

Making a ‘new’ constitution in a post-conflict context: An introduction

Joseph Geng Akech Geng*

Charles Manga Fombad**

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Abstract

This chapter takes a ‘helicopter view’ by introducing the key issues we address in this book. It problematises the meaning and nature of constitution-making within a post-conflict context, where divisions often run deep and make consensus elusive. As the world’s youngest country, the Republic of South Sudan is embarking on its ‘permanent’ constitution-making process in a context fraught with communal violence, political fragmentation and rampant foreign interference. In spite of these challenges, a new constitution is seen as one of the key enablers of democratisation and peace-building.

Key words: *post-conflict; constitution-making mechanisms; consensual constitution*

* Assistant Professor of Law at the School of Law, University of Juba. He holds a Doctor of Laws (LLD) from the University of Pretoria, South Africa. He has published widely in constitution-making, transitional justice and governance. He served as national Minister of Justice and Constitutional Affairs and Minister of Youth and Sports in the South Sudan’s Revitalized Transitional Government of National Unity.

** Professor of Law and Director of the Institute for International and Comparative Law in Africa (ICLA), Faculty of Law, University of Pretoria, South Africa.

1 Introduction

Be it written or unwritten, a constitution is the hallmark of a functioning democracy, good governance, and the rule of law. It is a device that fosters constitutionalism by putting in place institutions for building democracy and a framework for the people to demand accountability and claim their rights. South Sudan – the world's youngest country – is yet to adopt a final and consensual constitution. The country operates on a provisional document, namely the remodelled Interim Constitution of Southern Sudan, 2005. With or without a 'permanent' constitution, it faces enormous challenges in establishing and consolidating a constitutional democracy. This makes the 'permanent' constitution-making process currently under way a rare opportunity to redefine a strategic direction towards a stable democracy underpinned by the values of the rule of law and respect for human rights and fundamental freedoms. The problems confronting this ambition are manifold, but they can be summed up in one dilemma: How should South Sudan design a legitimate constitutional framework to achieve its post-conflict recovery, development, and democratisation goals?

The path towards achieving this dream is stipulated under the Revitalized Agreement on the Resolution of Conflict in South Sudan (R-ARCSS), which commits political forces to reforms and the adoption of a new constitution. This process commenced with legislation to guide the constitution-making already adopted by the country's parliament and assented into law by the President in December 2022.

Once rolled out, the other stages of constitution-building – convening, drafting, adoption and ratification – shall commence. These stages are to be led by mechanisms such as the reconstituted National Constitutional Review Commission, Constitutional Drafting Committee, National Constitutional Conference (NCC), and the Constituent Assembly, which is to be made up of all members of the national legislature.¹ These mechanisms will have to grapple with yet-to-be agreed upon, and potentially contentious, substantive constitutional issues, such as the system of government, the presidential term limit, the

1 The national legislature consists of 100 members of the Council of States and 550 members of the Transitional National Legislative Assembly (TNLA).

country's citizenship or national identity, the nature of local governance, and the determination of boundaries and resource-sharing.

Given the lack of consensus and the inherent complexity of constitution-making, what is required is dialogue among experts (national and international), political parties, civil society, and academia aimed at finding common ground on these critical issues of constitutional structure. Since the constitution-making process must be nationally owned if the outcome is to be legitimate, there is a need for robust popular participation in the making of the constitution.

2 Structure of the book

This book was borne out of a seminar of experts convened by constitutional scholars at the University of Juba with the purpose of critically analysing how emerging states (such as South Sudan) grapple with building democracy and constitutional governance. Chapters examined the extent to which constitution-making determines the trajectory of a country's transition to constitutional democracy. The book features chapters selected from three thematic areas: (1) approaches in designing inclusive post-conflict constitutions; (2) case studies on best practices or lessons for fostering constitutionalism through constitution-making; and (3) key substantive issues of significance in a constitution-making process.

The book has two parts and 12 chapters. Part 1 comprises chapters that discuss foundational issues of significance in a post-conflict constitution-making, while Part 2 considers lessons that South Sudan could learn in its constitution-making experiment.

2.1 Part 1: Key questions of post-conflict constitution-making

In Chapter 1, Joseph Geng and Charles Fombad introduce the book and the key issues it addresses. The authors describe the structure of the book and outline its chapters.

In Chapter 2, Hadi Strømmen discusses self-determination as a central question of constitutional design. He asks the questions: What is a constitution, and why and how is self-determination an issue that needs to be considered in South Sudan and perhaps included in its permanent constitution? A constitution establishes the pillars of power in a country and specifies how authority is distributed. Lile contends that the will of

the peoples of South Sudan must prevail in the final constitution. His premise is that a constitution derived from revolutionary aspirations must satisfy the self-determination needs of the peoples in whose name it is designed.

In Chapter 3, Abraham Kuol discusses the politics of constitution-making and, in particular, analyses the role of political parties and groups. He argues that these stakeholders often tend to write themselves and their interests into a constitution, thus risking elite capture of the process and its eventual outcomes. Kuol criticises the role of parties to the peace agreement and their failure to democratise themselves, arguing that this is necessary before they can meaningfully influence the ‘permanent’ constitution of South Sudan.

In Chapter 4, Garang Yach complements Kuol’s perspectives by discussing ethnic politics in constitution-making centred on safeguards for protecting minorities. The main claim of this chapter is that the inclusion of minorities in a constitution is a necessary measure of democratic health, all the more so in a context where ethnic groups are more predominant and influential than democratic political entities. Garang cautions against relying on, or giving credence to, ethnic perspectives, as this would threaten the rights of minorities and compromise the resulting constitutional legitimacy.

In Chapter 5, Margaret Mathiang explores the (in)adequacy of a constitutional quota system that calls for 35-per cent affirmative action for women in governance. She observes that while some progress has been made in ensuring women’s inclusion in governance, serious gaps remain due to lack of political will and what in her view is the fact that the quota is a mere political gesture rather than a legal or constitutional requirement. Mathiang argues that, to address this, the women’s quota needs to be entrenched in the constitution, including by putting legal mechanisms in place to enable women to access relevant opportunities.

In Chapter 6, Gabriel Mading examines the constitutionality of the current land tenure system and makes a case for urgent reform. He discusses gaps in legislation which reveal how South Sudan still relies on archaic land laws since discarded by the Sudan and of little political and economic congruence with the country’s contemporary needs. Mading concludes with policy recommendations for reforming laws so as to allow for legal and equitable land use.

In Chapter 7, Nhial Titmamer takes Mading's claims further and asks: Does the land belong to communities? He interrogates critical land tenure issues related to peace and social unity in post-conflict contexts. Titmamer too makes recommendations for land reforms, arguing that they should form part of the constitution-making process.

2.2 Part 2: Learning from without

This part examines lessons that South Sudan could learn in its constitutional design experiment.

In Chapter 8, Peter Garang looks at the critical question of the role of the judiciary in a process of constitutional design, arguing that South Sudan's judiciary should be transformed during this process. His main claim is that the judiciary that ought to arise from South Sudan's constitutional experiment should be one which is transformative and that satisfies the aspirations for popular freedom, liberty and justice symbolised in the country's coat of arms.

In Chapter 9, Deng' Kur Mading bolsters Garang's perspectives by analysing the role of the bar in the defence and promotion of rule of law, good governance, and constitutionalism. Drawing on the experience of bar associations in East Africa region, Mading calls for urgent reform of the South Sudan Bar in order to protect and defend the constitution and the law.

In Chapter 10, Nixon Wamamela examines the prospects for, and challenges of, constitution-making by drawing lessons from the experience of Uganda. He argues that South Sudan should use the constitution-making process to strengthen public institutions, especially those that protect and promote human rights and the rule of law.

In Chapter 11, Dhieu Mathok explores the governance options that are debated among political elites and the citizenry during constitution-making processes. In particular, he delves into models such as federalism, presidential systems, and parliamentary democracy, which are some of the options often discussed in the discourse surrounding constitution-making. The chapter's main argument is that although elites tend to promote certain governance models over others, these are questions best addressed by the people through referendums.

In Chapter 12, the editors re-examine the critical issues that are at stake in adopting a 'new' constitution in the post-conflict context deliberated upon in this book. The chapter provides an update on the

state of constitution-making in South Sudan and discusses whether a constitutional experiment undertaken in the prevailing conditions – ones characterised by post-war elites with exclusive control – is capable of representing the aspirations of the people. The editors contend that post-conflict constitution-making processes tend to test people's resolve in pursuing common aspirations in the face of challenging contemporary realities.