

A ‘new’ post-conflict constitution: A mere aspiration or an achievable reality?

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Abstract

Constitution-making in South Sudan is being undertaken in a time of uncertainty when there is a mixture both of hope that a new constitution will yield peace and stability and of concern that the aspirations of ordinary people will not be fulfilled. Adopting a new constitution with the idea that it will bring about a sudden magical change in the political and economic status quo is unrealistic, and nor is there anything such as a ‘good’ constitution that, alone, changes a situation for the better. Rather, a political culture that embraces a democratic ethos and strong institutions to safeguard the constitution may be the answer in post-conflict constitutional engineering. Realities, thus, ought to be balanced with aspirations to ensure a constitutional outcome which is reasonably acceptable to all.

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1 Introduction

Societies emerging out of armed conflict tend to struggle to achieve a transition to political stability characterised by economic prosperity, democracy and rule of law. A multitude of challenges reinforce this phenomenon, including the fragmentation of the social fabric along ethnic lines, the weakness of public institutions, and the prevalence of corruption as well as militant politics symbolised by a ‘gun class’¹ or junta politicians. One of the means often used to make peace and address the ills of conflict is to undertake a comprehensive constitutional overhaul or draft an entirely new constitution.

Both of these scenarios are observed in South Sudan’s constitutional reform process, where the Revitalized Peace Agreement stipulates that a ‘permanent’ constitution has to be drafted and adopted before elections are held at the end of the transition period.² The international community involved in negotiating peace agreements recommends, if not insists on, certain approaches that, it argues, facilitate a democratic transition.³ Historically, its ‘template’ to turn such a situation around appears to yield varying results: at times, total failure, and other times, unfulfilling success.⁴ In our reading of it, the prescribed international template holds that post-conflict societies should sign peace deals in which constitutional reform is a crucial part of peace-building and democratisation. Put differently, the template for post-conflict peace-building and constitutional reform calls for the following steps, all of which are provided for under South Sudan’s Revitalized Peace Agreement:

- The parties sign a cessation-of-hostilities agreement, thus silencing the guns.

1 For a discussion of the use of military power, experience and influence to leverage political advantage, see M D’Agoot, ‘Assessing the utility of risk management theory in the governance of new states: Lessons from South Sudan’ (2020) 23(2) *Journal of Risk and Research* 210.

2 See ch 6 of the 2018 Revitalized Peace Agreement, which stipulates the parameters of the constitution-making process. See also the Constitution-Making Process Act, 2022, which sets out a comprehensive process for the making of the ‘permanent’ constitution.

3 See generally JG Akech ‘Foreign influence and the legitimacy of constitution building in South Sudan’ (2023) 67(3) *Journal of African Law* 367.

4 Akech (n 3).

- Then they form a transitional unity government as a 'big tent' capable of accommodating as many of the 'aggrieved' military and political groups as possible.
- Then they ensure that such a unity government implements a set of prescribed institutional reforms.
- Then they adopt a 'new' constitution.
- Finally, they conclude the transitional period with elections leading to the formation of a 'democratic' government.

This 'template', found in nearly all peace negotiations, was adopted by the Inter-Governmental Authority on Development (IGAD) during the negotiation of the 2018 Revitalized Peace Agreement. The premises of such transitional arrangements are based on aspirations to consolidate peace and foster democratic culture. These aspirations, however, are counterpoised against the post-conflict realities of service delivery, justice, and reparation for war victims.

This book has zeroed in on one of these templates – 'permanent' constitution-making – as a key element of the post-conflict reform agenda. Constitution-making in South Sudan is viewed as a fundamental post-conflict reform project. Some contend that a 'permanent' constitution is a *sine qua non* for democratic elections, whilst others observe that whilst it is important, it need not be a precondition for elections.⁵ Divisive as it would ordinarily be, constitution-making in a post-conflict context reflects the aspirations of the people. However, the realities tend to challenge those aspirations.

2 The realities and aspirations underpinning constitution-making

Constitution-making in South Sudan is fraught with immense challenges. One of them is that parts of the country are still engulfed in conflict between armed groups and in communal feuds that have caused economic decline and population displacement. The political parties that are signatory to the Revitalized Peace Agreement are not all onboard with the idea of holding elections before every article in that Agreement is implemented. In particular, the Sudan People's Liberation Movement in Opposition (SPLM-IO) is not in agreement with

5 JG Akech 'The "permanent" constitution need not be a prerequisite for holding elections in South Sudan' The Sudd Institute (2022).

holding elections unless the ‘permanent’ constitution is promulgated. Constitutional scholars are also divided in their opinion on how to approach the question of elections and the adoption of the ‘permanent’ constitution. Accordingly, the following paradoxical perspectives on constitution-making have been discussed in a joint position paper by the United Nations Development Programme and the University of Juba:⁶

2.1 Elections should precede certain fundamentals – The Sudd Institute

There are prominent and persuasive perspectives calling for milestones, otherwise termed ‘prerequisites’, to be implemented before the country can go to polls. One of these calls has been made by the Sudd Institute, which asserts that elections in South Sudan could be held on time provided that certain ‘fundamentals’ are met. These fundamentals include:

- ensuring relative security;
- conducting a census for the delimitation of electoral boundaries;
- reforming electoral laws, including the adoption of a ‘permanent’ constitution;
- and
- securing the return and resettlement of displaced citizens.⁷

Another critical observation is advanced by Luka Biong, who has stressed that elections in South Sudan are possible provided the government prioritises three critical milestones:

- electoral laws to guide the process;
- voter registration; and
- constituency boundaries and a safe environment.⁸

Post-conflict political stabilisation initiatives link elections to democratic reforms, yet such elections can be ‘[a] tightrope walk between war and

6 See UNDP & University of Juba ‘Elections and constitution-making in South Sudan: A paradox of sequencing and pragmatism?’ Unpublished position paper (2024).

7 See AT Mayai and others ‘Democratic elections in South Sudan’ (2022) Sudd Institute Weekly Review, 1 March 2022, <https://bit.ly/4lvnCt8> (accessed 10 October 2023).

8 L Biong ‘South Sudan is gearing up for its first election: 3 things it must get right’ *The Conversation*, 15 August 2023, <https://theconversation.com/south-sudan-is-gearing-up-for-its-first-election-3-things-it-must-get-right-211355> (accessed 14 October 2023).

peace, stability and instability'.⁹ According to Kühne, 'elections are just a first step', not an end in themselves, with 'minimum conditions' including 'right timing, and independent electoral mechanisms including electoral complaint systems'.¹⁰

All these perspectives call for prioritising the implementation of certain milestones in the Revitalized Agreement on the Resolution of Conflict in the Republic of South Sudan (R-ARCSS). Following this argument might lead to extending the transition period, but another extension would not be without consequence. As one scholar observes,

further extending the transitional period may create anxiety among citizens who might [take the] view that democracy can no longer be deferred, especially since the country has been in transition since its [independence in July 2011]. For instance, the Transitional Constitution is transitional, the governance formula is transitional, and the government is transitional, all highlighting the risks of permanence of transitions.¹¹

Despite the unpopularity of another extension, the main opposition, the SPLM-IO, rejects elections before implementing the milestones (including adopting a permanent constitution) as provided in the R-ARCSS.¹² The main strength of this perspective, however, is that it might afford the parties an opportunity to implement necessary reforms that are the bedrock of democracy and the rule of law. These reforms include judicial and security arrangements, as well as the registration of political parties – all of which are key to free and fair elections. In addition, the need for implementing critical transitional justice processes (truth and reconciliation, accountability and reparation) cannot be over-emphasised. Together, these 'fundamentals' are paramount to fostering a conducive environment in which political parties and citizens can participate in elections without intimidation or fear of reprisal.

9 W Kühne 'The role of elections in emerging democracies and post-conflict countries: Key issues, lessons learned and dilemmas' Friedrich Ebert Stiftung International Policy Analysis (2010).

10 DK Leonard 'Elections and conflict in Africa: An introduction' (2009) 8(1) *Journal of African Elections* 7.

11 JG Akech 'To whom it may concern: South Sudan may not be ready for elections, yet democracy cannot wait' *Africa Law*, 25 July 2022, <https://bit.ly/4fDCm7X> (accessed 13 October 2023).

12 C Wote 'SPLM-IO MPs urge presidency to resolve rift over National Elections Act' *Eye Radio*, 19 September 2023, <https://www.eyeradio.org/splm-io-mps-urge-presidency-to-resolve-rift-over-national-elections-act/> (accessed 10 October 2023).

2.2 Constitutional convention to adopt a ‘permanent’ constitution in 100 days – Ebony Centre for Strategic Studies

Another perspective has been advanced by the Ebony Centre for Strategic Studies. It proposes that a constitutional convention, comprising ‘seventy individuals’¹³ drawn from across South Sudan, adopt a ‘permanent’ constitution within 100 days of its establishment. The Ebony Centre authors propose that this approach, mirroring the Philadelphia constitution-making experiment, be taken in order to ‘beat’ time pressure and increase the prospects for the elite consensus which is necessary for peace and stability in South Sudan.¹⁴

Whilst it is a plausible idea, the proposal could be criticised for being evidently elitist and thus risking elite capture of the constitution-making process. It is also possible that the proposed 100-day timeframe within which to adopt the ‘permanent’ constitution would deprive the people of South Sudan of their right to participate meaningfully in the making of their constitution. This is due to the fact that most people are displaced and the country’s weak infrastructure cannot facilitate access to remote and hard-to-reach areas. In sum, the proposal is unrealistic and the haste it entails could imperil the legitimacy of the resultant constitution.¹⁵

2.3 Constitution-making should be delinked from elections – University of Juba

The final viewpoint is diametrically opposed to the proposals by the Sudd Institute and Ebony Centre. It recommends a complete delinking of elections from the constitution-making process. This recommendation is premised on the fact that the necessary conditions for robust popular participation are lacking given that a significant proportion of the country’s population is displaced. Moreover, unhealed differences, insecurity, and economic hardship could impede meaningful popular participation in constitutional reform processes. Constitution-making

13 See Ebony Centre for Strategic Studies ‘Creating a constitution for South Sudan’ (2022) on file with the authors.

14 C Murray ‘Political elites and the people: Kenya’s decade long constitution-making process’ in G Negretto (ed) *Redrafting constitutions in democratic regimes: Theoretical and comparative perspectives* (Cambridge University Press 2020) 140.

15 JG Akech ‘Constitution-making is not a race against time’ Sudd Institute Weekly Review, 31 May 2022, <https://bit.ly/41b9n5n> (accessed 9 October 2023).

takes time, yet the timelines set out in the R-ARCSS are ambitious and untenable: constitution-making is not a race against time, but a fight for democracy.¹⁶

The main claim, according to the proponents of the viewpoint, is that 'elections are realistically possible despite absence of a "permanent" constitution',¹⁷ which means, a minimum constitutional reform would suffice. There is evidence that adopting 'a new constitution [in a post-conflict context can] reduce the risk of conflict recurrence'.¹⁸ However, 'post-conflict constitution-making processes that take longer are more beneficial for peace'¹⁹ than those that are hurried purely in order to facilitate elections.

This debate is a clear indication of the complexity of constitution-making in a post-conflict South Sudan, where aspirations and expectations vary among elites, political parties and the citizenry. The common denominator, though, is that a post-conflict constitution must strengthen democracy, the rule of law, and human rights, thus departing from a pre-conflict situation.

3 Conclusion

This chapter has recalled the main questions of the book: How should a post-conflict constitution be crafted? What realities and aspirations do such constitutional experiments face and what lessons can be learnt from others? We have emphasised that throughout the book, the chapters contributors have addressed these questions whilst indicating the complexity underpinning the varied realities and aspirations of the people of South Sudan for whom the constitution is being made. While there are enormous opportunities that may result from adopting a new constitution, such as prospects for peace and stability, there are also many challenges. These include balancing the realities under which a post-

16 Akech (n 15).

17 N Cheeseman and others 'How (not) to hold elections in South Sudan' Discussion paper published by Friedrich Ebert Stiftung (2023) 3.

18 T von Gienanth 'Elections in post-conflict countries: Lessons learned from Liberia, Sierra Leone, DR Congo, and Kosovo' (2009) https://www.zif-berlin.org/sites/zif-berlin.org/files/inline-files/ZIF_Report_Elections_in_Post-Conflict_Countries_2009_0.pdf (accessed 15 October 2023) 23.

19 C Fiedler 'Why writing a new constitution after conflict can contribute to peace' (2019) https://www.idos-research.de/uploads/media/BP_11.2019.pdf (accessed 13 October 2023).

conflict constitution is developed with the ambitious expectations and aspirations associated with a new constitution. That notwithstanding, the chapter concludes by stressing the need for a people-driven process in which choices are made by the people, and with the people, in order to increase the chances of arriving at a consensual post-conflict constitution.

4 References

- Akech JG 'Foreign influence and the legitimacy of constitution building in South Sudan' (2023) 67(3) *Journal of African Law* 367
- Akech, JG 'Constitution-making is not a race against time' Sudd Institute Weekly Review, 31 May 2022, <https://bit.ly/41b9n5n> (accessed 9 October 2023)
- Akech, JG 'The "permanent" constitution need not be a prerequisite for holding elections in South Sudan' The Sudd Institute (2022)
- Akech, JG 'To whom it may concern: South Sudan may not be ready for elections, yet democracy cannot wait' *Africa Law*, 25 July 2022, <https://bit.ly/4fDCm7X> (accessed 13 October 2023)
- Biong, L 'South Sudan is gearing up for its first election: 3 things it must get right' The Conversation, 15 August 2023, <https://theconversation.com/south-sudan-is-gearing-up-for-its-first-election-3-things-it-must-get-right-211355> (accessed 14 October 2023)
- Cheeseman, N, Biong, L & Yakani, E 'How (not) to hold elections in South Sudan' Discussion paper published by Friedrich Ebert Stiftung (2023)
- D'Agoot, M 'Assessing the utility of risk management theory in the governance of new states: Lessons from South Sudan' (2020) 23(2) *Journal of Risk and Research* 210
- Ebony Centre for Strategic Studies 'Creating a constitution for South Sudan' (2022) on file with the authors
- Fiedler, C 'Why writing a new constitution after conflict can contribute to peace' (2019) https://www.idos-research.de/uploads/media/BP_11.2019.pdf (accessed 13 October 2023)
- Kühne, W 'The role of elections in emerging democracies and post-conflict countries: Key issues, lessons learned and dilemmas' Friedrich Ebert Stiftung International Policy Analysis (2010)
- Leonard, DK 'Elections and conflict in Africa: An introduction' (2009) 8(1) *Journal of African Elections* 7

- Mayai, AT LeRiche, M & Underwood, W 'Democratic elections in South Sudan' (2022) Sudd Institute Weekly Review, 1 March 2022, <https://bit.ly/4lvnCt8> (accessed 10 October 2023)
- Murray, C 'Political elites and the people: Kenya's decade long constitution-making process' in Negretto, G (ed) *Redrafting constitutions in democratic regimes: Theoretical and comparative perspectives* (Cambridge University Press 2020)
- UNDP & University of Juba 'Elections and constitution-making in South Sudan: A paradox of sequencing and pragmatism?' Unpublished position paper (2024)
- Von Gienanth, T 'Elections in post-conflict countries: Lessons learned from Liberia, Sierra Leone, DR Congo, and Kosovo' (2009) https://www.zif-berlin.org/sites/zif-berlin.org/files/inline-files/ZIF_Report_Elections_in_Post-Conflict_Countries_2009_0.pdf (accessed 15 October 2023)
- Wote, C 'SPLM–IO MPs urge presidency to resolve rift over National Elections Act' Eye Radio, 19 September 2023, <https://www.eyeradio.org/splm-io-mps-urge-presidency-to-resolve-rift-over-national-elections-act/> (accessed 10 October 2023)