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The Transitional Constitution of the Republic of South Sudan 2011

An Expert View from the Outside

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31 October 2011

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Executive Summary

This study of the Transitional Constitution of South Sudan 2011 has been drafted at the request of the President of the Republic of South Sudan and commissioned by the Office of the Special Envoy for the Sudan and the Horn of Africa of the Swiss Department of Foreign Affairs shortly after the emergence of the new state on July 9, 2011. The study has been drawn up in the context of the process leading towards the drafting of the Permanent Constitution. The authors, a team of Professors at the University of Zurich Law School and researchers from the Centre for Democracy Studies Aarau (Switzerland), were asked to provide a critical legal evaluation of the Transitional Constitution, to analyse the constitution making procedures set out in that text, especially from a comparative perspective, and where appropriate to identify relevant procedures that could be locally adapted.

The comparative analysis identified a common dilemma that has historically afflicted constitution making exercises across the globe. Typically, there is a trade-off between maximising popular input into the drafting of the constitution -such as through a constituent assembly- or alternatively involving the people directly in the ratification of the new constitution. This trade-off is of relevance for the case of South Sudan. In looking more closely at some of the African constitution making processes what is quite extraordinary is how participatory constitution making exercises can be in terms of engaging the people in towns and villages in extensive deliberations. From comparative perspective, it is all the more striking given that this takes place in countries with frequently little tradition of democracy and institutionally organised political activity. In many respects, African constitution making can be favourably contrasted with the elite driven affairs of many European democracies. Nonetheless, the cases analysed demonstrate that even an open and participatory constitution making exercises can be insufficient for generating sustainable democratic institutions. Failure is a common outcome. What is noteworthy of those cases that have produced viable democratic outcomes, however, is that an open and participatory constitution making process was a crucial component of the transition process.

In the next step, a thorough legal analysis of the Transitional Constitution involved not only focusing on the process leading up to the drafting and enactment of the Transitional Constitution but also its content, that is to say its structure and wording. The Transitional Constitution bears much resemblance with the preceding Interim Constitution that was part of the Comprehensive Peace Agreement 2005. Yet it differs from that model in a number of ways. First, it was drafted by a body that was not really representative of the country's political landscape, under severe time constraints and in a process generally considered to have lacked transparency. Second, while politically important, the Transitional Constitution was constitutionally unnecessary, as the Interim Constitution was designed to survive to independence. Finally, with regard to its content, the Transitional Constitution marks a tendency to accentuate both horizontal and vertical power. Among the organs of the National Government the President has acquired a dominant position that has little institutional counterweight. Between the National Government and the states there is strong imbalance in favour of the former. The local government is dependent on both the National Government and the states, especially in terms of financial resources. The Traditional Authorities are formally recognized but marginalized and losing both power and respect. As a result it is difficult to see how the Transitional Constitution could enjoy much popularity among the people let alone broader political, social and economic stakeholders.

The road map towards a new constitution as shaped by the Transitional Constitution entails four stages that are sequenced in a curious way. Instead of starting on a narrow expert basis that subsequently gets more representative and ends up in a mechanism that is capable of producing an optimum of legitimacy, the Permanent Constitution Process begins with a broad Review Commission, continues through an inclusive Constitutional Conference, but then ends up in a simple majority vote of the Legislature, all stages being in control of the Executive.

The only recommendation the expert team dares to address to the framers of the new Constitution would be to introduce the referendum device into the constitution making process, either through formal amendment of the Transitional Constitution or through reliance on the existing referendum provision. This could thus erase most of the criticisms that have been raised, in this report and elsewhere, concerning the Transitional Constitution as a whole and the Permanent Constitution Process in particular. The gain in legitimacy for both the actual Government and the future Constitution would be enormous.

Introduction

> ***"No one expects, or hopes, that the countries of sub-Saharan Africa will go through the same centuries-long process (of violence) experienced by China and Europe in order to generate strong, consolidated states"***
>
> ***FRANCIS FUKUYAMA, The Origins of Political Order, New York 2011 457***

In February 2011, an expert team of the Centre for Democracy Studies Aarau (ZDA) (Professor Andreas Auer, Professor Daniel Thürer and Dr Fernando Mendez), mandated by the Office of the Special Representative of the Swiss Department of Foreign Affairs, conducted a first fact finding mission in Juba in order to analyze the constitutional context in South Sudan, to share initial ideas with the stakeholders and to evaluate a possible future Swiss support that could be provided in the constitution making process. In their report of March 1, 2011, the three Swiss experts made a series of remarks with the regard to the normative impact of independence on the then existing Interim Constitution of South Sudan.

In May 2011, the President of the Republic of South Sudan Salva Kiir personally expressed the wish that the same experts draft a scientific study of the Transitional Constitution that he was to sign into law on July 9, 2011. The study is to determine the position and importance of this Constitution within the Southern Sudanese self-determination process since 2005, to comment some of its main provisions under common standards of constitutional and international law and briefly analyze the road map towards a "permanent" Constitution as it is laid down in the Transitional Constitution.

In order to appropriately prepare the study and collect as much inside information as possible, Professor Auer and Dr Mendez held a series of interviews, talks and discussions in Juba in early September 2011 with a broad range of high personalities and persons: Ministers of the Government of South Sudan, presidential advisors, members of the National Legislative Assembly, Central Equatoria State Governor, cabinet and representatives of the Council of Chiefs, representatives of SPLM, SPLA, University of Juba, syndicated organizations, UNMISS, UNDP, women associations and citizens.

This is a study of the Transitional Constitution of South Sudan as it entered into force on July 9, 2011 (TC). Part I puts it within the broad context of comparative constitution making, taking into account the results of an ongoing research project at the Centre for Democracy Studies Aarau and a number of experiences in other countries of the African continent that present striking similarities or, on the opposite, significant differences with the South Sudan constitutional process. Part II then shifts the attention to this process by placing it in the constitutional setting that has led the new born country from the civil wars to independence. Part III deals with its content and meaning with regard to a number of selected topics such as Organs of the National Government, Decentralization, Human Rights and International Law and Democracy. Part IV finally analyses the process that is supposed to lead South Sudan towards a future "permanent constitution".

This study is not a plea of the Transitional Constitution. Nor is it an ode to its mentors and authors. As committed observers from the outside, we have a tremendous respect of the South Sudanese People and Government that have led the nation through war and many other challenges and brought about

this nation's most precious goal: independence. As academics however we are only but thoroughly guided and bound by the standards of contemporary constitutional and international law and political science. We are asked and prepared to write a critical study, "*to point out the weak points of the Transitional Constitution*"[1], not to rubberstamp the existing law. Yet we have to recognize and do appreciate at the outset the high value and priority that the Government of South Sudan, despite many adverse circumstances, has constantly reserved and still reserves to constitution making.

We wish to express our warm thanks to all the persons and institutions that have made this study possible, at the forefront President Salva Kiir, Ambassador Michael Winzap and his team in Berne and Juba and the many friends that have given us advice and help. We hope that not all of them will be disappointed.

1 Terms of Reference, August 30, 2011.

1. Comparative view

1.1. On how the process of Constitution making matters

> ***"Constitutions are chains imposed by Peter when sober on Peter when drunk"***
>
> ***JON ELSTER, Forces and Mechanisms in the Constitution-Making Process, 45(2) Duke Law Journal 2005 383***

Even at the best of times, embarking on a constitution making process is a complex exercise fraught with difficulties. As the Elster quote illustrates, constitutions are frequently written in times of crisis and when passions are heightened. It is because of this that a degree of sobriety and self restraint on the part of framers is generally required. Typically, such a process will involve a careful balancing act between multiple and conflicting interests. The task is all the more difficult in the aftermath of violent conflict and civil war – a situation in which South Sudan presently finds itself. Under such conditions striking a sustainable constitutional balance can mean the difference between successful conflict resolution and escalation of a regional conflict. This underscores the need to place the South Sudan experience, and its constitutional road map, in a broader comparative setting. Though every constitution making exercise is unique and ultimately reflects local needs, there are nonetheless some common principles to the constitution making process which may be revealing for South Sudan.

A first step is to note that not all constitution making processes have the same function or proceed according to the same format. In some cases the overriding function of the constitution making process may go well beyond the aim of simply establishing a set of new regulative rules. Indeed, in some instances the very act of engaging in a constitution making process can also serve a constitutive function.[2] This dual function is quite common during foundational moments where the constitution making process is often the principal vehicle for forging a common political identity through the very process of debating and negotiating a constitution – as was the case in India and Pakistan in the 1940s and 1950s. At other times, founding a new state is not the specific aim but the constitutional moment is no less momentous or transformational because of this, as was the case in South Africa in 1996.

Given its centrality it is surprising how poorly understood the phenomenon of constitution making is. To be sure, there is much commentary and speculation about the impact of different forms of constitution making but the empirical record is unclear.[3] In recent years this has begun to change as scholars try to assess the impact of constitution making processes. A number of research programs have begun to collect data on constitution making processes over time and across different regions of the globe.[4] These ongoing research efforts are of direct relevance to the South Sudan case. It is on the basis of this newly available data that this section presents some of its comparative findings.

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2 Sujit Choudhry, Constitutional design for divided societies: integration or accommodation?, New York 2008 Chapter 1.

3 Tom Ginsburg, Zachary Elkins and Justin Blount, Does the Process of Constitution-Making Matter? 5 Annual Review of Law and Social Science 2009 201–223.

4 Three international research programmes can be singled out. The Comparative Constitution Project involving researchers from the University of Texas and University of Chicago; The Constitution Writing and Conflict Resolution Programme at the Princeton University; and the Centre for Research on Direct Democracy (c2d) Constitutional Convention Project at the University of Zurich.

Although the field is still very much in its early stages and has advanced little beyond charting patterns of constitution making over time and space, there are some preliminary findings that are pertinent to the South Sudan case. Based on one of the largest datasets compiled on constitution making events, some of the early results from the Comparative Constitutions Project suggest that there is an association between constitution making processes that involve the public in the adoption of the constitution and the presence of rights and democratic institutions in the final text.[5] This is consistent with claims made by more qualitative researchers who have based their insights on the analysis of relatively few cases.[6]

What this body of research highlights is that the constitution making process matters. It is usually buttressed by the claim that the more open and participatory the process the better. Indeed, some scholars have argued that contemporary trends reflect a new form of 'constitutionalism' in which the constitution making process is not merely an event but rather part of a broader democratic dialogue and conversation.[7] Others have been more cautious about promoting constitution making in deliberative settings under the public gaze. They argue that such settings can be detrimental to political actors' ability to reach compromise on difficult or controversial issues.[8] What this suggests is that the setting and contextual factors matter. For instance, constitutional bargains struck in a conflict resolution setting cannot be conducted according to participatory ideals. An important finding in this connection is that in conflict resolution cases the use of interim arrangements is preferable to full-scale efforts to draft a new constitution.[9] Only later when passions have diminished is it possible to address the process in a more logical manner and thereby increase the possibility that the eventual product will create a framework for accountable government.[10]

1.2. Some basic insights from recent research

Whilst there may not yet be any conclusive findings linking constitutional process to outcomes, there is ample empirical material to draw on. The Comparative Constitutions Project (CCP) has identified over 700 cases in which new constitutions have been drafted or amended since 1780. Unfortunately, the data collected does not provide details of the specifics of the constitution making process. However, researcher based at the University of Zurich have examined a representative sample of these constitution making exercises over time and across distinct geographical settings to investigate linkages between the various procedures governing constitution making. It was not possible nor feasible to try to analyze all the cases identified. Instead the researchers restricted their analysis to a representative sample of 160 transformative or foundational constitutional events over time and across

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5 Ginsburg et al 2009; Tom Ginsburg (Ed.), Comparative Constitutional Design, Cambridge Mass. 2012 (forthcoming).

6 Vivian Hart, Constitution-making and the Transformation of Conflict, 26(2) Peace & Change 2001 153–176; Yash Ghai and Galli Guido, Constitution building and democratization, in: Conflict and Human Security: Further Readings, International IDEA Handbook Democracy 2006.

7 Hart 2001.

8 Elster 1994.

9 Jennifer Widner, Constitution writing in post-conflict settings: an overview, 49 William & Mary Law Review 2008 1513-1540.

10 Widner 2008 1534.

different sub-continents. It is on the basis of this analysis that the some of the relevant findings are presented below.

The focus of the investigation was on foundational constitutional acts or attempts to introduce significant constitutional transformation within a polity, which usually occurred in the context of real or perceived crises. In order to conduct the analysis it was necessary to specify which features of the constitution making exercise were important. Evidently, there are many contextual factors and political bargains that will shape the specific choices about the constitution-making process. Notwithstanding these locally determined factors there are also a number of dimensions that are common to all constitution making exercises. This includes the role of the key political actors involved and their specific mandates, the input of the public or the lack thereof, and finally the process by which acquiescence is achieved on the final constitutional package. For any given constitution making exercise it is possible to define these three measurable dimensions. We do this by labeling them in the following way:

a) Mode of representation

Since universal participation is in most cases impracticable, representation procedures have to be established in order to select the type of body entrusted with negotiating and drafting a new constitution. There are two basic extremes on this pole. Governing elites may appoint themselves as the principal constitutional designers. A common method is for the Executive to appoint a Constitutional Committee or a variant thereof. In other cases it is the legislature that appoints the committee. The crucial point is that regular parliaments are not elected for this purpose and the decision of a legislature to convert itself into a constitution making body is a decision taken by the political elite. This can be contrasted with a mandated Constituent Assembly. In this case, a parliament is directly elected to draft a new constitution even if it carries out other legislative functions. Between the poles there are other modes of representation, such as Constitutional Conventions (in the US example delegates represented territorial units) or a National Conference (a large, broad-based body drawn from all sectors of society).

b) Style of the constitution-making process

Two extremes can be defined in terms of whether the process is broadly open and participatory or whether it is an exclusive and largely closed affair. An open style is one in which citizens not only have the theoretical right to comment upon the constitution-making process and submit suggestions, but actually exercise that right, while a closed style refers to a “behind-closed-doors” scenario in which public consultation and public input is minimal. This generates two conflicting modes of communicative interaction, the more closed the process the more likely a bargaining style of negotiation will dominate. On the other hand, the more open the process the more likely a deliberative style of debate can emerge. A closed bargaining setting induces a style of personalized negotiation and potential horse-trading (which can be necessary during a conflict resolution setting for instance). In a more public and open deliberative setting, discursive interaction tends to be shaped by the need to argue (rather than bargain) in terms of the common good and in a more impartial and disinterested style.

c) Mode of ratification

This refers to how the constitution is to be ratified and become law. Another continuum can be identified here that ranges from instances in which the final product of a constitution-making process is ratified by political elites (e.g. the state executives themselves) to an alternative ratification mechanism involving a popular vote by the citizens. In the first case, the constitution making body itself ratifies the draft constitution whilst in the second case the constitutional draft is ratified by the people in a referendum. There is of course an intermediate model in which a parallel institutional body, such as the Parliament or a Constitution Court, has to approve the constitutional draft.

How the three dimensions are configured give rise to multiple models of constitution-making processes. The University of Zurich team investigated the linkages between the various operational procedures of the 160 cases analyzed. The goal was to identify the trade-offs involved in designing a constitution making process. A number of pertinent findings emerged from the analysis. The first is a rather obvious one. The style of constitution making and whether it is broadly open and deliberative or adopts a closed bargaining style is directly related to the mode of representation. For instance, constitution making exercises that occur in a conflict resolution context or during initial periods of decolonization are frequently negotiated by elites in a closed setting. In order to foster favorable conditions for bargaining and compromise, public input or media access to the negotiations is usually absent or minimal. At a later stage, the constitution making process can be opened up to a broader range of stakeholders. There is therefore a direct relationship between the mode of representation and the style of constitution making and debating. The mode of representation generates diverging models of debating and negotiating constitutions. In other words, where delegates are elected, especially in large numbers, or selected to reflect a broad range of societal groups, deliberative discussions and open public participation are more likely as is the case in the context of Constituent Assemblies or National Conferences. A bargaining model of negotiation that is generally more closed prevails where the process is controlled by a committee of governing elites.

A more important finding from the analysis of the global sample relates to the relationship between the mode of representation and the mode of ratification, however. Put simply, there is a negative relationship between the two insofar as popular input is concerned.[11] This suggests a general trade-off at the heart of constitutional design which has important implications for the legitimacy of a given constitution making exercise. In short, popular input during first order constitutional moments can be sequenced in a variety ways. It can be introduced into the mode of representation whereby the citizens directly elect the body responsible for drafting a new constitution. Alternatively, popular participation can be introduced into the mode of ratification whereby the citizens have a direct say on the adoption of a new constitution by means of a referendum.

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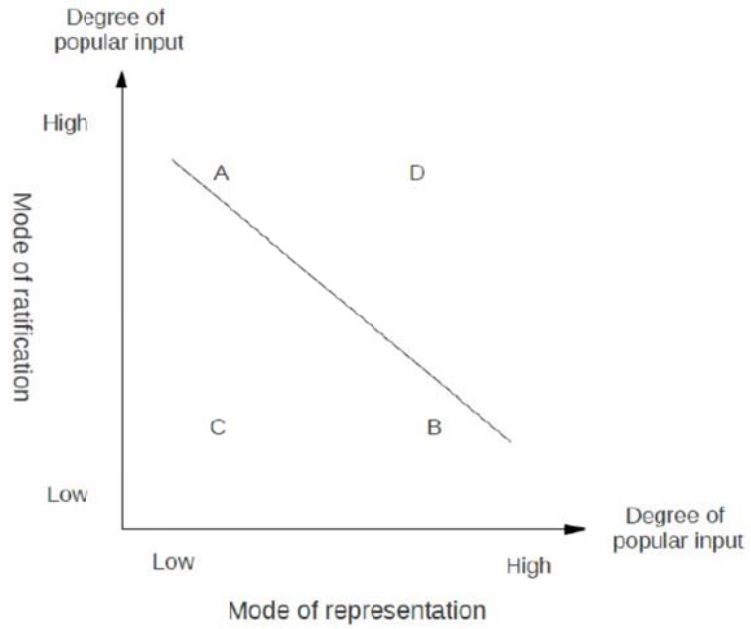
11 Based on a representative sample of the global cases, there is a statistically significant relationship (Spearman's R = -.311**, significant at 0.01 level) between the mode of representation and the mode of ratification. The relationship is negative, the more closed the constitutional drafting process, the more likely the ratification process will be open and involve a referendum.

Figure 1



The relationship is represented in figure 1. We identify two alternate (but not mutually exclusive) forms of popular participation which can be channeled through the input side or the output side. In the first channel, the input legitimacy of a constitution making process is achieved through various devices such as specially convoked elections to a Constituent Assembly. It is represented by the letter B. In the second model, the output legitimacy of the constitution making process is generated through a direct consultation of the people and represented by the letter A. What the analysis reveals is that at the aggregate level and across the global sample there is a trade-off between the two. Evidently there are other possible models, that lie outside the downward sloping curve in figure 1. The models represented by the letter C, where popular participation is both low on the input and output side, are characteristic of conflict resolution contexts, for instance Sudan's 2005 Comprehensive Peace Agreement, and quite common during a de-colonization setting. There are also examples of activating popular participation during a constitution-making process in terms of both the mode of representation and the mode of ratification. In these cases, represented by the letter D, a directly elected Constituent Assembly drafts the constitution which is subsequently submitted to the people for ratification. In some rather rare cases, such as Venezuela and Ecuador, a triple popular input mechanism has been used whereby the people decide by referendum on whether to engage in a constitutional process and elect a Constituent Assembly in the first place. The analysis of the global sample thus reveals a common trade-off facing constitutional designers given the need to legitimate a constitution making exercise through a degree of popular input. Notwithstanding some important outlier conditions, as discussed above, most cases can be placed along the downward slopping curve in figure 1.

1.3. African experiences

> ***"Africa without modern traditions or institutions of democracy engages its people, in towns and in villages throughout the country, in extensive deliberations on constitutional values and future of the country, and Europe with a great tradition of democracy, draws up its charter in the proverbial smoke filled rooms"***
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> ***JILL COTTRELL/YASH GHAI, Constitution Making and Democratization in Kenya 2000–2005, 14 (1) Democratization 2007 2***

The number of specifically African cases (47) in the University of Zürich global sample was too small to perform any meaningful quantitative tests. Drawing on the CCP dataset it is possible, however, to identify a broad sample of 164 new African constitutions since the foundation of Liberia's constitution in 1847. Unfortunately, these cases would have to be systematically analysed, rather than simply identified as is the case with the CCP dataset, a task beyond the scope of this report. Nonetheless, the CCP dataset does reveal a flurry of constitutional activity in the African sub-continent. If one includes amendments to constitutions and promulgation of interim constitutions the number of constitutional events increases markedly to over 500. Constitution making in Africa is, in short, a notable feature of the political process. What is clear from African cases is that, although constitutional reform has been an ongoing process, there have been at least two major waves of constitution making. The first occurred during the period of de-colonisation and independence around the 1960s. A second major wave can be linked to the so-called third wave of democratization which occurred in the early 1990s following the end of the Cold War. The emphasis below will be on this second wave of African constitution making which has its origins in the 1990s. The aim is to simply focus on a number of African cases to illustrate the various dynamics at play during periods of constitutional change and democratic transitions. To this end, a number of examples are selected from three geographic regions of the subcontinent, West Africa, Southern Africa and East Africa.

1.3.1. West Africa

In the early 1990s a wave of democratic constitution making swept across many African states. Though the outcomes and the particular local contexts varied considerably there were some common trends. One distinctly identifiable group of African countries formed part of the so-called National Conference phenomenon in Francophone Africa.[12] The phenomenon relates to a wave of constitution making between 1990 and 1993 in which a number of Francophone African nations (Benin, Gabon, Congo-Brazzaville, Mali, Togo, Niger, Zaire, Chad) implemented the National Conference as the route to democratic change. Most of these countries also shared a geographical proximity in the region of West Africa. The West African cases we focus on include Benin, Mali, Congo-Brazzaville, Gabon, and Togo. It is possible to add to this West African group the case of Ghana, which was also part of that same transition dynamic in the early 1990s.

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12 Pearl T. Robinson, The national conference phenomenon in Francophone Africa, 36(3) Comparative Studies in Society and History 1994 575–610.

It is worth highlighting the originator of the National Conference phenomenon, Benin. What is striking about the Benin case is how brief the process was -the National Conference lasted ten days. President Kerekou, a reluctant reformer, was forced to acquiesce in the reform process. Echoing the dynamics of the French Estates General of 1789, to which it has been compared,[13] the launch of a National Conference in Benin immediately took a revolutionary direction as the delegates declared the conference sovereign. Within those ten days the National Assembly was dissolved, many of the President's powers were removed, and multi-party elections were scheduled. To further underscore the degree of popular sovereignty, a referendum held later that year was the method used to ratify the constitution. The events in Benin had an obvious diffusion effect, especially amongst Francophone nations, including some beyond West Africa, such as Madagascar and Chad. Demands for convening a sovereign national conference as a transition mechanism proliferated in the aftermath of the Benin experience as political actors seized on the model as a plausible strategy for democratization. Indeed, a feature of this process of constitutional reform was the use of the National Conference by opposition groups to press for democratic change. Not surprisingly, outcomes have varied enormously.

As a specific mode of constitution making, the National Conference involves a large and broad-based body drawn from all sectors of society. It is an inclusive body which typically includes delegates from some or all elected bodies, civil society organisations, traditional leaders and religious groups. The composition of the National Conference in the West African cases varied considerably, Benin had 418 members whilst Mali incorporated around 1,800 representatives. So too did the duration, 10 days in Benin and four months in Congo-Brazzaville. Other differences can also be noted. Whilst the revolutionary declaration of sovereignty by the Benin National Conference was emulated by most Francophone African states, it was not always achieved in practice. In Togo the National Conference declared itself sovereign though it never achieved de facto sovereignty and the process was ultimately controlled by the President. A similar dynamic emerged in Gabon. In some cases such as Benin there was an open mode of deliberation with proceedings being broadcast on radio. One common feature of the process was the use of the referendum device as the mode of constitutional ratification. This added an additional element of popular input to the process. Only in the case of Gabon was the referendum device explicitly eschewed in favour of ratification by the Parliament.

The constitutional reform process in Ghana took a very similar path. In the Ghanian case an Expert Committee was to draw up and present a constitutional draft to a large and broad based body, the Ghanian Consultative Assembly. The latter was composed of 260 delegates, a few of which were elected. Although it was called a Consultative Assembly the body was functionally similar to the National Conferences which had proliferated in the Franco-phone area at the same time. It has been suggested that whilst the Assembly was broad based and representative most of the delegates from the districts were pro-government and arbitrarily chosen. The final stage of the constitution making process was also a referendum on ratification which was held in 1992.

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13 See in particular the work of Robinson 1994.

1.3.2. Southern Africa

Namibia is a good case to begin with in order to investigate constitutional dynamics not only in Namibia but also in its former occupying power, South Africa. Both cases offer text book examples of successful constitution making processes that have attracted academic attention.[14] A crucial backdrop to the Namibian case was the end of the Cold War which ensured that the regional stakes were high given the potential positive spillover effects for the broader region and South Africa in particular. Indeed, this is what eventually happened for in many respects the transition to democracy in South Africa was based on a formula which resembled the Namibian experience.[15] A notable feature of both experiences was an ex-ante agreement of what the broad constitutional principles would entail. Although South African went further in being bound by ex-ante constitutional principles, one of the lessons of the Namibian experience was to adopt constitutional principles before the drafting of the constitution.

The Namibian constitution making process has been widely lauded and routinely identified as one of Africa's most successful experiments despite the fact that Namibia has increasingly been characterised by one party rule.[16] A number of factors were relevant to both the constitution making process and the eventual constitutional product. The role of the international community was critical to both. Transition to statehood and democracy was preceded by a long and bitter struggle with the apartheid regime in South Africa, the occupying power. Indeed, the Namibian case was a persistent item on the UN political agenda and it was with the landmark Resolution 435, passed in 1978, that the procedures for a transition to independence and the withdrawal of South Africa were set out. Elections supervised by the UN would pave the way to independence. However, it took a decade before UN Resolution 435 was actually implemented by South Africa.[17] This led to the landmark elections of 1989. It is important to note that as implementation of the UN resolution unfolded, elections to a Constituent Assembly as a precursor to the adoption of the Namibian constitution became part of the internationally brokered settlement. In other words, the UN-sponsored constitutional road-map provided for elections to a Constituent Assembly and a series of constitutional principles that would shape the eventual constitutional product. In many respects, therefore, Namibia's constitutional drafters were constrained in terms of both the process and eventual constitutional product.

The elections to the Constituent Assembly took place in November 1989 and involved electing a chamber of 72 members. Its task was to draft and adopt a constitution. Ratification required a two-thirds majority of the Assembly. However, whilst the elections did produce a winning political party (SWAPO, the former liberation movement) its representation in the Assembly fell well short of the requisite majority. This ensured that constitution making process would require compromise and reconciliation. The outcome was a constitutional settlement that was largely accepted by all the

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14 There is an extensive literature on South Africa and Namibia, see for instance Hassen Ebrahim, The Soul of a Nation – Constitution-making in South Africa, Cape Town 1998; Christopher Saunders,Transition in Namibia 1989-1990 and the South African Case, 17 Transformation 1992; Gerhard Erasmus, The Constitution: Its impact on Namibia Statehood and Politics, in: State, Society and Democracy: A reader in Namibian politics, edited by Christiaan Keulder. Windhoek Namibia 2010.

15 Erasmus 2010.

16 John Wiseman, The rise and fall and rise (and fall?) of democracy in sub-Saharan Africa, in: David Potter, David Goldblatt, Margaret Kiloh and Paul Lewis (Eds.), Democratization 1997.

17 The international context was important here, the end of the Cold War had altered the security context, and the deal with South Africa was predicated on the withdrawal of Cuban forces from neighboring Angola.

players and widely credited as being one of the most democratic in Africa when it was ratified in 1990.

Events in Namibia did not go unnoticed in South Africa which would undertake its own, and in many respects even more dramatic, constitutional transformation. The much lauded constitution of 1996, adopted in December 1996, was the result of a long and inclusive negotiation process. As in the Namibian case, the transition process was governed by a number of principles that set the parameters for the constitution making process. Constitutional principles as well as a specific road map for transition were set out in the 1993 interim constitution. The latter had been designed by the various negotiating parties to act as a bridge between the old order and the new order.[18] The parameters set forth in the interim constitution shaped not only the process but also the provisions of the eventual constitutional product. The first step was the election of a representative body, the Constitutional Assembly. The landmark general elections of 1994 set the stage for the newly enfranchised South African electorate to elect political leaders that would have two distinct mandates. The first was to govern the new democratic regime and the second was to draft a final constitution. But in drafting the final constitutional text the Constitutional Assembly had to work within the constitutional parameters of the interim constitution.

A strict time frame of two years was imposed to try to ensure that the new constitution would be drafted within a reasonable period. At the same time the process had to be inclusive of all the major stakeholders. Three categories were identified, the political parties, civil society organisations, and individual citizens. Furthermore, it would be necessary to not only invite submissions but also to actively solicit the views of the various stakeholders. Lastly, the principle of transparency was to ensure that all material of the constitutional proceedings would be made available to the public.

The interim constitution incorporated an additional set of safeguards. It set a list of thirty-four constitutional principles which had an effect on the nature of the deliberations, the structure and working methods of the Constitutional Assembly, and the eventual product. There was in addition a crucial constitutional certification safeguard. The constitutional text would have no legal force without the approval of the Constitutional Court, which would determine that the text complied with the principles laid out in the interim constitution. To submit the constitution to the Constitutional Court a two-thirds majority of the Constitutional Assembly was required. As a deadlock breaking mechanism, and in order to deter parties from failing to compromise, a procedure was included that provided for a referendum if the Constitutional Assembly failed to secure the requisite two-thirds threshold. The constitution would be submitted to a popular vote but subject to a sixty per cent majority of the votes cast. In the end, it was not necessary to activate this procedure.

The drafting process, which involved a number of sub-committees, did not proceed entirely smoothly. Not surprisingly, there were periods of deadlock and intense negotiations. As the deadline loomed a constitutional document was approved by the Constitutional Assembly in May 1996. This was followed by the process of constitutional certification by the court. In what was an open and participatory hearing, the Court identified features that did not comply with the principles set out in the interim constitution and rejected the draft in September 1996. The Constitutional Assembly

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18 Ebrahim 1998.

quickly reconvened to address the flaws in the various clauses identified by the Court. In December 1996 the Constitutional Court gave its approval and a few days later President Mandela signed into law the new constitution of South Africa.

1.3.3. East Africa

In a similar vein to South Sudan, Eritrea gained its independence after a lengthy liberation struggle. It too held a referendum on independence that was supervised by the UN and sanctioned by the international community. Independence in the Eritrean case was a foregone conclusion following the striking military victory over its formidable Ethiopian colonial master. The successful outcome of the referendum paved the way for a smooth recognition of Eritrea's independence by the international community. The conditions for producing a durable post-independence constitutional settlement appeared favourable. Unlike South Sudan, in the immediate aftermath of independence Eritrea did not have to contend with disputed borders or wealth sharing issues. Yet, nearly two decades after independence that elusive constitutional settlement has not been forthcoming.

Following the independence referendum of 1993, Eritreans embarked on a constitution drafting process which lasted for nearly four years and culminated in 1997 with the ratification of the constitution by a Constituent Assembly. It was a constitution making process that, for many observers, was credited as being broadly participatory whilst incorporating an important civic education component.[19] Some notable steps had been already taken before the independence through a series of Proclamations which to all intents and purposes served as an interim constitution.[20] The interim National Assembly established a Constitutional Commission with responsibility for drafting a new constitution. The latter was to lay the foundations for a democratic system of government. The Constitutional Commission was appointed by the National Assembly and is credited with being broadly representative of the various societal groups, though most members shared a common background as veterans of the liberation struggle. It is crucial to note that during the constitution making process the commission's work was not hindered by the political authorities or the President - indeed the latter respected the full autonomy of the commission.[21]

A multi-step process to constitution making was envisaged involving a considerable degree of democratic input and public participation. The Constitutional Committee was responsible for not only drawing up a constitutional draft but also for organising and managing a wide-ranging national debate that would involve, *inter alia*, educating the public through seminars and the use of other techniques of public outreach. The aim was to sensitise the Eritrean public to the meaning of a constitution and its principles.[22] The first draft constitution was to be presented to the National Assembly for a further public discussion. Following a second round of discussions the constitution was to be submitted to a

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19 Bereket H. Selassie, Creating a Constitution for Eritrea, 9(2) Journal of Democracy 1998 164-174; R.A. Rosen, Constitutional process, constitutionalism and the Eritrean experience, 24 North Carolina Journal of International Law and Commercial Regulation, 1999 269.

20 Simon M. Weldehaimanot and Daniel R Mekonnen, The Nebulous Lawmaking Process in Eritrea, 53(2) Journal of African Law 2009 171-193. Essentially they refer to Proclamation No 23/1992, Proclamation 37/1993 and Proclamation No 52/1994 as the Interim Constitution.

21 This was confirmed in an academic article by the Chairman, see Selassie 1998.

22 This section draws on the account of Selassie 1998.

democratically formed representative body (constituent assembly) for final ratification. The design of the process therefore involved various stages of public debate which would culminate in the adoption by a Constituent Assembly. This body was to include the 75 members of the National Assembly, members of six regional assemblies (for which there were elections) and finally 75 representatives from the Eritrean diaspora abroad.

The three stage process was designed to ensure maximum democratic input. Indeed, between 1994 and 1997 Eritreans were engaged in a uniquely participatory civic education exercise on constitutional matters. In a nation with markedly low literacy rates, some of the techniques used, such as songs, poems, stories, and plays in vernacular languages, as well as radio and mobile theatre, are a testament to the innovative outreach of the constitutional drafters to the local communities. The process, and the work of the Constitutional Committee, has been positively evaluated by observers as a truly participatory exercise.[23]

So what went wrong in Eritrea? Put simply, the regime never implemented the constitution. The constitution, which did not contain a specific date on when it would take effect, was ignored by the President.[24] A year after the constitution had been ratified a border conflict erupted with Ethiopia and soon escalated into a war. The war was brought to an end by a cease fire brokered in 2000. During the war period implementation of the constitution was put off the agenda, but over a decade later the constitution ratified in 1997 has still to be implemented.

The Kenyan case of reform represents an example of a long drawn out constitutional struggle that spanned two decades. A landmark moment in Kenyan attempts at democratic transformation occurred in 1991 when long time President Moi officially ended one-party rule that had seen the KANU party in power since 1969. The reform that reintroduced political pluralism to Kenya in 1991 was accompanied by growing calls for constitutional reform – a topic that would dominate the political agenda in Kenya through to 2010. Whilst one party rule was officially ended in 1991 it took a further decade for an alternation of power to occur. This took place during the general elections of 2002 when an opposition coalition was swept into power under the leadership of President Kibaki. Although his enthusiasm for constitutional reform waned considerably when in office, the newly appointed President had been previously a vocal proponent of constitutional reform and promised an expedited road map to the adoption of a new constitution. This did not occur.

An important juncture in Kenya's constitutional reform odyssey had already occurred during the earlier general elections of 1997. A new forum had brought together the political parties to discuss constitutional matters. Shortly after the 1997 elections a landmark law was passed – the 1997 Constitutional of Kenya Review Act – which laid down the framework for constitutional change. Following further negotiations, including a series of stakeholder conferences, the Act was amended to place the participation of the people at the centre of the process. As with many constitution making exercises in Africa the process was immediately politicised – especially the nomination of the members that would form part of the constitutional review commission.[25]

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23 Rosen 1998; Weldehaimanot and Mekonnen 2009.

24 Dan Connell, Redeeming the failed promise of democracy in Eritrea, 46(4) Race & Class 2005 68 -79.

25 Cottrell and Ghai 2006.

The long awaited constitution making process was officially launched when the Constitution of Kenya Review Commission (CKRC) was created and commenced its work in 2001. The CKRC had been appointed by the president on the nomination of Parliament. The group included constitutional experts, such as the chair Prof. Yash Ghai, and was intended to reflect diversity of the country. Its tasks were to provide civic education to the public on constitutional matters, to solicit the views of citizens on reforms, and to prepare a draft for a National Constitutional Conference. Despite lots of backtracking and delays the CKRC managed to accomplish its tasks. At this point in April 2003 the National Constitutional Conference commenced its work and convened its sessions -a process that would last for almost an entire year.

The Constitutional Conference was a broad based organisation which comprised all members of parliament, regional delegates, representatives of various societal groups and civil society organisations -a total of 629 individuals.[26] In terms of representation, though the members of the group were not directly elected, it was designed to reflect social and ethnic diversity. When it came to deliberation the Constitutional Conference was characterised, according to its chairman, by interminable debates in the plenary amongst the delegates and a tendency to play up to the media in the public gallery, which would subsequently amplify the differences between members.

The eventual draft produced, the so-called Boras draft, was not to the government's liking, especially since it proposed a parliamentary system. A number of delaying tactics followed. These also included various litigation strategies one of which resulted in the 2004 decision *Njoya v AG* which held that a new constitution could only be adopted on the basis of a constituent assembly or if the people ratified it through a referendum. It was the latter route that was eventually followed when a constitutional draft, the so called Wako draft was submitted to the people. The constitution was rejected by the popular vote in 2005.

Two years later the contested general elections of 2007 produced an eruption of violence between supporters of the incumbent President, Kibaki, and his opponent Raila Odinga. The post conflict resolution involved a series of negotiations mediated by former UN Secretary General Kofi Annan. In addition to a power sharing formula whereby Raila Odinga was appointed as Prime Minister, implementing constitutional reform formed part of the accords aimed at resolving the conflict. The road map was laid down a few months later by the 2008 Constitution of Kenya Review Act. The route involved a referendum at the end of the process rather than a constitutional convention or a constituent Assembly. This time the draft was to be drawn up by a Committee of Experts. In doing so, the process did not reopen the earlier constitution drafting process but rather drew on the two earlier drafts.

Initially released to the public in November 2009 by the Committee of Experts, the draft constitution went through various rounds of revision and vetting by a Parliamentary Select Committee as well as a public consultation exercise, before the National Assembly agreed to the constitution in April 2010. The approval by referendum in August 2010 brought to an end Kenya's tortuous road to constitutional reform.

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26 The process, composition of the National Conference, and its politicisation is described in detail by Cottrell and Ghai 2006.

1.4. Comparative insights

All the constitutional reform processes described above had their origins in the 1990s. Even the protracted case of constitutional reform in Kenya, which was only completed in 2010, had its origins in 1990s. The outcomes of the various constitutional processes covered in this section vary from successful implementation in the Southern African cases to problematic non-implementation in the case of Eritrea. The temporal dimension also varies from the constitutional revolution in Benin -which took place in large part over 10 days- to the long drawn out process in the Kenyan case. Despite such variance there is one notable, common feature. This is the demand for popular participation. Indeed, what is rather striking from comparative perspective is the degree to which constitution making exercises in Africa have been highly participatory. This is rather striking since in most cases they have occurred in most unfavourable participatory conditions. That is, it occurred in countries which had little tradition of democracy or organised political activity and with too little commitment from political leaders to democracy. This, as the African constitutionalist reminds us, is a remarkable paradox.[27] Despite the absence of modern traditions and institutionalised democratic practices the African way has involved the engagement of people in towns and villages in extensive constitutional deliberations that can be favourably contrasted with the elite driven affairs of many European democracies. Demand for constitutional deliberation is high in Africa. Concomitantly, so too is the demand for civic education to sensitise the people to constitutional issues. But what of the outcomes produced as a result of the various, participatory constitutional experiments analysed?

Figures 2, 3, and 4 plot the Freedom House scores of the various countries according to their geographical region. The index is frequently used by political scientists as a measure of democratization.[28] The possible scores range from 14 for the least democratic to 2 for the most democratic polities. Insofar as the index is a reliable proxy for levels of democracy, what is clear from the trend line is the sheer variation across some of the countries. The Eastern African cases covered are the easiest to deal with. In the Eritrean case the constitution was simply not implemented and what followed was a transition to dictatorship. Although in the early to mid-1990s Eritrea could bask in the glory of having secured independence against the odds and subsequently undertaken a broad-based participatory constitution making exercise, the people, according to one analyst, willingly conferred absolute power on the leadership of a guerilla movement that won their freedom from Ethiopian occupation, and then deprived them of liberty.[29] Values such as national unity and the focus on the single goal of independence translated into uncritical loyalty and unquestioning obedience.[30] In the Kenyan case, it is simply too early to tell what the effects of the new constitutional settlement will be and whether the latter will become self-enforcing. This is less the case for the two Southern African cases that have respectable democracy scores. In fact, democracy appears to have become fairly well entrenched despite a tendency towards a dominant party system, which is more worrying of late in the case of Namibia.

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27 Cottrell and Ghai 2006.

28 The index is the sum of the Freedom House scores for a) political rights and b) civil liberties.

29 Debassay Hedru, Eritrea: Transition to Dictatorship 1991-2003, Review of African Political Economy 2003 435.

30 Ibid.

Figure 2

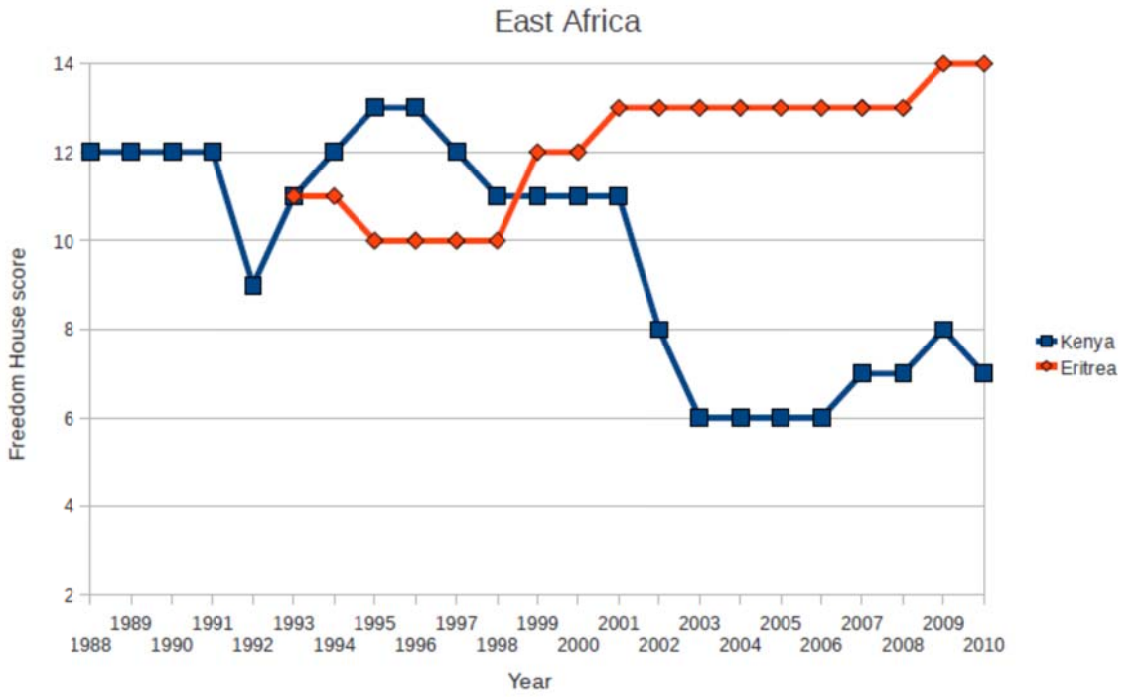


Figure 3

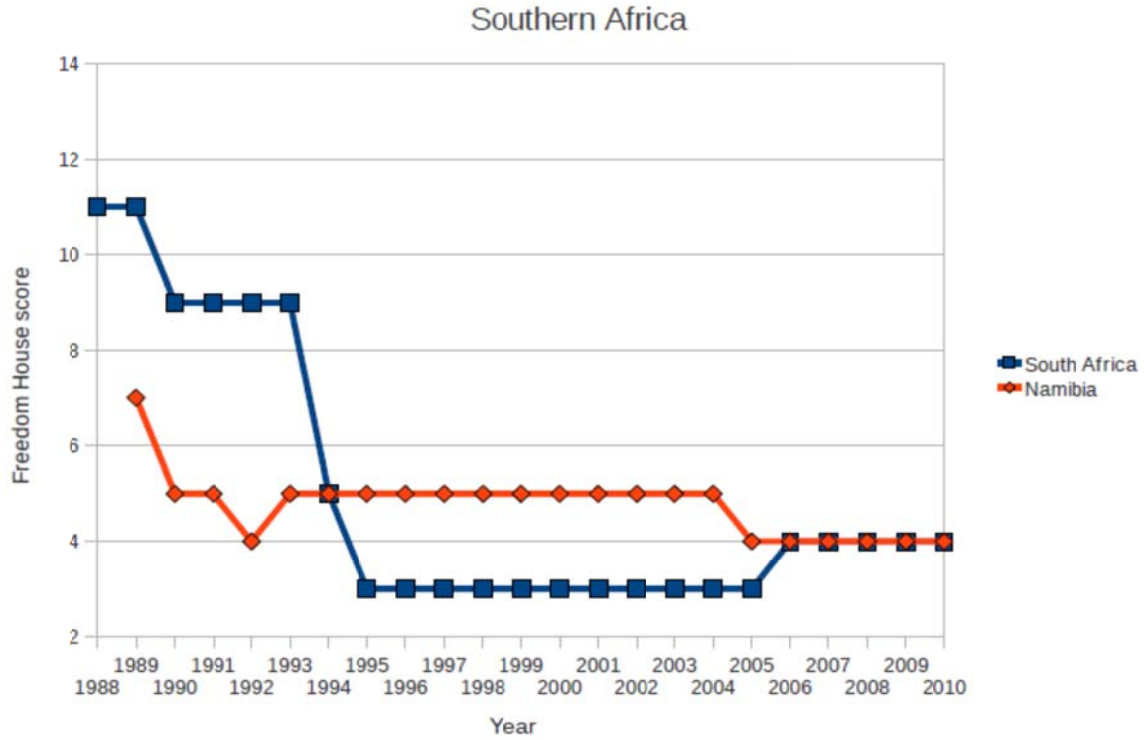
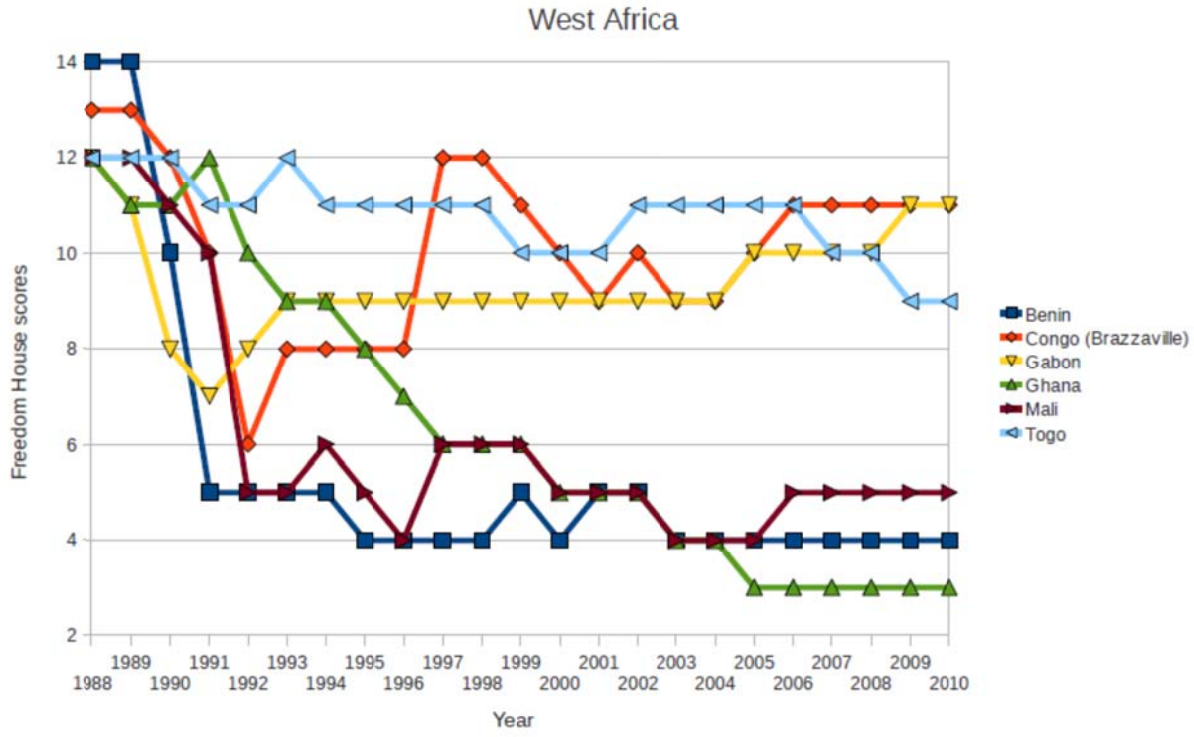


Figure 4



Lastly, the West African experience is perhaps the most revealing of all. On the basis of almost identical initial conditions and the implementation of Constitutional Conferences as a mode of constitutional transformation, two clearly distinct pathways have emerged. Whilst Congo-Brazzaville, Gabon and Togo have lost their democratic momentum and relapsed into authoritarian regimes, the outcomes in Benin, Ghana, and Mali have been radically different. The latter three cases have all successfully engineered a transition to democratic governance. A potential clue as to why this occurred may well be connected to the constitutional settlements produced in the early 1990s in these West African cases. The three successful cases of democratization, as well as the two cases from Southern Africa, are notable because of the relatively infrequent attempts to alter the constitutional bargain of the 1990s. In the case of Benin, there have been no subsequent constitutional amendments. Ghana is perhaps one the most instructive: not only did it innovate in terms of the constitutional product which introduced a House of Chiefs, but it also made future constitutional revisions difficult to undertake. Some constitutional provisions – so-called entrenched provisions- that involve fundamental rights or the distribution of powers among the various branches of the state cannot be altered without approval in a referendum by 75 per cent of voters on a 40 per cent turnout.[31] By contrast in the cases that have followed more authoritarian pathways, constitutional bargains quickly unfolded. What this demonstrates is that even a generally open and participatory constitution making process is insufficient to generate sustainable democratic institutions. Whilst an open constitution making process alone is certainly not a sufficient condition for democratization, as was the case in many of the examples surveyed, in the successful cases of West Africa and in Southern Africa it most certainly had a positive effect in shaping the democratization process.

31 The only amendment made to Ghana's constitution involved the non entrenched provision.

2. The Transitional Constitution in its normative setting

> ***"Conscious that the conflict in the Sudan is the longest running conflict in Africa; that it has caused tragic loss of life, destroyed the infrastructure of the country, eroded its economic resources and caused suffering to the people of the Sudan"***
>
> ***CHAPEAU OF THE COMPREHENSIVE PEACE AGREEMENT 2005***

2.1. A constitutional family

Five documents of constitutional significance structure the past, mark the present and shape the future of the Republic of South Sudan.:

The **Comprehensive Peace Agreement (CPA)**, signed on January 9, 2005 by The Government of The Republic of The Sudan and the Sudan People's Liberation Movement/Soudan People's Liberation Army as witnessed by the High Representatives of Kenya, Uganda, Egypt, Italy, The Netherlands, Norway, The United Kingdom and Northern Ireland and the Unites States of America, comprising a Chapeau, six Chapters and two Annexures.

The **Interim National Constitution of the Republic of Sudan 2005 (NIC)**, passed by the National Assembly of the Republic of Sudan as well as the SPLM National Liberation Council on July 6, 2005.

The **Interim Constitution of Southern Sudan 2005 (IC),** adopted by the Transitional Southern Sudanese Legislative Assembly and signed by the President of the Government of Southern Sudan in 2005.

The **Transitional Constitution of the Republic of South Sudan 2011 (TC),** adopted by the Southern Sudan Legislative Assembly on July 7, 2011 and signed into law by the President of the Government of Southern Sudan on July 9, 2011.

The **Permanent Constitution (PC)** does not yet exist, but it is mentioned by NIC 226-9 and referred to in Part Sixteen (Articles 202/203) TC.

The five documents, besides having a common language, style and structure, are legally intertwined and tied together thus forming some sort of a constitutional family[32].

The CPA refers to the NIC by mentioning the "Constitutional Framework of the Peace Agreement" (Chapter 1, 2.1f) that shall be drafted by the National Constitutional Review Commission (Chapter I, 3.1.2) as the Supreme Law of the Land (Chapter II, 1.5.1.2) to be adopted by the National Assembly and the SPLM (Chapter II, 2.12.5).

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32 See generally Douglas Johnson, The Root Causes of Sudan's Civil War: Comprehensive Peace or Temporary Truce?, 2011; Elke Grawert (Ed.), After the Comprehensive Peace Agreement in Sudan, 2010.

The CPA also refers to the IC by providing that the Southern Sudan Constitution be drafted by an inclusive Southern Sudan Constitutional Drafting Committee and adopted by the Transitional Assembly of Southern Sudan by a two-thirds majority of all members (Chapter II, 3.2).

The NIC directly refers to the IC by repeating the forgoing provision (160-1) and setting forth in detail the organization and the powers of the Government of Southern Sudan (161-176).

The IC does not mention the TC, nor define in detail the process that has led to the latter's adoption and proclamation. IC 208-4 simply states that it (the IC) shall govern the Interim Period in Southern Sudan.

The TC however presents itself as an amendment of the IC. The last point of the preamble explicitly says so, as does TC 201-1a. The document that has been sent to the authors of this study[33] quite curiously opens with a short chapeau referring to IC 59-2b and 85-1[34]. The first provision provides that the Southern Sudan Legislative Assembly "*shall enact legislations on all matters assigned to it*" by the CPA, the NIC and the IC. One may suppose that the correct reference would have been IC 59-2a empowering the Assembly to "*consider and pass amendments to this Constitution*". The second provision merely mentions that the President of the Government of Southern Sudan shall assent to and sign into law the bills approved by the Assembly. Furthermore, TC 201-1a states that the TC is considered to be an amendment of the IC.

The TC contains several provisions related to the PC. TC 201-2 provides that "This Constitution shall remain in force until the adoption of a permanent constitution". TC 201/202 defines in full detail the Permanent Constitution Process and its stages.

The four constitutions share many things. The general structure is very similar if not the same: a short preamble and approximately 15 parts including in almost the same order General Provisions on the State and the Constitution, Bill of Rights, Fundamental Objectives, Legislature, Executive, Judiciary, Public Attorneys, Independent Commissions, Armed Forces and Law Enforcement, States and Local Government, Census and Elections, Miscellaneous. Many provisions of the NIC, the IC and the TC are identical, others differ only slightly, very few are radically different.

So much resemblance can be no accident. There must have been a person or a group of persons that were directly or indirectly implied in the drafting processes of the CPA, the NIC and the IC, that were adopted the same year. Some of them might even have co-shaped the TC. They may have relayed on the same sources or been advised by common outside experts. It is a well-known fact that the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, at the request of the SPLM, elaborated in 2005 a draft constitution for South Sudan that has left more than footprints in the IC and the TC[35]. In March 2011 a high level delegation of South Sudanese representatives from Government, Parliament and the Judiciary again met with experts of the Institute in Heidelberg to discuss "technical problems" related to the amendment of the IC[36]. It is also common knowledge that

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33 See also www.unhcr.org; The Transitional Constitution is not published on the official website of the Republic of South Sudan, www.goss.org.

34 Other, presumably older versions of the TC, like the one published on www.gurtong.net, do not mention this chapeau.

35 We estimate that roughly 50% of the TC provisions have been directly inserted from the Max Planck Draft Constitution 2005.

36 See www.mpil.de/ww/en/pub/research/details/know_transfer/africa_projects/south_sudan_project.

experts from South Africa have assisted the drafters of the South Sudan constitutional package in 2005.

Be this as it may, constitution making in South Sudan already has some kind of tradition, autonomous or inspired by others, that sets a standard and paves the way for future constitutional experiences. Constitutional Review Commissions for instance have been associated with the constitutional amending processes from the CPA to the PC[37]. The technique consisting of enumerating the powers of both the national government and the state governments in schedules annexed to the constitutions has been constantly used. The provisions on referendums and the amendment formulas hardly differ from one constitution to another. "*Given the enormous conservatism of human societies with regard to institutions, societies do not get to sweep the decks clear in every generation*" writes Francis Fukuyama[38]. It is likely that it will be quite difficult to change or overcome these patterns, as institutional settings, once established, tend to reproduce itself.

2.2. The Transitional Constitution as an amendment of the Interim Constitution

Is the TC, as it contends, a formal offspring of the IC or a new constitutional creation? The question cannot easily be answered. The mere assertion in the preamble and TC 201-1a that the TC is an amendment of the IC is not sufficient to establish this relationship. In legal terms, the TC may be qualified as an amendment of the IC only if the process of its enactment meets the formal requirements set forth by the IC itself.

According to IC 206-1 "*This Constitution shall not be amended unless the proposed amendment is approved by two-thirds of all members of the Southern Sudan Legislative Assembly and only after introduction of the draft amendment at least two months prior to the deliberations*".

Shortly after the referendum of January 9, 2011, the President of South Sudan appointed a "Technical Constitutional Review Commission" in order to make the Interim Constitution fit for secession. It was first composed of some 23 SPLM members and one only opposition member. Under pressure, the President integrated 12 representatives of the opposition parties and later additional representatives of the civil society such as academia. At the final stage the Technical Commission was composed of over 50 members working full time, on four days a week. On May 5, 2011, the draft was presented to the cabinet that endorsed it with only minor changes.

In the absence of official records of the proceedings of the Commission and the Assembly on that matter it is impossible for the authors of this study to ascertain that the two conditions of IC 206-1 were met. We must content ourselves with the following remarks:

There is little doubt that the Technical Constitutional Review Commission was convened and its composition changed without an appropriate legal basis. The Presidential Decree of January 21, 2011 establishing the Commission and the following Decrees providing for changes in its composition may have some support in IC 103-2k, giving the President the power "to appoint ad hoc committees and

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37 CPA Chapter I 3.1.2; Chapter II 2.12.4 – 2.12.11; NIC 160-1; TC 202.

38 Francis Fukuyama, The origins of political order, New York 2011 437.

commissions". But the normative, political and symbolic importance of drafting a constitution commands that the body designed to perform such a noble task be created by law if it is not, like its predecessors, provided for by the constitution itself.

There seems to have been some confusion inside and outside the Assembly during the last days before independence on the issue of the TC. Many contend that the MP's were put under considerable pressure by members of the government, acting or not on behalf of the President. While some media reports asserted that the Assembly had actually rejected the draft, other sources indicate that the vote was 113 v. 42 among the 170 members of the Assembly, the exact phrasing of the question being however unknown. If this be the case, the required qualified majority would have been missed by a one vote margin. It is in addition not clearly established that the draft document was officially sent to the Assembly for deliberation prior to May 9, 2011.

The single most decisive feature that explains why the TC finally was enacted and signed into law is the independence dateline, hypothetically scheduled by the IC on July 9, 2011, a date then rendered mandatory by the clear-cut outcome of the January 9, 2011 referendum. The importance of this event must have outweighed hesitation towards and opposition to the TC as they may have appeared during the six months period that separated the referendum and independence. Politically, this pressure could hardly be resisted.

Legally however, it must be noted, there was no pressure at all. The authors of the IC (and the NIC) had wisely foreseen the possibility that following the vote for secession political circumstances might delay or even block the constitutional amendment process. In that case, IC 208-7 (comp. NIC 226-10) provided that "*this Constitution shall remain in force as the Constitution of a sovereign and independent Southern Sudan, and the parts, chapters, articles, sub-articles and schedules of this Constitution that provide for national institutions, representation, rights and obligations shall be deemed to have been duly repealed* ». The TC, in other words, was no legal necessity. Had it not been enacted, the newly born State of South Sudan would still have had a valid and workable constitution.

Still, once announced, the coming into force of a new constitution on the day of independence could not be avoided or prevented without spoiling the joyous occasion and, indeed, threatening the very legitimacy of the Government of South Sudan. To get out of this trap, the TC had to be enacted and signed into law, potential irregularities notwithstanding.

We have no authority to judge if the end justified the means. It usually does not. One might of course point to the fact that in other countries too, original constitution making happened to jump over occasional procedural obstacles. In 1787, the Founding Fathers of the US Constitution had a clear mandate to revise the Articles of Confederation and no right at all to draft a new constitution. The fathers of the first Swiss Federal Constitution, in the summer of 1848, overcame unanimity rule by an ingenious trick. But in South Sudan, the normative revolution had already taken place with the signature of the CPA in 2005. There was no need therefore to repeat a constitutional *coup de force* in 2011 with the TC.

2.3. From contract to constitution

Constitutions may have a contractual legal nature, being the normative result of an agreement between two or more parties that aspire to become partners. More often however, constitutions are unilateral acts proclaimed by a single *pouvoir constituant* – a body, a person, a party or the people – that manages to impose its will on society as a whole[39]. The example of South Sudan neatly shows that a contractual constitutional setting may give rise to a unilateral constitutional act.

The CPA was a treaty, a peace agreement between two parties that had fought a terrible war for many decades before. They had agreed not only on a ceasefire, but on a scheme of power (chapter II) and wealth sharing (Chapter III) that set the basis for the future institutional and political structure of both parties.

Formally, the NIC still was a treaty, being approved by the National Assembly of the Republic of Sudan as well as by the SPLM National Liberation Council. But one may venture that the will of the former was considerably more important than the will of the latter, that the unilateral element expressed by a parliamentary body that was created by it and that had played the decisive role in the enactment process outweighed the contractual element flowing out of the formal approval by a political party.

The IC's reference to contract is mainly indirect, in so far as its existence and its enactment were the result of the pre-existing CPA and the NIC. IC 53-3 recalls this normative origin, stating that the "*powers of the Government of Southern Sudan emanate from the will of the people of Southern Sudan, the Comprehensive Peace Agreement, this Constitution and the Interim National Constitution* ». Other provisions remind the legal prevalence of the NIC (IC 1-3, 2-1,3-1, 5). But these provisions merely pay lip service to the admittedly higher law. The only contractual element is mentioned in IC 206-2 requiring amendments that affect the CPA to be approved by the signatory parties of the latter. With this sole exception, the IC stands by itself, having been drafted, enacted and signed into law by "autonomous" bodies of South Sudan, without necessity to be ratified by any other party.

As far as the TC is concerned, there is no more reference to any higher law and not even the shadow of a contractual vision. The CPA is briefly mentioned in the preamble as being the basis of the independence referendum. But as a whole, the TC stands alone as the supreme law of the land, confirming and reminding the people and the international community of the freshly won independence[40].

What began as a treaty ended up in a constitution, not without passing through intermediary normative steps that met the characteristics of both bilateral and unilateral constitution making. South Sudan has, in this way, added a new chapter to comparative constitutionalism.

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39 Andreas Auer, Adoption, Ratification, Entry into Force, European Constitutional Law Review 1, 131-135 (2005).

40 For a detailed legal analysis of South Sudan's independence see Jure Vidmar, South Sudan and the international legal framework governing the emergence and delimitation of new states, to be published in 42(3) Texas Journal of International Law (2012).

2.4. Constitutional periods

The short history of the South Sudan Constitutions is marked by a succession of constitutional periods. One may distinguish indeed:

The **Pre-Interim Period** was defined as commencing with the signature of the CPA (Chapeau 1) and lasting six months (Chapter I 2). During that period, the national Constitutional Review Commission was to establish the constitutional and institutional framework for the peace agreement (Chapter I 2.1; 3.1.2; Chapter II 2.12. 4 – 2.12.7)[41]. This period lasted from January 9, 2005 to July 9, 2005.

The **Interim Period** was "*to commence at the end of the Pre-Interim Period and last for six years*" (CPA Chapter I 2.2; comp. NIC 226-4, IC 208-2). At the end of it was to take place the referendum "*for the people of South Sudan to: confirm the unity of Sudan by voting to adopt the system of government established under the peace agreement; or to vote for secession*" (CPA Chapter I 2.5). According to this provision, the independence referendum should therefore have taken place on July 9, 2011. However, IC 11-1 provided that the referendum on self-determination would be held six months before the end of the six-years interim period. The Referendum Act of December 29, 2009 later confirmed the date of January 9, 2011 for the referendum. Whatever the outcome of the referendum would be, the Interim Period was to end on July 9, 2011.

The **Transitional Period** is a creation of the TC, but of a special kind. Several provisions mention it (preamble; 56-2; 58-2; 69-8a; 194). Implicitly TC 201-1 sets the beginning on July 9, 2011. But the end is open, no provision fixing a dateline like the CPA did for the Pre-Interim and the Interim periods. TC 203-7 mandates the President to table the draft constitutional text (approved by the National Constitutional Conference) before the National Legislature for deliberation and adoption, "*at least one year before the end of the Transitional Period*". But that end is nowhere clearly defined. While the mandate of the National Legislature, the President and the State Legislative Assemblies will end on July 8, 2015 (TC 66-2; 100-2, 164-5b), that is four years after independence, TC 201-2 simply provides that the Transitional Constitution "*shall remain in force until the adoption of a permanent constitution*". The omission of a dateline for the Transitional Period could well become a source of considerable constitutional and political difficulties.

At the end of the Transitional Period will or should begin the unlimited reign of the **Permanent Constitution**. The concept seems to appear in Sudanese constitutionalism since 2005, NIC 226-9 holding that the NIC should "*remain in force until a permanent constitution is adopted*".

The reference to a future Permanent Constitution must not lead to the conclusion that all constitutional problems will be solved once and for all. The next constitution of South Sudan will come one day, but it will have to be amended or revised as soon as the circumstances will change, new needs appear or old constraints disappear. To be amended is, for a constitution, a way to prove that is a living instrument and not a dead letter. Art. 28 of the French Declaration of Human Rights of June 24, 1793 proudly proclaimed that „*the people have always the right to review, to amend and to revise their*

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41 CPA Chapter II 2.12.4.2 wrongly speaks of a six weeks period in which the National Constitutional Review Commission should prepare the constitutional framework.

constitution“[42]. Like all men made laws, constitutions are not written in stone. They are drafted, they come to life, they get amended and eventually they are replaced – the very opposite of a permanent phenomenon.

42 See George A. Bermann, The Constitutional Amendment Process, in: Bieber/Widmer (Eds.), The European Constitutional Area, Zurich 1995 291-311.

3. Selected topics

> ***"It is in my view the enduring curse of the study of Africa that we, outsiders, have thought it necessary to seek in that continent confirmation of the theories we employ most readily in the analysis of our own societies"***
>
> ***PATRICK CHABAL, Africa: The Politics of Suffering and Smiling,* London/New York/Pietermaritzburg 2009 16**

Passing through the two hundred and three Articles of the Transitional Constitution we have been immediately confronted with the dilemma of choosing among the many possible comments those that seem the most central and necessary, in view of the general scope of this study as defined in the Terms of Reference. The political choices made by the authors of the TC, and there are many, are beyond our reach and responsibility. What we aim at is to touch upon some constitutional provisions and settings that appear to be **contradictory** by themselves or **conflicting with basic principles** of constitutional engineering. We are however neither entitled nor required to indicate how these contradictions could or should be dealt with, and what these principles would require. Trying to avoid the curse Patrick Chabal is referring to, we dare to note, we occasionally might evaluate, but we are in no position to correct.

3.1. The organs of the National Government

By providing that the organs of the National Government are the Legislature, the Executive and the Judiciary (TC 51) and by reserving to each of these organs a distinct Part (Parts Five to Seven), the Transitional Constitution implicitly recognizes the principle of separation of powers[43]. However, the Public Attorneys and Legal Advisors (TC 135), the Civil Service (TC 138-141), as well as the Independent Institutions and Commissions (TC 137; 142-150), also qualify as organs of the National Government[44] the competencies of which should not overlap with those of the classical three powers: the legislature, executive and judiciary.

3.1.1. The Legislature

The National Legislature is composed of **two Houses**, the National Legislative Assembly and the Council of States (TC 54-1). While the members of the first are elected by the people on the national level (TC 56), those of the second are elected "*through their respective State Assemblies*" (TC 58), the idea being that the two Houses have different constituencies. However, they conduct their business, as a general rule, in **joint sittings** (TC 54-2) chaired by the same speaker, the vote count being separate (TC 54-3).

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43 See also TC 48-1d.

44 Advocacy however is an independent legal profession (TC 136) and as such not a state organ.

It is difficult to see the rationale for establishing a bicameral system when generally the parliamentarian affairs are being conducted in joint sessions. It seems important that each House sits and works separately, in order for both representations to find an adequate expression. Additionally, the vote count and quorum rule are complicated: TC 54-3 implicitly refers to TC 74 and needs to be clarified insofar as it is the votes of the representatives of both Houses of which the majority is to be established, although the quorum is to be applied to each House separately.

With regard to **separate sittings** (TC 54-4) we consider the respective competences set forth in TC 55, 57 and 59 a weak basis for establishing if an issue is with the remit of the National Legislature or of the Council of States. The rules applicable to the two Houses when sitting separately (TC 60) cause additional problems. TC 60a seems to regulate the arguably rare case that a bill falls within the competences of either the first or the second House, but not within the competences of both. For the case that an issue is raised in the National Legislative Assembly and might also fall within the competences of the Council of States TC 60b provides an approach. Here, the National Legislative Assembly passes a bill and after this the "Inter-House Committee" decides if the interests of the states are affected and if they are the bill has to be forwarded to the Council of States. In other words, if a bill falls within the competences of both Houses, and the National Legislative Assembly first discusses the issue, the Council of States is only allowed to decide on it (TC 60d) if the "Inter-House Committee" forwards it to that same body.

For the **Council of States** it is crucial that the "Inter-House Committee" is a reliable and highly credible actor to establish whether a bill affects the interests of states. The Constitution unfortunately does not provide any specifications of how the "Inter-House Committee" shall be composed and appointed. As the interests of the two Houses differ, it could become a source of tension between them. Besides, what would happen if the Council of States raises an issue which could also fall within the competences of the National Legislative Assembly? Should the procedure described in TC 60b apply analogously? In other words, should a standing "Inter-House Committee" decide if the bill introduced by the Council of States falls within the competences of the National Legislative Assembly? Or is the National Legislative Assembly excluded from legislation in this case?

Having established a National Legislature with two Houses, the **exclusive reference to the National Legislative Assembly** in a number of articles is confusing. Why, for example, does TC 87-1 establish that the President shall present a bill for the allocation of resources to the National Legislative Assembly and not to the National Legislature? Authorizing the annual allocation of resources and revenue is according to TC 55-3d - which even explicitly refers to this TC 87 - a competence of the National Legislature and not only of the National Legislative Assembly.[45]

The Transitional Constitution leaves it for the National Elections Law to determine the **number of members** of the National Assembly and of the Council of States (TC 56-1b; 58-1b). Thus, the National Legislature is to decide itself, by a simple law as opposed to a constitutional act, how many members are sitting in its two Houses, fixing their initial composition and changing their composition as it may feel fit. This is hardly compatible with basic requirements of separation of powers. The constitution does not have to provide for every detail of parliamentary rules and regulations. But the

45 See also TC 87-91, 102, 103, 106.

number of representatives of the people and the states must be defined by the constitution and not left to the political majority of the moment.

To leave the determination of the number of members of the Council of States completely to the National Election Law (TC 58-2b) is to leave the question of the **weight of each state** to the National Legislature. Indeed, as legislative acts are passed by a majority vote, this vote directly depends on how many representatives every state can send. The current regulation leaves uncertainties for the states on their legislative power and fosters tensions between states and the national level as well as between the states.

TC 63-1c establishes bankruptcy as a reason to **lose membership** of the National Legislature. This might well give private persons with economic power the possibility to favor the exclusion of a political foe by putting her under high financial pressure. Moreover, bankruptcy does not seem to affect the eligibility for membership which leads to the rather strange situation that a bankrupt person can be elected while an elected MP going bankrupt loses his membership.

TC 89-1 allows members of the National Legislative Assembly to introduce **financial bills** outside the context of the draft general budget deliberations with the consent of the National Council of Ministers. Taking into account that, as it stands, the Constitution does not prohibit members of the National Council of Ministers to be also members of the National Legislative Assembly, this gives the possibility to the Executive to table bills affecting the budget and taxes during the whole year. It will be the task of the National Legislative Assembly to ensure that this instrument is used with restraint and that it does not undermine the general budget provisions.

Moreover, membership in the Council of Ministers combined with membership of the National Legislative Assembly or of the Council of States is incompatible with the basic constitutional principle of separation of powers (TC 48-1d). As a general rule, members of one state organ, including commissions, institutions and civil service, should not be members of another state organ.

According to TC 57d it is for the National Legislative Assembly to "*ratify international treaties, conventions and agreements*", while TC 101d leaves it to the President to "*ratify treaties and international agreements with the approval of the National Legislative Assembly*". The most convincing way to read these two articles is that the National Legislative Assembly has the competence to **approve international agreements** and that the President accordingly has the power to formally **ratify** them. Ratification of international treaties is an executive privilege, but only on the basis of parliamentary approval

3.1.2. The Executive

Elected by the people, the President may stay in office as long as he or she wins the election. The absence of any **term limits** is problematic with regard to the basic democratic requirement of alternation in power.

A candidate for the office of the President shall according to TC 98-a be "a South Sudanese by birth". This will have to be clarified as the definition of citizenship has been left open in TC 45[46].

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46 On South Sudanese nationality see 3.4.

According to TC 101b the President has the function to supervise "*constitutional and executive institutions*". However, it remains unclear what "constitutional institutions" could mean as it is doubtful that the President has the function to supervise all institutions of the state, as all are based on the Constitution in the end. It is also unclear what "executive institutions" would then mean. Moreover, it remains unclear what this "supervision" implies in terms of competences. Separation of powers demands that only institutions of the Executive are under the supervision of the President.

TC 68-3 establishes that "*without prejudice to Article 101 (g) herein, each House shall determine the dates of commencement and closure of its sessions*". TC 101g states that the President shall "*convene, summon, adjourn or prorogue the National Legislature in consultation with the Speaker*". Now "in consultation with the Speaker" does not seem to require a formal agreement of the Speaker. In the end it is the President who has the power to convene, summon, adjourn or prorogue the National Legislature. In other words, the President apparently has the power to decide if and when the National Legislature shall meet or not meet, which threatens the core and essence of the legislative power. This threat is even greater as the President may issue provisional orders as long as the National Legislature is not in session, without any temporal restrictions (TC 86-2). This is not in line with the principle of separation of powers.

TC 78 grants priority to requests of the President for consideration by the National Legislature or either of its Houses. While this seems reasonable at first glance, there remains a risk that this principle of absolute priority may be used to dominate agenda-setting completely.

The Presidential powers to **remove a state Governor** and to **dissolve a state Legislative Assembly** (TC 101r-s), both elected by the people, is highly problematic in terms of both democracy and state autonomy. Even though removal is submitted to the condition of *"a crisis in the state that threatens national security and territorial integrity"* the door is open for abuse because the President would be the only one to decide if and when this condition is fulfilled.

TC 133 gives the President the **power to appoint all Justices and Judges** of the lower courts (Courts of Appeal, High Courts, County Courts), subject only to recommendation of the Judicial Service Commission, whose members he or she also appoints. This gives him a tremendous power to influence the administration of justice.

It is regrettable that the President is not being suspended of His or Her office in case of an **impeachment** (TC 103), as it is difficult to imagine that the President would be able to adequately take care of His or Her duties in such an extraordinary situation. Moreover, TC 103 and 106 do not mention any impeachment procedure against the Vice President, although this possibility is granted by TC 55-3f.

It is crucial to bind the President's power to declare a **state of emergency** to the principle of proportionality with regard to its substantial, geographical, and temporal application (TC 189-1) as well as with regard to presidential prerogatives (TC 190). The proportionality principle has to apply also in the substantial application of the state of emergency powers. The derogations from the provisions of the Constitution stated in TC 190a-d are only possible if and as far as they are absolutely required and suitable to avert the imminent danger, and the goods to protect are at least as important as the ones that are given up (proportionality of a measure with regard to the protected goods).

TC 190a enumerates the provisions from the Bill of Rights, which must not be infringed even during a state of emergency. It is generally accepted that the following rights are part of customary international law and can as binding norms (*jus cogens*) not be derogated from: The right to life, the right to be free from torture and other inhumane or degrading treatment or punishment, the right to be free from slavery or servitude and the right to be free from retroactive application of penal laws.

TC 109-1 provides that "*the National Council of Ministers shall be **the highest executive authority** in the Republic*". However, the President as part of the Executive appoints and removes the Ministers (TC 112-1) and even if the appointment of Ministers needs approval by the National Legislative Assembly (TC 112-2), they can be removed without such an approval by presidential decree. That the President is the highest executive authority in the Republic of South Sudan is not only explicitly prescribed by TC 97-3 but furthermore most convincingly demonstrated by the number and the importance of powers conferred to him by the TC.

The respective powers and responsibilities of the **Council of Ministers** and the **Ministers** with regard to both the President and the National Legislature seem quite confusing. While the President may appoint Ministers subject to approval by the National Legislative Assembly, he can remove them freely from office at any time (TC 112). While in office, Ministers are collectively and individually responsible to both the President and the National Legislative Assembly (TC 115). The latter may pass a vote of no confidence by a qualified minority against a Minister (TC 118), but not against the Council of Ministers. Thus the collective responsibility of the Council of Ministers to the Assembly is not secured by an appropriate instrument.

3.1.3. The Judiciary

TC 122-5d establishes that courts shall recognize and enforce **voluntary reconciliation** agreements between parties. The problem is that according to TC 122-5 this should apply to both civil and criminal cases. In the former case it is in fact a very useful procedure to settle disputes, but in the latter there is a serious problem with this provision. In criminal law there are two kinds of offences: offences requiring an application for prosecution and offences requiring public prosecution; as the names already tell, an agreement "between parties" is impossible in the case of offences requiring public prosecution, whereas deals between the offender and the applicant of an offence requiring an application for prosecution are generally possible. But also in the case where parties can agree not to apply for prosecution of an offence, this deal is not a "voluntary reconciliation agreement" as referred to in TC 122-5d, which basically brings an end to a procedure, but an agreement, not to start a procedure or not wanting it to go on. Overall, a criminal law procedure sometimes needs an application to start and also to keep the procedure going; however, no criminal procedure can be settled between "parties", this can only be made by a court.

The strong position of the President with regard to **appointments of all Justices and Judges** of the country (TC 133), even though somewhat tempered by the necessary recommendations of the Judicial Service Commission or parliamentary approval, puts seriously in danger the independence of the Judiciary, proudly proclaimed in TC 124-1.

TC 124-2 defines the **financial independence** of the Judiciary too narrowly. Indeed, the Constitution should not only guarantee that the Judiciary has "*financial independence in the management*" of the

budget, but generally guarantee its financial resources, in order to assure its independence. The financial resources are an essential factor of the independence of the Judiciary and should in no case be used by any power as a device to impair its capability to competently and independently fulfil its constitutional duties.

Article 124-7 leaves it to the legislator to establish which **immunities** Justices and Judges shall have; in light of the importance of the independence of the Judiciary, it would be vitally important to set the legal framework in the Constitution.

3.1.4. Independent Commissions

The Transitional Constitution creates no less than **sixteen independent commissions** whose chairpersons and members are all appointed by the President, playing a central role in literally all major political, administrative, social and economic problems the state has to deal with.

These are the Judicial Service Commission (TC 132), the Civil Service Commission (TC 140), the Employees Justice Chamber (TC 141), the Anti-Corruption Commission (TC 143), the Human Rights Commission (TC 145), the Public Grievances Chamber (TF 147), the Relief And Rehabilitation Commission (TC 148), the Demobilization, Disarmament and Re-Integration Commission (TC 149), the HIV/AIDS Commission (TC 150), the Local Government Board (TC 166-3), the Land Commission (TC 172), the National Petroleum and Gas Commission (TC 174), the Fiscal and Financial Allocation and Monitoring Commission (TC 181), the National Audit Chamber (TC 186), the National Bureau of Statistics (TC 193), the National Elections Commission (TC 197), not to speak of the Bank of South Sudan (TC 182).

Establishing as many independent commissions in all major fields of the state's activities without clearly defining their functions and powers is problematic for the separation of powers. What are the relationships between these commissions and the relevant Ministries? How do the central powers conferred to them match with the legislative powers of the National Legislature? How to justify the predominant position of the President in the appointment process? To whom are the commissions accountable?

A clarification of the distribution of competences between the independent commissions and the Executive/Legislature is also important for the workability of these institutions. One example: At no place does the Constitution specify the powers of the Ministry of Justice in public prosecution mentioned in TC 135. In consequence, the priority given in TC 144-1 to these powers of the Ministry of Justice can put the whole institution of the Anti-Corruption Commission into question. Generally, the independence of this institution claimed in TC 143-1 is voided if it depends on the Ministry of Justice's powers and actions; hence, its powers to investigate cases of corruption should trump the powers of the Executive if one wants this institution to succeed in performing its duties. In other words, investigation and prosecution of cases of corruption should only be made by the Anti-Corruption Commission and the Judiciary.

3.2. Decentralization

TC 162-1 provides that "*the territory of South Sudan is composed of ten states governed on the basis of decentralization*". However, decentralization is not only a way to divide the national territory into smaller units, but also to delegate political and administrative power.

While the number of states thus enjoys constitutional protection, their identity, territory, names, capital towns and boundaries are left to the Council of States (TC 59g). In light of their importance to the political system as a whole, and whatever type of decentralization/federalism is retained and implemented, it seems necessary to **enumerate explicitly** the ten states in the Constitution itself. Their existence must be constitutionally protected, for any basic change in number or territory of the states affects the Republic as a whole.

Generally, there are **three constitutional systems** to distribute powers between the National and the state level[47]. The constitution may a) enumerate both the powers of the National Government and of the states; b) enumerate all powers of the National Government, the remainder being left to the states; c) enumerate all powers of the states, the remainder being left to the national Government.

While c) is very rarely found in reality (one example being Canada), b) and c) are based on the same idea and have considerable advantages over a), because there are no gaps, all powers not mentioned at one level belong to the "other" level, because there is only one catalogue which has to be interpreted in order to establish which level is competent in a given matter and because if a power is not clearly assigned to one level, there is no need to amend the Constitution.

The preference given to a) by the founders of the Transitional Constitution, in spite of its disadvantages, can easily be explained. South Sudan as a new state entity needs to mention in the Constitution what falls within the powers of the National Government. The states as component units are more or less abstract constructions that do not have a long history either and need their powers also to be enumerated in the new constitution.

Several items in Schedule A name certain issues "National" (e.g. "National Police"), while Schedule B names certain (sometimes the same) issues "state" (e.g. "state Police"). To differentiate issues in a catalogue on power distribution between government levels by saying some are "National" and some are "state" is circular. This would actually be the place to define what is "National" and what "state". An example is "Police": in Schedule A-9 "National Police" are exclusively within the power of the National Government, in Schedule B-2 "state Police" are exclusively within the power of the states; thus, the question on who is competent in the field of police leads to the question of whether the police are "National" or "state", which arguably should exactly be answered by this catalogue.

The National Government is, according to Schedule A-39, not only competent to coordinate all services, but it can also set "minimum national standards" and even "uniform norms" in all fields where it is not, or not exclusively, competent. In light of the fact that the Constitution sets the legal framework and standards for the governance of all levels, this amounts to a disempowerment of the states even in the fields where they are competent. In fact, the "exclusive executive and legislative powers of a state" enumerated in Schedule B are in light of the above far from being "exclusive".

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47 See generally Walter Haller, The Swiss Constitution in a Comparative Context, Zurich 2009 56s.

Accordingly, there are no exclusive powers of the states, all powers of states being concurrent powers. The devolution of powers depends on the will of the National Government. Furthermore, what is the rationale for enumerating 57 items which shall be exclusively dealt by the National Government if there is a 58th item ascribing "*any other function as may be authorized by this Constitution and the law*" to the National level? Such provisions unhinge the whole system of power distribution between the National and the state level.

According to Schedule A-8 the legislative and executive powers with regard to the Judiciary belong exclusively to the National level. This contrasts with the aim to establish a decentralized governance system and its underlying rationales. There is a great danger that people will feel alienated by legal enforcement, which is not locally rooted.

It is surprising that according to Schedule A-55 it is the National Government, not the states, that is competent to decide on the names, capital towns and boundaries of the states; it would seem natural in a decentralized democratic state that these would belong to the powers of states. Even more problematic is the provision TC 162-3 on the alteration of state boundaries: it only demands a resolution of the Council of States and does not require the approval of the affected state through its representatives or a referendum.

To make the appointment of a state government according to TC 165-2 dependent on a consultation with the National President is problematic. The responsibility for the state government lies with the state Governor; hence, it is a state and not a federal matter and thus a matter of the elected state Governor and not of the National President.

Schedule A-17 "National Natural Resources" stands vis-à-vis Schedule B-7 "state Natural Resources"; however, according to TC 171-4 "rights over all subterranean and other natural resources throughout South Sudan, including petroleum and gas resources and solid minerals, shall belong to the National Government" which means that there are no "state Natural Resources" and thus also the word "National" in "National Natural Resources" is rather redundant.

Some of the items listed in the Schedules A to E are overlapping[48]. Some leave questions as to the exact power distribution open: e.g. how does Schedule B-4 "[s]tate information, publications and mass media" relate to Schedule C-13 "Information, Publications, Media and Broadcasting"? Does Schedule B-4 establish a *lex specialis* to Schedule C-13? Again, Schedule C-10 and Schedule A-14 both list "river transport" and are mutually exclusive - how should the competences be distributed in this field?

The regulation of Schedule E "Resolution of Conflicts in Respect of Concurrent Powers" clearly has a centralizing effect.

TC 166-2 gives the National Government the power to set up an "initial" **local government** system. Taking the introductory formula of TC 166-1 seriously would mean that the National Government could establish such an initial local government system only as long as the states have not enacted such laws; in fact, according to TC 166-1 it is the states that are competent in this field. However, TC 166-2 should arguably be read as a transitional provision which prevails over TC 166-1 during the

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48 E.g. Schedule A-14/A-16/A-29. It is also questionable if Schedule A-5 was not included in Schedule A-49, and if Schedule A-25 was not already included in Schedule A-3. Schedule B-12 lists prisons although they are already mentioned in Schedule B-2. Furthermore, how does Schedule B-38 relate to Schedule A-10?

transitional period until the National Government has provided such a local government system, but not later than until the transitional period ends.

TC 167-1 provides that "*the institution, status and role of Traditional Authority, according to customary law, are recognised under this Constitution*". This recognition has a very **high legal and symbolic value**, as it recognizes openly the necessity of a peaceful coexistence between state and Traditional Authorities on the local and state levels. But many local chiefs complain that they have been stripped of all essential powers and are no longer respected within their communities. To give the coexistence of state and traditional authorities a real meaning in full recognition of human rights remains one of the many challenges the Republic of South Sudan has to face in the near future.

TC 168-2 introduces the establishment of "Councils for Traditional Authority" but leaves their composition, functions and competences to the National and states legislatures.

3.3. Human Rights and International Law

The reference to the "**sanctity**" of rights and freedoms in TC 10 " is misleading. Rights and freedoms are definitely essential, as they must be obeyed by every single state authority in the exercise of its constitutional, legislative, administrative and judicial powers. But they are not sacrosanct as they generally can and sometimes must be restricted. The essential dialectics between the constitutional guarantee of human rights, the constitutionally permissible restrictions and the constitutionally prohibited violations of these rights is not addressed in the TC.

Nor does the TC make any reference to international or regional human rights conventions, which have come to play a decisive role by strengthening the national courts in their difficult task to protect the individual against abuse of power by the state. The **African Charter on Human and Peoples' Rights** was adopted by the Organization of African States in 1981 and entered into force on October 21, 1986. It differs from other conventions on human rights in a number of respects. First, the African Charter proclaims not only rights but also duties. Second, it codifies individual as well as peoples' rights. Third, in addition to guaranteeing civil and political rights, it protects economic, social and cultural rights. It reflects the influence of UN human rights instruments and African traditions and virtues such as specific community and family values[49].

TC 9-4 and 10 both regulate the upholding of the Bill of Rights by courts and the monitoring of its application by the Human Rights Commission; however, TC 10 seems to do it more precisely and should thus replace TC 9-4.

TC 6-1 holds in a very progressive way that "*all indigenous **languages** of South Sudan are national languages and shall be respected, developed and promoted*". TC 6-2 establishes English as "the official working language". The second part of TC 6-2 contrasts however with TC 6-1 when it establishes English not only as "a", "an important", or "the main", but "the language of instruction at all levels of education". Respecting, developing, and promoting indigenous languages would seem to

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49 Mbaye, Introduction to the African Charter on Human and Peoples' Rights, in: International Commission of Jurists, Human and Peoples' Rights in Africa and the African Charter 19 (1985) 26; Thomas Buergenthal and Daniel Thürer, Menschenrechte – Ideale, Instrumente, Institutionen, Zürich/Baden-Baden 2010 319 ff.

require some representation in education, also as a language of instruction. Furthermore, completely omitting **Arabic as the most widely spoken language** and as the *lingua franca* between tribes seems highly problematic.

TC 16-4a provides a twenty-five per cent **quota for women** in legislative and executive organs. But which institutions should count as such organs? Generally, commissions and committees of the executive and the legislative would seem reasonable to subsume under this expression (see TC 56-2c, 58-2b, 108-3, 138-2, 142-3, 151 to 161). TC 142-3 seems to support this view as it prescribes this quota explicitly also for institutions and commissions which are independent and thus not "legislative" or "executive". TC 139-1i is cautious with regard to "ordinary" administrative staff in general and seems not to demand a strict twenty-five per cent quota for women. What remains unclear however is if this quota should apply also to e.g. personnel of the armed forces, the law enforcement and security agencies (TC 151 to 161).

TC 19 on **fair trial** seems to be restricted to civil and criminal procedures. However, no convincing reasons can be found to justify the non-application of the right to fair trial also to administrative procedures.

If TC 28-1 is to be taken seriously, the expropriation of **property** does not only demand "consideration for prompt and fair compensation" as stated in TC 28-2, but effective prompt and fair compensation.

The exception clause of TC 32 guaranteeing the right of access to information "*except where the release of such information is likely to prejudice public security or the right to privacy of any other person*" should not become the rule, but stay an exception. Therefore, the interest of the public to have access to information is to be weighed very highly in balancing with public security and the right to privacy of a person.

3.4. Democracy

One of the major issues the Transitional Constitution has left open is **citizenship**. The right to enjoy South Sudanese citizenship and nationality is according to TC 45-1 dependent on the fact that a person was "*born to a South Sudanese mother or father*". The only definition of who could qualify as a South Sudanese citizen is provided by the IC, specifically IC 9-3, which refers to the right to participate in the independence referendum. According to this provision, a Southern Sudanese is:

> *(a) any person whose either parent or grandparent is or was a member of any of the indigenous communities existing in Southern Sudan before or on January 1, 1956; or whose ancestry can be traced through agnatic or male line to any one of the ethnic communities of Southern Sudan; or*
>
> *(b) any person who has been permanently residing or whose mother and/or father or any grandparent have been permanently residing in Southern Sudan as of January 1, 1956.*[50]

[50] See also Article 25 of the Referendum Act 2009.

Now how should one interpret the fact that the drafters of the TC have not reproduced this definition nor referred to IC 9-3? Was the omission deliberate or accidental? In legal terms, IC 9-3 is no longer valid by itself, as the TC has replaced the IC.

This particular omission is more dramatic than it may seem. If the Constitution does not in a satisfactory way define nationality, then there is legally speaking no “people of South Sudan”. The existence of a “people” is a well-known and classic prerequisite of statehood. The Referendum Act 2009 explicitly mentions nationality as being one of the post-referendum substantive issues which the Parties to the CPA should have settled through negotiations before independence (Article 67-3a). Now that the CPA has expired it will be all the more difficult to settle the nationality issue between Sudan and South Sudan.

Matters approved through a **referendum** shall according to TC 195-3 "*have authority above any legislation*". This leaves some questions open especially with regard to its relation to the Constitution:

- Is the object of a referendum a “law” that can be directly applied, or just a very general principle which would have to be "translated" into a legal provision?
- How do referendum norms and principles fit into the Constitution? Are they amending it directly? Can any constitutional provision, even human rights, be changed and amended by referendum?

TC 195-3 provides that regulations approved by a referendum "*shall not be annulled save by another referendum*". As long as the place of referendum norms within the hierarchy of norms is not determined, this rule can lead to legal uncertainties troubling the rule of law.

There is no constitutional provision on the **timing of elections** for the different institutions. Shall the elections of the President and of the National Legislative Assembly take place at the same date? How to coordinate elections on the national and on the state level?

4. The road map towards the Constitution of South Sudan

> ***"The Constitution is not simply some kind of statutory codification of an acceptable and legitimate past (…) It constitutes a decisive break to a constitutionally protected culture of openness and democracy and universal human rights for all ages, classes and colours (…) It is premised on a legal culture of accountability and transparency"***
>
> ***THE CONSTITUTIONAL COURT OF SOUTH AFRICA, Shaballala and Others v. Attorney General of the Transvaal and Another, 1996 South Africa 725 (C.C.)***

4.1. The four stages

Chapter II of Part Sixteen of the Transitional Constitution deals with the "Permanent Constitution Process", which entails four stages:

Stage 1 is the **National Constitutional Review Commission** (TC 202). It is to be appointed by the President. Political parties, civil society and other stakeholders must be consulted. Due regard must be given to gender, political, social and regional diversity. Members must have technical expertise and experience. The Commission is to collect views and suggestions from all stakeholders; it may consult "other experts"; it must conduct a nation-wide public information programme. The Commission shall adopt the draft constitution and an explanatory report and present it to the President.

Stage 2 is the **National Constitutional Conference** (TC 203). A number of delegates from political parties, civil society, business, trade unions, traditional authorities, academia etc. will be be appointed by the President. The Conference shall deliberate on the draft constitution, approve it by a simple majority and submit it to the President. It will then be dissolved.

Stage 3 is the **National Legislature** (TC 203-7), composed of the National Legislative Assembly and the Council of States (TC 54-1). It shall deliberate and adopt the draft constitution, no qualified majority being required, and present it to the President.

Stage 4 is the **President**, who is to sign (TC 203-8) and put into force the Constitution of South Sudan.

The four stages are strictly sequenced by datelines. Six months after independence, the President must have appointed the Commission (TC 202-1). The Commission must report to the President within one year (TC 202-4) since its establishment[51]. Once appointed and convened, the Constitutional Conference must submit the draft constitution to the President within six months (TC 203-3e). The President must table the draft before the National Legislature at least one year before the end of the Transitional Period (TC 203-7). The National Legislature must adopt the draft within three months (ibid.).

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51 TC 202-10 wrongly speaks of six months.

4.2. The central role of the President

What strikes most in this process is the pivotal and decisive role of the President at each stage. It is the President who appoints the members of the Commission and by doing so decides how many of them will be sitting; it is the President who presents the draft to the Constitutional Conference; it is the President who appoints the delegates to this Conference and by doing so decides how many they are; it is to the President that the Constitutional Conference presents the draft and the explanatory report; it is the President who causes this draft to be tabled before the National Legislature; it is to the President that the National Legislature presents the adopted draft and it is the President who shall assent to and sign the Constitution.

It must furthermore be recalled that the National Legislature has been sitting since July 9, 2011 in a composition that strongly favours the President, who was given the exceptional power the appoint 66 additional members to the Legislative Assembly (TC 94-2b) as well as 33 additional members of the Council of States (TC 58-2b).

The wording of TC 203-8 is by no means innocent, as the "draft constitution" is becoming a "constitution" not by decision of the Review Commission, not by the majority vote of the Constitutional Conference, not even by the vote of the National Legislature, but by only the will of the President, giving his assent to and signing the Constitution.

4.3. A possible but limited inclusiveness

The strong position of the President in the constitution making process can be (ab)used by effectively concentrating all essential decisions relating to procedure and content in the hands of the government. This is what seems to have happened between February and July 2011 with the Transitional Constitution Process. We got the impression that many people, including stakeholders, feel they have been excluded from this process. The result is that the Transitional Constitution seems not to have many supporters in public opinion and neither, apparently, has the Permanent Constitution Process drawn by TC 202/203.

To a certain extent, the sweeping language of TC 202/203 would allow however a different interpretation. Taken literally, TC 202-5 providing that the members of the Constitutional Review Commission are chosen "*in recognition of the need for inclusiveness*", might well lead the President to appoint experts representing a significant range of political parties and civil society, leaving them space and air for free deliberation, chaired by an independent and highly respected person. The delegates to the National Constitutional Conference could be those nominated by their constituencies (TC 203-2), irrespective of their political stand, and their comments on the draft constitution could be seriously taken into account, even though only a simple majority vote is required.

At this point however, the possible openness of the process would come to an end. It seems difficult indeed to instruct the National Legislature, when deliberating the draft, to stick to the priorities retained by the Commission and/or the Conference, without negating its basic representative and legislative functions (TC 55).

4.4. Amendment and Constitution Process

Constitutions are the supreme law of the land if and in so far as they provide for a specific amendment procedure that differs from ordinary legislation. They are, as Justice Marshall put it in Marbury v. Madison (1803), "*unchangeable by ordinary means*"[52]. In other words, the process leading to constitutional amendments must not be the same as the one that governs law making, otherwise the body that commands the latter dominates the former and the constitution is nothing but an ordinary legislative act.

The TC is a formal constitution because it defines an amendment formula requiring introduction of the draft to the National Legislature at least one month prior to deliberation and a two-thirds majority of each House of the National Legislature sitting separately (TC 199).

Yet at the same time, the TC sets forward a process that is supposed to amend the TC and replace it by a new constitution. "*The Commission shall review the Transitional Constitution*", says TC 202-6, making it clear that the Constitution Process is nothing else than an amendment procedure of a special kind.

The problem however is that the two procedures not only differ significantly, but contradict each other. While the ordinary amendment process entails neither a review commission nor a constitutional conference, but requires a qualified majority vote in each House, the new constitution, having gone through these preliminary stages, is to be passed by the National Legislature by a simple majority vote. In other words, the National Legislature can totally revise the TC the same way it enacts ordinary legislative acts, while the slightest amendment to the TC requires a qualified majority.

TC 203-7 contradicts and disqualifies TC 199, changing the whole nature and negating the constitutional value of the TC.

4.5. On pyramids and bottlenecks

Constitution making processes usually start on a rather narrow basis, for instance with a draft written by experts, that is then presented and discussed by a more representative body like a legislature or a constitutional convention and eventually submitted to the *pouvoir constitué*, be it an assembly at a qualified majority[53], or the states in a federalist polity[54] or the people in a constitutional referendum[55]. In other words, open- and inclusiveness grow at each step of the process, just like a pyramid solidly standing on the ground.

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52 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803): „*The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable*".

53 German Grundgesetz 1949 Art. 79-2; comp. TC 199.

54 US Constitution 1787 Art. V.

55 Swiss Constitution 1999 Art. 195.

Not so in Chapter II of Part Sixteen of the Transitional Constitution. The Constitution Process allegedly starts on a quite broad basis, the Constitutional Review Commission being established "*in recognition of the need for inclusiveness, transparency and equitable participation*" (TC 202-5). Stage 2 opens the process even further by designating thirteen constituencies – ranging from political parties to women organizations, people with special needs, traditional leaders, academia, etc. – entitled to nominate their delegates to the National Constitutional Conference (TC 203-1). But stage 3 then seriously constrains the openness, the National Legislature in its actual composition being dominated by the SPLM, not to speak of stage 4 where the President puts an end to any inclusiveness by deciding alone. In other words, open- and inclusiveness, having first been enlarged, are narrowed down at each step of the process, just like a reversed pyramid, or a traditional Chianti wine bottle with a broad belly and a narrow neck.

The difference is not only one of style and convenience but, as the comparison with a pyramid shows, one of solidity and legitimacy. Constitutions that end up being approved by a body representing large sections of political groups and social constituencies have a fairly good chance to be considered by both as legitimate and worth following. On the other end, constitutions that are the product of a small group that happens to be in power will hardly be followed by the many and outlive substantial changes in patterns of power.

Ten years ago, Cass Sunstein recalled that "*deliberative democracies do not respond mechanically to what a majority currently thinks (…) A deliberative democracy requires the exercise of governmental power, and the distribution of benefits and burdens, to be justified not by the fact that a majority is in favor of it but on the basis of reasons that can be seen, by all or almost all citizens, as public-regarding*"[56].

The Permanent Constitution Process as designed by the TC might indeed not give birth to a constitution that will be seen, by all or almost all citizens of South Sudan, as public-regarding.

4.6. The case for a constitutional referendum

In the long history of democracy, the constitutional referendum played a pioneer role in being the first device that gave the people the right to decide upon the validity of a legal norm. It was invented during the American Revolution, when the New England settlers, fighting for independence from Westminster, convened constitutional conventions to draft the first modern constitutions and then decided to put these constitutions before the voters. The constitutional referendum in both of its forms – the referendum *constituant* as the popular vote on a "first constitution" and the referendum *constitué* as the popular vote on subsequent constitutional amendments – then crossed the Atlantic to inspire the French Revolution and subsequently to be solidly anchored in constitutional traditions of France, Switzerland, Ireland, Australia and many more[57].

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56 Cass E. Sunstein, Designing Democracy: What Constitutions Do, Oxford 2001 239

57 Andreas Auer, Le référendum constitutionnel, in: Auer (Ed.), Les origines de la démocratie directe en Suisse, Basle/Frankfurt 1996 79-104.

The constitutional referendum establishes a privileged relationship between the people and the constitution. It makes the former the highest organ of the state, having the exclusive power to enact and to amend its foundational law. It gives the latter an unequalled legitimacy putting it above day-to-day political business and beyond any other accountability than the unaccountable will of the sovereign people. Constitutions that are not only enacted and amended in the name of the people, but by the people in a binding popular referendum undoubtedly have a special value, not in legal, but in symbolic and political terms.

If the constitution making process ends up in a referendum in which the people freely can chose to vote or not to vote, and to vote Yes or No, without having to fear for life, status or liberty, and whose outcome will be binding for all, including the rulers, then the preceding stages of that process, involving other bodies and actors, appear in a totally different light. As the final decision belongs to the people, the positions and opinions of experts, legislators or constitutional assemblies that have their saying in previous stages of the procedure gain weight and power because they are operating as recommendations to the voters who have the final and decisive saying. The constitutional referendum restructures and opens the whole amendment process making it more democratic even for non-democratic actors.

South Sudan owes its independence and internationally recognised existence as a sovereign state to the people who voted massively in favour of secession in the historic January 9, 2011 referendum. No other body or person – not the President, not the Government, not the Legislature, not the SPLM, not the SPLA and not the international or regional community – could have taken the same decision with the same landslide effect. Without the people's will there would be no independent South Sudan.

Having created the decisive condition of statehood, and indeed the state of South Sudan itself, the people of South Sudan can claim the inalienable right to vote upon the constitution of that state. That the Interim and Transitional Constitutions were not submitted to the people but passed by the legislature can be explained and justified by their very nature as provisional instruments of government. But the Constitution of South Sudan can have no other father and no other mother than the electoral body in its sovereign capacity.

In its actual wording, the TC does not provide for a referendum on the Constitution of South Sudan. There are three ways to make it happen nevertheless:

One way would be to amend TC 203 by adding a provision on a mandatory constitutional referendum following the vote of the draft constitution by the National Legislature. Such an amendment would need to gather a two-thirds majority of each House of the National Legislature sitting separately (TC 199). It would address a clear message to all those who might be unhappy with the process, and to the people, that the Government of South Sudan is now willing and determined to "bring the people in" by shifting the responsibility for the future constitutional setting of the country from the Legislature and the President to the voters. At the same time, TC 199 would need to be amended in order to make sure that future amendments of the Constitution be also submitted to a referendum.

Another way would be for the Legislature or the President to rely directly on the referendum provision of TC 195 by referring the Constitution of South Sudan as approved by the National Legislature to a referendum. Such decision would need either a resolution passed by more than half of all members of the Legislature or a Presidential Decree. Formal amendment of the TC could thus be avoided. But the

message to the public opinion and the voters would be less clear, as the holding of a referendum on the Constitution of South Sudan would be the mere result of the will of a majority of MP's or of the President, and not imposed by a mandatory constitutional provision. In terms of legitimacy the former solution is outweighs the latter. TC 195-3 would guarantee that all future amendments of the Constitution be submitted to a referendum.

Finally a ratification referendum could be provided for by the Permanent Constitution itself, even though this would amount to a violation of TC 203. But this provision of course cannot limit the sovereignty of the framers of the future Constitution.

One could object that in South Sudan, the referendum is a rather inappropriate device, as the people, having no experience in constitutional democracy, would vote not according to their convictions but to tribal considerations. This is a serious contention that cannot be denied other than through experience. As long as the people do not have the opportunity to vote there is no way to prove along what lines the voters divide will run. But to deny the right to vote in referendums because tribe could be one of the cleavages in voter behavior would mean to throw out the baby with the bath, fearing and rejecting democracy because the answer of the people might not be the one that is expected.

By introducing the referendum device into the Constitution Process, be it through ad hoc decision or through formal amendment of the TC, the Government and the Parliament of South Sudan could erase most if not all criticisms that have been addressed, in this report and elsewhere, to the TC as a whole and to the Permanent Constitution Process in particular. The gain in legitimacy for both the actual Government and the future Constitution would be enormous.

Conclusion

> ***"Paradoxically, the possibility of disagreement about the Constitution's meaning preserves constitutional authority, because it enables persons of very different convictions to view the Constitution as expressing their most fundamental commitments and to regard the Constitution as a foundational law"***
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> ***ROBERT. C. POST and REVA B. SIEGEL, Democratic Constitutionalism, in: Balkin & Siegel (Eds.), The Constitution in 2020, Oxford 2009 27***

The careful attention given to their basic law by both Government and people of South Sudan illustrates quite convincingly the central role played by constitution making in the process of nation building. Since the Comprehensive Peace Agreement of 2005, constitutional debates and documents have shaped the process and paved the way for South Sudan from autonomy within the former Sudan to the decisive independence referendum of January 9, 2001 and finally to statehood and sovereignty six months later.

The Transitional Constitution was conceived and drafted before formal independence and has now become the first constitutional act of the Republic of South Sudan. As its name indicates, it is not meant to last but to serve as a normative link between what was yesterday and what will be tomorrow. Its framers were under pressure and operating within severe time constraints, determined as they were to finalize the document and to get it passed through the different stages of the self-defined process before I-Day July 9, 2011. They were successful, as the Transitional Constitution was enacted and signed into law in time.

But as a result both process and content got somewhat shaken and have come to suffer partly from lack of procedural openness, some formal inconsistencies and other substantive inadequacies. There is a tendency in the Transitional Constitution to accentuate both horizontal and vertical power concentration trends. Among the organs of the National Government the President has been given an dominant position that has no institutional counterweight. Between the National Government and the states there is strong imbalance in favour of the former. The local government is dependent on both the National Government and the states, especially in terms of financial resources. The Traditional Authorities are formally recognized but marginalized and stripped of power. Among the losers are the MPs, the states, the chiefs and the people – an alliance of the unfortunate that cannot be ignored in the long term.

It was the aim of this report to point out these negative aspects in so far as they were not reproduced from precedent constitutional arrangements and practices, the idea being to avoid their repetition in the forthcoming constitutional debates. For one thing seems quite difficult to deny: the Transitional Constitution does not seem to enjoy great popularity among the people or amongst broad sectors of the political, social and economic stakeholders of the country. There is a problem of legitimacy that risks in time to undermine the laudable efforts and heavy sacrifices that have been made to create a stable and democratic state entity in a region of the African continent where failed states and authoritarian regimes are all too present.

If we were to summarize our arguments as a single piece of advice to those who will soon engage in the process of drafting the Constitution of South Sudan it would be to take the experience of the Transitional Constitution as a useful lesson for opening the process, balancing the powers and bringing in the people.

* * *

Aarau, 31 October 2011

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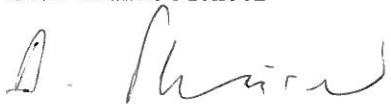

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