemporary conflicts, and are used to dehumanize groups and intensify conflict.

Finally the weakness of enforcement at the payam and boma levels that I mentioned earlier is also a complicating factor. The highest rates for theft were reported in Akobo, and the same applies for homicide. If you look at the types of items that were stolen, 62 per cent involved cows or other livestock in other

‘We asked our interviewees a hypothetical question, ‘If a female friend of yours is being beaten badly by her husband and requests your assistance, who would you turn to?’ What we found was that there was no appeal to formal statutory courts, nor to local government officials nor to the police. Despite the scale of the problem of domestic violence, people first want to resolve it within their close social networks. Perhaps most shocking is that the fourth most common response was to do nothing at all.’

David Deng

words mostly cattle-raiding. For abduction, again the highest rates were in Akobo: nearly 20 per cent of households had experienced an abduction within the past two years, followed by Pibor, Here, too, most of these crimes were committed by individuals from another village, suggesting a large amount of inter-ethnic, trans-boundary abduction.

This brings us to the second class of disputes: those which find their way into the justice system but where the manner in which they are resolved imposes unfair costs on people. On forced marriage, there was a recent report by Human Rights Watch,2 which showed that forced and early marriage is a common fact of life in South Sudan—despite the constitutional and statutory prohibitions. But the important point here is that, when it comes to local justice systems, it is not the girls who are forced to marry who appeal to either customary or statutory courts, but the girls’ families, who say, ‘This girl is stubborn, she is not marrying the man that I’ve selected for her’. This turns justice on its head and imposes an unfair cost on the girl whose constitutional and statutory rights ought to protect her.

In fact, when we asked our interviewees a hypothetical question, ‘If a female friend of yours is being beaten badly by her husband and requests your assistance, who would you turn to?’, what we found was that there was no appeal to formal statutory courts, nor to local government officials nor to the police. Despite the scale of the problem of domestic violence, people first want to resolve it within their close social networks. Perhaps most shocking is that the fourth most common response was to do nothing at all.

Capital punishment

One final issue that I’d like to touch on—which is important especially for the constitutional review process—is capital punishment. It was first introduced to South Sudan by the British colonial authorities in the 1920s and 1930s, when they would carry out public hangings as a way to deter violent crime. This was perpetuated in the Second Civil War, when the SPLA conducted public firing squads. Again, the goal was to deter crime, and people say it was effective. In 2005, the Government of Southern Sudan also empowered high court judges to sentence people to death by hanging—although it is no longer done in public.

2. Human Rights Watch, 2013, ‘“This Old Man Can Feed Us, You Will Marry Him”: Child and Forced Marriage in South Sudan’ New York: Human Rights Watch, available at http://www.hrw.org/sites/default/files/reports/southSudan0313_forinsertWebVersion_0.pdf

Recently, there has been a strong reaction from the international community,[3] and from civil society in South Sudan. The French government, for example, sent a letter to the government in Juba asking for a moratorium on capital punishment to be put in place. This was followed by a letter from the Comboni missionaries to the President of the Republic, asking for a moratorium and asking for the abolition of the death penalty in the permanent constitution.

Just by way of clarification, the way that the system of capital punishment works is that the judgment is delivered in the High Court, it goes to the Court of Appeal if there is an appeal, and then the Supreme Court either affirms or overturns the death sentence. If they affirm, the President then has to sign off on a death warrant. So a moratorium means in effect that the President simply refuses to sign warrants. Abolition either happens at the level of the Supreme Court, finding that the death penalty is a form of cruel and inhuman punishment, or else within the context of a constitution that bans capital punishment. In 2012, just a few months ago, the Government of South Sudan voted for a UN resolution in favour of a global moratorium on capital punishment, with a view to abolishing the death penalty. We don't yet know if it's going to be implemented here, or how.

To summarise the arguments for and against: deterrence and retribution are the two main arguments for the death penalty—either it stops crime or people deserve it. An argument against it is that it is not there in customary law, most South Sudanese are Christian and Christianity doesn't sanction killing other people. Also the absence of legal representation—in international human rights law, if you are not able to provide a lawyer for everyone who is accused of a capital offense, then you shouldn't be executing them. And then finally, the retention of capital punishment perpetuates the belief that the lives of South Sudanese are not worth as much as those of citizens of other countries.

In our survey, we found that most people were opposed to the death penalty, even in cases of people convicted of serious capital offenses. In the United States, by contrast 60 per cent of people are in favour of it—the US and Japan are the only two industrialized countries that continue to administer judicial

3. At least eight people have been executed in South Sudan since independence. On December 20, 2012, South Sudan, along with 110 other nations, voted in favor of a UN General Assembly resolution calling on countries that use capital punishment to place a moratorium on executions with a view to abolishing the death penalty South Sudan: Heed Global Call to End Death Penalty at http://www.hrw.org/news/2012/12/20/south-sudan-heed-global-call-end-death-penalty

‘The responsibility we have is to contribute to and participate in the constitution making process. I believe that this is a very important process, through which we can establish a formidable foundation for this country. There is no way it can be done except when there is popular participation.’

Merekaje Lorna

executions on a regular basis. It gets more complicated when you look at the county level. In Akobo, most people are in favour of the death penalty—and I believe that this is because of their frustration with the lack of accountability. In Pibor, most people are against it. This may be for several reasons: one, there may be a distrust of the state, because the Murle tend to be characterized with stereotypes of being violent and unruly. Also Murle are more isolated, and this may show more belief in the customary way of settling homicide through the payment of compensation.

We also asked what relatives of the deceased person would decide if they were given a choice, in law: should the perpetrator of the crime be hanged, or would they accept compensation, in which case the perpetrator gets a prison sentence? People overwhelmingly preferred compensation to execution.

Defining a role for local justice

There is a danger in going too far in criticism of local justice systems. Definitely there is a need for urgent reform, but at the same time, if one tries to eliminate all of these customary systems, you are going to be left with large regions that have absolutely no means to resolve their disputes. There is already an effort underway to restrict the jurisdiction of customary courts for homicide in almost every one of the counties that we studied—and that makes sense. You don’t necessarily want untrained chiefs adjudicating intentional murder cases. But it needs to be done carefully, so that you don’t eliminate this important source of cohesion. This brings us to the last question, one that I leave you with: in light of these findings, and seeing the strengths and weaknesses of customary courts, the very serious crises of accountability, both in terms of impunity and in terms of a justice system that discriminates or doesn’t adhere to the Bill of Rights or statutory norms, how do we as South Sudanese want to see customary law treated within the constitution?

Merekaje Lorna

Limits of governance; freedom of speech

Merekaje Lorna is the Secretary-General of South Sudan Democratic Engagement Monitoring and Observation Programme

I would like to look at two linked issues: term limits and freedom of speech. Why I'm looking at these two specific areas is because of the role that they play in democratization.

In the case of term limits I am looking at institutions but not personalities, at offices like the head of state or the presidency, heads of commissions, head of the judiciary. Should we have a system where, once you get yourself in there, you continue until you die in office? Or do we rather want a situation where there is a term limit? If we don't have term limits, that is a recipe for corruption and impunity. If I am in my job forever, I can do anything I want and you are not going to question me because I have all the power. It is better to step aside and see how the next person is doing it.

On freedom of speech, we must have a free media and an environment where civil society is able to criticize. There must be tolerance for constructive criticism. That is the only way to honour the heroes and martyrs, those who contributed with their lives to help us realize South Sudan's independence. As citizens our responsibility is to participate in national development. That starts with the constitution making process. Popular participation in the process is the only way to achieve a formidable foundation for this country.

Gabriel Shadar

How free speech is constrained

Gabriel Shadar is a journalist for Miraya FM. He spoke in a personal capacity

Let me make a point about freedom of speech in South Sudan. Do we have the sort of journalists who know the work and ethics of journalism? Do we have educational institutions that produce qualified and capable journalists to handle the issues in the right way? Do we have the laws that set out their responsibilities and limitations? We are holding this debate without even the basics in place. But I am still puzzled why the debate is continuing about the three media bills before Parliament. They are very simple, they are very clear—they just need the approval of the authorities. The challenge will then be on us,

the journalists, to live up to our responsibilities under these laws.

Freedom of speech is also determined by cultural issues. We live in a society where you cannot criticize. Criticism is always taken as personal, never as objective. So we have a society in which you cannot criticise people in authority. When Isaiah was assassinated,[4] I received a lot of calls saying 'Stop talking to politicians, because one day you may encounter the same thing'. But what happens to me because of freedom of speech—or the lack of it—is something that I cannot determine. People want to know how the government is behaving and what their policies are. And if people cannot question the people in power, what can we say about progress or about democracy?

'We live in a society where you cannot criticize. Criticism is always taken as personal, never as objective. So we have a society in which you cannot criticise people in authority. When Isaiah was assassinated, I received a lot of calls saying 'Stop talking to politicians, because one day you may encounter the same thing'.

Gabriel Shadar

Sometimes in South Sudan, we seem to be contradicting ourselves. We have very good laws, we have a very good constitution—maybe—but we contradict ourselves by not putting these things into practice. We come under pressure from the international community, not because we don't have views or we don't have laws, but because we are not really doing much to implement them.

Ambrose Riiny Thiik

Ambrose Riiny Thiik is Former Chief Justice of South Sudan

Local courts in historical context

I want to focus on local courts—also called chiefs' courts, or customary courts—and the various customary law regimes we have in the Republic of South Sudan.

The courts were established under the colonial system in the 1931 Chiefs' Courts Ordinance. There was a hierarchy of courts. You had the Executive Chiefs' Court below. You had the Regional Court, sometimes the B or A Court—they were not named uniformly in the different provinces. You also had at the district headquarters a Court of Appeal which sat seasonally, to deal with appeals coming from the Regional Court and referred to them by the resident magistrate or the District Commissioner, who also had judicial powers.

There was also an ad hoc court called the Chiefs' Special Court, which tried cases of group fights or tribal conflicts. And what I want to say about those courts is that jurisdictional limits were clear. Also, there was competence among those who ran them.

4. Isaiah Diing Abraham Chan Awol, known by his pen-name Isaiah Abraham, was a columnist for a number of Sudanese publications, including the *Sudan Tribune*. He was shot and killed outside his home in December 2012

They were tribal chiefs, leaders, much older people, they had definite understanding of the customary law rules, context and procedures. So the operation of the local courts during colonial rule probably served the ends of justice more effectively than I have come to know in recent years.

Then we got into the war situation and with the war— it took a long time, over 21 years—things disintegrated. The social fabric tended to crumble; values changed. Even the chiefs became very young, so young that you wonder how much they know of the customary rules and values.

There are many other factors. During the war, the commanders took all the power: judicial, traditional, you name it. And so the chiefs became figureheads, doing nothing except maybe to collect blood money.

We did something when I was Chief Justice – when we were in the bush – we reorganized the courts, we examined women's rights and child rights. We organized the courts along the lines of the constitutional charter that was spelt out in the first national convention of the SPLM in 1994. But a few things stood out very clearly: the diminution in the effectiveness of the courts, in the implementation of court decisions, and the overall power of the army—all these undermined the local justice system.

Today, though, we have a whole range of fundamental freedoms, women's and children's rights. And so the courts ought to tread very carefully when they are applying the customary law rules which are likely to be into conflict with these constitutional rights of citizens.

The cost of the local justice system in earlier times was cheaper. There were hardly any significant court fees required. But during the war, courts were used for revenue-raising and so court fines and fees were very high and you can say corruption crept in.

For the moment, our customary law situation is uncertain, is not codified, so there is a need, in my view, that there should be greater research into the customary law systems in order to ascertain the rules. The chiefs, the court presidents and the court members should become more educated and should undergo courses if we want to improve the local justice system.

'For the moment, our customary law situation is uncertain, is not codified—there is a need, in my view, for greater research into the customary law systems.'

Ambrose Riiny Thiik

Discussion

The limitations of customary law and statutory law

Many of the interventions following the presentations focused on the clash between customary law and statutory law, with the issue of the death penalty prompting animated responses. One speaker from the floor stated that there was 'a serious conflict of powers, a serious conflict of legislation, between customary and statutory provisions', which arose from 'the delegation of adjudicatory powers to the customary court'. According to the Transitional Constitution and the Local Government Act of 2009, he said, customary courts did not have criminal jurisdiction: 'The decision by the Chief Justice and the executive to constitute a special court comprised of local chiefs to try criminal offences is unconstitutional and should be reversed.'

'The role of customary courts remains questionable. But it is also obvious that our regular courts have limitations, and their ability remains questionable too. So what is the way forward?'

Another drew from personal experience to talk about customary law: 'Unfortunately, I come from an area where chiefs have administered capital punishment. I have seen people sentenced to death. Some were actually buried alive. This was done by the chiefs—and the police were there to administer the punishment. So where does customary law end and role of the state begin?' Another speaker echoed this, commenting that South Sudan's history had been 'full of violence'. 'Some,' he said, 'was imposed on us by the successive regimes in Khartoum, some because of the continuous war in our country. So this means actually that killings have become rampant and people don't give respect to human dignity.'

One participant expressed regret that, though those administering customary laws had 'done a great job within their own limitations,' they had not been able to bring down the rate of killings. 'This means their role remains questionable,' he said; 'it is also obvious that our regular courts have got limitations and their ability to administer justice effectively remains questionable. So what is the way forward?' He referred to India, where the Supreme Court had asserted that 'life imprisonment is the rule and the death penalty is an exception to be applied in the rarest of rare cases'. 'What I am saying here,' he concluded, 'is that we should not rush to abolish the death penalty, given the circumstances here, but we have to be very careful in imposing it.'

The final speaker questioned the practicality of alternatives to capital punishment. 'Let's say we are "good people",' she said, 'and we get rid of the death penalty: have we addressed where they are going to be imprisoned?' Recent human rights reports, she pointed out, had talked about the harsh conditions of prisons in South Sudan.[5] *She argued that the question of rights, responsibilities, and protection in law was a bigger and more pressing question than the death penalty. There was much in this area relevant to the Constitution, she concluded, that was left untouched by the present debate.*

5. Human Rights Watch, 2012, '"Prison Is Not For Me": Arbitrary Detention in South Sudan' New York: Human Rights Watch, available at http://www.hrw.org/sites/default/files/reports/southsudan0612ForUpload_1.pdf

Recent RVI Publications on the Sudans

THE SUDAN HANDBOOK

edited by John Ryle, Justin Willis, Suliman Baldo and Jok Madut Jok (2011)

The Sudan Handbook – covering Sudan, South Sudan and the North-South borderlands – offers an authoritative introduction to both countries, rooted in a historical account of the development of the state, written by leading Sudanese, South Sudanese and international specialists, with purpose-drawn maps, a glossary, capsule biographies, a chronology and a bibliography.

DISPUTED VOTES, DEFICIENT OBSERVATION: THE 2011 ELECTION IN SOUTH KORDOFAN, SUDAN

by Aly Verjee (2011)

The current war in South Kordofan followed a disputed election for the governorship of the state, an election endorsed by international and national election observers. This study argues that that there were significant deficiencies on the part of the observation missions. Irregularities were underplayed and critical lessons from Sudan's past electoral history were overlooked.

LOCAL JUSTICE IN SOUTHERN SUDAN

by Cherry Leonardi, Leben Moro, Martina Santschi and Deborah Isser (2010)

This report analyses the workings of the justice system in Southern Sudan, focusing on the real-world relationship between local chiefs' courts and government courts and the ways that litigants navigate between them. Based on extensive interviews with litigants, chiefs, and court officials, the report argues that that the role of the chiefs' courts has evolved to the point where the line separating them from government courts is blurred. On balance this has extended access to justice.

WHEN BOUNDARIES BECOME BORDERS: THE IMPACT OF BOUNDARY-MAKING IN SOUTHERN SUDAN'S FRONTIER ZONES

by Douglas H. Johnson (2010)

Discussion of the border between the two Sudans has focused on the question of where the boundary line is to be drawn. The first report in the Contested Borderlands series, When Boundaries Become Borders, examines a different, but equally important issue: the potential impact of the new boundary on the peoples of the borderlands and political developments at the local level. In a comprehensive survey of archival sources and current research, the study summarises the history and present situation of the communities each side of the north-south boundary and the existing international borders of Southern Sudan. Also available in Arabic

THE KAFIA KINGI ENCLAVE: PEOPLE, POLITICS AND HISTORY IN THE NORTH-SOUTH BOUNDARY OF WESTERN SUDAN

by Edward Thomas (2010)

At the westernmost extremity of Sudan, Kafia Kingi is a key meeting point between Darfur and the south of the country. This mineral-rich area is currently under the administration of South Darfur, but is due to be returned to Raga county, in Southern Sudan, under the terms of the 2005 Comprehensive Peace Agreement. The second report in the Contested Borderlands series, based on hundreds of interviews in Sudan, tells the story of the people of Kafia Kingi and Raga, and the choices they face today.

Available for free download in English and Arabic from **www.riftvalley.net**. Print versions available from Amazon.

‘MY MOTHER WILL NOT COME TO JUBA; SHE IS WAITING WHERE SHE IS. BUT SHE IS WAITING FOR YOU’

In South Sudan a delay in the making of the national constitution has led to growing public uncertainty. In early 2013 a series of public lectures held at the University of Juba looked at the reasons for this delay, at the issues at stake in the drafting of the document and the question of public participation in the constitution-making process. A dozen South Sudanese intellectuals discussed these topics with an audience of students and members of the public. The event was the third in an annual series of lectures at Juba University, a collaboration between the Centre for Peace and Development Studies and the Rift Valley Institute, supported by the Danish Institute for International Studies, with the partnership of the Gurtong Trust, the Sudd Institute and the South Sudan Law Society.

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