BUILDING THE HOUSE OF GOVERNANCE

POLITICAL ACCOMMODATION IN SOUTH SUDAN

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Executive summary

The independence of South Sudan on July 9, 2011 launched a period of remarkable transition. In this time of opportunity and change, the South Sudanese people face the momentous task of building a new State and unifying their nation. Essential to a peaceful transition will be arrangements that can effectively accommodate diverse political interests and perspectives.

The South Sudanese people share a common history together with richly diverse traditions and interests. To build *political accommodation* is to give every member of South Sudanese society a secure place in the "house of governance." This Briefing Paper is for South Sudanese who wish to engage in discussions about their common future, and serves two functions: it offers a technical approach to derive arrangements for political accommodation; and it presents a spectrum of possible viewpoints to stimulate discussion about how governance arrangements can bring diverse interests into public life.

> " The term *political accommodation* encompasses the objectives, processes, or outcomes of *mutual conciliation* around competing political interests and perspectives. "

Why political accommodation matters

While political accommodation can be a worthy objective in any political system, **Section 1.2** shows how political accommodation has particular importance for transitioning States like South Sudan by providing a framework to guide choices for developing a system that can effectively reconcile diverse political interests. This approach can prevent and mitigate violent conflict by ensuring that potential belligerents have incentives to engage in political dialogue. In addition, it provides a voice for groups which were previously marginalized or excluded from political and socio-economic opportunities. Therefore, political accommodation establishes a "safety net" such that minority parties have the security of political avenues to pursue their interests. In all these ways, political accommodation can build trust and sustain promising conditions for the consolidation of the new State and unity of the nation.

Structured approach to political accommodation

Conflict Dynamics has developed a typology of six Strands which underpin arrangements for political accommodation. These Strands function as focal areas in which to explore prospects for political accommodation and develop options. While focusing on a single Strand can enhance mutual conciliation, the typology offers a tool to weave the Strands into a "rope" with greater strength to bring together plural interests. The six Strands, described in **Section 2.1**, are:

1. Political structure and decentralization
2. Electoral system
3. Executive
4. Legislative branch
5. Public participation
6. Traditional and customary arrangements

Based on this typology, the Briefing Paper presents a process for developing governance arrangements which can support political accommodation, referred to as "options." This process involves repeated consultations with key actors in South Sudan and follows five stages:

STAGE	BRIEFING PAPER SECTION
1. Assessment of **prospects for political accommodation** through targeted consultations, alongside a review of existing legal provisions.	3.1
2. Identification of **processes and opportunities** for building political accommodation.	3.2
3. Identification of **considerations for options development** through targeted consultations.	4.1
4. Development of technical building blocks which highlight **opportunity areas** for options design.	4.2
5. Options development, with further refinement and appraisal. This Briefing Paper illustrates this step through **sample options**.	4.3

Prospects for political accommodation

Section 3.1 examines opportunities and shortfalls in the Transitional Constitution of the Republic of South Sudan, 2011 (the "Transitional Constitution") and related legislation for achieving political accommodation. Observations by Strand include the following:

POLITICAL STRUCTURE AND DECENTRALIZATION: While highlighting principles of decentralization and devolution, the Transitional Constitution has centralized some aspects of governance, reinforcing dimensions of economic and political decision making power at the national level.

ELECTORAL SYSTEM: The electoral law, passed as a bill by the National Legislative Assembly on April 11, 2012, preserves many features of the (Republic of the Sudan) National Elections Act 2008, including a mixed system of majoritarian and proportional representation. To the extent that the national constitutional review process may lead to consideration of new or modified governance arrangements, the electoral law may need to be amended in the future to reflect any new governance arrangements. This would offer an opportunity to revisit and enhance provisions which can strengthen political accommodation.

EXECUTIVE: The Transitional Constitution enhances presidential powers in a number of ways, and allows the president to appoint members of the national legislature. The appointments offer an avenue to allocate positions to marginalized groups which governance arrangements otherwise exclude. Appointments may also restrict political accommodation if they strengthen the dominance of one party or group.

LEGISLATIVE BRANCH: On independence, the national legislature split into two chambers: a 332-seat National Legislative Assembly (NLA) including members of the former National Assembly (NA) of the Republic of the Sudan, the Southern Sudan Legislative Assembly (SSLA) and 66 presidential appointees; and a 50-seat Council of States including 30 presidential appointees.

Given that the majority of its members are allied to the Sudan People's Liberation Movement (SPLM), the expanded NLA may limit political accommodation in the Transitional Period.

PUBLIC PARTICIPATION: The Transitional Constitution incorporates broad aspirations for public participation conducive to political accommodation. Several of the provisions remain general, requiring clarification about how they should function in practice.

TRADITIONAL AND CUSTOMARY ARRANGEMENTS: While the Transitional Constitution does not elaborate on the division of competencies between formal government institutions and traditional authorities, the Local Government Act (2009), which made progress in defining these roles and relationships, remains in force. The Act may require further revision to clarify ambiguities, including the division of competencies between traditional authorities and local government institutions.

Processes and opportunities

The Transitional Constitution initiated important processes and opportunities for building political accommodation. **Section 3.2** identifies key milestones including the National Constitutional Review Process and the development of key legislative instruments. The National Constitutional Review Process envisions three sub-processes, each offering entry points for enhancing mutual conciliation: (1) review and public awareness raising by the National Constitutional Review Commission (NCRC); (2) convening of a National Constitutional Conference; and (3) deliberation and adoption of the constitution by the national legislature. Building national consensus through the National Constitutional Conference and holding a national referendum on the final draft of the constitution would both offer important opportunities for enhancing political accommodation.

Considerations for options development

Section 4.1 lays out considerations central to strengthening political accommodation in the Republic of South Sudan. These considerations can be used as a filter to capture the most accommodating options from the large range of possible choices. Considerations include:

i.   Dimensions of the South Sudanese governance experience since independence, as reflected in public opinion surveys.

ii. Considerations relating to demography, and constituencies which require special focus. These include issues related to gender, youth, and religious and ethnic diversity.

iii. Cross-cutting considerations, as identified through consultations with South Sudanese interlocutors.

Opportunity areas across the six Strands

Section 4.2 summarizes opportunity areas for options development, and highlights comparative cases which shed light on methods to address them. The technical approaches and comparative cases are presented in full in the *Technical Supplement* to this Briefing Paper. Opportunity areas include:

POLITICAL STRUCTURE AND DECENTRALIZATION: The desired levels of decentralization and devolution in a federal or unitary State, and the attendant structures required; the nature of representation of subnational political units at the national level; and natural resource sharing arrangements among states, including equalization grants. _Focus case_: Canada

ELECTORAL SYSTEM: Membership of the National Elections Commission; use of multi-seat constituencies and definition of electoral boundaries; and conduct of local government elections. _Focus case_: Kenya

EXECUTIVE: Provisions for double qualification in presidential elections; composition of the Council of Ministers; and constitutional checks on the scope of presidential decrees. _Focus cases_: South Africa and Kenya

LEGISLATIVE BRANCH: Qualified majority voting rules within the legislature; formalized processes for consultation with specific interest groups; and clarification of competency divisions between the two houses. _Focus cases_: Burundi and Northern Ireland

PUBLIC PARTICIPATION: Enhancing participation in the production of legislation; enhancing participation in executive decision making, such as through "parliamentary questions" to the president; provisions for citizen-initiated referenda; and conducting a referendum to endorse the revised constitution. _Focus cases_: South Africa and Switzerland

TRADITIONAL AND CUSTOMARY ARRANGEMENTS: Powers of councils of traditional authority leaders (COTALs), including vetoes, ability to propose legislation, budgetary authority, and administrative powers. _Focus case_: Ghana

Sample options

With the considerations and opportunity areas for options development in mind, **Section 4.3** illustrates the exercise of assembling and assessing options. Sample options A, B and C show three types of configuration across a spectrum:

Sample Option A represents a centralized arrangement in the form of a unitary State. In this scenario, most powers remain at the national level, with a few administrative responsibilities transferred to subnational units through legislation.

Sample Option B represents a federal system with a moderate level of decentralization. Subnational levels of government have some devolved powers, including the power to raise revenues.

Sample Option C represents a highly decentralized system, where local subnational units have significant revenue-raising and service delivery powers.

The sample options are used to demonstrate the political accommodation approach in practice, and are <u>not</u> meant to serve as recommendations. Each sample option reveals merits and risks for political accommodation, and highlights how coherent choices can be made across the six Strands. **Section 4.3** also discusses how South Sudan's unique diversity issues demand special provisions in each option.

Conclusion

The Transitional Period presents a critical juncture in South Sudanese history for consolidating peace and creating a prosperous future. There is no single blueprint for achieving political accommodation. Rather, in transition, the South Sudanese people have a unique opportunity to define a model tailored to the State's unique history and rich social fabric. Tackling political accommodation from one or two narrow lenses is not likely to build effective and durable governance arrangements. However, a multi-faceted approach underpinned by all six Strands can deliver abundant dividends in terms of peace, State stability and national unity. It is envisaged that this Briefing Paper offers a modest contribution to assist the people of South Sudan as they advance their State along the path of transition.

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Figures and Tables

1. Introduction

The independence of South Sudan on July 9, 2011 launched a period of remarkable transition. In this time of opportunity and change, the South Sudanese people face the momentous task of building a new State and unifying their nation. Essential to a peaceful transition will be arrangements that can effectively accommodate diverse political interests and perspectives.

The South Sudanese people share a common history together with richly diverse traditions and interests. To build political accommodation is to give every member of South Sudanese society a secure place in the "house of governance." The term *political accommodation* encompasses the objectives, processes, or outcomes of mutual conciliation around competing political interests and perspectives.[1] The essence of political accommodation is mutual conciliation in situations where consensus is difficult to find, but not completely absent. Political accommodation does not concern placation, appeasement or buy-off among actors with different interests. Rather, political accommodation consolidates governance arrangements so that populations can express, discuss and reconcile diverse political interests.

Societies emerging from conflict and undergoing other forms of transition often discover that some groups feel excluded and believe they have no voice in the "house of governance." This is a challenge which confronts South Sudan. People who feel marginalized may include those who perceive themselves as disproportionately affected by past conflicts, such as war veterans and women, as well as those suffering the social costs of natural resource extraction. Individuals and population groups can translate these types of concerns into political opposition, social protests and, in some scenarios, violent acts. All of these risks threaten to thwart State stability and durable peace in South Sudan.

The Transitional Period presents an important moment for realizing the potential of South Sudan's governance arrangements to build political accommodation. The 2011 Transitional Constitution of the Republic of South Sudan (the "Transitional Constitution") contains both shortfalls and opportunities for achieving mutual conciliation among competing interests. How these shortfalls are addressed and opportunities seized will shape South Sudan's prospects for peace. The purpose of this Briefing Paper is to offer approaches for building peace through political accommodation, and thus contribute to a harmonious future for South Sudan.

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[1] The definition of political accommodation provided here is adapted from Brian Barry, "Political Accommodation and Consociational Democracy," *British Journal of Political Science* 5, no. 4 (1975): 477-505.

1.1 How to use this Briefing Paper

This Briefing Paper serves two functions:

i. **It offers an approach for developing technical options for political accommodation.** The Briefing Paper presents a typology and approach for developing options which can enhance the ability of governance arrangements to build mutual conciliation among competing interests. This Briefing Paper can thus be used independently to explore, and potentially derive different conclusions about, arrangements for mutual conciliation.

ii. **It serves to stimulate discussion about how governance arrangements and public institutions can bring diverse interests into public life.** Through assessing existing provisions and prospects for political accommodation, this Briefing Paper delineates key issues which may benefit from dialogue and public discussion along a range of governance dimensions. The purpose of this analysis is to present a spectrum of possible viewpoints on particular governance challenges.

The political accommodation approach is targeted towards all South Sudanese people concerned or involved with the momentous task of building their new State. Therefore, this Briefing Paper is intended for a broad range of actors in South Sudan who either a) influence or make policy, or b) wish to engage in discussions about the future. These audiences include:

- Interested citizens
- Public office holders
- Elected representatives
- Civil servants
- Civil society constituencies
- Academics

*This Briefing Paper is relevant to a broad range of processes and discussions about governance and peacebuilding in South Sudan. For those engaged specifically in **constitutional review**, please see Annex I for a guide to using this Briefing Paper.*

To forge durable and inclusive structures, governance decisions will be strongest when they emerge from nationally led public dialogues. In this spirit, the Briefing Paper does not offer prescriptions or a blueprint for South Sudan's governance arrangements. Instead, it offers an approach that diverse South Sudanese actors can use independently to derive their own conclusions about effective public choices.

1.2 Why political accommodation matters

Political accommodation is a powerful construct which offers durable arrangements to reconcile plural interests peacefully. Political accommodation delivers more sustainable opportunities to reconcile diverse political interests than a singular or disjointed focus on isolated areas of governance reform, such as electoral system design and legislative decision-making procedures. The construct captures how public participation and traditional and customary arrangements interrelate with formal dimensions of governance to build mutual conciliation. In this sense, political accommodation provides an alternative to elite-centered "power sharing."

While political accommodation can be a worthy objective in any political system, it has particular importance for transitioning States like the Republic of South Sudan because it:

- **Provides a framework to guide choices** for developing a system that can effectively reconcile diverse political interests.
- **Can prevent and mitigate violent conflict** by ensuring that potential belligerents have incentives to engage in political dialogue.
- **Provides a voice** for groups which were previously marginalized or excluded from political and socio-economic opportunities.
- **Establishes a "safety net"** such that minority parties have the security of political avenues to pursue their interests.

In all these ways, political accommodation can build trust between hostile parties, as well as across the broad range of communities which make up South Sudan, and sustain promising conditions for the consolidation of the new State and unity of the nation.

1.3 Political accommodation for peacebuilding, statebuilding, and nation building

In countries emerging from conflict like South Sudan, political accommodation can make a unique contribution to the related but distinct challenges of peacebuilding, statebuilding and nation building. Among academics and practitioners, there are debates about what peacebuilding, statebuilding and nation building mean, and how they relate to each other.[2]

For the purposes of this Briefing Paper:

i.   A "State" refers to an internationally recognized sovereign entity that has assumed responsibilities to its citizens, such as providing security and public goods. **Statebuilding** concerns the process of developing the capacity, institutions and legitimacy of core government functions.[3]

ii. A "nation" refers to a community which shares a culture, such that the people who share that culture recognize mutual rights and duties by virtue of their shared membership of it. **Nation building** involves actions which create a shared sense of nationhood and identity.[4]

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[2]   For an overview of these debates, see Charles Call and Elizabeth Cousens, "Ending Wars and Building Peace: International Responses to War-Torn Societies," *International Studies Perspective* 9 (2008): 1-21.

[3]   This is consistent with the Organization for Economic Co-operation and Development's (OECD) definition of a State as an entity which "at a minimum… [has] legal and normative responsibilities for assuring the security of their citizens, protecting property rights and providing public goods to enable the functioning of the market." Bruce Jones, Rahul Chandran, Elizabeth Cousens, Jenna Slotina and Jake Sherman, "Concepts and Dilemmas of State Building in Fragile Situations," *OECD Journal on Development* 9, no. 3 (2008): 69.

[4]   This draws from Gellner's discussions on nationhood. Ernest Gellner, *Nations and Nationalism* (Ithaca, New York: Cornell University Press, 1983), 6-7.
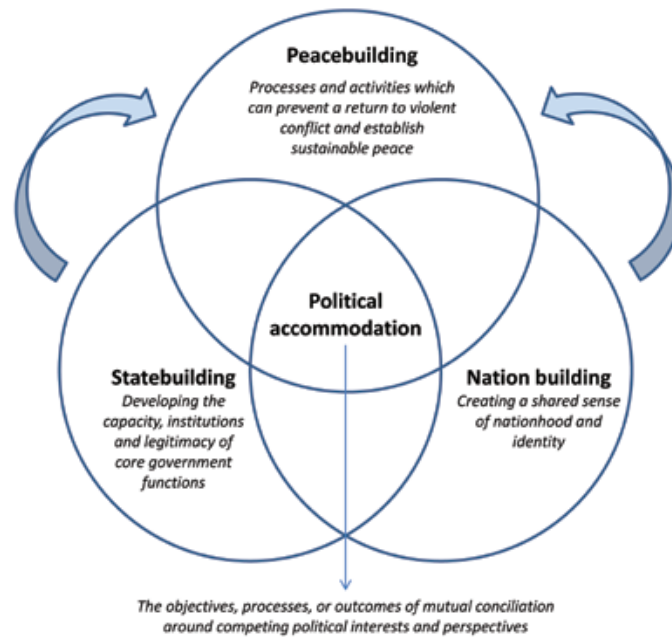
iii. **Peacebuilding** is a concept which has many definitions and approaches. It is gener-
   ally considered to include a variety of processes which can prevent a return to violent
   conflict and establish sustainable peace.[5]

Statebuilding and nation building can support peacebuilding in societies recovering from con-
flict. However, neither statebuilding nor nation building can produce peaceful outcomes unless
each includes avenues for mutual conciliation among competing interests; indeed, both can
have destabilizing effects if the conciliation challenge is not addressed. The value of political
accommodation is that it can contribute to both statebuilding and nation building in ways that
ensure they are complementary and support peace:

i. The political accommodation approach can guide the development of core government
   functions and the State's capabilities to respond to and manage public expectations.
   Therefore, political accommodation can ensure that the State's architecture represents
   and meets the needs of its population.

ii. Processes of mutual conciliation at the heart of political accommodation can support
    nation building by helping diverse communities find commonalities through consensus
    building, recognition of mutual rights and responsibilities, and building a shared iden-
    tity.

The role political accommodation plays in the context of peacebuilding, statebuilding and
nation-building processes can be visualized as follows:

Figure 1. Political accommodation in the context of peacebuilding, statebuilding and nation building

Peacebuilding
Processes and activities which can prevent a return to violent conflict and establish sustainable peace

Political accommodation

Statebuilding
Developing the capacity, institutions and legitimacy of core government functions

Nation building
Creating a shared sense of nationhood and identity

The objectives, processes, or outcomes of mutual conciliation around competing political interests and perspectives

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[5] Definitions of peacebuilding range from a so-called "negative peace," concerned primarily with the cessation of violent conflict, to types of "positive peace," which concern a broader range of objectives after violent conflict has ended. For further discussion, see Micheal Barnett, Hunjoon Kim, Madalene O'Donnell and Laura Sitea, "Peacebuilding: What Is in a Name?" *Global Governance* 13 (2007): 35- 58.

2. Structured approach to political accommodation

This section presents a structured approach to assessing the potential for different governance arrangements to reconcile diverse political interests and perspectives, and thus support peace and stability.[6] In practice, the political accommodation approach involves: i) a diagnosis along six Strands or focal areas of political accommodation; ii) an assessment of prospects for political accommodation using governance indicators and other conceptual tools; and iii) the development of technical options through consultations and policy-oriented research. The following section describes this methodology.

2.1 A typology of six Strands

Conflict Dynamics has developed a typology of six Strands which underpin arrangements for political accommodation. These Strands function as focal areas for exploring prospects for political accommodation, identifying opportunity areas and developing options. The six Strands are:

1. Political structure and decentralization
2. Electoral system
3. Executive
4. Legislative branch
5. Public participation
6. Traditional and customary arrangements

Rather than revealing all-encompassing solutions across every Strand, this typology offers a diagnostic tool to identify where in the system opportunities for the most effective political accommodation lie. While focusing on a single Strand can enhance mutual conciliation, the typology offers a tool to weave the Strands into a "rope" with greater strength to bring together plural interests.

Figure 2. Political accommodation typology

2.2   Subnational approaches

The different levels of government in South Sudan, as in many countries, present unique challenges and opportunities for political accommodation. For example, specific states may suffer internal disputes between communities with grievances linked to actual and perceived inequitable access to services or barriers to political representation. In these cases, the political accommodation approach can build mutual conciliation at two levels:

1. Of subnational[7] units *at the national level* – i.e., tackling inequitable access to power and representation for subnational units at the national level.

2. *Within* subnational units – i.e., tackling inequitable access to power and representation at the subnational level.

While this Briefing Paper largely focuses on political accommodation at the national level, it presents brief examples of how political accommodation can be applied at these two levels.

2.3   Staged options generation

The process for developing options for political accommodation includes consultations and dialogue to solicit feedback from key actors in South Sudan. This consultative approach includes five components:

1. Assessing the **prospects** for political accommodation. In practice, this analysis is conducted through targeted consultations with partners and stakeholders, alongside a review of existing legal provisions.

2. Identification of **processes and opportunities** in the Transitional Period for building political accommodation.

3. Identification of **considerations** for options development through targeted consultations.

4. Development of **technical building blocks** which highlight opportunity areas for options design.

5. **Options development**, with further refinement and appraisal. This Briefing Paper illustrates this step through presenting and appraising sample options.

The stages of options development involve repeated cycles of consultation, research and sharing of that research. Consultations for this Briefing Paper commenced in early 2011 and were repeated over a ten-month period to produce a set of sample options. Those consulted included government officials, political parties, civil society constituents and academics. The analysis and sample options which resulted from these dialogues underwent a process of refinement including a second series of consultations from January – April 2012.

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[7]   The term subnational refers to levels of government below the national level. These include, but are not restricted to, states, counties, payams and bomas.

The staggering of technical options development with extensive discussion builds consensus around particular option types. The process of producing options is as important to building mutual conciliation as the substance of the technical options themselves. Therefore, this Briefing Paper is one of a variety of products and methods for building political accommodation.

3. Prospects for political accommodation

3.1 Existing arrangements

This section reviews the status of pre-existing structures and provisions for political accommodation across the six Strands. Reflecting on the Republic of South Sudan's experience to date with implementation of these provisions, this section examines the prospects for political accommodation.

For a comprehensive overview of provisions of the Transitional Constitution pertaining to political accommodation across the six Strands, please refer to Section 4 of the Technical Supplement to this Briefing Paper.

3.1.1 Political structure and decentralization

Decentralization broadly encompasses "the transfer of authority and responsibility for public functions from the central government to subordinate or quasi-independent government organizations…"[8] Decentralization, therefore, is a process which occurs along a spectrum.[9]

a. Existing provisions

Key articles of the Transitional Constitution pertaining to political structure and decentralization provide that:

- "All levels of government shall promote democratic principles and political pluralism, and shall be guided by the principles of decentralization and devolution of power to the people…" (Art. 36(1))
- The Republic of South Sudan will comprise of three levels of government: (1) national; (2) ten states; (3) local government. (Art. 47)
- The Council of States shall legislate on decentralization. (Art. 59)
- Two or more states can agree on mechanisms to enhance coordination/cooperation. (Art. 49(2))
- The proportion of oil and mineral revenues accruing to the producing states shall increase from 2 percent to 5 percent. (Art 178(1))
- The additional 3 percent must be allocated to "communities." (Article 178(1b))
- National revenue is to be shared equitably. (Art. 169(7))[10]

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[8] World Bank, *What is decentralization?* (accessed November 28, 2011); available at http://www1.worldbank.org/publicsector/decentralization/what.htm.

[9] For more on this spectrum, and approaches to decentralization, see Section 3.1 of the *Technical Supplement.*

[10] *Transitional Constitution of the Republic of South Sudan 2011* (accessed October 13, 2011); available at www.goss.org.

b. Prospects for political accommodation

The Transitional Constitution highlights principles of decentralization and devolution, but also provides for some centralized aspects of governance, reinforcing dimensions of economic and political decision-making power at the national level.

Revenue allocation

The Transitional Constitution provides states with moderate revenue-raising powers, but increases the proportion of oil and mineral revenues accruing to "communities" in the producing states (Article 178(1b)). The Transitional Constitution does not define the exact meaning of communities, which creates legal ambiguity.

The Transitional Constitution explicitly underlines the principle, in Article 169(7), that national revenue is to be shared equitably. The newly reconfigured Fiscal and Financial Allocation and Monitoring Commission (FFAMC, Art. 181(1)) offers a mechanism through which this principle may be put into practice,[11] dependent in part on the formula it employs for the allocation of revenues.

Natural resource producing states

Where communities bear disproportionate costs of oil extraction in oil producing states, inadequate or inequitable compensation can serve as a major cause of tension and conflict. Therefore, revenue allocations offer an important mechanism to accommodate the interests and needs of these communities. Whilst, according to the Transitional Constitution, oil-producing states receive 5 percent of oil revenues, the populations in those states may require additional compensation, as well as provisions to ensure revenues benefit particularly marginalized communities and groups.

However, while compensation of natural resource producing states may support political accommodation, such a policy potentially creates other inequities through horizontal fiscal imbalances among states.[12] Where a state faces particularly low development outcomes, mechanisms such as equalization grants[13] may enhance accommodation.

Power of the president to dismiss state governors

According to Article 101(1r) of the Transitional Constitution, the president may remove a governor or dissolve a state legislature in the case of a crisis in that state that threatens national security or territorial integrity. This provision creates a centralizing power. How the presidency defines a threat to national security and exercises this power (should it be required) will determine the implications of Article 101(1r) for political accommodation.

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[11] The Comprehensive Peace Agreement (CPA) envisaged a similar institution for the former Republic of the Sudan.

[12] See the Glossary for definitions of horizontal and vertical fiscal imbalances. See Section 3.1 of the *Technical Supplement* for more on fiscal imbalances.

[13] An equalization grant is a financial transfer made from the central government to a subnational level government, in a situation where some states, provinces or counties are poorer than others. The purpose of the transfers is to ensure that all subnational governments can deliver the same level of services to their populations, without some states, provinces or counties being disadvantaged. For an example of how Canada has used equalization grants, see Section 3.1 of the *Technical Supplement*.

Land management

Schedule B of the Transitional Constitution specifies that the states have legislative and executive powers over state lands and that the national government has exclusive legislative and executive powers over national lands. While Chapter VII of the Land Act (2009) helps define the former Government of Southern Sudan's and states' respective relations to land,[14] ambiguity remains as to what amounts to state-controlled land and what amounts to national government-controlled land. This offers the potential for conflict between levels of government, a risk that can potentially be mitigated through definition in legislation and the creation of dispute resolution bodies. The proposed Land Commission has the potential to play the latter role, with the Commission's explicit powers to be determined by legislation (Art 172).

3.1.2 Electoral system

Electoral system design presents an important opportunity to accommodate a broad range of political perspectives, and to foster inclusive and participatory governance arrangements. If the design of the electoral system can achieve this accommodation, it will provide significant incentives for all political parties, civil society constituencies and the people of South Sudan to actively support and participate in elections.

This Briefing Paper uses "electoral system" in a broad sense to include: forms of representation (majoritarian and proportional); the systems for translating raw vote totals into electoral outcomes in terms of deciding who will hold public office for the term; and the electoral institutions and processes (including the resolution of electoral disputes) that can make elections an effective tool of political accommodation.

a. Existing provisions

The Transitional Constitution has the following broad provisions, leaving decisions about the electoral system open to debate through subsequent legislative and political processes, one of which has been the development of the national elections law:

- The electoral system would be determined through enactment of a national elections law. (Art.197(2))
- The system would provide for direct election of the president and National Assembly through universal adult suffrage. (Art.56(1a), 97(1))
- A population census during the Transitional Period would determine the number of electoral constituencies. (Art.194)

In line with Article 197(2), the Ministry of Justice conducted a civil society consultation in October 2011 and initiated a process to draft a national elections bill. This bill passed the National Legislative Assembly on April 11, 2012. The following analysis and cited articles refer to the bill, dated January 19, 2012 (hereafter referred to as the "Draft Bill"), which was the subject of the National Legislative Assembly's public hearing of the bill from March 1-2, 2012.

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[14] Chapter VII: Land Administration and Management, *Land Act*, Laws of Southern Sudan, 2009.

The Draft Bill preserves many features of the National Elections Act 2008, including a mixed system of majoritarian (or "first-past-the-post" (FPTP)) and proportional representation, such that:

- The allocation of seats remains 60 percent from geographical constituencies and 40 percent from proportional representation, of which 25 percent derive from women's lists and 15 percent from party lists.
- Geographical constituencies remain single-seat.[15]
- The National Elections Commission will determine constituencies following the next census.
- Each state legislative assembly would elect four representatives to the Council of States, of which at least one representative must be female.

b. Prospects for political accommodation through the electoral system

The Transitional Constitution provides for the establishment of a National Constitutional Review Commission which is mandated, among other tasks, to conduct a review of the Transitional Constitution including possible changes to the systems of governance.[16] To the extent that the review process may lead to consideration of new or modified governance arrangements, the electoral law may need to be amended in the future to reflect any changes in these arrangements.

Bearing in mind the need for ongoing debate on the electoral system, the following summarizes prospects which arise from existing provisions in the Draft Bill.[17]

National Elections Commission

The composition and decision-making procedures in the National Elections Commission at all levels will be critical to ensuring the independence and (political) impartiality of the Commission and the acceptability of electoral outcomes to all participants. If the Commission and its state, county and local representatives, as well as those involved in the resolution of electoral disputes, can be seen as neutral arbiters, they can enhance the potential for elections to promote political accommodation.[18]

System for elections

The Draft Bill specifies parallel majoritarian and proportional representation systems of election for the national and state legislative assemblies (Chapter 4, Article 35.2 of the Draft Bill). For each

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[15]Single-seat geographical constituencies mean that in any one constituency, a political party must get the highest number of votes to secure the single seat, and other parties are excluded from representation.

[16] Article 202(6), *Transitional Constitution of the Republic of South Sudan 2011* (accessed October 13, 2011); available from www.goss.org.

[17] For full analysis of these issues, see Conflict Dynamics' Discussion Note, "Electoral System Design and Political Accommodation in the Republic of South Sudan" (February, 2012), available as Appendix I to the Technical Supplement of this Briefing Paper.

[18] The Draft Bill (Chapter 2, Article 8(1)) stipulates that a nine-member Commission will be appointed by the president, to be approved by a two-thirds majority of the National Legislative Assembly, taking into account consultation with civil society and women, and including representation of these groups. Article 22.3 stipulates that the five-member state high committees are to be elected and appointed by the chairperson of the Commission with the approval of a simple majority vote of the Commission members, taking into consideration consultations with women and civil society groups. Article 14.3 specifies that decision-making in the Commission will be by a simple majority.

legislative assembly, 60 percent of the seats are filled using single-seat geographical constituencies, and 40 percent using political party and women's lists (15 and 25 percent, respectively). This is the same system which was used in the national elections held in 2010.

Single-seat geographical constituencies mean that in any one constituency, a political party must get the highest number of votes to secure the single seat, and other parties are excluded from representation. Under proportional representation, parties win seats in close proportion to their share of the votes. The current system combines, but does not link, majoritarian and proportional representation.

Comparing parallel and linked systems

The text of the Draft Bill specifies parallel majoritarian and proportional representation systems of election. One alternative is a "linked" majoritarian and proportional representation system. The following example demonstrates the distinct outcomes of these options.

Example: Consider elections to an assembly of 200 seats:

- 60% or 120 seats are elected through single-seat geographical constituencies.
- 40% or 80 seats are elected through proportional representation lists.

PARALLEL SYSTEM

If Party A receives 70% of all votes, both in majoritarian and proportional contests, as well as more than 50% in every geographical constituency, they will receive all 120 of the single-seat geographical constituency seats and roughly 70% or 56 of the proportional representation seats. This gives Party A 176 of the 200 seats (88%).

LINKED SYSTEM

If Party A receives 70% of all votes, both in majoritarian and proportional contests, they will receive all 120 of the single-seat geographical constituency seats. This equals 60% of the total 200 seats and so entitles Party A to no more than 20 of the 80 proportional seats. This gives Party A 140 of the 200 seats (70%).
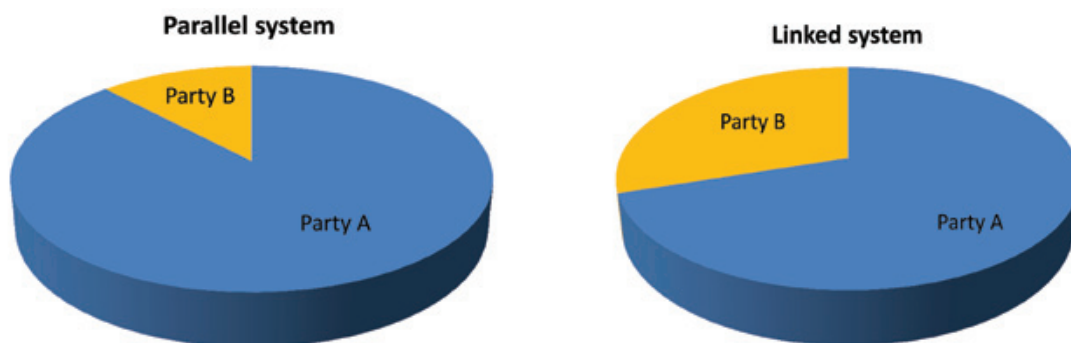
Single or multi-seat geographical constituencies

The Draft Bill specifies the use of single-seat geographical constituencies to elect 60 percent of members of the national and state legislative assemblies. However, it is notable that the use of single-seat geographical constituencies for the election of members of the Southern Sudan Legislative Assembly (SSLA) in 2010 did not translate voter preferences to seats (representation) as effectively as possible. To illustrate this issue, Figure 3 shows the spread of votes cast, disaggregated by party, for single-seat geographical constituency seats in the April 2010 election, and then compares this to actual party representation in the former Southern Sudan Legislative Assembly and the National Legislative Assembly on independence.

Political parties

The Political Parties Act, signed into law on March 24, 2012, contains a number of provisions pertinent to political accommodation, for example requiring that political parties be of a national as opposed to an ethnic character.[19] The stipulation that parties must draw their support base from at least eight of the ten states of South Sudan has, however, elicited concerns that some of the smaller parties may have difficulties registering.[20]

Qualifying threshold and presentation of political party and women's lists

Any political party or women's list must currently receive 4 percent of the valid votes cast for that list component to be eligible to compete for a seat in the national or state legislative assemblies (Chapter 4, Article 38(3) of the Draft Bill). Depending on the number of seats allocated to each political party or women's list, and especially in a situation where there is currently a single dominant political party and a range of smaller parties, this qualifying threshold may reduce the ability of smaller parties to secure seats from the relevant lists.

Local government elections

Article 48 of the Local Government Act 2009 outlines the need for local government officials to be elected in a general election every four years, with specific reference to county commissioners, county councils, and mayors. Local government elections have not taken place to date. Steps will need to be taken in line with the Local Government Act to establish the criteria for the size and number of constituencies, as well as the timing of local government elections. To ensure that electoral systems at all levels enhance political accommodation, a robust legal framework for local government elections will be required.

Election of members of the Council of States

The Draft Bill stipulates a system of indirect election of members to the Council of States, with each state legislative assembly returning four members of the Council. This system will generally ensure that the political majority in each state legislative assembly will be reflected in the composition and party affiliations of the four members elected to the Council of States. The probability that all four members will represent the same party increases when one or two political parties dominate, and when single-seat geographical constituencies are used to elect a significant percentage of the members of the state legislative assembly.

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[19] Articles 15(1f) and 16(2f), *Political Parties Act*, Laws of South Sudan, 2012.
[20] Article 16(2f), *Political Parties Act*, Laws of South Sudan, 2012.

Figure 3. The translation of votes to party seats in the legislature since the April 2010 election.

Former SSLA geographical constituency vote counts by party [April 2010 elections]

- SPLM-DC 2%
- SANU 1%
- USAP 1%
- SSDF 1%
- UDF 1%
- Other 4%
- NCP 5%
- Independent 14%
- SPLM 71%

Former SSLA seats by party [April 2010 - July 2011]

- Independent 3%
- NCP 1%
- SPLM-DC 2%
- SPLM 94%

National Legislative Assembly seats [August 2011]

- NCP 1%
- SPLM-DC 2%
- Independent 2%
- Appointed 20%
- SPLM 75%
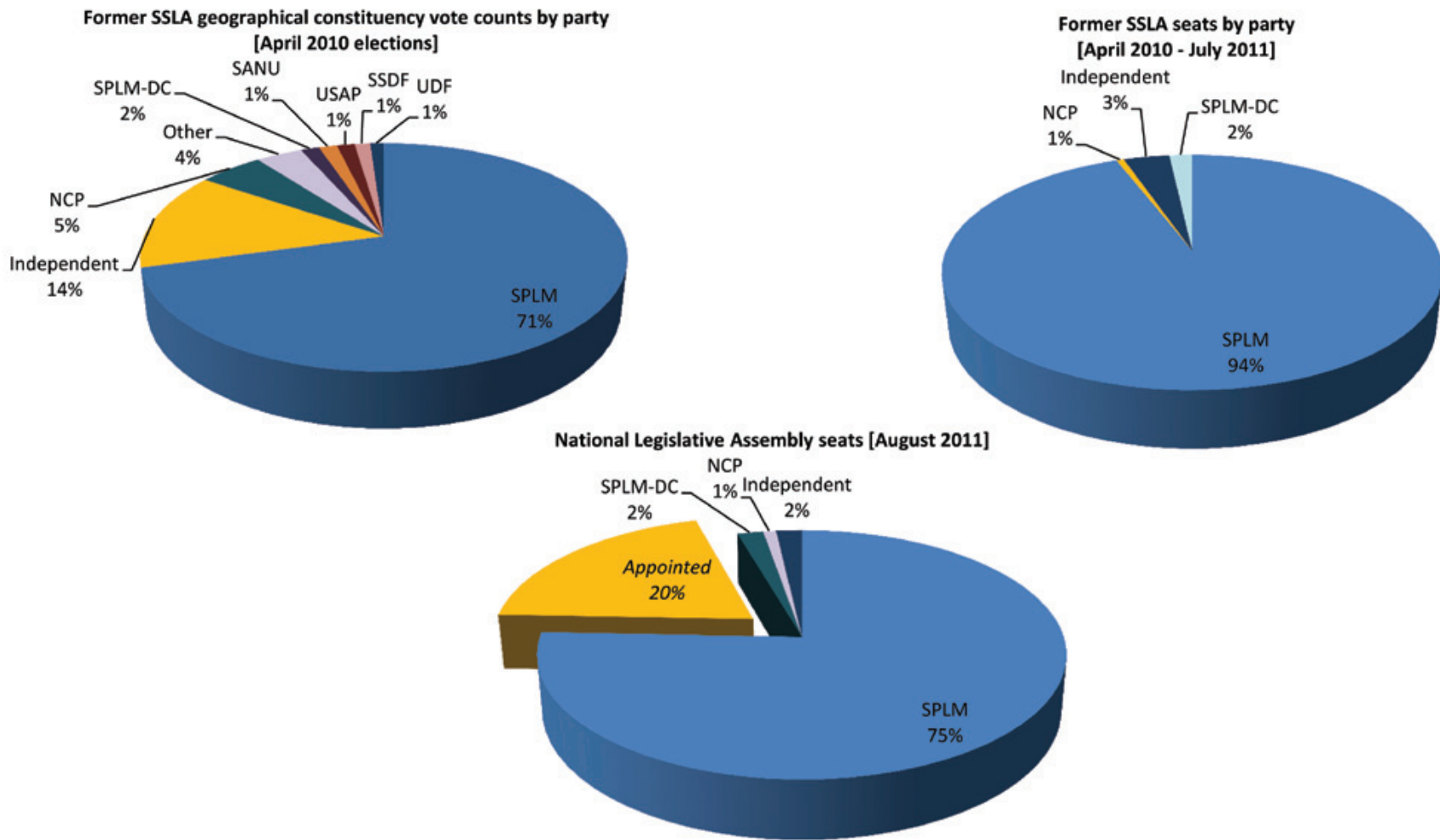
Data sources: National Elections Commissions, http://nec.org.sd/new/new/english/index.php; Government of South Sudan, http://www.goss.org/

Women and the electoral system

Article 16(4a) of the Transitional Constitutions states that:

> *All levels of government shall… promote women's participation in public life and their representation in the legislative and executive organs by at least twenty-five per cent as an affirmative action to redress imbalances created by history, customs, and traditions.*

Measures such as the women's lists have helped to enhance women's representation, with women gaining almost 29% of seats at the National Legislative Assembly. However, women still struggle to gain representation at the subnational level. Only one out of ten state governors is a woman. While the Local Government Act provides for county commissioners to be elected, current commissioners are appointed. Very few women have held these appointed positions.

3.1.3   Executive

The executive branch of government affects political accommodation through at least three dimensions. The first is the mode of election or appointment of positions in the executive. For example, some systems entail direct popular election of the president, while others, such as in South Africa, require parliament to elect the president. The second dimension is the internal configuration of the executive and how it makes decisions. While most executives have a cabinet or council of ministers with ministries, the chief executive might consist of a president alone, a president and one or more vice presidents, a prime minister, or even a president and prime minister who share competencies. The relationship between roles, and rules for making decisions, shape the equity of outcomes. The third dimension is the relationship the executive has with other branches of government, such as the legislature.

a. Existing provisions

The Transitional Constitution provides for a national executive comprised of a president, vice president, ministers and deputy ministers (Art. 96). The president has the power to appoint the vice president and ministers. The National Council of Ministers serves as the highest executive authority in the republic (Art. 109).

b. Prospects for political accommodation through the executive

Powers of the president

The powers of the president were enhanced in a number of ways in the Transitional Constitution. For example, the president has powers to convene and adjourn the national legislature without formal agreement of the speaker or other checks.[21] The Transitional Constitution sets no term limits on the presidency.

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[21] Article 101g of the Transitional Constitution.

The Transitional Constitution also provides the president with transitional powers to appoint members of both the National Legislative Assembly and Council of States, and to dismiss state governors. The way a president exercises these powers determines whether appointments help or hinder political accommodation.[22] On the one hand, the powers offer an avenue for inclusion through affirmative action. For example, the president could allocate positions to marginalized groups who otherwise fail to gain representation through existing governance arrangements. On the other hand, appointments can restrict accommodation of diverse interests if appointees are used to strengthen the dominance of one party.

Contesting acts of the president

The Transitional Constitution incorporates strong provisions for the Supreme Court to enforce the constitution by contesting acts of the president or the government (Art. 103, 116). The fact that the legislature must approve appointment of the justices potentially strengthens the Supreme Court's autonomy to check executive power, provided that the legislature's voting patterns are not driven by a single dominant party loyal to the executive. While the president nominates Supreme Court justices, a two-thirds majority of all members of the National Legislative Assembly must approve the appointments (Art. 133). This can act as an important safeguard in political accommodation terms.

Inclusion in the Council of Ministers

The president's cabinet appointments of August 2011 created a Council of Ministers with potential to accommodate a broad range of geographical interests through an enhanced regional balance of ministers. While the appointments reached the 25 percent quota for women through aggregate ministerial and deputy ministerial positions, women remain under-represented in ministerial positions. Whereas women hold 10 out of 27 deputy ministerial positions, they hold five out of 29 ministerial positions.

As Figure 4 suggests, ministerial appointments can offer potential for the president to include interests which remain under-represented in the legislative branch, and the party distribution of candidates in the cabinet suggests that the president has achieved this, at least to a certain extent.

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[22] For further exploration of this issue, see Appendix II of the Technical Supplement.

Figure 4. Comparison of party representation among ministers and deputy ministers with party representation in the National Legislative Assembly.

Ministers and deputy ministers by party

- Deputy Ministers - Democratic Front, 1
- Deputy Ministers - UDSF-M, 1
- Deputy Ministers - USAP, 1
- Deputy Ministers - SANU, 1
- Deputy Ministers - ANC, 1
- Deputy Ministers - SPLM, 22
- Ministers - SPLM, 26
- Ministers - USAP, 1
- Ministers - Democratic Front, 1
- Ministers - UDSF-M, 1

National Legislative Assembly seats by party

- NCP 1%
- Independent 2%
- SPLM-DC 2%
- Appointed 20%
- SPLM 75%
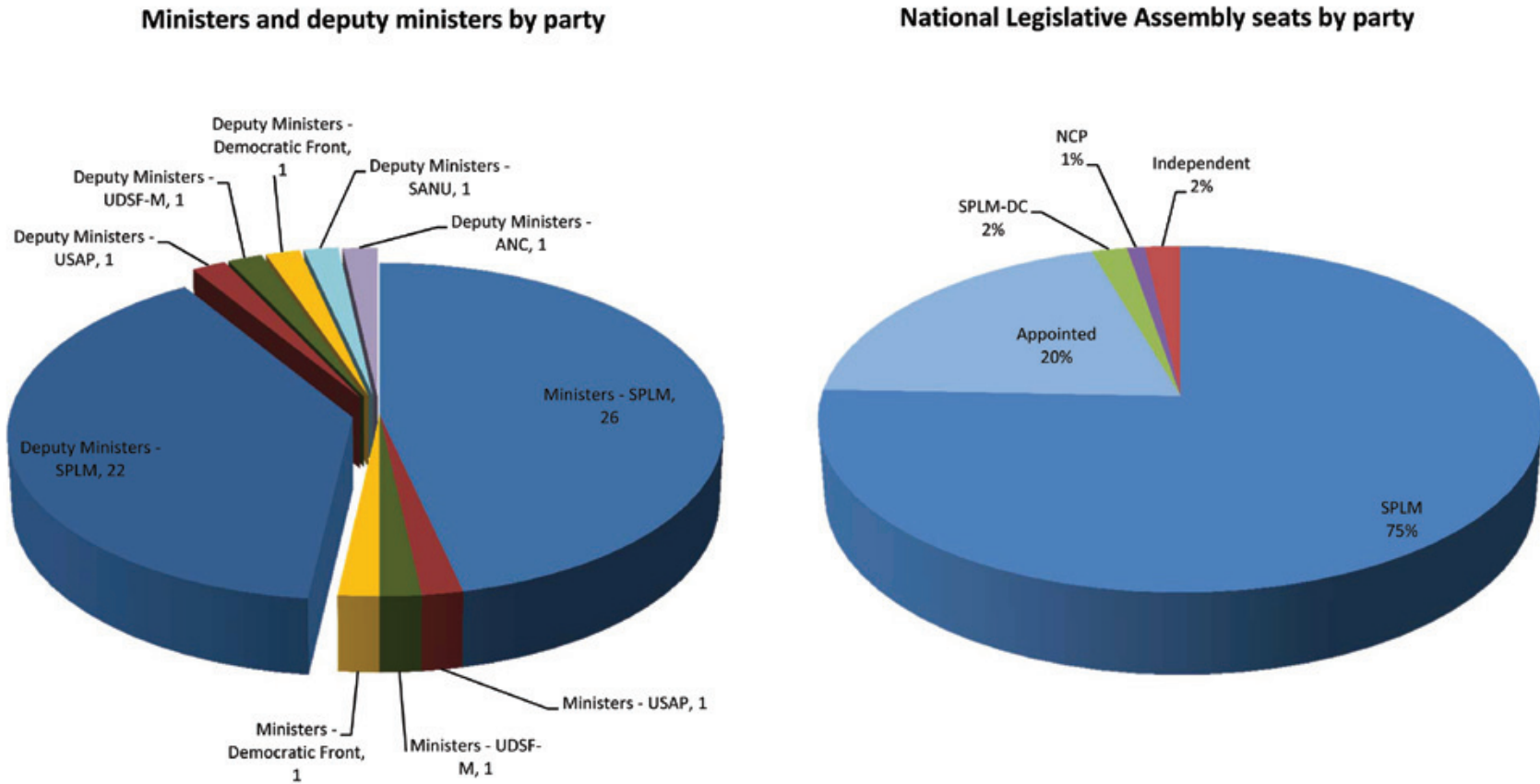
Note: In the cabinet, non-SPLM ministers account for 10% of all ministers and non-SPLM deputy ministers for 19% of all deputy ministers.

3.1.4 Legislative branch

The scope for political accommodation through the legislative branch depends on the shape and function of its composite bodies, how powers are distributed between houses if multi-cameral and internal decision-making procedures.

a. Existing provisions

In contrast to the Government of Southern Sudan's unicameral model under the Interim Constitution, the Republic of South Sudan's legislature consists of a National Legislative Assembly (NLA) and a Council of States (Art. 54).

The NLA incorporates all the former members of the National Assembly of the former Republic of Sudan who were elected from Southern Sudan geographical constituencies, political party and women's lists (Art 54, 94(2)). In addition, the president can appoint additional members not exceeding 66. This composition, at a total of 332 seats, almost doubles the members of the NLA compared to the former 170-seat Southern Sudan Legislative Assembly.[23]

Figure 5. Composition of the Transitional National Legislative Assembly
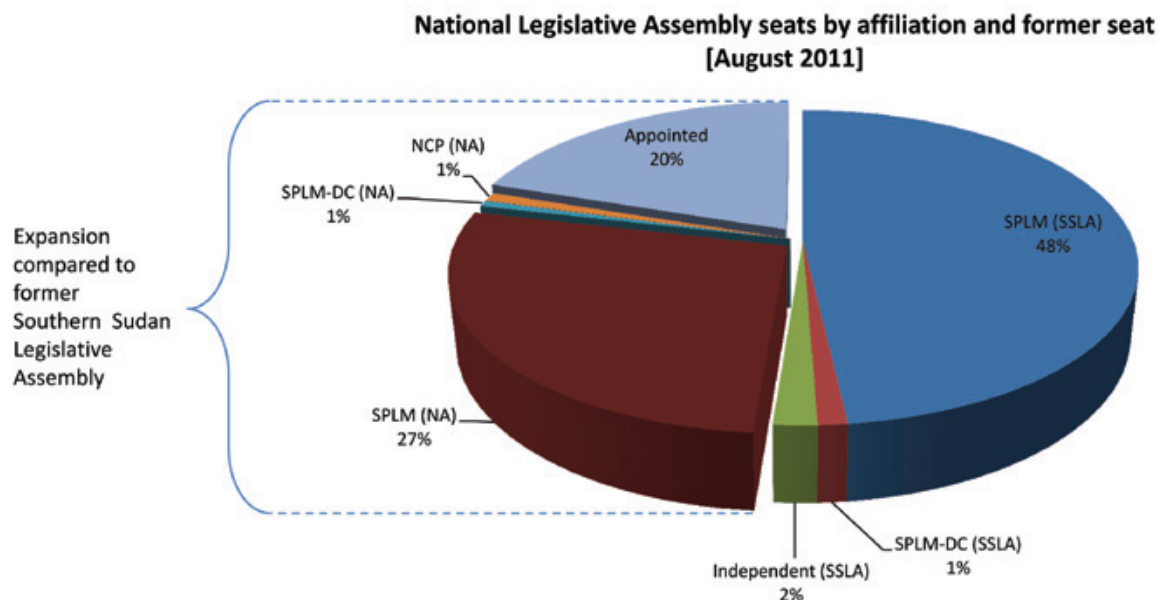
Data source: Government of South Sudan, http://www.goss.org/. **Note**: NA = members formerly sitting in the National Assembly of Sudan; SSLA = members formerly sitting in the Southern Sudan Legislative Assembly.

While the Council of States will normally be elected through state legislative assemblies (Art. 56), the Council is also subject to transitional provisions. Until the next general election, the 50-seat Council of States consists of members elected to the former Council of States established under the 2005 Interim National Constitution, with the addition of 30 members appointed by the president (Art 58). These appointees comprise 60 percent of the Council of States.

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[23] The provisions for appointments and transfer from the former National Assembly are transitional, with Article 56 of the Transitional Constitution establishing that the National Legislative Assembly shall normally be elected.

b. Prospects for political accommodation through the legislative branch

Composition of the National Legislative Assembly

The appointees and transferred members from the former National Assembly create the potential to dilute the influence of smaller parties. Given that the majority of these members are allied with the Sudan People's Liberation Movement (SPLM), the expanded NLA may limit political accommodation in the Transitional Period.

Competencies of the Council of States

On one reading, Article 59(a) of the Transitional Constitution could permit the Council of States to initiate, and possibly pass, legislation on decentralization and issues of interest to the states by a two-thirds majority without requiring the law to pass through the NLA.[24] This is an ambiguity, which may limit political accommodation especially if the appointed members of the Transitional Council of States do not reflect party plurality in the state legislatures.

Appointments to the National Legislative Assembly and the Council of States

The appointees to the two chambers of the national legislature have the potential to produce divergent outcomes for political accommodation. On the one hand, appointments offer a mechanism for the president to positively discriminate in favor of minorities whose interests would otherwise be marginalized. However, appointees risk increasing the dominance of a single party, and diluting the influence of groups with an already low level of representation.

3.1.5   Public participation

Public participation is central to political accommodation because it distinguishes the approach from power sharing constructs constrained to conciliation among elites. While elections offer discrete moments for citizens to register their preferences, durable mutual conciliation requires ongoing processes for the public and their political representatives to collaborate and deliberate on a regular basis. In this context, public participation encompasses the mechanisms and systems through *which the public influences and shares control over priority setting, policy making and resource allocations*. Public participation lies on a *continuum* from co-opting people into passive involvement in a conciliation process to direct decision-making.

> *Taking the Council of States as an example, Appendix II of the* Technical Supplement *examines through Lorenz curve analysis how different assumptions about the role of appointees affect prospects for political accommodation.*

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[24] According to Article 59(a) of the Transitional Constitution, the Council of States is competent to: "Initiate legislation on the decentralized system of government and other issues of interest to the States and pass such legislation with two-thirds majority of all representatives".

a. Existing provisions

The Transitional Constitution asserts the importance of far-reaching public participation. Key provisions include:

- Every citizen has the right to take part directly in any level of government or through chosen representatives. (Art.26(1))
- Every citizen has the right of access to official information and records at all levels of government, except when release would prejudice public security. (Art.32)
- National legislature sittings are open to the public, while proceedings are published and may be broadcast. (Art. 75)
- All levels of government shall take necessary steps to involve the people in the formulation and implementation of development plans. (Art.37(2d))
- Communities and persons "enjoying rights in land shall be consulted in decisions that may affect their rights in lands and resources." (Art.171(9))
- The president or national legislature can initiate public referenda. (Art.195)[25]
- The National Constitutional Review Commission is to initiate public information and civic education campaigns on reviewing the constitution. (Art.202(8))
- The National Constitutional Conference should involve broad civil society representation. (Art. 203(1))

b. Prospects for political accommodation through public participation

The Transitional Constitution incorporates broad aspirations for public participation conducive to political accommodation. However, several of the provisions remain general, requiring clarification about how they should function in practice.[26] It is evident that there is a low level of awareness among the public of the practical opportunities that exist, such as attendance at the public gallery of the NLA.

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[25] According to Art. 195(1) of the Transitional Constitution, "the President, or the National Legislature, through a resolution passed by more than half of all its members, may refer for a referendum any matter of public interest."

[26] Such provisions of the Transitional Constitution include: 169(1) The National Government shall promote, support and encourage broad based and balanced and participatory economic development based on the principle of subsidiarity and devolution of governmental functions and powers to the appropriate levels where the people can best manage and direct their own affairs; 169(3) The National Government shall promote and encourage the participation of the people in the formulation of its development policies and programs; 166(6) The objects of local government shall be to… promote self-governance and enhance the participation of people and communities in maintaining law and order and promoting democratic, transparent and accountable local government.

3.1.6   Traditional and customary arrangements

Traditional and customary arrangements are evolved customary practices and governance institutions, either formal or informal, founded on laws that derive from customs and cultures of indigenous people. Given that traditional authorities can play important service delivery functions and administer justice, they present an influential avenue for political accommodation. Moreover, traditional and customary arrangements can also directly assist in mediating and reconciling political interests and perspectives, and serve as a conduit for channeling political interests into formal governance arrangements.

a. Existing provisions

While acknowledging traditional authorities, the Transitional Constitution leaves their specific relationship with formal governance structures to legislation. Key provisions of the Transitional Constitution relating to traditional and customary arrangements include:

- Recognition of traditional authority according to customary law. (Art. 167)
- States can legislate on the role of traditional authority at the local level. (Art.167(1))
- Legislation will clarify functions of the Council of Traditional Authority Leaders. (Art.167(2))
- All levels of government should incorporate into law customary rights on land tenure. (Art. 171(8))

b. Prospects for political accommodation through traditional and customary arrangements

While the Transitional Constitution does not elaborate on the division of competencies between formal government institutions and traditional authorities, the Local Government Act (2009) remains in force. This act sought to define the relationship between formal and informal institutions, but may require further revision to clarify ambiguities about the division of competencies between traditional authorities and local government institutions.

Political accommodation at the subnational level

This section has focused on political accommodation at the national level in the Republic of South Sudan. However, a similar approach can be applied to assess existing provisions and prospects for political accommodation at the subnational level. As a first step, key provisions can be derived from:

- Transitional Constitution of the Republic of South Sudan (2011)
- Local Government Act (2009)
- State constitutions
- State council of traditional authority leaders acts

On political accommodation *within* subnational units, key provisions include:

1. **Political structure and decentralization**: Local government is responsible for ensuring equity in resource distribution (Local Government Act: Art. 13.6)

2. **Electoral system**: Direct election of local government councils and county commissioners (Local Government Act: Art. 26, 28, 48)

3. **Executive**: A state legislative assembly can remove a governor through a vote of no confidence from three-quarters of members (Transitional Constitution: Art. 164.4)

4. **Legislative branch**: There shall be established a legislative authority in each local government council (Local Government Act: Art. 25)

5. **Public participation**: All levels of government shall… involve the people in the formulation and implementation of development plans (Transitional Constitution: Art. 37.2d)

6. **Traditional and customary arrangements**: The objects of local government shall be to… acknowledge and incorporate the role of traditional authority and customary law in the local government system (Transitional Constitution: Art. 166.6i)

The nature of South Sudan's internal conflicts suggests that political accommodation at the subnational level may have an important stabilizing effect, especially where hostile groups are aggrieved by inequitable inclusion in governance structures. Prospects for political accommodation may be enhanced by putting current provisions into practice, as well as developing new provisions for tackling the opportunity areas described in Section 4.2.

3.2   Processes and opportunities

The Transitional Constitution initiated important processes for governance reform, including the National Constitutional Review Process and the development of key legislative instruments. Within these processes, there are important entry points for building political accommodation. Key entry points include the following:

- The constitution-making process and building national ownership of the outcome.
- Drafting and consultations on legislation pertaining to political parties and the electoral systems, both for national and local government elections.
- The decentralization policy framework contained in the Transitional Constitution, the Local Government Act and related implementation arrangements.
- The structuring and organization of the national census.
- The degree of political and public participation in policy-making and legislative development, using a wide range of fora and processes.

Figure 6 presents an overview of anticipated processes and milestones for building political accommodation.

Figure 6. Forthcoming processes and milestones during theTransitional Period
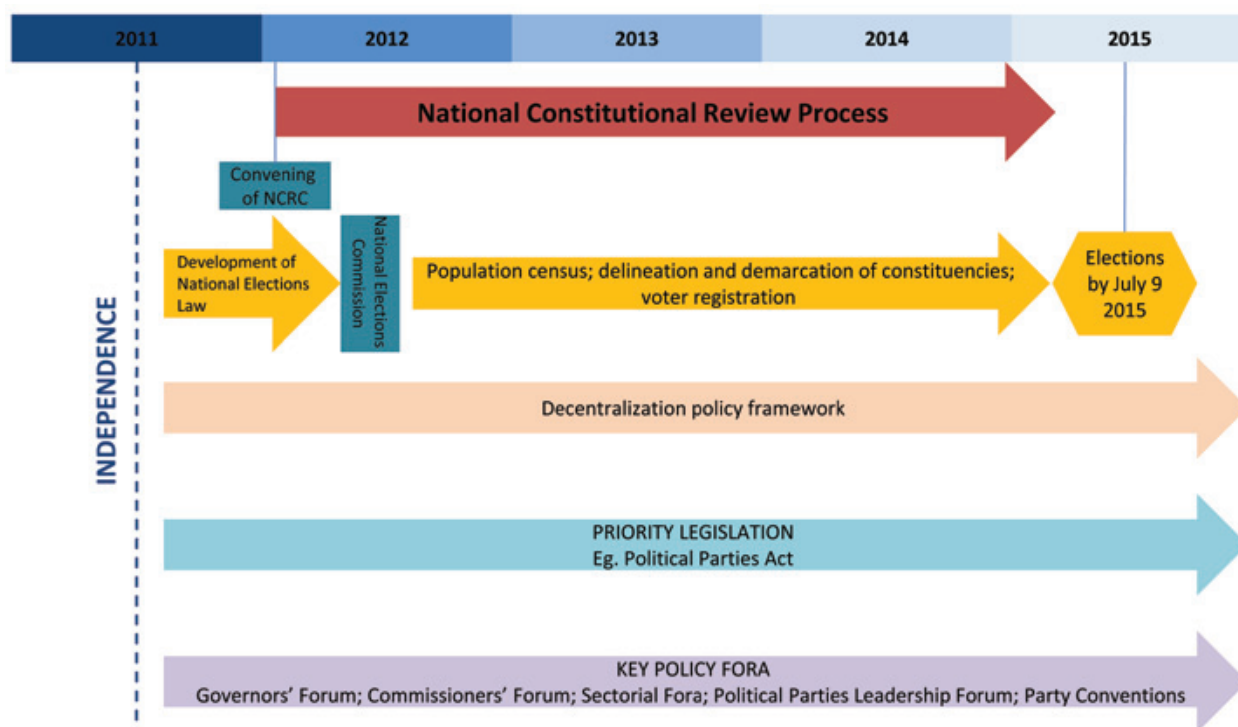
Note: These milestones present anticipated opportunities and key moments in light of the Transitional Constitution of the Republic of South Sudan (2011) and political developments up to May 2012. These milestones will require periodic review throughout the Transitional Period.

Constitutional review process

The process for reviewing the constitution, the completion of which would bring an end to the Transitional Period, envisions three stages:[27]

1. A presidentially appointed commission will disseminate public information and gather views. The commission will prepare a draft document that the president will comment on; the commission will then produce a final draft.

2. The president will convene a constitutional conference, requesting each interest group listed in the Transitional Constitution to nominate attendees. These delegates must adopt the draft by a two-thirds majority.

3. Once this draft is ready, the president will table it in the national legislature for "deliberation and adoption." It may prove important to establish specific principles for how the national legislature should approach the draft constitution and vote on it, which remain open to discretion (Art. 202, 203).

There are a number of ways in which the constitutional review process presents special opportunities for enhancing political accommodation. In particular, the National Constitutional Conference offers an important process for national consensus building on the constitution. A constitutional review act could establish the working methods of the conference, make provisions for broad inclusion, and safeguard the conference's outcomes.

Another opportunity could be to hold a national referendum on the final draft of the constitution.[28] Since voting at the national legislature follows inclusive drafting and consultation processes, its role would typically be to adopt or reject the constitution, rather than make substantive changes. Therefore, one option could be for a referendum to occur immediately before the constitution is tabled at the national legislature.

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[27] For a guide to relevant sections of this Briefing Paper for constitutional review, please see Annex I.
[28] This is a path that countries like Kenya followed in the case of Kenya's 2010 Constitution.

4. Options

This section lays out three practical steps to generate options for governance arrangements which can enhance political accommodation.

Step 1. The first step (Section 4.1) lays out the **considerations** central to strengthening political accommodation in South Sudan. In this Briefing Paper, considerations are a distillation of people's needs, perspectives and aspirations, which manifest themselves as political interests. These considerations can be used as a filter to capture the most accommodating options from the large range of possible choices.

Step 2. The second step (Section 4.2) is to define opportunity areas across the six Strands. These **opportunity areas** link to a technical approach to each Strand, a menu of "options components" and building blocks drawn from case studies, which are presented in full in the *Technical Supplement* to this Briefing Paper.

Step 3. Using the considerations filter to make choices across the Strands, the third step involves the assembly of options for political accommodation. Since the purpose of this Briefing Paper is to present a practical approach which can be used independently, this section uses a set of **sample options** (Section 4.3) to illustrate how options can be designed and assessed.

4.1 Considerations for options development

Considerations for options development include:

- Dimensions of the South Sudanese governance experience since independence, as reflected in public opinion surveys.
- Considerations relating to demography, diversity and constituencies which require special focus.
- Cross-cutting considerations, as identified through consultations with South Sudanese interlocutors.

4.1.1 South Sudanese governance experiences

Consultations with diverse South Sudanese stakeholders underscore strong commitment to the values of equality, inclusion and good governance. Public opinion polls conducted in 2011 reveal the following perspectives about governance arrangements and political accommodation, presented here under the six Strands:[29]

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[29] International Republican Institute, *South Sudan Public Opinion Survey September 6-17, 2011* (Juba: International Republican Institute, 2011); Traci D. Cook, *Building the Nation: South Sudanese Thoughts on the Creation of a Successful State*, (Washington, DC: National Democratic Institute, 2011).

(1) Political structure and decentralization: A majority views the distribution of development over the past six years as inequitable.

(2) Electoral systems: A majority desires a political system that allows both a choice of national representative with strong ties to their geographic area as well as the chance to vote for a party list representative. A majority favors a multi-party political system with the active participation of opposition parties in determining the future of the country.

(3) Executive: With few exceptions, respondents supported direct election of the president.

(4) Legislative branch: A majority supports a strong legislature able to provide checks and balances on the executive, with a preference that presidential terms of office be limited to four years. People are more likely to vote for female members of parliament, and 53 percent think that the current 25 percent gender quota should be increased.

(5) Public participation: A majority desires a constitutional development process that includes all political parties and features strong input from citizens, including a referendum for the adoption of the constitution.

(6) Traditional and customary arrangements: A majority considers that traditional authorities should play an integral role in governance.

Views which cut across Strands: In one survey, almost half of interviewees considered themselves South Sudanese rather than from a particular tribe,[30] but still fear the consequences of tribalism and believe a multi-pronged approach – cultural, administrative, political and legal – is necessary to address it.[31]

Experiences from other contexts

The survey evidence presents public views which are consistent with conclusions about successful political accommodation in other transition contexts. Comparative cases suggest:

(1) Political structure and decentralization: For decentralization to support political accommodation rather than fragility, a stable central government is required to mediate between levels of government, with mechanisms for political accommodation built into central institutions.

(2) Electoral system: Both mixed and pure proportional representation systems can enhance representation of smaller parties and local interests, which a "first-past-the-post" system could marginalize.

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[30] 49% of the sample in the International Republican Institute (IRI) survey, and "most participants" in the National Democratic Institute (NDI) focus group research.
[31] Traci D. Cook, *Building the Nation: South Sudanese Thoughts on the Creation of a Successful State* (Washington, DC: National Democratic Institute, 2011).

(3) Executive and (4) legislative branch: Where arrangements for the legislature and executive enshrine representation of diverse interests, countries generally experience greater stability, compared with those in which structures have failed to incorporate representation of diverse communities.

(5) Public participation: Participation builds stability and facilitates inclusion of otherwise marginalized groups in policy processes.

(6) Traditional and customary arrangements: Political systems which build effective linkages with traditional authorities in post-conflict transitions can facilitate more effective and stable long-term governance arrangements.

Cutting across Strands: In countries with ethnic, cultural and linguistic diversity, the political systems which have proven most robust have tended to involve pluralistic political frameworks. Countries which have adopted policies supportive of cultural and linguistic diversity, while building a united national civic identity, have been more successful in nation building than those which have sought to impose a homogenous cultural and linguistic identity.

Sources: OECD DAC, *Supporting Statebuilding in Situations of Fragility and Conflict*, DAC Guidelines and Reference Series, (Paris: OECD Publishing, 2011); Brendan O'Leary, *Building Inclusive States*, Background Paper for the Human Development Report 2004 (New York: UNDP, 2004); Sue Ingram, *Statebuilding: Key concepts and operational implications in two fragile states: the case of Liberia and Sierra Leone* (Geneva; New York: World Bank and UNDP, 2010); John-Mary Kauzya, *Decentralization: Prospects for Peace, Democracy and Development*, (New York: United Nations Department of Economic and Social Affairs, 2005).

4.1.2   Constituencies which require special focus

Political accommodation provides for arrangements that bring as many interests as possible into the "house of governance." To achieve effective political accommodation and inclusion, particular attention may need to be accorded to constituencies which face exceptional barriers to engaging in political interactions. Groups which face such barriers, and require special provisions to be built into governance arrangements across the various Strands, include:

- **Women:** While gender quotas of 25 percent for women in public institutions[32] remain a crucial step towards more equitable representation, sustainable engagement in political interactions requires that women have, simultaneously, the opportunity, capacity and motivation to participate.[33] Methods beyond quotas may be necessary to support women's participation in public fora and public service, such as initiatives to increase women's training and social acceptance of women's political participation.

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[32] Article 16(4a). *Transitional Constitution of the Republic of South Sudan 2011* (accessed October 13, 2011); available from www.goss.org.

[33] Rod Aya argues that people's intentions, capabilities and opportunities to engage in political interactions determine how people participate to pursue their interests. Rod Aya, *Rethinking Revolutions and Collective Violence: Studies on Concept, Theory, and Method* (Amsterdam: Het Spinhuis, 1990), 50-66.

- **Youth:**[34] Those between 15 and 44 years old make up 44 percent of South Sudan's population and 80 percent of adults.[35] The size of this constituency demands special attention across the various Strands to ensure the interests of youth are accommodated.

- Non-literate citizens: 62 percent of men and 81 percent of women in South Sudan cannot read or write.[36] In addition to economic challenges, these citizens face barriers to active participation in politics and means to express their views.

- **Populations living in disadvantaged geographical locations:** These include border populations and states or counties with low development outcomes.

Further to population groups which require special focus, other issues related to diversity, such as **ethnicity** and **religion**, may need to be considered in options development.[37] South Sudan's population is composed of over 63 different ethnic groups. By some estimates, the Dinka, Nuer and Shilluk may account for over 62 percent of the population.[38] While South Sudan has a rich and diverse cultural heritage, the civil wars have had a complex impact in terms of the accommodation of diversity. The varying levels and forms of participation of diverse ethnic groups during the different stages of the war, the role of various tribal militia groups and divergent degree of participation in political processes since the war, make the deliberate promotion of mutual conciliation among different ethnicities a priority for national unity and State stability.

The importance of promoting political accommodation of interests that arise from expressions of diversity, as a result of South Sudan's complex history, also extends to religion. As a predominantly non-Muslim population, the South rejected the application of Islamic Sharia law in the 1980s. While the population is still predominantly non-Muslim (Christian and animist), a significant minority of the population is Muslim. Governance arrangements can provide important avenues to reflect and channel political interests arising from expressions of religious and ethnic diversity, while a failure to accommodate these dimensions of diversity in public life could seriously undermine stability and harmony.

While centrally important, political representation through political parties, elections and national and local legislatures is unlikely to be fully inclusive of all minorities in a complex multi-ethnic society like South Sudan. Therefore, specific measures for accommodating diversity might be considered through two avenues:

1. Diversity-sensitive distributional policies, which require that resources, opportunities and public services are allocated in a way that addresses the complex socio-economic diversity of the population, based on the principle of promoting equity.

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[34] In South Sudan the term "youth" tends to refer to a broad age group, for example it often describes people between their mid-teens and forties.

[35] Southern Sudan Centre for Census, Statistics and Evaluation, *Statistical Yearbook of Southern Sudan 2010*, (Juba: Southern Sudan Centre for Census, Statistics and Evaluation, 2010), 9.

[36] Southern Sudan Centre for Census, Statistics and Evaluation, 48.

[37] For more on political accommodation and diversity, see Francis Deng, *Identity, Diversity and Constitutionalism in Africa* (Washington DC: United States Institute of Peace, 2008), 208.

[38] Ethnicity was not included in the 2008 Sudan Census. This estimate is based on data from the International Republican Institute, *Survey of South Sudan Public Opinion, September 6-27, 2011*.

2. <u>Diversity-sensitive representation</u>, which requires a range of approaches to ensure optimal representation of different ethnic and religious groups, women and youth in governance structures.

Diversity policies along both avenues can take "mixed" approaches by combining policy measures which reinforce equity and promote social integration, with those which uphold minorities' distinct cultural, religious and linguistic rights.

4.1.3 Cross-cutting considerations

In addition to public opinion research, consultations with a diverse range of interlocutors suggest a range of political, socio-economic and socio-cultural considerations for developing governance options.[39] These considerations cut across the Strands.

Political considerations for options generation include the need for governance arrangements to:

- Ensure that government can manage and have realistic prospects of meeting citizens' expectations about service delivery and representation.
- Accommodate political diversity both between and within political parties, and anticipate changing political configurations in light of that diversity. This requires the creation of an enabling environment for multi-party politics, in which parties can register, associate and fairly compete for public office.
- Ensure consistent application of constitutional provisions and legislation, enhancing citizen certainty in public decision-making processes.
- Support the separation of powers and adequate checks and balances on decision making at different levels of government.
- Support peaceful resolution of internal boundary disputes.
- Support peaceful resolution of international border disputes while accommodating the interests and livelihoods needs of border communities.
- Balance inclusivity with efficiency of decision-making, so as to prevent deadlock.

Socio-economic considerations for options generation include the need for governance arrangements to:

- Prevent and rectify fiscal imbalances between different geographical areas or communities.
- Surmount the logistical and practical challenges of delivering services to remote areas of South Sudan.
- Be affordable and operate on an economically viable basis.

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[39] Consultations for this Briefing Paper commenced in early 2011 and were repeated over a ten-month period to collate considerations. Those consulted included government officials, civil society constituents and academics.

Socio-cultural considerations for options generation include the need for governance arrangements to:

- Accommodate the interests and livelihoods needs of diverse ethnic and cultural groups, mitigating fractionalization.

- Accommodate equitably the unique interests of both men and women.

- Address uneven access to information, literacy rates and civic education in areas remote from national and state government centers.

- Cultivate inclusion in the context of linguistic diversity, and avoid subordination of citizens and communities which do not employ English as the mother tongue.

- Complement or interlink with the numerous non-state forms of association through which citizens express their preferences and manage their lives.

4.2   Opportunity areas across the six Strands

With the considerations of Section 4.1 in mind, the next step in options development involves decision-making about **opportunity areas** across the six Strands. These opportunity areas derive, in part, from the prospects for political accommodation in Section 3.2, and from the technical approaches which underpin each Strand. The following section summarizes these opportunity areas, and highlights comparative cases which shed light on methods to approach them. The technical approaches and comparative cases are presented in full in the *Technical Supplement* to this Briefing Paper.

4.2.1   Political structure and decentralization

Key opportunity areas include:

Political decentralization

- The desired levels of decentralization in a federal or unitary State, and the attendant structures required.[40]

- The nature and modes of representation of subnational political units at the national level.

- Models for allocating competencies between levels of government, including choices among allocation of competencies in the constitution, retrievable competencies (e.g., a devolved system of government), and à la carte competencies (i.e., where constituent entities can take on competencies as their capacities permit).

- Dispute resolution mechanisms to mediate disagreements that arise between political units.

- Avenues for accommodating the interests of border communities and other groups which face barriers to representation and participation in governance structures.

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[40] See the Glossary for definitions of a federal State and a unitary State.

Administrative decentralization

- Internal processes and decision-making rules within the bureaucracies of local government bodies.
- Scope and level of decentralization of administrative functions to subnational units.

Fiscal decentralization

- The degree and approach to fiscal decentralization, including needs- or quota- (e.g., population) based models and transfers between levels.
- Natural resource sharing arrangements among states, including equalization grants.

Subnational level: Example opportunity areas

For political accommodation *within* subnational units, opportunity areas include how fiscal transfer mechanisms between states and counties can ensure equity of both resource allocation and development outcomes.

<u>*Focus case:*</u> *Canada* presents a case pertinent to South Sudan because it consists of provinces and territories with diverse social and economic environments. The Canadian federal government has developed a set of fiscal measures to rectify inequalities and mitigate tensions that arise from Canada's diversity. For an overview of Canada's policy approaches, see Section 3.1 of the *Technical Supplement.*

4.2.2 Electoral system

In designing the electoral system, key opportunity areas in South Sudan include:

National Elections Commission

- Formalized involvement of civil society representatives and political parties in nominating and/or endorsing the composition of the National Elections Commission.
- Structuring membership of the Commission in a way that builds in representativeness of geographical areas (states or regions), and/or political parties, including a possible quota for the minimum number of women representatives.
- Qualified majority decision-making procedures for certain key decisions of the Commission.

System for elections

- The percentage of seats elected through the proportional representation system (i.e., through the political parties' and women's lists) could be increased – for example, from 40 percent to 50 or 60 percent – to give the smaller parties a better chance of securing representation.
- The majoritarian and proportional segments could be linked so that each party's share of seats in the legislature is not as distorted by the results of the majoritarian contests.

Single or multi-seat constituencies

▪ The use of multi-seat constituencies (two-seat or larger), which may achieve a greater degree of accommodation through possible election of candidates representing smaller, but still significant, voter constituencies/groups.

▪ The option to use existing counties (currently 79 in number), or groups of counties to be defined in the future, as the multi-seat geographical constituencies, with an upper ceiling (for most populous counties) and lower threshold (for least populous counties) for the number of seats per constituency.[41]

Local government elections

▪ The development of a robust legal framework for local government elections to occur in line with the Local Government Act, which may require new legislation and/or amendment of the Local Government Act.

▪ Mechanisms and provisions in legislation to create a system through which women can compete equitably for representation both as commissioners and members of local government councils.

▪ Collaboration between the National Elections Commission and state high committees to consider the relationship and potential alignment between constituencies for national elections and constituencies for local government elections.

Election of members of the Council of States

▪ The use of different types of direct system in each state to elect members of the Council of States.

▪ Including a provision in the electoral law such that at least one of the four delegates to the Council of States must be a member of a non-majority party (in addition to the gender quota of at least one being female).

Subnational level: Example opportunity areas

For political accommodation *within* subnational units, opportunity areas include direct election of county commissioners by universal suffrage.

Focus case: Reform of *Kenya*'s electoral system following adoption of its 2010 constitution may hold important lessons for mitigating conflict through electoral choices. Like South Sudan, Kenya has had to grapple with contentious decisions about how to draw electoral boundaries. For an overview of Kenya's approaches to this challenge, see Section 3.2 of the *Technical Supplement*.

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[41] See Appendix III of the *Technical Supplement* for an illustration.

4.2.3 Executive

Key opportunity areas in South Sudan include:

- Incorporation of provisions in the national elections bill for double qualification in presidential elections, such that the president would require both an overall majority and a particular geographical spread of votes.[42]
- Representation in the Council of Ministers of constituencies which may not achieve a high degree of political representation in the legislative branch through elections.
- Definition in the constitution of the permissible type and scope of presidential decrees.

Subnational level: Example opportunity areas

For political accommodation *within* subnational units, opportunity areas include the mode of election and required geographic spread of votes for election of state governors; and diversity policies in the civil service at state and local levels.

Focus cases: South Africa and Kenya offer examples of alternative presidential options which could be considered for South Sudan. For more on South Africa's "presidential parliamentary republic" and Kenya's electoral rules for double qualification of the presidency, see Section 3.3 of the *Technical Supplement*.

4.2.4 Legislative branch

Key opportunity areas in South Sudan include:

- Use of qualified majority voting formulae (for decision making on a certain range of pre-agreed issues) to support cooperation and collaboration between parties.
- Creation of a dedicated body within the legislature or a formalized process for consultation with organizations representing specific interest groups (border/ counties, youth, veterans, women, traditional authorities, etc.) when considering related legislation.
- Creation of public information campaigns and opportunities for written and oral submissions.
- Clarification of competency divisions between the two houses, particularly on whether both can initiate legislation.
- Development of mechanisms for the national legislature to interact with or incorporate representatives of traditional and customary arrangements.
- Special provisions moderating the voting rights and privileges of appointees.

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[42] This is also a feature of Strand 2 on the electoral system.

Focus cases: Burundi and Northern Ireland offer examples of qualified majority voting which hold lessons for choices about decision-making in South Sudan's national and local legislatures. See Section 3.4 of the *Technical Supplement* for an overview.

4.2.5   Public participation

Key opportunity areas in South Sudan include:

- Enhancement of participation in the production of legislation, for example through:
    - Explanatory memoranda outlining public participation during the preparation of legislative bills.
    - Required publication of agendas and proposed laws with a comment period.
    - Consultative/advisory groups or boards.
    - Freedom of information legislation.
- Enhancement of participation in executive decision-making, such as through "parliamentary questions" to the president or open councils.
- Creation of special provisions for the participation of youth in public affairs, for example through:
    - Creation of public discussion fora for youth, such as "youth parliaments" or youth citizens juries to discuss public policies.
    - Direct engagement of parliamentarians with youth as a special constituency, such as through town hall meetings targeted at youth.
- Incorporation into the constitution or legislation provisions for citizen-initiated referenda.
- Recognition of the rights of citizens to bring an issue to a supranational court or arbitrator.
- Consideration of the option to conduct a referendum to endorse the constitution.[43]

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[43] This has the benefit of ensuring widespread public ownership, as per the 2010 Constitutional Referendum in the Republic of Kenya; to introduce the requirement for a referendum in South Sudan would however require an amendment of the Transitional Constitution.

Focus cases: *South Africa* constitutionally mandates public participation in the production of legislation, a constitutional choice which holds lessons for translating principles of public participation into practice. In addition, *Switzerland* offers practical examples of participation through publicly-initiated referenda. For more on public participation in South Africa and Switzerland, see Section 3.5 of the *Technical Supplement.*

4.2.6 Traditional and customary arrangements

Key opportunity areas in South Sudan include:

- Clarification of powers of councils of traditional authority leaders (COTALs), including vetoes, ability to propose legislation, budgetary authority and administrative powers.
- Clarification of the role of traditional authorities as administrators relative to local government organs.
- Clarification of division of competencies between local government and traditional authorities, especially regarding justice and taxation.
- Development of procedures that allow for a national COTAL and national legislative assembly collaboratively to address disputes related to traditional authorities.

Subnational level: Example opportunity areas

For political accommodation *within* subnational units, opportunity areas include interaction between state COTALs and state and local governments.

Focus case: *Ghana's* National House of Chiefs and Regional Houses of Chiefs offer pertinent parallels to South Sudan's COTAL structure. For more on Ghana's initiatives to ensure formal government complements traditional arrangements, see Section 3.6 of the *Technical Supplement.*

4.3   Sample options

Using the "considerations filter" to make choices about opportunity areas, this section illustrates how to assemble options and assess which combinations of arrangements most effectively support political accommodation.[44]

Sample options A, B and C show three types of configuration which could conceivably be assembled. These samples serve to demonstrate a) how complementary choices can be made across Strands, and b) how prospects for political accommodation through particular options might be assessed. It is important to emphasize that sample options A, B and C and their sub-variants **do not** represent recommended governance arrangements. They merely serve as illustrations of the political accommodation approach. A wide range of other combinations of options are conceivable, and each will have different merits and disadvantages for political accommodation.

Evaluating options

In assessing a "package" of choices across the six Strands, like the sample options below, it is important to take into account a number of dimensions:

1. Are the opportunities for political accommodation across the different Strands clearly identified?

2. Are the linkages between the different Strands coherent?

3. How well does the option address key considerations in the South Sudanese context?

4. Have opportunities to reflect South Sudan's diverse population and interest groups been built into the option?

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[44] Options assembly – or generating possible governance arrangements which can enhance political accommodation – may be a useful exercise in a variety of contexts. For example, in anticipation of the National Constitutional Conference, civil society constituents might develop options to guide their inputs. Likewise, when developing a piece of legislation, representatives at the national legislature may find it useful to assemble and appraise options to examine the system-wide effects on political accommodation of particular choices.

4.3.1   Sample Option A

Sample Option A is a centralized arrangement in the form of a unitary State.[45] This type of centralized structure means that most powers remain at the national level, with a few administrative responsibilities transferred to subnational units through legislation. These subnational units operate like field offices of central government and have no independent decision-making powers; local government merely implements policies and directives which the center issues. In this specific variation of a centralized unitary State, citizens do not elect local government, but directly elect the president and a national legislative assembly.

The centralized nature of this arrangement and limited moments for citizens to register their preferences mean that public participation beyond elections is one of several key avenues for mutual conciliation in Sample Option A. This section illustrates and describes the benefits and drawbacks of variant A1, a version of Sample Option A where diverse mechanisms for public participation are provided through legislation. The risk of this variant is that opportunities for public participation can be withdrawn as fast as they are given by the central government. Annex II compares A1 with a second variant, A2, which provides a version of Sample Option A with constitutional guarantees for public participation.

Note: A unitary structure can equally be a characteristic of a centralized arrangement, like Sample Option A, and a highly decentralized arrangement. The level of centralization depends on how different competencies are allocated *through legislation* to different levels. Sample Option C below shows how a unitary structure might support a high level of decentralization by devolution through legislation.

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[45] See the Glossary for definitions of a unitary State and a federal State.

ATTRIBUTES OF A1
1. **Political structure and decentralization**: Centralized unitary State.
2. **Electoral system**: Executive directly elected with double qualification for president. National Legislative Assembly (NLA) directly elected through mixed proportional representation/ majoritarian system.
3. **Executive**: President appoints a vice president and ministers.
4. **Legislative branch**: Directly elected NLA; a Senate which reviews but does not strike down bills, with members appointed by the president, based on regional diversity and effective representation of women (i.e. in number and responsibilities) and approved by NLA.
5. **Public participation**: Legislation provides for a broad range of public participation mechanisms such as: mandatory dissemination of information about bills coming to vote; public submissions to "presidential questions" sessions.
6. **Traditional and customary arrangements**: National Council of Traditional Authority Leaders plays a consultative role to the Senate.
Please see Annex II for further variants and a more detailed description of attributes.

Figure 7. Sample Option Variant A1
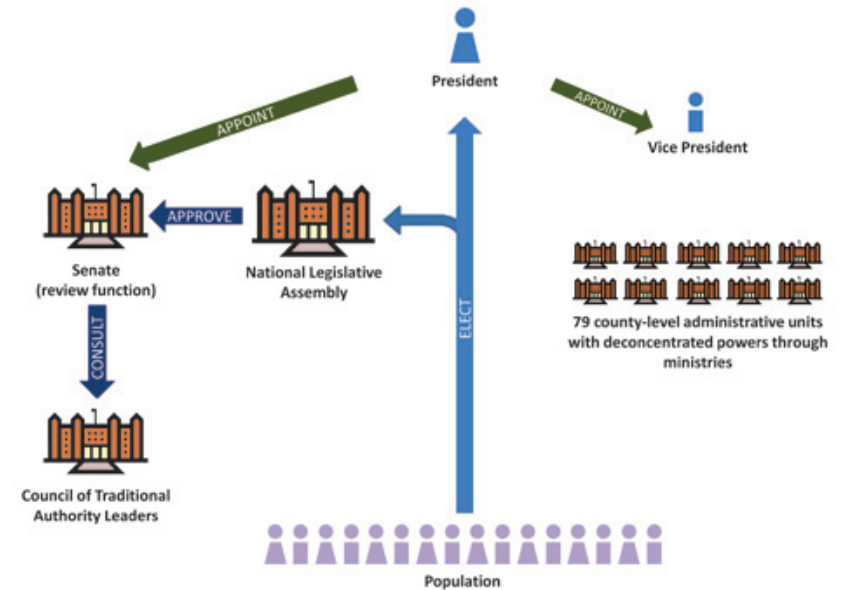
Interplay between Strands

Choices in one Strand inter-relate closely with choices across other Strands. The political accommodation each option can achieve depends on the coherence of those choices.

In all variants of Sample Option A, for example, *(1) political structure and decentralization, (2) electoral system* and *(5) public participation* have a special relationship with each other. A highly centralized political structure can achieve a high level of political accommodation, provided that citizens can directly register their preferences and check the central government through an inclusive electoral system.

Provisions for public participation enhance the scope for political accommodation in almost every possible option. Public participation sits at the core of strengthening the social contract and can build mutual conciliation in the context of diverse types of political structure. Hand-in-hand with electoral systems, the scope of public participation has special importance in highly centralized structures like Sample Option A. In the absence of an elected and independent local government, public participation defines how local interests can be accommodated at the center.

BENEFITS OF A1	DRAWBACKS OF A1
Simplicity and responsiveness? A centralized unitary State with deconcentration simplifies decision-making and service delivery through reducing the levels of government between which policy makers must coordinate. If the political structure (Strand 1) is combined with a representative electoral system (Strand 2) and qualified majority decision-making in the legislative branch (Strand 3), then this form of centralized unitary State can be representative, inclusive and, through its simplicity of structure, responsive to interests.	**Insufficient accountability?** If the legislative branch (Strand 4) and executive (Strand 3) are not sufficiently representative and inclusive, then the level of centralization of Sample Option A could make for a system with low levels of accountability of those in power, and the conditions for the executive to crowd out diverse interests. This risk may be exacerbated by the limited opportunity in this example for citizens to register their preferences through direct election (restricted to elections to the National Legislative Assembly and of the president).
Presidency with wide appeal? While centralization vests considerable authority in the executive, strict rules for double qualification of the president provide that the winning candidate should have wide appeal across geographical constituencies.	**No executive power at the local level?** Centralization with deconcentration means that communities do not have an elected executive at the local level (like an elected county commissioner or state governor). This reduces the scope for local influence and context-specific tailoring of policies like local development plans and budgets.
Effective mechanisms for participation? While public participation is not necessarily constitutionally mandated in this option, the use of legislation provides for specific mechanisms, with the chance to increase the likelihood that aspirations for public participation translate into practice.	**Legislature with limited representativeness?** While the National Legislative Assembly must approve appointments to the Senate, the Senate in this case enhances the powers of the president. Although the Senate cannot veto legislation, it may crowd out diverse interests in the review process if the president appoints party loyalists, rather than members of groups who have struggled to gain representation through the National Legislative Assembly.

4.3.2   Sample Option B

Sample Option B offers an example of a federal system[46] with a moderate level of decentralization. Subnational levels of government have some autonomous powers, including the power to raise revenues. These powers are guaranteed in the constitution.

One unique feature of Sample Option B is that it is tri-cameral: three chambers form the national legislature. In addition to a National Legislative Assembly and Council of States, a National House of Traditional Authorities forms a part of the legislature, with constitutionally mandated review powers.

> **Political accommodation within subnational units:**
>
> *According to Sample Option B's hybrid structure, state governments have a degree of autonomy to tailor to specific state contexts policies which determine equity and representation. This independence could serve as a powerful avenue to achieve mutual conciliation among diverse groups within state structures.*

Sample Option B is open to many variations, dependent on systems of election and the number of states which comprise the system, among other factors. The political structure could range from a small number of states, which more closely resemble regions or provinces, to a larger number which resemble counties.

This section illustrates variant B1, which consists of 10 states. A unique feature of B1 is that it combines federal arrangements with the principles of a presidential parliamentary republic, with a president who serves as both head of state and head of government.[47] The president is elected by the National Legislative Assembly with approval by the Council of States. A similar arrangement is replicated at the state level, such that governors must win a two-thirds majority vote in their state assemblies.

As an alternative, Annex II presents variant B2, which provides for direct election of the president and governors. B2 also shows an arrangement with three states, which more closely resemble regions or provinces.

One variant, which is not presented in this Briefing Paper, could involve constitutional provisions for individual states to "opt-in" or "opt-out" of the federal arrangement, for example through a referendum. If states "opt-out," they receive a greater degree of autonomy but forfeit service-delivery benefits and representation at the center.

[46] See the Glossary for a definition of a federal State.
[47] See the Glossary for a definition of a presidential parliamentary republic.

ATTRIBUTES OF B1
1. **Political structure and decentralization:** State-based federal system consisting of 10 states.
2. **Electoral system:** President elected through two-thirds majority in NLA, with approval by simple majority in the Council of States. Governors elected through two-thirds majority in the state legislative assemblies (SLA). NLA directly elected through mixed proportional representation/ majoritarian system. Direct election of Council of States and SLAs.
3. **Executive:** President and governors elected by legislatures.
4. **Legislative branch:** A tricameral parliament at the national level and a single chamber SLA at the state level. At the national level, NLA forms the lower house, Council of States the upper house, and a National House of Traditional Authorities a third house which reviews legislation pertaining to traditional and customary arrangements.
5. **Public participation:** Constitutionally mandated public participation in production of legislation.
6. **Traditional and customary arrangements:** National House of Traditional Authorities elected or appointed through state-level COTALs.
Please see Annex II for further variants and a more detailed description of attributes.

Figure 8. Sample Option Variant B1
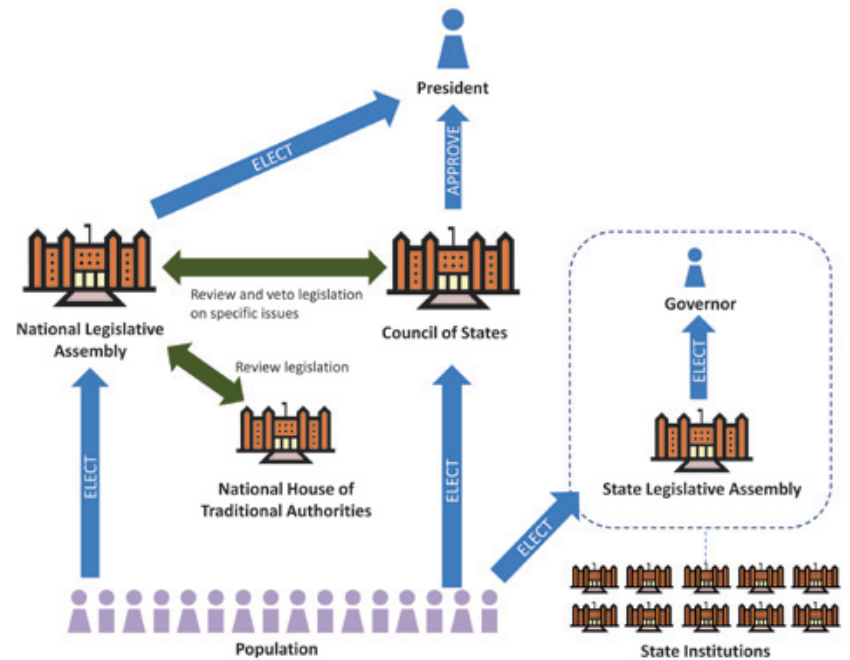
Interplay between Strands

In Sample Option B, *(3) executive and (4) legislative* branch have a special relationship in two ways. Firstly, their interplay determines the level of accommodation at the level of the executive. Where the legislature elects the president, the representativeness of the legislative branch, its internal decision-making dynamics and how the president interacts with parliament in daily business will shape how diverse interests are reflected in the executive.

Secondly, to support mutual conciliation, the relationship between the executive and legislative branch will need to strike a careful balance between the legislature checking the powers of the executive and the president having space to mediate between houses to resolve deadlocks. Inefficient policy-making is a risk of tricameralism, and the executive's behavior can mitigate or exacerbate this risk.

BENEFITS OF B1	DRAWBACKS OF B1
Responsive to local interests? A state-based federal system provides for decentralization of powers down to subnational levels. This configuration can enhance the representativeness and responsiveness of state governments, if combined with the appropriate electoral rules in Strand (2) so that state institutions represent a broad range of interests, and sufficient fiscal arrangements under Strand (1) so that states can exercise their devolved service delivery powers.	**Weak accountability of executive?** While election of the president and governors by the legislatures provides a strong check, this arrangement puts the executive one step removed from the people. If provisions for public participation under Strand (5) do not establish mechanisms for citizens to express their interests to the executive, then the president and governors may crowd out, or be unable to mediate between, interests which are not represented in the legislature.
Strong checks on the executive? If the president is elected by the legislature, the president must be accountable to the configuration of interests represented in the legislature. However, for this arrangement to be accommodating, electoral rules under Strand (2) must provide for plurality in conjunction with, under Strand (4), internal decision-making rules within the legislature, which would incentivize collaboration among interest groups.	**Coordination challenges?** Multiple layers of government present coordination challenges, which, without efficient financial transfers or handling of fiscal imbalances, can reduce the ability of government structures both to mediate between and to respond to diverse interests.
Integration of traditional authorities? The tricameral structure of parliament as incorporated in this example provides for formal integration of traditional authorities into the legislature. The legislative review role of this house means that it can harmonize legislation with customary law, but without undue influence for a body that is not necessarily representative of the whole population.	**Cumbersome legislative process?** While a tricameral parliament enhances the opportunities for review and consensus-building among diverse interests, this configuration can make the development of legislation time-consuming and resource-intensive. It may also be liable to deadlock, contingent on internal decision-making rules under Strand (4).

4.3.3 Sample Option C

Sample Option C presents a highly decentralized structure. Local subnational units (here, using counties as an example) have significant revenue-raising and service-delivery powers; intermediary regional/ state units have administrative coordinating roles but limited discretion over policy. This sample option can encompass many variations, contingent on the number of counties which comprise the system, and how powers are decentralized.

If the constitution mandates the competencies of counties, Sample Option C would form a federal system. This section illustrates this scenario through variant C1. Alternatively, powers could be devolved through legislation rather than by the constitution. This would create a highly decentralized unitary structure. Sample Option C in unitary form is presented in Annex II in variant C2.

C1 and C2 may differ little in form and function. However, the use of legislation to devolve powers in C2 may mean that it is easier for the central government either to increase or to withdraw those powers than if they were guaranteed in a constitution. By contrast, C1 would require a constitutional amendment to change the allocation of competencies.

Another distinguishing feature of Sample Option C is its executive structure, which splits competencies between a president and a prime minister. Here, a president has responsibility for foreign policy, while a prime minister oversees the decentralized system by playing a coordinating role in domestic affairs.

ATTRIBUTES OF C1
1. **Political structure and decentralization:** A highly decentralized federal system based on counties, with states/ regions as coordinating bodies appointed as administrators.
2. **Electoral system:** Directly-elected *president*. A *prime minister* elected by two-thirds of NLA. Directly-elected NLA. Directly-elected county commissioners. Directly-elected *county councils*.
3. **Executive:** A president with competence in international relations and a prime minister with competence in domestic affairs. A state/ regional administrator appointed by the prime minister. County commissioners lead executives at subnational level.
4. **Legislative branch:** A unicameral NLA, which legislates on inter-governmental issues, and unicameral county legislatures.
5. **Public participation:** Public participation defined by county for county governance structures. Citizens can initiate local referenda by petition.
6. **Traditional and customary arrangements:** COTALs at the county level play consultative role to county councils.
Please see Annex II for further variants and a more detailed description of attributes.

Figure 9. Sample Option Variant C1
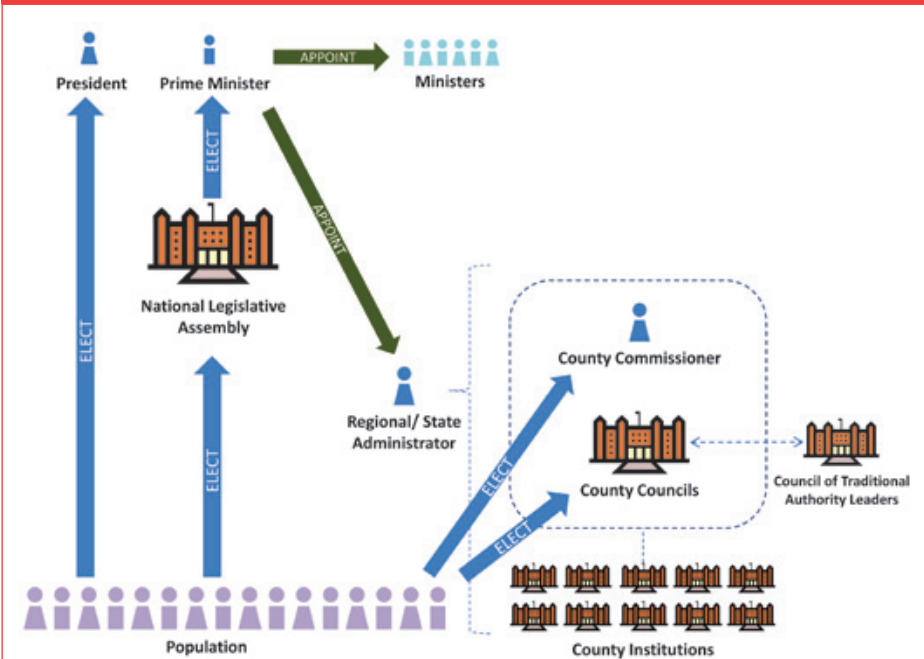
Interplay between Strands

Where traditional and customary arrangements are a dominant governance institution, formal structures – however politically accommodating they appear on paper - may prove irrelevant to mutual conciliation in practice if they do not complement or integrate informal institutions. For this reason, in Sample Option C, *(4) legislative branch* and *(6) traditional and customary arrangements* have a special relationship. Their interplay at the local level in a highly decentralized structure determines how formal policy and customary decision-making coexist. This relationship can determine whether formal and informal governance structures conflict or complement each other in a way that broadens public deliberation.

BENEFITS OF C1	DRAWBACKS OF C1
Governance tailored to the local context? Devolution of powers to the most local level of government potentially enhances the responsiveness of government to local needs. This will be especially true if the electoral system of proportional representation delivers county councils which reflect the diversity of interests at the local level. This would require a low qualifying threshold in terms of the percentage of votes minority groups would have to win to gain seats at the council. In addition, interaction of COTALs with county councils provides for county-specific roles of traditional arrangements in formal governance.	**Executive deadlock?** The division of competencies between the president and prime minister (PM) poses the risk of deadlock and uncertainty, particularly when issues do not fit neatly into either the foreign policy or domestic sphere. To mitigate this risk, the executive would require clear mechanisms, such as a decision in a Supreme Court, to resolve uncertainty about whether the president or PM should prevail on a particular issue. The National Legislative Assembly might also play a role in determining issues through a qualified majority vote on an ad hoc basis, which would require dual consent from the president and PM.
Equity of representation? If county boundaries successfully align with population distributions, an electoral system of multi-seat constituency FPTP voting for the National Legislative Assembly has the potential to deliver equitable representation at the national level. Multi-seat constituencies provide for large minorities, who would otherwise lose single-seat elections, to gain representation.	**Risk of boundary manipulation?** The scope for political accommodation depends on how the boundaries and number of county units are defined. The system risks so-called "gerrymandering,"[49] where some interest groups define boundaries which split minorities so that they lose the ability to deliver representatives in any one constituency. To mitigate this risk, an independent boundary commission would have to delimit and demarcate counties through a technical process open to public consultation and judicial review.
Direct accountability to citizens? Sample Option C provides for direct election to all levels of government except for the regional/state level. While multiple direct elections can complicate ballots, this arrangement maximizes the direct accountability of public officials to citizens.	**Fiscal imbalances?** Devolution of revenue-raising powers to the county level risks causing horizontal and fiscal imbalances. While all counties will have similar competencies, some will have greater sources of revenue than others. To safeguard equity, the national government would have to disburse equalization and conditional grants.

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[49] See the Glossary for an explanation of gerrymandering.

4.3.4 Cross-cutting diversity issues

In all options, South Sudan's unique diversity issues cut across Strands and thus demand special attention during options design. These diversity issues include how public governance institutions and other arrangements deal with gender, youth and ethnic and religious pluralism. The following approaches are examples of methods for addressing diversity across options and Strands:

Quotas

Quotas in the civil service and other public institutions offer one option for accommodating political interests emanating from different forms of diversity.

Gender and youth quotas: Preserving, and potentially increasing, the quota for women of 25 percent in public institutions[48] is an avenue for political accommodation which affects choices across all six Strands. Likewise, options might include youth quotas for institutions which disproportionately affect youth.

Representation of ethnic minorities: The dominance of the public service (including the military and security services) by certain ethnic groups, particularly at the more senior levels, is a frequently voiced concern in South Sudan. The use of ethnic quotas in government is controversial due to debates about their risks. Explicit recognition of ethnic groups can strengthen arrangements in ways that prevent marginalization. However, quotas risk reinforcing ethnic identities and undermining meritocratic practices. There are various alternatives to quotas which seek to achieve the same policy objectives. These include a rigorous approach to ensuring equal opportunities, and affirmative action programs to support groups which are under-represented. Promoting diversity in the civil service at the local government level is considered an important measure. Additionally, for certain types of bodies (such as national committees designed to be representative of the general population) geographical quotas can accommodate people on the basis of their place of origin (such as the three greater regions, states or counties).

Social cohesion

Over and above the possible range of approaches through legislation to promote and protect diversity, other proactive policy measures may be necessary to create a climate of social cohesion and collective South Sudanese identity and mutual responsibility. A process of healing and overcoming animosities between and within some ethnic groups, resulting from the legacy of civil war, may still be needed. Truth and reconciliation processes at national and local levels could support this healing. Other measures which could foster collective values based on equality, respect and shared cultural understanding might include a nation-building program to promote national values of equality and respect for diversity; rotation of civil servants around the country; and a system of national youth service requiring deployment to areas other than the person's area of origin.

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[48] Article 16(4a). *Transitional Constitution of the Republic of South Sudan 2011* (accessed October 13, 2011); available from www.goss.org.

5. Conclusion

The Republic of South Sudan became a sovereign State with promising prospects but daunting challenges. The Transitional Period presents a critical juncture in South Sudanese history for consolidating peace and creating a prosperous future. Inevitably, some groups will continue to perceive themselves as marginalized, underserved and excluded from political processes. Governance arrangements may become fragile if they do not adequately address these grievances. Through mutual conciliation among competing interests, the people of South Sudan can create the foundations of long-term peace and stability.

There is no single blueprint for achieving political accommodation. Rather, in transition, the South Sudanese people have an unparalleled opportunity to define a model tailored to the State's unique history and rich social fabric. Tackling political accommodation from one or two narrow lenses is not likely to build effective and durable governance arrangements. However, a multi-faceted approach underpinned by all six Strands can deliver abundant dividends in terms of peace, State stability and national unity.

Among many critical processes, constitutional review provides a crucial window during which the South Sudanese people can work together to reach consensus on key public decisions about the future of their State. This window offers a chance for every citizen to weigh the merits of a range of complementary arrangements to establish inclusivity across national and local governance structures.

It is envisaged that this Briefing Paper offers a modest contribution to assist the people of South Sudan as they advance their State along the path of transition.

Annex I: Guide to Briefing Paper sections relevant to constitutional review

The constitutional review process will begin with a revision of the Transitional Constitution. The following table presents a guide to the relevant sections of the Briefing Paper for reviewing the Transitional Constitution through the political accommodation lens.

Sections of Transitional Constitution	Chapter of Transitional Constitution	Strand of political accommodation	Linked to populations requiring special focus	Key sections of Briefing Paper
Rights of women	Part 2 Section 16	Cross-cutting	◊	4.1.2
Religious rights	Part 2 Section 23	Cross-cutting	◊	4.1.2
Rights of ethnic & cultural communities	Part 2 Section 33	Cross-cutting	◊	4.1.2
Right to participation & voting	Part 2 Section 26	◊ Public participation ◊ Electoral System		3.1.2, 3.1.5, 4.2.2, 4.2.5
Decentralized governance	Part 3 Chapter III	◊ Political structure & decentralization		3.1.1, 4.2.1
Legislature	Part 5	◊ Legislative branch		3.1.4, 4.2.4
Executive	Part 6	◊ Executive		3.1.3, 4.2.3
Civil service	Part 9 Chapter I	Cross-cutting	◊	4.3.4
States, local government and traditional authorities	Part 11	◊ Political structure & decentralization ◊ Traditional & customary arrangements		2.2, 3.1.1, 3.1.6 4.2.1, 4.2.6
Wealth-sharing	Part 12 Chapter 1	◊ Political structure & decentralization	◊	3.1.1
Land	Part 12 Chapter 2	◊ Political structure & decentralization ◊ Traditional & customary arrangements		3.1.1
Referenda		◊ Electoral system ◊ Public participation		3.2, 4.2.5
Elections	Part 14 Chapter 3	◊ Electoral system		3.1.2, 4.2.2

Annex II: Attributes of Sample Options and Variants

Table 1. Attributes of Sample Option Variants A1 and A2.

Strand	Sample Option Variant A1	Sample Option Variant A2
1. Political structure and decentralization	A centralized unitary State, with deconcentration to administrative units at the county level, in a symmetric system of 79 counties.	A centralized unitary State, with deconcentration to administrative units at the state level.
2. Electoral system	EXECUTIVE: Direct election, such that the winning candidate must win a simple majority of votes, and at least 40 percent of votes in two-thirds of (53) counties. NATIONAL LEGISLATIVE ASSEMBLY: Direct election with 75 percent of seats elected through "first-past-the-post" multi-seat constituencies at the county level; and 25 percent through proportional representation from women's lists presented at the national level.	AS FOR A1
3. Executive	A multi-member presidency, where the elected president appoints a vice president and ministers must be elected members of the National Legislative Assembly.	AS FOR A1
4. Legislative branch	Bicameral parliament with: NATIONAL LEGISLATIVE ASSEMBLY: Directly-elected. SENATE: Reviews but does not strike down bills, with members appointed by the president, based on regional diversity and effective representation of women (i.e., in number and responsibilities) and approved by simple majority in the National Legislative Assembly.	AS FOR A1
5. Public participation	Legislation provides for a broad range of public awareness and public participation mechanisms including: mandatory dissemination of information about bills coming to vote over the radio; public submissions to weekly "presidential questions" session; mandatory constituency town hall meetings, alternating between payams, led by county constituency parliamentarians.	Constitutionally-mandated public participation in the production of legislation.
6. Traditional and customary arrangements	Council of Traditional Authority Leaders at the national level which plays a consultative role to the Senate.	State Councils of Traditional Authority Leaders play a consultative role to state administrations.

Annex II cont.: Attributes of Sample Options and Variants

Table 2. Attributes of Sample Option Variants B1 and B2.

Strand	Sample Option Variant B1	Sample Option Variant B2
1. Political structure and decentralization	A state-based federal system consisting of 10 states.	State-based federal system consisting of three region-like "states", with deconcentration of revenue collection and service delivery from state governments to county administrations.
2. Electoral system	PRESIDENT: Elected through two-thirds majority in the National Legislative Assembly with approval by simple majority in the Council of States. GOVERNORS: Elected through two-thirds majority in the state legislative assemblies. NATIONAL LEGISLATIVE ASSEMBLY: Direct election with 50 percent of seats elected through single-seat geographical constituencies, where counties serve as the constituency unit, and 25 percent through proportional representation with party lists at the national level, and 25 percent through proportional representation with women's lists at the national level. COUNCIL OF STATES: Direct election through proportional representation of parties with lists presented at the state level. STATE LEGISLATIVE ASSEMBLIES: Direct election through proportional representation of parties with lists presented at the state level.	PRESIDENT: Direct election. GOVERNORS: Direct election. NATIONAL LEGISLATIVE ASSEMBLY: AS FOR B1 COUNCIL OF STATES: Members elected by state legislative assemblies. STATE LEGISLATIVE ASSEMBLIES: AS FOR B1 [COUNTY ADMINISTRATIONS are appointed by the state governor and his/her cabinet].
3. Executive	A presidential parliamentary republic such that the National Legislative Assembly elects the president. The principles of a presidential parliamentary republic are replicated at the state level, where the state legislative assemblies elect the governors. Each state also includes counties, which have no legislative powers but serve as administrative units to implement state policy at the local level.	Directly elected single-member presidency and state governorships.
4. Legislative branch	A tricameral parliament at the national level and a unicameral parliament with the state legislative assemblies at the state level. The tricameral parliament consists of: NATIONAL LEGISLATIVE ASSEMBLY: The lower house, which initiates and has final approval over all legislation. COUNCIL OF STATES: With primarily a legislative review role, the Council can veto, through a two-thirds qualified majority, a specified set of legislative issues pertaining to the states and decentralization policy. NATIONAL HOUSE OF TRADITIONAL AUTHORITIES: The third house, which has no veto power, but must review legislation pertaining to traditional and customary arrangements, presents revisions to bills directly to the National Legislative Assembly. STATE LEGISLATIVE ASSEMBLIES: Have some revenue-raising powers and have some devolved powers, including in the areas of education and health service delivery.	AS FOR B1
5. Public participation	Constitutionally mandated public participation, such that all legislation, prior to debate at the National Legislative Assembly, must be: published in the government gazette; summarized through a notice on radio across each state; open to public comment through both oral and written submissions.	AS FOR B1
6. Traditional and customary arrangements	National House of Traditional Authorities elected or appointed through state-level COTALs, defined through state-specific COTAL acts.	AS FOR B1

Annex II cont.: Attributes of Sample Options and Variants

Table 3. Attributes of Sample Option Variants C1 and C2.

Strand	Sample Option Variant C1	Sample Option Variant C2
1. Political structure and decentralization	A highly decentralized federal system based on counties, and states/ regions as coordinating bodies appointed as administrators.	A highly decentralized unitary State, with devolution to county units through legislation.
2. Electoral system	EXECUTIVE: A directly-elected president, with responsibility for international relations, and a prime minister, elected by two-thirds of the National Legislative Assembly, who manages domestic affairs. NATIONAL LEGISLATIVE ASSEMBLY: Directly-elected through multi-seat FPTP county constituencies. COUNTY COMMISSIONERS: Directly elected through simple majority, with provisions for two rounds if no candidate attains a majority. COUNTY COUNCILS: Directly-elected through county-based proportional representation lists.	AS FOR C1 (Direct election to all houses, including national senate)
3. Executive	PRESIDENT, with competence in international relations, serving four-year terms with a limit of two terms. A PRIME MINISTER, with competence in domestic affairs, serving four-year terms, providing that no candidate can serve two consecutive terms. The prime minister appoints a cabinet from members of the NLA. At the state/ regional level: an ADMINISTRATOR, appointed by the prime minister and approved by the NLA. At the county level: A COUNTY COMMISSIONER, serving four-year terms, with a limit on two terms. The county institutions have prime responsibility for public service delivery, covering areas of education, health and security and have significant revenue-raising powers.	AS FOR C1
4. Legislative branch	A unicameral national parliament, comprising an NLA, which legislates on inter-governmental issues. COUNTY COUNCIL: A unicameral county legislature, with extensive political and fiscal powers.	A bicameral national parliament, comprising an NLA, which legislates on inter-governmental issues, and a national senate, an upper house, which must review (but cannot prevent) legislation on devolution initiated by the National Legislative Assembly. COUNTY COUNCIL: AS FOR C1
5. Public participation	Public participation defined by county for county governance structures. However, citizens can initiate referenda at the local level by petition.	Provisions for public participation defined in both local and national legislation.
6. Traditional and customary arrangements	A COTAL at the county level plays a consultative role to the county council.	AS FOR C1

Glossary

Administrative decentralization: How policies and decisions are made, and how these are turned into outcomes in terms of distribution of resources.

Bicameral legislature: A legislature comprising of two legislative chambers, with each playing a role, not necessarily equally, in consenting to proposed laws.

Considerations: A distillation of people's needs, perspectives and aspirations which manifest themselves as political interests.

Decentralization: The transfer of authority and responsibility for public functions from the central government to subordinate or quasi-independent government organizations.

Deconcentration: A form of administrative decentralization in which local authorities serve as field offices of central government, taking charge of policy implementation and administration, while the central government makes policy decisions.

Delegation: A form of administrative decentralization in which local authorities have some responsibility and decision-making authority, but remain accountable to the central government in a principal-agent relationship.

Derivation principle: A constitutional provision that requires national government to return a given percentage of natural resource revenues to resource-producing states.

Devolution: A form of administrative decentralization where local government has responsibility, authority and accountability over specific policy areas, receiving some degree of political autonomy.

Equalization grant: A financial transfer made from the central government to a subnational level of government, in a situation where some states, provinces or counties are poorer than others. The purpose of the transfers is to ensure that all subnational governments can deliver the same level of services to their populations, without some states, provinces or counties being disadvantaged.

Equity: Fairness, based on the impartial distribution of representation, power or resources according to need, rather than arithmetic equality between particular units.

Federal State: While there are many competing definitions, the Forum of Federations proposes that the essence of all federal States is that there are two constitutionally established levels of government with some autonomy from each other, and the governments at each level are primarily accountable to their respective electorates.

Fiscal decentralization: The assignment of expenditures, revenues, transfers, and subnational borrowing to subnational governments.

Gerrymandering: The act of manipulating political and/or electoral boundaries in order to gain an unfair advantage, for example by dividing minorities between constituencies or creating

population imbalances between political units so that some groups have less representation than others.

Horizontal fiscal imbalance: A situation where some subnational units possess weaker fiscal capacities than others.

Inclusiveness: A condition such that the diversity of population groups and interests, regardless of their size, has access to representation or the means to express their views in political institutions.

Opportunity area: Potential arrangements or choices within a specific Strand with the potential to enhance political accommodation.

Option: A governance arrangement comprised of complementary choices across each Strand of political accommodation.

Political accommodation: The objectives, processes or outcome of mutual conciliation around competing political interests and perspectives.

Political decentralization: How the voice of citizens is integrated into policy decisions and how civil society can hold authorities and officials responsible for the consequences of their choices.

Presidential parliamentary republic: A system where a national legislature elects a president who serves as both head of state and head of government. Unlike a prime minister, the president cannot be removed by a vote of no confidence in the legislature.

Public participation: The mechanisms and systems through which the public influences and shares control over priority setting, policy making and resource allocations.

Representativeness: A condition such that the people chosen to act or make public decisions on behalf of a population are proportionate in number and allegiance to the social groupings which comprise the population.

Social contract: A tacit and implicit agreement among citizens to cooperate for social benefits, usually by sacrificing some individual freedom in return for State protection and services.

Strand: One of six focal areas or pillars of governance institutions through which political interests can be pursued and accommodated.

Unicameral legislature: A legislature comprising of only one legislative chamber.

Unitary State: A State with national and subnational tiers, in which the national government is defined as sovereign over all its territorial units.

Vertical fiscal imbalance: A situation where a subnational level of government incurs a disproportionately large amount of responsibility compared to its share of revenue.

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