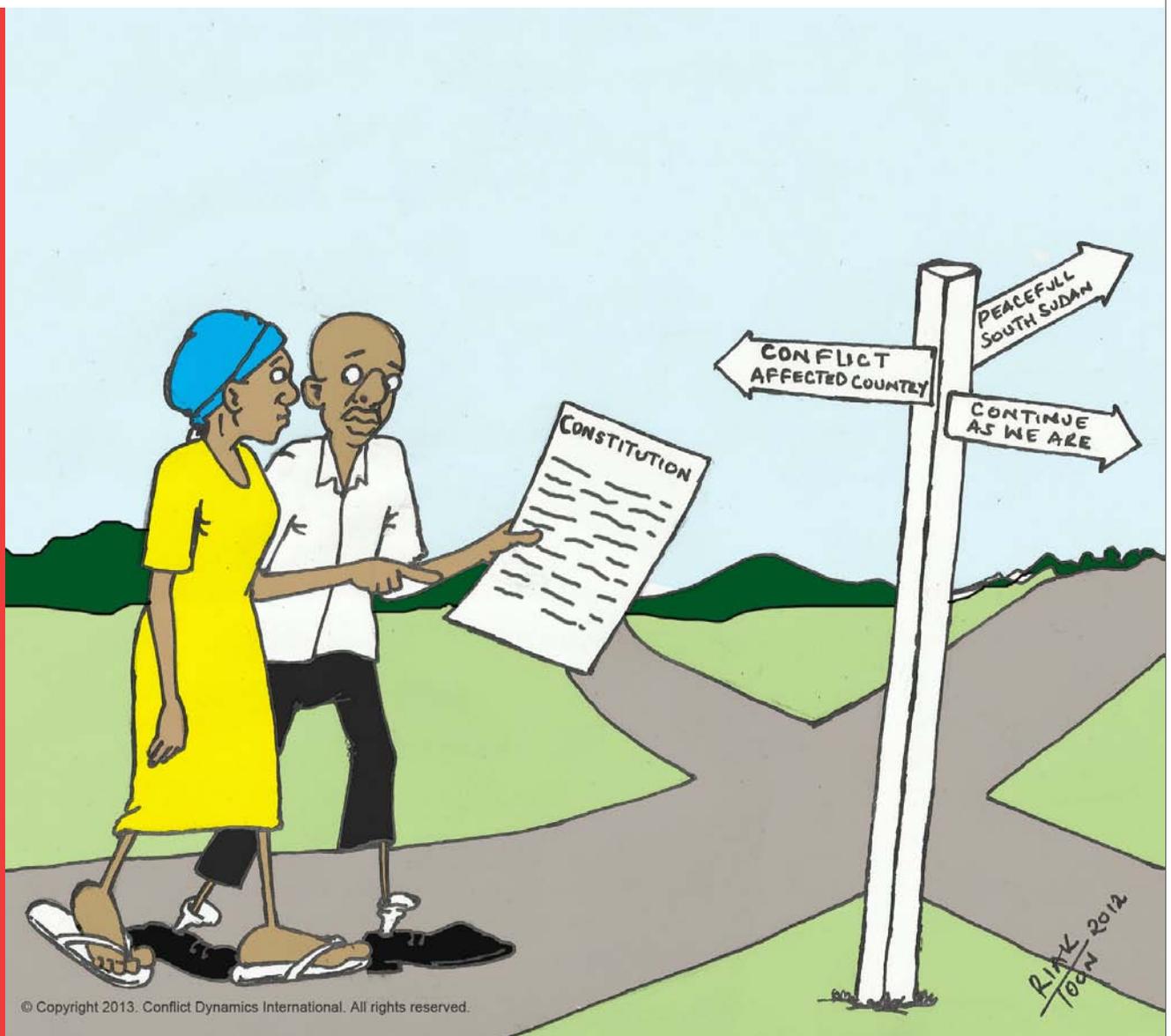


# **PATHWAYS TO PEACE:** **South Sudan's Constitution**

JANUARY 2013



## Acknowledgements

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# Introduction

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The national constitutional review process presents the people of South Sudan with important choices about governance and peacebuilding. In many ways, South Sudan is now at a crossroads. It can consolidate a positive peace, walk an uncertain path, or risk a return to conflict. Constitutional review can provide considerable opportunities for reconciliation, searching for negotiated solutions to divisive issues, building consensus on the system of governance best suited to South Sudan, and devising a peaceful State.

The purpose of this note is to highlight how choices about governance arrangements in the constitution can build peace. While the choices relate primarily to the national constitution, they are also relevant to the state constitutions, which may be reviewed at the same time. The note highlights special linkages between different choices about governance arrangements in the constitution. The content of this note draws from the analysis in a more detailed Briefing Paper '*Building the House of Governance: Political Accommodation in South Sudan*' (May 2012). This note presents the most important issues from this Briefing Paper as they relate to the constitution, and offers guidance on making choices supportive of peace.

## I. How can constitutional review support peace?

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South Sudan is not alone in facing important constitutional choices. Constitutional processes have played an important role in the formation of new States and in other transitions, including in South Africa, East Timor, Rwanda, and Kenya. In countries that have recently emerged from revolutions across North Africa and the Middle East, such as Tunisia, Egypt and Libya, these processes are ongoing as populations debate their constitutions in an effort to create foundations for a stable future.

South Sudan is a country rich in cultural, social and ethnic diversity. Accordingly, the people of South Sudan have diverse views, interests and perspectives. People's ability to voice different views and reconcile them is a key element of peace and stability. If governance arrangements do not take fair account of people's different views, some groups may perceive themselves as marginalized, adhere more strongly to local and ethnically-based identities than a national identity, and pursue their interests through violent means. To avoid these risks and help provide a peaceful future for South Sudan, constitutional choices should take every opportunity to reconcile people's many political interests and perspectives.

### **The three stages of constitutional review**

People have the opportunity to make choices about the constitution through a three-stage national constitutional review process:

1. The National Constitutional Review Commission (NCRC) oversees the first stage of this process. The NCRC's mandate is to disseminate public information and gather views. The NCRC will prepare a draft document, which the president will comment on, before the NCRC produces a final draft.
2. The president will convene a constitutional conference, requesting each interest group listed in the Transitional Constitution to nominate attendees. The delegates must adopt the draft by a two-thirds majority.
3. Once the draft is ready, the president will table it to the national legislature for "deliberation and adoption." [Art. 202, 203, Transitional Constitution of the Republic of South Sudan 2011]

## II. Weaving a rope from Six Strands

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Different areas of governance are linked in important ways. To build peace and effectively reconcile people's interests, it is important to understand how choices interact. When people review constitutions, they sometimes focus on single, isolated areas of governance without taking account of how different provisions work together in practice. For example, a citizens' group that campaigns for transparency in elections might focus on the provisions of the constitution dealing with elections. Or people with a special interest in decentralization policies might focus only on the provisions in the constitution that deal with South Sudan's decentralized system of government. This approach – of working on sections of the constitution in isolation – can lead to less than ideal outcomes when different provisions contradict each other, and important opportunities to build peace can be missed.

This note considers six linked areas (or “Strands”) that present important choices for governance and peacebuilding when debating a revised constitution. These are areas with especially active competition around people's political interests. They are also areas that offer opportunities to reconcile people's different perspectives. The areas are:

- 1. POLITICAL STRUCTURE AND DECENTRALIZATION** – This area concerns the number of levels of government, and the powers national, state and local governments each have. Constitutional review presents choices about how many counties and states will make up South Sudan, what decisions will be made at each level of government, and how resources will be distributed between levels (the fiscal allocation mechanisms).
- 2. ELECTORAL SYSTEM** – This area concerns how people elect their representatives. Constitutional provisions on elections present choices about which positions in government are open for elections, and the rules and systems that govern these elections.
- 3. EXECUTIVE** – This area concerns how laws and decisions are executed. The executive can take many forms. For example, the national executive can consist of a president, vice president, and council of ministers, or it can include a president and prime minister, or even a president elected by parliament. The executive also includes the civil service. Constitutional provisions on the executive present choices about what powers the president, governors and county administrators should have.
- 4. LEGISLATIVE BRANCH** – This area deals with the form and function of the national legislature, state legislatures and local councils. Provisions on the legislative branch present choices about how legislatures make decisions, their membership, and the roles they play alongside other parts of government, such as the presidency. In South Sudan, the Council of States currently acts as a second chamber. The National Council of Traditional Authority Leaders (CoTAL) could potentially even act as a third house of the legislature, after the National Legislative Assembly and Council of States, under a so-called ‘tri-cameral’ arrangement.
- 5. PUBLIC PARTICIPATION** – This area deals with how the public participates in decisions that affect their lives, beyond voting in elections. Constitutional review presents choices about the opportunities available for people to voice their views, and how elected representatives engage directly with citizens.
- 6. TRADITIONAL AND CUSTOMARY ARRANGEMENTS** – This area concerns the role traditional and customary arrangements play in reconciling people's different interests. Constitutional review presents choices about how traditional authorities and government institutions interact, and what powers traditional authorities have.

## The Bill of Rights

The Bill of Rights in the constitution includes important provisions cutting across the six areas of governance that can support peacebuilding. Key components of the Bill of Rights include:

- Rights of women (Part 2, Section 16 of the Transitional Constitution)
- Religious rights (Part 2, Section 23 of the Transitional Constitution)
- Rights of ethnic and cultural communities (Part 2, Section 33 of the Transitional Constitution)

These provisions play a central role in protecting diversity while guaranteeing equal rights in South Sudan. For more on this issue, see *Example D: How can the constitution protect diversity while building a shared national identity?* on page 9.

These six areas of governance in the constitution are like pillars of a 'House of Governance'. When people enter the house, they find the facilities to reconcile different interests and perspectives. The national constitution works with other elements of governance, such as legislation, to provide the foundations for this house; without a solid constitution that ensures sufficient room for people's different interests, the house will crumble.

Another way to think about these six areas of the constitution is as Strands of a rope. By focusing on a single Strand of governance, people can have a system that provides some support for peace. But that support can be fragile since, without reinforcement, a Strand can only hold a light weight before breaking.

On the other hand, if people make choices that weave together some or all of the six Strands, they can create a strong rope. Complementary choices can bind the Strands together in a way that ensures the rope can endure tension, and support sustainable peace and national unity.



Building a house of governance to reconcile people's different interests

## The Judiciary

The judiciary's role in enforcing the constitution will be central to ensuring that the choices adopted across all six Strands become reality. Access to justice, through both formal and customary mechanisms at the various levels of government, also plays a key role in peacebuilding by opening channels for non-violent resolution of disputes.

# A 'family' of Strands

When making choices about these important issues, the first step is to understand the links between the six Strands. Like brothers and sisters in a family, the Strands are related but have different identities and relationships with each other. Some have special relationships. Examples of special relationships between the Strands include:

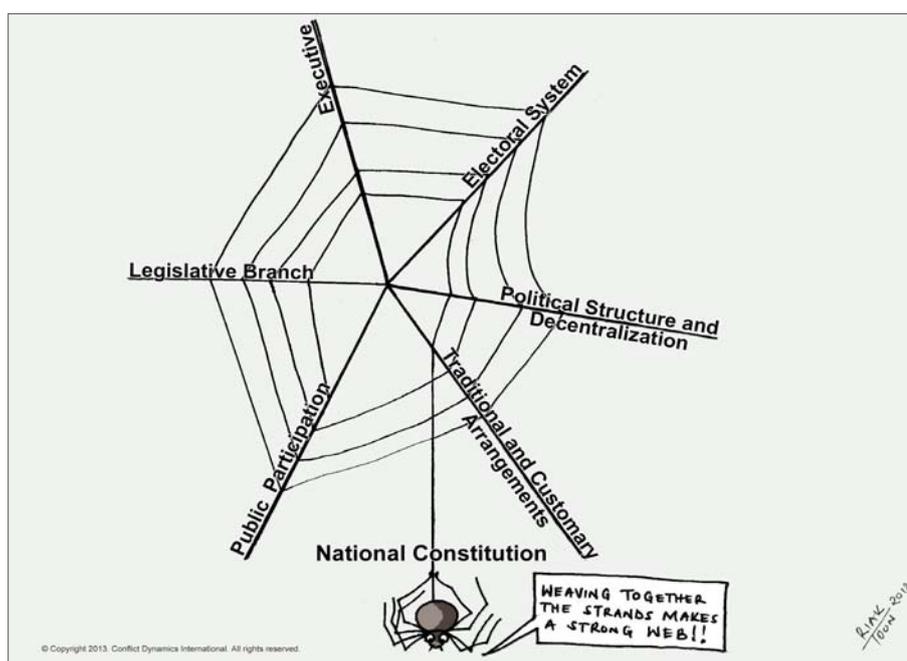
**Executive & legislative branch.** These two Strands balance each other like weights on a scale. While the executive is the decision-making body of government, the legislative branch reviews and checks the decisions of the executive, expressing the views – ideally – of many different groups in society. In this way, a well-functioning legislature can help the executive make decisions that take account of a broad range of interests.

**Legislative branch & traditional and customary arrangements.** Choices in these Strands determine whether there is conflict or harmony between formal government institutions and traditional authorities. Their relationship defines the distribution of powers between the two.

**Electoral system & political structure and decentralization.** Together, the electoral system and form of political structure and decentralization shape how people experience governance at the local level. Whether people directly elect their county commissioner or their county commissioner is appointed shapes the connection of local government to the people.



Creating harmony between traditional & customary arrangements and the legislative branch



Weaving a web from the six Strands

**Public participation & all Strands.** Public participation supports all the other Strands. In almost any situation, measures for public participation encourage decisions that reconcile people's diverse interests.

These special relationships between Strands show the importance of weaving them together into a strong web.

### III. Using the Strands to address key issues

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Taken together, the Strands offer useful guidance on how to address important issues related to governance and peacebuilding in South Sudan. The Strands can help answer key questions posed by constitutional review. Examples include the following:

**A: What are the checks and balances in government?** Constitutional review presents choices about how different parts of government, such as the legislature and the executive, can review each other's decisions. It also presents choices about the relationship between the legislative assemblies at national, state, and local levels. The judiciary's role in enforcing the constitution will be central to ensuring that the choices adopted in any of these Strands become reality. All these choices determine the checks and balances on power of different parts of government.

**B: What will the decentralized system of governance look like?** Constitutional review presents choices about what powers the state government and local government will have, and their respective roles.

**C: What role will the president play?** Constitutional provisions define the role the president plays and the competencies he or she has. Constitutional review presents the opportunity to establish safeguards to help the president govern and use his/ her powers justly.

**D: How can the constitution protect diversity while building a shared national identity?** By reviewing the constitution, people can make historic choices about how to build a South Sudanese identity while protecting ethnic and cultural diversity.

**E: How will national resources be shared?** Constitutional provisions define how national resources are allocated between communities and geographic areas. They present choices about whether allocations should be equal (where every state/county receives the same allocation, regardless of population size) or equitable (where allocations are calculated according to need, population size and development outcomes). Constitutional provisions also determine which people and communities receive revenue from natural resources like oil.

**F: How can the public participate in decisions that affect their lives?** Provisions in the constitution define how the public can participate beyond voting in elections. For example, the constitution can require that the legislature consults the public on laws by holding hearings and providing information on the radio.

The following examples show how people can use the six Strands to think about key issues in constitutional review. This note does not recommend particular answers or choices, but describes through the examples how the Strands can be used.

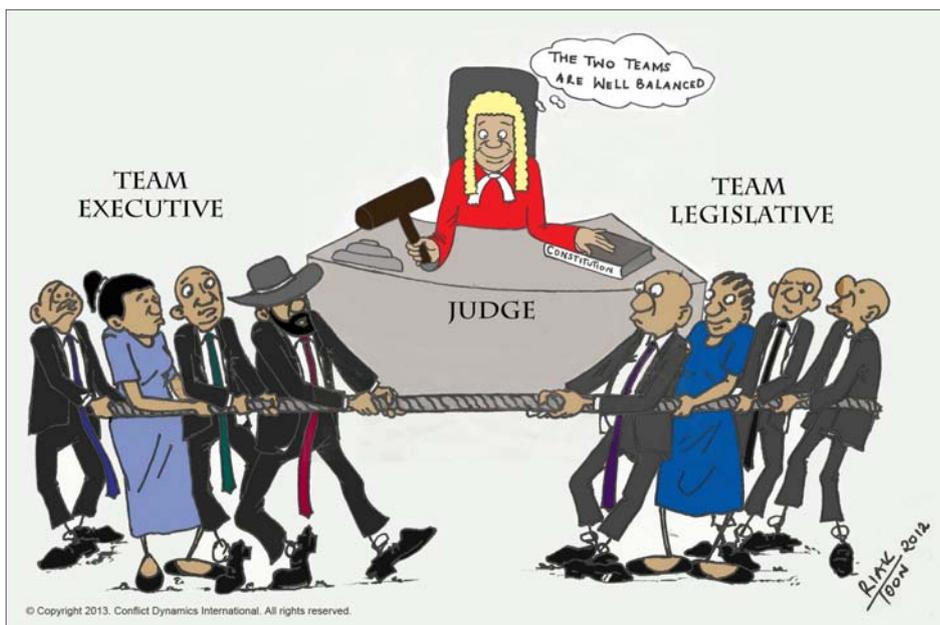
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For further discussion of the potential choices explored below, see *Chapter 4.2: Opportunity areas across the six Strands* and *Chapter 4.3: Sample options* of 'Building the House of Governance: Political Accommodation in South Sudan' (May 2012).

## EXAMPLE A: WHAT ARE THE CHECKS AND BALANCES IN GOVERNMENT?

Constitutional provisions present choices about how different parts of government balance each other. Checks and balances, when created wisely, can ensure that no part of government can act beyond its powers. However, when choices about checks and balances are not complementary across the six Strands, they can lead to deadlock in government and increase the risk of conflict.

Complementary choices across the six Strands include the following:



Creating a balance between the executive and legislative branch

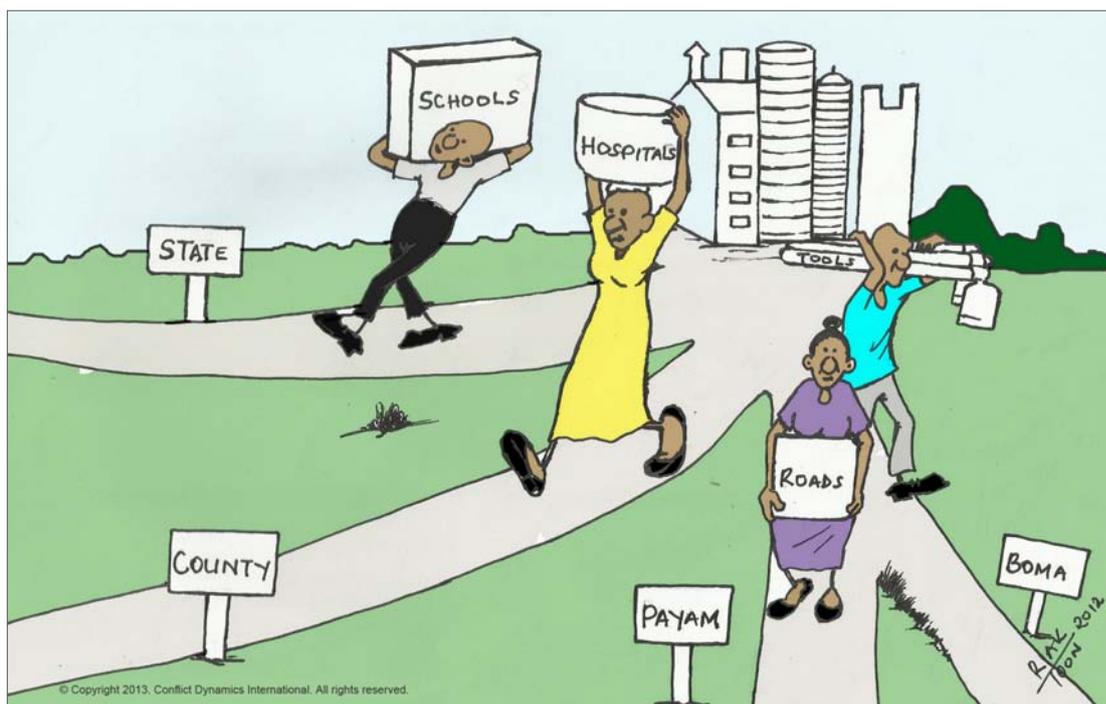
Strands	Choices that help reconcile people's different views, perspectives and interests
<b>Political structure and decentralization</b>	Constitutional provisions present choices about how to resolve disputes between levels of government. A judiciary that is independent from other parts of government is central to having a system of fair dispute resolution. An additional choice is how to decentralize the judiciary alongside the legislative branch and executive.
<b>Electoral system</b>	Through elections, people decide who should hold power, and have the opportunity to peacefully remove those who have made bad decisions. One important choice is between having 'proportional representation' (where the number of positions given to one group matches the proportion of votes they get), a 'majoritarian system' (which gives advantage to the group that wins the largest percentage of votes) or a mixture of both systems.
<b>Executive</b>	Constitutional review presents key choices about the limits of the president's power. Issues include whether the Supreme Court can bring charges against the president for misconduct, whether the legislature can block his or her policies, and how much the president can influence the legislature.
<b>Legislative branch</b>	Constitutional provisions can provide the legislature with powers to revise, delay or reject decisions of the executive on certain issues.
<b>Public participation</b>	Constitutional review presents choices about how the public can keep a check on government power. For example, the constitution could include provisions for the public to register their complaints or provide input on bills. One mechanism could be constituency meetings, where representatives meet their constituents to hear grievances and suggestions.
<b>Traditional and customary arrangements</b>	The Local Government Act (2009) recognizes traditional authorities' powers, particularly in the area of justice. Constitutional provisions define how these powers are regulated, and how traditional authorities and formal government bodies review each other's decisions. A clear and complementary division of responsibilities between the formal justice system and the traditional and customary justice systems is important.

Another check, which cuts across all the Strands, relates to oversight and independence of the military. Ensuring civilian oversight of the military is an important condition for peace. Long-run stability requires a professionalized military that will provide security to the population and implement government decisions, regardless of who is the president or which party holds power. Constitutional provisions can establish the legal framework for civilian oversight, for example by preventing people from holding both military and government positions at the same time.

## EXAMPLE B: WHAT WILL THE DECENTRALIZED SYSTEM OF GOVERNANCE LOOK LIKE?

Constitutional review presents key choices about how much power different levels of government have, how close the government is to the people, and how resources are distributed between levels of government.

Complementary choices across the six Strands include the following:



Bringing equitable services to all states, counties, payams and bomas

Strands	Choices that help reconcile people's different views, perspectives and interests
<b>Political structure and decentralization</b>	If local government is responsible for delivering services, different parts of the country risk having different levels of service delivery. This is because different states/ counties have different population sizes and levels of revenue. To resolve this problem, the constitution could include provisions for 'equalization grants' based on need to ensure equitable levels of service delivery across the country.
<b>Electoral system</b>	Direct election of local government officials could strengthen the direct link between people and the public officials who make decisions about their lives.
<b>Executive</b>	Constitutional review presents important choices about how payam administrators, county commissioners, governors, and the president interact with each other. Effective decision making at the local level requires clear definition of the decisions each level can make, and how disputes between them are resolved.
<b>Legislative branch</b>	Active local government councils could play an important role in engaging people from different communities in governance, because the councils are often the levels of formal government closest to communities.
<b>Public participation</b>	Providing for public hearings at local government councils could enhance public participation at the grassroots level. Constitutional provisions can also shape the relationship between public officials and their constituents, for example by obliging members of parliament to visit their communities on a regular basis.
<b>Traditional and customary arrangements</b>	In many areas of South Sudan, traditional authorities remain the most visible form of governance at local levels. Constitutional review presents options for strengthening traditional authorities' relationship with formal government, for example by recognizing the different powers and strengths of each, and creating ways for them to work together.

## EXAMPLE C: I WHAT ROLE WILL THE PRESIDENT PLAY?

The president has the potential to hold a broad range of competencies, such as issuing presidential decrees and removing state governors in crises. If one person has these competencies, that person may be unable to reconcile different political interests. This could create conflict among those who do not feel that their views have been fairly taken into account.

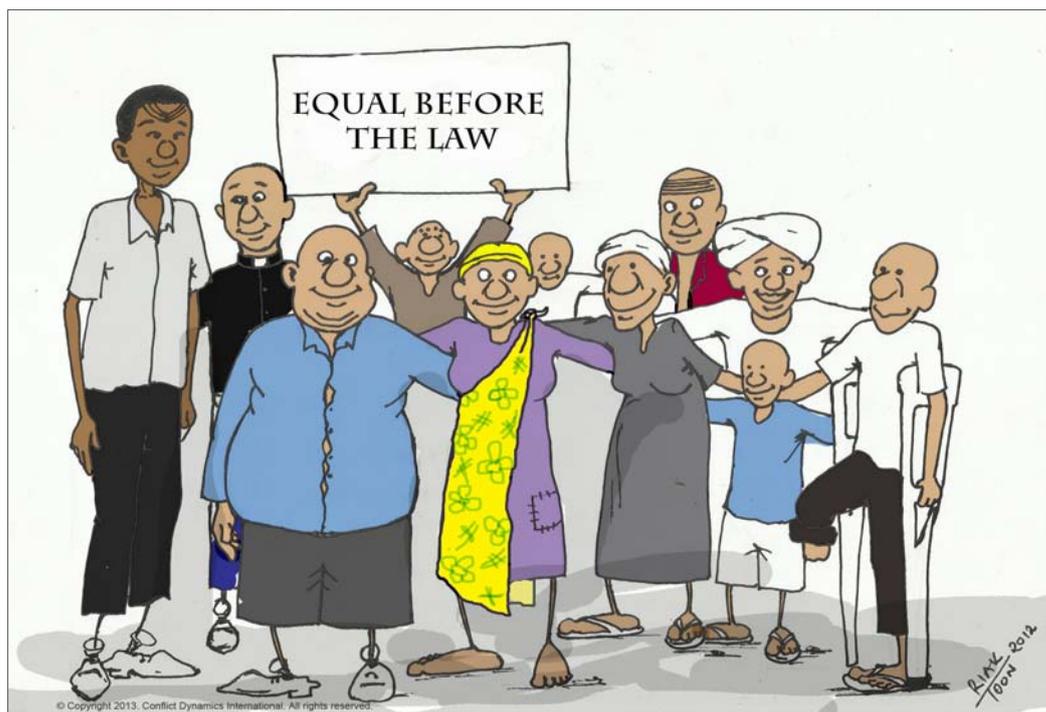
Complementary choices across the Strands can reduce this risk:

Strands	Choices that help reconcile people's different views, perspectives and interests
<b>Political structure and decentralization</b>	Giving subnational levels (e.g., state government and county administrations) some competencies independent from the president may help reconcile different interests within states or counties that might not be taken into account at the level of the presidency.
<b>Electoral system</b>	The way in which the president is elected can support reconciliation of different views. For example, people might consider a system of 'double qualification.' This means that a presidential candidate must gain <u>both</u> a majority of votes in the whole country <u>and</u> a majority in a set number of states (for example, a majority in at least six out of ten of South Sudan's states).
<b>Executive</b>	Constitutional review presents a choice between different models for the executive, such as: an executive formed of one president; a president who works with a vice president; a president who works with a prime minister elected by parliament; and many other models. A multi-member presidency, where the members are directly elected or chosen by parliament, can either reconcile a wider range of views within the executive, or it can lead to deadlock if the multiple members of the executive are divided.
<b>Legislative branch</b>	An active legislature, if representative of South Sudan's diversity, can help the president make high quality decisions by debating different perspectives on important laws and policy issues. Whether the president can veto legislation affects how different interests are reconciled.
<b>Public participation</b>	Constitutional provisions can allow people to express different perspectives directly to the president. For example, some countries have 'parliamentary question time', where the president (or prime minister) appears before the legislature once a week to answer questions. Another mechanism is for the president to appear regularly on the radio to debate key issues.
<b>Traditional and customary arrangements</b>	Constitutional provisions for traditional authority leaders to play a consultative role to the presidency may help the president take account of a broader variety of interests not addressed through formal government.

## EXAMPLE D: HOW CAN THE CONSTITUTION PROTECT DIVERSITY WHILE BUILDING A SHARED NATIONAL IDENTITY?

South Sudan has to strengthen national unity by helping people identify with a South Sudanese national identity. At the same time, South Sudan has to protect the rich diversity of its people and reconcile the different interests resulting from that diversity.

Through complementary choices across the six Strands, both these objectives can be achieved:



Protecting diversity and building national unity through equality before the law

Strands	Choices that help reconcile people's different views, perspectives and interests
<b>Political structure and decentralization</b>	Constitutional provisions can protect the cultural, religious and linguistic rights of South Sudan's many communities. Repeating these provisions in state constitutions can strengthen constitutional protections.
<b>Electoral system</b>	An electoral system based on proportional representation can allow for the representation of many different minorities. By contrast, a majoritarian system gives disproportionate representation to the party that receives the most votes. Expanding the use of proportional representation could enhance representation of different communities. Constitutional review also presents choices about the size of the women's quota, and measures to ensure that women from different communities are included on the 'women's list'.
<b>Executive</b>	A civil service that represents the diversity of South Sudan can build national unity by bringing people from different communities to work together. Provisions relating to civil service recruitment can help ensure equal opportunities as well as representativeness.
<b>Legislative branch</b>	Legislatures sometimes make decisions that disproportionately affect particular minorities. Constitutional provisions could ensure these decisions do not harm minority groups. For example, voting on particular decisions might require a 'qualified majority', such as a majority of votes in both the group affected and the overall legislature.
<b>Public participation</b>	Constitutional provisions can help ensure that people of different cultures, religions, and languages can participate equally, for example by making it compulsory to disseminate information about government decisions in different languages and in ways that reach remote communities. Special participation mechanisms can engage groups whose voices may need special consideration, such as youth and women.
<b>Traditional and customary arrangements</b>	Traditional and customary arrangements include a rich diversity of practices, for example different types of chiefdoms and kingdoms. The constitution can protect that diversity by creating flexible arrangements that enable all forms of traditional authorities to engage with government, as well as by building in safeguards to ensure the participation of women.

## IV. Conclusion

Constitutional review is a unique moment for statebuilding and peacebuilding, an opportunity to resolve divisions, and a chance to strengthen national unity. This note has highlighted how different governance areas in the constitution are interlinked in important ways, and offered ideas on how reviewing the constitution can build reconciliation among people's diverse interests to establish sustainable peace. By making coherent choices across the six different Strands of governance, people can weave a rope that will support a peaceful and harmonious future for all South Sudanese.



A strong constitution that can uphold peace and unity will be a cause for South Sudanese to celebrate!

For a broader discussion of the issues in this note, and other processes in South Sudan for governance and peacebuilding, see Conflict Dynamics' Briefing Paper 'Building the House of Governance: Political Accommodation in South Sudan' (May 2012) and its accompanying Technical Supplement. These are accessible at [www.cdint.org](http://www.cdint.org).

## About Conflict Dynamics International - South Sudan

Conflict Dynamics International is an independent, non-governmental organization that specializes in mediation support, post-conflict governance, and humanitarian policy development. The organization works to develop innovative technical options for peacemaking and peacebuilding in transition contexts through a process of applied research, and an inclusive methodology of iterative consultations and impartial engagement. Founded in 2004, Conflict Dynamics International works to fulfill its mission across three program areas: (I) Peacebuilding in Transition States, (II) New Frontiers in Humanitarian Policy, and (III) Pressure Points for Conflict Prevention and Resolution.

Conflict Dynamics International - South Sudan seeks to support the building of a peaceful nation, and the prevention of a return to conflict, through the evolution of inclusive governance arrangements by the people of the Republic of South Sudan at both national and sub-national levels. The program of work has four areas of focus:

1. **National dialogue on policies to support political accommodation**, supporting the people of South Sudan to agree and adopt inclusive governance frameworks to accommodate the aspirations of all communities, including through the permanent constitution, arrangements for decentralization, electoral systems and interlinkages with traditional and customary governance.
2. **Political accommodation and peacebuilding at the subnational level**, addressing governance challenges at the sub-national level which have led to, or could potentially be a cause of, internal conflicts, thereby contributing to lasting peace.
3. **Gender as a key dimension of effective political accommodation**, supporting approaches to enhance the inclusion and accommodation of women and their specific interests in governance arrangements.
4. **Strengthened national capacities for political accommodation**, supporting South Sudanese academic, civil society and government institutions to use the tools of political accommodation.

This note is part of a series of publications on governance and peacebuilding issued by Conflict Dynamics International. Other publications on South Sudan include:

- *Building the House of Governance in Jonglei State* (October 2012)
- *Building the House of Governance: Political Accommodation in South Sudan and accompanying Technical Supplement* (May 2012)
- *Electoral System Design and Political Accommodation in the Republic of South Sudan* (March 2012)
- *Envisioning the Future: Options for Political Accommodation between North and South Sudan following the Referendum* (September 2010)

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