

Legislative Drafting in South Sudan

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Introduction

Africa is about to witness the birth of the world's newest nation: the Republic of South Sudan. If, as expected, the new Republic is declared in July this year, it will become Africa's 54th nation. It will comprise the southern portion of what is now the Republic of Sudan, which is currently the largest country on the African continent.

I have spent the past 3 years in Juba, which is expected to become the capital of new republic, engaged in legal work, including drafting legislation. I have recently completed my assignment there and have now returned to my base in Nairobi, Kenya.

Overview of South Sudan

Southern Sudan has been almost continually at war since before independence from the Anglo-Egyptian condominium on 1 January 1956. The most recent conflict lasted 23 years and ended with the signing of the Comprehensive Peace Agreement² on January 9, 2005 and was the longest-running civil war in Africa.

In accordance with the CPA, a referendum on independence was held from 9-16 January 2011. The final results were released shortly afterwards on 7 February. Over 98 percent voted in favour of independence with over 90 percent of registered voters voting. Independence is widely expected to occur on 9 July 2011, which is the end of the CPA period.

The conflict in the South is to be distinguished from the ongoing conflict in Darfur, another part of Sudan. According to the latest census held in 2008, Southern Sudan has a population of 8.26 Million. Most of the inhabitants are black African and either Christian or animist. Only about 10

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² The "CPA".

percent of the population is Muslim, with most of those people living in the northern part of what is expected to form the new Republic.

Shari ‘a law was first imposed in Sudan in September 1983 along with forced Arabisation³ and was one of the reasons why the southerners returned to war. The embryo Government of Southern Sudan has adopted English as its language of government and business and has embraced the English common law.⁴ Although the Interim Constitution of Southern Sudan guarantees that English and Arabic are the official languages of the Government of Southern Sudan, English is the de facto language of government. Although almost every public servant speaks Arabic, very few can actually read or write it.

The Government of Southern Sudan had been primarily focused on establishing itself and stabilizing the security situation in the run-up to the recent elections and referendum. It is now starting to pay attention on developing and promoting private sector activity. The business environment is not conducive to foreign investment. Laws are not transparent; and processes and institutions that are conducive to encouraging the development of the private sector are largely non-existent.

However, this cuts both ways. The existing lack of an institutional framework for entrepreneurs, means no stifling bureaucracy, and it is for that reason that many entrepreneurs have come to Southern Sudan. The dangers of unregulated environment are of course manifold. These dangers include—

- the possible exploitation of workers;
- the absence of safety and health protection for workers and others;
- the lack of legal protection for shareholders and other investors;
- the failure to protect property rights;
- the tendency of tribal relationships to dominate contracts; and
- concerns about the willingness of the Government to observe the rule of law.

The fundamental pieces of legislation supporting business start up and basic corporate governance are in place. However, the private sector is not sufficiently well organized to become an effective partner to the provisional Republic in establishing policy or providing input and recommendations on legislation.

³ ‘Arabisation’ means that the people were forced to take up the Islamic faith and adopt Arabic cultural norms (including the Arab language).

⁴ Judicial Circular No. 1/2007 dated July 12, 2007: The “application of the principles of justice, equity, good conscience and judicial precedents of the English Common Law may further require the Court or Judge to apply the provisions of—

- (i) International Treaties & Conventions; and
- (ii) the general principles of other different legal systems provided they are in conformity with the local values or conditions in the Southern Sudan.

Mandate of the Directorate of Legislation, Gazette, Publication and Printing

The Ministry of Legal Affairs and Constitutional Development was created by its own Act in 2008.⁵ It replaced the former Attorney General's Chambers of the New Sudan. The Directorate of Legislation, Gazette, Publication and Printing is one of eight directorates within the Ministry.

Section 9 of the Act defines its functions as follows:

- (a) Drafting Government legislation including subsidiary legislation, as requested by GoSS and the State legislatures and executive branches;
- (b) Overseeing the progress of legislation, and provision of legal opinions thereon;
- (c) Printing and publishing the Southern Sudan Gazette and any other necessary government publications;
- (d) Translating legislation and any other legal documents from English to other languages, as necessary;
- (e) Publishing written laws;
- (f) Reviewing, refining and improving the legislative drafting process in Southern Sudan;
- (g) Conducting research and proposing legal reforms; and,
- (h) Performing any other duty or function that may be assigned to it, or which is reasonably related to the forgoing activities.

Capacity of the Directorate

The Directorate has a staff of about 15 headed by the Director. In addition to perceived management problems, a lack of computer literacy hampers the drafting process.

Most of the legal counsel in the Directorate of Legislation, attended law school in Khartoum and studied Shari'a law in Arabic and are rather challenged by the English language. Drafting of laws in both English and Arabic is a constant hurdle.

Very few of the legal advisers have computers and the 3 laptop PCs that were recently provided to the Directorate are kept under lock and key. Lack of computer literacy severely hampers the Directorate as there is a lack of consistency between the various laws that should share a common theme. Even at the top level much of the drafting is done in pencil, with existing Sudanese laws being translated, often poorly into English. The Director has a non-legally trained secretary who then transcribes these laws into a poor form of English. This is despite the fact that the Director's knowledge of English vocabulary and grammar is excellent.⁶

Technical assistance

Technical assistance has historically been offered by USAID, the Government of Kenya and the International Finance Corporation of the World Bank. The latter focused on mercantile laws that

⁵ The Ministry of Legal Affairs and Constitutional Development Organization Act, 2008

⁶ He was trained prior to the imposition of Shari'a law in 1983.

are designed to promote the business environment. Other donors have promised assistance but so far none has been forthcoming.

Technical assistance took the form of direct drafting in the early years but more recently has evolved into just reviewing and editing the Bills drafted by the Director. More recently, there have been suspicions that technical assistance that used to be gladly accepted has been refused, but I have been unable to confirm that.

In 2008, five members of the Directorate received 3 weeks of training in legislative drafting. This, however, seems to have made little impact as whatever skills were learned were not put into practice; nor were they shared with other members of the Directorate, which like most of the Ministry's Directorates has a high turnover as well as low productivity.

The Gazette Office

The Gazette Office is also under the direction of the Directorate of Legislation. Much needs to be done to improve the efficiency of that Office. Laws and regulations are not being properly printed on a timely basis. In addition, they are not gazetted in a timely and efficient cost basis thereby delaying the implementation and dissemination process. In essence, the Gazette Office does not function in any meaningful way. High quality equipment (a server, 4 workstations and a Ricoh High Speed Colour printer) costing approximately US\$800,000 was installed in January 2009 in a project funded by the US International Narcotics and Law Enforcement Bureau, but this equipment has been barely used.

Almost immediately, the Gazette Office ceased to function due to technical and administration failures and lack of expertise in the use of the equipment. In addition, those chosen as staff to produce the Gazette are reported to have had little IT training⁷ or experience. The situation has been exacerbated by the departure of some of the more competent people, who have left to start their own IT businesses.

Only some degree of copying is being undertaken and key laws are being printed outside either in Juba or in Kampala, Uganda.

Technical assistance is urgently needed to properly train the staff and the capacity of the existing staff needs to be increased to professional print house standards

The laws of the Government of Southern Sudan

In both 2009 and 2010, only two Bills in each year (one of which was the Appropriations Act) were passed by the Southern Sudan Legislative Assembly.⁸ The problems will be explored more fully below.

⁷ One of those chosen was night watchman who was chosen more as a result of tribal affiliation rather than expertise.

⁸ These were the Southern Sudan Police Services Act, 2009 and the Emoluments and Privileges of Constitutional Post Holders and Members of Legislative Assemblies Act, 2010,

Provisional Orders

On 9 January 2011, the President of the Government of Southern Sudan signed 17 Provisional Orders. Article 86 of the Interim Constitution of Southern Sudan, 2005 provides as follows:

“Such provisional order shall be submitted to the Assembly as soon as it is convened.”

At that point, a Provisional Order has to go through the normal legislative process at the Southern Sudan Legislative Assembly. Sixteen Provisional Orders were presented to the Assembly in late January.⁹ The Assembly can reject, adopt or adopt the Order with or without changes. As a general rule, the Assembly will accept and pass a Provisional Order and, with independence looming, it is expected that the Assembly will be under intense political pressure to pass these laws.

The Transitional Constitution

On 21 January 2011, a committee called the Technical Committee was appointed¹⁰ by His Excellency the President Salva Kiir Mayardit to review the Interim Constitution of Southern Sudan, 2005, and convert it into a Transitional Constitution. The next step will involve the drafting of a permanent Constitution, which is expected to follow public consultations after the anticipated independence in July of this year. Leading constitutional experts from around the region and the world will be assisting in the 2 phase process.

Article 208(7) of the Interim Constitution currently provides as follows:

“(7) If 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.”

What this means then is that those items of national competence contained in Schedule A of both the Interim Constitution and the Interim National Constitution would now be the exclusive legislative competence of an independent South Sudan. Currently, an exercise is underway to insert those Schedule A provisions from the Interim National Constitution of Sudan into the appropriate places in the Interim Constitution of Southern Sudan to create a Transitional Constitution.

The historic first sittings of the Technical Committee for the Transitional Constitution took place on 2 and 3 February 2011. Noted constitutional scholars Professor Yashpal Ghai, Professor Jill Cottrell and Professor Frederick Ssempebwa gave presentations. Professors Ghai and Ssempebwa were members of Kenya’s Committee of Experts that recently redrafted Kenya’s Constitution¹¹. The Technical Committee was led through an early draft prepared by the Public Interest Law &

⁹ Only the Fire Brigade Provisional Order has not been submitted owing to the fact that it has been misplaced.

¹⁰ Presidential Decree No. GOSS/PD/J/002/2011

¹¹ This was promulgated in August 2010.

Policy Group, which incorporated certain articles of the Interim National Constitution into the draft Transitional Constitution.

The Technical Committee was planning to meet 4 times each week until the end of April 2011, by which time they were due to deliver up the draft Transitional Constitution to the President. It has a mandate to consult with outside experts. However, the whole process has become politicised. The initial Presidential Decree named 20 members to the Technical Committee with 4 advisors who are law professors and now out-of-work Government of National Unity Constitutional Court judges. This raised a great outcry from the other political parties who felt that the Committee was “stacked” with Sudan People’s Liberation Movement (“SPLM”¹²) appointees. Indeed it was, but all of these people were chosen not only for their technical expertise but also for the fact that many, if not most, had worked on drafting the Interim Constitution.

The President yielded to political pressure and on 17 February 2011 appointed 12 additional members to the Technical Committee.¹³ The next day, he, appointed 3 “faith based” members to the Technical Committee.¹⁴ Three days later, he appointed 17 additional members to the Committee, all of whom were members of the ruling SPLM party.¹⁵ The Committee had grown from an already bloated committee of 24 to one consisting of 56 members!

From what was intended to be a strictly technical exercise, the work became extremely politicised. Indeed, on 7 March, the non-SPLM members withdrew from the Technical Committee. Despite this intrigue, the Technical Committee still believes that it will be able to complete its work on time, even though it seems likely that the Committee will exceed its original jurisdictional mandate.

Secondary legislation

There are no implementing regulations for the few laws that have been passed. Article 92 of the Interim Constitution provides that the Legislative Assembly has the final say with regards to the passage of regulations. Given the problems of passing primary legislation, it is hardly surprising that no secondary legislation (much of which would be highly technical) has been passed.

The legislative process

I worked for several years on a tripartite process that included the development of a legislative tracking mechanism, which involved the improvement and streamlining of the legislative process as well as establishing a method of tracking the legislative agenda for the Government. This involved the removal of the Governance Cluster of the Council of Ministers from the legislative process.

¹² The dominant political party and the organisation which led Southern Sudan to its present state along with the Sudan People’s Liberation Army (“SPLA”)

¹³ Presidential Decree No. GOSS/PD/J/08/2011

¹⁴ Presidential Decree No. GOSS/PD/J/09/2011

¹⁵ Presidential Decree No. GOSS/PD/J/10/2011

Although there is no constitutional provision for the Clusters, they were introduced a number of years ago by Presidential Decree. The Governance Cluster operates as a clearing house for all legislation prior to it being forwarded to the larger Council of Ministers for deliberation.

The current method of processing legislation is not provided for in the Interim Constitution of Southern Sudan, 2005, and is in fact a result of custom that has developed over 3 years ago. Indeed, it is noted that the system we had proposed (which was to remove the role of the Governance Cluster to conduct a line-by-line review of the draft legislation) was exactly the method that the Government had initially used.

Articles 84 and 85 of the Interim Constitution describe the flow of legislation. Under the Interim Constitution, either a Minister or the President can introduce legislation.

Procedures for presentation and consideration of Bills

The Interim Constitution sets out the procedure for the presentation of Bills to the Legislative Assembly. Article 84 reads as follows:

- “84. (1) Bills presented to the Assembly shall be submitted for the first reading by being cited by title. The bill shall then be submitted for a second reading for general deliberation and approval in principle. Should the bill be passed in the second reading, there shall be a third reading for deliberation in detail and introduction of, and decision upon, any amendment. The bill shall then be submitted in its final form for the final reading, at which stage the text of the bill shall not be subject to further discussion and shall be passed section by section and then passed as a whole.
- (2) After the first reading, the Speaker shall refer the bill to the appropriate committee of the Assembly, which shall make a general evaluation report for the purpose of the second reading. The committee shall also present a report on the amendments that the Committee might or might not have endorsed in the third reading for the decision of the Assembly; the Speaker may also refer the bill once again to the appropriate committee to prepare a report in a final draft in preparation for the final reading.
- (3) The Speaker of the Assembly or the appropriate committee may seek expert opinion on the viability and rationale of the bill; an interested body may also be invited to present views on the impact and propriety of the bill.
- (4) The Assembly may by a special resolution, decide on any bill as a general committee or by summary proceedings.

Assent of the President of the Government of Southern Sudan

The Interim Constitution further requires Presidential Assent before a Bill can become a law. Article 85 reads as follows:

- “85. (1) Any bill approved by the Assembly shall not become law unless the President of the Government of Southern Sudan assents to it and signs it into law. If the

President withholds assent for thirty days without giving reasons, the bill shall be deemed to have been so signed.

- (2) Should the President of the Government of Southern Sudan withhold assent to the bill and give reasons within the aforementioned thirty days, the bill shall be re-introduced to the Assembly to consider the observations of the President of the Government of Southern Sudan.
- (3) The bill shall become law if the Assembly again passes it by a two-thirds majority of all its members, and the assent of the President of the Government of Southern Sudan shall not be required for that bill to come into force.”

Part Six of the Interim Constitution deals with the Southern Sudan Executive and Chapter 1 deals with the Southern Sudan Executive and its powers. Article 115, in particular, deals with the Functions of the Council of Ministers and provides as follows:

“115. The Southern Sudan Council of Ministers shall have the following functions:

...

- (b) approval of the general policies initiated by the respective ministries;

...

- (f) receiving reports on matters that are concurrent or residual and deciding whether it is competent to exercise such power in accordance with Schedules E and F herein. If it so decides, it shall notify the respective state in Southern Sudan of its intention to exercise such power. In case a state in Southern Sudan objects thereto, a committee shall be set up by the two levels concerned to amicably resolve the matter before resorting to the Southern Sudan Supreme Court;

...

- (m) implementing Southern Sudan legislations [sic] and applicable national legislations in Southern Sudan;
- (n) formulating and implementing government policies;
- (o) coordinating the functions and reviewing the performance of the ministries, departments and administrations of the Government of Southern Sudan;
- (p) initiating legislative bills before the Southern Sudan Legislative Assembly;”

Originally there were 6 permanent Ministerial members of the Governance Cluster. These were—

- Legal Affairs
- Cabinet Affairs
- Parliamentary Affairs
- Public Service

- Interior
- SPLA Affairs

Now there are 12. These are—

- Minister of Peace and CPA Implementation
- Minister of SPLA and Veterans Affairs
- Minister of Regional Cooperation
- Minister in the Office of the President
- Minister of Legal Affairs and Constitutional Development
- Minister of Internal Affairs
- Minister of Parliamentary Affairs
- Minister of Finance and Economic Planning
- Minister of Labour and Public Service
- Minister of Information
- Ministry of Human Resources Development
- Secretary General to the Government of Southern Sudan.

Indications are that since the beginning of this year that the Clusters are once again sitting regularly. There was much criticism levelled against the Governance Cluster by the former Minister of Legal Affairs that they seldom met and when they did, a quorum was often not present.

There are also indications that the Southern Sudanese ambassadors who are being recalled by Khartoum are being interviewed to act as policy advisors to the Clusters. Their new role is expected to start in May.

Resolution No. 160 from extraordinary meeting of the Council of Ministers No. 3/2010 held on 1 November 2010 states:

“Approved the proposed improvement to the Government of Southern Sudan Legislative mechanism which would increase transparency and productivity of all involved in drafting, vetting and passage of legislation and holding these parties responsible through regular reports to the Council of Ministers as per memo no. GoSS¹⁶/MOLACD/MO/J/1.a.1/2010 dated 29th Sept 2010 of the Ministry of Legal Affairs and Constitutional Development presented to the council of Ministers on his behalf by the Minister of Parliamentary Affairs.”

My colleagues and I lobbied most of the Council of Ministers regarding the simplified legislative process. All of those whom we lobbied told us they would support the initial proposal to do away with the role of the Governance Cluster. When it got down to the vote, several key Ministers voted against the proposed simplification of the legislative process.

¹⁶ Government of South Sudan

What in fact happened was that a subcommittee of the Governance Cluster was created to vet all legislation bound for the Governance Cluster. This subcommittee is composed of the Ministers of Cabinet Affairs, Legal Affairs and Parliamentary Affairs along with the line Minister sponsoring the legislation.

The subcommittee approved 17 bills as Provisional Orders which were ultimately¹⁷ signed by the President on 9 January 2011, so it would appear that the new system might in fact be working.

Legislative tracking

During late 2010, I developed an Excel based legislative tracking system. The tracking mechanism will allow the Minister of Legal Affairs and Constitutional Development, and indeed the Council of Ministers, to know at any time the status of a Bill within the Government legislative process. Initially, monthly reports will be generated through to the end of the CPA after which time, reporting can be made every other month. Ultimately, the summary produced by the legislative tracking mechanism is intended to be posted to the Ministry's website.¹⁸

The mechanism is expected to increase the flow of legislation from inception through to the Legislative Assembly by making the responsible parties accountable. However, of the 2 legal counsel assigned to update the system, one has left to enter private practice and the other is on extended leave back in Canada. This has considerably slowed the updating process and, along with a lack of responsiveness from line Ministries responsible for drafting laws, has left the project in limbo.

Legislative priorities

The Government has demonstrated no discipline in prioritising and adopting legislation, resulting in very few laws being promulgated since 2005. With independence looming, apart from key laws that need to be drafted for there to be a fully-functioning government, other new laws within the exclusive legislative competence of the Government of National Unity (such as banking, currency, and aviation) will also be needed for that purpose. So far, I have identified over 130 laws that will be required by the time of independence or shortly afterwards.

The way forward

The situation in Southern Sudan is still rather uncertain. On the one hand, there is no deep history or regime that must be unwound, so we are starting with a *blank page*. However, if the new Republic is to be a success, the following challenges remain to be addressed:

- The shortage of legislative counsel at the Ministries of Legal Affairs, Cabinet Affairs, the line ministries, Legislative Assembly, and other key government agencies. Despite Article 155 of the Interim Constitution, the Council of Ministers lacks the ability to ensure that draft laws accord with government policy.

¹⁷ As noted above.

¹⁸ www.molacd-goss.org

- The lack of prioritisation: Line Ministries continue the practice of tabling laws that are of interest to them only and not for the greater good of a new State that will need essential legislation to be in place before independence.
- The fact that the Minister of Legal Affairs is now solely focused on the Transitional Constitution and is not interested in setting legislative priorities.

One of the bright prospects for the future is the return of the Diaspora.¹⁹ A number of legal counsel trained in Khartoum speak only in Arabic, insisting it is their right to do so. Whatever their rights might be, they will not progress far in Southern Sudan, where the Minister of Legal Affairs and Constitutional Development has made it very clear that those who cannot draft even a letter in English (and this is a serious challenge for some legal counsel) will not progress far in their careers within the Ministry.

However, the previous Minister has also made it clear that those returnees from the Diaspora will become the future leaders of the Ministry. They can speak and write in both English and Arabic and they have been trained in the Common Law. These efforts will save the Ministry and its donors significant training costs. Certainly they will be able to progress far more quickly in their careers. However, Southern Sudan is in danger of losing these bright lawyers. The payment of salaries is often delayed for months. Many of those from the Diaspora have returned to South Sudan out of a sense of patriotism. Others never succeeded in gaining bar admission in Canada or elsewhere and have practised as paralegals or have embarked on government careers. They left their families back in their new countries and are hearing their cries to return to the stable jobs that they previously held to support their families. This will truly be a loss to the new nation.

While Southerners are optimistic about the future independent Republic of South Sudan, I am fearful that the new nation will not be able to deliver on the expectations of their people, particularly the returnees from Khartoum who may have been born and raised in a modern capital now being repatriated to an often rural existence. Already students who have returned from studying in the North are turning up at university campuses in Juba and expecting to attend lectures automatically. There will be similar issues with Southern civil servants in the Government of National Unity who had until now made up 24 percent of the national civil service.

In addition, there have recently been defections from the senior ranks of the SPLA to those of a renegade general who has threatened to attack Juba before the declaration of independence, widely anticipated to be announced on 9 July of this year. Although these defections were not uncommon during the years of the struggle for independence, it does not bode well for a new nation.

¹⁹ The Diaspora includes Southern Sudanese lawyers who had been educated in Canada, US, UK, India and Australia have returned. Some of them had been educated in more than one Common Law jurisdiction and have a good grasp of the relevant subject matter.