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Constitution-making in South Sudan: Issues of self-determination

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Abstract

A constitution defines the fundamental premises for power in a state. It can be called a 'social contract' specifying how humans within a territory choose to organise their society. In a multi-ethnic country like South Sudan, ethnic identity is a key part of the self-determination (or internal autonomy) of the various peoples. Thus, a constitution may enjoy broad support from all ethnic groups if they all feel that their voice, their interests, and their will are accounted for. After all, a constitution is a recollection of people's aspirations in regard to governance, the economy, culture, language, and values. This chapter argues that constitution-making is a critical continuation of the self-determination journey of the people of South Sudan insofar as it aims to build a just, prosperous and equitable country. Its making should therefore be as inclusive as possible, with particular attention being paid to ethnic nations' views, aspirations and interests.

Key words: *constitutions; self-determination; collective paternalism; peoples; inclusivity*

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1 Introduction

South Sudan is one of the newest countries in the world, having gained independence in 2011. Two years later, however, civil war broke out. The conflict was halted by a peace agreement in 2015, which collapsed a year later and was revitalised in 2018. The Revitalized Peace Agreement provides a framework for a 'permanent' constitution-making process, given that South Sudan has no 'permanent' constitution yet and is instead governed by the Transitional Constitution of 2011. Nevertheless, the process leading up to that Transitional Constitution was rushed and lacked key representation from central parts of the society of South Sudan. In addition, as Joseph Geng Akech Geng points out, 'the processes borrowed a lot from outside South Sudan without much contextualisation to ensure the new constitution's relevance to domestic needs and ambitions'.[1]

The University of Juba, together with the United Nations Mission in South Sudan (UNMISS) and the University of New South Wales, Australia, organised a high-level conference to begin a conversation on how South Sudan should build and adopt a permanent constitution. It is my great honour to have presented a paper (now a chapter) at that conference on constitution-making in which I focused on the issue of self-determination. In this chapter, I ask the following question: What is a constitution and why and how is self-determination an issue that needs to be considered and perhaps included in South Sudan's permanent constitution?

2 What is a constitution?

A constitution defines the normative basis for the distribution of power in a country and the fundamental rules of decision-making – the 'highest level of positive law'.[2] Michael Potacs writes that '[t]he character of the constitution as the highest level is justified by the fact that all other norms of the particular legal system are finally based on it'.[3] A constitution may

1 JG Akech 'Foreign influence and the legitimacy of constitution-building in South Sudan' PhD thesis, University of Pretoria, 2021 14.
2 H Kelsen *Pure theory of law* (2009) 222.
3 M Potacs 'Tree diagram or pyramid of norms' in N Bersier and others (eds) *Common law – civil law: The great divide* (2022) 63.

be called the 'social contract' specifying how people in a country organise their society. It is based on the rule of recognition, or the most basic norms of the legal system and the rule of law. There are no other laws that justify or limit the constitution. It ranks supreme over all other laws as the ultimate *lex superior*.[4] It is the foundation of the self-determination of the peoples in a country – the ultimate expression of the rules of how they will govern their society.

The constitution, as the term suggests, constitutes the most important governing institutions of the state and the relationships between them, as it sets out rules about legislative power, executive power and judicial power. It should say something too about how individuals are appointed, the rules pertaining to the mandate, and the decision-making power of these three branches of government. A constitution may also contain the rules governing the mandate and functions of other important institutions of power and decision-making, such as the central bank or regional and tribal institutions.

In addition, it should contain procedural rules about how it may be changed. Because the constitution contains the most fundamental rules concerning power and decision-making in the country, the rules as regards how to change the constitution itself must be particularly elaborate and require stronger support from a broader base of the society than is the case with the parliamentary enactment of ordinary statutory laws. For instance, to change the constitution in Norway, the proposed change must be announced by Parliament during its first sessions, but thereafter one has to wait until the election of the next Parliament before the decision may be passed by at least a two-thirds majority vote.[5] The reasoning behind this is that voters (namely, the citizens of the country) should be given an opportunity to assess the proposal fully.[6]

4 Herbert Hart describes 'the rule of recognition' as the foundation for the legitimacy of all the laws in a society. See H Hart *The concept of law* (2012). Kelsen (n 2) in turn refers to the most fundamental norm – the *Grundnorm* – as the point of origin of all other laws in a society. These theories are related to the concept of the social contract, which is the means by which human beings save themselves from the state of nature, as described by Thomas Hobbes, Jean-Jacques Rousseau, John Lock and a range of other so-called social contract philosophers.

5 Article 121 of the Constitution of the Kingdom of Norway of 17 May 1814.

6 MJ Kristoffersen & M Reinertsen 'Grunnlovsforslag har druknet i valgkampen' Juridika, 10 September 2021, https://juridika.no/innsikt/grunnlovsforslag-har-druknet-i-valgkampen (accessed 15 January 2025).

The constitution may also include provisions about human rights and group rights. However, although human rights are important laws, they are not necessarily constitutionalised to the same degree as the rules regarding the institutions of power and governance of the country. Thus, in Norway a chapter about human rights was not included in the constitution until 2014 – 200 years after it was first adopted.[7]

Lastly, it is befitting to emphasise that constitutions are associated with a country's most sacred rituals and celebrations. In Norway, our national day is 17 May, a celebration of the constitution on the date of its adoption. It is a day of pomp and ceremony, with Norwegian flags everywhere, speeches, and children's parades; it is a day to sing the national anthem, to dress in our finest clothes, a day for royalty to wave from the Royal Palace balcony, and a day to eat cakes and good food. It is a day to celebrate the cultures and peoples of the country, the flag, unity and history of Norway. Thus, to draft and adopt a constitution is a sacred act, the creation of the most fundamental values of the country. This is not something to be taken lightly.

3 Self-determination of peoples

As mentioned, a constitution is the foundation for the self-determination of the peoples of a country because it lays out the rules about who has the power to make decisions and rule the country. In international law there is the concept of 'peoples' right to self-determination'. South Sudan gained statehood and self-determination as a country in 2011 following an internationally supervised referendum held under the 2005 Comprehensive Peace Agreement (CPA) that ended the war between the North and South of Sudan.[8] Thus, the quest for self-determination was a key issue for the country's founders and those who fought for freedom.

Self-determination is an important part of international law and the history of many countries. It has at least two dimensions. The first is about the self-determination of sovereign and independent states; the other is about the self-determination of peoples, which might include the tribal peoples of South Sudan. Furthermore, one might also talk

7 Constitution of the Kingdom of Norway, ch E, arts 92-113.
8 Akech (n 1) 13.

about territorial or regional autonomy as opposed to central autonomy and power.

3.1 The legal basis of the right under international law

What is the legal foundation for the right to self-determination under international law? Articles 1(2) and 55 of the United Nations (UN) Charter declares that the purpose of the UN is to develop 'friendly relations among nations based on respect for the ... self-determination of peoples'. The self-determination of states is enshrined in UN Charter article 2(4), which emphasises that states shall refrain 'from the threat or use of force against the territorial integrity or political independence of any state'.

The right to self-determination of 'peoples' is also included in article 1 of both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The formulation is the same in both covenants:

> (1) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
> (2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
> (3) The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

This recognition of self-determination as a distinct right was initiated by the socialist states and so-called 'Third World' states, whereas Western states (above all, the European colonial powers) vehemently opposed and voted against it. They argued that self-determination was a political principle, not a right, and that, because it did not protect individuals but groups, it was impossible to enforce.[9] The right to self-determination of peoples is also recognised in the African Charter of Human and

9 M Nowak UN *Covenant on Civil and Political Rights: CCPR commentary* (2 ed, NP Engel Publisher 2005)10.

Peoples' Rights. Article 20 states that '[a]ll peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination.'[10]

These are the most important treaty obligations under international law that are relevant to South Sudan in regard to self-determination.

3.2 The meaning of 'peoples' within legal frameworks

What is the meaning of 'peoples'? Does it refer to the people of the state of South Sudan, or does it refer to the tribes too? The vast majority of South Sudanese individuals are members of a tribe and are inclined to feel loyalty to the tribe to which they belong. The Dinka are in the majority compared to other tribes; then there are the Nuer, the Shilluk, and a number of other smaller tribes. Each tribe has its own language, culture, history and territorial connection to areas within South Sudan. The civil wars have been fought along tribal lines. Are the Dinka, Nuer and Shilluk regarded as 'peoples', with a right to self-determination?

One might say that 'peoples' are those who live permanently in, or are citizens of, self-governing states.[11] In 1992 a communication was brought to the African Commission on Human and Peoples' Rights[12] by the president of the Katangese Peoples' Congress. The latter argued that the Congress should be recognised as a liberation movement and that the Katanga people are entitled to self-determination and independence from Zaire. In response, the Commission wrote that it could not find that Katanga people had been 'denied the right to participate in government, as guaranteed by Article 13(1) of the African Charter'. Thus, it concluded that 'Katanga is obliged to exercise a variant of self-determination that is

10 The full text of article 20 is as follows: '1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen. 2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community. 3. All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.'

11 J Waldron 'Two conceptions of self-determination' in S Besson & J Tasioulas (eds) *The philosophy of international law* (2010) 397-398.

12 The treaty body of the African Charter of Human and Peoples' Rights

compatible with the sovereignty and territorial integrity of Zaire'.[13] The African Commission has made several similar decisions.[14] The Katanga people are much like the tribal peoples of South Sudan. Does this mean, then, that they are not 'peoples' with a right to self-determination?

Not necessarily. If 'peoples' are defined as the citizens of sovereign states, then one is basically saying that peoples are only those that already have self-determination; peoplehood becomes the effect, not the cause, of this right.[15] That is a circular argument; furthermore, article 1(3) of both the ICCPR and ICESCR declares that states have a responsibility for the administration of 'Non-Self-Governing and Trust Territories' and 'shall promote the realization of the right of self-determination'. Article 20(2) of the African Charter also refers to 'colonized and oppressed peoples'. These peoples have 'the right to free themselves from the bonds of domination'.

Thus, 'peoples' are something other than the citizens or inhabitants of a state. Peoples may or may not have been granted a right to self-determination, but they still exist and have a right to existence too, as per article 20(1) of the African Charter. In regard to article 1 of the ICCPR, the UN Human Rights Committee (HRC) has made it clear that indigenous peoples have a right to 'internal self-determination'.[16] It also pointed out that

> [t]he rights to political participation of an indigenous community in the context of internal self-determination under article 27, read in the light of article 1, of the Covenant, and in pursuance of the preservation of the rights of members of the community to enjoy their own culture or to use their own language in community with the other members of their group, are not enjoyed merely individually.[17]

In this case, the committee found a violation of article 25 of the CCPR on the right to effective representation in internal matters because the government of Finland had interfered with the definition of who

13 *Katangese Peoples' Congress v Zaire* (1995) Communication 75/92; F Ouguergouz *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 255.
14 Ouguergouz (n 13) 255-258.
15 M Scheinin 'Sámi self-determination: A Nordic perspective on indigenous peoples' right to self-government' (2008) 2 *Gáldu Čála: Journal of Indigenous Peoples Rights* 57.
16 *Sanila-Aikio v Finland* (2019) UN Doc: CCPR/C/124/D/2668/2015 para 6.9.
17 *Sanila-Aikio v Finland*, para 6.9.

might participate in the election of Sami representatives to the Sami Parliament.[18]

The concept of 'peoples' is a difficult one, but the solution is not to frame it as a question of citizenship. Indeed, Will Kymlicka and Wayne Norman argue that

> [t]he discourse of citizenship has rarely provided a neutral framework for resolving disputes between the majority and minority groups; more often it has served as a cover by which the majority nation extends its language, institutions, mobility rights, and political power at the expense of the minority, all in the name of turning supposedly 'disloyal' or 'troublesome' minorities into 'good citizens'.[19]

Furthermore, article 2 of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) declares that '[i]ndigenous peoples ... are free and equal to all other peoples', while, according to article 3, '[i]ndigenous peoples have the right to self-determination'. Indigenous peoples are per definition colonised.[20] However, although 'peoples', including indigenous peoples and the peoples of non-self-governing territories, have this right to self-determination, there is no international legal definition of the term 'peoples'. According to John Bernard Henriksen, Martin Scheinin and Mattias Åhrén, a working definition by a United Nations Educational, Scientific and Cultural Organisation (UNESCO) expert meeting (1989) has gained the most acceptance.[21] However, what the expert meeting accomplished was merely to point to some characteristics that might be included in such a definition. It suggested that 'peoples' might be thought of as follows:

(1) A group of individual human beings who enjoy some or all of the following common features:
    (a) a common historical tradition;

18 *Sanila-Aikio v Finland* para 6.11-12.

19 W Kymlicka & W Norman 'Citizenship in culturally diverse societies: Issues, contexts, concepts' in W Kymlicka & W Norman (eds) *Citizenship in diverse societies* (2000)11.

20 According to article 1(1)(b) of ILO Convention 169 on Indigenous and Tribal Peoples, indigenous peoples are defined as 'peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions'.

21 JB Henriksen and others 'Vedlegg 3: Det samiske folkets rätt til Självbestemmande' (2005) 317.

(b) racial or ethnic identity;
(c) cultural homogeneity;
(d) linguistic unity;
(e) religious or ideological affinity;
(f) territorial connection;
(g) common economic life;

(2) The group must be of a certain number which need not be large but which must be more than a mere association of individuals within a State;

(3) The group as a whole must have the will to be identified as a people or the consciousness of being a people – allowing that group or some members of such groups, through sharing the foregoing characteristics, may not have that will or consciousness; and possibly;

(4) The group must have institutions or other means of expressing its common characteristics and will for identity.[22]

If it is possible to tick almost all of these boxes for a group, it would be fair to call them a people. The Dinka, Nuer and Shilluk, as I understand it, would surely fit most of these criteria. Thus, they might be regarded as peoples. Peoples of Africa are often called tribes. According to article 1(1)(a) of the International Labour Organization (ILO) Convention No. 169 on Indigenous and Tribal Peoples, *tribal peoples* are those 'whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations'. Indigenous peoples are defined in clause (b) of the same article. They 'descend from the populations which inhabited the country ... at the time of conquest or colonisation or the establishment of present state boundaries'. Thus, indigenous peoples are per definition colonized. Both tribal peoples and indigenous peoples might be 'peoples'. The tribes of South Sudan have their own language, culture, history, ethnic identity, and territorial connection, and fit almost all of the characteristics of peoples. Thus, the tribes of South Sudan are surely 'peoples', not just groups of individuals called 'tribes'.

22 UNESCO 'International Meeting of Experts on further study of the concept of the rights of peoples' Final Report (1990) 7-8.

3.3 Internal self-determination, not secession

Given that one might agree that the Dinka, Nuer and Shilluk are peoples and, according to international law, have a right to self-determination, what would that mean in practice? First of all, self-determination is not the same as secession.[23] It must find its balance within a state and in relation to the equal sovereignty, independence and territorial integrity of the state, which is also a fundamental part of international law.[24] In 1995, Ethiopia adopted a constitution which in article 39 proclaims, 'Every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession.'[25] This system has been called ethnic federalism,[26] and has been heavily criticised.[27]

However, it is unfair to dismiss the entire idea of self-determination and ethnic federalism because it has not been particularly successful in Ethiopia. The thing is that the rights of the Ethiopian Constitution are 'unconditional' and go too far, as they include 'the right to secession'. The country's former Prime Minister, Meles Zenawi, argued that ethnic federalism was adopted to stop a war and prevent the eruption of a new wars – wars fought along ethnic lines as in South-Sudan.[28] But the law must be realistic and in touch with reality. It is not practical or realistic to grant far-reaching rights to self-determination when territories and resources are shared.

According to article 1(1) of the ICCPR and ICESCR, the right includes the right of peoples to 'freely determine their political status'. Many questions need to be resolved in regard to each peoples' (or tribe's) internal political system. How do they choose their leaders and who speaks on behalf of them? The Sámi people in Norway, Sweden, and Finland have a Sámi Parliament elected by the members of the Sami

23 See article 46(1) of the UNDRIP, which asserts that '[n]othing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity ... which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States'.
24 See section 2.4 below.
25 Constitution of the Federal Democratic Republic of Ethiopia, 1995.
26 L Aalen 'Ethnic federalism and self-determination for nationalities in a semi-authoritarian state: The case of Ethiopia' (2006) 13(2) *International Journal on Minority and Group Rights.*
27 Aalen (n 26).
28 Aalen (n 26) 245; S Vaughan *The Addis Ababa Transitional Conference of July 1991: Its origins, history, and significance* (1994).

electoral register, which in practice is a register of those who qualify as Sámi and have applied to be admitted on the electoral roll. The criteria as to who might qualify have been disputed for many years. According to the Norwegian Sami Act § 2-6, the following individuals may be included in the Sami electoral register:

> All persons who make a declaration to the effect that they consider themselves to be Sami, and who either
>
> (a) have Sami as their domestic language, or
> (b) have or have had a parent, grandparent or great-grandparent with Sami as his or her domestic language, or
> (c) are the child of a person who is or has been registered in the Sami electoral roll.

Under this model, language is considered a key cultural marker for identifying individuals as belonging to the Sámi people. However, owing to more than a hundred years of a harsh assimilation policy by the Norwegian government, a majority of Sámi do not speak the language anymore.[29] Thus, the lowest common denominator is that one must have a great-grandparent who had Sami as his or her home language and consider oneself 'to be Sámi'. It was state interference with these electoral roll rules in Finland that the HRC found to be in violation of article 25 of the ICCPR mentioned above.[30]

The Sámi Parliament is elected every fourth year. A Sami Parliament president is elected among the members of the Sami Parliament with the Sámi Parliament Council, which is regarded as the executive unit of the Sami Parliament.

Whatever system is chosen, either by the peoples themselves or in cooperation with other peoples or tribes, there should be as little doubt as possible about the legitimacy of whoever speaks on behalf of them. South Sudan is not obliged under international law to include anything in its constitution about the self-determination of the tribes or peoples of the country,[31] since it and all its peoples collectively have the right to 'freely determine' their 'political status', as per article 1(1) of the ICCPR.

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29 H Minde 'Assimilation of the Sami: Implementation and consequences' (2005) 3 *Gáldu Čála: Journal of Indigenous Peoples Rights*.

30 *Sanila-Aikio v Finland* (2019) UN Doc: CCPR/C/124/D/2668/2015 para 6.11-12.

31 See section 2.4 below.

However, since a constitution should lay the foundation for the most important institutions of power in the country, it might be wise to say something about the principle of self-governance of each of the tribes or peoples. The detailed rules about how to ensure legitimate and effective representation could be an issue that shifts over time, and thus it may be better to leave it to be decided by ordinary legislative processes, not the constitution.

A further question arises: What should internal self-determination include? Article 1(1) and (2) of the ICCPR states that peoples may 'freely pursue their economic, social and cultural development'; moreover, they have a right to 'freely dispose of their natural wealth and resources', allowing that in 'no case may a people be deprived of its own means of subsistence'. If there were undisputed borders between the tribes, and if those borders had been respected for some 50 to a hundred years, then one might say that such people have a right to continue to enjoy what has been considered theirs. A state does not automatically become the owner of the land of the country; individual or group ownership does not disappear or become null and void because state borders have shifted. However, oftentimes there are disputes between individuals and groups about natural resources and territories; borders between the territories of tribes, that is to say, are not undisputed.

Thus, how to settle disputes between tribes about the ownership, control, and use of natural resources within territories is a central and important question. Detailed rules about land ownership, expropriation, compensation, territorial control, and the selling and buying of properties cannot be included in a constitution. But perhaps one should say something about the settlement of disputes. How should tribes cooperate to find solutions and settle disputes? Perhaps there ought to be a tribal council or a 'peoples' court system', with a fair balance of representatives from all of the tribes.

Lastly, there is the question of what issues might be decided only by the tribes themselves without any interference by the central state or any of the other tribes. I would say that issues regarding language and language learning are, to a certain degree at least, an internal matter. Then there are cultural traditions, ceremonies (including burials and weddings), traditional handicrafts, and literature and art. There may also be traditions and practices involving natural resources that are unique to each tribe, for instance different cattle-farming traditions. The

recruitment of cattle farmers might be an important issue for the future of the language and many of the cultural traditions of a tribe.

Say, for instance, that there are too many cattle in a certain district and a group of cattle herders is required to reduce the number of cattle. One must agree to the rules of how that would be done. However, the central parliament should be mindful of how important such an issue is to the tribes. Thus, there should perhaps be rules as to how to include representatives of the cattle farmers and tribes in such legislative processes. One question that could arise is whether all of the cattle farmers within a district should be required to reduce their herds equally. The representatives of the cattle farmers and the tribes may feel that, in order to secure the recruitment of new and young farmers to carry on the traditions and culture, they should spare those young farmers that have the smallest herds.

In Norway, an issue of this kind – one involving reindeer herding – came up before the Supreme Court some years ago.[32] The government insisted that if the reindeer herders could not agree (which is usually the case), all of them would have to reduce their herds equally. The Sámi Parliament and Reindeer Herding Association insisted, in turn, that young herders (those who had less than 200 reindeers) should be spared. This was an internal question of what was best for the Sámi People and the reindeer herders, one not involving anybody else, but the government was adamant that it knew what was best for them notwithstanding that it was against the will of the Sámi Parliament and the Reindeer Herding Association. When the Supreme Court gave the government permission to go ahead, it caused deep mistrust and much anger among the Sámi people.[33]

Nevertheless, in Norway they are so few in number that it had no consequences. In a country like South Sudan, however, one may have to

32 *Jovsset Ante Sara v Ministry of Agriculture and Food* (2017) Supreme Court of Norway, HR-2017-2428-A.

33 The president of the Sámi Parliament, Aili Keskitalo, said that because of the decision, the Sámi people no longer had confidence in the Supreme Court. See A Keskitalo 'Sameretten ved inngangen til 2018' (2018) 44(1) *Kritisk Juss.* In 2024 the Human Rights Committee found that this decision by the Supreme Court was in violation of article 27 of the ICCPR. See *Jovsset Ánte Sara v Norway*, UNHRC (12 September July 2024) UN Doc CCPR/C/141/D/3588/2019; HS Lile 'Three pivotal Norwegian cases on Sámi rights' (2024) 156 *TOAP Policy Brief Series* 1.

be more careful. Decisions based on collective paternalism, where the central government insists that it knows better what is best for the tribe and goes against the will of the tribe, could be dangerous indeed. Besides, the HRC found that this kind of collective paternalism was in violation of article 27 of the ICCPR.[34]

3.4 The 'will' of the peoples

It is common to refer to democracies as embodying the 'will of the people', but David Hume had a point when he questioned the foundation of such reasoning. The power of rulers is certainly not founded on some direct contractual will from their citizens. One should rather talk of a tacit will:

> [A] will there must certainly be ... however silent or tacit. But were you to ask the far greatest part of the nation whether they had ever consented to the authority of their rulers, or promised to obey them, they would be inclined to ... reply, that the affair depends not on their consent, but that they were born to such an obedience.[35]

Thus, when one talks about the self-determination of the peoples of a country as if it were based on a sort of collective will, this is something which is true only up to a point. There are elites in all societies and, in reality, only a small number of people have the capacity, ability, position or resources to concern themselves with the governance of a country or region. Most people simply go about their own business, trying to provide for themselves and their families. Having said that, the foundation for the rule of law, the constitution, would benefit from having broad support from all the individuals and tribes within the state. Giving people at least a 'feeling' that their voice, the voice of their tribe, their interests, and their will matters is certainly important in building allegiance and loyalty to the constitution and the pillars of power that it establishes.

A key question, therefore, is how to build a constitution that recognises the will of the tribes, or at least the biggest tribes, that respects their internal self-determination, and that avoids collective paternalism – a form of decision-making that can unleash rage and mistrust.[36] The

34 *Jovsset Ante Sara v Norway* (2024) UN Doc: CCPR/C/141/D/3588/2019 para 9.10.
35 D Hume *A treatise of human nature* (2003) 390.
36 See section 2.3.3 above.

Nuer people, as an example, should be able to decide for themselves what is best for their culture and their people, not the government. That does not mean, however, that the majority of questions that affect what is best for the Nuer also affect the other tribes. A system of central decision-making and legislation is very necessary, but it is not for the other tribes to decide what is best for the Nuer, allowing that they (the Nuer) might not always have things go their way or get what is best for them – given that in society everybody has to make compromises.

4 State sovereignty: The peoples of a state

The self-determination of peoples, as expressed in the UN Charter and the two covenants, must be viewed in relation to the 'sovereign equality and independence of all States' and the 'non-interference in the domestic affairs of States', as expressed in the preamble of the Vienna Convention on the Law of Treaties. According to article 2(1) of the UN Charter, the UN is 'based on the principle of the sovereign equality of all its Members', while according to article 2(7), nothing authorises the UN or any states to 'intervene in matters which are essentially within the domestic jurisdiction of any state'.

The idea of sovereignty is one of the oldest concepts in modern international law. Through the centuries it has acquired an almost mythical quality.[37] How should one understand these provisions of the UN Charter? There is no expert treaty body. However, the General Assembly has adopted a few declarations that expand on these issues. There is, for instance, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations 24 October 1970.[38] It contains seven principles. Principle (f) concerns the 'sovereign equality of States', which echoes article 2(1) of the UN Charter. The declaration identifies six elements on which this principle is based:

(a) states are juridically equal;
(b) each state enjoys the rights inherent in full sovereignty;
(c) each state has the duty to respect the personality of other states;
(d) the state's territorial integrity and political independence are inviolable;

37 B Simma and others *The Charter of the United Nations: A commentary* (2012) 135.
38 GA Res. 2625 (XXV).

> (e) each state has the right freely to choose and develop its political, social, economic and cultural systems;
> (f) each state has the duty to comply fully and in good faith with its international obligations and to live in peace with other states.[39]

All states are equal and have the same equal sovereignty, legally speaking. Another principle in the declaration, principle (e), is about the 'equal rights and self-determination of peoples'. This is an obligation that each state has to promote 'co-operation among States' through 'joint and separate action' and to bring a 'speedy end to colonialism'. Thus, self-determination here refers to both state sovereignty and colonialised peoples. However, it is specified that nothing 'shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States'.[40] In addition, in 1974 the General Assembly adopted the Declaration on the Establishment of a New International Economic Order.[41] This also elaborates on the equality and independence of states, and provides that the 'new economic order' shall be founded on

> (a) Sovereign equality of all States, self-determination of all peoples ... territorial integrity and non-interference in internal affairs of other States;\
> ...
> (d) The right of every country to adopt the economic and social system that it deems the most appropriate for its own development ...[42]

Thus, legally speaking, all peoples have a right to self-determination, and all countries are equally sovereign and independent. Also, in context, the concept of 'peoples' refers both to the peoples of a country (*demos*) and to peoples as cultural or ethnic groups (*ethnos*).

Similarly, the UNDRIP reiterates the sacredness of territorial integrity. Its article 3 deals with the self-determination of indigenous peoples, whilst article 46(1) states that

> [n]othing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging

39 GA Res. 2625 (XXV) 124.
40 GA Res. 2625 (XXV) 124.
41 GA Res. 3201 (S-VI).
42 GA Res. 3201 (S-VI) 4.

> any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

It was only after this provision was added that the UN African Group, consisting of 53 African UN member states, supported the declaration and thereby secured its adoption after more than 20 years of international negotiations.[43]

4.1 Territorial self-governance

Chapters XI and XII of the UN Charter concern non-self-governing territories and the international trusteeship system. Article 73 proclaims that, within non-self-governing territories, states are, as a 'sacred trust', obliged to promote the development of 'self-government' and assist these territories 'in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples'. According to article 76 of the Charter, the objective of the trusteeship system is the 'progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned'.

Although these provisions have been used to justify self-determination and the independence of peoples and nations within states, they should be understood in relation to territories and peoples which had been colonised and controlled by the great colonial powers.[44] Having said that, regional and local self-governance is clearly a matter of importance in many states. How such governance should be organised and balanced against the self-governance of tribes is a question that, in South Sudan, might need clarification and inclusion in the constitution.

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43 Three African states abstained from the vote, 15 were not present during the vote, and 35 voted in favour: thus, 66 per cent of Africa voted in favour of the UNDRIP in 2007. See N Crawhall 'Africa and the UN Declaration on the Rights of Indigenous Peoples' (2010) 15(2011) *International Journal of Human Rights.*

44 P Thornberry 'Self-determination, minorities, human rights: A review of international instruments' (1989) 38(4) *International and Comparative Law Quarterly* 872-875.

4.2 Western NGOs and international organisations

Another question of self-determination which is relevant to constitution-making is the fact that South Sudan has long been plagued by war, poverty, lack of infrastructure, and humanitarian crises. As a result, it has been flooded by Western non-governmental organisations (NGOs), UN agencies, and other international organisations. These foreign entities have considerable economic as well as political power.

Manfred Nowak argues that independence under international law does not mean that affected peoples themselves necessarily determine their own political, economic, social and cultural development: the gap between rich and poor countries, and the dire situation in many such poor countries, demonstrates that in reality there are great differences in self-determination.[45] While no country or human being is entirely free to do whatsoever it wishes, and actions have consequences for individuals as well as for states, poorer and smaller states cannot afford to deal with consequences in the same way as richer, larger and more powerful ones.

South Sudan is a country rich with natural resources; it has strong peoples that have fought for their self-determination and won it. If one could find a way to build stable institutions that can settle disputes between tribes and facilitate constructive cooperation between all the peoples, South Sudan will surely prosper. The day will come when it will no longer be the recipient of foreign aid and the beneficence of Western NGOs but have its own foreign aid service and an army of NGOs that provide assistance to other countries. Provided that the constitution brings peace and prosperity, there are no limits to what this society could become.

5 Conclusions and suggestions

A constitution is the normative foundation of a country's structures of power, and stipulates the mandate and functions of the legislative, executive, and judicial branches of government. The freedom to make decisions on our own is called self-determination: because it constitutes the foundation of a country's decision-making powers, a constitution is the ultimate expression of the country's self-determination.

45 Nowak (n 9) 8.

As regards the self-determination of peoples, this has a strong international legal foundation. It has two main dimensions – the internal self-determination of tribal peoples, and the sovereignty and independence of the country. South Sudan is not in any way obliged by international law to include provisions about the internal self-determination of tribal peoples. However, since its constitution would deal with the most important rules of power and the nature of decision-making power in the country, it might be wise to include at least something about this topic if the constitution is to be seen as important in building trust and peace among the tribes.

Internal self-determination does not include secession or activities that might threaten the territorial integrity or independence of the state; nor does it include unilateral self-determination of matters that affect the other peoples. In short, the self-determination of tribal peoples might be defined as protection against collective paternalism – a situation in which other tribal peoples make paternalistic decisions about what is best for a tribe against the will of that tribe. In effect, this would amount to a collective act of degrading that peoples' human capacity to determine their own happiness.

However, when it comes to exercising the right to self-determination, there should be no doubt about who the legitimate representatives of the peoples are. I would say that the best would be for all the tribes to agree on some common criteria for electing their leaders. That would be the easiest and most practical measure for courts and the administration to implement and interpret. The right to self-determination includes the right to 'freely determine [one's] ... political status', which means that tribal peoples should be free to determine their own system of leadership and decision-making. However, that does not mean that different tribes cannot find agreement among themselves. Based on what has been said, let me try, ever so humbly and carefully, to formulate a few suggestions for South Sudan's constitutional text:

- The Dinka, Nuer and Shilluk are equal and independent peoples of South Sudan.[46] They have the right to internal self-determination and shall be protected against collective paternalism. They shall be free to determine how

46 This is not at all meant as an exhaustive list. It merely includes what I happen to think are the largest tribal peoples.

to appoint their own leaders and shall have full autonomy to determine what is best for their own tribe.
- The state shall provide the necessary resources and support to enable tribes to appoint their legitimate leaders.[47]
- A Tribal Peoples' Court shall be established to settle disputes between tribes about how to interpret tribal agreements and the applicable rules. The Court shall be represented by competent and independent judges from each of the tribal peoples. Each tribal peoples' leadership body shall appoint judges from their own tribe. Judges shall serve in the capacity of independent experts.
- South Sudan is a sovereign and independent country, free to pursue its own economic, social and cultural development. In God we trust, and in time we will become the light of the world.[48]

These formulations are merely tentative suggestions based on the arguments of this chapter. As they were formulated, however, they began to take on a life of their own. They certainly need more research and consideration than has been provided here; but then again, this chapter is not meant as a playbook for final decisions: it has simply been an attempt to explore certain ideas that could be useful to consider during deliberations around South Sudan's constitutional future.

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47 This might include financial support for elections and conferences. Such support should be limited to what is deemed necessary.

48 The constitution is a sacred document and, as such, may well express aspirations for the future.

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