


RESEARCH ARTICLE

Foreign Influence and the Legitimacy of Constitution Building in South Sudan

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Abstract

Many countries write their constitutions with some form of international involvement. Internationalized constitutional assistance has been made easier by technology as well as trade and political exigencies. The question, therefore, is: How does this inevitable foreign influence impact constitutional legitimacy? This article discusses this question and asserts that foreign influence interacts with three approaches of constitutional design to shape constitutional legitimacy: (a) popular participation, (b) elites' contracts, and (c) transnational constitutional implants. Such a transactional relationship is referred to as the “three-stone legitimacy theory”, which implicates both the internal and the external legitimacy of a constitution. The former means citizens' acceptance that a constitution meets their aspirations, while the latter refers to the international community's satisfaction with the resulting constitution as guaranteeing the universal democratic ethos. The article ends with a proposition conceptualized as a “blueprint” for a democratic constitutional legitimacy in South Sudan.

Keywords: Foreign influence; constitution building; three-stone theory; constitutional borrowing; popular participation; elite capture; South Sudan

Introduction

The Republic of South Sudan is the world's newest country, becoming independent in 2011 after decades of conflict which many scholars attribute to the absence of constitutionalism.¹ The new country unexpectedly descended into internal civil war, which is blamed on a longstanding toxic power struggle and unhealed grievances, mistrust and governance failures in the Sudan People's Liberation Movement (SPLM).² The conflict was halted with a peace deal in 2015, which collapsed in 2016 and was revitalized in 2018 through the mediation of the regional bloc, the Inter-Governmental Authority on Development (IGAD), with assistance from the international

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1 See generally MK Mbondenyi and T Ojienda *Constitutionalism and Democratic Governance in Africa: Contemporary Perspectives from Sub-Saharan Africa* (2013, Pretoria University Law Press) at 1. See also HF Johnson *South Sudan: The Untold Story from Independence to Civil War* (2016, LB Tauris & Co) at 1, which discusses the link between constitutionalism and South Sudan's democratic backsliding into chaos, civil war and lawlessness.

2 See generally A de Waal “When kleptocracy becomes insolvent: Brute causes of the civil war in South Sudan” (2014) 113 *African Affairs* 347; DH Johnson “The political crisis in South Sudan” (2014) 53/3 *African Studies Review* 167. See also JG Akech “Prosecution or reconciliation? Perspectives on the Commission for Truth, Reconciliation and Healing and the independent Hybrid Court for South Sudan” (LLM dissertation, University of Pretoria, December 2018) at 9.

community.³ It is evident that the conflict has its roots in the absence of a consensual governance framework (a constitution), aggravated by ethnic militancy and weak institutions. This is why the grand aim of the peace agreement is to build a durable peace anchored in legislative and institutional reforms to give birth to a constitutional democracy.⁴

The implementation of critical aspects of the peace agreement has been inexcusably sluggish, with only the constitution-building legislation (Constitution-Making Process Act 2022) enacted.⁵ The slow pace of implementation led to the parties to the agreement deciding to extend its transition period for a further 24 months from February 2023,⁶ which, the parties contend, would permit the implementation of pending activities, including the adoption of a new constitution and holding of elections by 2024. However, scholars have raised concerns that factors which would enable the realization of a legitimate constitution hardly exist,⁷ including the fact that several armed groups have yet to join the peace process. This has led to an appeal for constitution building to be delinked from the periodized timelines stipulated under the peace agreement.⁸

In the meantime, the international actors involved in mediating the peace agreement remain influential, including in leading certain key institutions which are instructive in the constitutional reform process.⁹ In addition, the peace agreement commands the involvement of international actors to provide guidance during the constitutional design process. This phenomenon – a situation where foreign influence is part of the constitution building of a sovereign land – is not new. Indeed, most post-conflict countries hardly ever write their constitutions without some sort of external support or the participation of foreign actors.¹⁰ The legacy of foreign influence in post-conflict constitution building tends to be justified on normative and socio-political grounds. The former suggests that foreign influence promotes the entrenchment of international normative standards such as human rights, the rule of law, and good governance.¹¹ The latter aims at pacifying and stabilizing post-conflict situations, which facilitates national elites to agree to a political transition, including adopting a new constitution that breaks from the – usually autocratic – past to a constitutional democracy. Foreign actors also influence constitution building to establish, strengthen and maintain a strategic relationship with national political elites. In sum, foreign influence is predicated on a claim that states emerging out of conflict would have been torn or fractured, and their restoration needs international constitutional assistance.¹²

3 Referred to as the Revitalised Agreement on the Resolution of Conflict in South Sudan 2018 (Revitalised Peace Agreement).

4 *Id.*, cap 6.

5 See generally JG Akech “Out of time but full of enthusiasm? Assessing progress and hurdles in South Sudan’s constitution-making process” (April 2022), available at: <<https://constitutionnet.org/news/out-time-full-enthusiasm-assessing-progress-and-hurdles-south-sudans-constitution-making>> (last accessed 8 October 2022).

6 JG Akech, MG Mading and PG Geng “Amending the South Sudan’s Revitalized Peace Agreement: The implications of the extension and its roadmap” (August 2022) at 1, available at: <https://suddinstitute.org/assets/Publications/62f597fd5f1f6_AmendingTheSouthSudansRevitalizedPeaceAgreement_Full.pdf> (last accessed 7 October 2022).

7 Some of the factors mentioned by scholars include the absence of national reconciliation, the return and resettlement of internally displaced persons and refugees, the acute humanitarian crisis and economic distress. For more details on this, see generally AT Mayai, M LeRiche and W Underwood “Democratic elections in South Sudan” (March 2022), available at: <https://suddinstitute.org/assets/Publications/621decdb2b89e_DemocraticElectionsInSouthSudan_Full.pdf> (last accessed 6 October 2022).

8 JG Akech “Constitution-making is not a race against time” (May 2022) at 1, available at: <https://suddinstitute.org/assets/Publications/6296e5bf8e86b_ConstitutionmakingIsNotARaceAgainstTime_Full.pdf> (last accessed 6 October 2022).

9 See Revitalised Peace Agreement, paras 1.18.4 and 7.2, for evidence that foreign nationals chair both the National Constitutional Amendment Committee and the Revitalised Joint Monitoring and Evaluation Commission (RJMEC).

10 See generally CM Fombad “Constitution-building in Africa: The never-ending story of the making, unmaking and remaking of constitutions” (2014) 13 *African and Asian Studies* 429.

11 R Wolfrum “The UN experience in modern intervention” in M Keren and D Sylvan (eds) *Interventional Intervention: Sovereignty versus Responsibility* (2002, Routledge) 95 at 96.

12 See generally S Wassara “South Sudan: State sovereignty challenged at infancy” (2015) 9 *Journal of Eastern African Studies* 634.

The question, therefore, is: How does foreign influence interact with constitution-building processes to shape constitutional legitimacy? The term constitution building is used in this article to refer to processes of negotiating, drafting and implementing constitutions and implies building new structures or re-developing existing ones, enhancing or adding value to governance and the political system.¹³ On the other hand, constitution making refers to the “drafting and promulgation of a constitutional text”¹⁴ or a “process of drafting [a] new constitution or reforming [an] existing one”.¹⁵ The rest of the article proceeds as follows: the second section discusses theoretical perspectives on foreign influence and constitution building. A new theoretical framework for analysing constitutional legitimacy is then introduced, and foreign actors, referred to as the “critical few” engaged in constitution building in South Sudan, are discussed; their historical role in influencing constitutionalism is then analysed. The following section examines evidence of the process and outcomes in terms of mechanisms for enhancing constitutional legitimacy, before proposing a “blueprint” for ensuring democratic constitutional legitimacy.

Theories of constitution building

While views about constitution building in the literature differ, this section examines three theories of constitution building, namely the elites’ role, public participation and constitutional borrowings.

Elite-controlled constitution building

The first perspective argues that because constitution building is a complex and technical process, it is best driven by national elites with support from international experts.¹⁶ The proponents of the elite-driven approach suggest that elites’ bargains are the basis upon which successful constitutions can be built and that it is such elite initiatives which acquire legitimacy over time. In other words, the political elites’ consensus on the nature of a state is a precedent to the adoption of a constitution. In support of this view, Arato observes that although lawyers often draft constitutional texts, they do so for the political elites who hire them.¹⁷ This suggests that political elites are among the main players in any constitutional design process.¹⁸ I argue that although, indeed, an elite consensus is essential for normality to prevail in a post-conflict context, an elite’s exclusive role in a constitution-building process poses a risk of them capturing it. The 2011 Transitional Constitution of the

13 See International IDEA “Constitution building after conflict: External support to a sovereign process” (May 2011) at 11, available at: <<http://www.constitutionnet.org/sites/default/files/2017-06/cb-after-conflict.pdf>> (last accessed 7 October 2022).

14 Id.

15 Guidance note of the Secretary-General on United Nations constitutional assistance, UN doc September 2020 at 1, available at: <https://peacemaker.un.org/sites/peacemaker.un.org/files/SG%20Guidance%20Note%20on%20Constitutional%20Assistance_1.pdf> (last accessed 25 August 2023).

16 See generally C Murray “Political elites and the people: Kenya’s decade long constitution-making process” in G Negretto (ed) *Redrafting Constitutions in Democratic Regimes: Theoretical and Comparative Perspectives* (2020, Cambridge University Press), discussing how the elites’ consensus in Kenya was instrumental in the constitution-building process; G Negretto “Constitution-making and liberal democracy: The role of citizens and representative elites” (2020) 18/1 *International Journal of Constitutional Law* 206 at 207, arguing that political elites’ agreements eventually transform into normative liberal values in a constitution. Such political consensus reinforces civic education, thus expanding consensus among the people. See generally C Bell “Introduction. Bargaining on constitutions: Political settlements and constitutional state-building” (2017) 6/1 *Global Constitutionalism* 32, discussing how negotiated settlements between political elites can be used to broaden and entrench constitutional normativity.

17 A Arato “Forms of constitution-making and theories of democracy” (1996) 17 *Cardozo Law Review* 191.

18 See generally M Steinitz “Internationalized pro bono and a new global role for lawyers in the 21st century: Lessons from nation-building in Southern Sudan” (2009) 12/1 *Yale Human Rights and Development Journal* 240, discussing legal pro bono services of international lawyers who participated in the Southern Sudan constitution-making processes.

Republic of South Sudan (the John Luk Constitution) is an example of an elite contract with no meaningful citizen voices.¹⁹ This self-dealing constitutional experiment (where the elite put their own interests ahead of those of the supposed representatives) raises fears that “South Sudanese political elites may fail to deliver a democratic ‘permanent’ constitution”, unless the people are involved.²⁰

Participatory constitution building

The second viewpoint offers a counter-argument to the first. It says that constitution building is a sovereign process that should be adopted through popular participation of the people. The main proponents of participatory approaches include Bannon, Ginsburg, Saati, Prempeh, Hart and Moehler, who extensively discuss the strengths and weaknesses of participatory constitution building.²¹ They contend that public “participation and deliberation are premium methods”²² and that post-conflict constitution building “cannot achieve its aims in the absence of extensive public participation”.²³

Proponents of this viewpoint emphasize an inclusive and participatory constitution-building process because, they argue, “how constitutions are made after conflict, particularly following civil conflict or authoritarian rule, impacts the resulting state and its transition to democracy”.²⁴ Indeed, this view affirms the phrase “we the people” found in almost all constitutions as a touchstone to the people being sovereign. This means constitution building should be an exclusive realm of relevant domestic actors, at whose invitation international actors may provide guidance, assistance and advice. Thus exclusion of the people from the constitution-building process may “dilute [the] constitution’s democratic nature as well as its legitimacy in the eyes of the nation”²⁵ and renders it incapable of “penetrating the society to effectively regulate social relationships” or the social

19 Luk was the Minister for Legal Affairs and Constitutional Development and a leading member of the SPLM who led the drafting of the Transitional Constitution in 2011.

20 M Deng “Constitutional transformations: Failure and opportunity in post-independence South Sudan” (PhD thesis, University of Queensland, 29 March 2021) at 5.

21 A Bannon “Designing a constitution-drafting process: Lessons from Kenya” (2007) 116/8 *Yale Law Journal* 1824; T Ginsburg, Z Elkins and J Blount “Does the process of constitution-making matter?” (2009) 5 *Annual Review of Law and Social Science* 201; A Saati “Participation – to unveil a myth” in T Abbiate, M Böckenförde and V Federico (eds) *Public Participation in African Constitutionalism* (2018, Routledge) 14, discussing the meaning and scope of public participation in constitution building; A Saati “Participatory constitution-making as a transnational legal norm: Why does it ‘stick’ in some contexts and not in others?” in G Shaffer (ed) *Constitution-Making and Transnational Legal Order* (2019, Cambridge University Press) 283, demystifying participatory constitution building in post-conflict states and arguing that it is indeed a “good thing” to allow the public to participate in constitutional design; A Saati “Public participation in constitution building processes: What does it mean?” (paper presented at the IPSA World Congress, Madrid, 8 July 2012), available at: <<https://www.diva-portal.org/smash/get/diva2:759743/fulltext01.pdf>> (last accessed 25 August 2023); K Prempeh “Does participation help to foster constitutionalism in Africa?” in T Abbiate, M Böckenförde and V Federico (eds) *Public Participation in African Constitutionalism* (2018, Routledge) 298; V Hart “Democratic constitution making” (2003) *United States Institute of Peace* 1, available at: <<https://www.usip.org/publications/2003/07/democratic-constitution-making>> (last accessed 25 August 2023); D Moehler “Prospects and pitfalls of participation” in D Moehler (ed) *Distrusting Democrats: Outcomes of Participatory Constitution Making* (2008, University of Michigan Press) 12, discussing possible outcomes of people’s participation in constitutional design, but arguing that more participation does not necessarily lead to entrenched democracy.

22 Ginsburg, Elkins and Blount “Does the process”, above at note 21 at 5.4, where they discuss deliberation as one of the phases of participatory constitution building. See also Bannon “Designing”, above at note 21 at 1827.

23 Y Ghai “The role of constituent assemblies in constitution making” (2006) at 3, available at: <http://constitutionnet.org/sites/default/files/the_role_of_constituent_assemblies_-_final_yg_-_200606.pdf> (last accessed 18 August 2021).

24 K Samuels “Post-conflict peace-building and constitution-making” (2006) 6 *Chinese Journal of International Law* 662 at 667.

25 P Dann and Z Al-Ali “The internationalized pouvoir constituent: Constitution-making under external influence in Iraq, Sudan and East Timor” (2006) 10 *Max Planck Yearbook of United Nations Law* 423 at 449.

contract.²⁶ Participatory constitution building legitimizes a constitution, “generates a constituent process and leads to the recognition of local sociopolitical practices in the constitution”.²⁷ In other words, popular participation could “reduce demands for [constitutional] renegotiation, increases legitimacy and strengthens people’s resolve to defend the constitution from sabotage”.²⁸ Thus, “a nationally led, participatory, and inclusive process” could set a strong basis for democracy and the rule of law to thrive.²⁹

According to Saati, participation is meaningful if it involves people in both agenda setting and in critical decisions that influence constitutional design processes and outcomes.³⁰ That notwithstanding, challenges to popular participation abound, including high rates of illiteracy, insecurity and intercommunal violence, as well as a shrinking civic space in South Sudan. The absence of peace between and among the Nuer and Dinka (Jiëng) ethnic groups, sporadic violence inflamed by economic meltdown, acute humanitarian crises and political polarization are some of the impediments to popular participation in the constitution-building process. This calls for the prioritization of initiatives for local peacebuilding and accountability.

Constitutional transplant as a constitution-building approach

The third and last theory is a constitutional design by transnational transplant or borrowing. This perspective contends that constitution building involves inevitable transnational constitutional transplants from jurisdictions believed to offer better options. The terms constitutional borrowing or transplant are used interchangeably to refer to the adoption of foreign constitutional substantive or structural frameworks – in part or in whole – during the design of a domestic constitution. This transfer is facilitated by “super-structural” forces (technology, demography and economy), learning, competition or coercion.³¹ Mimicking a foreign constitutional model is also motivated by economic and political reasons,³² or strategic alignment with “countries with similar legal origins, religion, common coloniser or aid donor”.³³ At times, it takes the form of wholesale copying of pre-existing foreign constitutional ideas, cultures and structural arrangements. Such a practice risks blind adoption of others’ bad “literature of governance”;³⁴ escaping such a risk calls for foreign actors to “refrain from being prescriptive and imposing models or norms with no local

26 P Ocheje “Exploring the legal dimensions of political legitimacy: A rights approach to governance in Africa” in K Quashigah and C Okafor (eds) *Legitimate Governance in Africa: International and Domestic Legal Perspectives* (1999, Kluwer Law International) 109 at 168.

27 J Wallis “The role of a constituent process in state building” in J Wallis (ed) *Constitution Making during State Building* (2014, Cambridge University Press) 315 at 342.

28 Y Ghai “Civil society, participation and the making of Kenya’s constitution” in D Landau and H Lerner (eds) *Comparative Constitution Making* (2019, Edward Elgar Publishing) 212 at 231.

29 M Brandt “Constitutional assistance in post-conflict countries. The UN experience: Cambodia, East Timor and Afghanistan” (2005) at 1, available at: <<https://www.agora-parl.org/sites/default/files/agora-documents/Constitutional%20Assistance%20in%20Post-Conflict%20Countries.pdf>> (last accessed 8 October 2022).

30 See generally Saati “Public participation”, above at note 21.

31 R Dixon and E Posner “The limits of constitutional convergence” (2011) 2 *Chicago Journal of International Law* 402.

32 BA Simmons, F Dobbin, and G Garrett “Introduction: The international diffusion of liberalism” (2006) 60 *International Organization* 782.

33 B Goderis and M Versteeg “Transnational constitutionalism: A conceptual framework” in D Galligan and M Versteeg (eds) *Social and Political Foundations of Constitutions* (2013, Cambridge University Press) 103 at 104. See also H Adelman “Theory of humanitarian intervention” in M Keren and D Sylvan (eds) *International Intervention: Sovereignty versus Responsibility* (2006, Routledge) 121, which discusses how the South African apartheid government may have absorbed foreign constitutional ideas to elevate its standing in the eyes of the international community; D Jinks and R Goodman “How to influence states: Socialisation and international human rights law” (2004) 54 *Duke Law Journal* 1.

34 Remark by an elder, Dr Aldo Ajou Deng Akuei, during a roundtable radio talk show entitled “Taking stock of the last 10 years of South Sudan’s independence” (10 July 2021, Radio Miraya).

contextualisation”.³⁵ This is because external imposition risks ousting local voices and may diminish local constitutional ownership.³⁶

Constitution making by transplant advocates for the contextualization of all external borrowings to meet domestic realities and aspirations. Constitutional contextualization or “cultural justification”³⁷ refers to a systematic analysis of external constitutional models that are under consideration for adoption domestically. The justification is the explanation of the rationale for adopting otherwise “imported” constitutional values or norms.

Towards a potential new theory of constitutional legitimacy

The three constitutional design approaches discussed above suggest a potential new theory that may be useful in studying the impact of foreign influence on constitutional legitimacy. If we are to study the relationship between international involvement and constitutional legitimacy, there is a need to turn to aids that facilitate our better understanding. Let us picture the assertion that foreign influence interacts with the three approaches of constitutional design – the elites’ role, popular participation and constitutional borrowing – to influence constitutional legitimacy. Consider that the three approaches represent X which supports Y to produce Z, such that $X+Y=Z$, where X = the three approaches of constitutional design, Y = the constitution, and Z = democratic constitutional legitimacy (which results from the three approaches of constitution building). If we substitute this equation with an object that tells the same story, we can use an African pot, which often stands on three stones to obtain a balanced position.³⁸ As Figure 1 shows, we can use the pot to symbolize a constitution where the three constitutional design approaches – (a) people’s participation, (b) the role of political elites, and (c) constitutional borrowings – symbolize the three metaphorical stones, hence the name the “three-stone theory”. A balance of the three stones would result in a constitutional equilibrium where a post-conflict constitution may inspire popular acquiescence and yield democracy.

Merits and limitations of the three-stone theory

The proposed theory has several potential merits. First, the illustration of an African pot visualizes the three constitutional design approaches and their relationship to democratic legitimacy. It deconstructs the substantive complexities of constitution building and shows the effective participation of ordinary people. It may promote an understanding among illiterate people that who is involved or excluded, the role of the elite and how foreign constitutional transplants are domesticated have a correlation with constitutional legitimacy. The other merit is that the three-stone theory is a socio-legal methodological framework for studying foreign influence and constitutional legitimacy. The theory is not without limitations, however. One is its emphasis on the influence of the three factors conceptualized as the three stones of constitutional legitimacy. There are, of course, a multitude of factors and forces that influence post-conflict constitutional experiments.³⁹ There is, therefore, potential for further research to learn the comprehensive utility of the proposed theory.

35 M Ndulo “Constitution making: The role of external actors” (2014) 1/1 *Southern African Journal of Policy and Development* 6 at 9.

36 K Seidel “State formation through constitution making in emerging South Sudan: Unveiling the technicity of the rule of law” (2015) at 3, available at: <<https://www.nomos-elibrary.de/10.5771/2363-6270-2015-1-3/state-formation-through-constitution-making-in-emerging-south-sudan-unveiling-the-technicity-of-the-rule-of-law-jahrgang-18-2015-heft-1>> (last accessed 11 July 2022).

37 Remarks by Adem K Abebe during a constitution-making workshop organised by International IDEA, UNMISS and UNDP, held in Juba, South Sudan (30 June 2021).

38 My informants tell me that such a pot is common in Africa and is called by different names. For instance, the Luo call it “polo” whereas the Jiëng and Nuer call it “Töny é thôt” and “Dhâr”, respectively. The Zulus in South Africa refer to it as “ibhidwe lesiZulu”, while the Akan ethnic group in Ghana call it “mukyea”.

39 See generally Samuels “Post-conflict peace-building”, above at note 24.

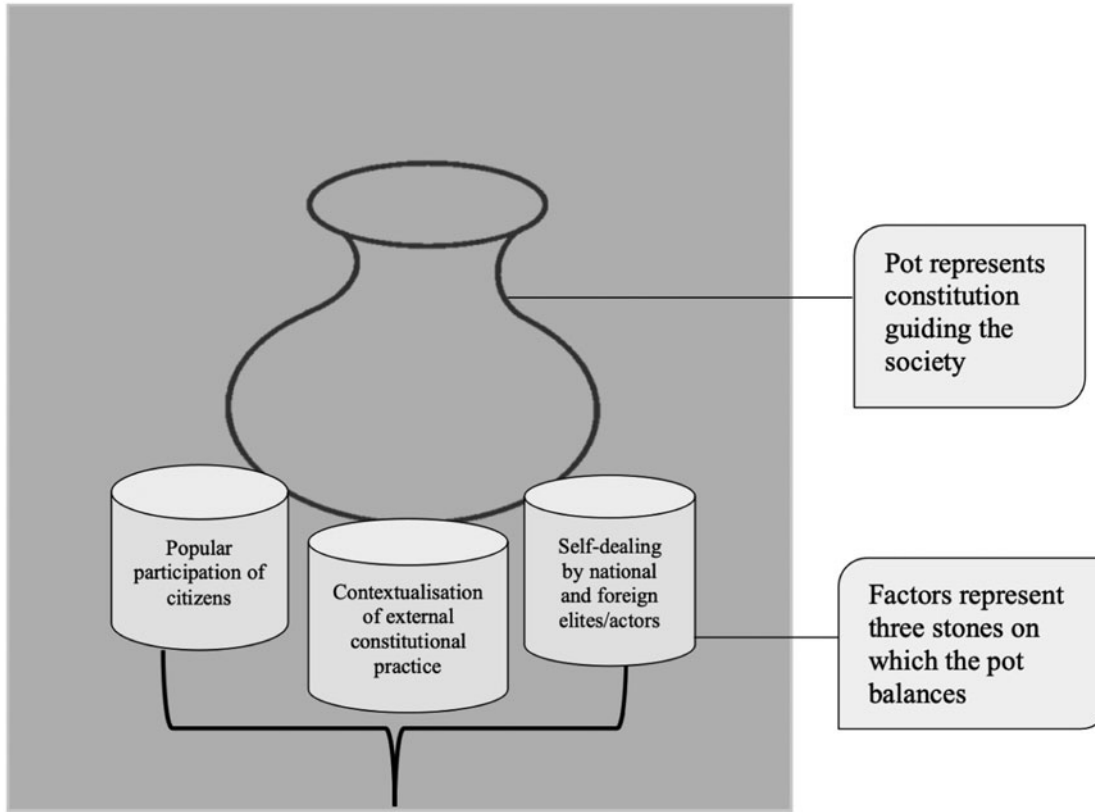


Figure 1. Three-stone legitimacy theory

Source: JG Akech, “Foreign influence and the legitimacy of constitution building in South Sudan” (PhD dissertation, University of Pretoria, 2022)

		If...	Then...
Nature of legitimization	Popular engagement, contextualization and elites' influence	All South Sudanese ethnic groups are engaged, elite capture is diminished, and contextualization of constitutional borrowings is undertaken	The constitution may be deemed to have met religious or moral, legal and popular legitimacy requirements. This births an ideal legitimacy
	Popular engagement of citizens	Only popular engagement is undertaken	Elites might feel excluded, which could trigger tension and impair constitutional legitimacy
	Elites' control of the process	Only elites control the process, without engaging the populace	Elite consensus might confer legitimacy but risks rejection if the constitution does not deliver for the people
	Contextualization of constitutional borrowings	Only contextualization of constitutional borrowing is undertaken by the elites	The constitution might enjoy legitimacy if local people deem it consistent with their domestic ethos and values

Figure 2. Constitutional legitimacy table

Source: JG Akech, "Foreign influence and the legitimacy of constitution building in South Sudan" (PhD dissertation, University of Pretoria, 2022)

Another way to explain the three-stone theory is a tabular experiment I have called the “constitutional legitimacy table”, which presents the influence of the three factors on constitutional legitimacy depending on the degree of engagement (see [Figure 2](#)).

The “critical few”: Foreign actors influencing constitution building

International actors engaged in constitution building in South Sudan are manifold; however, the most prominent ones are the Max Planck Foundation for International Peace and the Rule of Law (Max Planck), the International Institute for Democracy and Electoral Assistance (International IDEA), the United Nations Development Programme (UNDP), the United Nations Mission in South Sudan (UNMISS), the Troika (the USA, the UK and Norway) and IGAD. It would seem that international actors influence constitution building through their toolbox of approaches, including experts’ deployment to support drafting or legal advice, financial aid and comparative constitutional research. A brief account of international actors’ role in constitution building is found below.

United Nations agencies

The UN’s engagement in constitution building is to “strengthen legitimate and stable constitutional orders”,⁴⁰ including facilitating countries in transition to restore peace and stability and to realize their democratization agenda.⁴¹ In the case of South Sudan, the two UN agencies at the forefront of supporting constitution building are UNDP and UNMISS, both of which support peacebuilding, the rule of law and strengthening of institutions. UNMISS, in particular, is authorized to use its “good offices to support the peace process, including advice or technical assistance”.⁴² Generally, the aim of the UN’s engagement in constitution building is to

“foster opportunity for peacebuilding and sustainable development; encourage compliance with international norms and standards; ensure national ownership to reflect local context; support inclusivity, participation and transparency; mobilise and coordinate a wide range of expertise; and promote adequate implementation and follow-up after a constitution is adopted.”⁴³

The UN has been criticized for relying on “foreign experts, foreign models, and foreign-conceived solutions to the detriment of durable improvements and sustainable capacity”.⁴⁴ It has sought to address this by recognizing that constitutional design “is a sovereign process, more likely to be successful when [it is] nationally owned and led, inclusive, participatory and transparent, based on applicable international norms, standards and good practices, and tailored to the specific country context”.⁴⁵

The Troika

The Troika is an informal but influential alliance of three countries – Norway, the United Kingdom and the United States of America – which uses its collective diplomatic thrust to achieve common

40 Guidance note, above at note 15 at 1.

41 V Sripathi “The United Nation’s role in post-conflict constitution building processes: TWAIL insights” (2008) 10 *International Community Law Review* 411 at 413.

42 Resolution of the UN Security Council, 15 March 2019, UN doc 2459, para 9.

43 Guidance note, above at note 15 at 7.

44 K Seidel “They cannot influence by remote control bringing money here and there: Brief reflections on international rule-of-law engagement in emerging South Sudan” (2019) at 7, available at: <<https://www.gcr21.org/publications/gcr-quarterly-magazine/global-cooperation-research-3/-/2019?type=rss>> (last accessed 10 August 2023).

45 S Bisarya “No strings attached? Constraints on external advice in internationalized constitution-making” in E De Groof and M Wiebusch (eds) *International Law and Transitional Governance: Critical Perspectives* (2020, Routledge) 58 at 60.

goals in South Sudan. The Troika is a longstanding partner, backer and influencer in the South Sudanese political landscape. This special relationship dates back to the Comprehensive Peace Agreement (CPA) era, during which their combined political and financial support contributed to the successful political independence of South Sudan.⁴⁶ Norway in particular had a special relationship with the SPLM before, during and after independence.⁴⁷ After independence, the Troika intensified support in the areas of human rights and good governance, which was re-focused to peacebuilding and lifesaving humanitarian assistance after the December 2013 conflict.⁴⁸ The reason for this change of heart may be due to the fact that the national political elites are not serious about improving conditions for their citizens. A rigorous constitution-making process might therefore help to restore these broken relationships and strengthen the government's legitimacy, in addition to any legitimacy a new constitution may confer.

Even with disinterest in supporting governance, the Troika remains a strategic partner with strong leverage in the South Sudanese governance landscape. Its influential role in the peace process undeniably swayed the parties during negotiations to adopt principles to guide the constitutional design process. The intentions of the Troika in South Sudan's constitution building are perfectly summed up by one informant:

“[A]lthough Troika will not be prescriptive, it wishes to see democratic practices such as term limit, peaceful transfer of power and pluralistic non-violent politics entrenched in the constitution.”⁴⁹

Any assistance it may provide in the constitution making would, he emphasized, be based “on a voluntary request from the government of South Sudan”.⁵⁰ Owing to that standpoint, the Troika's assistance in constitution building is not based on transplanting a particular constitutional structure, nor is it in pursuit of any constitutional model. Rather, one of its expectations is that the constitution-building process complies with international best practice. To be precise, the Troika is keen on promoting a constitutional order that prioritizes human rights, strong institutions and proper management of public resources.⁵¹

Thus, acting together or alone, the Troika's aim is to promote the principles of democracy, the rule of law and human rights. These good intentions notwithstanding, the question is: Can a constitution with “best” practices deliver if there is no democratic government? Are they mutually exclusive? I ask these questions because others contend that a country should “carefully peruse their own national interests and societal values in full awareness of the options available, and of

46 “Troika warns against inflammatory statements by South Sudanese parties” (11 February 2022) *Sudan Tribune*, available at: <<https://sudantribune.com/article67085/>> (last accessed 25 August 2023). See also “South Sudan parties must compromise on critical issues: Troika” (7 February 2020), *Sudan Tribune*, available at: <<https://sudantribune.com/article67064/>> (last accessed 25 August 2023).

47 See generally HJ Hanssen *Lives at Stake: South-Sudan during the Liberation Struggle* (2018, Africa World Books) and Johnson *South Sudan*, above at note 1. Hilde Johnson, the then Minister of International Development of Norway, was a leading member in the 2005 peace negotiations between the Sudan government and the SPLM before becoming the first UN Secretary General Special Representative to the newly independent nation which she helped give birth to through negotiations, thus giving her a first-hand view of political dynamics in South Sudan.

48 L Moro et al “Localising humanitarian aid during armed conflict: Learning from the histories and creativity of South Sudanese NGOs” (2020) at 44, available at: <https://assets.publishing.service.gov.uk/media/5e735e6ee90e073e3cdaf462/20200318_20_0076_South_Sudan_Report_Report_web.pdf> (last accessed 22 July 2021), discussing the increased number and evolving influence of national civil-society organizations, through and with whom international actors collaborate to reach communities.

49 Personal communication with anonymous Troika diplomat, Juba (25 July 2019).

50 Personal communication with anonymous diplomat, Juba (10 November 2020).

51 Ibid.

their respective costs and benefits”.⁵² The sharing of comparative best practice and constitutional models should thus be cognizant of the need to contextualize to the domestic context.

Other international and regional organizations

The other actors influential in constitutional design are IGAD, Max Planck and the International IDEA. IGAD is a regional bloc that mediated the peace agreement, whereas the other two are expert organizations specialized in constitutional design.⁵³ Max Planck, for instance, is the only organization to which the peace agreement grants a special mandate to support the constitution-building process, including facilitating a stakeholders’ workshop to agree issues to guide the legislation on constitution making.⁵⁴

Evidence of foreign influence in constitution making

The preceding section has pointed out foreign actors influential in the constitution-building business. I now wish to evaluate the theory I constructed above by analysing how foreign actors influenced South Sudanese constitutional history. This is done by examining the role of foreign actors in three landmark constitutional moments: the Interim Constitution of Southern Sudan 2005, the Transitional Constitution 2011 and constitution building under the 2018 Revitalised Peace Agreement.

Interim Constitution of Southern Sudan 2005

In 2005, the Interim Constitution of Southern Sudan (Interim Constitution) was enacted, as required by the CPA, to guide the autonomous government established in southern Sudan. The process involved significant international influence on the one hand and a few national political elites on the other. Although the international community had been enjoined by the CPA, they were keen to provide technical and financial assistance to ill-prepared South Sudanese political institutions who were unable to write a constitution on their own. As part of “internal scrutiny, a cadre of international observers and interveners descended on the process” to provide technical assistance in the form of drafting.⁵⁵

In what has been described as “making the client’s peace”,⁵⁶ the SPLM sought technical support from a US law firm, Latham and Watkins,⁵⁷ and a host of international organizations. Others actors which provided assistance in the form of drafting and technical training included the Public International Law Group, the National Democratic Institute, an American organization acting in cooperation with the United States Agency for International Development, and Max Planck, with European funding.⁵⁸ In the end, “much of the international community was [engaged and] watching closely as the government emerge[d] and develop[ed]”.⁵⁹ On the national side, President Kiir formed a technical committee comprised of 28 SPLM members, six members of

52 TM Franck and AK Thiruvengadam “International law and constitution-making” (2003) 2 *Chinese Journal of International Law* 467 at 469.

53 It comprises eight countries: Sudan, South Sudan, Kenya, Ethiopia, Eritrea, Djibouti, Somalia and Uganda.

54 Max Planck “Support to the constitutional process in South Sudan”, available at: <<https://www.mpfpr.de/projects/south-sudan/support-to-the-constitutional-process-in-south-sudan/>> (last accessed 6 October 2022).

55 K Cope “South Sudan’s dualistic constitution” in D Galligan and M Versteeg (eds) *Social and Political Foundations of Constitutions* (2013, Cambridge University Press) 295 at 304.

56 See generally C Daase “Making the client’s peace: ‘Privatizing’ peace? Global law firms offering pro bono services in post-conflict settings” (2014) 21/2 *Indiana Journal of Global Legal Studies* 423.

57 Cope “South Sudan’s dualistic constitution”, above at note 55 at 304.

58 Ibid; K Cope “The intermestic constitution: Lessons from the world’s newest nation” (2013) 53/3 *Virginia Journal of International Law* 667 at 693.

59 Id at 686.

the National Congress Party and six representatives from other parties.⁶⁰ The 2005 Interim Constitution was adopted for the six-year transition period, but it was changed substantially by political elites in the lead-up to the independence declaration in July 2011.

Transitional Constitution of the Republic of South Sudan 2011

Upon successful declaration of the South Sudan referendum vote in favour of secession, the SPLM leaders, other political actors and technocrats became busy with crafting relevant state institutions, including the constitution of the would-be new state. The process started with a review of the Interim Constitution, which was later reworked into a provisional constitution for the expected new state. The transitional nature of the constitution was premised on two arguments: first, the Interim Constitution had not been produced through an open and participatory process. Instead, it was adopted by appointed individuals, the majority of whom were SPLM members, the main armed group that had signed the peace with the Sudan government. Second, there was a multitude of underlying differences on which the South Sudanese needed to agree or at least reach a consensus or compromise. These included the nature of the state South Sudan should be, including unsettled questions as to whether the country should adopt federalism or decentralization, or a presidential or a parliamentary system, among other matters, on which national political elites differed. More time was therefore needed for dialogue and consensus before a permanent constitution could be adopted.⁶¹

However, it may be argued that the Transitional Constitution was not technically required, since the Interim Constitution was designed to withstand a vote for secession. In fact, the Interim Constitution provides for continuity of the constitution for the sovereign nation of South Sudan in the case of such a vote.⁶² Perhaps the government of Southern Sudan thought a new constitution would confer additional legitimacy upon it. Those reasons notwithstanding, the process proceeded, and the Interim Constitution was converted into the Transitional Constitution of the Republic of South Sudan 2011. The process was, however, plagued by a number of concerns. First, the process lacked the popular engagement of the people, which is a central feature of modern constitution building consistent with the theory of *pouvoir constituant*, or constituent power.⁶³ In fact, the drafting bodies were not inclusive of all political forces and the peoples of Southern Sudan in all their diversity. In particular, the committees set up to draft the constitution were dominated by the SPLM party, with 37 out of 52 members.⁶⁴

This left other political forces and civil-society organizations underrepresented, prompting some of them to withdraw their representatives from the process. The short-lived boycott was a protest by non-SPLM members who argued that the All-Southern Sudanese Political Parties Conference had recommended an inclusive constitution-building process, including a constitutional conference.⁶⁵ In an attempt to remedy this protest, additional members from other political parties, faith-based organizations and civil society were added.⁶⁶ Two reasons were advanced by the government for excluding public participation in the transitional constitution-making process. The first was time

60 Cope "South Sudan's dualistic constitution", above at note 55 at 303.

61 The Revitalised Peace Agreement does not address these issues to their logical conclusion, although it has provided mechanisms to address them.

62 Interim Constitution of Southern Sudan 2005, art 208(7).

63 See generally M Tushnet "Constitution-making: An introduction" (2013) 91/1 *Texas Law Review* 1983. See also A Banks "Expanding participation in constitution-making: Challenges and opportunities" (2008) 49/4 *William and Mary Law Review* 1047.

64 D Gruss and K Diehl "A new constitution for South Sudan" (2011) *Yearbook of Islamic and Middle Eastern Law* 69 at 77.

65 See generally All-Southern Sudanese Political Parties Conference "Final communiqué of Southern Sudan parties conference on referendum" (2010), available at: <<https://reliefweb.int/report/sudan/final-communiqué-southern-sudan-parties-conference-referendum-18-oct-2010>> (last accessed 12 February 2021).

66 Cope "South Sudan's dualistic constitution", above at note 55 at 306.

constraints, since popular consultation generally requires a substantial amount of time. The second was that the Transitional Constitution was intended to serve only as an interim document, a placeholder for a permanent constitution.⁶⁷ But the SPLM-led government promised to make the permanent constitution-building process inclusive, as well as to ensure external borrowing was contextualized to local realities in order to meet peoples' aspirations.

The second challenge was that constitution making was elite-driven where, for instance, the Transitional Constitution was led by the Drafting Committee and was rushed because the moment of the independence declaration was fast approaching. Third, the crafting borrowed extensively from outside South Sudan, without much contextualization to ensure the new constitution's relevance to domestic needs and ambitions. Cope says that the "bill of rights [in the Transitional Constitution] is substantively transnational".⁶⁸ The Transitional Constitution soon faced challenges, with the sudden eruption of conflict in December 2013 which halted the work of the National Constitutional Review Commission (the Commission) established in 2012.⁶⁹ The Commission promptly commenced its work but failed to deliver anything substantial due to a number of factors, including lack of political will, inadequate financial resources and political instability.⁷⁰ The peace deal re-instated constitution making, to be followed by general elections.

Constitution building under the 2018 Revitalised Peace Agreement

Midway to the 2015 deadline when a final constitution was supposed to have been adopted, South Sudan was engulfed in conflict and the constitution-building process was terminated. Mediated by the international community, the peace deal aimed to resolve the conflict, including enacting constitutional reform. The international actors' footprint can be seen in the actions of those involved in mediating the peace agreement and those involved in key institutions with influence on constitutionalism. In terms of mediation, actors such as IGAD, the African Union, the Troika, China and the European Union were involved and remain engaged in peace implementation. Another influential institution, chaired and deputized by foreign experts appointed by IGAD, is the National Constitutional Amendment Committee, mandated to review a set of legal frameworks that have influence on the constitutional order. The "permanent" constitution is to be adopted through a three-stage process: the first is convening, which includes adopting a law to guide the process,⁷¹ reconstitution of necessary institutions⁷² and commencement of drafting and solicitation of public ideas. Second is the adoption of the text by the National Constitutional Conference, and third is ratification by the Constituent Assembly (a transformed Transitional National Legislative Assembly) (see Figure 3).⁷³

67 Z Akol "A nation in transition: South Sudan's constitutional review process" (2013) at 3, available at: <<https://bit.ly/2UQ1PmK>> (last accessed 27 March 2019). See also Ghai "Civil society", above at note 28 at 227, discussing constraints attendant on public participation, as it requires considerable time to build consensus and forge a common direction for the complex issues involved in constitutional design.

68 Cope "The intermestic constitution", above at note 58 at 699.

69 The Commission was chaired by a distinguished South Sudanese constitutional scholar, the late professor Akolda Tier, who was appointed in 2012 by President Salva Kiir Mayardit.

70 J Christian "Is time running out for South Sudan's new constitution?" (2012) at 2, available at: <http://constitutionnet.org/sites/default/files/071112_sudanconst_brief_v3.pdf> (last accessed 25 March 2019).

71 See the Constitution-Making Process Act 2022.

72 To "reconstitute" in this case is to expand membership to the parties to the Revitalised Peace Agreement. The institutions of constitution building are the National Constitutional Review Commission, the Constitutional Drafting Committee, the Preparatory Sub-Committee for the National Conference, the National Constitutional Conference and the Constituent Assembly.

73 JG Akech "The transitional national legislature is to be transformed into a constituent assembly to adopt the 'permanent' constitution of South Sudan, but what does this mean?" (2021), available at: <<https://africlaw.com/2021/10/25/the-transitional-national-legislature-is-to-be-transformed-into-a-constituent-assembly-to-adopt-the-permanent-constitution-of-south-sudan-but-what-does-this-mean%E2%80%9C/>> (last accessed 9 October 2022).

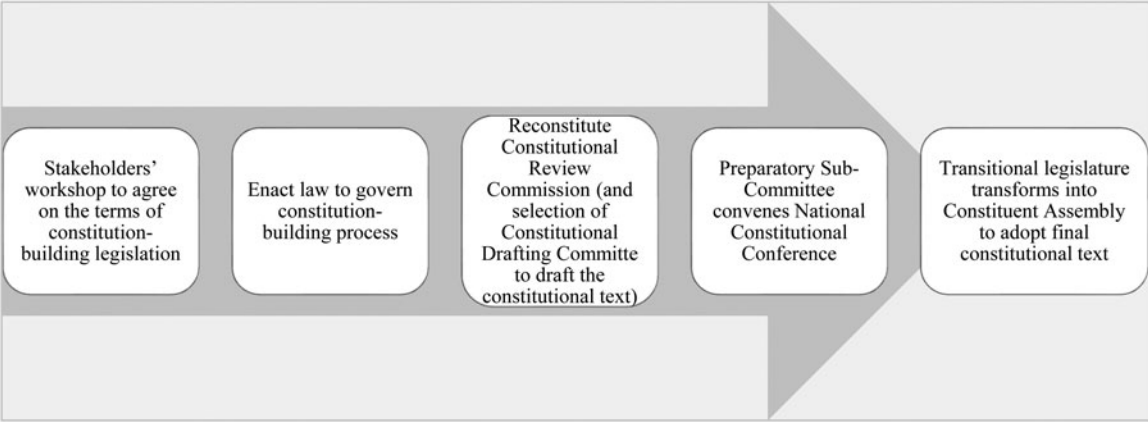


Figure 3. Constitution-building steps as per the Revitalised Peace Agreement

Source: JG Akech, “Foreign influence and the legitimacy of constitution building in South Sudan” (PhD dissertation, University of Pretoria, 2022)

The entire process of adopting a new constitution is to be overseen by the Revitalised Transitional Government of National Unity (the unity government) and is to be South Sudanese-led and owned.⁷⁴ However, constitutional framers and stakeholders are to seek advice from international actors. The Revitalised Peace Agreement stipulates that the unity government “shall seek advice from regional and international expertise, experience and best practices to assist the constitution building process”.⁷⁵ Similarly, the process is to draw lessons from South Sudan’s “common law, constitutional history, and experiences”.⁷⁶ These stipulations are in themselves arguably constitutional rules or a constitution of the constitution – a document that stipulates the validity of the process of drafting a constitution, also referred to as a rule of recognition, found in pre-constitutional rules that determine the legitimacy of the foundational Grundnorm of a country.⁷⁷ In that regard, one can say that the peace deal stipulates the mandatory engagement of international actors in the constitution-building process, including responsibility to oversee constitutional amendment and chairing of certain institutions.⁷⁸

Like the Transitional Constitution, which was adopted at a time when critical constitutional matters were unsettled, leading some scholars to question whether South Sudan was ready for a “permanent” constitution,⁷⁹ similar questions are being asked of the constitution building under the Revitalised Peace Agreement.⁸⁰ This is in spite of the fact that a new constitution may afford the country the opportunity to re-write its dark history. The process, however, faces a myriad of challenges:

- The absence of enabling factors for participatory constitution building: this includes the fact that millions of South Sudanese are internally displaced persons or refugees, yet they have to be part of the process. This raises the question: What popular legitimacy can there be of a constitution that is adopted when a third of the country is displaced? Is it sufficient to consult with these people while they are living in foreign countries as refugees or in camps for the internally displaced? It is also to be noted that insecurity is still rampant, as evident in the surge in communal violence, namely between the Twic and Ngok, and cattle raids in Warrap, Unity and Jonglei states. There are also worsening humanitarian crises, with the international community feeding people while the economy nosedives.
- There are various armed groups that have yet to sign the peace agreement, and they could pose a threat to the civic engagement of people at the grassroots, including in areas they control. Their absence at the table may also undermine elite consensus on the constitution.
- The risk of elite capture: the Revitalised Peace Agreement establishes a six-person presidency whose political groups have control over the constitution-building process, given that all institutions will be comprised of or led by their chosen representatives. The question therefore is: Can unelected elite groups write a constitution that may pave the way for an election in which some could lose? As the literature indicates, all constitutions adopted since Sudan’s independence in 1956 “have only focused on legitimising new political dispensations” rather than on a social contract with the people.⁸¹

74 Revitalised Peace Agreement, art 6.6.1.

75 Id, art 6.6.16.

76 Id, art 6.6.12.

77 HLA Hart *The Concept of Law* (2nd ed, 2012, Oxford University Press) at 100.

78 See above at note 9.

79 K Seidel and T Sureau “Introduction: Peace and constitution-making in emerging South Sudan on and beyond the negotiation tables” (2015) 9/4 *Journal of Eastern African Studies* 612 at 626. See also Wassara “South Sudan”, above at note 12 at 639.

80 Akech “Constitution-making”, above at note 8.

81 DK Deng “Constitutionalism under siege: Constitutional standoffs in South Sudan and their implications for the war-torn nation” in L Oette and M Babiker (eds) *Constitution-Making and Human Rights in the Sudans* (2019, Routledge) 67.

Although these concerns may be real, others argue that “once a short-lived constitutional movement is missed, it becomes difficult to reach agreement in conditions of simultaneous transitions to constitutionalism and democracy”.⁸² It is also said that peacebuilding takes a long time, and pinning constitution building on a certain outcome would not be ideal in a context where institutions have to be created from scratch. Agreeing with this observation, Elster observes that constitution building should only occur in “maximally calm and undisturbed conditions” and that there must be a sense of urgency to restore the efficacy of public institutions.⁸³ Furthermore, South Sudan has been mired in transition upon transition, and it may be that a permanent constitution will help to counteract this addiction to transitional governance, whatever happens in the electoral process.

Up to this point, I have shown evidence of the foreign influence on constitutional legitimacy in the short-lived constitutional history of South Sudan. The next section discusses mechanisms put forward by the peace agreement and other options South Sudan may consider to enhance the legitimacy of the “permanent” constitution.

Mechanisms for enhancing constitutional legitimacy

In the preceding sections, I have tried to establish that constitutional legitimacy is influenced by the extent to which foreign influence interacts with popular participation, the elites’ role and constitutional borrowing. From that vantage point, the degree of acceptance or dissatisfaction by foreign actors, national forces and the people influences the internal and external legitimacy of a constitution. For instance, in the case of South Sudan, if external actors (particularly IGAD and the Troika) feel excluded, they might withdraw their recognition of a constitution, which could diminish external legitimacy. On the other hand, if national stakeholders (the national elites and the people) are dissatisfied with the constitution, this may weaken its internal legitimacy (see Figure 4). Seen from this perspective, it would appear that internal legitimacy is established by fulfilling citizens’ aspirations in a constitution, whereas external legitimacy is attained by satisfying international and democratic actors; Nabukenya calls this satisfying “pressures from within and without”.⁸⁴ The fact that foreign influence in constitutional design implicates process and outcome legitimacies is the subject of the section below.

Process legitimacy

The process of constitution building is important in conferring constitutional legitimacy.⁸⁵ The constitutional design process provided under the Revitalised Peace Agreement is crucial for political stability and the consolidation of constitutionalism in South Sudan. By process legitimacy, I mean the extent to which various mechanisms of constitution making ensure the inclusion of diverse constituencies concerned with the “permanent” constitutional design process.

Constitutional drafting

Constitutional drafting is a fundamental legitimizing process that ought to conceptualize the citizens’ consensus, intentions and aspirations into the constitutional text. This stage of constitution making is to be led by a technical, independent and non-partisan 15-member expert body referred

82 W Osiaſtynski “Paradoxes of constitutional borrowing” (2003) 1/2 *International Journal of Constitutional Law* 244 at 267.

83 J Elster “Forces and mechanisms in the constitution-making process” (1995) 45 *Duke Law Journal* 364 at 394.

84 S Nabukenya “Why do constitutions in Africa not stand the test of time? Lessons and perspectives from Uganda” in J de Visser et al (eds) *Constitution-Building in Africa* (2015, Nomos Verlagsgesellschaft) 293 at 294.

85 See generally Ginsburg, Elkins and Blount “Does the process”, above at note 21, discussing the importance of the constitution-making process.

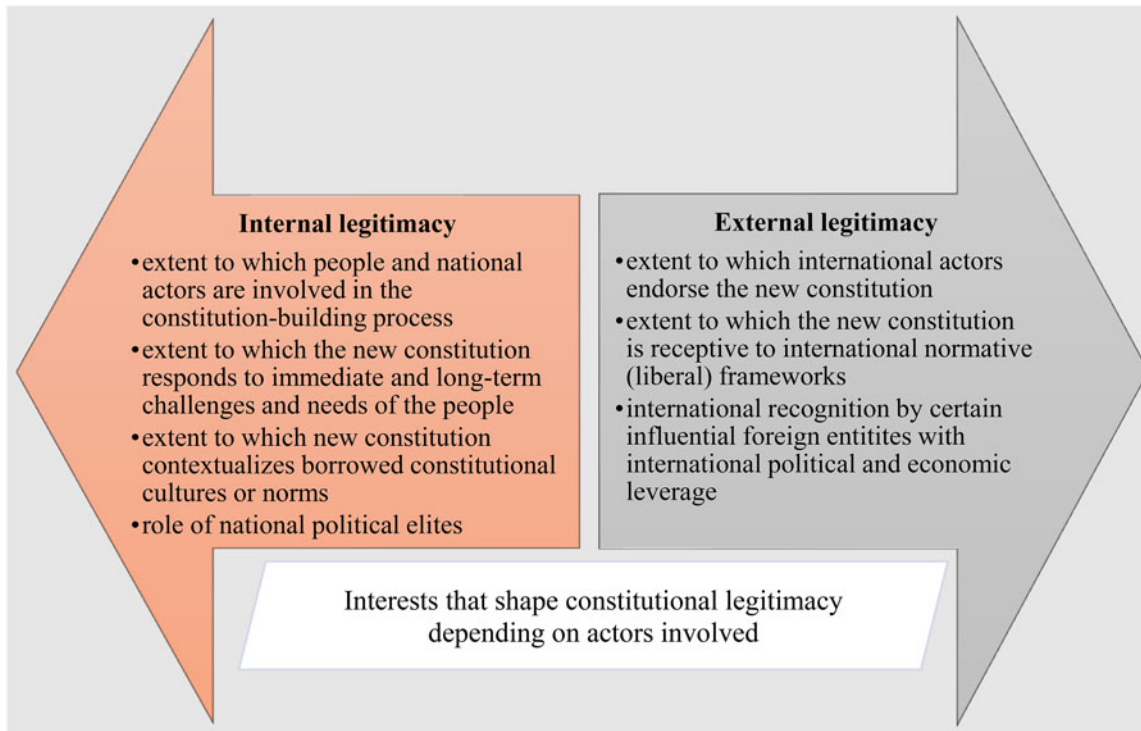


Figure 4. Constitutional legitimacy shaped by actors' engagement and interests

Source: JG Akech, "Foreign influence and the legitimacy of constitution building in South Sudan" (PhD dissertation, University of Pretoria, 2022)

to as the Constitutional Drafting Committee (the Drafting Committee).⁸⁶ The Drafting Committee is to be as diverse as possible, comprising both nationals and expatriates with years of experience and degree qualifications in law, political science and economics.

Civic engagement

Civic engagement includes citizens' engagement through public consultations and experts' submissions for feedback on the draft constitutional text that has been formulated by the Drafting Committee. Citizens' input and feedback will be led by the Commission, which constitutes 57 members drawn from political groups, civil society, academia, faith-based organizations and the private sector, and including women, youth, and ethnic minorities.⁸⁷ The people's engagement is meant to influence necessary adjustments or corrections in the draft text, as well as building consensus among stakeholders as to what the popular view on a particular issue might be. The Commission's main role can be summarized as three basic functions:⁸⁸

- to conduct civic education in connection with the constitution-making process;
- to consult the population and key groups such as political parties, civil society and other stakeholders on key constitutional questions; and
- to compile and create a draft of the new constitution, taking on the views received.

As a first stage of conceptualizing and drafting the constitution, the consultation stage is critical, because it is then that consultations, the contextualization of borrowed material and the self-interest of elites will determine the nature of the draft that will be forwarded to the National Constitutional Conference, before its adopted version is passed by the national legislature acting as the Constituent Assembly. This stage is also influential to the legitimacy of the permanent constitution not only because it is the stage at which international and national actors converge to undertake technical negotiation, but also because it is a platform for receiving and processing public and technical inputs and submissions. However, there are a number of issues which could derail this possibility.

First, the requirement that the Commission be reconstituted before it can commence its work is to ensure a broad-based representation of various political formations and interest groups. Second, the composition, powers and level of independence of the Commission will have a bearing on the legitimacy of the constitution. Third, the types of individuals appointed to the Commission, whether they are conservatives, status-quo loyalists or young progressive proponents of a rule-based order, can also have a bearing on the input. The process of selecting members, including vetting and ascertaining their degree of independence, is equally a critical factor.

Adoption and ratification

Two mechanisms of constitution making – the National Constitutional Conference (the Constitutional Conference) and the Constituent Assembly (a converted transitional national legislature) – are mandated to adopt and ratify the final constitution of the Republic of South Sudan. The process of deliberation and adoption by both the Constitutional Conference and the Constituent Assembly is crucial in conferring outcome legitimacy. The question is, however, whether their constitutive and operational structure will facilitate or fail to confer democratic legitimacy on the country's final constitution. The next section briefly examines the mandate of the Constitutional Conference and the Constituent Assembly in order to expose their potential challenges.

⁸⁶ Constitution-Making Process Act 2022, sec 19.

⁸⁷ *Id.*, paras 2(2.1)–2(2.9).

⁸⁸ RJMEC "Post-conflict constitution-making processes: Lessons and best practices for South Sudan" (2020) at 51, available at: <<https://jmecsouthsudan.org/index.php/reports/rjmec-quarterly-reports/169-post-conflict-constitution-making-processes-lessons-and-best-practices-for-south-sudan-final-report-2020/file>> (last accessed 18 August 2021).

Constitutional Conference

The Constitutional Conference is to comprise at least 1,200 delegates drawn from across the country's diversity, including political parties, civil society, faith-based organizations, academia and trade unions.⁸⁹ Of these delegates, 100 shall come from each of the country's ten states, 30 from each of the three administrative areas and 110 from other categories.⁹⁰ Whereas the Conference attempts to satisfy diversity and equitable representation, its expansive nature could implicate its decision making, as it could potentially become a foolish crowd that can be easily manipulated by political insurers. Another challenge is that nominations from states and administrative areas may be influenced by political parties, who may animate the voting behaviour of their delegates. Finally, delegates do not have to have specific qualifications relevant to constitution making; they only need to be of "sound mind, [and] people of high moral character and integrity".⁹¹

Constituent Assembly

As already mentioned, a 650-member bicameral legislature is to be transformed into a constituent assembly to ratify the final constitution.⁹² Ordinarily, a constituent assembly is a representative public body elected or appointed to debate and adopt a constitution, and, according to Elster, can be of four types: "constitutional conventions, mandated constituent legislature, self-created constituent legislature, and self-created legislating assemblies".⁹³ Elster argues that constitutional conventions are superior because they are "elected for the sole purpose of adopting the constitution".⁹⁴ The fact that "an ordinary parliament turns itself into a constituent assembly" is not new.⁹⁵ A constituent assembly becomes a self-created assembly if a transitional legislature transforms itself into such a body. What is worrisome is that the transitional national legislature is unelected and may not be representative of all South Sudanese stakeholders. This is because the majority of its members represent an elite contract in the form of a consociational government birthed by the 2018 revitalized peace deal. In particular, the fact that the transitional legislature is to be transformed into a constituent assembly to pass the final constitution faces two main challenges: first, the transitional legislature is unelected, and second, it is non-representative and exclusive of many South Sudanese stakeholders.

Unelected constituent assembly. Elections have not been held in South Sudan since the country gained independence. The national legislature is, therefore, not a democratically elected institution, except for a few members who were elected as part of the Sudanese general election in 2010 but whose term lapsed in 2015 and who have only been self-renewing their mandate. Accordingly, the national legislature draws its legitimacy, as does the entire government, from the Revitalised Peace Agreement.

It is to be noted that the parties to the Revitalised Peace Agreement who make up the national legislature are opposed on certain aspects, and they may extend their rivalries to the constitution-building process. This might jeopardize peace and stability, since political disagreements have led to

89 Constitution-Making Process Act 2022, sec 30(1). Sec 302(1) lists "political parties, civil society, including women, youth, and faith-based organisations, people with disabilities, internally displaced persons, refugees and diaspora, traditional leaders, war widows, veterans and war wounded, business leaders, trade unions, professional associations, academia and others" as categories from which delegates are to be selected.

90 *Id.*, sec 30(2).

91 *Id.*, sec 30(3).

92 See Constitution-Making Process Act, sec 33(3)(a). Note that the 650 members of Parliament are spread between the Transitional National Legislative Assembly, which comprises 550 members, and the Council of States, which is made of 100 individuals.

93 J Elster "The optimal design of a constituent assembly" in J Elster (ed) *Securities against Misrule: Juries, Assemblies, Elections* (2013, Cambridge University Press) at 206.

94 *Ibid.*

95 *Id.* at 208.

devastating political violence in the past. The parties might also attempt to write themselves into the constitution, which would be contrary to the democratic aspirations of the citizens, who have limited or no influence over the political process. For these reasons, one can argue that the Constituent Assembly might vote to maintain the status quo ante, since it would lack political incentives to adopt a transformative constitution that might lead to some losing elections when they are held on a level playing field.

Non-representative body. As stated above, only parties to the Revitalised Peace Agreement make up the national legislature, which will be dissolved and turned into a constituent assembly. This makes the assembly unrepresentative because there are many stakeholders, including estranged groups (armed and non-armed), which are not represented in Parliament. Inclusive representation is a key ingredient of popular legitimacy; thus, a non-representative constituent assembly raises concerns as to whether it can remain faithful to the aspirations of the South Sudanese people. One way to address this is to encourage all members of the Constituent Assembly to consult with their constituencies before they vote on a constitution. This is important to strengthen representative democracy wherein major policy decisions are influenced by and respect peoples' views. Other propositions that might strengthen legitimacy are expounded upon below.

Women's voices and representation in the process legitimacy

Women are about half the population of South Sudan, yet they remain underrepresented in socio-economic and political spheres.⁹⁶ Women's rights to "participate in public life and representation",⁹⁷ including a favourable affirmative policy of a 35-per-cent quota system of representation across all levels of government and other public institutions, are, however, entrenched under the Transitional Constitution.⁹⁸ The legislation guiding constitution making enjoins the government to appoint women to either head or deputize the Commission, in addition to ensuring that 35 per cent of people in all the mechanisms of constitution making are women.⁹⁹ Before this, women participated in constitutional reforms through peace agreement and intellectual policy engagements that saw the inclusion of a strong role for women in governance and protection of their rights under the constitution.¹⁰⁰

Outcome legitimacy

In addition to the constitution-building institutions discussed above, referendums and court certifications are other mechanisms and processes that influence constitutional legitimacy. While these are not explicitly stipulated as part of constitution building, they are common legitimizing pathways.

Referendums

A constitutional referendum is a democratic device that ensures transparency in the public decision-making process and is an assurance that public institutions will not make certain decisions of

96 See World Bank population data, available at: <<https://data.worldbank.org/indicator/SP.POP.TOTL.FE.IN?locations=SS>> (last accessed 20 January 2023). The Revitalised Government of National Unity that the peace agreement established has, however, appointed a sizeable number of women: the Governor of Western Bhar el Ghazal State, one of the five vice presidents, and the Speaker and Deputy Speaker of the National Legislative Assembly and the Council of States, respectively.

97 Transitional Constitution of the Republic of South Sudan 2011, art 16.

98 NM Ali "Gender and statebuilding in South Sudan" (2011) at 3, available at: <<https://www.usip.org/publications/2011/12/gender-and-statebuilding-south-sudan>> (last accessed 19 January 2023).

99 Constitution-Making Process Act 2022, art 11.

100 T Tindall "Women's participation and influence in transitions from conflict: The case of South Sudan" (2022) at 15, available at: <https://cdn.odi.org/media/documents/WPS_South_Sudan_Case_Study_FINAL_FCDO_v2_3eWbhFR.pdf> (last accessed 20 January 2023).

fundamental impact to public lives without citizens' consent. Recognizing that the "people are a source of constitutional legitimacy",¹⁰¹ a constitutional referendum can be an effective way of galvanizing popular ratification of a constitution, directly involving the people as final decision-makers. This, it is argued, makes the people "gatekeepers against elite capture".¹⁰² Expounding on Elster's notion of "downstream constraint",¹⁰³ Böckenförde suggests that a referendum may restrain elites when they are drafting a constitution since they know that their draft will have to be approved or rejected by another body.¹⁰⁴ In other words, a referendum may deter the self-dealing tendencies of elites in the "upstream" or preparatory processes of constitution building.¹⁰⁵

A referendum is, however, not without weaknesses. It is said that a referendum does not, in itself, necessarily guarantee popular constitutional legitimacy unless it is accompanied by meaningful public participation.¹⁰⁶ Four reasons are cited as referendums' limitations in relation to constitutional legitimacy. First, even if a referendum reinforces popular participation, which is a constitutional legitimizing aspect, "there is mixed empirical evidence for the notion that [a referendum as a means of endorsing a constitution] secures its long-term stability and acceptance".¹⁰⁷ Any existing link between referendum and constitutional acceptance is weakened by evidence of a constitutional dispensation that differs from popular aims established at its promulgation. The challenge is usually in constitutional amendments by a majority political party that uproot the basic structure of a constitution which would have been entrenched by citizens in a constitutional referendum. King, while acknowledging the lack of empirical evidence linking constitutional legitimacy to referendums, suggests that "constitutions that are subject to approval by popular referendum will, all else being equal, tend to have greater popular acceptance than those that do not".¹⁰⁸ Indeed, it has been said that constitutions that are adopted through popular means appeal more to the local people than those which are not.¹⁰⁹

Second, a referendum risks disenfranchising minorities and favours majorities, which could polarize division in an ethnically diverse society such as South Sudan where toxic ethnicity threatens to tear the country apart. In fact, one can say that a referendum would be a grave injustice to minority ethnic groups such as the Jie and Kichopo, for instance, whose national influence on political affairs is limited in the prevailing unity government in which power is divided by the ruling groups. This may be further complicated by the high rate of illiteracy and ignorance among the vast majority of South Sudanese, who might be easily rallied along ethnic lines championed by political elites.

Third, a referendum has an inherent tension with representative democracy where elected representatives are expected to act on behalf of the electorate and the people.¹¹⁰ In this regard, Beckman notes that "deliberative spirit and desire for agreement is preferable".¹¹¹ Deliberative and consensual mechanisms witnessed during the National Dialogue are preferred because they offer compromise,

101 L Beckman "Democratic legitimacy does not require constitutional referendum: On 'the constitution' in theories of constituent power" (2018) 14 *European Constitutional Law Review* 567 at 571.

102 M Böckenförde "Letting the constituent power decide? Merits and challenges of referenda in constitution making processes in Africa" in T Abbiate, M Böckenförde and V Federico (eds) *Public Participation in African Constitutionalism* (2018, Routledge) 31.

103 Elster "Forces and mechanisms", above at note 83 at 373, discussing constraints instituted to ensure popular approval of a constitution.

104 Böckenförde "Letting the constituent power decide?", above at note 102 at 31.

105 Elster "Forces and mechanisms", above at note 83, describing upstream constraints as an imposition on the extent to which actors at the end of constitution building can change the constitutional text.

106 Beckman "Democratic legitimacy", above at note 101 at 571.

107 Id at 568.

108 J King "Constitutions as mission statements" in D Galligan and M Versteeg (eds) *Social and Political Foundations of Constitutions* (2013, Cambridge University Press) at 89.

109 Cope "The intermestic constitution", above at note 58 at 683.

110 Beckman "Democratic legitimacy", above at note 101 at 573.

111 Id at 568.

as opposed to a referendum which is habitually associated with “lack of reflection and antagonism”.¹¹²

Finally, referendums are criticized for their tendency to focus on galvanizing popular approval of a constitution, effectively placing emphasis on mere constitutional “openness which makes it unsuitable for safeguarding constitutional quality”¹¹³ or the substantive quality of the constitutional text. A referendum is unlikely to safeguard against unconstitutional changes or future illegal amendments, although it might build a public consciousness necessary to defend the constitution.¹¹⁴

Constitutional Court certification

Certification of a constitution by a constitutional court is rare; it is often done to determine if a constitutional text has complied with subsisting international obligations and pre-agreed principles guiding the constitution. In South Africa, for instance, a constitution endorsed by an elected parliament was subjected to a certification process by the country’s Constitutional Court.¹¹⁵ The court was required to ascertain that the final constitution passed by the Parliament was in line with the Document of Principles (a pre-agreed negotiated political compromise among political forces) guaranteed in the Interim Constitution.¹¹⁶

How can court certification be applied in South Sudan? Like the South African case, constitution building in South Sudan is guided by a number of principles agreed to by parties to the peace agreement. The guiding principles or the “pre-defined reference frame”¹¹⁷ on which a permanent constitution is to take cognizance include that people’s views have been adequately reflected in it (supremacy of the people),¹¹⁸ that the constitution adopts a “federal and democratic system of government that reflects the [country’s] character”, “guaranteeing national unity, peace and political stability” and “promoting people’s participation in governance”.¹¹⁹ Other principles include the fact that the constitution must “respect ethnic identities, rights and values” and establish public institutions that guarantee the “fair distribution of national wealth and resources” and “promote international cooperation” and a culture of “peaceful resolutions of disputes”.¹²⁰

The role of the Constitutional Court would thus be to certify that the “permanent” constitution complied with the above agreed principles. Indeed, the object of a certification by a constitutional court is to ensure that the manner in which the various building blocks of a constitutional structure come together are “normatively legitimate”,¹²¹ in other words, that “matters that bear constitutive significance to the legal and political system” have been taken care of in a constitution.¹²² One can argue that the device of judicial certification protects countries drafting their constitutions from

112 Id at 569. The National Dialogue was an initiative launched by President Kiir in December 2016 to promote dialogue among South Sudanese people on how to promote peace and national unity. See <<https://www.ssnationaldialogue.org/national-dialogue-objectives/>> (last accessed 25 August 2023).

113 Beckman “Democratic legitimacy”, above at note 101 at 568.

114 G Jacobsohn “An unconstitutional constitution? A comparative perspective” (2006) 4 *International Journal of Constitutional Law* 460, discussing the idea of unconstitutional constitutionality in terms of constitutional amendments that are deemed illegal by virtue of being contrary to the spirit of the founding values of the constitution.

115 Certification of the Constitution of the Republic of South Africa (1996), Constitutional Court Case CCT 23/96, Southern Africa Law Report.

116 C Murray “A constitutional beginning: Making South Africa’s final constitution” (2001) 23 *University of Arkansas at Little Rock Law Review* 815.

117 K Seidel “Involvement and impact of external actors on constitution making in South Sudan and Somaliland: A comparative study” (2017) *Global Cooperation Research Papers* 16.

118 Revitalised Peace Agreement, art 6.2.1.

119 Id, arts 6.2.2, 6.2.3 and 6.2.4.

120 Id, arts 6.2.5, 6.2.6, 6.2.7 and 6.2.8.

121 A Follesdal “Constitutionalisation of European law by European courts: Legitimate constitutional moments?” (2018) at 2, available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3211889> (last accessed 13 November 2019).

122 Beckman “Democratic legitimacy”, above at note 101 at 577.

slipping away from democratic norms otherwise negotiated and agreed prior to adoption of a constitution. The court's certification may also entrench principles agreed to by a small elite group and endorsed by a non-representative parliament. Foreign actors engaged in constitution building may pressure constitution drafters to ensure adherence to these principles as contributing factors for the legitimacy of the final constitution. It is also possible that political entities could pull out of constitutional negotiations if they sense a deviation from these core principles which they consider the basis upon which a permanent constitution should be anchored.

Expected challenges with court certification. One immediate challenge is that the court certification is not part of the constitution-building process, and the parties are unlikely to accept it, despite it being a device that could enhance the legitimacy of a constitution adopted on a negotiated deal. Another is that South Sudan does not have an "independent, credible and impartial Constitutional Court" separate from the Supreme Court.¹²³ What exists is a mechanism fashioned alongside the Sudanese judicial system where members of the Supreme Court sit as a constitutional panel when a constitutional matter arises. The Revitalised Peace Agreement, however, stipulates the establishment of a Constitutional Court, which is yet to be established by the Revitalised Transitional Government of National Unity. In the meantime, constitutional disputes continue to be addressed through petitions to a constitutional panel of the Supreme Court, whose independence has been increasingly questioned. This lack of independence makes it increasingly difficult for the parties to the revitalized peace deal to trust the constitutional court to certify the "permanent" constitution. In the unlikely event that this option is considered, the court should be led by a leading African jurist, preferably from South Africa, to ensure credibility, impartiality and independence. All judges to the Constitutional Court should be publicly vetted for competence, integrity and independence.

Towards a blueprint for constitutional legitimacy: A proposal

This article's main claim is that foreign actors influence constitutional legitimacy through three approaches to constitutional design – elite contracts, popular participation and constitutional transplants. This is illustrated graphically in the form of the three-stone theory, demonstrating that their interdependence cumulatively and independently influences the legitimacy of a constitution. The article also contends that foreign influence in constitution building is inevitable, historical and at times necessary to encourage dialogue, and avails national elites of expertise and resources which they might otherwise lack. International involvement should, however, respect aspirations of *zol meskin* so as to increase local acceptance and ownership of a constitution.¹²⁴ How to achieve this is what I have called the "blueprint" for constitutional legitimacy, which applies the three-stone theory in practice. The blueprint is a set of authoritative proposals through which the "permanent" constitution in South Sudan can gain legitimacy, despite the role played by foreign actors in the design process, and is a near-ideal roadmap or pathway for a constitution that would be truly legitimate in the eyes of all South Sudanese people. The blueprint would comprise the following components: first, constitution building that promotes peacebuilding, national unity and political stability. This calls for promoting people-to-people dialogue in an environment free from intimidation and threats. As these intersect to enable a legitimate constitutional outcome, it follows that constitution building should not be rushed nor isolated from other critical legislative and institutional reforms the country is undertaking.

123 Revitalised Peace Agreement, art 1.17.7.

124 The phrase *zol meskin* is a Juba Arabic term referring to a less fortunate or common person. It is used in this context to refer to the "ordinary" person.

Second, a process that promotes both internal and external legitimization of a constitution is necessary. This may be achieved through an inclusive consensus of the elites and an understanding with the international community engaged in the process. A key component that may assure both national and international actors is a certification of the draft constitutional text by a constitutional court whose role would be to consider the following questions: Does the “permanent” constitution reflect the will of the people, who are sovereign? Does the constitution provide for the rule of law, democracy and constitutionalism to thrive? Given the apparent lack of an independent judiciary, the constitutional court to certify the final constitution should be led by a leading African constitutional jurist.

The last part of the “blueprint” would be a constitutional design process that ensures robust, free and transparent civic engagement. For a participatory process of constitution making to give birth to popular legitimacy, it should be inclusive of all shades of the country’s diversity (as practically as possible) – civil society, ethnic and political groups, and refugees. Popular participation would also promote contextualization of any constitutional implants, since people would have a chance to critique. This would ensure that any form of governance adopted, for instance, takes cognizance of or is contextualized to a local or customary system that is widely used and entrenched.

Conclusion

The main claim this article makes is that foreign influence is inevitable, historical and at times necessary in post-conflict societies where international involvement might facilitate consensus building and compromise in a constitutional design process. It constructs an analytical framework referred to as the three-stone constitutional legitimacy theory, drawing its name from three factors compared to the stones on which an African pot stands. The implication of foreign influence impacts internal and external constitutional legitimacy, which requires that the constitutional process and outcomes be satisfactory to both international and national actors. The article posits that attaining a constitutional legitimacy in South Sudan requires following a certain approach, which it refers to as a “blueprint”, a three-part process of ensuring citizens’ participation, the balanced role of elites and the contextualization of all constitutional implants or borrowings.

Competing interests. None