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The legality of Order No. 36 of 2015 that created the 28, 32 states plus Abyei, and the importance of public participation in the constitution process

Abstract

On October 2nd 2015, President Salva Kiir signed an executive order or "Establishment Order" No 36/2015 AD. The decree established the new states largely along ethnic lines. The order has caused considerable tension and significant violence in former Upper Nile and Western Bahr el Ghazal States. Continued conflict in Malakal has significant potential to destabilise the entire country. The Order has, for the most part, been a subject of controversy between its supporters and its critics. In January 2017, President Salva Kiir restructured the country once more and created seven additional states bringing the total number of states in the country to 32 including the disputed region of Abyei.

Per the Transitional Constitution, state governors are supposed to be elected; the president has the authority only to appoint 'care-taker' governors. So far, a lot of attention has been focused on whether the SPLM-IO will be given the opportunity to nominate governors for some of the new states, but elections should also be considered when security permits.

Analysts offer three main explanations for Kiir's reasons to create the 28 states. First, he may have wanted to secure a balance of power that favoured his supporters and/or members of the Dinka ethnic group. Second, he may have wanted to reinforce his patronage network by creating new positions of power that he could award to key figures in order to buy or maintain their loyalty. Third, he may have felt pressure to respond to long-standing demands for federalism and greater decentralisation of power [1].

This is an attempt to answer the questions of whether the Order number 36 2015 was constitutional? Whether the operationalisation of those states is legal? And what is the constitutional implication involved? Having all these questions in mind let me first begin by defining the term 'constitution'.

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By Gar Adel Gar

Introduction

What is the Constitution?

A Constitution is an aggregate of fundamental principles or established precedents that constitute the legal basis of a polity, organisation or other types of entity and commonly determine how that entity is to be governed. [2]

In other words, this definition provides the Constitution as a body of fundamental principles or established precedents according to which a state acknowledged the Constitution to be governing rule or the supreme law.

In other definition as per Tutor2u, a constitution is primarily a set of rules and principles specifying how a country should be governed, how power is distributed and controlled and what rights citizens possess.[3]

This definition has also raised two primary functions;

1. It creates the government and its structure with a system of checks and balances among the governmental departments/organs.

2. It divides the power to all the levels of government (separation of powers)

By looking at the above definitions, one may conclude that the Constitution is a fundamental legal text that provides a formal framework for how a country is governed. It creates institutions for meaningful functioning of the state and defines the relations and responsibilities of the state verse the people and serves as the basis of all laws.

All countries in the world except for those under military rule have a constitution to govern their activities. It remains the highest law of the land and to abide by its provisions is Constitutionalism. According to Ronald Dworkin, constitutional interpretation "reflects an underlying theory about the general character of law." Otherwise, it may be in the word of Prof. Okoth Ogendo, “constitutions without constitutionalism.”

Legal theories on the constitutional interpretation and implementation

In order to conceptualise the interpretation of the law, there is a need to familiarise oneself with the foremost theories to understand the nature and function of the Constitution which in itself is a complex and controversial phenomenon.[4] Although these theories have been conflicting with each other, each has a distinct goal and is a creation of history, tradition, as well as contemporary conceptions.[5]

(a) Legal Positivism theory

This theory separates law from morality and argues that the rights of all people are written in the constitutional text. And that interpretation should be in the text. For this school, the law is the written law as it appears in the document. Meaning, the Order squarely fell outside the provision of Article 185 (6) of the Transitional Constitution of the Republic of South Sudan prior to its amendments and is cited below.

(b) Legal Realism theory

Within this theory, interpretation has become a process of creating new meaning rather than of ascertaining and enforcing an already existing constitutional meaning. Legal realism, including the sociological school of law, struggles for an objective exercise, because the ultimate grounds for the judges' constitutional interpretation, within certain unavoidable constraints, include their own 'political ideals and preferences, their conceptions of what is required by the nation's ideals.

Based on the proposition that all judges are human, the goal should be the ideal enunciated by Chief Justice Marshall, who said that they are to apply the will of the law rather than their wills.[6] Unfortunately, realism has become coupled with a particular vision of what a good society might look like —depending on the prevailing political orientation.

(c) Judicial Activism Theory

In more recent times, judicial activism has taken root. Judicial activism emerges cumulatively when judges first, write their personal preferences into the law;

Second, extend their judgments beyond what is needed to settle a dispute;

Third, use rights as trump cards; and

Fourth, displace the legislature's role by having the final word.[7]

(d) Statutory Interpretation

The statutory interpretation grew in Britain mainly because it lacked a "written constitution," but the same statutory interpretation applies to constitutional interpretation. There are four competing methods of statutory interpretation. These are the literal (textual) rule, the golden rule, the mischief rule and the purposive rule.

NB: Both the legal realism, judicial activism and statutory interpretation theories are not analysed in the text for the case did not have the ruling but are merely mentioned for records.

Constitutional interpretation draws a lot from American Jurisprudence. Under this jurisprudence, the judiciary has a unique role concerning constitutional interpretation. The reason is not merely that "it is emphatically the province and duty of the judicial department to say what the law is."' That famous line from Marhury v. Madison, in the context of 1803, was not an assertion of interpretive

supremacy but a claim of interpretive parity: the courts "as well as other departments" are bound by the Constitution and must interpret it when a dispute so requires.

This school of thought argues that the text of the Constitution should be construed according to its original understanding—that is, the people who drafted, proposed, and ratified it and understood the way the text is. On this view, modern constitutional controversies should be resolved based on what the framing generation understood the text to mean in application because that understanding is what the people adopted, acting in their sovereign capacity, endorsed as the supreme law of the land.

By contrast, the Constitution is a living document. Based on this approach, the Constitution is understood to grow and evolve as the conditions, needs, and values of our society change. Proponents of this view contend that such evolution is inherent to the constitutional design because the Framers intended the document to serve as a general charter for a growing nation and a changing world. Thus, the constitutional interpretation must be informed by contemporary norms and circumstances, not merely by its original meaning.

Constitutionalism

The other part of the Constitution is its implementation, which is through the concept known as Constitutionalism. Okoth Ogendo argues that the idea of Constitutionalism must, in the very first instance, imply that society acknowledges its Constitution as a living standard with which the conduct of public behaviour should conform and against which it must be evaluated.

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The minimum evidence of adherence to the principles of Constitutionalism is, therefore, public respect of the Constitution. At a more fundamental level, Constitutionalism involves habitual acceptance of the rules enshrined in the Constitution or consistent with constitutional principles as the ultimate bases of political choice.

Hans Kelsen emphasises the significance of the grundnorm or constitutional process. It has been said that the grundnorm is the Constitution because it establishes the foundation of any state's legal system.

In principle, it is the government norm upon which all governmental action ought to be founded. It lays down the proper legal framework and values deemed requisite for social life among the governed inter se. On the other hand, Constitutionalism and constitutional practices can be equated to the oil that keeps the pistons of this dynamic instrument running.

The concept of Constitutionalism in its distinctive sense deals with the question of; what is the function of a constitution? In order to develop such a concept, a constitution must be defined in a way that indicates the features that make it contrast with other kinds of political Order. It governs governmental action in relation to the polity.

Is the Executive Order no. 36 of 2015 constitutional?

Generally, every modern written Constitution confers specific powers on institutional entities or agents and established upon them the primary condition that they should abide by its limitations. Because the government is a political organisation and political organisations should remain constitutional at all times to the extent that it contains the institutional mechanism of power control for the protection of the interests and liberties of the citizenry including those in the minority.

In December 2015, the President issued a Provisional/Executive Order number 36, 2015, which purport to establish the 28 later 32 states plus Abyei contrary to the provision of Article 86 (5). The Order revoked the 10 states, which did also violate a provision of article 162 (1).

Article 86 (5) provides,

'Notwithstanding sub-Article (1) above, the President shall not make any provisional order on matters affecting the Bill of Rights, the decentralised system of government, general elections, annual allocation of resources and financial revenue, penal legislation or alteration of administrative boundaries of the states'.

The Executive Order was a violation of the cited article as it excludes the President from altering or changing the names leave alone revoking the existing ten states as they were; the Order was void ab initio.

The President should not have issued the Executive Order because it was not in his powers. Neither was

creating states an urgent matter if he would be hiding in the abstract of the article of urgency matters as the essence of the article is that the matter of the provisional Order is urgent and the

This Constitution derives its authority from the will of the people and shall be the supreme law of the land. It shall have a binding force on all persons, institutions, organs and agencies of government throughout the country.

parliament is in alcove. But, at the date of issue of the decree, the parliament was in session. Making this action appears to be beyond the president powers and should have ceased to exist through judicial review by mean of constitutional interpretation.

The Executive Order was also a violation of Article 162, which provides South Sudan as composed of 10 states from July 2011 to December 2015. This is an act of constitution violation by the person who took an oath to preserve and defend it. It provides and I quote,

'The territory of South Sudan is composed of ten states governed based on decentralisation'.

The action was therefore illegal and placed the President to have also violated Article 99 of the said Constitution, which the President solemnly swore to protect by stating the following words that,

'I shall be faithful and bear true allegiance to the Republic of South Sudan and shall diligently and honestly discharge my duties and responsibilities in a consultative manner to foster the development and welfare of the people of South Sudan; that I shall obey, preserve and defend the Constitution and abide by the law; and that I shall protect and promote the unity of the people of South Sudan and consolidate the democratic, decentralised system of government and preserve the integrity and dignity of the people of South Sudan'.

The Constitution is the supreme law of the law (South Sudan), and any official act, which is contrary or contravening its provisions is unconstitutional, i.e. not in the powers, granted to the executive by the Constitution is null and void. The nullification is void ab initio (from the inception of the Act) as is the Order number 36 of December 2015.

And as a consequent, the President has acted outside his legal powers as provided and therefore offended the doctrine of supremacy of the Constitution as provided for under the provision of Article 3 (1) & (2) which provide,

1. This Constitution derives its authority from the will of the people and shall be the supreme law of the land. It shall have a binding force on all persons, institutions, organs and agencies of government throughout the country.

2. The authority of government at all levels shall derive from this Constitution and the law.

Therefore the instance of the creation of the 28/32 did not in any way conform to the procedure and form enshrined in the Constitution itself; the process was illegal, and their operationalisation too is illegitimate, and they have no legal basis. Look at the positivist interpretation theory as cited above. The framers have indeed excluded the President from altering, changing the boundaries or changing their names. Affording these powers to himself is an act without observation of the rule of law and amounts to a violation of the Constitution.

This violation plus others may supplement the claim that we have a constitution without the spirit of Constitutionalism, having laws without respect for the rule of law due to lack of good governance. All are testimony of failure to the adherence and respect of the Constitution at more fundamental levels, especially its provisions in making a political choice.

The President violated the principle of implementing institutionally safeguarding by the division of political power, both functionally and spatially. Typically, the "separation of powers" serves as the functional division, while decentralisation serves as the spatial. Both require a constitution for their effective operation. They operate as restraints on governmental power.

COMMANDEERING EFFORT THAT THE PARLIAMENT AMENDED THE CONSTITUTION

No doubt that our laws exclusively vest the lawmaking powers in the parliament, including the amendment of the Constitution. Article 55 (3) (a) provides that,

3. Without prejudice to the generality of sub-Article (1) above, the National Legislature shall be competent to:

(e) Consider and pass amendments to this Constitution;'

Article 59 (g) excludes both the executive from altering, changing the names or boundaries of the state(s).

But the amendment of the states, boundaries and names is an exclusive power endowed on the Council of states whose competence falls under the provision of the Constitution.

Article 59 (g)

'To approve changes in state names, capital-towns and boundaries.'

This provision excludes both the executive from altering, changing the names or boundaries of the state(s). Therefore, the Executive Order number 36 that created the 28 later 32 states and the subsequent claim that the parliament amended the Constitution was a nullity in practice and operation. Neither of the two departments has the powers under the Transitional Constitution as it was then.

Even if the Order was not a self-executing order and the Council of State did debate it has it is the procedure and the form and also pass it with a 2/3 majority of all active members. The said Order has itself contravened the quorum necessary for the amendment of the Constitution.

PART 2 OF THE COMMENT

THE IMPORTANCE OF PUBLIC PARTICIPATION IN THE CONSTITUTION MAKING-PROCESS

A constitution is a powerful legal instrument that means any state which is involved in its making is high oblige to get the public negotiation because it provides a foundation and guiding principles for the formation of a state.

WHAT IS CONSTITUTION MAKING?

Constitution-making is the process of developing the body of fundamental principles intended for governing the country. And in the case of South Sudan, it is happening as a part of a broader political transition from oppression to a democratic state (2011 to presence). It should be an effort to reforming the structure and functioning of the state.

Therefore, the process of constitution-making is often a critical entry point for shaping the country and its future, the exercise of power and social compact among the citizens and between citizens and their states. Although no blueprint fits every process, the current political climate and the future needs must be drafted in rules that incorporate and govern generational preferences.

Therefore, the Executive Order number 36 that created the 28 later 32 states and the subsequent claim that the parliament amended the Constitution was a nullity in practice and operation.

Political elites inevitably play a significant role in making decisions about how to structure a new state and avoid a constitution that simply divides the spoils among competing factions, and to improve the chances of the new Constitution enjoying a high degree of popular legitimacy.

The forms of public participation now go beyond voting for constitutional representatives or in a referendum. Instead, they include civic education and media campaigns, public consultation (both on how the process should be undertaken and on the substance of the Constitution), national dialogue, and other creative means to make the process more genuinely participatory, along with the potential risks associated with public participation and how to minimise these risks.

All relevant groups in the society should be involved in the dialogue and priority-setting to ensure that actors from each social groups are dispelled with a sense of responsibility for the rebuilding and reconciliation process than isolating factions.

Public participation may be direct or through representation. An example of the need and importance of public participation was illustrated in the Kenyan case of Robert Gakuru & others Vs. Governor Kiambu County & 3 others where the petitioners seek a declaration that the Kiambu Finance Act, 2013, gazette vide Kiambu County Gazette supplement No. 8 violates various provisions of the Constitution and that the same is null and void on the grounds that no consultations

took place and the respondents made no invitations before the said Act was enacted.

The Petitioners complained that no proper public participation was undertaken when enacting the Act. The court held that there was no public participation as enacted under the Constitution and the County Government Act, 2012. The court opined that 'public participation ought to be real and not illusory and ought not to be treated as a mere formality for the fulfilment of the constitutional dictates'.

So, in every country public involvement is a requirement in the constitution-making because the Constitution is the text of the social contract. Its structure, forms and substance devise a better negotiation to reach a compromise, rights and interests from the divide. It is a requirement not only in the electoral process but also an ethos of the entire structure of governance under the Constitution.

WHAT LEGAL FRAMEWORK PROVIDES FOR PUBLIC PARTICIPATION?

The right to participate in the constitution-making is arguably in the principle of political participation. Several international and regional legal instruments recognise political participation as a fundamental right. They include UDHR, ICCPR, ACPHR, ACDEG, etc. Public participation lies in a political or practice that holds that those who are affected by a decision have a right to be involved in the decision making process.[8]

THE LEGAL STANDARDS THAT PROVIDE FOR THE FRAMEWORK

Internationally, both UDHR and ICCPR guarantee public participation, whether in the major or minor decisions that affect the country directly or through their elected representative.

Regionally, the African Charter on People and Human Rights recognises the importance of participation in public affairs as an essential element of democracy. Because public participation builds peoples' abilities to hold authorities to account for the implementation of decisions and actions they agreed upon. The African Charter on Democracy, Elections and Governance oblige member states to recognise people's participation as an inalienable right of the people of Africa.

Way forward on this part

1. Government has to introduce and implement a policy framework to provide direction on people's participation in public affairs beyond the constitution-making and anticipate elections.

2. The policy framework should guide how citizens views are collected and integrated into national Constitution now and policies and how it provides feedback to the people as well as what would amount to meaningful, active and useful participation of the people in the public affairs.

3. The policy framework should, on the same note establish organ, which facilitates people participation in the making of critical decisions at all levels of public practice.

4. The government should also provide a mechanism for engaging civil organisations in effective and meaningful participation in policymaking.

5. Government to repeal laws or sections thereof that undermine media freedom and freedom of expression.

6. Development partners should increase support to civil society to monitor the government efforts in promoting public participation in public affairs and provide support for public litigation in this respect.

In conclusion, the Constitution is a fundamental law, which a nation that needs to be stable and peaceful must build on with a logical summary of historical developments and social agreement of values.

Reference and footnotes

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About UPDM

The United People's Democratic Movement (UPDM) is a popular grassroots Movement formed by concerned South Sudanese in the country and the Diaspora; in response to the political crisis and fast deteriorating economic, humanitarian and security situation in the Republic of South Sudan, amid heightened ethnic polarisation and devastating conflict in the country, encouraged and abated primarily by President Salva Kiir's divisive Government policy, incompetent, oppressive and corrupt leadership.

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