

Issues Regarding the Design of Sudan's Federalism in Light of the Juba Agreement

The Juba Agreement for Peace in Sudan is a major accomplishment in the country's search for a democratic, just and peaceful future. The Agreement states that Sudan is a federal state and it contains many provisions relating to an eventual new federal constitution. Federalism is in many ways the appropriate constitutional structure for a democratic Sudan, given its large territory and regionally diverse population. That said, making federalism work can be a challenge, especially in a post-conflict environment where enmities may linger and there is not a strong sense of shared nationality. The country will continue to need the political will and preparedness to work together that has made the Juba Agreement possible.

The Juba Agreement provides for a Governance Conference and a Constitutional Conference and the former may take place as early as the autumn of 2021. These conferences will need to consider many issues regarding the longer-term governance of the country that are not directly related to its new federal structure. This paper is focused on the provisions in the Agreement that relate to this eventual federal structure, but it also raises several issues of importance to a federal design that have not been dealt with in the Juba Agreement. It is hoped that this may provide useful background to the Governance and Constitutional Conferences. The paper does not discuss the Agreement's many provisions relating to transitional governance and security arrangements as well as steps towards the drafting of a new constitution, except to the extent that they may be relevant to the eventual longer-term constitutional arrangements in the country. It discusses the following major issues:

- Federal units—the structure of states/regions
- Distribution of powers to states/regions and federal government
- Revenue powers and revenue sharing
- National capital
- Asymmetry—potential differences in the powers assigned to states/regions
- National legislature and executive
- Judiciary and dispute resolution
- National Commissions
- Constitutional ratification and amendment

Each of these issues is complex and could merit a separate paper of analysis and options. This purpose of this paper is to draw attention to each issue in a general way and give a very broad sense of options related to it.

Federal Units

Critical issues in any federal design are the nature and number of federal units, as well as the number of levels of government. Federations are normally based on two constitutionalized tiers of government—federal and state—though some federations also establish the municipal or local level of government with its own powers. Sudan currently has six “regions” and 18 “states” as territorial divisions, but despite frequent reference to “regions/states” in the Juba agreement it is unclear what this distinction might mean in constitutional terms. Title One of the Juba Agreement refers to establishing a “regional system of governance”, but elsewhere there are frequent references to region/state governments. The Eastern and Northern Track agreements make explicit reference to three levels of governance: federal, region/state and local and this appears to be the intent in other agreements as well—at least in terms of the federal constitution. The Darfur agreement, for example, explicitly envisages a regional federalism and the regional government is given exclusive competency over “local governance”. The Two Areas agreement, by contrast, provides that “the two Parties shall agree on the nature of the governance system in the Two Areas”—presumably mainly whether one region or two states—and it states that West Kordofan will remain a separate state “until the issue of the borders of South Kordofan State/Nuba Mountains and West Kordofan is resolved. It is envisaged that these three areas may form one region or West Kordofan may remain a stand-alone state. However, the section on governance structures refers to the “states/regions” of Blue Nile, South Kordofan, Nuba Mountain and West Kordofan and envisages each having a legislature and executive “in their current status”, which may be seen as a transitional arrangement.

Thus it would appear that in Darfur it is decided there will be a regional government, which likely will have sub-units with the region, whereas in the rest of the country the option is open for regional or state governments but presumably not both (though regional governments could opt for some arrangements at the state level). The key issue will be to determine for each territory, whether there is to be a regional or state government. This is more an issue of boundaries than of powers. Regions and states could have the same powers.

Sudan has about 42 million people and its states range in population from about one million (Northern) to about 8 million (Khartoum), while the regions range from about 2.5 million (Northern) to over 10 million (Darfur). Thus Sudan could have a federation made up of one region (Darfur) and 15 states or of six regions or of some other combination of regions and states. Resolving this structure of federal units will be important. Based on comparative experience, any of these possible arrangements could prove workable—many federations have a mix of large and small federal units, but there may be issues of capacity in smaller states if very extensive powers are devolved. In the Two Areas, the powers to be assigned to state or regional governments would appear to be the same, so the choice of federal units need not affect the extent of devolution. The choice of federal units could also influence the composition of the second chamber of the legislature, should there be one.

There will need to be a process or processes to decide on the choice of federal units—states or regions—in different parts of the country. Spain adopted a common process for consolidating its former provinces into larger autonomous communities—there were criteria, local government officials collectively decided, and any province that did not join a larger unit according to the criteria would not receive the new devolved powers (none did). In almost all federations, the constituent federal units are called the same thing (state, province, community, region, etc.) so once the decisions are made regarding the number and composition of the constituent units in Sudan's federalism, it may be logical to use a common appellation unless the distinction had substantive meaning.

Distribution of powers

Federations vary considerably in the extent and nature of their devolution of powers. Some federations are highly decentralized, while others are not. Some emphasize the separation of the powers of the federal versus the state governments with limited overlap, while others favour extensive shared or concurrent powers—with the states in the latter case often administering many federal laws. The Darfur and Two Areas agreements both set out divisions of powers for the federal arrangements affecting those regions, while the agreements for the other tracks do not. As mentioned above, federations normally assign the same powers to all the federal units, but there is no hard-and-fast law requiring this—there can be some measure of

asymmetry. So a logical starting point is to compare the divisions of powers envisaged in the Darfur and Two Areas agreements with a view to establishing their similarity or differences. Such a review could serve for a consideration of what arrangements might apply elsewhere in the country.

Two Areas Agreement

The Two Areas agreement lists exclusive powers of the state/region government, concurrent powers of the federal and state/region governments and exclusive powers of the federal government. For the federal government list, the 41 items are presented as “exclusive executive and legislative powers” and then each subject—such as defense, foreign affairs, passports, migration, etc.—is given without a verb or any policy objectives. By contrast, the 61 exclusive powers on the state/region list are not presented as “exclusive executive and legislative powers” but simply as “powers”. These powers take several different forms. Many start with a verb infinitive (e.g., to exercise, to establish, to address, to plan, to enforce), which in some cases may not actually require constitutional authority (e.g. to enforce state laws or to plan development). Some “powers” cross-reference other provisions in the Agreement (e.g., power and wealth sharing); some are full sentences that seem unrelated to powers (e.g. 9.5 on positive discrimination “is (a means) to remedy grievances”); some set objectives, e.g. “9.37 To protect traditions and customary law”; one relates to residents of the Two Areas (9.9 on rewriting history), not government; only eight take the form of a simple identification of a subject (“9.20 Mass media, prints, publications and different media outlets in the state/region”, “9.25 Cultural affairs within the state region” and 9.41 recreation and sports, 9.44 socio-economic development, 9.46 vocational and professional training, 9.48 trade, industry, 9.52 state/regional media, and 9.61 forestry). Many of these “exclusive” powers include provisions that require cooperation with the federal government (“in coordination with federal authorities” or in accordance with federal regulations) and so might better be listed as concurrent powers (e.g. 9.34 environmental policy 9.58 investment contracts and 9.54 international and regional agreements re education, culture and sports etc., 9.42 licensing small firearms). Some of exclusive powers are also listed as concurrent powers. There are several cases of the same or closely related issues being referred to more than once (e.g. media in 9.20 and 9.52; health services in 9.13 and 9.47; languages 9.7 and 9.8; culture 9.10, 9.25 and 9.36). Finally, there are items that deal with transitional

arrangements that would likely not be included in the eventual constitution (e.g. transitional justice, reparations 9.6)

The Two Areas concurrent list has 28 items. They are not described as executive or legislative powers but simply as concurrent powers. Many are straightforward subject matters (e.g. telecommunications, natural resources, banking, transboundary waters of the state/region) but as with the exclusive powers there are also full sentences (e.g. 10.7 on addressing land issues) and statements of objectives (e.g. 10.11 immediate resolution of borders and confiscated lands).

A few items appear in both the exclusive and concurrent power lists: socio-economic development, census, and land, with the latter being the most significant.

This review suggests there are several drafting issues associated with the allocation of powers in the Two Areas Agreement, which if addressed could bring greater clarity and simplicity. Some items do not belong in a list of powers in a constitution, but might be included elsewhere. Normally, powers in a constitution are listed as subjects (defence, education) without verb infinitives or purposes or comment.

Darfur Agreement

The Darfur Agreement has a list of executive and legislative powers for the regional government and a list of concurrent executive and legislative powers for the federal and regional governments. It has no list of exclusive federal powers, but assigns “residual powers” to the federal or regional governments or both together depending on their nature. The list of exclusive regional powers has 28 items while the concurrent powers list has 33 items (compared with 61 and 41 respectively in the Two Areas Agreement). As in the Two Areas Agreement, there is a marked difference in style and approach between the different lists: all the items on the regional exclusive list start with a verb infinitive (to regulate, to provide, to manage etc.), while almost all the items on the concurrent list are simple subject matters (e.g. police and prisons, health policies, banking, insurance, cross-border trade).

The absence of a list of exclusive federal powers is striking. In all modern federal constitutions these powers are set out quite extensively and it is hard

to imagine that Sudan will adopt a constitution without a statement of federal powers. The Darfur Agreement's would make federal *legislative* powers dependent on the residual powers clause (32) and assign powers of a "federal nature" to the federal government. This could result in great uncertainty and dispute. By contrast, the Darfur Agreement deals with, federal *revenue* powers separately and is explicit as to what they are.

The Darfur Agreement (33) sets out criteria for resolving disputes related to concurrent powers, something on which the Two Areas Agreement is silent. Of course, there can be other disputes related to the allocation of powers, but both agreements are silent on how these might be resolved. These issues are discussed in the section on dispute resolution below.

As with the Two Areas agreement, Darfur Agreement has a few items on both the exclusive and concurrent lists, e.g. reconstruction, urban development.

Comparing the Allocations of Powers in the two Agreements

The Two Areas Agreement provides for the "principle of coordination between agreements", while also stating that the provisions and texts are binding. The Darfur Agreement provides for the Conference on the System of Governance to define the competencies, authorities and powers in Darfur region provided that it makes no amendment to these powers "except by adding to them". These provisions locking in powers will make any future coordination very challenging, especially given that there are significant substantive differences between the two agreements.

The Two Areas Agreement (TAA) and Darfur Agreement (DA) differ significantly on the following powers:

- Health, education and welfare, environmental policy, and most economic or commercial policy (trade, agriculture and industry) are exclusive state/region powers in the TAA, but 93-96 provides for both parties to be engaged on the environment. These are largely concurrent powers in the DA and there is extensive discussion of educational institutions in the DA (29). The DA makes "planning health and welfare services" exclusive to the region, but presumably within a context a federal framework policy. Paragraphs 14.2 and 26 in Title 1

appear to envisage major responsibilities on the environment and education for the federal government.

- The state/region constitution and civil service, local government, local languages, local culture and heritage, regional transportation infrastructure, marriage and divorce, local media, are exclusive state/region powers in both the TAA and DA.
- Banking, natural resources, telecommunications, socio-economic development, regional police and prisons, wildlife and civil defense are concurrent in both the TAA and DA.
- Fisheries and forestry are state/region exclusive powers in the TAA but not mentioned in the DA, where they might fall under natural resources, which is a concurrent power.
- Electricity generation, insurance, women and gender issue, pastures, consumer safety, immigration and foreigner and child care are concurrent powers in the DA but not mentioned in any list in the TAA, though they might fall under other headings.
- There are omissions in both agreements, e.g. neither mentions post-secondary education, which is frequently a separate heading in modern federal constitutions.

This brief review suggests there will be important work in doing a detailed comparison of the two agreements and in consideration regarding the extent to which they might be clarified and coordinated.

The Two Areas Agreement clearly devolves significantly more powers than the Darfur Agreement. It appears largely to exclude the federal government from social and educational policy and environmental policy (though 14.2 of Title 1 appears to give the federal government a major role on the environment) and from much of economic and commercial policy (unless a very wide reading is granted to the concurrent power for socio-economic development). At the same time, the absence of a list of exclusive federal powers in the Darfur Agreement could have major consequences in limiting them. The list of concurrent powers in the Darfur Agreement, with its sharing of social, economic and environmental policies, is consistent with modern federal constitutions in other countries. The Darfur Agreement, with clarification (including a list of federal exclusive powers) and some modification, could serve as a basic reference for devolution to other states/regions in Sudan, while the Two Areas Agreement may be too radical in its

devolution to serve for a whole federation. One option might be for the Two Areas to have an asymmetric situation of extra powers within the federation.

There are critical issues regarding the resolution of potential disputes over which government has paramountcy when federal and state/region legislation in an area of concurrent powers conflicts and when the federal government's residual powers (especially in the Darfur Agreement) may be an issue. These issues are discussed separately below.

Revenue powers and revenue sharing

Sudan is going through an economic and fiscal crisis, which is important context for reviewing provisions in the Juba Agreement relating to fiscal federalism and revenue sharing. Because of its dependence on oil revenues, Sudan prior to 2005 failed to build an adequate revenue base and since South Sudan's separation the new Sudan has been collecting as little as 3 percent of GDP in taxes. At 12 percent of GDP its subsidies for fuel were larger than all government revenues. There are significant off-budget revenues and accounts, notably within the control of the military that are not transparent or subject to legislative authority. The transitional government has been engaged in fundamental transformations of government revenues and expenditures: it has slashed fuel subsidies and is committed to eliminating them, while introducing a family supplement scheme that is the beginnings of a social safety net and provides some offset to the impact of ending fuel subsidies. The government has also introduced fundamental reforms to the tax regime that should permit higher collections from corporations. There is to be a new personal income tax. These measures are expected to permit a significant increase in government revenues and expenditures and have opened the way for major debt forgiveness by international lenders with prospects of greater foreign aid and investment. The government has made significant progress with its financial reporting, but there are still significant weaknesses related to off-budget accounts, civilian oversight of the military and intelligence budgets, transparency of natural resource contracts and in the powers and capacity of the National Audit Chamber. Progress on these reforms will be fundamental for economic growth and better government programming in Sudan. Both the Darfur and Two Areas agreements have extensive provisions on fiscal and revenue sharing issues but they seem detached from recent fiscal and economic developments.

Fiscal and Revenue Sharing Provisions in the Darfur Agreement

The Darfur Agreement states that the federal government will have the authority to generate revenues from “all sources of wealth in the country” (12.1)—in other words, it will have a general power of taxation. However, the Darfur Agreement lists twenty-three sources of revenue for the region/ states are described as “exclusive”, which suggests that what is exclusive is the revenues the states/region would derive from these taxes as levied in their areas. The so-called exclusive revenues also include the region/states *share* of locally generated oil revenues, which is different from the total of these revenues. Personal and corporate income taxes are modified as states/ regional taxes, though this presumably would not conflict with the federal government’s general power of taxation. Many federations permit both orders of government to impose the same kinds of taxes on the same objects, so as long as a taxing power is not “exclusive”, it can be assigned to both orders of government. Of course, this can pose issues of tax competition between the two orders of government.

There is to be a national revenue fund into which all national revenues will be deposited (13). Forty percent of oil and mineral revenues generated in Darfur are to be allocated to the region, which in turn will allocate 3% of the revenues (from the 40 percent?) for “local population in areas from which the resource has been extracted” (25). There is to be a National Commission for the Division, Allocation, and Monitoring of Financial Resources, whose chair will be appointed by the Prime Minister and whose members shall equitably represent the regions/states. It appears the Commission would have the power to decide on revenue allocations, subject to agreed standards for equitable allocation to be incorporated in the law (14), but such a Commission’s mandate could be severely limited by the list of exclusive revenues for Darfur.

Regions/states are to have full discretion over their expenditure of revenues from the national revenue fund or from their own taxes and borrowing.

Fiscal and Revenue Sharing Provisions in the Two Areas Agreement

The agreement identifies “national taxes and improving national income” and “value added tax” as exclusive federal powers (11). It then lists 16 sources of revenue for which the state/region government may legislate,

including several taxes and fees, as well as foreign grants, borrowing and the state/region share of “central support”.

There are special revenue sharing provisions for ten years: the state/region government is to receive 40 percent of revenues from natural resources and taxes levied in the region with 60 percent going to the federal government. (16) In addition, based on national standards and positive discrimination, the federal government shall pay the state/region government its allocation for national resources and foreign aid (21). The Two Areas is to participate “in managing the Revenue and Monitoring Commission”. (23)

The state/region government is to abide by approved accounting standards and its revenues shall be deposited public accounts subject to auditing and review (15).

Fiscal and Sharing Provisions in the Two Agreements Compared

The taxing powers in the two agreements are largely consistent, both in the revenue powers of the federal government being effectively unlimited and in the list of region/state revenue powers. One notable exception is that the Two Areas Agreement includes the right to levy a sales tax, which the Darfur Agreement does not; however, sales taxes are largely inconsistent with a value added tax, which the TAA gives as an exclusive federal power. This could be resolved by prohibiting a sales tax on anything that is subject to the VAT. Many federations give wide and overlapping taxing powers to the two orders of government, so for the most part the taxing provision in the two agreements should be workable. In practice, it is highly likely that the federal government will collect the largest share of revenues and the states/regions will get most of their revenues from the federal level.

The two agreements do not address off-budget accounts, which appear to be a major, unaccountable source of revenue in the system. These include state owned enterprises, some of which are directly under the military and intelligence establishments.

The Darfur provision for a National Revenue Fund is good practice in many federations. It would serve as an account for all governments holding revenues “to be shared” and not be part of the federal budget. Transfers from such accounts to states are normally unconditional, but there is a question as to whether the federal government would be prohibited from

making conditional transfers to the states/regions from its own budgetary resources. Federations that have unconditional revenue sharing out of the national revenue fund normally do not prohibit transfers from the federal budget for particular purposes.

Both the Darfur and Two Areas agreements envisage a national revenue sharing commission, as does Title 1 of the Juba Agreement. Several federations have revenue sharing commissions. They are normally most effective if they are largely technocratic and independent. Models include a standing body (Australia) or periodic special commissions (India). The Nigerian model with a standing body and representation of all the states has proven ineffective and its recommendations have largely been ignored. Title 1 provides that the commission will be chaired by a nominee of the Prime Minister who is “independent” while the law “shall ensure fair representation of the regions/states therein”. A key issue will be whether the region/state representation will be “independent” experts, whether the federal government or both orders of government name members of the commission, how large the commission will be, its decision-making procedures and whether the federal government is obliged to accept its decisions. Such arrangements usually give some final word to the federal government, which has overall responsibility for managing the economy, but the more technical commissions have generally found their decisions to be accepted.

The two agreements would have allocations made “equitably” and Title 1 “fairly”, but it is not stated whether the 40 percent share of resource revenues (and in Two Areas of all taxes collected by the federal government in the region/states) would affect the equitable share of these regions/states. In Nigeria, when oil prices are high, the oil producing states have had several times the fiscal revenues per capita of non-oil producing states, partly because they receive both their special share of oil revenues and their share of general revenues on the same basis as other states, with no consideration of their oil revenues. In Australia, by contrast, the general transfers take account of states’ resource revenues, so there is an offset. The major issue here is whether there are to be limits on the financial disparities between richer and poorer regions/states.

Auditing arrangements at the federal and region/state levels

The provisions in the Two Areas agreement about auditing raise larger issues about institutional arrangements. In some federations, such as India and South Africa, there is an independent audit office that audits federal and state government accounts, submitting its reports to the respective legislatures and executives. A strong audit office can be a major help in promoting transparency and combatting corruption, so this deserves further consideration. In some other federations, each jurisdiction has its own audit office, reporting to the legislature, but this has sometimes proven problematic when corruption is an issue.

National Capital

The National Capital is the subject of a separate section of Title One of the Juba Agreement. It states that an administration for the national capital shall be established, taking into consideration the fair representation of Sudanese people: as may be decided by the System of Governance Conference. There is to be a balance between Khartoum's status as a capital and as a region/state, with its residents to have effective participation in state-level agencies and other executive and legislative positions; in addition, "the peace process parties" are to participate in the institutions of national capital administration. There is to be an economic, social and cultural plan to address the many challenges of the capital.

National capitals in federations have a variety of statuses. Berlin is a province like others. Washington, Delhi and Canberra are in federal districts, with elected governments that are legally under the federal government. Ottawa is a city in a large province. Federal governments always have an interest in the development and functioning of the national capital, but they recognize that local residents have a right to a measure of self-government. Thus Khartoum could be a regional or state, but subject to some federal laws specific to the national capital.

The Juba Agreement provides for the peace process parties to participate in the administration of Khartoum, without explaining how this would be done. It may be a transitional arrangement. Once the federation is constitutionally established, there will be an elected parliament and executive, which would normally have a role in relation to the national capital, while the constituent units of the federation would not. Presumably the peace process parties would cease to have a role once the federation is constitutionally established: the Juba Agreement calls for a "fair representation of the Sudanese people"

in the administration of the capital. Would an elected parliament and executive provide this representation or might some additional arrangements be sought?

Asymmetry

Federations generally assign the same powers to all federal units. “Asymmetrical” federalism, in which some units have greater constitutional powers than others, is rare. The most dramatic example of asymmetry is in the United Kingdom, which is not a federation: Scotland, Wales and Northern Ireland all have devolved powers, which vary, but there is no separate government or legislature for England. This highly asymmetric arrangement has posed an issue at the centre: should members of Parliament from the devolved regions be able to vote on laws that will apply to England but not to their own regions. Some have argued for “English votes on English laws” but it has proven impossible to achieve this given the nature of responsible government in the UK. (This might be more manageable in a Presidential-Congressional regime, but even there it would pose issues.) When Spain transitioned to federalism, it was initially thought that the regions of the “historic nationalities”, such as the Catalans, would have greater powers than the others, but politically all regions wanted whatever the historic nationalities received. There are less dramatic cases of asymmetry, usually in largely unitary countries, in which regions with very small populations (one or two percent of the country) have special arrangements and this seems not to upset the institutional balance in central institutions.

It is not clear whether the new federal system in Sudan will be asymmetric. The Two Areas agreement suggests that the powers of a regional or state government would be the same, depending on whether the Two Areas remain as two states or become a region. However, as discussed above, the division of powers in the Darfur and Two Areas agreements are very different, with the Two Areas Agreement providing for substantially more devolution. So one possibility for Sudan would be a federation in which the Two Areas—whether as a region or two states—have greater powers than other regions/states. With a population of about 8 percent of the country (similar to Scotland in the UK), this could pose issues regarding the role of elected representatives from the Two Areas in voting on legislation that would not apply to the Two Areas. If the Two Areas did have more powers than other states/regions, the allocation of powers to other states/regions

could be based on the Darfur agreement, which would give some consistency across the country (though with the possibility of some special arrangements for the National Capital). There could even be a third group of states/regions, with less devolution than the Two Areas or Darfur. There is no allocation of powers in the agreements of the North, South and East tracks. The East track agreement identifies many undertakings of the federal government and some areas of joint action, but has no reference to exclusive state/regional powers. The Northern track agreement provides for the current system to continue in the two states/region “until the administrative division, the distribution of power and competencies between the levels of governance are revised.” The Central track agreement is silent on issues of governance. So a significant issue is whether the parts of the country other than Darfur and the Two Areas will opt for similar powers and responsibilities with the new federal regime. However, the more that different states/regions have different powers, the more the federal structure could experience the Spanish phenomenon whereby the states/regions with fewer powers push to have the same treatment as those with maximum devolution. A highly varied system in the distribution of powers could also complicate the functioning and legitimacy of central institutions.

National Legislature and Executive

Title One of the Juba Agreement has numerical provisions regarding the representation of the peace process parties in the Sovereign Council, the Council of Ministers and the Legislative Council during the transitional period. However, all it states regarding representation in the post-transition period, once a new constitution is in place, is that the regions “shall be represented in federal and legislative institutions of power in proportion to their population size to ensure just power sharing” (1.29). Presumably, once elections are held the peace process parties will be replaced by elected representatives in the new federal institutions.

The Darfur, Two Areas and other track agreements do not elaborate on the nature or composition of the national legislature and executive, which may seem surprising given the emphasis on power-sharing in the agreements. The design of the national legislature and executive are critical issues for any federation. Is there to be parliamentary-cabinet government or presidential-congressional government? Will there be two legislative chambers and, if so, what will be the composition and powers of the second chamber? These questions are linked: in parliamentary regimes the

formation of the government depends on the confidence of the first “popular” chamber, so there are limits to the powers of the second “state/regional” chamber, e.g. over the budget. By contrast, in presidential-congressional regimes, the second chamber may have equal or greater powers than the “popular” chamber, e.g. with authority over treaties and senior appointments. The composition of second chambers also varies across federations: all states may have the same number of representatives regardless of population or there may be some weighting by population; the second-chamber representatives are usually elected on a state-wide basis, but in some federations they are not elected by the population but are representatives of the state governments (Germany) or state governments and legislatures (South Africa). In a presidential-congressional regime, the president is popularly elected and has significant powers, whereas in a classic parliamentary regime the president normally has few powers and may be indirectly elected by the parliament (though some federations have a mixed regime with an empowered president and a prime minister who commands the support of the popular chamber; this can lead to divided government if the president and prime minister are political adversaries). Choices between these alternatives will have a major influence on the nature of Sudan’s federalism and so they will need careful consideration at the Governance and Constitutional Conferences.

There is frequent reference to power sharing in the Juba Agreement. Frequently this means the sharing out of power between the federal and region/state governments, but it also includes the provisions for the peace parties to be represented within the transitional institutions. There are no provisions for power-sharing within the national executive in the Juba Agreement with the exceptions for calls for the civil service to be regionally representative. This could mean that after elections under the new constitution that majoritarian government will apply. However, there are federations, Belgium and Switzerland, that have constitutionally based power-sharing within the national executive: this option, which increases the number of actors with vetoes on key decisions, is difficult to operate but can mitigate some aspects of political polarization or marginalization. In South Africa, there was power-sharing during the transition to democracy, but after that minorities were protected by devolution and constitutional protected rights.

Judiciary and dispute resolution

An independent, professional judiciary is important in any democracy, but the judiciary can play an especially important role in federations, when disputes may arise as to the powers of the federal versus region/state governments. In some federations a constitutional court is the ultimate arbiter, while in others the apex court considers both constitutional and non-constitutional matters. Title 1 of the Juba Agreement refers to the importance of reforming Sudan's justice system, without elaborating (11). The Darfur Agreement parties agreed to institutional reforms in the judiciary, including increased representation of women, and provided for an independent committee of the Supreme Judicial Council to consider accommodating men and women from Darfur in the judiciary and establishing percentages for this (27). The Two Areas agreement provides for the establishment of a judicial authority in the state/region, which would manage the judiciary, and sets out a structure of courts in the state/region: circuits of the Supreme Court, Court of Appeals, General courts, District courts, and other courts created by the Chief Justice or head of the judiciary (44-45). However, none of the agreements set out court structures, composition or functions at the federal level. In most federations, the court system is partly established within the Constitution and partly by law. A key issue is whether there is to be a separate Constitutional Court to deal with constitutional issues or whether there will be one Supreme Court for all matters. Both models can work well.

Dispute Resolution

A key issue will be the role of the courts as arbiters of federal disputes, but this is not discussed in the Juba Agreement. There can be disputes when the federal government claims to be able to legislate on a matter given its exclusive powers while a state/region government might contest this and say that its exclusive powers preclude the federal legislation. Moreover, the Juba Agreement sets up particular issues regarding disputes over residual and concurrent powers.

The Two Areas and Darfur agreements state that residual powers shall be exercised according to their nature, e.g. whether their nature is national, state/regional or joint (TAA 12, DA 32). In most federations residual powers are assigned clearly to either the federal or state/region level. Residual powers are less important when there are extensive lists setting out the powers of the two orders of government, but given the absence of a list of federal exclusive powers from the Darfur Agreement, the interpretation of

residual powers would be critical in this case. But the Darfur Agreement does not indicate how disputes over residual powers will be resolved: by a Constitutional Court or in some other way?

The Darfur Agreement does have a separate clause on resolving disputes related to concurrent powers (33), e.g. when there is conflict between the provisions of a federal versus a state/region law in an area of concurrency. In most federations, in such cases the federal law prevails. The Darfur Agreement provides that “the law that shall prevail is that which most effectively deals with the subject matter”, given national sovereignty and regional autonomy, the need for national standards and norms, the principle of subsidiarity, and the need to promote the welfare of the people, along with human rights. These criteria would prove difficult and contentious to apply, especially given that it is not stated who would have the authority to resolve the dispute. Normally it would be the Constitutional or Supreme Court.

Human Rights

Another area where courts have played a fundamental role in federations is in the interpretation of constitutionally established human rights. These rights can be a constraint on the actions of federal, region/state and local governments. Title 1 of the Juba Agreement states that “The bill of rights enshrined in the Constitutional Charter constitutes a social contract among all Sudanese people.” It includes these rights as part of the Agreement along with all rights and freedom provided for in international and regional human rights agreements, covenants and charters ratified by Sudan. The Bill of Rights and Freedoms in the Constitutional Charter sets out four pages of very comprehensive rights, including social rights such as the right to education and health, which pose obligations on governments. Disputes could arise around government actions in relation to many rights: for example, the Bill of Rights “guarantees freedom of the press”, while the Two Areas Agreements gives the state/region the exclusive power over “media”. Will the Constitutional Court be empowered to adjudicate such disputes? Might there be a Human Rights Commission with some powers to adjudicate?

National Commissions

Modern constitutions in federal or devolved countries often institutionalize various commissions that are to be part of the continuing structure of the

state. Thus in Kenya, for example, the constitution establishes commissions to deal with human rights and equality, land, elections and electoral boundaries, revenue allocation, the public service, police, and teachers services; it also has a clause dealing with commissions in general. The Juba Agreement contains references to many commissions: some are in Title 1, while others appear in the Darfur and Two Areas agreements. A number of these have to do with transitional issues so there is a question whether they would continue once the new Constitution is in place and, if so, whether they would be constitutionalized or dealt with in statute law. It might be preferable for commissions with a finite life to be dealt with through law. Similarly, the establishment of regional or state commissions would best be assigned to region/state governments or legislatures.

Title 1 calls for a Transitional Justice Commission, a Peace Commission and a Commission of Resources and Financial Revenue Sharing and Allocation. The Darfur Agreement refers to commissions on civil service reform, reconstruction and development in Darfur, internally displaced persons and refugees, the development of nomads and herders, borders, and security arrangements; there are to be national and Darfur lands commissions and national and regional DDR commissions. The Two Areas Agreement refers to national commissions for civil service reform, IDPs and refugees, transitional justice and reconciliation, religious freedoms, the development of nomads, herders and farmers and religious freedoms, land and DDR, as well as to regional commissions for lands and DDR. In some cases, the mandates of these commissions are given at some length, but in others not at all. The composition of the commissions is never fully set out, though in some cases there is explicit mention of the representation of the region/state on the commission. While membership of commissions in federations is often designed to have elements of regional balance, the federal government is given responsibility for nominating members, which may require ratification by one or both houses of the legislature.

Of those mentioned in the Juba Agreement, the strongest possibilities for constitutionalized national commissions would appear to be those for revenue allocation, lands, civil service, borders, and perhaps nomads and herders. There are also strong cases for a national electoral commission, which would recommend electoral law and electoral boundaries, and conduct national and regional/state elections and for a human rights commission (which would include a mandate for religious freedom). Consideration should also be given to a police commission. Some

federations have anti-corruption commissions; these can be useful but their role needs to be considered in relation to that of the Public Prosecutor and whether it extends to the states/regions as well as the national level

Constitutional Ratification and Amendment

The Juba Agreement has no provision for how the new federal constitution shall be approved. Presumably it would be approved by the national constitutional conference, but neither the composition of this conference nor its voting procedures are discussed. The approval of the new constitution may or may not be according to the rules that will be established for amending the constitution.

Constitutional amendment rules almost always have a higher threshold than the simple majority rules for passing laws, especially for major provisions affecting the interests of the federal and state/region governments. These rules may be for a super majority in the legislature (e.g. 60 percent or two-thirds in both houses). There may be a requirement for a certain majority of state legislatures to approve changes, at least on some subjects. There may be a requirement for a national referendum, again depending on the change proposed. The amendment rules can be different for different parts of the constitution—and in a few federations there are provisions that cannot be amended, e.g. the democratic character of the regime. So there will need to be decisions as to how the System of Governance and Constitutional Conferences will be composed and make decisions. In due course, the Constitutional Conference will need to decide on the amendment rules.

Conclusion

This paper has provided a brief overview of the federalism provisions of the Juba Agreement as well of other design issues for Sudan's federalism that will need to be resolved. It draws on comparative experience. There is no one best way to design a federation and every country must work through arrangements that seem to accord with its character and needs and to have the possibility of functioning reasonably well. The Juba Agreement provides a fundamental starting point, but it gives rise to important questions of interpretation and overall design. The undertaking to coordinate the various agreements could be seriously constrained by the apparent locking-in of certain provisions, notably regarding the distribution of powers. Moreover, the Juba Agreement is silent on several key issues regarding the central

institutions and rules of the new federation. This is perhaps not surprising given that the focus of the peace agreements has been on region/state issues and powers, but it means there are significant design issues where the System of Governance and Constitutional Conferences will have wide latitude.

George Anderson