

Ethnic politics in constitution-making: Safeguards for protecting minorities

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Abstract

The chapter discusses the protection of ethnic minorities during constitution-making processes. It does this by examining both the history of constitution-making in Sudan and Southern Sudan and current efforts towards making a 'permanent' constitution under the Revitalized Peace Agreement. The analysis reveals that there have been limited constitutional safeguards and guarantees for protecting ethnic minorities. Steps to ensure such protection should begin with the inclusive participation of all minorities, in particular those that are not only minorities in numerical terms but socio-politically marginalised. The role of ethnicity in any political process is critical

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because exclusion breeds division and unhealthy competition, which potentially leads to conflict. The chapter recommends the inclusion of all minorities and the adoption of constitutional measures to safeguard a variety of minority rights, in particular the right of ethnic minorities to participate in South Sudan's socio-economic programmes.

Key words: *ethnicity; inclusive participation; protection; ethnic minorities*

1 Introduction

South Sudan has been plagued by conflicts that are deeply rooted in ethnic divisions, so it is pertinent to examine the question of ethnic politics in constitution-making and the nature of the safeguards that should be adopted to protect ethnic minorities. In a conflict-divided country like South Sudan, ethnicity plays a central role in the political process: power and resource-sharing arrangements are always made using ethnicity as the benchmark. Constitution-making is itself a political process, with the resultant constitution representing a contract between the government and citizens. Ethnic hegemonies and their respective elites in the political sphere thus put a high premium on the constitution-making process in order to secure their interests in the contract. However, for a peaceful and democratic constitutional transition to occur in South Sudan, the process should take cognisance of the iniquities that arose during the constitutional process around South Sudan's secession from Sudan and try to avoid the errors and pitfalls that characterised this experience.

The chapter takes stock of the history of the constitution-making process in South Sudan. The first part of the process involved amending the Interim Constitution of Sudan, which was steered by the Sudanese People's Liberation Movement (SPLM) and the National Congress Party, both of which were functionally partners in the Comprehensive Peace Agreement (CPA). The review aimed to align the Constitution of Sudan with the CPA in order to adopt reforms agreed upon by the peace partners. Both the 2005 and 2011 processes, as demonstrated by the literature, excluded citizens. The constitutions were birthed in the same manner, and the processes underlying them were similar. Accordingly, the chapter explores the historical absence of popular involvement in the process of constitution-making in Sudan and what is now South Sudan.

Constitution-making in Sudan, as the literature shows, dates to the 1899 Condominium Agreement and extends through to the CPA in 2005. The processes had not been inclusive of citizens but were initiated and managed entirely by elites. Public consultation and participation ordinarily legitimise a constitution and galvanise public acceptance of it, but in these cases it was conspicuously absent, thus undermining citizens' sovereignty.

Although the process of writing a 'permanent' constitution is, according to the Constitution Making Process Act, 2022, more elaborate than the previous two processes of 2005 and 2011, citizens' participation remains limited. This is evidenced by the allocation of 45 per cent and 55 per cent in representation to the stakeholders and the Revitalized Transitional Government of National Unity (RTGoNU) in the reconstituted National Constitution Review Commission and National Constitutional Conference, respectively.¹

It is also argued that the protection of ethnic minorities includes safeguarding their participation in determining the content of the constitution, articulating their interests, and defending their minority rights and values. The chapter argues that citizens' views should be considered at every point of the process, ranging from the formation of constitution-making mechanisms to the adoption of the constitutional text by the Constituent Assembly.

2 The historical absence of popular involvement in constitution-making

The history of constitution-making in Sudan dates back to the Condominium era when Egypt and Britain colonised Sudan. The 1899 Condominium Agreement was preceded by the British constitutions established in all British colonies worldwide.² Kristine Mo argues that the Condominium Agreement was the first constitution of Sudan, albeit that the country was then under foreign rule.³ The constitution-making processes preceding 1942 were exclusive of Southerners' views since the

1 The Constitution Making Process Act, 2022 of the Republic of South Sudan.

2 AS Fadhall 'A paper presented at the Constitution-making Forum: A Government of Sudan consultation' 24-25 May 2011, Khartoum, Sudan.

3 K Mo 'Contested constitutions: Constitutional development in Sudan, 1953-2005' Master's thesis, University of Bergen, 2014.

introduction of the Closed District Ordinance, which came into effect in 1922. The Closed District Ordinance was a policy introduced by the British colonial administration to protect Southern Sudan from Arab influence and exclude Arabs from trade and settlement in the South.⁴ The agreement also protected the Southern Darfur, White Nile and Kassala regions from the influence of Islam.⁵ The Juba Conference of 12 June 1947 was, as Kristine Mo argues, the first opportunity for Southerners to be consulted on their destiny. The consultation on the second day, as revealed by Mo, was completely different from that on the first day because the delegates appear to have been threatened and had to change their position for the sake of unity.

This is characteristic of undemocratic governments, for whom the views of the public and the marginalised do not matter. However, the excerpt below perhaps better explains the long-standing distrust between Southerners and Northerners. This was a call for the withdrawal of Southern Members of Parliament from the constituent assembly and could have been responsible for the mutiny of 17 August 1955 in the town of Torit:

[T]he next day, the atmosphere was completely changed several participants from the South side had fundamentally changed their minds when the meeting resumed the next day ... In 1955, Southern members of parliament put forward a condition for supporting full independence in exchange for consideration of their proposal for a federal system. The northern politicians decided to go along with the proposal, and the motion for independence was passed unanimously.⁶

In 1951, a 13-plus four-member Constitution Amendment Commission was formed and headed by Justice Stanley-Baker. This was preceded by the establishment of the legislative assembly in 1948 after Southerners had accepted to remain in a united Sudan.⁷ The 1953 self-determination agreement led to elections that brought in a government under the Ashigga, later reconstituted as the National Unionist Party,⁸ which advocated for independence. Shortly before independent self-

4 DN Mayo 'The British Southern Policy in Sudan: An inquiry into the Closed District Ordinances (1914-1946)' (1994) 1(2)-(3) *Northeast African Studies* 165.

5 Mo (n 3) 18-19.

6 Mo (n 3) 19.

7 Mo (n 3) 19.

8 Ashigga was later renamed the National Unionist Party, and led by Ismail al-Azhari.

government, the statute was amended by the legislative assembly to become Sudan's transitional constitution. As Suleiman argues, this transition was made easier by the promise to the Southerners that their desire for a federal system of government in Sudan would be entrenched in the permanent constitution of an independent Sudan. A 46-member constituent assembly, highly deficient in ethnic representation, was appointed to draft the constitution. The draft adopted a parliamentary system of government, and independence was declared on 19 December 1955⁹ under a unitary country, abrogating the deal between the National Unionist government and Southerners, who wanted at least a federal region. The Southerners subsequently withdrew from the Commission on realising that the constitution endorsed a unitary country in disregard of the demand for federalism.

Several *coup d'états* were staged in later years: in November 1958, May 1968 and June 1989. In 1965, a constituent assembly was again appointed to draft a permanent constitution. The 1968 draft constitution declared Sudan a democratic socialist republic, adopted a presidential system, and made Islam a religion of the state.¹⁰ In 1972, a constituent assembly was once more appointed to pass the permanent constitution of the Democratic Republic of Sudan; after barely six months of writing, the first constitution was passed, on 15 April 1973.¹¹ In 1983, President Numeiri amended the 1972 Addis Ababa Agreement (AAA), causing a constitutional crisis. The crisis led to the Southern region being split into three regions, which contradicted the AAA. The AAA had recognised only three provinces and stipulated that any changes to this structure required a constitutional amendment passed by the legislature.¹² The AAA recommended using organic laws to organise the self-government of provinces of the Southern region.¹³

A popular uprising put an end to the May Regime¹⁴ in April 1985 and reverted the country to the 1956 transitional constitution. The newly elected government embarked on a permanent constitution in 1986,

9 Fadhall (n 2).

10 Mo (n 3).

11 Fadhall (n 2) 35.

12 See art 2 of the Addis Ababa Agreement between the Government of the Republic of Sudan and the Southern Sudan Liberation Movement, Addis Ababa, 1972.

(n 12) 1.

14 In May 1968, a military Junta came to power in Sudan under the leadership of a junior military commander named Jafaar Numeiri.

but the latter did not see the light of day until the civilian government was overthrown in June 1989. In 1998, the junta government embarked on the permanent constitution after years of rule by decree. The 1998 constitution was controversially adopted and passed in a referendum in April 1998.¹⁵ This marked the first time that citizens had ever had any involvement in deciding on matters to do with the constitution, albeit that their participation was limited, given the fact of war in the South. The constitution, in essence, was an Islamic constitution that emboldened Islamic rule by the National Islamic Front. The adoption of Islam as a religion of the state was an indication that Christian and traditional believers' views and faith had not been considered by the drafters.

Upon the signing and coming into effect of the 2005 CPA, the country needed an interim constitution that accommodated the secular demands of the CPA and the Sudanese People's Liberation Army in particular. The appointed National Assembly, dominated by the SPLM and National Congress Party, adopted the 2005 interim constitution as reviewed by the National Constitution Review Commission. This interim constitution conspicuously included a Bill of Rights and new reforms required by the CPA, reforms which for the first time emphasised minorities' rights, including human rights, in the country's constitutional development.

The historical epochs of constitution-making in Sudan have been characterised by exclusionism, racial and religious discrimination, and have been elite-driven at best. The effort to secure a permanent constitution thus reflects a century-long desire in Sudanese history; South Sudan shares the same long search for a permanent constitution. Kok argues that Sudan's search for a permanent constitution stemmed from the need for national consensus on core principles that unite the country, acknowledge the diversity of Sudanese people, uphold human rights and the rule of law, and establish the framework for the nature of the state, the system of government, and the process of forming a government.¹⁶ The search for a permanent constitution in Sudan as well as in South Sudan is still as relevant today as it was at the time of its

15 Fadhall (n 2).

16 PN Kok *Governance and conflict in Sudan, 1985-1999: Analysis, evaluation and documentation* (Deutsches Orient-Institut 1996).

historical origins, while the issues of governance, inclusivity, identity constitutionalism that confront South Sudan remain the perplexing challenges they have long been.

The permanent constitution that was once envisioned in Sudan – and is now similarly envisioned in South Sudan – aims to safeguard minority rights and align with international standards. As Kristine Mo succinctly argues, Southerners – who have become South Sudanese – have long been fighting for equality, self-government and federalism not only in the course of ordinary politics but in constitution-making processes as well.¹⁷ Arabisation, Islamisation, cultural superiority, and marginalisation have been central themes in Southern Sudanese involvement in constitution-making. Indeed, South Sudan's secession was a direct result both of the failure of various constitutions to address these matters and of the lack of political will to address them politically. The problems associated with constitution-making in Sudan were thus passed on to South Sudan after its secession in 2011.

3 Constitution-making in South Sudan: An overview

The origins of constitution-making in South Sudan lie in the historical epochs explained above; indeed, the country is plagued by the same social, economic, political and security issues that threatened the unity of Sudan and finally tore it apart. The crises that culminated in South Sudan's 2013 conflict reflect constitutional failures that mirror the erstwhile constitutional breakdowns experienced in Sudan.

The constitution-making processes in 2005 and 2011 in South Sudan entailed a consociational process that resulted in a transitional government of national unity, and a military-initiated process aimed at concentrating power. Both established authoritarian regimes, under the 2005 and 2011 constitutions.

The 2005 Interim Constitution of Sudan was a reviewed constitution which had been brought into conformity with the provisions of the 2005 CPA; the 2005 Interim Constitution of Southern Sudan was in turn derived from it. Sudan's 2005 constitution gave priority to provisions on security as well as wealth- and power-sharing arrangements, and allowed

17 Mo (n 3).

for a referendum in regard to the self-determination of Southerners.¹⁸ Part 2 of the Bill of Rights guarantees that ethnic and cultural communities can exercise their rights and freedoms within the ambit of their cultures.¹⁹ For the second time under the Southern regional government, a semi-autonomous constitution which was a subsidiary to the national constitution came into force. The Constitution gave the ruling party unfettered authority to appoint representatives from marginalised ethnic groups to the regional government for the first time, although with some imperfections.

The second process of constitution-making in South Sudan was in relation to the Transitional Constitution of the Republic of South Sudan, 2011, as amended.²⁰ The Regional Interim Constitution of Southern Sudan was hastily reviewed again by the elite and hurried along so as to meet deadlines and bolster the growing euphoria around independence. Although they recognised the multi-ethnicity, diversity, and rights and aspirations of the people of Southern Sudan, neither the 2005 regional Interim Constitution of Southern Sudan nor the 2011 Transitional Constitution of the Republic of South Sudan effectively incorporated ethnic diversity and considerations in the structures and functioning of the Government of South Sudan. Minority ethnic groups were not represented, and government positions were occupied largely by major ethnic groups to the disenfranchisement of the former. National and regional elections conducted under the 2005 Constitution of Sudan regional constitutions did not factor in ethnic representation of minorities, save for a measure agreed upon in the CPA and enshrined in the interim constitutions that allows 25 per cent affirmative action for women.²¹ The constitutions that came into force in Sudan and, latterly, South Sudan have focused on power relations among the elites rather than regulating relations between communities and addressing their respective social issues and government structures.

18 Interim Constitution of the Republic of Sudan, 2005, art 222.

19 Interim Constitution of the Republic of Sudan, 2005, art 47.

20 In 2005 a semi-autonomous interim regional constitution occasioned by the Comprehensive Peace Agreement came into force. The process yielding the interim regional constitution became the first in the region since 1972 and the 2011 process, the second.

21 Comprehensive Peace Agreement between the Government of Sudan and the Sudanese People's Liberation Movement, Nairobi, 2005.

These are crucial observations because, in a politically and ethnically sensitised society, the constitution-making process can be divisive and its mismanagement can lead to failure. The case of the 2000-2005 Kenyan process serves as a warning to any process that does not take care to reduce prospects of failures. With that taken into consideration, the South Sudanese constitution-making process must be safeguarded from the exclusionary practices that characterised previous processes and adopt genuinely inclusive approaches that ensure meaningful participation by minority groups.

4 Ethnicity and ethnic groups in constitution-making

Ghai regards ethnicity as a condition in which a community's self-consciousness focuses on the language, history and culture that holds it together and differentiates it from other communities.²² Ghai further argues that ethnic sentiment qualifies as ethnicity when emotions, symbols, and material elements are used to distinguish one group from others, thereby reinforcing internal social cohesion within that ethnic group.²³ This phenomenon strengthens cohesion among members of an ethnic group but also alienates them from groups with differing features.

Ethnicity in this context is a political tool that can lead to one's identification with a group with a particular history and language within a divided society; it may also result in armed groups that rally around the banner of a certain ethnicity. In societies where physical and social features such as colour, language, culture and values reinforce divisions between ethnic groups, political and constitutional demands are often intensified and ethnicised causing political tensions. These tensions can escalate into violent conflict and, in extreme cases, lead to secessionist movements.

In a post-conflict or conflict-ridden society like South Sudan, the constitution-making process may be conflictual, as the relationships between dominant and minority ethnic groups are dichotomised by traits that antagonise rather than unite. A conflict-resolution strategy would be to grant political and constitutional recognition to ethnic

22 YP Ghai 'Constitutionalism and the challenge of ethnic diversity', 2008, http://jenni.uchicago.edu/WJP/Vienna_2008/Ghai_Diversity_and_constitutionalism.pdf (accessed 20 June 2023).

23 Ghai (n 22) 6.

groups, something which in cases is supported by international legal regimes.²⁴ Elsewhere, Ghai argues that constitution-building can give pride of place to popular sovereignty by empowering people, promoting national unity, and respecting diversity of language, belief and the like through an inclusive process.²⁵

The racial discrimination and ethnically-based divide-and-rule policies adopted by successive governments have deepened divides between ethnic groups in South Sudan, as did the politics of liberation²⁶ during the country's war of liberation, when administrative units were in some cases created on the basis of ethnicity. This inflamed ethnic consciousness and prompted demands for special administration, as seen with the presidential Executive Order No. 36/2015, which created 28 states in 2015 and four more in 2017.²⁷ Ethnicity plays a fundamental, and indeed divisive role, in South Sudan's politico-military establishment, as was vividly evidenced by the 2013 conflict. Given the ethnic sensitivities embedded in the country's social and political spheres, the constitution-making process should certainly not ignore the role that ethnicity could play in either popular acceptance or rejection of the resultant constitution.

5 Protecting ethnic minorities through constitution-making

Majoritarian attitudes toward minorities are rarely reflected upon by ordinary members of South Sudan's dominant ethnic groups. Instead, the power relations between the majority and minority in this context are invoked by politicians in order to arouse negative ethnic nationalism and trigger conflicts. This challenges the assumptions of the majoritarian agenda within the inter-ethnic dynamics of South Sudan. The ethnic identification entailed by tribalism is used strategically to gain access to jobs in the public and private sector. Majority ethnic groups in South Sudan have not reached any consensus regarding dominating or ruling

²⁴ Ghai (n 22) 6.

²⁵ YP Ghai *The role of constituent assemblies in constitution making* (International IDEA 2005).

²⁶ NP Adwok *Politics of liberation in South Sudan: An insider's view* (1996) (Kampala Fountain 1996).

²⁷ In 2015, President Salva Kiir signed Executive Order No. 36/2015, which established 28 states (as well as Abyei Administrative Area) out of ten states inherited from Sudan.

over minority groups. While some individuals may consider leveraging ethnic numbers for political influence, ordinary people rely on ethnic identity and affiliation primarily as a means of socio-political survival.

South Sudan has never had a democratic process leading to elections to justify the existence of a majority rule and hence majoritarian dictatorship. As Lile argues elsewhere in this book, every ethnic group ought to have a constitutional right of internal self-determination.²⁸ The right of self-determination, just like political rights, cannot be meaningfully upheld through a constitutional process that lacks genuine public advocacy and participation. As a principle rooted in international law, the right to self-determination must be recognised and protected within the constitution-making process, especially for ethnic minorities.

The absence of consensus or policies to deny or dominate minority rights resonates with article 27 of the International Covenant on Civil and Political Rights, which grants minority rights to individuals rather than minority groups.²⁹ Ensuring the collective participation of marginalised ethnic minorities in the constitution-making process across social, political, cultural and economic is essential to protecting their rights and empowerment. Once such an approach is adopted within an inclusive process – a process sanctioned by subsidiary laws, particularly constitution-making legislation, and enforced by the National Constitution Review Commission – then minorities' rights may be deemed to be protected in the constitution-making process. This would not be unprecedented in the region at large, which has generally sought to promote social cohesion and stability. The African Charter on Human and Peoples' Rights reckons this phenomenon, therefore, legalising the collective awards of rights to the groups.³⁰

Gilbert defines minorities as 'groups who are ethnically, religiously, or linguistically different from the rest of the society and who are non-dominant in that society'.³¹ Ethnic minorities in South Sudan, by virtue of being non-dominant, remain largely outside of governmental and

28 See ch 2 of this book.

29 VP Ramaga 'The group concept in minority protection' (1993) 15(3) *Humanities and Arts Quarterly* 575.

30 Office of the High Commissioner for Human Rights 'Minority rights under the African Charter on Human and Peoples' Rights: Guide to minorities – Pamphlet No. 6'.

31 J Gilbert *Constitutionalism, ethnicity and minority rights in Africa: A legal appraisal from the Great Lakes region* (Oxford University Press 2013) 416.

social spheres in spite of political rhetoric endorsing notions of inclusive governance and affirmative action. In practice, the RTGoNU continues to exclude ethnic minorities due to their low numbers and historical under-representation, all the while privileging dominant ethnic groups such as the Dinka, Nuer, Chollo, and Zande. The legislative and judicial branches of central-state and local government are conspicuously unrepresentative of minor ethnic groups such as the Kichepo, Boya, Jiye, Bongo, Keliko, Nyangatom, and Pari.

Limited representation of ethnic minorities in the RTGoNU, political parties, civil society organisations and other stakeholder entities translates into marginalisation or exclusion from the constitution-making process. As such, legislation governing constitution-making ought to operationalise affirmative action or proportional representation in order to protect ethnic minorities in the process. Although the constitution-making process is committed in principle to respecting 'ethnic and regional diversity and communal rights',³² the application of this principle falls short of protecting ethnic communities by means of special quotas for minorities. Their rights are thus ultimately at risk of being overridden by a majority made up of all the main ethnic groups involved in the process via political parties and stakeholder organisations.

Another factor is the question of how prepared or well-equipped ethnic communities, especially minorities, are for engaging in constitution-making mechanism, articulating the issues that affect them, and advocating for safeguards for themselves. Adequate preparation is indeed also part and parcel of inclusive participation in a transparent process. This entails that organisers of the process need to cater for the interests of the ethnic minority groups. As Ghai argues,

the challenge for participation is to avoid these perils. The procedure must address questions of the preparedness of the people, both psychologically and intellectually, to engage in the process, the methods of soliciting views of the public and special and organised groups.³³

At the same time, the concept of a minority could become problematic, especially where the country's laws and governance benefit minority groups. Here, minority status becomes privileged and the minority is

32 Revitalized Agreement on the Resolution of the Conflict in South Sudan, art 62(5).

33 Ghai (n 22) 5.

accorded preferential treatment; accordingly, every marginalised group would want to identify itself as a minority in order to benefit from the provisions of the law. With this tendency kept in mind, one would need to define the term precisely. Capotorti duly defines a minority as

a group, numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.³⁴

The protection of ethnic groups' culture, tradition, religion and language is an exclusive responsibility of the state, and it should begin with the constitution-making process, where decisions that affect all ethnicities in South Sudan will be constitutionalised. This national responsibility is reinforced by the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 1992, which mandates the sovereign state to protect the minorities within its territorial boundaries.

6 Participatory constitution-making

The constitution-making process represents a participatory initiative involving key stakeholders, including marginalised groups, ethnic minorities and elites, aimed at renegotiating and restructuring the state in post-conflict contexts where the existing constitutional framework no longer makes relevance. The constitution, as a conflict-resolution mechanism, should be designed in a way that addresses the grievances, and articulates the views, of diverse ethnic groups in post-conflict situations.

To that end, Solomon argues that the constitution could also 'play a role in consolidating peace and democracy'.³⁵ One key aspect of democracy is equality of participation regardless of gender, ethnicity or social status. Thus, an inclusive and representative constitution-making process should enable participation by people in all categories

34 F Capotorti 'Study on the rights of persons belonging to ethnic, religious, and linguistic minorities' (1977) UN Doc. No. E/ CN.4/Sub.2/384/Add.1–7.

35 LE Miller (ed) *Framing the state in times of transition: Case studies in constitution making* (United States Institute of Peace Press 2010).

of society. Hart contends, however, that public participation should not be limited to the traditional processes of voting in the constituent assembly or parliament, participating in constitutional conferences, or ratifying the constitution in a referendum; instead, it should extend to engagement with the 'substance of the constitution'.³⁶ The substance of the constitution cannot be determined fully if the process is exclusionary. Deliberations on constitutional issues should therefore involve the public through dialogue and negotiation in which the political community is engaged in the process of arriving at consensus among stakeholders.

For the authentic substance to be agreed upon by the actors and stakeholders engaged in constitution-making, the environment in which this process occurs – including, for instance, events such as civic education and public consultation – should be open, free, fair and inclusive. Brandt et al. note too that media campaigns facilitate public participation in constitution-making.³⁷ This underscores the critical role that media houses and the social media fraternity can play in enhancing participation. Under conditions of full participation, the popular sovereignty of the citizens reigns and the resultant constitution would be readily accepted by the public if it were put to a constitutional referendum and/or passed by Members of Parliament.

Brandt et al. point out that the idea of public participation in constitution-making is one that has gained traction over the years, especially in post-conflict societies.³⁸ Good examples are the constitution-making processes of Kenya (in 2005-2010) and Uganda (1988-1995). When it comes to constitutions, the process and the product are equally important in harmonising the adversarial interests of conflicting parties. The former legitimises the latter by means of popular participation, in the course of which the people reach consensus on critical issues.³⁹

The participatory constitution-making process does not risk producing an elite and exclusive constitution, which would be a recipe for conflict. The history of constitution-making in Sudan and South Sudan attests to the fact that constitutions birthed through exclusive

36 YP Ghai & G Galli *Constitution-building processes and democratization: Lessons learned. in democracy, conflict and human security* (International IDEA 2006).

37 M Brandt, J Cottrell, YP Ghai & A Regan *Constitution-making and reform: Options for the process* (Interpeace 2011).

38 Brandt et al (n 37).

39 Yash & Galli (n 36) 38.

and non-participatory processes tend to exacerbate political instability and provoke contestation over state legitimacy. This is exemplified by the cases of the Interim Constitution of the Republic of Sudan 2005⁴⁰ and the Transitional Constitution of the Republic of South Sudan 2011 as amended, both of which are transitional in practice.

In an ethnically divided society like South Sudan, where ethnicity is politicised and long-entrenched ethnic animosity has led to deadly civil war, participation by all ethnic groups – and with a particular focus on ethnic minorities – in a key political process such as constitution-making is a *conditio sine qua non* for stability. Post-conflict constitutions have the potential to resolve the root causes of conflicts when the process is inclusive and participatory. They foster national unity and democracy in a divided state and promote harmonious co-existence. Indeed, this would serve the very intention that South Sudan's permanent constitution should forge national unity in a divided society.

Protecting ethnic minorities begins with affirmative action underwritten by the political will to ensure that citizens of different identities, groups and creeds are recognised as stakeholders in national issues. The voices of minority ethnic groups should not only be represented and heard in the process of constitution-making but supported and strategically placed in the decision-making mechanisms of this process. For public participation to occur, the process should garner significant popular legitimacy by enabling citizens to be directly involved throughout the process, beginning with its initial phases and concluding with the final steps of ratifying the resultant constitution through a referendum or elected constituent assembly.⁴¹

With that being said, it should be noted (as before) that 'minority' is a concept with emotive political connotations in South Sudan. As Gilbert argues, determining which group constitutes a numerically majority or minority remains a complex and contested issue; in other words, it is not the case that every ethnic group would qualify to claim minority rights.⁴²

40 The Interim Constitution of the Republic of Sudan was suspended on 11 April 2019 after President Bashir was ousted by General Ahmed ibn al Ouf and the Forces for Freedom and Change.

41 A Fruhstorfer & A Hudson 'Majorities for minorities: Participatory constitution making and the protection of minority' (2022) 75(1) *Political Research Quarterly* 103.

42 Gilbert (n 31).

Gilbert goes on to clarify that ‘the essence of the emerging regime of minority rights is to protect the “non-dominant” and the vulnerable.’⁴³ The paradigm of emerging minority regimes is particularly applicable in the South Sudanese context, where statistically, the underrepresented groups are among the most marginalised in a society where access to power and resources is often mediated through militarisation. In ethnically divided states such as South Sudan, the concentration of armed groups among numerically dominant communities often intensifies their capacity for violence and destabilisation. Nevertheless, these destructive forces are not exclusively directed against the minority. This underscores the multifaceted nature of conflict and power dynamics in South Sudan.

Nyaba argues that the numerical dominance of the Dinka has fuelled a form of ethnic nationalism⁴⁴ which manifests itself as unconscious nationalism among the ordinary Dinka and, to a certain extent, among political elites. This dynamic became particularly evident following the outbreak of the 2013 conflict, during which ethnically aligned organisations such as the Jieng Council of Elders⁴⁵ and Naath Council of Elders⁴⁶ emerged to support their respective political factions in the civil war. It is, however, fallacious to believe that minority ethnic groups are always oppressed by the majority, given that there have been stable states where minorities dominated and ruled. Ethiopia under Prime Minister Meles Zenawi and South Africa under apartheid are cases in point.

In terms of the Constitution Making Process Act, 2022, the National Constitution Conference (NCC) is to comprise 1 200 delegates, with 100 delegates allocated from each of the ten states, 30 delegates from each of the three Administrative Areas,⁴⁷ and 110 delegates from other stakeholders.⁴⁸ The NCC is a strategic organ of the constitutional process that does not need to be subjected to political allocation. It should function as a critical and impartial organ whose decisions will profoundly influence both the structural design and substantive content of the constitution. The rule of procedures of the NCC is formulated

43 Gilbert (n 31).

44 AP Nyaba *South Sudan: Endless wars, elites, ethnicity and the stunted state* (Mkuki na Nyota 2019).

45 The Dinka people of South Sudan refer to themselves as Jieng.

46 The Nuer people of South Sudan refer to themselves as Naath.

47 South Sudan has a decentralised system of government comprising ten states and three Administrative Areas under special administration by the presidency.

48 Constitution Making Process Act, 2022, art 29.

to be considerate of marginalised groups' minority representation, with no mention made of ethnic minority groups.⁴⁹ Leaving it up to political parties and other stakeholders to decide on their allocation of delegates to the NCC is in blatant disregard of the responsibility to protect the involvement of ethnic minorities. The constitution-making process should integrate enhanced affirmative action measures and grassroots-level quota systems for the empowerment of marginalised minority groups to facilitate their equitable representation.

According to the constitution-making legislation, the incumbent unelected legislature will be transformed into a constituent assembly. The latter's responsibility is to endorse and adopt the NCC-passed constitutional text. The procedure of the constituent assembly, as guided by the Constitution Making Process Act, should, as a matter of critical importance, be considerate of minority rights, given the lessons learnt from Kenya's constitution-making processes and the fact that the Transitional National Legislative Assembly is currently not representative of ethnic minorities. Under-represented ethnic groups can be appointed to complete the expanded constituent assembly, which could be accomplished through an amendment of the Constitution Making Process Act. An expansion of constituent assembly is necessary since half of the members of the legislature were appointed under the Revitalized Agreement and the other half were elected in 2010 but saw their terms of office expire in 2015.

In a nutshell, the current national legislature – which, in terms of the Constitution Making Process Act 2022 would be transformed into a constituent assembly – no longer possesses the legitimacy to warrant the exclusion of under-represented ethnic minorities. As mentioned, the Constitution Making Process Act can be amended to allow for such representation, noting too that it falls short of providing for affirmative action in the case of ethnic minorities.

As regards the reconstituted National Constitutional Review Commission, it is a politically appointed commission, but the parties and stakeholders can be guided by the need for equitable representation of all ethnic groups and, specifically, quotas for minorities. The Commission's operational procedures should be reformulated to facilitate such ethnic

49 Constitution Making Process Act, 2022, art 30.

representation. In addition, the Constitution Making Process Act mandates the Commission to conduct public consultations and civic education across the country to solicit public views for inclusion in the constitutional text. This crucial process is a window of opportunity for gathering minority views and helping to ensure that they inform the eventual constitutional text. The consultations should be far-reaching, participatory, inclusive, and representative.

Introducing affirmative action for ethnic minorities in the mechanisms of the constitution-making process is a clear way of adhering to the principles of inclusivity and participation. The process of constitution-making should at the least entail strategic placement of representatives of ethnic minorities in positions of influence so as to improve the chances of producing an inclusive constitution that protects minorities of all categories, especially ethnic minorities. Achieving this goal calls for both political will and the investment of resources; in particular, popular consultation and civic education would be effective means of facilitating inclusivity, participation and representation, especially in hard-to-reach communities.

However, efforts to involve the public in constitution-making are likely to encounter challenges, such as limited understanding of constitutional issues and issues in managing submissions and commentaries towards the draft constitutional text – the latter are liable to variation depending on the note-takers and their political dispositions. As such, the mechanisms charged with the responsibility of collating inputs from the public and undertaking civic education must be impartial, free from political interference, and capable of authentic documentation of citizens' contributions and the outcomes of public consultations.

In order for the process to be participatory and feed into the content of the constitution, time is of the essence. This is so given the need for the public's timely involvement in stipulated processes, the need for thorough consultation with experts and subcommittees such as thematic groups, and the need to collate, analyse, and transmit submissions to the drafting committee for incorporation.

7 Unifying a divided society through an inclusive constitutional process

Most countries that emerge from conflicts have internally or regionally brokered peace agreements that install consociational governments. The consociational government almost always takes the form of a transitional government of national unity of former enemies, yet almost never provides safeguards for ethnic minorities, given that the most powerful actors are usually also the demographically dominant groups in society. In addition, such countries will always have constitutions that have been amended to be in alignment with the terms of the peace agreements. Here, the process of amending the transitional constitutions invariably tends to be driven by elites and to exclude not only the majority of the population but, worse yet, the minorities who neither featured in armed groups challenging the state nor fall into the category of marginalised groups recognised by the shared government.

Constitutions made after the transition from conflict to democracy always aim to consolidate peace, build trust, and reconcile former foes, as well as, occasionally, seek transitional justice. Post-conflict constitutions build on where the transitional constitutions' mandates end. Such constitutions attempt to unify the divided society by addressing the root causes of the violent conflicts the country experienced through reforms to avert relapses into conflict.

Key among these measures is embedding an inclusive process. The process of recovery is not always a rosy one given that drafters, parties and stakeholders involved in the making of the constitution are always under pressure either to write their interests into the new constitutions or to protect the public interest against certain political actors. Conflicts of interest thus arise, causing the process to stall or weaker stakeholders to be elbowed out of the process. Despite these hurdles, the post-conflict constitution must resolve political, social and economic issues that are central to the conflict that has just recently ended. In South Sudan, the preamble of the 2018 Revitalized Agreement for Resolution of Conflict in South Sudan (R-ARCSS) recognises the people's demand for a system of governance that devolves greater political and economic powers to levels of government closer to the people in order to address socio-political and economic issues responsible for the conflict.

For constitution-making to elicit the participation of stakeholders and the public, political parties – in this case, the former warring parties, among them the SPLM, SPLM/A-IO and South Sudan Opposition Alliance – should carefully appoint delegates to the NCC. However, elsewhere in this book, Abraham Nyuon expounds on the role that parties play in constitution-making and sounds an important cautionary note: attempts by ruling parties to strengthen their grip on the process and hence on the content of the final constitutional text invariably stifle the rights of ethnic minorities.⁵⁰ Constitution-making processes that are stage-managed by political parties in this way thus risk polarising society.

As regards the substance of public consultations, drafts of the constitutional text should be translated into minority languages and all stakeholders, including members of the public, should be invited to offer submissions throughout the process until the new constitution is signed into law. Clearly, this accords the public the opportunity to engage in shaping the content of the final constitutional text. The second and final act of public involvement is to put the final constitutional text to a referendum that involves all categories of minorities. Notably, the process currently envisaged for South Sudan does not consider the option of a plebiscite for securing public endorsement of the final constitutional text.

8 Conclusion

The history of constitution-making in Sudan since the era of the Anglo-Egyptian Condominium and up until the advent of the CPA and South Sudan's attainment of independence reveals that citizens have long been excluded from this crucial process; where they have been consulted or been able influence the resultant constitutions to some extent, their role has nevertheless been trifling. What has always mattered far more are the views of elites in government, the army, civil society and religious organisations. However, after the failure of a transitional constitution and the outbreak of violent conflict that tore the country apart, the 2018 R-ARCSS has presented South Sudan with an opportunity to embark on making a 'permanent' constitution. The process stands to benefit

50 See ch 3 of this volume.

from the experiences of the past; however, as with previous processes in Sudan and South Sudan, it runs the risk of being stage-managed by elites.

The protracted conflict in South Sudan left the country sharply divided along ethnic and political lines. Ethnicity is therefore a very real factor in South Sudanese politics, and its role in the constitution-making process should reflect its importance. The 'new' constitution, in short, must consider the ethnic diversity and plurality of South Sudanese society; more specifically, ethnic minorities cannot secure protection for themselves without them being involved in decision-making in a genuinely inclusive constitutional process.

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