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Embedding Federalism in the South Sudan's Permanent Constitution: Achieving Unity in Diversity Policy

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Abstract

As South Sudan emerges from a brutal conflict, the 2018 Agreement mandates the Government to initiate and adopt a federal system of government through a new constitutional dispensation during the Transitional Period (2020-2024). The central issue in this paper revolves around the nature of the federal system that South Sudan should adopt to govern itself. The paper finds that while the federalism debate has historical pedigree in the political thought among the people of the Republic of South Sudan, the type of federal system to be adopted lies in the discretion of the framers. In light of this and having regard to global practice and experience of federal systems, the federal system in South Sudan should be guided by several factors such as management of ethnic conflicts, cultural compatibility, economic viability of constituent units, territoriality, and population sizes.

Keywords: *Federalism; Unity in Diversity Policy; Federal System; Transitional Period*

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Introduction

As South Sudan gradually emerges from nearly a decade long civil conflict that has claimed thousands of human lives, critically impacted societal cohesion, and dilapidated most of its socioeconomic structures (Rolandsen, Glomnes, Manoeli, & Nicolaisen, 2015), the world's youngest country is making efforts to rise from the ashes, having adopted a wide range of institutional, economic, and political systems (Kuol, 2020).

These efforts came on the heels of the Revitalized Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCISS) which the Government and various rebel groups signed on September 12, 2018, in Addis Ababa, Ethiopia (Mayai, 2020). The formation of the Revitalized Transitional Government of National Unity (RTGONU) in February 2020 by the signatory parties to the R-ARCISS has further boosted these efforts. Chapter VI of the R-ARCISS specifically promises to reboot the country through a new constitutional dispensation and commits the RTGONU to initiate the "Permanent" Constitution-Making Process. The R-ARCISS as well mandates the RTGONU to embed into the new constitutional order the federal system of government. The federal system of government, the R-ARCISS declares is "a popular demand of the people of the Republic of South Sudan" and that it must reflect South Sudan's unity in diversity. Since the adoption of the federal system is a foregone conclusion because it has been prescribed by the R-ARCISS, this Paper seeks to contribute to the debate about the type of federalism and number of states that South Sudan should have and embed in the Permanent Constitution (Justin & De Vries, 2019).

Methodologically, the Paper relies on doctrinal data in the form of monologues (books and journal articles). It also draws relevant data from conference workshops on the constitution-making process, academic reviews and commentaries, legal and government documents (including the R-ARCISS) among others.

Section 2 examines the general definition and conceptual framework of a federal system. Section 3 examines two methods of creating a federal system while Section 4 explores various forms of federalism (maximum federalism and minimum federalism). Whether a federal system is a minimum or maximum federalism depends on how the executive, legislative and/or judicial powers are shared by at least two orders of the government (mainly the government of the federation and governments of the constituent units).

Section 5 examines the nature of the contemporary discourse on federalism in South Sudan under the R-ARCISS while Section 6 looks at the dominant features of a federal system and their relevant to the unique context of the Republic of South Sudan. Finally, Section 7 analyses the relevant factors for determining the number of constituent units in a federal system and how the framers of South Sudan may benefit from using these factors in the determination of the number of constituent units in South Sudan.

Federalism: Definition and Conceptual Framework

Federation may be defined as a set of political arrangements involving a constitutionally entrenched distribution of legislative, executive and/or judicial powers between at least two orders of government within the same country (Anderson, 2008). Each order has a direct electoral relationship with its respective constituents, is relatively independent of the other within its sphere of constitutionally allocated responsibilities and has the authority to act directly either on behalf of all the people of the country (in the case of a federal government) or people of a particular geographical area (in the case of the government of a constituent unit) (Dardanelli et al., 2019). Federalism, thus, consists of divided sovereignty, plural loyalties and identities which include but are not limited to cultural, linguistic, or religious affiliations. There is, therefore, at least a legislative and executive separation of the roles of the government of the federation, on the one hand, and the governments of constituent units, on the other, save for where both levels may amicably exercise concurrent powers (Gagnon, 2021).

A federal system usually adopts a constitution. Any amendment to the federal constitution must follow a formula that the constitution itself prescribes. In Canada and the United States, for example, an amendment to the constitution requires the approval of at least two-thirds majorities of both houses of Congress (in the case of America) or federal Parliament and provincial legislatures (in the case of Canada). Such a rigid formula ensures that no changes can be made to the constitution save as prescribed by law. Such rigidity, however, applies to some but not all federations and provides some form of protection from unilateral changes to the federal balance of powers (Trinn & Schulte, 2022).

Finally, a federal system is partly a response to societal diversity. That, in view of an understanding that federalism is a part response to diversity, there might be a need to ensure the representation of diverse communities in the political process or their balanced participation in the judicial appointments process. In Canada, for example, one-third of the members of the Supreme Court must be from Quebec (Bulmer & White, 2022).

Methods of Establishing Federalism

A federal system may be established in two main ways. First, it may be established when formerly independent States cede some of their sovereign powers to a new central government, which becomes the federal government. This process is sometimes referred to as coming together. The United States and Australia are examples of the coming-together federations (Dixon, Levy, & Tushnet, 2018). Second, a federal State may, conversely, be established when a sovereign State elects to delegate some of its legislative, executive and/judicial powers to new constituent units. This process is often referred to as holding together: It enables a formerly unitary state to seek a federal solution to the problems of scale and diversity (Bulmer & White, 2022). Examples of holding together federations are Ethiopia, Kenya, and Spain.

Whether a federation is a consequent of coming together or holding together, any residual powers are normally exercised by the federal government, not by the constituent units (Bulmer & White, 2022). That is because residual powers are generally exercised by the level of government with the original jurisdiction (Talesh, Mertz, & Klug, 2021).

Each level of government makes decisions relatively independently of the other, unless a given subject matter is one over which both governments may exercise concurrent jurisdiction without substantially frustrating the core functions of the other (Stillion Southard, 2019).

Forms of Federalism

Minimum/Horizontal Federalism

One form of a federal structure is known as minimum federalism, also referred to as asymmetrical or peripheralized federalism. It describes a relationship in which the federal government is granted very limited powers, allowing it to make decision in a narrowly restricted category of actions without obtaining the approval of the rulers of the constituent units (Trachtman, 2022). For this reason, minimum federalism largely vests sovereignty in constituent units.

This suggests that the most important relationship in such a federal structure is that which exists between the governments of constituent units, not between the government of the federation and the governments of the constituent units. Since minimum federalism is primarily defined by equal powers between constituent units, it is also referred to as horizontal federalism (Trachtman, 2022).

Maximum/Vertical Federalism

In maximum federalism, the central government enjoys almost unfettered latitude to make decisions, without having to consult with the governments of constituent units, in all but narrowly restricted category of actions, as it was case in the former Soviet Union (Sablin & Semyonov, 2020). Since the government of the federation enjoys greater latitude than the governments of the constituent units, having the ability to overrule decisions made by the latter on most matters save as may be excluded by law, maximum federalism is often referred to as vertical federalism (Sablin & Semyonov, 2020).

It is worth noting that, whether a federation takes the form of a minimum or maximum federation, depends on whether a given federal system is a dualist or an integrated in nature. The dualist model tends to exclusively assign legislative and executive functions to each level of government to the exclusion of the other. Each level is then able to conceptualize and deliver its own programs within the purview of its legal competence. The integrated model, on the other hand, is characterized by shared competencies: both orders of government concurrently implement programs in the same area. For instance, both may share responsibilities on programs such as healthcare, education, security, etc (Rivlin, 2012).

The R-ARCISS and the Federalism Discourse in South Sudan

The ongoing debate in respect of which type of federal system South Sudan should adopt is a discourse whose historical pedigree, among the people of South Sudan, is traceable to the 1950s (Johnson, 2018). What, most recently, gave more impetus to the debate was the 2013 outbreak of violence that eventuated into what has become known as South Sudan's First Civil War.

Since the outbreak of the violence, the question as to the appropriate system of government which South Sudan should adopt with the view to remedying the defects of the system of ten states (which South Sudan inherited from the Sudan at independence) became louder across the country. In response to this question, the Sudan People's Liberation Movement/Army-in-Opposition (SPLM/A-IO) was the first, in 2014, to expand the number of states from 10 to 21, citing popular demand for the federal system and more states as a justification for its decision (Wild, Jok, & Patel, 2018).

On the heels of the rebels' initiative, President Kiir's Government adopted a devolved system of 28 (and later 32) states in 2015. In addition to citing popular demand as a justification for more states, the Government claimed that the creation of more constituent units was aimed at (1) devolving powers and resources to improve livelihoods of rural citizens, (2) reduction of the size of national government to free up more resources for local governments, (3) attracting, encouraging, and mobilizing national experts to work at the state and county levels and (4) promotion of social and economic development amongst the rural people (Wandaga & Mberia, 2021).

The SPLM-IO outright rejected the Government's creation of 28 states and conditioned its participation in the putative RTGONU on the return to 10 states (Garang, 2022). This view was surprising, considering that it led the efforts to create more states.

Yielding to both exogenous and endogenous pressures for a compromise for peace, President Kiir would subsequently issue a Republican Order on February 15, 2020, ordering a return to 10 states, in addition to three administrative areas of Ruweng, Pibor and Abyei.



Figure 1. Putative Boundaries of South Sudan's 10 States and 3 Administrative Areas
Source: Republic of South Sudan Map (2022)

The Republic Order, however, appeared to violate Article 15 of the R-ARCISS, which provides for three institutions to resolve the issue of the number of states and their boundaries namely, the Technical Boundaries Committee (TBC), Independence Boundaries Commission (IBC) and the Referendum. Since the R-ARCISS did not vest the authority to determine the boundaries and number of states in the Office of the President, the Order clearly breached Article 15 of the R-ARCISS.

Despite the *de facto* return to 10 states and three administrative areas, there remains a legitimate case for dissatisfaction with the current system. In fact, it was in response to this dissatisfaction that prompted the parties to the conflict to accept the clause providing for the adoption of a federal system during Transitional Period under a new constitutional dispensation. For instance, in its Preamble, the R-ARCISS states that the parties are cognizant that the federal system of government is a popular demand of the people of the Republic of South Sudan and the need for the RGONU to reflect this demand by way of devolution of more powers and resources to the lower levels of government.

In a more obligatory form, Chapter VI of the R-ARCISS further reaffirms the preambular vision of creating a federal system of government. Article 6.2.2-6.2.5. specifically provides that the principles of making the Permanent Constitution shall include the creation of a federal and democratic system of government that shall reflect the character of South Sudan…. by incorporating respect for ethnic and regional diversity and communal rights, including the rights of communities to preserve their history, develop their language, promote their culture and expression of their ethnic identities.

What is unmistakable from the foregoing is that both the Government and the rebel leadership appear to acknowledge that federalism would provide an opportunity for all communities to participate in the political process. They also believe that it has the remedial effects, having the capacity to ameliorate systemic (or claimed) ethnic domination. Both parties, however, disagree on the criteria for determining the number of states.

Yet, one would be remiss to pass over the undeniable fact that the creation of more states appears to be a popular demand in South Sudan. This is not only clearly acknowledged by all parties to the R-ARCISS but also by the ordinary people in South Sudan. For instance, the 2019 National Dialogue, which brought together South Sudanese from various walks of life, passed a resolution calling on the Government to establish 39 states, 13 from each of the three former regions of South Sudan (Bachmann, Ruth Pendle, & Moro, 2022). While a corollary arises as to whether the three former regions should have equal number of states, the gist of the issue is that ordinary people are clearly involved in this conversation. A fundamental question is in relation to the factors that should animate the conception of federal system in the unique circumstances of South Sudan.

Main Features of a Federal System and their Relevance to South Sundanese Context

A federal system is often tailored to tackling specific domestic circumstances. This partly explains why federations vary in terms of contents and designs. Nevertheless, even though there does not exist a universal template for a federal structure, the following features may be extracted.

Division of Powers

One of the most important features of a federal structure is the division of powers between the federal government, on the one hand, and governments of the constituent units, on the other. Division of powers refers to the constitutional allocation of legislative, executive and, in some federations, judicial functions between the government of the federation on the one hand and governments of the constituent units on the other, with each level exercising jurisdiction over constitutionally enumerated subject matters (Hegele & Schnabel, 2021).

The constituent units may variably be known as states (as in the U.S. India, Australia, Nigeria, etc.), counties (Kenya), provinces (Canada and Spain), cantons (Switzerland), regions (Belgium and Ethiopia), autonomous communities (Spain), and *bundesländer* (Germany and Austria), among others. While South Sudan currently refers to its devolved units as states and administrative areas, it may well elect to customize its own nomenclature.

There are two main models of federalism in relation to division of power namely, the dualist and integrated models. The dualist model typically assigns jurisdiction to each order of government, which then delivers and administers its own programs (Anderson, 2008). A typical example of a dualist model is the United States (Anderson, 2008). In practice, however, the dualist model does not neatly delineate the separation of powers between the two orders of government, considering that many issues have intersecting or intertwined regional, national or international interests (Anderson, 2008). The integrated model, on the other hand, involves shared competences between the two orders of government.

This implies that, although the integrated or interlocking model of federalism, as found in Germany and Austria, may involve a situation in which some subject matters are exclusively allocated to one level of government, its prominent feature is one in which the orders of government have a concurrent jurisdiction. The central government, however, often sets the overall legislative framework which constituent units may complement (but not contravene) with their own specific legislation.

The integrated model is often referred to as an administrative federalism because principal powers of constituent units are largely administrative in nature (Anderson, 2008). The dualist model tends to be more common among the "coming together" as opposed to holding together federations.

Considering that the R-ARCISS and National Dialogue have resolved to adopt federalism, it is up to the people of South Sudan and their political leaders to adopt the most appropriate model of federalism-whether dualist or integrated model-that is more

suited to the domestic circumstances of South Sudan, having regard to the country's political history and diverse cultural and linguistic communities.

Sharing of Revenues and Fiscal Transfers

Raising of Revenues

Generating and sharing of revenues between the central government and governments of constituent units is a critical element of an effective federal system of government. This affirms the idea that sharing of revenues is as imperative in federalism as it does in daily human life generally (Schomerus & de Vries, 2019). This idea is discernible in at least two ways. First effective sharing of revenues depends on federal arrangements regarding which order of government collects taxes or raises revenues as well as on who spends such revenues, on what and how. Second, the way revenues are raised, shared and/or spent in each federal system can have significant impacts on the economic life of a federation. For instance, tax rates may or may not provide incentives and thereby affect the efficiency and/or performance of the overall economy of the federation. The presence of such incentives, or lack thereof, may be utilized by constituent units to attract businesses or determine whether citizens can voluntarily remain or leave a constituent unit within the same federation (Anderson, 2008). In this sense, revenue raising (taxes, charges, debts, issuance of money) and spending by governments affect the total level of activity in the economy whether [such] policies are expansionary or contractionary (Anderson, 2008).

For instance, in some federations such as Nigeria, revenues levied on natural resources, usually in the form of royalties, license fees, export taxes, and corporate taxes, etc, are collected by the federal government which then shares them with states in a manner that is consistent with principles such as equity and equality among states and derivation (which means giving more revenues for producing states). In yet others, such as Canada, provinces have almost exclusive control over the collection of revenues levied on natural resources (Anderson, 2008). South Sudan may also adopt a revenue sharing formula that with the view to ensuring an effective and efficient administration of revenue, having regard to equity among its constituent units.

Equity/Equalization and Transfers

Indeed, in almost all federations, central governments generate more revenues than what it spends. This prompts the federal government to make fiscal transfers of the surplus to the governments of the constituent units (Anderson, 2008), with the view to enabling them to meet their administrative and fiscal responsibilities (Anderson, 2008). How the central government shares revenues with constituent units and how much each constituent unit gets is a function of several other subsidiary principles.

One of these principles is the vertical fiscal gap principle, which measures the difference between the spending of constituent units and their own source of revenues (Anderson, 2008). This is considered reasonable because the level of wealth among constituent units tend to vary significantly. The least able constituent units often face major challenges in terms of their ability to raise revenues for their own programs and

operations. Most federations constitutional arrangements seek to offset these differences by transferring more resources to the least advantaged constituent units which typically have the same responsibilities as their richer counterparts. Equalization principle also ensures that all constituent units have comparable standard of living. This explains why the federal government tends to even-up the amount of revenues among different constituent unit governments. Equalization principle is distinguishable from principle of derivation. The latter allows constituent units, which enjoy a particular source of revenue (such as oil) to have a special claim on all or part of the revenue it generates (Anderson, 2008).

To achieve either of these policies, some equalization programs serve to shrink the resource gaps among different constituent units while, yet others endeavor to bring all constituent units to the same spending level by bridging the gap completely. That is100 percent equality. Others yet make efforts to equalize only the least advantaged constituent units up to a standard, just as others equalize all constituent units up and down to the desired or targeted standard. Finally, some equalization programs or revenue-sharing formulae are based on condition or unconditional transfers to the constituent units. Unconditional transfers occur when the federal government provides that the recipient constituent units can use the money for purposes they so elect. In most federations, however, conditional transfers exist. These occur when the central government attaches stringent conditions to the purposes for which these transfers are to be used by recipient constituent units. Conditional transfers are also time and program bound, tending to be used within the prescribed period to achieve specific objectives (Anderson, 2008).

These principles and mechanisms for revenue-sharing processes may be of help to the framers of federalism in South Sudan. Currently, the National Government presides over taxation at almost all levels pursuant to the powers vested the National Government by several pieces of legislation such as the Taxation Act, the Financial Management and Accountability Act, the Expropriations Act, the National Revenue Authority Act, etc.

In addition, the quantum of revenues received by each constituent unit in South Sudan may be contingent upon several factors. South Sudan's current devolved system has constituent units that vary in terms of their population sizes, environmental conditions, endowment of natural resources, remoteness, or geographical distance or in terms of cataclysmic events (natural adversities that substantially affects constituent unit each year) experienced by these units.

Factors for Determining the Number of Constituent Units in a Federal System

A federation can have as few constituent units as two or have as many as it can. This wide differential suggests that no single model may be held out as a universal template for determining the number of constituent units in all circumstances. Simply put, the adoption of a federal system is triggered by different domestic conditions and the unique choice of citizens (Anderson, 2008). Common considerations may include the following.

Identity: Cultural, Linguistic and Religious Affiliations

Federalism is particularly suited for countries with very large populations or expansive geographical territories or more importantly, countries with highly diverse populations with conflicting identities. That means that a significant part of managing political conflict, especially in post-conflict societies such as South Sudan, is to ensure that the federal system affords each identity group some form of self-government. Identity defines one's sense of belonging to an ethnic/cultural, ideological, racial, or religious community or group (Anderson, 2008).

Studies show that identity is important in the sense that individuals generally tend to care deeply about their sense of belonging to a particular group which they often want to preserve in the form of self-government. Groups that are conscious of their identity tend to fear the loss of what they cherish in their peculiar identities—their race, their tribes and perhaps more powerfully, their religion (Walsh, 2018). This shows that more often than not identity invoked as a tool to frame political claims, promote political ideologies, or stimulate and orient social and political action, usually in a larger context of inequality or injustice and with the aim of asserting group distinctiveness and belonging and gaining power and recognition (Neofotistos, 2013).

This also explains why identity has increasingly been an imperative for determining constituent units in the form of different linguistic, ethnic, or religious majorities (Bakvis & Brown, 2010). Example of federations based on cultural, linguistic and/or religious identities include Ethiopia, Kenya, Belgium, Nigeria, Canada, India, and Switzerland, Iraq, etc. In practical sense, there have, historically, been two ways of navigating the question of identity in determining constituent units. The first attempts to incorporate outlying ethnic enclaves into the dominant identities. The aim is normally to suppress ethnic consciousness and promote a common sense of identity. This sense may be an existing or an entirely conventional one. Where it is conventional, the purpose is to superimpose a new sense of belonging to a national identity (Greenfeld & Eastwood, 2009), that is distinctively different from one's indigenous heritage (Ruhanen & Whitford, 2019). This strategy has, however, been found to be counterproductive largely because the rate at which such an identity change is imposed tends to be faster than the organic order of societal change and is, thus, more likely to operate adversely to the established patterns (Hogg & Smith, 2007).

Where a new identity is drawn from a pre-existing identity, the object would be to integrate minorities into the dominant identity or identities. This is also known as an integration or assimilation model. This model was tried in India in the 1950s. However, the results that obtained were incendiary: many groups whose identities were slated to be subsumed under dominant ones vehemently rejected these structures. The pressure that ensued led the Indian Government to abandon this approach in favor of structures based on linguistic identities and religious identities (Levitt & Schiller, 2004).

Following fifty years of Kenya's independence which years were replete with ethnic domination, the 2010 Kenyan Constitution which grants, as much as possible, each ethnic

group some political autonomy in the form of constituent units known as counties, the Preamble to that Constitution provides that the Kenyan people are proud of their ethnic, cultural, and religious diversity and that they are gifting to themselves a Constitution that shall guide the current and all generations to come. Such a dispensation operates to mitigate the systemic or ethnic domination.

Similar, even though India originally resisted determining its constituent units on the basis of ethnic, linguistic or cultural identities, fearing that such a determination would heighten internal divisions, the Indian Government reversed this position between 1956 and 1966 when it decided to determine boundaries of constituent units along cultural and linguistic lines with only one state, Punjab, being distinctively religious based (Anderson, 2008). This decision followed the Report of the States Reorganization Commission established in 1955 which found that an India in which minorities were federally administered in the same constituent units with the dominant groups was a recipe for instability. For this reason, the Indian Government sought to get it right from the outset by affording every community the opportunity to participate on equal footing with the dominant groups in the economic and political life of India (Mccabe, 2006). In the same vein, although Nigeria was originally federated based on three distinct regions during the colonial era, post-independence Nigerian leaders would later conclude that the existence of three geographically distinct and politically hostile cultures" was unsustainable (Suberu, 2009). Each of the three regions has since been redivided, resulting in a total of 36 states in Nigeria.

Finally, the concept of identity as an aspect of self-government is a central theme in international law. For instance, Article 1 (2) of the UN Charter provides for internal self-government while Article 21 of the Universal Declaration similarly recognizes the right of popular participation in the political process. As well the Common Article 1 of both the International Convention on Civil and Political Rights (ICCPR) and International Convention on Economic, Social and Cultural Rights (ICESCR) promotes the right of both internal and external self-government while Article 27 of ICCPR specifically provides for the protection of religious, linguistic, and cultural minorities. All these provisions underscore the fundamental nature of linguistic, cultural, and religious identities to internal self-government, which is operationalizable in the form of constituent units.

In federal systems where identity consciousness is not an issue, the most important considerations for determining constituent units are historical and/or economic differences among various regions, not distinctiveness engendered by identity.

In light of these consideration, it is up to the framers of the federal constitution and the desire of the people of South Sudan determine whether to consider identity as a factor in determining their constituent units. British colonial authorities were conscious of identity when they created colonial districts in South Sudan. In addition, the importance of ethnic diversity is express in the R-ARCISS which provides that South Sudan must adopt a federal and democratic system that reflects ethnic and regional diversity.

Should South Sudan choose to consider identity as a factor for determining the number of states, such a choice would be consistent with global practice. Studies show that countries in which religious, ethnic or cultural identities are strong have come to

view federal system as serving preservation purposes that are related to the distinctiveness engendered by such differences (Watts, 2002). It would seem, thus, that linguistic and cultural ties, religious connections, historical traditions and social practices, which provide a distinct basis for a community's sense of identity and yearning for self-government play important role in the creation of constitution units in federal systems if doing so would mitigate the severity of actually or perceived ethnic domination or resolve ethnic/resource-based conflicts (Watts, 2002).

Population

Currently, populations of extant federations differ significantly. They vary from well over a billion people in India to only over 46, 000 in St. Kitts and Nevis (Watts, 2002). This suggests that the populations of constituent units in some federations are bigger than the entire population of certain federations. At the extreme end, the population of some constituents are under 15, 000 people. This is the case for Nevis, which is slightly over 12, 000. This is true both in populous and least populous federations (Watts, 2002). The larger the population, the more economically viable it is. Very small or less developed units may lack the capacity to take on some governmental responsibility (Watts, 2002).

A federation may have as few as 2 constituent units (as is the case with St. Kitts and Nevis) while others may have as many as over 80 (as is the case with Russia which has 86) constituent units. In the same vein, one or two largest units may constitute a clear numerical majority of the general population of the federation as it is the case in Belgium (Anderson, 2008). All this depends on the design, needs, resource and domestic dynamics.

Table 1. Comparing the Most and Least Populous Constituent Units
Source: Processed by Author (2022)

S/N	Country	Number of Constituent Units	Most Populous Constituent Unit	Least Populous Constituent Unit
1	India	29 States	Uttar Pradesh, 240 million.	Lakshadweep, at 64, 000
2	Canada	10 provinces and 3 territories	Ontario, 15 million	Prince Edwards Island, 170, 000
3	United States	50 states and 14 territories	California, 40 million	Wyoming, 580, 000 people
4	Kenya	47 counties	Nairobi, 3 million	Lamu, 143, 000

There is, therefore, no requirement that all constituent units be equal in sizes. For example, in India which has a population of over 1.4 billion people (2022 figures), the most populous constituent unit is Uttar Pradesh with the population of over 240 million people while the least populous unit is Lakshadweep with a population of 64, 000 people. Similarly, in Canada, which has a population of about 38 million people (2022 figures), the most populous province is Ontario with a population of over 15 million people while

the least populous province is Prince Edward Island with a population of about 170, 000 people. Likewise, in the U.S., which has about 332 million people (2022), the most populous state is California with over 40 million people. The least populous American state is Wyoming whose population is about 580, 000 people. Finally, in Kenya, which has a population of about 56 million people (2022 figures), the most populous constituent unit is Nairobi County with a population of about 3 million people. The least populous constituent unit is Lamu County with a population of about 143, 000 people (Nyabira & Ayele, 2017).

From these figures, it should be clear that population sizes of constituent units are not evenly distributed across federations. What determines whether an area should constitute a constituent unit is a function of a myriad of factors including genuine demand of the people of a particular area. For instance, Ethiopia was recently prompted to create a new state in compliance with the demand of the Sidama people who voted in a regional referendum to establish their own state within the Ethiopian federation, a right enshrined in Article 39 of the 1994 Ethiopian Constitution (Nyabira & Ayele, 2017).

What if an Area May Not be Viable to Constitute a State?

The foregoing demonstrates that there is no requirement that population sizes of constituent units be equal. That is because the design of each federation is a function of common local factors as well as unique domestic needs (Anderson, 2008). It is worth reiterating that in some federations, one constituent unit may constitute a super majority. For instance, in St. Kitts and Nevis, which is made up of two constituent units, St. Kitts makes up 75% of the federation. Similarly, in Belgium, the Flemish region makes up 58% of the Belgian population. In Pakistan, there are four provinces with 56% of the population in Punjab. In Canada, which consists of 10 provinces and 3 territories, the province of Ontario constitutes 40% the entire population while in Argentina, Buenos Aires Province constitutes 38% of the Argentinian population (Anderson, 2008).

This shows that where members of a community share a sense of identity and are geographically concentrated in the sense that they constitute a majority in their locality, such a community can constitute a state irrespective of its population size if having a joint constituent unit with another community does not promote administrative efficiency (Anderson, 2008). In a situation in which a group is intermixed with the dominant group and may not constitute a state because it is not geographically concentrated, the remedy seems consist in constitutionalizing affirmative action (Anderson, 2008). It stands to reason that, as regards South Sudan, the question as to whether some areas are too small to constitute a viable state is a determination to be made by the framers.

Cultural Compatibility and Administrative Efficiency

Delivery of public goods and services or implementation of public programs is more effective if an institution enjoys administrative efficiency. Administrative efficiency is defined as the ease with which an institution, organization, or an administration can produce desired or optimal results, with minimum amount of expenditure in terms of time, energy, resources, and personnel. Administrative efficiency measures the ratio of

output to input. The greater the ratio of output to input, the more efficient an administration is (Rutgers & van der Meer, 2010).

For similar reasons, it appears that a federal structure in a diverse society must have regard to whether different groups are culturally compatible, considering that there is a relationship between compatibility and administrative efficiency, especially as they relate to resource allocation and decision-making (Hinrichs-Krapels & Grant, 2016). When relations between two or more cultural, linguistic, or religious groups are characterized by violent hostilities, they are administratively incompatible. In this regard, it would seem that administrative efficiency in such a situation cannot be achieved.

The search for administrative efficiency explains why colonial authorities had to redesign colonial districts in South Sudan during the Colonial Era. For instance, the administrative transfers of the Ruweng Ngoog Dinka from Upper Nile to Bhar el Ghazel, from Bhar el Ghazel to Kordofan and from Kordofan back to Bhar el Ghazel by colonial authorities were initially thought to be necessary for at least two interrelated reasons. First, as the then Upper Nile Colonial Governor succinctly puts it, the British Colonial Administration thought that it was unfeasible to administer them from Upper Nile Province due to their antagonistic relationship with their southern neighbors. Similarly, their transfer to Bhar el Ghazel from Kordofan was thought necessary because they could not be administered satisfactorily from the headquarters of an Arab Province.

Indeed, during the British time, the British Colonial Administration was largely organized on ethnic lines. In Wills' own words, the British Colonial administrative units essentially had the foundation for ethnic character. Whether the federal structure in South Sudan could be designed along the lines of ethnic and/or cultural compatibility is an option that the framers may consider.

Economic Viability

The final factor for determining the number of constituent units in a federal system is whether a given geographical locality is actually or potentially economically sustainable. Availability of natural and human resources enables a constituent unit to be self-reliant, having the capacity to run its own programs without having to heavily rely on the federal government to implement vital public programs. If a given geographical area can satisfy the minimum requirements of self-sustenance, in terms of its ability to generate and manage its own revenues or resources independently, such a constituent unit, in all practical respects, can afford to run its own government relatively independently.

Demarcation of the Boundaries of Constituent Units

The determination of administrative boundaries of constituent units in every federal system is another critical factor. This depends on whether a given federation was created by way of coming together or holding together. For the coming together federations, such a determination is relatively easier. However, formerly unitary countries must decide the number and boundaries of units if they become federal. The boundaries of the new units may follow traditional boundaries or administrative units or

former political units (Anderson, 2008). In India, the Central Parliament decided in the mid-1950s to systematically redraw state boundaries to reflect major linguistic differences…without state consent [while] Nigeria has gone from three to thirty-six ethnically based states today (Anderson, 2008).

In the context of South Sudan, there are no official boundaries yet. All its current 80 counties do not have official boundaries. Lack of official boundaries, however, presents a potential crisis in the world's youngest country. It is for this reason that the Upper Nile Regional Conference in 2019 recommended that the Government should move quickly to demarcate South Sudan's ethnic boundaries as they stood on January 1, 1956. In the same vein, the demarcation of constituent units or states in South Sudan should begin with the delineation of ethnic and administrative boundaries as they stood on January 1, 1956 (Hirblinger & Landau, 2018).

The body tasked with the determination of the number of constituent units in South Sudan could rely on two sources of evidence of boundaries as alluded to by the Upper Nile Regional Conference. These sources are *de jure* and *de facto* boundaries.

De jure boundaries refer to boundaries whose existence and legality are recognized under both municipal and/or international laws (Schultz, 2014). In the case of South Sudan, *de jure* ethnic boundaries are those that were delineated by the British Colonial Government, just before independence in 1956. These boundaries became official as of January 1, 1956. *De jure* borders are, thus, recognized or prescribed by law. The legality of the 1956 ethnic boundaries in South Sudan has been affirmed time and again by both the Government and rebels in South Sudan. For instance, when the rebels of the SPLM-IO purportedly established 21 States in 2014, they cited the 1956 lines as the basis for determining boundaries. Similarly, when the Government established 28 states in 2015, it also cited the same as the basis for determining state boundaries.

Similarly, the African Union has long insisted that colonial boundaries are sacrosanct (Amadife & Warhola, 1993). It was in the same vein that the concept of *de jure* boundaries is being applied to determine the boundaries between the Sudan and South Sudan today.

De facto boundaries are simply oral borders. They describe, in theory and practice, the territorial limits of a given community's boundaries in relation to its neighbors. While their existence may not be known to the law, they are, however, still understood as describing a community's territorial limits. They allow a community and its neighbors to conduct themselves as if these boundaries are perfectly legal (Amadife & Warhola, 1993).

The determination of internal boundaries in South Sudan has also been provided for in Article 1.15 of the R-ARCISS which creates three institutions to determine the number and boundaries of states. The first institution is the Tribal Boundaries Committee (TBC), which the Drafters of the R-ARCISS constituted to define and demarcate South Sudan's tribal boundaries as they stood on January 1, 1956. The second institution is the Independent Boundaries Commission (IBC) which was also created by the R-ARCISS to determine the number and boundaries of States. In the event that the IBC fails—as it did—to determine the number and boundaries of states as prescribed by the R-ARCISS, such a determination, the agreement provides, shall be resolved by means of a

Referendum. The Agreement has designed the Referendum to allow the people of South Sudan to do what both the TBC and IBC have currently failed to achieve.

Given that the above three institutions have failed to achieve what they were tasked to do, their functions have now rolled over to the body charged with making of the Permanent Constitution: the Reconstituted National Constitution Review Commission (RNCRC).

Conclusion

While South Sudan has just emerged from a 7-year-long conflict that claimed thousands of lives and destroyed most its fledgling socioeconomic structures, the world's youngest country now seeks to reboot itself through a new constitutional dispensation, pursuant to the R-ARCISS. The latter mandates the RGONU to initiate the Permanent Constitution-making Process and adopt a federal and democratic system of government which the R-ARCISS recognizes as a popular demand of the people of South Sudan. The R-ARCISS also commits the RTGONU to adopt federal system of government in a manner that reflects the character and values of the people of South Sudan in their ethnic and regional diversity.

In this endeavor, this paper has sought to examine the concept and form of federalism that South Sudan seeks to embed in its "Permanent" Constitution. The paper examined not only the methods of creating a federal system but also general features of federalism and their relevance to the political and social contexts of the Republic of South Sudan.

The paper concluded that the drafters of the Permanent Constitution in South Sudan may elect which factor or a combination of factors in designing the federal structure in South Sudan, in addition to regional and ethnic diversity which the R-ARCISS has framed as a factor that must inform the determination of federal system during the Transitional Period and beyond.

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