

The Transitional Constitution of the Republic of South Sudan

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*Constitutions are chains imposed by Peter when sober
on Peter when drunk.¹*

I. Introduction

The Transitional Constitution of the Republic of South Sudan (TCSS) was promulgated on 9 July 2011 as the first constitution for the independent South Sudan. The TCSS replaced the Interim Constitution of Southern Sudan (ICSS). The ICSS was in force during the interim period – the time between 2005, when the Comprehensive Peace Agreement (CPA) was signed, until 9 July 2011, when South Sudan became an independent country.

In order to appreciate the significance of the TCSS in the history of South Sudan it is important to contextualise this document. The Republic of the Sudan, which included South Sudan, was a British colony that was later governed through a hybrid system called the condominium rule between the British and the Turco-Egyptians.² The British governed the North and South of Sudan on the basis of one country, two systems. Islam and the Arabic language and culture were promoted in the northern part of Sudan, while in the southern part, Christianity and the English language were promoted. The eventual policy goal was that the northern part of Sudan would be developed as a priority and would ultimately be annexed to Egypt. The British would then retain southern Sudan, with the main goal of eventually annexing it to East Africa.

Contrary to that plan, the North and South Sudanese decided in 1947 that Sudan should be granted independence as one country.³ The South Sudanese further agreed with their northern counterparts that such an independent Sudan must be governed on the basis of a highly devolutionary system, preferably a federation or even a confederation.⁴ However, in 1956, when Sudan was granted independence by its colonial masters, the agreement on federalism and equal representation was ignored. As a result, South Sudanese felt betrayed by the British and their northern Sudanese counterparts. This led to a sense of exclusion, disrespect, and disregard for agreed positions among many South Sudanese. This mounting frustration of South Sudanese with the future policy directions of the government of independent Sudan had led them to revolt in August 1955. That rebellion marked the beginning of wars in the history of Sudan. The history of the relationship between Northern and Southern Sudan has been characterised ever since by promises that were never kept, a sense of exclusion, betrayal of trust, and a determination to resist these vices.

¹ S. Holmes, *Passions and constraints: On the theory of liberal democracy* (1995) 132.

² M. Daly *Imperial Sudan: The Anglo-Egyptian condominium 1934-1956* (2003) 47. At the turn of the 19th century, Ottoman Sultan was in charge in Istanbul. His rule and influence extended to Egypt. A combined force from the Ottoman and his sympathisers in Egypt expanded into Sudan and jointly ruled it. The joint rule of Sudan by Ottoman and Egyptian rulers is commonly referred to by scholars as the Turco-Egyptian rule of the Sudan. So when the British colonial masters invaded the Sudan, this began another period of joint rule of the Sudan, which is referred to as the Anglo-Egyptian rule of the Sudan.

³ D. Berhanu, *Institutions and investment in Sudan: Socio-economic and institutional foundations of reconstruction and development* (2010) 56.

⁴ D. Ruay, *The politics of two Sudans: The South and the North, 1821-1969* (1994) 66.

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This resistance degenerated into civil wars. The first war, the Anya Anya 1, ended in 1971 with the Addis Ababa Peace Agreement. This Agreement was reneged upon, and that resulted in the 1983 civil war, led by the Sudanese People's Liberation Army (SPLA). The civil war ended in 2005 upon the signing of the Comprehensive Peace Agreement (CPA) between the Government of the Sudan and the SPLA.⁵ The CPA provided for an interim period wherein the South Sudanese were given another taste of one country, two systems. Under this arrangement, Southern Sudan was granted regional autonomy pending the conduct of a referendum on self-determination. The referendum provided the South Sudanese with an opportunity to vote to stay as one Sudan, or to vote for an independent Republic of South Sudan.

The interim period – the period between the signing of the CPA in 2005 and the conduct of the referendum in 2011 – was governed by the ICSS of 2005. Except for its provisions stating that ‘without prejudice to article ... of the Interim National Constitution’,⁶ the ICSS was for all intents and purposes a constitution for a nation-in-waiting. The Transitional Constitution of South Sudan, which is the subject of this discussion, is in some respects merely a cosmetic improvement of the ICSS.

II. The origins and historical development of the Transitional Constitution of South Sudan

Constitutions are a product of history. The history of South Sudan is one of exclusion, marginalisation, and exploitation. As a result, the constitution-making processes in Sudan have been very challenging. Between its independence in 1956 and 2005, Sudan had four transitional constitutions, two permanent constitutions, and many constitutional orders.⁷

Sudan was the first African British colony to become independent after World War II. One scholar has argued that because the independence of Sudan was ‘thrust upon’⁸ it well before the country was ready for it, that lack of preparedness has ‘haunted Sudanese politics ever since’,⁹ and has resulted in politicians ‘taking the popular will for granted, and therefore circumventing agreed legal procedures in all major constitutional issues.’¹⁰ In fact, some scholars have even argued that this same lack of preparedness to assume sovereign and leadership responsibility has been the cause of the crisis unfolding in South Sudan.¹¹ This assertion is probably true, in the sense that both the British government and successive governments of the Sudan failed to put in place institutional and infrastructural facilities in South Sudan that could easily facilitate responsible and responsive governance in South

⁵ See <http://unmis.unmissions.org/Portals/UNMIS/Documents/General/cpa-en.pdf> for more details on the CPA.

⁶ Article 2(1) of the Interim Constitution of Southern Sudan, available at <http://www.refworld.org/pdfid/4ba74c4a2.pdf>.

⁷ See M. Flacks, *Sudan's Transitional Constitution: Potential Perils and Possibilities for Success* (Journal of International Policy Solution), available at <http://irps.ucsd.edu/assets/004/5377.pdf>.

⁸ D. Douglas, *The root causes of Sudan's civil wars* (2003) 22.

⁹ Ibid.

¹⁰ K. Cope, *The Interim constitution: Lessons from the world's newest nation* (2013) 53 Virginia Journal of International Law 667.

¹¹ See M. Mamdini, *South Sudan: No power sharing without reform* (2014), available at <http://www.newvision.co.ug/news/652467-south-sudan-no-power-sharing-without-reform.html> (accessed 19 June 2014).

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Sudan. However, distinct from the case of independence of the Sudan from colonial rule, the South Sudanese had been intellectually, psychologically, and emotionally prepared for their independence since 1956.

Sudan adopted its first constitution in 1956, but within a few months its operation was suspended during a military coup led by General Ibrahim Abboud. This triggered a series of constitutional and political crises that culminated in the first civil war between the North and Southern Sudan. After a few years, the military junta initiated a constitutional review process which was prematurely terminated during another military coup in 1964. This was followed by a number of short-lived civilian administrations, which were succeeded by a military government headed by Jafa'ar Nimeiri in 1969.

In 1973, following a peace agreement between Nimeiri's government and Southern Sudanese rebels, a permanent constitution was adopted. This constitution guaranteed regional autonomy for Southern Sudan. It also provided that Sharia law, which was a contentious issue during the war period, would apply only to family and personal matters concerning Muslims. This agreement resulted in eleven years of tense peace. Former rebel soldiers were incorporated into the army and Southern Sudan's autonomy meant it could raise income from revenue from natural resources within its territory.

However, when Nimeiri's government failed to abide by the terms of the Addis Ababa Agreement of 1972, the Agreement and the constitutional order collapsed. In 1983, Nimeriri introduced the 'September laws' that made Sharia law supreme, suspended the constitution, and revoked Southern Sudan's autonomy unilaterally. This development led to a military mutiny, the start of another civil war, and the overthrow of Nimeiri by popular uprising. Subsequent changes in governments did not result in the repeal of the Sharia laws. In 1989, the National Islamic Front (NIF) (now the National Congress Party) staged another military coup that brought Bashir to power. This new government pursued the agenda of Islamization with renewed vigour, and prosecuted, oppressed, and eliminated opposition just as the war in the southern part of the country continued to rage with renewed zeal. In 1998, the NIF drafted a constitution which it claimed had been approved in a referendum. This 1998 constitution was eventually suspended when the Bashir government declared a state of emergency in 1999.

In the absence of military victory, and facing a deteriorating economic situation and increasing international pressure, the warring parties agreed to start negotiations under the auspices of a regional body, the Intergovernmental Authority on Development (IGAD). In July 2002, the parties signed their first significant agreement – the Machakos Protocol. This Protocol set up structures for the pre-interim, interim, and referendum periods upon the signing of a final agreement that would create a 'broad framework which sets forth the principles of governance, the general procedures to be followed during the transitional process and the structures of government to be created under legal and constitutional

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arrangements to be established.¹² This final agreement – the Comprehensive Peace Agreement (CPA) – was signed between the SPLA/SPLM and the NCP in 2005.¹³

The CPA created the Interim National Constitution of the Republic of Sudan (INCS) which, in turn, established the Interim Constitution of Southern Sudan (ICSS). The Transitional Constitution of the Republic of South Sudan (TCSS) of 2011 is an ‘amendment’ of the ICSS. These three constitutions have been described as ‘some sort of a constitutional family’ for the Republic of South Sudan.¹⁴ This is so because the five documents (the Machakos Protocol, the CPA, the INCS, the ICSS, and the TCSS) are historically linked, structurally similar, and substantively the same. Therefore, the CPA was not just a peace treaty or a contract between the two warring parties, but a constitutional framework for post-conflict Sudan. It provided a formula for power and wealth-sharing, and set the basis for the future institutional and political structure of the country and for South Sudan.¹⁵ The most important outcome of the CPA was that it granted Southern Sudan the right of self-determination, to be exercised through a referendum at the end of a six-year period from the date of the CPA’s signing.

The CPA provided for how and when the INCS and the ICSS would be drafted, the substantive and procedural provisions of these constitutions, and how they would come into operation.¹⁶ This is probably why the ICSS is almost a replication of the INCS. In this regard, the CPA was more than a framework of militarily and politically negotiated peace; it defined every aspect of the government that would implement its provisions. For instance, it insisted that ‘there shall be a decentralized system of government with significant devolution of powers, having regard to the National, Southern Sudan State, and Local levels of government.’¹⁷ It provided for human rights and fundamental freedoms.

The first draft of the ICSS was prepared by the Southern Sudan Constitutional Technical Drafting Committee, initially with the assistance of four non-governmental groups, which prepared draft constitutional texts.¹⁸ It appears that after consideration of the drafts, the Committee decided to conform quite closely to the INCS when drafting the new constitution for Southern Sudan.¹⁹ The first draft of the ICSS was reviewed and revised by a forty-member Southern Sudan Constitutional Drafting Committee. The membership of this Committee was made up of 70 per cent SPLM, 15 per cent NCP, and 15 per cent other political forces.²⁰ A revised draft of the ICSS was adopted by the Committee and presented to the Transitional Southern Sudan Legislative Assembly for approval.

¹² See <http://unmis.unmissions.org/Portals/UNMIS/Documents/General/cpa-en.pdf> for more details on the Machakos Protocol.

¹³ See <http://unmis.unmissions.org/Portals/UNMIS/Documents/General/cpa-en.pdf> for more details on the CPA.

¹⁴ *The Transitional Constitution of South Sudan 2011: An expert view from outside*, available at <http://www.uzh.ch/news/articles/2012/der-ruf-nach-demokratie-wird-immer-lauter/SouthSudan2011.pdf> (‘An expert view’).

¹⁵ See n. 13.

¹⁶ Ibid.

¹⁷ See the CPA Protocol on power sharing, available at <http://unmis.unmissions.org/Portals/UNMIS/Documents/General/cpa-en.pdf>.

¹⁸ See n. 14.

¹⁹ K. Cope (n. 10).

²⁰ See n. 14.

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The drafters of the ICSS did not anticipate the TCSS. The drafters of the ICCS had therefore, provided that

[i]f the outcome of the referendum on self-determination favours secession, this Constitution shall remain in force as the Constitution of a sovereign and independent Southern Sudan, and the parts, chapters, articles, sub-articles and schedules of this Constitution that provide for national institutions, representation, rights and obligations shall be deemed to have been duly repealed.

To actualise the above provision, an ‘All-Southern Sudanese Political Parties Conference’ was convened in Juba with the aim of ‘building consensus’ for the independence referendum and post-referendum issues.²¹ On 21 January 2011, President Kiir appointed a Technical Constitutional Review Committee to review the ICSS. The main mandate of the Committee was to ‘re-cast existing government structures in the south at a regional level as the institutions of a sovereign nation-state.’

There were two main concerns with the process that led to the drafting of the TCSS. The first was the exclusive nature of the process. The SPLM insisted that this was an amendment and thus a technical review process, rather than a constitution-making process that needed wider participation. Based on that assumption, a small ‘technical’ group made up of SPLM members (except one) was set up to undertake this review. For many observers, the technical group was more of a political group and represented only one political party, the SPLM. This was mainly because the twenty-four members first appointed by the President were all, save one, from his party.²² After the political parties complained, the President appointed an additional eleven members from other political parties, two from civil society organisations, and one from faith-based groups.²³ As this was not enough, the President, to the surprise of many, appointed seventeen additional members from his party just days later.²⁴

As a result, the review process ‘took place in an environment that was completely devoid of public participation, scrutiny, and input.’²⁵ This ‘lack of inclusiveness and under-the-radar power shifts proved a political debacle that provoked widespread public anger at the Kiir administration.’²⁶

The second challenge was to determine whether the review process was actually an amendment or was constitution-making. If it was an amendment, the process had not followed the required procedure provided for in the ICSS. Further, the ICCS only provided for deletion of references to sub-national features of the ICCS and not for additions to its provisions. Even though the reviewers of the ICCS deleted all references to the sub-national

²¹ K. Cope (n. 10).

²² See Presidential Decree No. 002/2011 for the Formation of the Technical Committee to Review the Interim Constitution of Southern Sudan, 2005, dated 21 January 2011.

²³ See Presidential Decree No. 36/2012 for the appointment of more additional part-time members to the National Constitutional Review Commission, 2012 and Presidential Decree No. 09/2012 for the appointment of two additional part-time members to the National Constitutional Review Commission, 2012.

²⁴ See Presidential Decree No. 36/2012 (n. 23).

²⁵ Z. Akol, *A Nation in transition: South Sudan’s constitutional review process* (Policy Brief of the Sudd Institute, 2013).

²⁶ K. Cope (n. 10).

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status of South Sudan, they added new institutions and structures. Thus the technical review was simply seen as a pretext for the ruling party to single-handedly make a new constitution for South Sudan. Irrespective of the concerns, the President pushed the draft Constitution through the Parliament on the eve of independence for South Sudan.

III. The Fundamental Principles of the Constitution

Part III and Chapter One of the TCSS outlines the Fundamental Objectives and Guiding Principles of the Constitution.²⁷ The TCSS puts individual dignity and the needs of the citizens at the centre of constitutional interpretation and application in South Sudan.²⁸ In addition, it broadly provides for political and economic objectives.²⁹ The TCSS expects all levels of government in South Sudan to promote democratic principles, political pluralism underpinned by decentralization, and devolution of political and economic powers.³⁰ The ultimate goals of the exercise of political power are national reconciliation, healing, harmony, and peaceful co-existence.³¹ It is useful to examine some of the key political and governance principles in some detail.

IV. Fundamental Rights Protection

The South Sudanese fought for decades to uphold human rights and fundamental dignity. As a result, South Sudan ensured that internationally recognised human rights were incorporated into the CPA and, consequently, into the ICSS as well as the TCSS. In addition to making specific rights constitutional rights and, thus, justiciable, the TCSS directly incorporates instruments on international human rights, constitutionalizes these instruments and, by implication, renders them justiciable too.³²

According to Article 9(3) and (4),

[a]ll rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified or acceded to by the Republic of South Sudan shall be an integral part of this Bill.

This Bill of Rights shall be upheld by the Supreme Court and other competent courts, and monitored by the Human Rights Commission.

The TCSS protects the following rights: life and human dignity,³³ personal liberty,³⁴ freedom from slavery,³⁵ servitude and forced labour,³⁶ equality before the law,³⁷ the right to found a

²⁷ See Arts. 35 – 44 of the TCSS.

²⁸ Art. 35(2).

²⁹ Art. 36.

³⁰ Art. 36(1).

³¹ Art. 36(2)(b).

³² R. Miamingi, ‘Inclusion by exclusion: An assessment of the justiciability of socio-economic rights under the 2005 Interim National Constitution of Sudan’ (2009) 9 African Human Rights Journal 76. Article 9(3) (4) of the TCSS is a cut and paste of the same provisions in the ICSS which was also an exact copy of the provision in the INCs.

³³ Art. 11.

³⁴ Art. 12.

³⁵ Art. 13(1).

³⁶ Art. 13(2).

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family,³⁸ rights of women,³⁹ rights of the child,⁴⁰ freedom from torture,⁴¹ fair trial,⁴² rights to litigation,⁴³ privacy,⁴⁴ religious rights,⁴⁵ freedom of expression and the media,⁴⁶ freedom of assembly and association,⁴⁷ rights to participation and voting,⁴⁸ freedom of movement and residence,⁴⁹ rights to own property,⁵⁰ rights to education,⁵¹ rights of persons with special needs and the elderly,⁵² rights of access to information,⁵³ and rights to housing.⁵⁴

The TCSS describes the Bill of Rights as a covenant among the South Sudan people and between them and their government.⁵⁵ It is difficult to understand precisely what this means in legal terms. This is so even though the TCSS provides that the rights and freedoms in the Bill of Rights shall be respected, upheld, and promoted by all organs and agencies of government and by all people.⁵⁶ The Supreme Court and all competent courts have the same constitutional mandate to ‘uphold’ the Bill of Rights.⁵⁷

The conceptualisation of human rights, the scope and nature of these rights, and the circumstances under which these rights are absolute or able to be limited are not so clearly thought out. This is probably why some scholars hold the view that the TCSS has not adequately and properly addressed ‘essential dialectics between the constitutional guarantee of human rights, the constitutionally permissible restrictions and the constitutionally prohibited violations of these rights.’⁵⁸ The only constitutional limitation on the application of some of the rights in the TCSS is a declaration of emergency either by law or by order by the President of the Republic. Even in such a circumstance, the President can only

[s]uspend part of the Bill of Rights; however, there shall be no infringement on the right to life, prohibition against slavery, prohibition against torture, the right of non-discrimination on the basis of race, sex, religious creed, the right to litigation or the right to fair trial.⁵⁹

³⁷ Art. 14.

³⁸ Art. 15.

³⁹ Art. 16.

⁴⁰ Art. 17.

⁴¹ Art. 18.

⁴² Art. 19.

⁴³ Art. 20.

⁴⁴ Art. 22.

⁴⁵ Art. 23.

⁴⁶ Art. 24.

⁴⁷ Art. 25.

⁴⁸ Art. 26.

⁴⁹ Art. 27.

⁵⁰ Art. 28.

⁵¹ Art. 29.

⁵² Art. 30.

⁵³ Art. 32.

⁵⁴ Art. 34.

⁵⁵ Art. 9(1).

⁵⁶ Art. 9(2).

⁵⁷ Art. 9(4).

⁵⁸ *An expert view* (n. 14).

⁵⁹ Art. 190(a).

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The Bill of Rights of South Sudan seems to create vertical as well as horizontal obligations.⁶⁰ This is a more likely interpretation of the constitutional provision that the rights and freedoms provided for in the TCSS ‘shall be respected, upheld and promoted by all organs and agencies of Government and by all *persons*'.⁶¹ ‘Persons’ here could refer to natural or artificial persons.

The South Sudan Bill of Rights is an expansive Bill of Rights. In addition to providing for specific rights and freedoms, the TCSS states further that ‘all rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified or acceded to by the Republic of South Sudan shall be an integral part of this Bill.’⁶² The Bill of Rights is to be ‘upheld by the Supreme Court and other competent courts’.⁶³

The rights and freedoms provided for in the Bill of Rights apply to ‘every person’ except the following rights and freedoms that are limited only to ‘every citizen’: freedom of expression;⁶⁴ the right to participation in governance and voting;⁶⁵ freedom of movement and residency;⁶⁶ the right of access to education;⁶⁷ the right of access to official information and records;⁶⁸ and the right to have access to decent housing.⁶⁹

The Bill of Rights provides for both civil and political rights as well as economic, social, and cultural rights. The rights to education,⁷⁰ to free primary health care and emergency services for all citizens,⁷¹ to freely enjoy and develop their particular cultures,⁷² and to housing⁷³ are socio-economic rights provided for in the Bill of Rights. However, even though the title of some of these rights might make the provision look as if it is conferring substantive rights, the socio-economic rights provisions are mainly limited to a right of access.⁷⁴ Under international human rights law, governments have obligations to ensure that these socio-economic rights are available, acceptable, accessible, and affordable. It has been argued, however, that since the Bill of Rights incorporates international human rights instruments, which include the International Covenant on Economic, Social and Cultural Rights, upon

⁶⁰ Art. 9(1).

⁶¹ Art. 9(2) (emphasis added).

⁶² Art. 9(3).

⁶³ Art. 9(4).

⁶⁴ Article 24(1) provides that ‘[e]very citizen shall have the right to the freedom of expression, reception and dissemination of information, publication, and access to the press without prejudice to public order, safety or morals as prescribed by law’.

⁶⁵ See Art. 26(1)(2).

⁶⁶ Art. 27(1)(2).

⁶⁷ Art. 29(1).

⁶⁸ Art. 32.

⁶⁹ Art. 34(1).

⁷⁰ Art. 29.

⁷¹ Art. 31.

⁷² Art. 33.

⁷³ Art. 34.

⁷⁴ For instance, Article 34(1) provides that ‘every citizen has the right to have access to decent housing;’ and Article 29(1) states that ‘education is a right for every citizen and all levels of government shall provide access to education.’

ratification of this instrument, the obligations under the framework of the TCSS will have to be interpreted more generously so as to comply with international obligations.⁷⁵

It is interesting to consider how and why a revolutionary movement could allow for the constitutionalisation of such an expansive human rights regime. There are two schools of thoughts as to why. Some scholars believe that the South Sudan Bill of Rights is a result of international pressure and assistance received during the drafting process of the TCSS.⁷⁶ Others, however, hold the opinion that the government of South Sudan could not foresee any serious consequences arising from domesticating international human rights. This reasoning is supported by Feldman, who observed that

potential opponents of incorporating the content of international human rights duties into domestic law . . . made the not unreasonable assumption that the treaties had been ignored in the past and could safely be ignored in the future, regardless of whether the constitution incorporated a duty to abide by them.⁷⁷

The most plausible explanation, though, seems to be the influence of the CPA. The human rights provisions of the CPA were in fact ‘cut and pasted from international conventions’ to which Sudan was already a party. Thus those human rights provisions could easily find their way into the ICSS and from there to the TCSS, which did not tamper with the Bill of Rights that was provided for in the ICSS.

V. Separation of Powers

At the core of constitutionalism is the principle of separation of powers. Constitutionalism dictates that government institutions and political processes operate within the confines of constitutional rules. The legitimate authority of government depends on it abiding by those limitations. The separation of powers requires separation of powers and functions. It abhors overlap in powers and functions and in the personnel of the three arms of government, and any unreasonable interference.

The TCSS provides for the separation of powers between the executive, the legislature, and the judiciary. The legislature makes the laws, the executive implements the laws, and the judiciary interprets the laws.

A. The Legislature

The National Legislature is composed of the National Legislative Assembly (NLA) and the Council of States.⁷⁸ The members of the NLA are elected by universal suffrage, while the members of the Council of States are elected ‘through their respective State Assemblies’.⁷⁹

⁷⁵ R. Miamingi (n. 32). ‘

⁷⁶ K. Cope (n. 10).

⁷⁷ N. Feldman, *Imposed Constitutionalism* (2005) 37 Connecticut Law Reviews 857.

⁷⁸ Art. 54(1)(a), (b).

⁷⁹ Art. 58(1).

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The number of members of the NLA and the Council of States are determined by Electoral Laws.⁸⁰

During the transitional period, the membership of the NLA was to be composed of four categories of members. The first category was made up of the members of the Parliament of the Sudan and of the National Council of States who were representing constituencies and states in Southern Sudan. At the time of succession Southern Sudan, as it was then known, had ninety-six members in the national Parliament of the Sudan. From this number, sixty-six automatically became members of the NLA of South Sudan. Those who were members of the National Council of States became members of the South Sudan Council of States.⁸¹

Second, members of the then Southern Sudan Legislative Assembly automatically became members of the NLA of Southern Sudan.⁸² Third, the President of South Sudan was given the power to appoint up to sixty-six individuals as members of the NLA of South Sudan.⁸³ Finally, all members of the Council of Ministers who were not members of the NLA would be able to participate in the proceedings of the NLA, but would not have the right to vote.⁸⁴

It would seem that the difference in the sources of representation of these two Houses is a result of the differences in their competencies. However, the two Houses generally conduct their business in a joint sitting, chaired by one speaker, while the votes of the two Houses are counted differently.⁸⁵ Each House sits independently only when an issue is determined to be within the exclusive competence of that House.⁸⁶ The provision that concerns how the two Houses are supposed to determine which legislative issues fall within whose authority to legislate is confusingly weak.⁸⁷

It is difficult to understand why the TCSS established a bi-cameral system that functions as a uni-cameral House. In addition, the reference in many provisions of the TCSS to only the NLA, and not to the National Legislature, of which there are two Houses, could be confusing.⁸⁸ Moreover, the TCSS leaves the question of the composition of the members of the National Legislature open and to be determined by the National Elections Law.⁸⁹ In other words, the legislature decides how many members should sit in the two Houses and it may change the composition of the two Houses as and when it deems fit. To leave the question of the composition of the Council of States to the National Electoral Law is to leave the determination of the weight to be attributed to each state in the hands of the National Legislature.

⁸⁰ Art. 56(1)(b).

⁸¹ Art. 56(2)(b).

⁸² Art. 56(2)(a).

⁸³ Art. 56(2)(a), (b), (c).

⁸⁴ Art. 56(3).

⁸⁵ Art. 54(3).

⁸⁶ Art. 54(4).

⁸⁷ Art. 60.

⁸⁸ See eg Arts. 79-81.

⁸⁹ See Arts. 56 and 58.

The TCSS provides that members of the NLA can introduce financial bills outside the context of draft general budget bills, with the consent of the Council of Ministers.⁹⁰ In light of the fact that the TCSS allows members of the Council of Ministers to sit as members of the National Legislature,⁹¹ this provision might see the executive tabling bills affecting budget and taxes throughout the year. The fact that members of the Council of Ministers are also members of the National Legislature compromises the principle of separation of powers. In addition, even though the TCSS provides that ‘without prejudice to Article 101(g) herein, each House shall determine the dates of commencement and closure of its sessions’,⁹² it equally provides that the President shall ‘convene, summon, adjourn or prorogue the National Legislature in consultation with the Speaker’.⁹³ Since this power is predicated only ‘in consultation with the Speaker’ and not after consultation with the Speaker, it is able to be abused. Moreover, the TCSS gives the President the unilateral power to dissolve state councils, dismiss state governors, and even dissolve the National Legislature, pursuant to the state of emergency provision.⁹⁴ The TCSS grants priority to requests of the President for consideration by the National Legislature or either of its Houses.⁹⁵ While this seems reasonable at first glance, there remains a risk that this principle of absolute priority may be used to dominate agenda-setting completely.

B. The Executive

The executive is made up of the President, the Vice President, ministers and deputy ministers. The tenure of the President is five years, except during the transitional period where it shall be four years. The President supervises constitutional and executive institutions, appoints constitutional and judicial post-holders, declares and terminates wars and states of emergency, and initiates constitutional amendments and legislation.⁹⁶ In addition, the President convenes, summons, prolongs, adjourns, or dissolves the NLA, ratifies treaties, removes governors or state assemblies, and appoints new ones.⁹⁷ Upon high treason, gross violation of the Constitution, or gross misconduct, the President may be charged before the Supreme Court by a resolution of two-thirds of the NLA.⁹⁸

The TCSS does not provide for a term limit for the President. The President can therefore stay in office as long as he or she can win elections. The President supervises ‘constitutional and executive institutions’.⁹⁹ Whatever this means in terms of competencies is not clear. If it means that the President supervises the Parliament and the judiciary, that is dangerous and contrary to the principle of separation of powers as provided for in the TCSS. This is even the more so when the President has the power to decide if and when the National Legislature

⁹⁰ See Art. 89.

⁹¹ See Art. 56(3).

⁹² See Art. 68(3).

⁹³ See Art. 101(g).

⁹⁴ See Art. 101(r).

⁹⁵ See Art. 78.

⁹⁶ Art. 101(a-u).

⁹⁷ Art. 101(a-u).

⁹⁸ Art. 103(2).

⁹⁹ Art. 101(b).

shall meet. The President may issue provisional orders whenever the National Legislature is on recess, without any temporal restrictions.

The President has the power to appoint all Justices and judges only upon the recommendation of the Judicial Service Commission.¹⁰⁰ The members of the Judicial Service Commission are, in turn, appointed by the President.¹⁰¹ This arrangement gives the President enormous power to influence the appointment of the judiciary. In the event of impeachment proceedings, the President may continue to discharge his responsibilities.¹⁰² The TCSS provides that ‘the National Council of Ministers shall be the highest executive authority in the Republic’.¹⁰³ However, the President appoints the ministers and removes them. Thus, the fact that the President is the highest executive authority in the Republic of South Sudan is not only explicitly prescribed by the TCSS, but is strongly demonstrated by the number and the importance of the powers conferred upon him or her by the TCSS. Some commentators hold the view that the TCSS provides the President with a dominant constitutional position without institutional counterweight.¹⁰⁴

While in office, ministers are collectively and individually responsible to both the President and the National Legislative Assembly.¹⁰⁵ The latter may pass a vote of no confidence by a qualified minority against a minister,¹⁰⁶ but not against the Council of Ministers. Thus the collective responsibility of the Council of Ministers to the NLA is not secured by an appropriate instrument.

C. The Judiciary

The TCSS establishes an ‘independent institution to be known as the Judiciary’.¹⁰⁷ The power of the judiciary is ‘derived from the people’¹⁰⁸ and this power is ‘exercised by the courts in accordance with the customs, values, norms and aspirations of the people.’¹⁰⁹ The judiciary is supposed to exercise this delegated power without fear or favour, in an expeditious manner, ensure effective remedies where there is violation, encourage amicable settlement, and give preference to substantive justice over technicalities.¹¹⁰ The TCSS provides that there ‘shall be a substantial representation of women in the Judiciary having regard to competence, integrity, credibility and impartiality’,¹¹¹ without defining exactly what substantial representation means.

The decisions of the courts are binding on all authorities and institutions of government. The TCSS provides that ‘all organs and institutions, at all levels of government, shall obey and

¹⁰⁰ Art. 101(c).

¹⁰¹ Art. 133(2).

¹⁰² See Art. 103.

¹⁰³ Art. 109(1).

¹⁰⁴ *An expert view* (n. 14).

¹⁰⁵ Art. 115.

¹⁰⁶ Art. 118.

¹⁰⁷ Art. 122(2).

¹⁰⁸ Art. 122(1).

¹⁰⁹ Art. 122(1).

¹¹⁰ Art. 122(5)(a-e).

¹¹¹ Art. 122(6).

execute the judgments and orders of the courts.¹¹² Should this provision be interpreted to mean that it is only organs and institutions of government at all levels that are bound by the decisions and orders of the courts? Or should it be read to include all institutions, public or private, operating at all levels of government? What about individual persons? It would seem that since the Bill of Rights puts in place vertical as well as horizontal obligations, it is reasonable to argue that every organ, institution, and person are bound by the decisions of the courts.

The judiciary in the Republic of South Sudan is composed of the Supreme Court, Courts of Appeal, High Courts, County Courts, and other courts or tribunals as deemed necessary to be established in accordance with the provisions of the Constitution and the law.¹¹³

The judiciary is independent of the executive and the legislature.¹¹⁴ Financially, the budget of the judiciary is approved by the national Judicial Service Commission and assented to by the President, and is charged to the consolidated fund.¹¹⁵ The Judiciary has ‘independence in the management’,¹¹⁶ and control over the allocated fund.¹¹⁷ Substantively, judges are expected to perform their function without interference from the other arms of government.¹¹⁸ Thus, ‘Justices and Judges shall not be affected by their judicial decisions’.¹¹⁹ The Chief Justice is appointed by the President, while the Deputy Chief Justice, Justices of the Court of Appeal, and judges are appointed by the President on the recommendation of the Judicial Service Commission.¹²⁰ Only the appointment of the Chief Justice and the Deputy Chief Justice require the approval of a two-thirds majority of the NLA.¹²¹ The Chief Justice has disciplinary powers over Justices and judges.¹²² The President may remove Justices and judges for ‘gross misconduct, incompetence and incapacity’¹²³ upon the recommendation of the Judicial Service Commission. What amounts to gross misconduct, incompetence, or incapacity is not defined.

The Supreme Court is the highest court and the custodian of the Constitution. It interprets the Constitution at the instance of the President, the legislature, or the state governments. It is the court of final instance in respect of any litigation or prosecution in the country. It has original jurisdiction to decide on any constitutional dispute arising either under the TCSS or the constitutions of states at the instance ‘of individuals, juridical entities or governments’.¹²⁴ It has the competence to adjudicate on the constitutionality of laws, and to set aside or strike down or determine the existence of laws.¹²⁵ It is a court of review and cassation in respect of

¹¹² Art. 122(7).

¹¹³ Art. 123.

¹¹⁴ Art. 124(1).

¹¹⁵ Art. 124(2).

¹¹⁶ Art. 124(2). See *An expert view* (n. 14).

¹¹⁷ Art. 124(3).

¹¹⁸ Art. 124(4).

¹¹⁹ Art. 124(8).

¹²⁰ Art. 133.

¹²¹ Art. 133(3).

¹²² Art. 134(1).

¹²³ Art. 134(2).

¹²⁴ Art. 126(2)(a-c)

¹²⁵ Art. 126(2)(d).

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any criminal, civil, and administrative matters.¹²⁶ It has criminal jurisdiction over the President,¹²⁷ the Vice President, and members of the legislature.¹²⁸ It reviews death sentences, receives appeals, has original and final jurisdiction with respect to disputes between the national and state governments, and upholds and protects human rights.¹²⁹

The Supreme Court sits in panels of three judges on each issue, except on constitutional issues when nine judges constitute the quorum.¹³⁰ The decision of the Supreme Court is taken by majority and is final and binding.¹³¹ The Supreme Court is headed by the Chief Justice and a Deputy Chief Justice.¹³²

The TCSS leaves the establishment and competencies of the other courts to be determined by law.¹³³

The TCSS provides that ‘[j]udicial power is derived from the people and shall be exercised by the courts’ in accordance with the ‘customs, values, norms and aspirations of the people and in conformity with this Constitution and the law’.¹³⁴ The judiciary is independent. The Justices and judges are appointed by the President upon the recommendation of the Judicial Service Commission, and the President can dismiss members of the judiciary only on the grounds of gross misconduct, incompetence, and incapacity.¹³⁵

.¹³⁶ The President appoints and dismisses everyone, and even if there is an impeachment procedure against the President he or she remains in office.¹³⁷ The President can remain in office as long as he or she wins the election.¹³⁸ The President has absolute priority before the NLA. The TCSS provides that ‘the National Legislature or either of its two Houses shall accord priority to such request over any other business’.¹³⁹ In addition, during recess the President has the power to rule by provisional orders.¹⁴⁰ The President’s powers to declare a state of emergency or of war is not subject to the principle of proportionality with regard to its substantial, geographical, and temporal application.¹⁴¹

VI. Federalism and decentralisation

¹²⁶ Art. 126(2)(e).

¹²⁷ Art. 126(2)(f).

¹²⁸ Art. 126(2)(g).

¹²⁹ Art. 126(2)(h-k).

¹³⁰ Art. 126(3).

¹³¹ Art. 126(4).

¹³² Art. 127(1)(a).

¹³³ Arts. 129 and 130.

¹³⁴ Art. 122(1).

¹³⁵ Art. 134(2).

¹³⁶ *An expert view* (n. 14).

¹³⁷ Ibid.

¹³⁸ Art. 100(1).

¹³⁹ Art. 78.

¹⁴⁰ Art. 78.

¹⁴¹ Art. 101(e). In addition see Article 189(1), which provides that ‘[the] President, may upon the occurrence of an imminent danger, whether it is war, invasion, blockade, natural disaster or epidemics, as may threaten the country, or any part thereof or the safety or economy of the same, declare a state of emergency in the country, or in any part thereof, in accordance with this Constitution and the law.’

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South Sudan's system of governance is more like a federal or quasi-federal system, even though the TCSS does not use the term federalism. The TCSS establishes three levels of government: the national government, the state governments, and local governments.¹⁴² Governmental powers and authorities are decentralised to ensure unity in diversity, to promote and protect human rights and fundamental freedoms and the welfare of all citizens, to facilitate the meaningful participation of citizens in decision-making, and to promote the separation of powers, participatory democracy, transparency, accountability, and respect for the rule of law.¹⁴³ Each level of government is assigned powers and competence which it is expected to carry out in accordance with the Constitution while respecting the powers and competences of other levels of government.¹⁴⁴ Each level of government is constitutionally mandated to respect each other's competences and to collaborate with each other.¹⁴⁵ The three levels of government are not in competition with each other, but are designed to complement each other through the constitutional system of inter-governmental linkages.¹⁴⁶ The state governments are the main link between the national and local governments.¹⁴⁷

The national government represents an institution around which South Sudanese are expected to be 'politically, economically, socially and culturally organized'.¹⁴⁸ The national government

shall exercise exclusive legislative and executive authority on all functional areas in Schedule A; it shall also exercise legislative and executive authority on all concurrent and residual matters as set forth in Schedules C and D read together with Schedule E herein.¹⁴⁹

The national government thus exercises legislative and executive powers over all powers provided for in the Constitution, with the exception of those set out in Schedule B, which confers specific powers on state governments.¹⁵⁰ The states, together with the national government, also exercise legislative and executive powers under Schedule B.¹⁵¹ This constitutional distribution of power seems to favour the national government more. This seems particularly so because the Constitution provides that 'if there is a contradiction between the provisions of a National law and a state law on the matters that are concurrent, the National law shall prevail to the extent of the contradiction.'¹⁵² In addition, even though there are three levels of government in the Republic of South Sudan, the constitutional division of powers is carried out only with respect to the national and state governments.¹⁵³ Scholars hold the view that with respect to the balance of power between the three levels of government, the state and local governments are completely dependent on the national

¹⁴² Art. 47.

¹⁴³ Art. 48(1)

¹⁴⁴ Art. 48(2).

¹⁴⁵ Art. 49(1(b)(i).

¹⁴⁶ Art. 49(1)(a).

¹⁴⁷ Art. 49(1)(a).

¹⁴⁸ Art. 50(2).

¹⁴⁹ Art. 52.

¹⁵⁰ Art. 163(3).

¹⁵¹ Art. 163(1).

¹⁵² See Schedule E of the TCSS.

¹⁵³ Article 166, which establishes local authority, is more descriptive of what local government is rather than conferring real constitutional power, apart from servicing state and national government purposes.

government.¹⁵⁴ The national government has an exclusive list of competencies and has shared powers with the state governments over concurrent issues.

Thus the TCSS places a very pronounced emphasis on decentralisation. Its preamble recognises South Sudan's governmental system as a decentralised system of governance.¹⁵⁵ It provides that 'the territory of South Sudan is composed of ten states governed on the basis of decentralization'.¹⁵⁶ However, decentralization entails not only that the national territory is divided into smaller units, but also that political powers are devolved and delegated to other units of government. The manner in which decentralisation is provided for in the TCSS significantly rolls back the decentralisation of political power and economic resources.

The brief overview above reveals that the TCSS endows the national government with extremely dominant power and a presence at all levels of government. The powers of the states and local governments are mandated and may be withdrawn by the national government. Even though the TCSS provides that the states have exclusive powers, the Schedule of Powers grants the national government the power to decide which powers the states may exercise, and how. In addition, the President has the power to remove the chief executives of the states and to disband state legislative assemblies. Furthermore, the identities, territories, names, capital towns, and boundaries of states are not constitutionally protected, but left to the Council of States to determine.¹⁵⁷

The states have no control over the natural resources in their territories. This is because the TCSS provides that 'rights over all subterranean and other natural resources throughout South Sudan, including petroleum and gas resources and solid minerals, shall belong to the National Government'.¹⁵⁸ In addition, the national government is the only competent authority to coordinate all services and to set 'minimum national standards' and 'uniform norms' in all fields.¹⁵⁹ This amounts to a disempowerment of the states, even in the fields where they are competent and even on issues where the states enjoy 'exclusive executive and legislative powers'.¹⁶⁰ In practice, therefore, there are no exclusive powers for the states. All the powers of the states are concurrent powers.

The TCSS provides that all legislative and executive powers with regard to the judiciary belong exclusively to the national level.¹⁶¹ The appointment of state officials is dependent on a consultation with the national President. In fact, the TCSS provides that the national government has the power to set up an 'initial' local government system for the states.¹⁶² The enormous power of the national government over almost every area of competence of the state governments has significantly weakened the decentralised system of government, and is one of the causes of tension between the different levels of government in South Sudan.

¹⁵⁴ K. Cope (n. 10); see also *An expert view* (n. 14).

¹⁵⁵ See paragraph 6 of the Preamble to the Constitution.

¹⁵⁶ Art. 162(1).

¹⁵⁷ Art. 59 and Schedule A.

¹⁵⁸ Art. 171(4).

¹⁵⁹ Item 39, Schedule A to the Constitution.

¹⁶⁰ Schedule B.

¹⁶¹ Schedule A.

¹⁶² Art. 166(2).

VII. International law and regional integration

The TCSS does not deal substantively with the question of the status of international law within the constitutional framework, or its domestic standing. It provides for the process of ratification of international instruments, but is silent on what happens after ratification in terms of the legal standing of international law in the domestic arena. The TCSS deals, briefly, only with the procedural aspects of international law. For example, the NLA has the power to ‘ratify international treaties, conventions and agreements’.¹⁶³ Further, the TCSS provides that the President shall ‘direct and supervise foreign policy and ratify treaties and international agreements with the approval of the National Legislative Assembly’.¹⁶⁴ The only aspect of international law for which the Constitution has provided is international human rights law. Within the framework of the Bill of Rights, the TCSS provides that international human rights instruments ratified by the Republic of South Sudan constitute an integral part of the Bill of Rights.¹⁶⁵ It is possible to argue that by specifically providing that human rights instruments have direct application in the domestic setting, the Constitution has excluded other international law instruments from the same treatment; or, that the spirit of Article 9(3) of the TCSS should indicate the general predisposition of the Constitution towards international law. However, the assumption that arises from the constitutional provisions dealing with ratification is that South Sudan is a dualist state with respect to general international law, while it is a monist state with respect to international human rights laws.

Within the framework of the Fundamental Objectives and Guiding Principles, the TCSS deals with the question of regional integration. The Constitution provides that the cardinal principle guiding the foreign policy of the Republic of South Sudan shall be the

[p]romotion of international cooperation, specially within the United Nations family, African Union and other international and regional organizations, for the purposes of consolidating universal peace and security, respect for international law, treaty obligations and fostering a just world economic order.¹⁶⁶

The Constitution provides further that the Republic of South Sudan shall work towards the achievement of African economic integration, and promote African unity and cooperation on the basis of respect for human rights and fundamental freedoms, respect for international obligations, good neighbourliness, non-interference in domestic issues of other states, and the peaceful co-existence of people and nations.¹⁶⁷

VIII. Roadmap to a permanent constitution

¹⁶³ Art. 57(d).

¹⁶⁴ Art. 101(p).

¹⁶⁵ Art. 9(3).

¹⁶⁶ Art. 43(a).

¹⁶⁷ Art. 43(a-d).

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South Sudan's journey to a permanent constitution can be divided into four phases: the pre-interim period,¹⁶⁸ the interim period,¹⁶⁹ the transitional period,¹⁷⁰ and the period of a permanent constitution.¹⁷¹ The pre-interim period started with the signing of the CPA and lasted for six months from 9 January to 9 July 2005. During this period, the National Review Commission was established, the National Interim Constitution was prepared, and the Interim Constitution of Southern Sudan was put in place.

The interim period was to 'commence at the end of the Pre-Interim Period and last for six years.'¹⁷² At the end of the six years of the pre-interim period, a referendum was to take place 'for the people of South Sudan to: confirm the unity of Sudan by voting to adopt the system of government established under the peace agreement; or to vote for secession.'¹⁷³ According to this provision, the referendum should have taken place on 9 July 2011. However, the ICSS provided for the referendum on self-determination to take place six months before the end of the interim period.¹⁷⁴ Irrespective of the outcome of the referendum, the interim period was to end on 9 July 2011.

As already stated, the transitional period was not anticipated under the CPA or the ICSS. It was the creation of the TCSS. The TCSS stated that the transitional period would start on 9 July 2011, but it failed to provide for its end.¹⁷⁵ According to the TCSS, the President shall table before the NLA a draft constitutional text that has been approved by the National Constitutional Review Commission for deliberation and adoption 'at least one year before the end of the Transitional Period',¹⁷⁶ without stating in any precise terms when the end of the transitional period is to be. Since the mandate of the National Legislature, the President, and the State Legislative Assemblies will end on 8 July 2015, it is possible to consider that date to be the end of the transitional period.¹⁷⁷ However, the TCSS states that the TCSS 'shall remain in force until the adoption of a permanent constitution'.¹⁷⁸ There is, therefore, a possibility that the transitional period might, constitutionally speaking, still be in force after 8 July 2015.

The TCSS provides for a four-stage process for the adoption of a permanent constitution for South Sudan. The first stage is the appointment by the President of an all-inclusive National Constitution Review Commission (NCRC).¹⁷⁹ The NCRC has the mandate to collect the views of South Sudanese and incorporate them into a draft constitution. The mandate of the NCRC was initially for one year,¹⁸⁰ which ended in December 2012. In that one year the

¹⁶⁸ See Chapter I, 2.1 and 3.1.2; Chapter II, 2.12.4-2.12.7 of the CPA.

¹⁶⁹ See Chapter I, 2.2 of the CPA, Art. 226(4) of the INCS, and Art. 208(2) of the ICSS.

¹⁷⁰ See the Preamble to the TCSS and Arts. 56(2), 58(2), 69(8) (a)&(a), and art.194. It would seem that Article 201(1) of the TCSS sets the beginning of the transitional period at 9 July 2011.

¹⁷¹ See Arts. 202-203 of the TCSS.

¹⁷² See Chapter I, 2.1 and 3.1.2; Chapter II, 2.12.4-2.12.7 of the CPA. See Chapter I, 2.2 of the CPA.

¹⁷³ See Chapter 15.5 of the CPA.

¹⁷⁴ Art. 11(1) of the ICSS.

¹⁷⁵ See Art. 66(2) of the TCSS.

¹⁷⁶ Art. 203(7) of the TCSS.

¹⁷⁷ See Arts. 22(2), 100(2), and art.164(5) (a) &(b).

¹⁷⁸ Art. 201(2).

¹⁷⁹ Art. 202.

¹⁸⁰ Art. 202(4).

NCRC has struggled, only to secure office space. The President has extended the mandate of the NCRC again, from 10 January to 31 December 2014.¹⁸¹

The second phase involves the establishment of a National Constitutional Conference. The Conference will deliberate on the draft constitution, and by a simple majority approve it and submit it to the President.¹⁸² The Conference will then be dissolved. The third stage involves the presentation of the draft constitution by the President to the National Legislature.¹⁸³ The National Legislature shall deliberate and adopt the draft constitution. There is no qualified majority mentioned in the adoption process by the legislature. The National Legislature shall then present the constitution to the President to put it into force, which marks the fourth and final stage of the roadmap.¹⁸⁴

What is noticeable in all of these four stages is the central and dominant role of the President. The process starts and ends with the President. Another challenge is the non-inclusive nature of the NCRC. In addition to the disregard of the constitutional deadlines that were provided for this process, the outbreak of conflict in South Sudan in mid-December 2013 put a stop to this roadmap. A peace process is now proceeding in Addis Ababa. This process includes a discussion on a new roadmap for constitution-making.

IX. Conclusion

The TCSS is new. It is yet to be interpreted by the courts. It has not been researched and written on widely in academic circles. However, as this brief review indicates, the TCSS provides for democratic governance, separation of powers, a decentralised system of government, and an expansive Bill of Rights. The main shortcomings of the TCSS are the central and pivotal roles it concedes to the President. The dominance of the President in the Constitution erodes the classical separation of powers and check and balances, and dilutes constitutional safeguards.

The President has exercised some of the enormous powers granted to him by the TCSS. In some contestable circumstances, the President has dismissed at least two elected governors, as well as his Vice President; has invited foreign armies to fight in South Sudan without parliamentary approval; and has continued to rule by Decree. The manner in which the President has exercised his powers has, to some extent, led to the crisis unfolding in South Sudan.

The permanent constitution was expected to address the major limitations of the TCSS. However, since the NCRC's inauguration on 9 January 2012, it has not begun its own core work. The civil war that started in mid-December 2013 has further complicated the implementation of the roadmap that was intended to lead to a permanent constitution for South Sudan. The peace talks taking place in Addis Ababa, Ethiopia, are expected to yield a new roadmap.

¹⁸¹ See Transitional Constitution of South Sudan, 2011(Amendment Act, 2013).

¹⁸² Art. 203(1).

¹⁸³ Art. 203(7).

¹⁸⁴ Art. 203(8).

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