
**A SEARCH FOR A PERMANENT CONSTITUTION IN SOUTH SUDAN:
EXPECTATIONS AND ASPIRATIONS**

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ABSTRACT

The article reflects on the expectations and aspirations surrounding the ‘permanent’ constitution that South Sudan prepares to draft. South Sudan has travelled a long and complicated path in the constitution-making process, with its origins tracing back to Sudan. The troubled Sudan, where South Sudan seceded, sought a constitutional resolution to the enduring political conflicts that characterised the nation. Successive governments endeavoured to draft and enact a ‘permanent’ constitution, but this aspiration remained elusive until 2011 when South Sudan realised its long-held ambition of becoming an independent country. The search for a ‘permanent’ constitution in South Sudan is an aspiration for a stable and prosperous nation where the people’s constitution protects minority’s rights and facilitates services to citizens in a manner that involves their governance. The paper attempts to address the question of the nature of the anticipated ‘permanent’ constitution and the people’s aspirations regarding the ‘permanent constitution.’ To this effect, the paper proposes, among other things, the adoption of a robust system of governance, particularly federalism, the nature and details of which should undergo public consultations and validation before being endorsed by the public. It also discusses a hybrid system of government as a relevant framework that will address historical inequities with the current presidential system and its federal judicial structure, which is independent and devolved to various levels of government. The ‘permanent’ constitution is expected to embrace consociational democracy and recognise the diversity that fosters national identity and unity as mechanisms for conflict mitigation in a divided country such as South Sudan. Finally, the paper considers the aspects of constitutionalism and the rule of law necessary for an effective constitution; therefore, the new constitution is anticipated to promote respect for laws and entrench the rule of law and the culture of constitutionalism throughout government structures.

Key words: *Expectations; Federalism; Consociational Democracy; Constitutionalism; Diversity; Governance*

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1. Introduction

South Sudan seceded from Sudan after two bitter civil wars of 1955-1972 and 1983-2005 that stunted the Southern region, which is now South Sudan. The region's historical marginalisation forced Arabisation and Islamisation sponsored by successive regimes in the then-Sudan remained the hallmark of bad governance, which made unity unattractive and subsequently led the Southern region to break away and form an independent country.

Since becoming an independent country, South Sudan initiated a search for a permanent constitution to stabilise itself. For example, the post-independent Republic of South Sudan, governed by the Government of National Unity, established the National Constitutional Review Commission (NCRC) to steer the making of the permanent constitution. Meanwhile, the state remained governed by the Transitional Constitution of the Republic of South Sudan 2011 (TCRSS) as amended. The process was cut short by the 2013 conflict, only to be revived by the R-ARCSS, leading to the reconstitution of the National Constitutional Review Commission. The constitution-making process has seen momentous strides in passing the guiding law, the Constitution-Making Process Act, 2022, the commission's reconstitution and subsequent passing of its internal operation documents. The path to attaining the permanent constitution is set; however, the question of what the permanent constitution will become is thought-provoking and leaves much to be anticipated. The answer to the question of what the content of the permanent constitution will be and what will distinguish it from the current TCRSS constitutes the expectations and aspirations of stakeholders as well as interested citizens in South Sudan.

In this article, the author contemplates the expectations and aspirations of the permanent constitution among which to constitute among others a formidable system of governance that federates more political, judicial and economic powers to the lower levels of federal governments, consociational democracy that allows ethnic, partisan and social representation in the government, recognises diversity, prioritises national unity and promotes a culture of constitutionalism and rule of law in the governance system.

The failure of politics in Sudan to mend the social fabric was manifested in successive futile attempts to make the constitution in Sudan. South Sudan, unfortunately, seceded with Sudan's syndrome characterised by the constitutional failures and governance crises engendered by the long absence of the rule of law and constitutionalism.

Under the auspices of the Revitalised Agreement on the Resolution of Conflict in South Sudan, the country seeks a constitutional settlement of its governance issues. So, the constitution-making process is a political process that aims to culminate in a permanent constitution for South Sudan. The permanent constitution will end decades of rule under the transitional constitutions. The problems of South Sudan, as the author argues, do not emanate from the absence of a constitution but from the combined desecration of laws, including transitional constitutions, deliberate disregard for the rule of law and constitutionalism, and militarisation of politics and society. The permanent constitution, if it is to bring lasting stability and democratic transformation, must adopt unifying properties that hold the country together amidst dilemmas of nation and state-building processes in the divided society.

The author argues that constitutionalising the culture of constitutionalism and the rule of law enhances the protection of minority groups under overall human rights. As such, the author presents the culture of constitutionalism as one that will allow the executive and law enforcement agencies to respect laws under the new constitutional regime.

Recognising the existence of divisions along ethnic lines driven by politics, the paper outlines ways to strengthen the protection of citizens, especially minorities, through the adoption of a people-centred constitution. It is argued herein that adopting a federal form of governance can preserve the sovereignty and unity of the country, notwithstanding the decentralisation of resources and power. This approach enables all peoples, including minority groups, to exercise authority over their destinies and manage their affairs within their respective constituent units. Constitutionalising consociational democracy as well promotes inclusiveness and representation in governance, thereby alleviating grievances and marginalisation. The nation's diversity is a constitutional issue that necessitates constitutionalisation to ensure that no group is excluded from the country's affairs and national wealth. Thus, unity in diversity is posited as a crucial element for the preservation of social cohesion and territorial integrity. A nation in which all are equal and possess equal opportunities, without preferential treatment for any one ethnic group, fosters social cohesion and is a fertile ground for all aspiring to flourish.

Practically, the 'permanent' constitution should adopt a formidable system of governance, reinforce respect for the laws, inculcate constitutionalism, and operationalise consociational democracy in transition in a manner that recognises diversity and national unity in South Sudan. The author considers the following proposals to constitute the content of the expected permanent constitution in the making. If the new constitution adopts the following recommendations, they will strengthen social cohesion, national unity, and democratic developments in South Sudan.

2. Adopting a Formidable System of Governance

War and political violence in a multi-ethnic state leave behind bitter memories and secessionist tendencies among marginalised and minority groups in post-conflict states, for instance Ethiopia, the Democratic Republic of Congo, and Mali, just to mention a few. Ethnic sentiments and identities are generated, with politics always being the driving force. Consequently, calls for self-determination become more pronounced, and imminent breakaways dominate the public domain whenever identities are at stake. A swift establishment of a robust system of government, along with aligning its governance structures to preserve the unity of the country, serves as a remedy for the governance crisis phenomenon. This explains why the constitution-making process is a primary political strategy in which post-conflict societies engage during the interim of restoring stability.

To preserve the unity of the state, the post-conflict constitution ought to adopt a robust and formidable system of governance. The formidable system of governance is the one that safeguards the interests of all ethnic groups and political entities, including marginalised minorities in the country. This makes it imperative to consider a system of governance that proportionally uplifts these entities and grants them the right to govern themselves in a manner

that preserves their identities in a united country. As substantiated by Sujit and Nathan, ‘many states in the developing world, such as Ethiopia, Iraq, Nigeria and Sudan, have adopted federal solutions to manage ethnic conflict, often as part of a broader package of post-conflict constitutional reforms.’¹ This way, the wars are mitigated and the post-conflict states avoid secession. This constitutional design preserves peace and territorial integrity.² Adopting a formidable system of federalism³ in the permanent constitution shall be an institutional response to the myriad regional and inter-ethnic conflicts the country has undergone throughout its history. As argued, ‘constitutional federalism is a common mechanism for dealing with territorial difference and societal diversity within a single state.’⁴ It provides a solution to the root causes of conflict through a transient settlement of ethnic and marginalisation issues in the power-sharing arrangements of a state.⁵ Constitutional federalism can, therefore, safeguard the ethnic groups, political entities and minorities in the post-conflict societies of South Sudan. However, it may not provide permanent solutions if it takes an ethnic trajectory, as the cases of Ethiopia and Nigeria, which somehow adopted ethnic federalism, would support this argument. South Sudanese preferred model of a federal system of governance is anchored on the viewpoints akin to the ones articulated below.

Involving [more] powers and resources to improve the livelihoods of rural citizens, (2) reduction of the size of the national government to free up more resources for local governments, (3) attracting, encouraging, and mobilising national experts to work at the state and county levels and (4) promotion of social and economic development amongst the rural people.⁶

This is consonant with the SPLM vision of ‘taking the town to the people’⁷ articulated in Dr John Garang’s historical speech of 9 January 2005. It is, nevertheless, doubtful that federalism, even in the most troubled ethnic federal countries, has achieved some recognisable stability. This is because each constituent unit is governed by laws that are consensually built by the public and protected by the Constitution. Each identity has free space to comfortably exercise the values at their discretion within the ambit of laws. Despite the dilemmas federalism

¹ S Choudhry and Nathan Hume ‘Federalism, devolution and secession: from classical to post-conflict federalism.’ Edited by Tom Ginsburg and Rosalind Dixon Comparative. Constitutional Law 31 May 2011 <https://doi.org/10.4337/9780857931214>. Accessed on 03 April 2025

² As above.

³ See ‘Preamble of the Revitalised Agreement on the Resolution of Conflict in South Sudan.’ Para 5 <https://docs.pca-cpa.org/2016/02/South-Sudan-Peace-Agreement-September-2018.pdf> . Accessed on 01 April 2025

⁴ G Tom ‘Constitutional Design for Territorially Divided Societies.’ (International IDEA Constitutional brief.) 1.

⁵ Sujit and Nathan (n 1)

⁶ M Augustino, Ting, Jok Madut Jok and Nhial Titmamer ‘The Creation of 28 South Sudanese States: Is Economically and Legally Viable?’ (2015) Sudd Institute Weekly Review, October 6, 2015.

⁷ See Dr John Garang’s Speech at the Signing of the Comprehensive Peace Agreement in Nairobi on 9th January 2005.

presents, especially in countries moving away from a decentralised system like South Sudan, there is hope for stability and unity. There is always inherent fear that it will safeguard the pluralistic nation and protect the ethnic minorities. Bisarnya succinctly acknowledges the fears but dispels them and affirms the protection of minorities and the possibility of installing governance structures that may provide protection and good governance.⁸

Federalism, and ethnic federalism, in particular, presents a dilemma. It is capable of recognising the plurinational character of a country, establishing a multi-tiered governance structure which can protect and empower minority groups by giving them an area within the country where they form a majority.⁹

The minority, however, has the power to self-govern under the terms of the federation as a constituent unit. This, as Bisarnya argues above, applies perfectly to ethnic federalism, but in any case, it is federalism, and its principles remain protective of minorities. This way, the ethnic minority is protected from majority dominance through federation. Although ethnic federation may be plausible at face value and indeed falsely presents itself as a panacea to governance predicaments facing the multi-ethnic country, ethno-nationalism threatens the unity of the country, and caution must be exercised when applying it to a deeply divided state like South Sudan. The problem with crafting an ethnic federation in a multi-ethnic country is that demographic settlement in a territory is never always homogenous, nor is it easy to demarcate the ethnography on whose basis the federal constituent units are determined. Ethnography in South Sudan does not favour ethnic federalism, therefore ruling out its feasibility.

The choice of the type of federalism during the constitution-making process in South Sudan must be thoroughly consultative and aware of the primacy of national unity. Territorial federalism would serve as the fundamental system of governance that could help mitigate the deep-seated divisions within South Sudanese society. The establishment of new federal states ought to be guided by the principle of national unity, avoiding the pitfall of using ethnicity as the basis for forming the federation. An authentic federation for South Sudan presents the most effective strategy to preserve the threatened unitary state. Furthermore, the challenging choice of federalism and the strength of the federation are important aspects the process should emphasise. The strength of the federation lies in whether federalism is minimalist or maximalist.¹⁰ The former denotes a system where the central government has minimal responsibilities, and the constituent units possess nearly absolute sovereignty¹¹ or powers. The latter occurs when the central government wields more authority than the constituent units and

⁸ B Sumit. 'Protecting Ethnic Minorities within Minorities.' (International IDEA, Constitutional briefing March)

⁹ As above.

¹⁰ A Santino Langar 'Federalism: A Position Paper in Support of the Stakeholder Dialogue in the Permanent Constitution-Making Process in South Sudan' (Juba: 2021) Unpublished paper

¹¹ As above.

makes decisions without consulting the lower levels of government.¹² Maximalists would argue that the current system in South Sudan is already federal,¹³ albeit with iniquities, thus positing that no new federal arrangements are necessary.

Federalism will provide an opportunity for state and political restructuring, which will offset power imbalances among political organisations and ethnic groupings by creating levels of government that will proportionally decentralise politics and resources. Political power is shared among individuals, and executive, as discussed in the following sections three and four. This structure allows the federal government to accommodate potential political contenders. The constitution of the prospective federal democratic government must necessarily delimit political powers and resource sharing among the multi-level system¹⁴ of government in a federation. This mitigates conflicts among the levels of government and constituent units, as the federal constitution grants a degree of autonomy over their affairs. The permanent constitution should be designed to enhance the lower levels of government while remaining cognisant of the essential power relations embodied in the principle of subsidiarity.¹⁵ This will foster democracy within the federation, enabling the people to participate in governance.

3.1 Hybrid System of Government

The mother country from which South Sudan broke away can be described from its history as an independent nation with a hybrid regime characterised by authoritarianism and autocracy with some controlled democratic practices. According to Henry, a “hybrid regime is a political regime that combines some democratic and some autocratic elements in a significant manner.”¹⁶ In Sudan, the authoritarianism and autocracy elements of a hybrid regime featured more conspicuously than democratic elements. On some occasions, a semblance of democracy, such as elections, was carried out with no significant change of government or democratic space for the citizens. The sham elections stage-managed by the military where results were predetermined, were all, though a mockery to democracy and sometimes a covertly planned deception to the international community which needed to be convinced when some boxes were ticked. Therefore, the political transitions in Sudan have always been incomplete democratic transitions where elections did not necessarily lead to a change of power but instead resulted in a hybrid regime, typically authoritarianism as of late the National Islamic Front/National Congress Party.

¹² As above.

¹³ As above.

¹⁴ United Nations Department of Political and Peacebuilding Affairs. ‘Constitution and Peace Process: A Primer’ (Berlin: Berghof Foundation, 2020)

¹⁵ C Saunders ‘The Division of Powers in Federations Constitution’ Brief (International IDEA, 2019) https://www.idea.int/sites/default/files/PDF_file/The_Division_of_Powers_in_Federations accessed on 19 February 2025

¹⁶ HE Hale, ‘Eurasian politics as hybrid regimes: The case of Putin’s Russia’, *Journal of Eurasian Studies* 1, no. 1 (2010): 34, doi: 10.1016/j.euras.2009.11.001.

South Sudan inherited substantial constitutional forms and substance from the Sudan. The Sudanese People's Liberation Movement, which was a military and political movement, took over the country after entering into a partnership with NCP in 2005, after the Comprehensive Peace Agreement¹⁷ and successfully managed to deliver independence for South Sudan. Since then, the military has been significant in the governance of the country; generals serve in the civilian administrations and could still retain their ranks and return to the military after completing service in the civil administration. Politics and the military purposefully intertwined, with the latter taking prominence. South Sudan has been marred into a sustained conflict that inhibited the conduct of any kind of elections and transition to democracy. Although the institutions exist to some extent, they remain functionally weak. So, the permanent constitution will be in place and federalism is adopted, the constitution will have to prescribe a system of government formidable enough to foster peace and stability in the country. As such, the discussion and determination of the forms of government is another constitutional aspect that is expected in the 'permanent' constitution.

The proposed system of government combines presidential and parliamentary systems. Under this arrangement, the executive president is elected independently and subsequently appoints the prime minister, who serves as the head of government and may also be the majority leader of the legislature. In this case, the Premier will always be accountable to the legislature. This constitutional framework will establish checks and balances between the executive and legislative branches of government to enhance governance, improve service delivery, and mitigate conflict. The system prevents the absolute and exclusive power inherent in the current presidential or parliamentary systems if the country were to adopt the latter. The hybrid system of government, much like the consociational arrangements discussed in the following section, serves as a conflict resolution mechanism for a nation transitioning from conflict to a nascent democracy. The constitutional provisions in such instances should be aimed at instituting inclusive governance that fosters peace through its dividends.

The need to adopt a hybrid system could be one of the most sought-after solutions to the governance crisis that the country is expected to resolve in the constitution-making process. This system has the potential to put the country on a path of democracy and stability. The presidential system has proven ineffective in South Sudan, and the parliamentary system is unlikely to be any better; thus, combining the two could be the anticipated remedy for the prevailing excessive power entrenched in the Transitional Constitution of the Republic of South Sudan 2011, as amended, which has led to what could be termed 'constitutional absolutism.'

3.2 Federal Judicial system

Courts are crucial components of any government, and more critical is the judiciary in any federal system of government. Given the fact that South Sudan has already decided to adopt

¹⁷ In 2005 the Sudanese People's Liberation Army/Movement (SPLA/M) signed an agreement dubbed Comprehensive Peace Agreement on the 9th January 2005 with National Congress Party (NCP), formed a Government of National Unity and conducted national elections confirmed President Omar Hassan Ahamed al Bashir in 2010.

federalism in the RARCSS¹⁸ and as resolved in the 2016-2020 National Dialogue¹⁹ preceding the ‘permanent constitution-making, a federation of courts is implicit for the kind of federalism aspired for. The understanding that federalism is a constitutional arrangement that divides and shares competencies between two or more levels of government necessitates the existence of competent and independent courts or judiciary to arbitrate between or among the levels of government any constitutional disputes²⁰ that may arise in the practical governance and running of the governments in a federal democracy. An aspiring constitutional federation makes it more compelling to adopt a federal judicial system independent enough to interpret laws and inter-governmental linkages between the levels of government without compromise.

The aspiration inherent in the demand for constitutional federalism in South Sudan is to have strong federal constituent courts that are competent to deliver services to the citizens at the subnational levels. Substantial powers should be delegated by the federal government to the lower-level governments as they are directly involved in the day-to-day service delivery and management of the people. This applies to the judiciary through the devolutions of the courts to the payams, counties and states.

The court structures in the federal democratic South Sudan should be based on the principle of triality at the federal, state and county levels. The federal constitutional court is expected to be established by the ‘permanent’ constitution to adjudicate constitutional matters concerning the bill of rights, federal competencies and jurisdictions and intergovernmental linkages, while state-level courts of appeal, high courts, and various categories of courts of first instances at the local government level should also be formed. In other words, the two lower tiers should possess autonomous courts capable of independently engaging with the federal courts. The judicial system within these federal arrangements should embody decentralist principles in content, nature, and the spirit of constitutional federalism, which must derive from and be governed by the federal constitution. The centralist nature of the judiciary highlights one of the key injustices of the Transitional Constitution of the Republic of South Sudan, 2011, as amended, and South Sudan aims to move away from it. The South Sudanese do not expect a quasi-federal arrangement but rather fully-fledged federalism that respects the constitution, the doctrine of separation of powers, and the independence of constituent governments at lower levels, along with their institutions within the federal framework.

Given the suggested federation of the judiciary in the to-be-adopted federal system by South Sudan, the author proposed three levels of civil courts with respective competencies as shall be determined by the ‘permanent’ constitution. There shall be the County Court with its lower

¹⁸ See chapter Six of the Revitalised Agreement on Resolution of Conflict in South Sudan, 2018 on the Parameters of the ‘Permanent of the Constitution’ page 67 /<https://docs.pca.cpa.org/2016/02/South-Sudan-Peace-Agreement-September-2018.pdf>

¹⁹ South Sudan National Dialogue Steering Committee Final Report. /<https://dr.211check.org/wp-content/uploads/2021/07/NDSC-Final-Report-2nd-Draft-12-Dec-2020-.pdf>. page 22. Accessed on 14 March 2025

²⁰ N Aroney and J Kincaid ‘Courts in Federal Countries Subtitle: Federalists or Unitarists’ (University of Toronto Press Stable) 4 <http://www.jstor.com/stable/10.3138/j.ctt1whm97c.5> Accessed on 10 February 2025

levels in *Payam*,²¹ the State Courts, which would be synonymous with the High Court with appellate competencies to review courts with competencies of interpreting the constitution and the intergovernmental linkages between the state and local government.

4. Adopting Consociational Democracy

Given the bitter division enhanced by a strong quest for political power among the politicians, the country ought to seek a constitutional settlement of these politicised ethnic differences in South Sudan. The ongoing constitution-making process offers an opportunity to constitutionalise an accommodative system of conflict resolution mechanisms that will remain in the governance system in South Sudan until such a time that the culture of liberal democracy is acclimatised in the country.

Consociational power-sharing arrangements have been used in several countries and have yielded good results in promoting social cohesion and maintaining peace in diverse and divided countries. Cases of successful consociational systems of governance or democracy are involved. Include but not limited to:

Belgium, Burundi, Malaysia, Northern Ireland, South Tyrol, and Switzerland. It influences international policy prescriptions for conflict zones, as in Afghanistan, Bosnia & Herzegovina, and Iraq. It has been used for or proposed for conflict settlements in Cyprus, Fiji, Kenya, Lebanon, Macedonia, South Africa, Sri Lanka, Zimbabwe, and other divided societies.²²

McCulloch argues that consociationalism is a form of power-sharing arrangement in which the major stakeholders in the conflict are represented and participate in the governance processes. Also referred to as consociational democracy, consociationalism has many advantages that outweigh its disadvantages.²³ In Lijphart's argument, these advantages should be considered when engineering post-conflict constitutions.²⁴ So, the constitutional process in South Sudan could benefit from the peacebuilding mechanisms that have been tested time and again across the region and internationally.²⁵

The ardent proponents of consociational theory argue that consociationalism is the only mechanism that may bring stability and end violent conflict in a deeply divided society²⁶ and

²¹ 'Payam' is an indigenous word of the equivalent of a sub-district, which is the fourth of the five administrative units.

²² M Allison. 'Consociational settlements in deeply divided societies: the liberal-corporate distinction' Vol. 21, No. 3, 501–518, Democratization, (Taylor & Francis 2012) 501 <http://dx.doi.org/10.1080/13510347.2012.748039> Accessed on 15, March 2025

²³ L Arend 'Thinking About Democracy: Power-Sharing and Majority Rule in Theory and Practice.' (London: Routledge, 2008) 66.

²⁴ As above.

²⁵ McCulloch (n 18) 501.

²⁶ Lijphart (n 19) 66.

that it may bring about ‘parity of esteem’ among ethnic or political groupings involved in the division, therefore, fostering democracy²⁷ as the endgame of the transitional consociational government. South Sudan, in essence, has not yet attained the status of post-conflict society as the current arrangements under the RARCSS do not comprehensively address the root causes of the conflict, and there are still active conflicts with holdout groups and among the parties to the R-ARCSS, albeit with the fragility of the current Revitalized Agreement. The constitutional arrangements that take into consideration various political interests and ethnic differences in the governance of the country are the transient solution to the challenges of unity in South Sudan.

On the other hand, critics of the consociational theory argue that consociational arrangements are not easy to arrive at in a very complex situation. Accordingly, they further argue that consociationalism in a divided society may lead to a political impasse or “political immobilism.”²⁸ The case of the Transitional Government of National Unity birthed by the 2018 RARCSS is a vivid example of the kind of impasse that comes with consociationalism in South Sudan. Rightly, a country under such power-sharing arrangements may end up trapped in a perpetual consociational arrangement or transition that may be difficult to unshackle. The case is the successive extension of the R-ARCSS, and the life of the RTGoNU is a typical example of the trap. The partakers in the consociational government always tend to antagonise any process that drifts them away from the power-sharing arrangement or de-empowers them. This encumbers the transition to a fully-fledged democracy in the conflict-divided country. This is indeed idiosyncratic of the consociational arrangements; however, it is a necessary constitutional arrangement that could stabilise the country and is synonymous with the federal arrangement as well.

Antecedent to adopting a consociational democracy in the permanent constitution in South Sudan, akin to a federal system of governance as agreed upon in the Revitalised Agreement impending its constitutionalisation, a deeper investigation into types of consociationalism is critical. Lijphart postulated two types of consociationalism namely; the ‘corporate,’ which essentially articulates the accommodation of the groups involved in power-sharing or consociational arrangements based on given identities such as religion, ethnicity, and race.²⁹ The second type, the ‘liberal consociational’ is accorded to key or prominent political groups that emerged in the democratic processes through their identities, such as religion, ethnicity³⁰ or ideology. None of these types will sufficiently address the political marginalisation that is part of the root causes of the conflict in South Sudan. Due to the complexities of ethnic and

²⁷ B O’Leary. ‘Debating Consociational Politics: Normative and Explanatory Arguments.’ From *Power-Sharing to Democracy: Post-Conflict Institutions in Ethnically Divided Societies*, edited by Sid Noel, 3–43. (Montreal: McGill-Queen’s University Press, 2005)

²⁸ J Anna. ‘The Prevalence of Power-Sharing: Exploring the Patterns of Post-Election Peace.’ *Africa Spectrum* 44, no. 3 41–62.

²⁹ M John, and B O’Leary. ‘Iraq’s Constitution of 2005: Liberal Consociation as Political Prescription.’ *International Journal of Constitutional Law* 5, no. 4 (2007) 670–698. doi: 10.1093/icon/mom026

³⁰ As above.

political struggles among politicians, a hybrid type of consociational arrangement befits the situation South Sudan is in. The hybrid conglomerates corporate and liberal consociations,³¹ as was the case with “Northern Ireland, Macedonia, Switzerland and Kenya with the National Accord and Reconciliation Act 2008,”³² which literarily apportioned power among political parties that were essentially ethnic. South Sudan’s political arena is not unique from its neighbours, though, because politics invokes ethnicity, unlike in other settings where ethnicity determines political alliances.

The constitution that cements the divided society endorses ethnic and political proportional representation of ethnic and social minorities such as people living with disabilities, women, youth, and religious minorities. Among the four features of consociationalism, as presented by Lijphart, the third feature of proportionality is the antithesis of the principle of zero-sum in a democratic dispensation.³³ The fourth feature of segmental autonomy recognises the minority’s right to self-government in specific areas that concern them. This relatively justifies the highly coveted federal system of governance as discussed in section two above. The ideal features plausible to the minority in the consociational arrangement, in addition to the features of the grand coalition that aims at power-sharing among elite politicians and mutual veto, are the rights of a minority to veto issues that do not protect their interests.³⁴ Through this constitutional arrangement, minorities such as the Kichepo, Njie, Beli and Bongo ethnic communities, among others and small political parties will be represented in the governance process and protected by the constitution that allows them to veto policies that denigrate their interest at the lower level of government.³⁵ Consociationalism, as Lijphart argues, is an ideal conflict management strategy in a plural or segmental society because it prevents conflicts resulting from ethnicity³⁶ and political or religious marginalisation. He further defended consociational democracy as the most suitable democracy as opposed to the majority rule democracy. Lijphart further projected it as a feasible democracy for deeply divided countries.³⁷

³¹ As above.

³² As above.

³³ L Arend ‘Consociation and Federation, Conceptual and Empirical Links’ Canadian Journal of Political Science xii (3): 495-515

³⁴ As above.

³⁵ Y Garang, "Ethnic Politics in Constitution-Making: Safeguards for Protecting Minorities," in JGA Geng and CM Fombad (eds), Post-Conflict Constitution-Making: Dilemmas and Options for South Sudan. Pretoria: Pretoria University Press (2025) 72-73. DOI: [10.29053/978-1-0672373-0-1_4](https://doi.org/10.29053/978-1-0672373-0-1_4)

³⁶ Lijphart, Arend ‘Democracy in Plural Societies: A comparative Exploration’ (New Haven: Yale University Press, 1977)

³⁷ L Arend ‘Prospect of power sharing in the New South Africa in Election ’94: The campaigns, results and future prospect’ (ed) A. Reynolds (Cape town and Johannesburg, 1994)

5. Constitutionalism and the Rule of Law

The preceding section discusses the adoption of consociational arrangements that protect ethnic categories and political organisations through inclusive representation of all segments of society, with special consideration for ethnic minorities and political parties. This section, however, examines the adherence of government institutions, respect for the law, and the rule of law by those in authority, as well as the protection of ethnic groups, other minorities, and political organisations through constitutionalism and the practice of the rule of law. The region has been rocked by civil wars and political troubles, primarily inflicted by the ethnic majority against minorities. Although the political turmoil in South Sudan has always exploited the fault lines of ethnicity, leading to the politicisation of ethnic identities, it is not primarily major ethnic groups pitted against smaller ones, but rather one ethnic group in conflict with another over limited resources or politicised violence in urban areas that spills into rural regions.

A divided society like South Sudan is no doubt fertile ground for political violence fueled by a majority-predominant attitude that seeks to oppress the minority. The tension persists as a result. Although this is not the case with the South Sudan ethnic dichotomy, the trajectory is nevertheless pessimistic. The post-conflict constitution that transitions the divided society must seek to protect the minority against the majority's dominance and oppression. Heyns noted that "only three African constitutions protect minority rights making specific reference to 'minorities.'"³⁸ Gilbert argues that the three Cameroon (preamble), the Democratic Republic of Congo (art. 51), and Uganda (art. 36) out of 48 Sub-Saharan African countries represented a small portion of the region that largely missed out on adopted constitutions with a legal provision that protects minorities.³⁹ Gilbert further argues that although most constitutions adopt non-discriminatory approaches, none of the constitutions indeed protect the rights of minority ethnic groups.⁴⁰ The rights of minorities includes the right to access power⁴¹ and resources. The advent of democracy, however, has diluted and once again endangers the minority's rights in the face of democracy, which cherishes majority dictatorship with rhetorical utterances or adherence to respect for minority rights.

The anticipated post-conflict constitution must, as a matter of necessity, set a precedent for constitutionalism. Constitutionalism to this effect means ensuring the government's actions are by the law, its officials act with due respect to pre-determined laws. Adherence to the traditions of law and respect is the essence of constitutionalism. Writing and adopting a constitution in itself does not guarantee constitutionalism. It ought to be the culture of the government and its officials to adhere to the precepts of the laws and the application of the same. Barnett argues

³⁸ H C 'Constitutional Human Rights Law in Africa' 22s.afr.Jhum.rts.764 (2006)

³⁹ J Gilbert 'Constitutionalism, Ethnicity and Minority Rights in Africa: A legal Appraisal from The Great Lakes Region' International Journal of Constitutional Law, Volume 11, Issue 2, April (2013) Pages 414-437, <https://doi.org/10.1093/icon/mot002>

⁴⁰ As above.

⁴¹ As above.

that constitutionalism entails government limitations to how far it can use the law, separation of powers and accountable government.⁴²

The characteristics of popular sovereignty stipulate that the government derives its authority and legitimacy from the public, which must include minorities. It governs with the consent of the public; as such, the sovereignty of the government relies on the public. This, in essence, implies that the public is an integral part of decision-making and must, therefore, be involved in the governance decisions that concern them. Bazezew argues that a referendum is one way in which the public is given a chance to exercise popular sovereignty.⁴³ So, minorities and inclusive participation in deciding the fate of a constitutional text are crucial for them to safeguard their rights and establish grounds for the acceptance, legitimacy, and respect of the constitution. Bazezew's argument emphasizes the importance of public consultations in every decision the government makes, including soliciting views during the constitution-making process. The history of the constitution-making process in Sudan and now in South Sudan has lacked the exercise of popular sovereignty.

Constitutionalism also demands a responsive and accountable government in a democratic dispensation, citizens take the government as their servant to serve. This is reflected in the government dialogue with the public where a clear and transparent channel of communications between them is accorded. Rule of law is another characteristic under constitutionalism that demands the government and its officials' adherence to the rule of law rather than the rule of a powerful person, which in some cases seems not to protect minorities. Respect for human rights does not categorize the rights of the majority versus the rights of the minority but all rights granted equal treatment before the law of the land. The post-conflict constitution-making underway in South Sudan shall enhance the rule of law and protect people from the arbitrary acts of the legislature, executive and judiciary, therefore entrenching constitutionalism and the rule of law from the onset with the subsidiary laws is the right step to right direction.

Constitutionalism as an aspiration of the permanent constitution does not rely on the constitution-making process, which ends in the adoption of the good constitutional text but dwells in the constitution building and lives on after the constitutional text is adopted and enacted into law. Constitution building is a continuous process that seeks to put in place and retain constitutional order that runs pre-drafting through the constitution-making process and after the adoption. While the former determines the latter, the latter determines constitutionalism and the reign of the law in the state. The culture of constitutionalism and the rule of law come at the expense of many sacrifices and punitive measures to entrench respect for the laws and constitution by the branches of government and the citizenry alike.

6. Accepting Diversity to Foster National Identity and Unity

South Sudan is a culturally miscellaneous society; its mosaic demographic settlement is as diverse as the people themselves. This diversity, unfortunately, has benefited neither the

⁴² H Barnett, 'Constitutional and Administrative Law' 5 (London: Cavendish Publishing Limited, 2000)

⁴³ B Maru. 'Constitutionalism Mizan Law Review.' Vol. 3 No.2, September 2009

country nor the people. Communal conflicts and civil wars thrive in the unfortunate utility of the ethnic diversity in the country. Politics is at the centre of the lethal use of ethnicity and diversity that fuel ethnic conflicts at the peripheries. Ethnic identities are more prominent and commanding than the supposedly national identity.

The new constitution provides hope of transforming entrenched social and political disorders that have plagued the country for a long time. For this to bring lasting peace and stability and unite the country, the constitution must manage diversity in all its aspects and grant no preferential treatment to a segment of its society or political organisation. All cultures, languages, and people of South Sudan stand equal before the law, deserve equal treatment, and have equal opportunities regardless of social or political ascriptions. The current fiasco that engulfs South Sudan potentially threatens the unity of the country. The oneness of the social entities in the country hangs by a thread; the voices of secession cannot be ignored amidst mismanagement. Therefore, a good constitution stands a chance of fixing social fault lines, restoring the unity of the country and fostering national identity.

The starting point in the constitution-making process is to accept the diversity and adopt the fact that South Sudan is a multi-ethnic, cultural, and lingual nation. The nation is not homogeneous, and the federal system which the constitution adopts should be cognizant of the fact that its constituent units are awarded cultural federalism, which is referred to in anthropology as cultural relativism. The constitution should grant each ethnic and cultural people the liberty to exercise and keep their cultural identity not to the detriment of national unity. This is because the denial of identity and non-participation of cultural people in the governance of their affairs is responsible for feelings of marginalization and fighting back for recognition.

When politics plays into differences of any sort, the upshot is always conflict and protracted instability. So, the supposedly post-conflict constitution is a conflict resolution blueprint or management legal framework. The paradigm shift in identity, diversity, and unity management requires constitutionalisation and subsidiary legal frameworks and, above all, a changed mindset guided to embrace unity in diversity. The constitutional provisions should enshrine the inclusive participation and representation of minority groups and allocate them some quotas in the executive and legislature through proportional representation in electable posts and other constitutional posts as a matter of affirmative action. The participation of the minority groups through proportional representation in the national and constituent units of the federation, in the civil service and security sector, is a clear way of empowering the underrepresented to protect themselves through self-government.

Federalism would not be complete without translating political and fiscal restructurings into the social restructuring of the state.⁴⁴ This begins with acknowledging ethnic and cultural

⁴⁴ B Karki, 'State restructuring and federalism discourse in Nepal' in 'The Federalism Debate in Nepal' ed. By Budhi Karki Rohan Edrisinha (United Nations Development Programme, 2014) <https://www.academia.edu/10171876> accessed on 12 March 2025

diversities and recognising their significance in the political and economic spheres of the state. The state structure shifted power from the elite to the grassroots, unlike centralised or unitary systems of government, where the elites manage state affairs to the exclusion of marginalised citizens.

Through the constitution, the state codifies its national identity that galvanises all the differential identities that are idiosyncratic to ethnic, political, social or economic groupings. This is expressed in terms of values, norms, credos, cultures and history. The state of South Sudan was crafted from a history of marginalisation and oppression. Its people were called '*junubeen*' (Southerners) as opposed to '*shumaleen*' (Northerners).⁴⁵ These are just but mere geographical compass directions that do not have what the people of the region value, believe in or any economic benefits. With the new constitution-making process, South Sudan set a path to defining its national identity that shall be streamlined in the government and social institutions. Hanna also thinks that 'constitutions serve as the state's charter of identity. By delineating the commonly held core societal norms and aspirations of the people, constitutions provide the citizenry with a sense of ownership and authorship, a sense that 'We the People' includes me.'⁴⁶ As a charter, the participation of every constituent unit is necessary for ownership of the charter. However, the process of chartering the constitution is not easy because it is a political process and attaining a prototype constitution at one time is unattainable, and it ought to be mindful of. Literature has shown that no constitution is perfect and that the impeccability of the constitution is the process that is attained through a series of amendments and reviews of incumbent constitutions. Many countries have gone through this, and although South Sudan stands a better chance of making a better constitution, the nature of politics, prevailing conditions and the design of the process cast doubts about attaining the aspired impeccable constitution.

⁴⁵ Junubeen is an Arabic word for Southerners in the description of people from erstwhile Southerner Sudan now (South Sudan) as opposed to Shumaleen, also an Arabic word for Northerners denoting people of Northern Sudan, now Sudan

⁴⁶ H Lerner, 'Constitution-Writing in Deeply Divided Societies: The Incrementalist Approach' Journal of the Association for the Study of Ethnicity and Nationalism 16 (1), 2010, 68–88.

7. Conclusion

The constitution-making process offers an opportune occasion for South Sudan to make a contextual constitution that permanently addresses the root causes of the conflict so that chances of a return to conflict on the same causes are minimised, redresses issues of governance and binds the government to the terms of a social contract with citizens. The question of the type of federal system of the government appropriate enough to meet this demand is answered with the proposed constitutional federalism with a hybrid system of government that combines presidential and parliamentary systems, a republican government of and by all that brings the South Sudanese together under forged national identity, while appreciating the checks, and balances and independence of the judiciary enshrined in the doctrine of the separation of powers.

In light of the prevailing culture of impunity stemming from the protracted civil wars, this paper contemplates a reinforced constitutionalism and rule of law anchored in the provision of a ‘permanent’ constitution. The ongoing pursuit of a ‘permanent’ constitution in South Sudan is expected to benefit from the framework of expectations and aspirations discussed herein. This framework encapsulates some of the sentiments and aspirations expressed by ordinary citizens who endure the repercussions of failed governance and prolonged civil and political violence. To the average South Sudanese, a constitution is not merely a collection of principles, a bill of rights, or a charter that allocates power among political actors; rather, it is a blueprint detailing how the governed engage with the constitutionally mandated service providers, ensuring the protection of their lives and property. Therefore, it is essential that the anticipated permanent constitution addresses fears, guarantees and safeguards the fundamental values across all sectors of society. For any permanent constitution to gain acceptance and legitimacy, in the author’s viewpoint, it could take into account the constitutional framework articulated in this article. It is hoped that future political violence can be mitigated by establishing a solid constitution that does not grant excessive and unchecked powers to any single institution individual person or government. In the author’s view, a constitution that enshrines the discussed expectations and aspirations will stabilise the country, pave the path to democracy, and foster happiness and prosperity among its citizens.

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