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Elites and Constitution-Making in a Multi-ethnic Society: Challenges to Constitution-making in South Sudan

David Rauch Tang*

Abstract

This article examines constitution-making in post-conflict South Sudan, and asks a number of central questions. How inclusive was this process? What challenges were faced, and what lessons could be learnt from them for future constitution-making in this country? What impacts do the state institutions created by the Constitution have on peace and stability in South Sudan? Using a qualitative case-study methodology, the article takes the Transitional Constitution of South Sudan of 2011 as a case of constitution-making in post-conflict states. To this end, in-depth interviews were conducted with 10 key informants selected from members of the Constitutional Review Commission, political parties, and parliament using purposive sampling techniques. The objective of the study is to investigate past constitution-making and discern what lessons could be learnt for future constitution-making in post-conflict South Sudan. The findings show that the post-independent South Sudan's constitutional design as a multi-ethnic society has been elite-driven and exclusive. The article argues that failure to make constitution-making a people-driven process brought about failure in building inclusive and capable state institutions and shared values among the peoples of South Sudan. It also argues that lack of political recognition of ethnic diversity led to the political and economic marginalisation of some nationalities. These failures in state- and nation-building culminated in the eruption of the December 2013 conflict and the political and governance crises it entrained. For South Sudan to achieve sustainable peace and inclusive state- and nation-building, constitution-making must be an inclusive and public-driven process responsive to the society's diversity.

Key words: *South Sudan, post-conflict state, elite, constitution-making, multi-ethnic society*

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1. Introduction

Understanding the politics of constitution-making in multi-ethnic and post-conflict societies is becoming an increasingly complex matter. Centrally, what form of institutions should be included in the constitution to best enable it address the political, social and economic needs of a country's diverse societal groups? It is by now clear that there are many issues that make constitution-making highly contestable in any post-conflict society and that everyone needs to have a say in the process. Indeed, part of the reason for the failed history of constitution-making in South Sudan is that the diverse people of South Sudan do not trust the dictatorial and authoritarian government, led by the Sudan People's Liberation Movement (SPLM), to deliver a democratic constitution for the people. Too many people feel they have been excluded from having a say in the making of the Constitution country (Jock, 2022).

This article seeks to answer some of the key questions that are likely to arise in the new constitution-making process. Constitutional design and the institutions which go with it are widely seen as the basis for democracy and nation-building: Can the new constitution respond adequately to the demands of diversity in South Sudan? Is the constitution-making process in post-conflict (as of December 2013) South Sudan inclusive? Can South Sudan use the new constitution to manage its ethnic diversity by building common values and a shared vision into it?

Attempting to answer these questions requires some analysis of South Sudan's previous attempts at constitution-making and this analysis is drawn from the interpretation of a range of primary and secondary data. It also draws on comparisons with the experience of other multi-ethnic societies in their attempts at constitution-making.

2. The struggle for independence and constitution-making

On July 9 2011, after six decades of bitter struggle, South Sudan achieved independence by separating itself from the northern state of Sudan to become the youngest nation in the world The Southern Sudan region had suffered two rounds of civil war

against successive governments in Sudan (Varma, 2011). The first (known as Anyanana 1) lasted from 1956 to 1972, ending with the Addis Ababa Agreement that granted Southern Sudan local autonomy or self-rule within a united Sudan. The period from 1972 to 1983 saw comparative peace in the region. A second civil war began in 1983 and lasted until a peace agreement in 2005 promised (amongst other things) a referendum on South Sudan's independence, to be held six years later (Zemalek & et. al, 2022; Young, 2022).

In both of these wars, the motivating factors were the South's economic marginalisation, its exclusion from significant roles in national politics, and the national government's imposition of Sharia law on the whole of Sudan, including the animist and Christian Southern Sudan (Cope, 2013). In addition, Southern Sudan felt that the North had failed in its promise of a federal government system that would give the region more autonomy. This had been turned down owing to fears that federalism would lead to the disintegration of the newly independent state.

The Comprehensive Peace Agreement (CPA) was signed in 2005 between the Government of Sudan and the SPLM/A and brought to an end more than 22 years of armed conflict. The CPA granted Southern Sudan region self-government and self-determination through the internationally supervised referendum which brought independence in 2011 (Zemalek & et al. 2021; Wassara, 2022). But South Sudan has continued to be plagued by violent conflicts, occasioned by the struggle for power between different factions of the governing SPLM party, the massive displacement of people, and the influx of refugees from neighbouring countries and beyond (Zemalek & et Al. 2021; Jok, 2012).

Factionalisation in the ruling SPLM and the absence of capable state institutions were central to post-independence conflict (Wassara, 2022). Elites in the governing SPLM disagreed and clashed over what system of governance South Sudan should adopt. As one interviewee explained, the division between those who favoured a participatory form of constitution-making and those who did not was razor-sharp. The Deputy Chairman of the governing party, Riek Machar, favoured a constitution-making process with full public participation, while the chairman of the

SPLM and President of the Republic, Salva Kiir, and his group disagreed and wanted a simple review of the Interim Constitution, without any need for public participation (interview with SPL-IG officials, 2020).

The civil war has come to a halt for now, thanks to several rounds of peace talks and the signing of several extremely fragile peace agreements in 2015 and 2018. These had been brokered by the Intergovernmental Authority on Development (IGAD) and its allies. But the latest agreement is yet to be implemented, and its future is uncertain (Zemalek & et. al., 2022; Young, 2021).

As the governance crisis continues (driven by the challenges identified above), political elites continue their project of state capture, frustrating any attempt to bring about the peace and stability which is essential to addressing key issues around the socio-economic development of the new state (Varam, 2011; Young 2021). The manipulation of ethnicity as a source of political power is widespread and uncondusive to democratic governance in the new nation (Jok, 2021).

Ginsburg and Simpe (2014) note that the usual perception of constitutions in dictatorships is that they are not worth the paper they are written on. These constitutions do no more than acknowledge an idea of democratic legitimacy which is firmly denied in practice. So, why South Sudan should not be interested in investing in democratic constitution-making?

It is essential to understand both the function of constitutions in general as well as why it is that even authoritarian regimes appear to be preoccupied with writing constitutions with no participation by those who are to be governed by them. A comparative understanding of these questions will help us better understand the plight of South Sudan, particularly with regard to the problems posed by ethnic and other diversities (Mo, 2014).

External actors long have influenced the making of constitutions in Africa. Likewise, in the past two decades their role in peace-building after violent conflict has often extended to constitution-making in processes characterised by the limited involvement of key stakeholders such as opposition parties, civil society organisations (CSOs), and the population in general (Fombad, 2007).

3. Post-independence conflicts, peace agreements and constitution-making

3.1. The 2015 peace agreement: righting the wrongs of the past

The Agreement for Resolution of Conflict in the Republic of South Sudan (ARCSS, 2015) was brokered by IGAD, a regional bloc in the Horn of Africa, after nearly two years of vicious fighting between factions of the SPLM governing party. It led to the formation of a Transitional Government of National Unity (TGoNU) on 29 April 2016.

Despite the formation of the TGoNU, many challenges to peace and stability in South Sudan remained (Dagne, 2016). The agreement gave no detail on substantive institutions or constitutional mechanisms; and the lack of cooperation between the Office of the President and the first vice president boded ill (Interview, 2020). All in all, a general lack of political will among the parties involved in the Agreement's implementation cast a shadow over the proceedings and threatened the effective functioning of the intended national unity government right from the start. The political elite continued to usurp power and act unconstitutionally even though the Agreement recognised that the political crisis in South Sudan which had led to civil war was due to the concentration of power and resources at the centre, that is, in the hands of executive, especially so the President and his surrounding elite (Nyaba, 2019; Zambakari 2018).

In an attempt to remedy this situation, the peace agreement provided a number of amendments to the Transitional Constitution of 2011. Article 2(1) (14) stipulated that more powers and resources be devolved to states and local levels of government by amending the Transitional Constitution (IAGD, 2015). The participatory amendment of the Transitional Constitution is also affirmed in the peace agreement in Article 13(1). The latter stipulates that there should be an inclusive representation in the formation of the National Constitutional Amendment Committee (NCAC). However, this inclusivity (as stipulated by the agreement) was never implemented because of the lack of political will manifested by the main parties to the peace agreement, namely, the SPLM-in-Government (IG) and the SPLM-in-Opposition (IO).

Not surprisingly, on 8 July 2016, the peace agreement collapsed when fighting broke out in the national palace between the security guards of President Salva Kiir and the Vice President, Riek Machar (IGAD, 2015). As a result, Machar and the majority of his SPLM-IO faction members were forced to leave the country and flee for their lives. And, as a result, neither the NCAC nor the amendments in the Transitional Constitution were fully instituted as required by the terms of the peace agreement (ACCORD, 2019).

3.2. The revitalised peace agreement of 2018 and constitution-making

Like its predecessor the Agreement for the Resolution of the Conflict in the Republic of South Sudan (ARCSS) – the Revitalized Peace Agreement (R-ARCSS) also contained provisions for the amendment of the 2011 Transitional Constitution. One of these was to devolve greater powers and resources to the states and to the local levels of government (Article 1(2), R-ARCSS, 2018). This was to be done through a participatory and inclusive constitutional amendment that could lead to peaceful, participatory and democratic permanent constitution-making afterwards (Article 3(1), R-ARCSS, 2018).

However, a key informant from the SPLM-IO explained that a key reason for the collapse of the 2015 peace agreement was simply the unwillingness of President Kiir and his SPLM-IG faction elites to implement it. Their major concern was equitable power- and resources-sharing between the different parties in the coalition government promised by the legislation. As a result, the attempt by the Dinka to continue their domination over political life in South Sudan, against other ethnic communities, meant that the peace had to be abrogated altogether.

Indeed, the implementation of the R-ARSS by the parties to the agreement had been slow from the very beginning, and became even slower as the parties reached the halfway mark in the implementation of the provisions of the peace agreement (Vhumbunu, 2019). A typical example is pre-transitional issues that were prerequisite to the formation of the Revitalized Transitional Government of Nationality (R-TGoNU). Lack of implementation of those prerequisite activities on time led to the

postponement of the formation of the government of national unity twice consecutively. First, it was for six months, and for the second time, three months (Ryan, 2018). The reasons are many, but involve a deliberate delay in the implementation of pre-transitional activities (Interview, 2020). To mention a few of these fundamental reasons, the pre-transitional activities are the amendment of Transitional Constitution of 2011 through its constituted body, the National Constitutional Amendment Committee (NCAC); the reconstitution of the Transitional National Legislative Assembly (TNA); and the formation of state and county governments (JEMC Quarterly Reports, February 2021).

Similarly, the Transitional Security Arrangements were intended to consolidate all the various armed groups into a unified national organised force that would reflect the country's ethnic diversity. More than two years have passed since the forces were placed in cantonment sites and military training camps in different parts of the country yet the graduation of those forces has been completed. Until now, it is only President Kiir's faction of the armed forces mostly dominated by Dinka and a few Nuer that is functioning as national armed that provides security. This has brought a lot of suspicions from other armed factions that are part of the coalition government whether or not the graduation of the unified national organised forces will happen. Without proper security arrangements, the already fragile revitalized peace agreement remains very shaky and even more fragile (JEMC Report, 2021). This claim was confirmed by one member of a political party which is part of the Revitalised Government National Unity during my time in file data collection in 2021 Juba. According to him, the delays in the implementation of security protocols in the peace agreement, may put the efforts for achieving sustainable and lasting in the country in serious jeopardy (KII, in Juba, 2021).

4. Conceptual understanding of constitutions and constitution-making

According to Hardin (2013), there are two main schools of thought in constitutional theory. The first and oldest grounds constitutions in contractual agreement, as in the long-standing contractarian tradition in political philosophy. The second grounds them in coordination. The former theories are almost

all at the normative level as part of an ostensible justification of obedience to the monarch or state. The coordination theories are inherently explanatory or causal theories (Hardin, 2013). Before we discuss these two theories in detail, it is important to define the concepts of constitution and constitution-making. In the context of this article, we adopt the definition of constitution given by Hardin (2013).

According to Hardin, a constitution establishes a system of government. It defines the powers and functions of its institutions; provides substantive limits on its operation; and regulates the relations between institutions and the people (Hardin, 2013). In this conception, constitutions are meant to constrain the power that governments have. They generate a set of inviolable principles to which future law-making and government activities must conform. As well as restricting government, constitutions also enable government, by empowering institutions and, in some cases, by mandating them to promote social welfare. Thus, constitutions can help to develop the institutions that offer critical services such as education, health, security and infrastructure to the people through equitable power and resource-sharing arrangements. Although the use of the term “constitution” in this way is relatively recent, the very idea of government has always included some notion, elementary though it may be, of a constitution – that is of rules creating, empowering, and limiting government institutions (Hardin, 2013). Hence, the success and endurance of constitution might be partly attributable to the ability of institutions, in this case the Supreme Court in its restrained approach to judicial review of legislation (Hardin, 20213).

Other scholars suggest other definitions. For Brown (2002), constitutions represent the basic legal framework for governing. Brown further argues that a constitution serves two main purposes: it divides and checks state power, and it defines and protects the rights of the people. Others, like Devera (2008), define the constitution as a public document, a contract between the state and its people negotiated by appropriate representatives, and concluded, signed and observed by them. However, this is a traditional definition which has been challenged and suffered some serious criticisms.

Hardin (20103), for instance, insists that contracts are typically enforceable by a third party (usually the state) while constitutions are not. Contracts typically govern a fairly limited quid pro quo between parties; but it is hard even to define who might be the parties engaged in such an exchange when a constitution is drawn up (Hardin, 2013). Finally, according to Hardin, constitutions typically govern into the distant, unforeseeable future and have no project for “completion” in sight – they will never be “fulfilled”. Contracts require genuine agreement to make them binding, while constitutions only require acquiescence to make them work. Therefore, the analysis of the Transitional Constitution of South Sudan is based on the view that a constitution defines powers, and how they can be exercised, on the basis of the functions of the institutions it creates.

A constitution designates institutions, specifies how these institutions are to be filled, and allocates powers and responsibilities between the various levels of government (Kincaid & Tarr,2000). It also indicates the aims for which political power is to be exercised, and, in most instances, elaborates individual rights, as well as – sometimes – group or multi-ethnic rights, which are all to be protected from violation by the government (Kincaid & Tarr, 2005). More generally, an important part of constitutionalism is the legal framework that surrounds it. Constitutionalism goes beyond the constitutional text. It works to operationalise the constitution, the fundamental law containing the rules, conventions and practices by which a society governs itself (Mo, 2014).

5. Theories of constitution-making

For the purposes of analysing South Sudan’s Transitional Constitution, this article considers two major theories of constitution-making: the coordination and contractarian theories (as described by Hardin (2013). According to coordination theory, government derives its power (and not its right) to rule by some specific form of coordination that works as a convention and the population acquiesces in that rule by its own convention (Hardin, 2013 page 59). Through convention, the government has the capacity to do serve the people in many ways. Moreover, for democratic governments, the dual-convention theory virtually demands constitutional limits on the power of government to interfere in democratic processes (Hardin, 2013).

Ginsburg (2013) has outlined other constitution-making theories. He argues that the social contract metaphor (of contractarian theory) is primarily a normative one. For him, the contract theory view of the constitution is rooted in the ideas of the early thinkers in the liberal tradition. Here contract was a natural metaphor for helping to explain why a constitution ought to be legitimate in a society composed of fictively autonomous individuals (Ginsburg, 2013). Contractarian theorists typically focus on the basis of contract to ground a claim that citizens as the parties to a real contract would be legally obliged to consent to whatever government does (Ginsburg, 2013). Advocates of contractarian theories assert that contracts are helpful for understanding how constitutions are formed and how they can operate in a positive manner – in other words, they help us understand the actual social and political foundations of constitutions, as opposed to their theoretical foundations (Ginsburg, 2013).

The contractarian approach implies a government-controlled process of constitution-writing. Dubbed “the old approach”, the government controls the appointment of the members of the constituent assembly and the selection of the committees is dominated by conservative lawyers and politicians. The process in this old approach limits the participation of ordinary people even before the constitution comes into force.

In South Sudan, constitution-making was elite-driven, and the institutions created by the constitution proved unable to serve the public. Thus, for example, the division of powers has given way in favour of national executives who are unable to deliver basic services to the people (Miamingi, 2018). The public does not have proper access to basic services (Nyaba, 2018). According to one civil society organisation representative who was interviewed in 2019 in Entebbe, Uganda the e history of constitution-making that starts with the CPA in South Sudan shows that the SPLM’s elites (military and political) have designed state institutions to serve their own interests, in which they have control over the power and resources of the nation. Thus, the government has proved unable to provide public security for its people. The failure of the governing SPLM party to democratise the political process and focus on the necessary political and economic inclusion as the grounds for national reconciliation are the standard signs of the failure of the constitution-making process (Zambakari, 2018). The recent crisis indicates the failure of the state institutions to properly serve the public.

According to Zambakari the, lessons from successful and unsuccessful transitions inform us that the process and context of political transition matters. South Sudan should develop a system of governance rooted in its socio-historical context and that responds to people's needs. Key stakeholders should be prioritised through an inclusive process that allows all relevant actors to shape the outcome of the permanent constitution-making (Zambakari, 2021). For Zambakari, the parties to the peace agreement have the difficult task of implementing inclusive democratic processes and bringing diverse ethnic groups into the national framework to create a unified state.

Constitutionalism, meaning the putting-into-practice of a constitution through the institutions it has created, it is pertinent concept, and in South Sudan's case, it has been missing. It entails that power and authority are exercised according to what is stipulated in the constitution. According to Mading (2015), however, the history of constitution-making in South Sudan reveals a process which is exclusive, elite-driven, oppressive and unaccountable, disconnected from the masses and with little bearing on rural social contexts; the product itself is often unworkable. As a result, both the process and outcome of the Transitional Constitution of 2011 failed to secure constitutional legitimacy (Mading, 2015).

The review of the Interim Constitution, a process from which the Transitional Constitution was born, was dominated by the ruling SPLM (Mading, 2015); moreover, the practice and implementation of the Constitution have not been actualised. The separation of powers between branches of government, for instance, is not clearly stipulated (Key informant interview, 2020), with power exercised instead from the centre by SPLA/M military and political elites (Akol, 2013). In this regard, the President governs the country through presidential decree orders in matters such as the appointment of Members of Parliament, state governors and county commissioners (Akol, 2013). The last elections in South Sudan were held in 2010; since independence in 2011, there have been no further elections. It is the President who appoints all the officials at different strata of government, ranging from the national to the county levels. This is contrary to the Constitution's stipulation that every level of government shall have autonomy

in choosing and electing its representatives (Transitional Constitution, 2011, Article 36(1)).

Inasmuch as there are differing conceptions of what a constitution is, so there are differing conceptions of the form that constitution-making should take. For example, Jillson (2003) states that constitution-making is, or should be, an elaborate, yet elegantly simple, process in which participants refer to distinct sources of information to determine fundamental aspects of the institutions created based on the design of the Constitution. An implication of this definition is that constitution-making is different from constitutional design, with the former being a process and the latter reflecting the outcome. More important, though, is the reference to participants having distinct sources of information as bases on which to reach decisions. In other words, a constitution must be a reflection of views of diverse communities with similar or different social cleavages.

Other authors, such as Arato (2009), maintain that there are two constitution-making processes: one is public driven in its process, while the other is elite-driven. By “elite-driven constitution-making”, Arato means a process of constitution-making in which popular participation is lacking, and he terms the result an “imposed” constitution. South Sudanese constitution-making falls into this category. As Akol (2012) observes, the SPLM imposed on its will and interests on the people of South Sudan without enabling them to play an active role in the process.

This article adopts the definition of constitution-making proposed by Lijphart (2004) and Choudhry (2019). They define it as a process in which a constitution responds to opportunities and challenges raised by ethnic, linguistic, religious and cultural differences and does so in ways that promote democracy, social justice, equality, peace and stability. Lijphart (2004) further maintains that constitutional designers can ensure that they meet the demands of a deeply divided society by focusing on two major elements: power-sharing and group autonomy. As such, this article views constitution-making in the context of South Sudan as a process that, ideally, should involve participation reflective of South Sudan’s diversity and ethnic, cultural, linguistic and other cleavages.

Assessed against this benchmark, constitution-making in South Sudan during the transitional period of the CPA implementation was elite-driven, with little or no consultation with grassroots constituencies. In the process, the elite assumed that they had “liberated” the people of South Sudan from Khartoum’s social, political and economic marginalisation of them, and thus took the responsibility upon themselves to develop the Constitution on behalf of the people. This was in spite of the fact that South Sudan is a multi-ethnic society politically divided along clan and ethnic lines and fractured by more than many years of conflict in the Sudan; moreover, during independence it has witnessed a repeat of the pre-independence situation in which ordinary citizens were exploited and marginalised by elites who had captured the state machinery as well as the country’s wealth and natural resources (Nyaba, 2018).

Given this enormous segmentation, it is doubtlessly true to say that South Sudan is a country without a state and a nation fraught with social cleavages. The political process accordingly needs to take these cleavages into account: avoiding this plurality and diversity in the constitution-making process may well exacerbate the conflict (Choudhry, 2019). In contrast to this view, most of the political elites who were canvassed in this study attributed the problem of managing South Sudan’s diversity to tribalism. They thus see the country’s conflicts as primordial in origin and an irrational manifestation of traditional rivalries between ethnic groups. As Reilly (2003) notes, this explanation pays little attention to the objectives and interests of those involved in the conflicts. Furthermore, it echoes the old argument advanced by political thinkers of the 17th and 18th centuries who, like John Stuart Mill, held that democracy is incompatible with a multi-ethnic society since “free institutions are next to impossible in a country made of up of different nationalities” (Reilly, 2003).

The assertion that democracy cannot survive in multi-ethnic societies and, conversely, that it is possible only in relatively homogeneous societies has been as source of controversy, and is disproven when countries which are largely homogeneous become entangled in protracted, spiralling conflicts (Reilly, 2003). The problem in South Sudan, therefore, is not its diversity but the lack of management of that diversity through inclusive states institutions created by a constitution.

6. South Sudan's failed history of constitution-making

A critical by-product of the new dynamics of power, politics and political contestation has been a renewed interest in constitutionalism and constitution-making in most countries in Africa (Ihonvbere, 2005). However, this has not always worked well. In South Sudan, the approach to constitution-making has been an obstacle to constitutional government and rule of law ever since 1956 when Sudan gained independence from Britain. Historically, constitution-making has been characterised by elitism, exclusionism and limited public participation (Mading, 2015).

After independence in 1956, a permanent constitution-making process was proposed, but it was never carried out as a military coup in 1958 put an end to the idea (Cope, 2015). The 1964 Roundtable Conference and the 1964 Transitional Constitution followed the same pattern of a top-down approach driven by elites and political parties (Mading, 2015). In addition to the problem of elite-driven constitution-making, the country has experienced turbulent military rule marked by prolonged civil wars (Mo, 2014). It had three short parliamentary periods – 1954–1958, 1964–1969, and 1985–1989 – and a longer stretch of military regimes – 1958–1964, 1969–1985, and 1989–2018 – at the end of which the last one, under Omar Al Bashir, was overthrown by military officials during a civil uprising.

This instability influenced Sudan's political culture, a culture which South Sudanese leaders in turn inherited from the old Sudan. As in the Sudan, the South Sudanese political and military elite has been the driving force of the political process, its objective being to ensure that political institutions serve its interests (Cope, 2013). Furthermore, Cope argues that South Sudan's Constitution of 2011 is broadly influenced by two major factors. The first is the international model of constitutions, given that the Interim Constitution was created under international scrutiny: as with the CPA, a cadre of international observers and role-players, including constitutional experts from IGAD and the United States, descended on the process. The second factor is that the Interim Constitution was based on the priorities of SPLM elites. This influenced the design and operation of state institutions which

serve only the interests of SPLM political and military elites and their patrimonial networks (Cope, 2013).

The constitution of the newly independent South Sudan was written when the second civil (1983–2005) ended and warring parties signed the CPA in the same year. As Cope (2013) explains, constitution-making was characterised by an “our-turn-to-eat” attitude and the exclusion of other stakeholders. Most notably, the constitution-makers created a second legislative chamber, the Council of States, which substantially increased the size of the national assembly in order to create future jobs in Khartoum for them and their allies (Cope, 2013). To understand the factors that led to the failure of constitution-making in South Sudan, it is necessary to look briefly the country’s constitutional history between 2005 and 2016.

6.1. The Interim Constitution of Southern Sudan (2005)

Work on the Interim Constitution of the Southern Sudan began on 5 December 2005 when a technical committee met in Rumbek to begin the drafting process not long after the Republic of Sudan’s National Legislative Assembly had adopted the Interim National Constitution on 6 July 2005 (Cope, 2013). Within about three weeks, the technical committee produced a draft, which was given to a 40-member drafting committee appointed by President Kiir. Drafting technical committee members consisted of 28 SPLM members, six members of the National Congress Party, six representatives of opposition parties, and three of CSOs (Cope, 2013). The drafting of the Interim constitution was thus not entirely dominated by the SPLM but included a mixture of groups. There was also a significant contribution by the IGAD and its international partners, which supported the CPA process into the draft.

The Interim Constitution establishes a federalist system with significant decentralisation (Interim Constitution of Southern Sudan, 2005, Article 2(1). It provides for meaningful state-government autonomy, including elected state governors and state courts (Article 167(1)– (3)). Equally important, it enumerates 25 individual human and civil rights and establishes a judiciary at the state level (Article 13).

Nevertheless, the Interim Constitution is not without its problems. Despite the mixture of groups involved in its drafting, the SPLM remained predominant. Moreover, its provisions reflect little of South Sudan’s diversity; instead, the Constitution reflects SPLM’s political elites interests for control of power and resources. Those interests are reflected in the implementation of the Constitution through rule by decrees and authoritarianism- bypassing democratic provisions, constitutionalism and collective decision-making in state institutions. The Interim Constitution was also subject to inputs from interested groups from different parts of the world (Cope, 2013). In general, the Interim Constitution paved the way for another failure in inclusive constitution-making in South Sudan’s constitutional history (Interview, 2020).

6.2. The 2011 Transitional Constitution of South Sudan

On 21 January 2011, following the overwhelming vote for independence in a referendum, President Kiir (elected in April 2010) appointed a technical committee to review the 2005 Interim Constitution (Cope, 2013). The Technical Review Committee was initially chaired by John Luk Jock, the Minister of Justice and Constitutional Development. The committee consisted of 20 members, four observers and various experts, including attorneys and other technocrats. Although the resolution of the October 2010 conference called for an “all-party constitutional conference” that would later enable participatory constitution-making, not all the stakeholders such as civil society groups and political parties participated in the process. It was hijacked and dominated by the SPLM political elites. For example, 19 of the 20 committee members, including the chair, were SPLM members. In protest at the composition, the single non-SPLM member boycotted the committee but was later reinstated to it by presidential decree (Cope, 2013).

In response to complaints about the committee’s political homogeneity, President Kiir signed another decree in February 2011 adding 11 further seats for opposition parties, as well as two for the Council of Churches and one for Muslim contingents, making a total of 14 new members (Cope, 2013). This substantially tilted the committee’s balance of power, as more than 40 per cent were now non-SPLM members. In response to protests from his own

party, though, the President later added 17 more SPLM members. In turn, many non-SPLM members walked out of the process. The committee eventually began work, but its appointment process and composition engendered a backlash against Kiir and the SPLM (). Many non-SPLM members left, including the religious representatives in the committee. Thus, the constitutional review became SPLM-owned (International Crisis Group, 2011). As one opposition political party who is a close ally to the governing SPLM puts it, all the SPLM wished for to increase its control of state institutions and stay in power indefinitely (KII, 2020).

Some domestic opposition groups protested at the committee's political homogeneity and began acting to circumvent the committee and contribute independently to the constitutional review process (International Crisis Group, 2011). This move was also supported by a group within the governing SPLM, led by Deputy Chairman and Vice President Riek Machar, which held that the constitutional review should be made a participatory process. This prompted sharp division within the SPLM (Miamingi, 2018), with accusations made that the President had manipulated the process to suit his own interests rather than those of the party.

The division within the SPLM compounded the fragility of the constitutional review, which degenerated into a clash of personalities between Kiir and Machar, whose political differences were already entrenched (Zambakari, 2021). The SPLM responded that the committee's task was essentially technical, not political: it was, after all, charged only with transforming the 2005 constitution of a semi-autonomous region into that of a sovereign nation, and therefore only technical changes were needed (Cope, 2013). The Technical Review Committee continued its work despite massive criticism from the public, opposition parties, and factions in the SPLM. Finally, the revised Interim Constitution was tabled before the Assembly and passed into law as the Transitional Constitution of the Republic of South Sudan (Zambakari, 2021).

7. Challenges in the Transitional Constitution

The structural provisions incorporated into the Transitional Constitution tell a different story. The SPLM-dominated committee made several changes that, by design or accident, appear to

benefit their members directly (Interviewee, 2020). First, the 2011 Transitional Constitution adds a second legislative chamber, creating a “Council of States” and thereby substantially expanding the National Assembly (Cope, 2013). Although some members of minority parties also benefited from this change, one motive for the move may have been to provide job opportunities for now-unemployed former Southern members of Sudan’s national legislature (Zambarkari, 2021; Cope, 2013).

More importantly, the document rolls back the decentralisation and devolution that existed in Southern Sudan prior to independence. It has been suggested that decentralisation was a futile pursuit from the start, given the states’ lack of means for generating tax or other revenues. But decentralisation also benefited members of the central party leadership, where SPLM hegemony is greatest (Cope, 2013). As an interviewee explained, one of the challenges facing subnational government is lack of autonomy in exercising the right to generate own revenue. Even the 2 per cent given to oil-producing/rich areas is not used for development, but ends up in the pockets of elites in the states who have patrimonial and client networks with their fellow elites within the governing SPLM in the capital, Juba.

Another challenge in the implementation of the Transitional Constitution is that it places all public attorneys under national control and eliminates state-level courts, thereby nationalising the entire national judiciary (Zamabkari, 2021; Cope, 2013). It also gives the President the power to dissolve both state councils and the National Legislature and to dismiss state governors during any (presidentially determined and initiated) “state of emergency”. During a state of emergency, the President may suspend most parts of the bill of rights and take any measure “deemed necessary”, which then “shall have the force of law”. The President may “by law or orders, take any measures ... to dissolve or suspend any of the state organs or suspend such powers conferred upon the states under this Constitution” (Article 34(1), Transitional Constitution 2011). In addition, the revisions remove the role of the legislature in dismissing federal justices, arguably giving the President the unilateral authority to remove justices (that is, members of the Supreme Court) on grounds that include not only gross misconduct and incapacity but “incompetence” (Cope, 2013).

The Transitional Constitution sets no term limit for the President, thereby facilitating the centralisation of power to the benefit of the SPLM elites that control power in the centre (Interview with a CSO representative, 2019). The lack of a term limit has resulted in a weak parliament incapable of checking executive powers and stripped states of key autonomies from the national government (Zambakari, 2021; Miamingi, 2018). In addition, the executive branch has relied on presidential decrees to circumvent the legislative process and thus rule with impunity. The unconstitutional creation of 32 new states and the dissolution of the government in 2013 are a few examples of how the President rules the country with an iron fist (Zambakari, 2021). The removal of elected officials from office and other instances of egregious exercise of power have greatly undermined the autonomy of the states as well as hope for a truly federal system in South Sudan (Zambakari, 2021). Decentralising power by way an executive order serves to strengthen the executive branch, override the powers of the legislature, and exclude the public from transparent deliberation on national issues (Zambaraki, 2021).

In general, the lack of inclusiveness in the 2011 constitutional revision, combined with under-the-radar structural power shifts, proved a political debacle that provoked widespread public anger at the Kiir administration (Cope, 2013). After the initial controversy about the committee's composition controversy, "the [political] damage was done and opposition suspicions reinforced" (Cope, 2013). It raised public doubts as to whether the new nation's government would be transparent, inclusive, or truly democratic (International Crisis Group 2011). It also demonstrated the SPLM's willingness to concede to additional human rights while altering government structures in ways that yield future political gains – in other words, by conferring institutional power to its most prominent members, most notably the President (Cope, 2013).

8. Constitution-making and South Sudan's multi-ethnic society

Most experts on multi-ethnic societies and constitutional engineering agree that deeply societal divisions pose a grave problem for democracy. Likewise, they agree that the problem of

ethnic and other deep divisions is greater in countries that are not yet democratic or fully democratic than in well-established democracies, and that such divisions present a major obstacle to democratisation in the 21st century (Lijphart, 2007).

It should be noted too that, as Lijphart (2007) points out, even in the so-called advanced democracies, there are divisions between different communities as a result of unequal distribution of wealth – inequality which then affects ethnic minority groups and results in non-recognition of their rights. A similar argument is advanced by Jess & Williams (2005), who correctly assert that intractable conflicts within and between states often revolve around inequality in access to political power and social and economic resources.

By implication, division within a multi-ethnic society arises not only from social cleavages such as differences in language and cultural orientation, but from failure to manage diversity effectively through equitable sharing of power and resources. Managing diversity by way of equitable resource distribution and the provision of equal opportunities for all citizens is thus critical. Property rights, jobs, scholarships, educational admissions, language rights, government contracts, and development all confer benefits on individuals and groups, and – if not managed effectively – may lead to division within society (Jess & William, 2005). In South Sudan, rampant corruption and mismanagement of public resources mean that a few groups win while the majority of the population loses, a situation that deepens inequality between the have (elites) and have not in the society (the public of South Sudan).

For conceptual clarity, it is important to define the phrase “divided society”. In this regard, we refer to the definition given by Lijphart. In his seminal work, *Democracy in plural societies* (1977), as cited in Choudhry (2019), he draws a contrast between two kinds of political communities: culturally homogeneous ones, which are not beset by political division, and plural societies, which are termed divided communities due to the presence of social cleavages (Choudhry, 2019). In a critical reflection on Lijphart’s thesis of a divided society, Choudhry (2019) maintains that political claims are refracted through the lens of ethnic identity;

when such cleavages are not recognised in the political setting of a country, conflict is always inevitable amongst ethnocultural groups who see themselves as marginalised.

South Sudan is a divided society with more than 64 ethnic communities. This diversity should be addressed through the creation of inclusive and participatory state institutions provided by the Constitution (Akol, 2012; Yoh 2018). State institutions in South Sudan do not serve the public interest. Rather, they are exclusive in nature and meant to serve only the interests of the country's elite. Elite control of power and resources is not new in South Sudan (Key informant interview, 2020). What makes South Sudan a divided society is the fact that the elite, who hail from majority ethnic communities such as the Dinka and Nuer, use conflict and ethnicity as tools for accessing power (Nyaba, 2019). In other words, the elite have ethnicised the political process through ethnic mobilisation to advance their political and personal interests (Zambakari, 2018).

The resultant lack of inclusivity in state institutions has excluded ordinary citizens from benefiting from the social and economic services offered by the state. One of the primary challenges in the Constitution is the elite nature of peace -building outlined in the CPA, which has given too little consideration to what the national government in South Sudan would do within its own borders, to its own communities, once conflict has ended. What the international community wrongly assumed was that the SPLM/A and Khartoum were the only key stakeholders in the peace-making process by excluding the other armed groups from the main agreement, and so postponing resolution of all the issues around these groups to the implementation phase, the CPA became a catalyst for a return to war (Jok, 2022).

9. Political recognition and constitution-making in South Sudan

The expression the politics of recognition can be used in two ways. It can describe or explain a range of empirical phenomena, that is narrow conception or to denote a normative response to those phenomena, or broad conception to mean political inclusion (Burns & Thompson, 2013).

Political recognition means the recognition of [the] unique identity of an individual or a group, their distinctive characteristics from everyone else to participation in national governance process through power and resources sharing at a certain level of government. Politics of recognition of ethnic diversity in a political system would also means to), of participation of different ethnic communities of a multi-ethnic society not only in the constitution-making but also in actual implementation of a constitution through decision-making in public matters such as in elections (Tayler, 1994; Mirsolav, 2016).

In South Sudan, the SPLM as a rebel movement-turned-governing political party, unlike many other post-conflict ruling political parties in Africa, provided little political space for other stakeholders to participate in governing processes such as constitution-making (KII, 2020). For example, since 2010 general elections in the Sudan that happened before the separation and independence, there has never been any other elections that took place after South Sudan became an independence state.

There are quite a number of reasons for the SPLM failure to establish an inclusive political system which recognizes diversity in power and resources sharing South Sudan. The first is due to the fact that the SPLM's political transformation from liberation movement to governing political party was a top-down, elite-driven process without any mass political mobilisation to sensitise the public about the mission, vision, programmes and objectives of the party (Nyaba, 2019a). Thus, state-crafting occurs in the same way. Lack of political recognition of diversity by the governing SPLM party has created a social and political rift between them and the masses of South Sudan (Nyaba, 2019a). Second, the failure of the ruling class to build inclusive democratic state institutions that could have provided basic services to the public is an example of how the SPLM elites designed and are implementing the Transitional Constitution in their political interest. Relating to this is, the failure of political elite to democratically transform SPLM. This has also resulted in face-saving exclusionary political settlements, inequitable power and wealth-sharing arrangements, between different levels of government (Zambakari, 2019). Hence, the exclusionary nature of South Sudanese political practice has had profoundly negative impacts on state-crafting and the nature of

the system of governance adopted. This has also adversely affected the South Sudanese people regardless of their ethnic background and political affiliation.

Since constitutionalism and the rule of law are commonly seen as the “antithesis of arbitrary rule” constitution-making has been fetishized and turned into “the dominant paradigm for state governance in the international arena (Kartin & Sureau, 2015). This is the case of South Sudan constitution-making. Through the amendments of the Transitional Constitution, the elite were able to have more power, and inflated number of the states which were originally 10 to 32 states that serve only their interests. The politico-legal discourse through “use of concepts like people, self-government, taking town to people, citizen, rights, equality, elites and legislators into the Rule of Law mind-set whereby enormous normative transfers take place: constitutions, institutions, and state-making techniques” (Kartin & Sureau, 2015).

Therefore, the constitution-making in post-conflict South Sudan has not brought about such results as self-government, the rule of law, and the building of an inclusive and democratic nation (Miamingi, 2018). The SPLM dominated the process of constitutional review by means of its superior numbers in the Technical Review Committee and let other stakeholders leave the process. The technical committee members, mostly from the SPLM governing party, claimed that the task at hand was not constitution-making but constitutional review, which does not require a constitutional conference (Miamingi, 2018). The objective of elites in the SPLM was to ensure that they could control state institutions so as to serve their personal and political interests. Hence, the SPLM as a ruling party had not recognised the importance of public participation in the constitution-making process. To understand the challenges of constitution-making in South Sudan, it is important to look into the body which was tasked with the making of a permanent constitution, the National Constitutional Review Commission (NCRC).

10. The NCRC and failed permanent constitution-making

The NCRC was established on 9 January 2012, nearly a year after the declaration of the country’s independence on 8 July 2011 by

presidential decree. Major mandates given to the Commission included drafting a permanent constitution, which was supposed to be adopted in 2015; reviewing the Interim Constitution of 2005 and seeking the views of stakeholders on the Transitional Constitution; and conducting a nation-wide public information programme on constitutional issues (NCRC, 2012). However, the NCRC did not carry out its mandate, as there were a number of challenges.

First, the composition of the Commission did not reflect South Sudan's political, ethnic and other diversities. Of the 24 members appointed by the President, 21 were from the ruling SPLM party, three were from opposition political parties, and one was from civil society (Cope, 2013). This shows that 95 per cent of the Commission was dominated by the SPLM. As a result, four members of the Commission from other political parties and one from civil society did not take oath of office but withdrew their membership (Cope, 2013). The fact majority of members of the Constitutional Review Commission were from the governing SPLM, this has led some people called the Commission the "SPLM Constitutional Review Commission." This practice of the SPM dominating the process constitution-making is not something new; they did the same during the drafting of the Interim Constitution in 2005 in which the whole from the beginning to the end was entire was dominated by SPLM and its peace partner NCP (KII, 2021).

A second challenge that prevented the NCRC from carrying out its function was the outbreak of conflict in December 2013 within the governing SPLM party leadership- conflict that later became a full-blown civil war that lasted seven years and which led to the death of more than half a million people and devastated the country socially, economically and politically (Nyaba, 2018). One of the tasks of the Commission was to hold a national constitutional conference that would bring together representatives of various stakeholders, but this has not been done . Moreover, the NCRC's mandate is again limited to "reviewing" the constitutional document instead of "revisiting" it in its entirety. In this respect, the constitution-making design exposes another problem: it seems to prevent a citizen-driven constitution, since it would be a matter of governmental actors debating among themselves (Kartin & Sureau, 2015). Key informants including the Acting SPLM Secretary General expressed their satisfaction with the

constitutional review, maintaining that there was no “lack of political will” in the leadership of the governing party. However, interviewees among CSOs were critical of the situation at the time of the constitution-making. They argued that the SPLM had dominated the process and rejecting its assertion that the drafting of the Transitional Constitution was inclusive.

The process of constitution-making was elite-driven from its very inception. Ever since Sudan gained independence from Britain, the people of South Sudan aspired to separation from the rest of the country. Conflict that broke out in December 2010/3 and later led to more than seven years of civil war is to be blamed.

11. Lessons for other multi-ethnic societies

Constitution-making in a multi-ethnic society, is a political and social nature, and hence it needs the involvement and participation of all stakeholders in the process. The process should consider the diversity of the society. The institutions created by the constitution must be those that serve of the interest and needs of a multi-ethnic society in terms of representation and participation in decision-making (Cope, 2013). This has not been the case in the process of constitution-making in many multi-ethnic societies including South Sudan. For example, a Constitution went into effect in Iraq on 15 October 2005 by political elites at and in complete mockery of constitutional procedure (Arato, 2009). Similarly, in a referendum on 21 November 2005 Kenyans rejected a draft constitution which had been in the making since year 2000 through a participatory or “people-driven” process. The reason was that it was hijacked at the last minute while it was still in the making. The constitution was overhauled by the government of the democratically elected president Mwai Kibaki to suit the interests of the political elites.

As Choudhry (2019) explains, constitution-making in a multi-ethnic society should respond to opportunities and challenges raised by ethnic, linguistic, religious, and cultural differences. This should be done so in ways that promotes democracy, social justice, peace and stability amongst different ethnic communities (Choudhry, 2019). Developing constitutions is one of the most difficult questions facing multi-ethnic societies in the world today

and one of the most important questions that contemporary politics should take into consideration (Ajmond, 2007).

Part of the problem in the constitution-making process in Iraq was the notorious lack of planning by the US government for post-war reconciliation between Shia majority and Sunni minority. Hence, the first concrete sign of Iraq's looming constitutional problem was the boycott announced by the majority of the Sunni Arab leadership ahead of 31 January 2005 (Morrow, 2010). This made the constitution-making process in Iraq elite-centred (Bogaards, 2019). In August 2005, constitutional negotiations were replaced by informal meetings among the leaders of the main Shia Arab and Kurdish parties; the lack of any representation of the Sunni community resulted in what Dodge (2012) calls an "exclusive elite bargain" and what Diamond (2005) terms "the truly cardinal sin". The principal shortcoming of the constitution-making process was the "pressure-cooker approach" imposed by the American-led occupation, notwithstanding that "a truly legitimate process that leads to an acceptable and sustainable constitution cannot be rushed" (Bogaards, 2019). The consequence of making constitution-making exclusive was a continuation of the civil war in the form of insurgency and deep division between the Sunni and Shia communities.

Similarly, in Kenya, although the 2010 constitution-making was participatory and "people-driven" process in nature, it was hijacked by the government of the democratically elected president, Mwai Kibaki, in 2000 (Ajmond, 2007). The government which was in power during the process of constitution-making had undue influence on the selection of the technical committee members, which skewed the process and made it lean towards the executive in favour of an executive president with sweeping powers, though the judiciary is strong and independent in its decision. The impact of that undue influence on the constitutional process resulted in lack of adherence to constitutionalism and the rule of law (Wanyoike, 2020).

South Sudan, as a post-conflict multi-ethnic state moving towards the process of permanent constitution-making, has lessons to learn from Kenya's constitution-making experience. First, limit the influence of the powerful elite (both political and military

elites) on the political governance process. This could be possible only by making constitution-making a participatory process through the involvement of important stakeholders such as CSOs, which was not the case during the 2011 Transitional Constitution process. Secondly, constitutional processes should be designed to bring about a new constitutional contract between the state and the people by taking the past failed constitution-making experience into consideration. The constitutional process should aim at bringing about a new political dispensation that promotes democracy and the democratic values of inclusion and cherishing diversity (Ihnovbere, 2007).

In the light of this, one of the former members of the Technical Committee for the review of acknowledged the flaws in the process. He said that the review did not consider the country's diversity. He noted that the committee was told by the Office of the President that its task was to review the Interim Constitution with minor changes the country was going to be an independent state (Interview, 2020). He further argued that South Sudan is a country which has recently emerged from protracted civil war and has inherited economic, political and social problems from the old Sudan. He concluded that constitution-making at the time was top-down and imposed by the SPLM's political and military elites. Therefore, the process saw weak or little participation from different stakeholders; in particular, the participation of CSOs and opposition political parties was a critical missing link.

Inclusive constitution-making is seen as a basis for democratic nation- and state-building in a multi-ethnic society. As such, it requires serious attention from the designers of a permanent constitution so as to avoid repeating the mistakes of the past. The alternative solution would be political commitment from the elite to ensure for popular involvement in the constitution-making process (Galligan & Versteeg, 2013).

12. Conclusion

Research findings indicate that pre-independence and post-independence South Sudan has been marked by socio-political and economic problems. In pre-independence South Sudan, the governing SPLM party had not been able to deliver public goods

such as peace and stability after the CPA. It was not able to deliver education and health services to the people it claimed to have liberated during 21 years of war of liberation. Fundamentally, it was unable to reconcile people of South Sudan who have been divided and are still by conflicts for decades. Instead, the elite at different levels of government focused its attention on controlling power and resources. In other words, it used liberation as a tool for advancing political ambitions to remain in power and personal interests in acquiring wealth.

Thus, pre-independence governance South Sudan was marked by centralisation of powers, lack of adherence to the rule of law and constitutionalism, and the exclusion of peripheries from the state. In short, the SPLM followed the political path that existed in the Sudan before independence.

The SPLM led government is an authoritarian and dictatorial regime that serving only the interest of elites who capture the state institutions. For example, the peace agreements dividends starting from the time of the CPA to the current peace arrangements have not been benefiting the people of South Sudan.

The constitution making for both Interim Constitution of 2005 and Transitional Constitution of 2011 was dominated by SPLM. Thus, the implementation of both constitutions in terms of rule of law, democratic governance for public participation in the governance and constitutionalism become missing the links. In other words, the processes and the implementation of the constitution, have been exclusive activities of the SPLM devoid of public participation. The governing SPLM's political elites have not been and are not ready to share power and other resources with the people it claims to have liberated. Creating inclusive state instructions through an inclusive constitution-making process that can benefit all citizens is not a priority in its governance agenda.

Findings indicate that South Sudan's constitutional design is influenced by the political culture that preceded South Sudan when Sudan was still one country. In other words, like the political culture that existed in the Sudan for millennia, constitution-making in South Sudan both during the Interim period of the CPA and in post-CPA independent South Sudan has been dominated by

the SPLM ruling political elite with little to no public participation in any of the stages of constitution-making. As a result, the practice and the implementation of the Transitional Constitution of 2011 of South Sudan has always been unconstitutional.

As such, South Sudan's Transitional Constitution of 2011 has not been able to serve as a leading tool for managing or mitigating conflicts and promoting democracy in a multi-ethnic South Sudanese society. The inability of the political leadership and governing party to build capable state institutions that could unite the country after cycles of conflicts starting from the interim period of the CPA to post-independence led in December 2013 to the outbreak of the current conflict.

Political leaders in South Sudan do not have buy-in and political will. South Sudan's history of constitution-making, which has been dominated exclusively by the elites of a few ethnic communities, may repeat itself. Powerful SPLM factions led by the President Kiir, along with those led by Riek Machar, may again dominate the constitution-making process. Should this scenario happen, the situation may lead the already war-devastated country back to another conflict.

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