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The successes and challenges of constitution-making in Uganda: Lessons for South Sudan

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Abstract

Constitutional governance has its roots in a philosophical debate between Plato and Aristotle about the nature of good government. Whereas Plato said it involved the rule of good men, Aristotle proposed that it involved the rule of good laws. Aristotle's ideas inspired John Locke, whose views form part of contemporary conceptions of constitutions. Uganda has taken these ideas onboard in having come up with four written constitutions since independence, namely those of 1962, 1966, 1967 and 1995. On the one hand, constitution-making has offered hopeful prospects, including for the recognition of the principles of justice, human rights, and popular sovereignty; on the other, it has legitimised the self-interests of elites. One way or the other, many lessons can be learnt from Uganda's experience. Among them is that constitution-making ought to be founded on the ideals of justice

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and people-centeredness. Another is that, that since human nature tends to be guided by self-interest, those who are directly involved in making and amending a constitution should adopt a 'veil of ignorance' or, where this impossible, declare a conflict of interest in order not to impair faith in the constitution. The chapter critically discusses these lessons by highlighting the ideals on which a good constitution-making process ought to be founded. The overarching questions are: What should constitution-making and amendment entail? What have Uganda's successes and challenges been? What lessons could South Sudan learn from Uganda's experience? To answer these questions, the chapter explores the work of thinkers whose ideas are relevant to the subject.

Key words: *constitution-making; prospect; challenge; lesson; Uganda; South Sudan*

1 Introduction

The word 'constitution' has its etymological roots in the Latin verb *constituere,* which means 'to set up, establish, erect, construct, arrange, settle or determine'. In the history of political philosophy, the first use of the word 'constitution' is attributed to Aristotle, who in his *Politics* conceives of it as 'a way of organizing those living in a state'.[1] In contemporary usage, the meaning of the term 'constitution' is contested, but the following are some of the ideas usually associated with it: a constitution is the supreme law of the land that regulates the functioning of the state; it is a legal document that stipulates the functions of the organs of government; it is a political and moral document that guides a state; and so forth. In this chapter, a 'constitution' is understood to be a set of fundamental legal, political and moral principles that regulate the functioning of a state. In turn, 'constitution-making' refers to the process of drafting and adopting a new constitution, while 'constitutional amendment' refers to the act of changing a constitution by adding new provisions to it or removing existing ones.[2]

1 Aristotle *The Politics* (1962) 102.
2 N Wamamela 'A critique of constitutional making and amendment in Uganda' PhD thesis, Makerere University, 2022 23.

Constitutional governance has its roots in a philosophical debate between Plato and Aristotle about the nature of good government. Whereas Plato said it involved the rule of good men, Aristotle proposed that it involved the rule of good laws. In his *Politics*, Aristotle categorised different kinds of constitutions, in part according to the interests they serve.[3] A constitution, for him, is the formal cause of a society whose *telos* is the good life. Machiavelli and Thomas Hobbes held that good government is that which considers the self-interests of leaders and their ability to consolidate their grip on power. John Locke, however, argued that men are born with inalienable rights. In his view of Locke, good government is one in which there is a limitation on governmental authority, usually via the law. Locke's ideas were influenced by Aristotle and form part of the basis for contemporary conceptions of constitutional governance.

Many countries today have constitutions, be they written or unwritten, and the United Nations emphasises that constitution-making is a key component of democratic governance. However, the way constitutions are made remains a subject of controversy, at least in Africa. The most stable constitution in the world today is thought to be that of the United States of America, a document which was adopted more than 200 years ago. The spirit of this constitution has for long been sustained, having undergone only 27 amendments.

Uganda has made four constitutions since independence, namely the 1962, 1966, 1967 and 1995 constitutions. These have come both with prospects for a better life and with challenges. For instance, the 1962 Constitution was an independence constitution that laid the foundation for future governments and was consultative in nature. However, the influence of colonialists affected its spirit and resulted in political misunderstanding between the Kabaka Yekka (KY) and the Uganda People's Congress (UPC). This misunderstanding led to the suspension of the 1962 Constitution and its replacement by the controversial 1966 Constitution and, thereafter, the 1967 Constitution. The mistakes that were made during the formulation of these constitutions led to the making of the 1995 Constitution. The latter is thought to have been one of the best constitutions on the African continent, given the rigorous

3 M Forsyth & M Keens-Soper (eds) *The political classics: A guide to the essential texts from Plato to Rousseau* (1988) 57.

process by which it was made.[4] Unfortunately, its spirit has been watered down by controversial amendments, especially those pertaining to the removal of presidential term and age limits.

South Sudan is a new country with an interim constitution in place. It has now embarked on the uphill task of making a substantive constitution to address the political, economic and social challenges that it faces. A good constitution-making process has the potential to succeed in these aims. However, in order to have such a process, it is necessary to learn from past experience and be guided by a vision for the country. South Sudan's constitutional process should thus take a leaf from international experiences, especially those of its neighbours – Uganda is one such neighbour and, as mentioned, it has gone through the process of having developed four constitutions.

The chapter critically discusses these lessons by highlighting the ideals on which a good constitution-making process ought to be founded. The overarching questions are: What should constitution-making and amendment entail? What have Uganda's successes and challenges been? And what lessons could South Sudan learn from Uganda's experience? To answer these questions, the chapter explores the social-contractarian theories of Locke and Rawls as well as Kwasi Wiredu's theory of consensual democracy. In terms of its methodology, the study takes a qualitative approach based on documentary analysis of primary and secondary data including Hansards, the four constitutions of Uganda, and constitutional reports.

The structure of the chapter is as follows. Section 2 explores selected theories and principles of constitution-making; section 3 examines Uganda's history of constitution-making; section 4 identifies the mains strengths and weaknesses of the processes that Uganda has followed; section 5 highlights the lessons that South Sudan could learn from this experience; and the final section provides some concluding remarks.

4 OJ Odoki 'The challenges of constitution-making and implementation in Uganda' in J Oloka-Onyango (ed) *Constitutionalism in Africa: Creating opportunities, facing challenges* (2001) 263.

2 Selected theories and principles of constitution-making

Making and amending a constitution is a practice but, as was observed by Nkwame Nkrumah, 'thought without practice is empty; and action without thought is blind'; in other words, any practice should have a connection with thought. Here, 'thought' means that before, during and after making or amending a constitution, reference should be made to relevant theories and principles. Such theories and theorists include Plato, Aristotle, Aquinas, Rousseau, Rawls and Wiredu; among the principles, there are trust, justice, respect for human rights, respect for the sovereignty of the people, limitation of government authority, and beneficence. This chapter focuses on the theories and principles that are arguably most directly relevant to constitution-making and amendment in Uganda and South Sudan.

2.1 Theories of constitution-making

The theories identified here are John Locke's theory of the social contract, John Rawls's theory of justice, and Kwasi Wiredu's theory of consensual democracy. These speak directly and indirectly to the context in which Uganda has made and amended its various constitutions, and they are also theories that advance ideas as to what *good* constitution-making entails. As such, they provide a basis upon which lessons for South Sudan may be articulated.

2.1.1 John Locke's social contract theory

In his Second Treatise on Civil Government, Locke disagrees with Hobbes, who in his *Leviathan* had postulated that in a state of nature prior to the advent of civil government, there is a war of each against all in which life is 'poor, nasty, brutish, and short'.[5] For Hobbes, civil government arises from the realisation of the need for a sovereign whose main responsibility is to ensure peace and stability. Although this may seem appropriate to situations where societies are faced with wars, there is a danger of the sovereign's enjoying unlimited powers. The implication of Hobbesian theory is that a constitution should

5 R Tucker (ed) *Hobbes: Leviathan – Revised Student Edition* (Cambridge University Press 2003) 88.

give unlimited powers to those in leadership. Unlimited powers are a negation of constitutionalism, and therefore may compromise respect for the principle of human dignity.

In view of this weakness, Locke observed that humans are by nature free, equal, independent and social.[6] They are endowed with conscience informed by the natural law principle of doing good and avoiding evil. This, according to Locke, is what characterises life in a state of nature; therefore, he argued that civil government is founded on the idea that each person has inalienable rights that no government can take away, such as the rights to life and ownership of property, and that government should be founded on the consent of the majority. In practical terms, Locke suggested that a government should be based on law and have three major organs – the executive, legislature and judiciary – with the role of parliament being to make laws in the public interest and hold the executive accountable.

Although Locke's ideas might not speak to a state vulnerable to political instability or to contemporary multiparty dispensations where the leadership of the ruling party commands support in parliament, his ideas form part of contemporary constitutional theory. The latter highlights ideas about the sovereignty of the people, the rule of law, limited government, and respect for human dignity.

The implication of Locke's ideas is that constitution-making and amendment should be a product of people's wishes and these should determine which provisions are inserted. This can be achieved through engagement directly with the people or with their elected representatives. In addition to highlighting the supremacy of the people, the constitutional document should enshrine the rule of law, the separation of powers, and respect for human rights.

2.1.2 John Rawls's theory of justice

Rawls's theory is an extension of the social contract theories developed by philosophers such as Hobbes and Locke. What distinguishes Rawls is his emphasis on justice as a virtue of social institutions. He argues that social institutions ought to function in terms of two main principles of justice: equality and difference. To effectuate these principles, Rawls

6 J Locke *Two treatises on government* (1823) 147.

suggests that, in what he called the original position, members of society enter into contract without knowledge of each other's status or power by putting on 'a veil of ignorance'. Rawls opines as follows:

> The idea of the original position is to set up a fair procedure so that any principles agreed to will be just. The aim is to use the notion of pure procedural justice as a basis of theory. Somehow, we nullify the effects of specific contingencies which put men at odds and tempt them to exploit social natural circumstances to their own advantage. Now in order to do this I assume that the parties are situated behind a veil of ignorance. They do not know how the various alternatives will affect their own particular case and they are obliged to evaluate principles solely on the basis of general consideration.[7]

The purpose of the 'veil of ignorance' is to minimise our self-interest. What does this mean in constitution-making and amendment processes? It implies that we should always put aside our positions as we make or amend constitutions. But the question critics raise is: How is it possible for us to claim ignorance of how the constitution will position us when we are by nature self-interested? To respond to this question, Rawls seems very aware of self-interest and appeals to us to minimise it or do away with it only in the interests of the public or the greater good.

2.1.3 Wiredu's theory of consensual democracy

Wiredu suggests that where the veil of ignorance cannot work, consensual democracy can take its place. Consensual democratic theory not only fills the gap of the veil of ignorance but also challenges Western democratic practices based on the idea of the winner taking it all. In consensual democracy, there is an appreciation of each party's interests and a sense of coming together to find a compromise based on a win-win rather than zero-sum strategy. This theory was developed by keeping in mind the indigenous West African political practice in which the elders would sit under a tree and disagree and later agree on matters that concern their community.[8] The theory is thus antithetical to contemporary majoritarian politics where the views of the opposition are swept under the carpet. A danger, however, is that this theory is only applicable in a no-party state or situations involving very few parties.

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7 J Rawls *A theory of justice* (1999) 118.

8 K Wiredu 'Democracy by consensus: Some conceptual considerations' (2001) 30(3) *Socialism and Democracy* 227.

Nevertheless, Wiredu's theory is relevant to contemporary society, where we have warring parties and those in a position of advantage take all the winnings for themselves. In terms of this theory, constitution-making processes ought to strike a balance between the warring parties in the interests of peace and stability. This can be achieved by appreciating each party's interests and finding a platform to hold a discussion with the view to reaching consensus on which interests to include in the constitution.

The theories discussed above do not apply in isolation of each other since each has strengths and weakness in particular areas. If exploited, they can be significant in guiding constitution- making and amendment. However, the theories above should not be seen in isolation of principles of ethics. Such principles include respect for popular sovereignty (the supremacy of the people); the separation of executive, judicial and legislative powers; respect for human rights and freedoms, including civil and political rights and economic social and cultural rights; justice; common interest; and integrity.

3 Constitution-making in Uganda

Constitution-making in Uganda can be seen as an attempt to put the theories above into practice. This section discusses Uganda's constitutional history since precolonial times when there were mainly two categories of communities: on the one hand, the communities in the central parts of the country, such as the Buganda, Bunyoro, Ankole and Toro; on the other, the Acholi, Lango, Gishu, Bakonzo, Bakiga, and Basoga.[9]

Each community had its own constitution in the form of customs and values; in other words, each of them had an unwritten constitution.[10] The strength of precolonial constitutions was that they were deeply sunk into the hearts of the people and came from experience and tradition. However, this is not to say there were no issues. For instance, law-making and implementation were fused in the office of the monarch or chief, which led to abuses. For instance, some kings came up with the custom that their spears do not rest on the ground but the feet of the

9 SR Karugire *A political history of Uganda* (1980) 17.
10 Wamamela (n 2) 83.

subject, while others did not spit on the ground but in the mouths of the subjects. Kasozi corroborates this idea, noting that '[p]recolonial kings of Buganda had a constitutional right to kill their citizens. As a supreme Judge of the land, the Kabaka was supposed to have a right to inflict the death penalty.'[11] Perhaps such conduct was a confirmation of Lord Acton's adage that power corrupts and absolute power corrupts absolutely.

In 1894, the country we now call Uganda was established by the British colonialists.[12] During the colonial period, the various communities of Uganda were amalgamated to form a country and therefore were subjected to one political leadership. The law was handed over to the people of Uganda by the colonialists in form of ordinances. For example, the 1902 Ordinance meant that all other communities of Uganda were forcibly annexed to Uganda.

In 1920, the Legislative Council (LEGCO) consisted mainly of the British and Indians, but by 1958 had been expanded to include Ugandans. Although the role of LEGCO was to make laws, the institution depended largely on decisions made in Britain. The independence constitution-making process began in 1958 when the governor appointed a Constitutional Committee and later, the Uganda Relationship Commission, also called the Munster Commission of 1961. With these commissions having been put in place, the role played by the colonial masters in making the 1962 Constitution became very clear. The overarching issues were the nature of representation in the LEGCO and the political structure of the future Uganda.

As noted, constitution-making was spearheaded by the colonial government but with the representative participation of the people of Uganda. A question that can be asked is whether the ground between the colonial masters and the people of Uganda was levelled. The answer, obviously, is no: the ground was in favour of the interests of the colonial masters. Nonetheless, the 1962 Constitution was made with the following being key issues: Buganda was granted federal status, while Bunyoro, Busoga, Toro were granted semi-federal status. Other parts of Uganda were to be administered on a district basis. In the same constitution,

11 ABK Kasozi *The social origin of violence in Uganda* (1994) 21.
12 GW Kanyeihamba *Constitutional and political history of Uganda from 1894 to present* (2010) 1.

there had been a provision that matters of the 'lost counties' of Bunyoro (Buyaga and Bugangaizi) would be addressed by the independence government. The Constitution was amended in 1963 to provide for the positions of the President and Vice President. The President replaced the colonial governor as head of state. However, this amendment was controversial in that the position of President was reserved for cultural leaders, or kings, and district heads.[13]

The first government of Uganda, elected in 1962, was an alliance between the UPC and KY. In 1966, a crisis erupted over the issue of the lost counties and resulted in the overthrow of the President of Uganda, Kabaka Mutesa II, by his ally, Obote. Having declared himself President, Obote proceeded to draft the 1966 Constitution single-handedly and put copies of it in the pigeonholes of Members of Parliament (hence the term 'pigeonhole constitution'). Kasozi observes as follows:

> Obote abolished the office of the president and vice president assuming the executive powers of state ... [O]n 15th April, the National Assembly was forced to abrogate the 1962 Constitution and pass a new one, which members had not yet seen but were told would be in their pigeon holes. As Parliament listened in silence, military aircraft flew over the roof of the House.[14]

The 1966 Constitution was an interim measure that legitimised Obote's new government. Under its article 35, the President was given full executive authority, unlike in the 1962 Constitution where he or she was a ceremonial figure.[15] However, the kingdoms and districts remained. After minimal consultations that lasted less than two months and were accompanied by a state of emergency in the central region, the 1967 Constitution was promulgated.

What were the key issues in this constitution? Unlike the case with the 1966 Constitution, the 1967 Constitution was developed through consultation and was meant, first, to correct the injustices in the 1962 Constitution in regard to the federal status of Buganda and the semi-federal status of other regions vis-à-vis other communities. Secondly, it was meant to be a product entirely of the people of Uganda, unlike the 1962 Constitution. However, it has been criticised for giving the President excessive powers to appoint government officials and detain

13 SR Karugire *The roots of instability in Uganda* (1996) 50.
14 Kasozi (n 11) 84.
15 Constitution of Uganda, 1966, art 35.

suspects without trial. Odoki corroborates these allegations by arguing as follows:

> In 1967 Obote introduced another constitution that was republican in nature. It abolished kingdoms and aspects of federalism and turned Uganda into unitary state. The president was given excessive powers over appointments and making laws through ordinances and detention without trial ... [T]he opposition political parties were banned, effectively transforming Uganda into single-party state.[16]

As if this were not enough, the 1967 Constitution legitimised Obote's unelected presidency and, moreover, was enacted by a parliament whose term of office had ended but been extended without elections. Obote was overthrown in 1971, and the 1967 Constitution, together with Parliament, was suspended. Idi Amin used loopholes in the 1967 Constitution to justify his actions. However, he proved to be worse than Obote I, especially when he resorted to outright autocracy and ruled by decree rather than in terms of the Constitution.

With his autocratic tendencies, Amin persecuted pro-Obote soldiers and government officials, expelled Asians, and killed the Chief Justice and Archbishop of the Church of Uganda, to mention but a few incidents. The breakdown of the economy and institutions of government was evident, and people resorted to smuggling. Amin's expansionist policy resulted in an armed struggle with the Uganda National Liberation Army (UNLA), which was supported by Julius Nyerere of Tanzania. Amin was overthrown in 1979 by the UNLA and its political wing, the Uganda National Liberation Front (UNLF).

When the UNLF took power in 1979, its leaders reinstated the 1967 Constitution as amended. The Constitution was to be implemented alongside the resolutions of the Moshi Conference. The National Consultative Council (NCC) became a legislative organ. However, there were challenges when then President Yusuf Lule was accused of nepotism and autocracy. Although Lule argued that he was simply following the 1967 Constitution as amended, NCC members accused him of appointing a majority of ministers from Buganda Region without consultation. This practice was thought to contravene the principles of the NCC. The situation led to the overthrow of Lule. He was replaced by Godfrey Binaisa, who himself was overthrown 11 months later.

16 Odoki (n 4) 265.

In terms of the Moshi Conference and 1967 Constitution, Uganda held elections in 1980.[17] The following parties participated: the UPC under Milton Obote; the Democratic Party under Paul Kawanga Ssemwogere; the Conservative Party of Mayanja Nganyi; and the Uganda Patriotic Movement (UPM) under Yoweri Museveni. The UPC controversially emerged the winner.[18] The UPM obtained only a single seat in Parliament. As a result, it alleged that elections had been rigged in favour of the UPC; hence in 1981 the leader of UPM decided to use military means to reclaim victory. However, in 1985 Obote was instead overthrown by his own military officers, Tito Lutwa and Basilio Okello. After the overthrow, Legal Notice No. 1 of 1985 suspended the 1967 Constitution.

In January 1986, Museveni, under the banner of the National Resistance Army/Movement (NRA/M), overthrew Okello and promulgated Legal Notice No. 1 of 1986, effecting what he termed a revolution. This revolution was based on a ten-point programme that included the restoration of democracy. Soon after the NRM took power, a constitution-making process began in 1988. A commission was set up by the President and National Resistance Council in terms of the Uganda Constitutional Commission Statute, 1988. The 20-member commission included professionals from the military, academia, and the legal and medical fraternity, among others, with individuals selected on the basis of merit. The objectives of this commission were twofold: first, to review the existing constitution to make proposals for the enactment of the new constitution and, secondly, to 'formulate and structure a draft constitution that will inform the basis for the country's new national constitution'.[19] In 1993, the commission came up with what is commonly known as the Uganda Constitutional Commission Report or Odoki Report (after Benjamin Odoki, the chairperson of the commission).

Following the tabling of the report, the Constituency Assembly was elected in 1994 to deliberate on its findings. Although the President appointed 74 delegates over and above those who were elected, attempts were made to tame the presidency and assert the power of the people

17 Karugire (n 13) 88.
18 Kanyeihamba (n 12) 165.
19 Uganda Constitutional Commission *Report of the Uganda Constitutional Commission: Analysis and recommendations* (1993) 4.

in the body politic. A number of provisions were adopted to that end. For instance, article 1(1) of the 1995 Constitution states that power belongs to the people. This provision is emphasised by paragraph 3ff, which deals with the right of the people in enforcing and protecting the Constitution. While the document recognises the President as the head of state and government, as well as commander-in-chief of the armed forces, checks were inserted to ensure that he or she does not trespass in certain areas and violate the rights of citizens. For example, democratic principles were highlighted, and regular elections, separation of powers, and term and age limits were put in place.

The process was concluded in 1995 with the promulgation of the new constitution, which was lauded as one of the best in Africa owing to the consultative manner in which it was produced,[20] given that consultations extended to the subcounty level countrywide; moreover, the document has all the key elements of a constitution, including democratic principles, a bill of rights, and provisions for affirmative action. Its preamble was a beacon of hope to many, and Museveni was quoted as saying that if any one dared tamper with this constitution, he would go back to the bush (meaning he would take up arms in resistance).

The fact that the present Constitution has been in force since 1995 makes it the longest-standing one in Uganda's history. Nevertheless, it has undergone more than 68 amendments, with the provisions on presidential term and age limits having been controversially removed. Article 105(2) of the 1995 Constitution provided for two term limits for the President of Uganda, but in 2005 the government mooted a plan to remove them at a point when the incumbent was approaching the then-mandatory two-term limit. In what was considered a bribe, Members of Parliament (MPs) were given five million UGX each to go and consult with their constituents – the nature of the consultation was not clarified, and some MPs merely conferred with handfuls of their supporters. The main justification proffered for the amendment was that the presidential term limit was discriminatory, and though a number of MPs opposed it, the amendment was duly passed. Fears that the exercise was intended to serve the incumbent's self-interests proved well founded when he offered

20 Odoki (n 4) 263.

himself for the presidency and won an election. What was left of the limits on the presidency was now just the age limit.

In 2017, when the same incumbent was approaching the age limit of 75 set by article 102(b), the Constitution was amended to pave the way for him to continue his stay in power. This time around, it involved a scuffle on the floor of Parliament between members of the opposition and the Special Forces Command, a presidential protection force. Although it was argued that term and age limits are unnecessary in a democracy, where people can vote out a president if he or she is under-performing, neither the influence that incumbency commands nor the political self-interestedness of MPs should be underestimated. Apart from removing the age limit, MPs also proposed an extension of the President's term of office from five to seven years.

Controversial amendments like these have raised questions about whether the Constitution still retains it original spirit. Opposition MPs, together with individual complainants, petitioned against the amendments in the Constitutional and Supreme Court. As for the Constitutional Court, it ruled in favour of the amendment removing the age limit, though not in favour of the extension of the term limit; as for the appeal to the Supreme Court, it was unsuccessful.

From the above, we note that constitution-making and amendment in Uganda has been a long process and one that is ongoing to this day. The process, moreover, has had its strengths as well as weaknesses, as is discussed in the following section.

4 The successes and challenges of Ugandan constitution-making

Odoki points out that an assessment of Uganda's experiment in constitution-making should consider the past, present and future of the country.[21] Seen in this light, constitution-making and amendment have been an attempt to respond to the challenges of the time and to meet aspirations for a better future. The fact that Uganda has developed four constitutions is a sign of strength and optimism; however, there have also been challenges that led to bloodshed.

21 Odoki (n 4) 273.

4.1 Successes, strengths and achievements

Constitution-making in Uganda has recorded various successes in regard to justice, popular sovereignty, and limitations on government. To begin with, constitutional processes have attempted to address the question of justice. The unified political entity known as Uganda was forged by the British, but before their arrival, the country consisted of autonomous ethnic groups such as the Buganda, Bunyoro and Acholi. Although they co-existed with each other, they each pursued their own interests. For instance, the interests of the Buganda lay in expansionism, which was pursued at the expense of the Bunyoro. These differing interests led to conflicts between communities. The 1962 Constitution thus sought to address these issues. In addition, it was meant to balance the interests of federal and semi-federal communities with those of other communities that were administered on a district basis.

However, federal communities had a larger budget than the rest of the communities, while the highest political office was the reserve of monarchs and district heads. As such, there was a seeming injustice against non-kingdom communities and the common people. The 1967 Constitution purportedly attempted to address this by abolishing all kingdoms and placing the country under a unitary system. Although this apparently radical act masked an attempt to suppress Obote's opponents, its reasonableness in promoting fairness cannot be denied. Likewise, the 1995 Constitution has sought to use affirmative action to empower the poor and socially disadvantaged groups such as women.

Also, constitution-making processes have been consultative to one degree or another. With the exception of the 1966 Constitution, which was produced single-handedly by the President and left in MPs' pigeonholes, the rest of the constitutions were a product of consultation and popular participation. The 1962 Constitution was discussed by elected MPs within and outside of the country, while the 1967 Constitution underwent one or two months of consultation and was passed by Parliament, as was the case with the 1995 Constitution. In fact, the process with the latter has been praised as the most widely consultative one in the country's history, given that it extended to the subcounty level and involved all key stakeholders.

Moreover, Uganda's constitution-making processes have inculcated a constitutional culture, in particular the idea that government should

be based on the constitution. An extreme form of such a culture can be described as 'constitutionisis' (that is, an exaggerated desire to make constitutions). Although 'constitutionisis' could be negative in the sense that every time a government is overthrown there is a tendency to make a new constitution, the idea of having a constitution in the first place is a positive one: inasmuch as it means that state functions are performed with reference to a legal framework, this may lead to certain limitations on the government and, indeed, even inspire hope for a more inclusive form of governance.

Indeed, constitution-making has guided the functioning of government. Every act in the country has to find reference in the constitution. In 1979, for instance, Yusuf Lule justified his choice of ministers by use of the 1967 Constitution. Even when constitutions were thought to have been abrogated, only a few of their provisions were affected. Critics argue that when Obote was overthrown in 1971 and the 1967 Constitution was apparently suspended, it in fact remained in force.

Constitution-making in Uganda has settled and subdued political crisis in the country. In the case of the 1995 Constitution, whenever there is a controversy, people appeal to courts of law for an interpretation of it as the supreme law of the land. For example, the 2001 and 2006 elections were settled constitutionally rather than through resort to extra-constitutional means. This is also the case with the controversy that arose after the enactment of the Public Order Management Act and the amendment of article 102(b) of the Constitution. In view of this, it is likely that the 1995 Constitution has survived for as long as it has in part because of the faith people have in its ability to settle conflicts.

4.2 Challenges of constitution-making

A first challenge is self-interest. Machiavelli, Hobbes and Rand all observed that humans are self-interested. In his theory of justice, Rawls took this a step further and attempted to address the extremes of self-interest, arguing that lawmakers can address it by putting on 'a veil of ignorance'. However, this has not been the case in constitution-making in Uganda. The British, for instance, structured the 1962 Constitution to suit their interests by appeasing certain communities at the expense of others. The Westminster system was not relevant to Uganda's social and political setting at the time. The amendment of the 1962 Constitution

in 1963 was made out of the self-interest of Obote and Kabaka Mutesa.[22] Similarly, Obote used the 1966 Constitution to declare himself the President of Uganda without elections. As Kabwegyere points out, 'The 1967 Obote Constitution was not only coloured by the immediacy of the situation at the time but also by Obote's personal interests and ambitions.'[23]

The same was true with the 1967 Constitution, where Obote went ahead to extend the term of office of Parliament and turn it into a constituency assembly without elections. The process was blatantly tilted in favour of Obote as a person. The 1995 Constitution was a watershed moment in the history of the country, but it seems that no lessons were learnt from past mistakes. The President remained a key actor in that he indirectly and directly influenced the debate on what should be included in or left out from the 1995 Constitution. Provisions in regard to age limits were directed at preventing Milton Obote from coming back to power. Most importantly, constituent assembly delegates positioned themselves for the next election. Wapakhabulo notes as follows:

> It was nevertheless feared by some people that the CA delegates might tailor the constitution to suit their future political ambitions. Suggestions were made that CA delegates should be disqualified from standing for election to Parliament in the first elections to Parliament under the new constitution. This suggestion was not accepted. To some degree these fears were later [confirmed].[24]

Although Wapakhabulo does not refer to the presidency, his observation is evidence of the vice of self-interest in the 1995 constitutional process. More evidence is provided by the age and term-limit amendments, of which the incumbent president has been the chief beneficiary.[25] The amendments came at a time when the incumbent was approaching the mandatory two-term and 75-year age limits, and paved the way for what some describe as a presidency for life.

Power imbalances between leaders and citizens have been a second challenge to constitution-making in Uganda. In the case of the 1962 Constitution, citizens were invited by the colonialists to make the

22 Karugire (n 13) 50.
23 T Kabwegyere *The politics of state formation and destruction in Uganda* (1995) 229.
24 FJ Waphabulo *Uganda's experience in constitution-making,* http://www.commonlii.org (accessed 24 August 2025).
25 Wamamela (n 2) 223.

constitution. The situation was not much different with the 1966 Constitution, where Obote overthrew Kabaka Mutesa II and then required MPs to approve the pigeonhole constitution. In the case of the 1995 Constitution, the current President came from the bush and invited citizens to make the constitution. One wonders how a former rebel would be at the same level as other citizens in ensuring a people-centred constitution. The President is alleged to have had a hand in the appointment of the commissioners; furthermore, 66 special delegates were directly and indirectly appointed by the President, who at the same time oversaw the entire process.[26] The above-mentioned delegates were to join the Constituency Assembly in 1994 to deliberate on the new constitution. The question that arises in this connection concerns the implications of an incumbent's self-interest in constitution-making process. While the incumbent's self-interest might not necessarily be an issue, there is a tendency for power to tilt in his or her favour. This situation may ultimately undermine principles of fairness and people-centred constitution-making.

It follows that constitution-making and amendment have to a large extent lacked the spirit of constitutionalism. Constitutionalism is broadly understood as the idea that government should be limited, usually by the laws, and for constitutionalism to be achieved, there has to be commitment to it by each party involved in the constitution-making processes, a commitment founded on ethics and integrity.

5 Lessons for South Sudan

From the above it is clear that South Sudan can learn many lessons from Uganda's experience of constitution-making. There are positive elements in that experience, but glaring mistakes were also made. On a positive note, South Sudan should learn a culture of being governed by the constitution. Secondly, it should try to consult as widely as possible with the people during its constitutional processes, as was the case with Uganda's 1995 Constitution. The consultative process should have legitimacy in the eyes of the people since it is meant to facilitate

26 MA Tripp 'The politics of constitution-making in Uganda' in LE Miller (ed) *Framing the state in times of transition: Case studies in constitution making* (2010) 165.

consensus among them. As such, it should be based on equality rather than involve superior-inferior relations (that is, disequilibrium between leaders and citizens).

Additionally, as Hobbes pointed out, people are by nature self-interested. A good constitutional process is thus one that strikes a balance between self-interest and common interest. Civil and political rights belong to everyone by virtue of their being human. However, due to self-interest, the actors in a constitutional making process will seek to obtain benefits for themselves at the expense of others. So, it is incumbent upon the South Sudanese to ensure that key actors are not beneficiaries at the expense of the common good.

Ideally, those actively involved in constitution-making processes should declare conflicts of interest. These declarations may enable the general public to find a way of dealing with the situation in order to achieve a win-win constitution. Otherwise, such processes can end up as a one-man project. Furthermore, constitution-making, especially amendment, should not be merely legalistic. In other words, the process should not be merely in conformity with constitutional rules, as was the case with the 1995 Constitution of Uganda. It should instead also take into consideration ethics and the shared values that bind people together even if this is not directly stipulated in the written document.

6 Conclusion

Constitution-making in Uganda has had a long history, with various strengths and weaknesses. The major strength lies in its consultative nature and the constitutional culture it has inculcated in the minds of citizens; a major weakness is that while constitution-making and amendment have seemed to be pro-people and pro-justice, in actuality they have masked the selfish interests of elites. That is, the processes have not been undertaken in the public interest and, furthermore, there have not imposed limitations on government officials. In regard to Rawls, the 'veil of knowledge' has prevailed rather than the 'veil of ignorance', while in regard to Wiredu's theory of consensual democracy, the tendency has been for the winner to take it all rather than for consensus to be built.

These strengths and weaknesses, along with the theories and principles highlighted in this chapter, provide valuable lessons to South Sudan as it embarks on its process of developing a permanent constitution. The most important lesson to learn is that constitution-making and amendment

ought to be understood not only as political and legal processes but also as ethical processes. Therefore, ethical principles should be foundational.

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