

**A COMPARATIVE ANALYSIS OF THE SOUTH SUDAN CONSTITUTION
MAKING PROCESS WITH OTHER EAST AFRICA COUNTRIES**

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ABSTRACT

The South Sudan Constitution Making Process provide an opportunity for the Country to address governance, economic, social issues and others facing the Country for decades now. However, it's important for the process to appreciate democratic principles by ensuring that there's active participation of the citizens and their views are reflected in the final constitutional text.

In writing the new constitution for South Sudan, it's equally important that the Country borrows past and present experiences of the East African Countries especially appreciating their processes, procedures and institutions charged by the responsibility of spearheading the process as provided by law.

The Constitution Making Process Act establishes key institutions such as the National Constitution Review Commission (NCRC), The National Constitutional Conference (NCC), Preparatory Committee and the Drafting Committee. These institutions were charged with different responsibilities for ensuring a transparent, accountable, credible and legitimate Constitution Making Process.

However, the process is faced with a number of challenges including lack of political will by the leadership, lack of resources, failure to implement the Revitalized Peace Agreement, political and security tensions in the Country, leadership failure and others.

The study recommends the review of the Constitution Making Process Act to narrow the existing lacunas in the law, provide budgetary allocation of funds to the institution, constitutional referendum, reform draconian security laws, ensure judicial independence and impartiality and others.

DECLARATION

I, Wani Saki Michael, hereby declare that this dissertation is my original work, it is not plagiarized and has not been submitted to any other institution for any award. I stand responsible for what is stated hereunder.

Wani Saki Michael

Signed:

Date:

APPROVAL

This is to certify that this dissertation was done under my supervision.

Supervisor: Counsel Irene Natamba.

Signed:

Date:

DEDICATION

I dedicate this work to the almighty God for his guidance and protection, I also dedicate this work to my very supporting family, my wife Wuka Beatrice for her overwhelmingly support towards my study, my daughter Simbi Faith Elaine Wani and my son Elon Luga Joshua Wani. I also dedicate this work to my parents, Mzee Michael Lotiyu and Mama Florence Gaba who supported me throughout this journey. I dedicate this work to my sibling Yongo Moses and Dr. Londu Emmanuel who also supported me during this journey. Lastly, I dedicate this work to my dearest colleagues Mr. Johnmary Kasozi, Wanda John Paul, Kissa Gibert, Jame David Kolok and Kimutai Hillary for their commendable support during my law school time.

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ABBREVIATIONS

RARCISS -----Revitalized Agreement on the Resolution of Conflict in South Sudan.

NCRC-----National Constitution Review Commission.

NCAC-----National Constitution Amendment Committee.

CA-----Constituency Assembly.

CPA-----Comprehensive Peace Agreement.

RTGoNU-----Revitalized Transitional Government of National Unity.

NRM-----National Resistance Movement.

SPLM-----Sudanese People’s Liberation Movement.

SPLM-IO-----Sudan People’s Liberation Movement-In-Opposition

1.0 INTRODUCTION

Constitution Making is a process that brings people and their governments together to shape their future political life. It is a meeting point between the past, the present and the future¹. It is an historic rendezvous between state and society. One common feature of the Constitution Making is the principle that there must be certain limits to government power; the nature and extent of such limits differ from place to place and one period to another. The conflicts between the King and Barons that produced the Magna Carta gave more powers to the barons². South Sudan Constitution Making process started way back in 2011 when the Transitional Constitution of the Republic of South Sudan established the National Constitution Review Commission with the overall mandate and responsibility of writing a new Constitution for the Country.

Based on the Constitution Making Process Act, 2022 which provided for key institutions such as the National Constitution Review Commission (NCRC), Constitutional Drafting Committee, Preparatory Sub-Committee, National Constitutional Conference and the Constituent Assembly whose task is basically to spearhead the Constitutional Making Process³. However, it is abundantly clear the current NCRC is heavily politicized and subjected to the RARICSS power sharing ratio. The RTGoNU parties allocated for themselves 55% and other stakeholders who're the people's representatives were allocated 45%⁴. How do you refer to such process as people led and owned in accordance with Article 6.13 of the Revitalized Agreement

¹ The Search for a National Consensus, the Making of the 1995 Uganda Constitution, Benjamin J. Odoki.

² Constitutionalism in Africa, creating opportunities facing challenges- J. Oloka Onyango at page 234, Constitution-Making in Eritrea: Democratic Transition through Popular Participation- Bereket Habte Selassie

³ Section 7 of the Constitution Making Process Act, 2022.

⁴<https://dr.211check.org/wp-content/uploads/2024/02/Constitution-making-process-Act-2022.pdf>

on the Resolution of Conflict in South Sudan when its institutions are already heavily politicized to meet specific political agenda as opposed to addressing genuine fundamental issues facing our people⁵.

A critical element of the governance reforms anticipated in the Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS) is the process of writing a Permanent Constitution. Modern constitution building processes involve a combination of top-down and bottom-up approaches to facilitate popular participation and political negotiation. Participation of key population groups such as civil society, youth organizations and youth leaders from different sectors are critical elements of inclusion in national peacebuilding processes and constitution making.

South Sudan is ethnically polarized and deeply divided, there'll be serious controversial constitutional issues that might require the facilitation of someone deemed to be neutral and basically non-South Sudanese to moderate the conversations and discussions to build consensus. Such issues might include land, federalism, sharing of natural resources, devolution of powers and resources and others⁶.

To deliver a genuine, credible and people's owned Constitution, there's need to disband or dissolved the current National Constitution Review Commission (NCRC) and instead establish a Hybrid Independent Panel of Experts recruited by an independent committee in an open, transparent and accountable manner through

⁵ <https://docs.pca-cpa.org/2016/02/South-Sudan-Peace-Agreement-September-2018.pdf>

⁶ <https://www.radiotamazuj.org/en/news/article/opinion-why-south-sudan-needs-an-independent-hybrid-constitution-making-body>. (Accessed on 22 April, 2025).

public participation. This independent Commission will definitely attract foreign donors whether in-kind, expertise or resources mobilization⁷.

1.1 BACKGROUND OF THE RESEARCH

South Sudan got Her independence in 2011 after nearly twenty-one (21) years of violent armed conflict led by the Sudan People’s Liberation Movement/Army, an armed rebellion led by the late charismatic John Garang together with his dedicated comrades⁸. The Constitutional history of South Sudan can be trace to the famous 1972 Addis Ababa Agreement⁹, however the Agreement didn’t address the fundamental governance, constitutional, economic and social issues facing the country. Thereafter, there was a war again in 1983 which resulted into the signing of the Comprehensive Peace Agreement (CPA) in Nairobi, Kenya in 2005¹⁰. The CPA had a provision on the question of succession by the Republic of Sudan (by then) conducting a referendum for the Southerners to decide whether to remain in the Republic of Sudan or succeed and establish an independent State. The people in the South voted overwhelmingly for the succession of the Southern part of the country and established the newest Country which is present day South Sudan¹¹. In 2013, just two years after independence the Country experienced a violent armed conflict between the Government of South Sudan and the Sudan People’s Liberation Movement-In-Opposition lead by Dr. Riek Machar. Due to political disagreement within the ruling political party SPLM in regard to the party flagbearer in the

⁷ ibids

⁸ <https://www.bbc.com/news/world-africa-14069082> (Accessed on 22 April, 2025).

⁹ <https://peacemaker.un.org/sites/default/files/document/files/2024/05/sd720312addis20ababa20agreement20on20the20problem20of20south20sudan.pdf>. (Accessed on 23 April, 2025)

¹⁰ <https://peacemaker.un.org/sites/default/files/document/files/2024/05/sd060000the20comprehensive20peace20agreement.pdf>. (Accessed on 23 April, 2025)

¹¹ <https://www.theguardian.com/world/2011/feb/07/sudan-referendum-result-confirmed> (Accessed on 23 April, 2025)

supposed 2015 Presidential Election. The armed conflict led to massive destruction of both human beings and property, massive displacement of people which resulted into refugee crisis in the region. Some scholars have argued that the 2013 conflict or crisis was caused by the Transitional Constitution of the Republic of South Sudan because it gave excessive powers to the President abnormally¹². The President has powers to remove and appoint any public officer without the Parliamentary oversight including judicial officers. The conflict was eventually ended through a Peace Agreement that was signed in 2015 between the Government of South Sudan and the SPLM-IO¹³,

South Sudan has a had a tumultuous beginning politically and constitutionally resulting in a brutal civil war just two years after its independence. Attempts to end the civil war have led to many elite-centered peace agreements, all which have not resolved the political crises. The crisis is essentially about leadership and power. Based on the assessment of the South Sudan national dialogue, many citizens believe that the leadership has largely failed the country and violent contestation of leadership and power has created paralysis in the country. The result is an unbreakable political stalemate, which has kept the country in political instability.

It follows, therefore, that a solution must break this violent political contestation and the political stalemate and leadership failure. Our perspective is that another elite-centered political agreement that re-arranges the political chessboard will have marginal impact on the impasse¹⁴. What is needed is a complete restructuring

¹² <https://reliefweb.int/report/south-sudan/final-report-african-union-commission-inquiry-south-sudan> (Accessed on 23 April, 2025)

¹³ <https://southsudan.igad.int/index.php/about-us/91-demo-contents/news/299-agreement-on-the-resolution-of-the-conflict-in-the-republic-of-south-sudan>. (Accessed on 23 April, 2025)

¹⁴ <https://southsudan.igad.int/index.php/about-us/91-demo-contents/news/299-agreement-on-the-resolution-of-the-conflict-in-the-republic-of-south-sudan> (Accessed on 22 April, 2025)

of state power that is aimed at restoring the sovereignty of the people of South Sudan. Ultimately, the question before the people of South Sudan is whether to amend the status quo, which is an exclusive authoritarian rule, to accommodate excluded elites, or to create a more inclusive and democratic system. If we keep the status quo, then we are maintaining a “closed access order,” concentrating private power in the hands of a few, according to Douglass North. This is exactly what we will get if we reach for another elite-centered political agreement. We can break with the status quo through a constitutional agreement by striving for a more “open access order,” which, according to Douglass North¹⁵, is a rules-based agreement that envisions an inclusive, participatory state.

Over the few years, the great lakes region has witnessed the raise of authoritarian regimes, brutal in nature and resulted into Constitutional crisis, endless sub-national, national and regional conflicts, refugee’s crisis in the region and beyond. Total violation of fundamental human rights characterized by massive disappearance, torture and extrajudicial killing of citizens who’re so critical about the governance of their respective Countries¹⁶. However, we’ve witnessed the resistance of such authoritarian regimes by the people especially the young people who’re passionate about a governance system that works for them. This is evident by the fact that so many young people are increasingly participating in political processes which includes; peace building initiatives, exercising their constitutional right to peaceful protest, participate in democratic elections and realizing the importance of using their democratic right to vote for leaders of their choice

¹⁵ The Root Causes of Sudan's Civil Wars: Old Wars and New Wars (Expanded 3rd Edition)- DOUGLAS H. JOHNSON (Accessed on 22 April, 2025)

¹⁶ <https://www.accord.org.za/conflict-trends/conflict-great-lakes-region/> (Accessed on 23 April, 2025)

1.2 STATEMENT OF THE PROBLEM

The Constitution Making Process started way back in 2011 right after South Sudan had attained Her independence and the Transitional Constitution of the Republic of South Sudan established critical institutions for the process such as the National Constitutional Review Commission. However, the process was stalled due to the 2013 conflict which was late resolved through a peace negotiated process which resulted into the signing of the 2015 Peace agreement. Unfortunately, in 2016 a year later, another conflict erupted which resulted into the signing of 2018 Revitalized Peace Agreement. However, the 2018 Peace Agreement presented a rare opportunity to jump-start the Constitution making because it incorporated the permanent constitution making process under chapter six of the Peace Agreement. Unfortunately, due to lack of political will and lack of complete spirit of constitutionalism, the institutions established by the Constitution Making Process Act, 2023 aren't independent and operational as they remained on paper without any significant work. Equally, lack of government funding to the institutions has crippled their work. The Act, fundamentally establishes four critical institutions to spearhead the process, these institutions include; The National Constitution Review Commission (NCRC), National Constitution Conference (NCC) and the Constituent Assembly (transforming the current unelected Parliament into Constituent Assembly) and the Constitutional Drafting Committee (CDC). There still exist lacunas in the Constitution Making Process Act and these include the question of constitutional referendum, legitimacy, oversight responsibilities, public participation, making no reference to the National Dialogue and decision-making processes.

Consequently, these challenges or lacunas risk the process being hijacked from the people of South Sudan and predominately turning into an elite constitution making process with ultimate decision-making powers against the will of the people. It also risk failing to addressing the root causes of endless conflicts in South Sudan associated with governance, resource management or utilization, national identity and other social issues.

1.3 OBJECTIVE OF THE STUDY

1.3.1 MAIN OBJECTIVE

To critically draw a comparative analysis on the South Sudan permanent constitution making process with other East Africa countries.

1.3.2 SPECIFIC OBJECTIVE

- I. To analyse the South Sudan permanent constitution making process in comparison with other East Africa Countries.
- II. To understand the existing lacunas in the law and institutional framework governing the Constitutional Making Process.
- III. To understand the extent to which popular public participation is enshrined in the law and institutional framework.
- IV. To evaluate the transparency of the Permanent Constitution Making Process as anticipated by the law.
- V. To evaluate and learn from regional perspectives on Constitutional Making Processes.

1.4 RESEARCH QUESTION

1. How is the South Sudan Constitution Making process crafted in comparison with other East Africa Countries?
2. What are the existing lacunas in the law and institutional framework governing the Constitution Making Process?
3. How transparent are these institutions in discharging their duties or responsibilities?
4. What's the current status of the Constitution Making Process?
5. Whether the law has addressed the question of public participation in the Constitution Making Process?
6. What are the available key recommendations?

1.5 SIGNIFICANCE OF THE STUDY

The study will evaluate and analyse the existing legal and institutional frameworks governing the Constitution Making Process, identifying or unpacking the existing lacunas and proposing areas of intervention or narrowing the gaps. The study will explore possible ways or recommendations to the policy makers in the seek of having people's led and owned constitutional making process. It shall make reference to South Sudan Constitutional journey underscoring the challenges encountered during the respective processes.

1.6 SCOPE OF THE STUDY

The study is eventually limited to South Sudan Constitutional Making Process by comparing it with the East Africa Countries Constitutional Making Process. They will focus on the Revitalized Peace Agreement, The Transitional Constitution of the Republic of Uganda, 2011 (As amended), the Constitution Making Process Act, 2022.

Make reference to regional and international jurisprudence on Constitution Making Process drawing lessons from such experiences.

1.6.1 Time Scope

The study is limited to 2011 up-to-date Constitutional Making Process in South Sudan.

1.6.2. Geographical scope

The study covers the East Africa Countries which includes Kenya and Uganda Constitution Making Process in comparison with the South Sudan Constitution Making Process.

1.6.3 Subject Scope

The study focuses on the South Sudan Constitution Making Processes in comparison with the East Africa Countries Constitution Making Processes. The study will involve the respective readership on the existing lacunas and the key recommendations in ensuring a People's Led Constitution.

1.7 LITERATURE REVIEW

The making of a new constitution in Uganda marked an important watershed in the history of the Country. It demonstrated the desire of the people to fundamentally change their system of governance into a truly democratic one. The process gave the people of Uganda an opportunity to make a fresh start by reviewing their past experience, identifying the root causes of their problems, learning lessons from the past mistakes and making a concerted effort to provide genuine solution to their better governance and future development. The Constitution Making process was thus a major step towards the democratization of the Country which had experienced nearly thirty years of oppression, tyranny and exploitation. It restored

Uganda to the Constitutional path. The process has been hailed as unique and unprecedented in the history of Constitution Making in Africa and elsewhere. It was an epic process lasting over seven years commencing in 1988 when the Uganda Constitutional Commission was established until 1995 when the new constitution was promulgated by the constituent Assembly¹⁷. The distinct characteristic of the process was the popular participation by the people that was achieved through wide consultation and national public debate. The process of popular participation contributed to the building of a national consensus on the most suitable form of constitution. Such has been the interest in Uganda's Constitution Making process that it has been the subject of considerable interest¹⁸.

On institutional framework in Uganda to manage reforms and partake in the 1995 Constitution Making Process, the NRM government decided to establish a ministry of Constitutional affairs to make appropriate arrangements or steps for the preparation of writing a new constitution and to oversee the process¹⁹. Notably, the first major institutional mechanism was the Uganda Constitutional Commission that was established by Statute No. 5 of 1988²⁰. The law set out the purpose for establishing the commission, its composition and terms of reference. The Commission consisted of twenty-one members appointed by the President in consultation with the Minister responsible for constitutional affairs²¹. The members were to be appointed on the basis of personal integrity, professional skill and expertise. The commission had a

¹⁷ Constitutionalism in Africa, creating opportunities facing challenges- J. Oloka Onyango at page 263, The Challenges of Constitution-Making and Implementation in Uganda- Benjamin J. Odoki

¹⁸ Constitutionalism in Africa, creating opportunities facing challenges- J. Oloka Onyango at page 263, The Challenges of Constitution-Making and Implementation in Uganda- Benjamin J. Odoki

¹⁹ The Search for a National Consensus, The Making of the 1995 Uganda Constitution, Benjamin J. Odoki at page 19.

²⁰ The Search for a National Consensus, The Making of the 1995 Uganda Constitution, Benjamin J. Odoki at page 2.

²¹ The Constitution Commission Statute, 1988.

chairperson who was a justice of the Supreme Court, a vice chairperson who was a professor of political science and a secretary who was a professor of history. Other members were highly qualified in various fields and represented the national diversity of Uganda. Two of its members were women. The Commissioners were required to perform their functions impartially and in practice enjoyed complete independence from interference from any quarter²².

Reminding ourselves with the past, the 1962 Constitutional Conference which was attended by the representatives of the Government, the Opposition, Buganda and other kingdoms including districts leaders was conducted in London. However, the conference was faced with two major problems which includes; the future positions of the kingdoms of Ankole, Bunyoro and Toro and the district of Busoga. The second major problem was the issue of the lost counties whereby the delegation from Bunyoro protested and demanded their transfer back to the Kingdom²³. One could assume that the organizers of the Constitutional Conference would've first organize inter-party discussions or negotiation prior to the Conference to create awareness on the delegates.

The question of legitimacy of people's power in the context of Kenya came up in one of the plenary sessions of the National Convention Assembly (NCA)- a grouping of civil society organizations that had recently led the opposition to the government of President Danile Arap Moi and his Kenya Africa National Union (KANU) government. It was argued that the Moi-KANU regime had ceased to have the Constitutional, legal

²² ibid

²³ Uganda Development of its Laws and Constitution, H.F. Morris & James S. Read at page 78

and moral power to rule the Country. It was further contended that the regime had failed to carryout economic, social, cultural and political reform²⁴.

Following the general elections of 1997 which were marred with irregulates and illegalities, many Kenyans arose and demanded for a new Constitution and political dispensation in the Country. Parliament of Kenya on the initiative of the government enacted the Constitution of Kenya Review Act (2002) which created the legal framework for comprehensive constitutional making process in Kenya²⁵. In achieving the full implementation of the Act's provisions, a constitutional review body, Constitution of Kenya Review Commission (CKRC) was established headed by renowned law Professor Yash-Pal Ghai and specifically meant to conduct civic education, seek public input and prepare a draft constitution for consideration by an enlarged inclusive National Constitutional Conference (NCC)²⁶. The NCC, referred to as the Bomas of Kenya was comprised of all members of parliament by then, 42 representatives from different political parties, 3 delegates from each district, 125 representatives of religious groups, women's groups, youth groups, the disabled, trade unions and NGOs. Unfortunately, the process was derailed by deep politicization and disagreements among the stakeholders resulting in the rejection of the Commission's draft constitution in the constitutional referendum of 2005. Important to note is that the 2009 constitutional process was a sequel to the 2000-2004 process. The rejection of the draft constitution by Kenyans in the referendum of 2005 ultimately meant that the 1963 constitution remained the basic law of

²⁴ Constitutions, Law and Civil Society: Discourses on the Legitimacy of People's Power- Willy Mutunga, Former Kenya Chief Justice. **(Accessed on 22 April, 2025)**

²⁵ Designing a Constitution-Drafting Process: Lessons from Kenya, Yale Law Journal, Alicia I. Bannon

²⁶ Constitution-Making in Contemporary Kenya: Lessons from the Twentieth Century, KSR Volume 1, Number 1, December 2009 by Robert Maxon, <https://kessa.org/wp-content/uploads/2020/01/1.pdf>. **(Accessed on May 22, 2025)**

Kenya. Disputed presidential election results in 2007 provoked an unprecedented wave of political violence and killings across Kenya claiming over 1000 lives and causing the displacement of hundreds of thousands. An AU-brokered power sharing deal subsequently ended the conflict and created a government of national unity between rival factions. The deal also provided for constitutional reforms. Under the Constitution of Kenya Review Act 2008 (CKRA), a Committee of Experts (CoE) was established as the main technical organ to drive the process. The CoE was given 12 months to produce a draft to be submitted to referendum. Members of the CoE were appointed on 23 February 2009 and sworn in on 2 March 2009²⁷.

The government of Eritrea was formed in May 1991 by the EPLF immediately after the liberation of the country from Ethiopian military occupation. The EPLF-based government was designed under proclamation No. 1 of 1991 as a provisional government. On 23 May, 1997, a Constituent Assembly ratified the draft constitution of Eritrea prepared by the Constitutional Commission. The ratification marked the climax of a process of three years of intense public debate and consultation, that debate was itself the fulfilment of a long struggle for national self-determination and independent statehood²⁸. A thirty year of independence struggle from Ethiopia ended in Eritrean military victory in May 1991. Two years later, the Eritreans of voting age chose independence rather than association with Ethiopia in an international observed referendum. The government of the Eritrea then embarked²⁹ on a transition process culminating in the adoption of the Constitution. A critical part of the transition was the establishment of the Constitutional Commission of Eritrea

²⁷ <https://constitutionnet.org/country/kenya> (Accessed on 23 April, 2025)

²⁸ Constitutionalism in Africa, creating opportunities facing challenges- J. Oloka Onyango at page 234, Constitution-Making in Eritrea: Democratic Transition through Popular Participation- Bereket Habte Selassie

(CCE). The CCE was mandated to draft a constitution on the basis of wide-ranging public debate on the matter and through expert consultations³⁰.

The idea of Constitutionalism is particularly associated with the existence of a written constitution from which the state's authority and legitimacy may derive or limits the power of the state and help protect the rights of individuals³¹. It is important to appreciate that a written constitution defines the existence of different powers of state actors or authorities and how they should consciously exercise such authority or power constitutionally or legally. The ideal of constitutionalism is centered around distribution and separation of powers and respect to the rule of law, most importantly the pivotal role played by the citizens in defending and protecting their Constitution³².

1.8 METHODOLOGY

The study deploys the qualitative but mainly desktop reviewing the Constitution Making Process Act, conducting interviews, reviewing literatures relating to Constitution Making Process. The study carried out at least (05) in person interviews to response to the questions through developed questionnaires.

³⁰ ibids

³¹ Constitutional and Administrative Law, 15th Edition, AW Bradley & K D Ewing

³² Constitutional and Administrative Law, 15th Edition, AW Bradley & K D Ewing at page 8.

CHAPTER TWO; NON-LEGAL ISSUES

This chapter will look at the non-legal issues in the South Sudan Constitution making process in comparison with the East Africa Countries Constitution Making Process. The study will evaluate how these non legal issues shall affect the Constitution Making Process and the proposed mechanisms in addressing these issues.

2.1 Political will in supporting or facilitating the Constitution Making Process by the political leaders.

The existence of political will in supporting and facilitating constitution making forms the fundamental aspect of the process. These includes; speeding the establishment of the mechanism or institutions to oversee the constitution making process such as the National Constitution Review Commission and the National Constitutional Conference³³. Limited or lack of resource to facilitated the Constitution Making Process by the government, there's absolutely no budgetary allocation to the institutions charged with the responsibilities of overseeing the process. The National Constitution Review Commission hasn't received any budgetary allocation from the National Budget and there's absolute lack of political will to adequately fund the institutions established by law to oversee the process in administering and achieving their activities.

Additionally, government missed the timelines provided by the law to reconstitute the different institutions charged with the responsibility of spearheading the Constitution Making Process. The political leadership lack the will to reconstitute

³³ <https://theradiocommunity.org/govt-urged-to-demonstrate-political-will-in-constitution-making-process-3097> (Accessed on 22 May 2025)

them due to political difference between different parties to the Peace Agreement. Such missed opportunities affected the process greatly. The political leaders need to be pressured always to implement such critical processes and most likely due to the fact that they failed to cultivate the spirit of constitutionalism and rule of law.

It is important to note that the Constitution Making Process is political in nature and the willing of the political actors in supporting and providing the necessary resources is very paramount for the success of the process. The participation and engagement of political leaders in the process not only fasten it but equally ensure that every voice is heard in the process. Political parties form the integral part of the society and the governance by ensuring democratisation of the Country of such need to be actively engaged.

2.2 Prioritizing election over the Constitution Making Process.

The process is faced with the challenge of whether the Country should prioritise elections first before writing a new constitution. However, there has been issues of which sort of constitution or legal framework will the National Election Commission use in conducting of the election. A lot of voices in the government seem to suggest that election should be prioritized over the Constitution Making Process and the new elected government will be charged with the responsibility of writing the new constitution as opposed to the current appointed government including the parliament. However, government finds it difficult to conduct election without any constitutional framework and wouldn't make critical decisions in terms of what to prioritize between election and the Constitution Making Process. There's also another important argument that the current Parliament doesn't derive its mandate or powers from the people and lack the people's legitimacy to approval and legislate

on the new Constitution. Therefore, there's need to leave the process to the supposed elected Parliament to legislate and approve it as Parliament will be transformed into a Constituent Assembly³⁴.

Correspondingly, South Sudan as an independent Country is yet to conduct its general democratic election and the citizens are impatiently waiting for the opportunity to vote for their leaders through a free, fair and democratic election that reflects the will of the people. The desire for free, fair and democratic election by the people of South Sudan override the demands and calls for writing a new constitution. Citizens want government to prioritize election first as opposed to the Constitution Making Process, such pressures have been pushing government to prioritize election over the Constitution Making Process.

There's a general understanding that the country can organize its first general election using the 2011 Transitional Constitution as the legal framework to facilitate the conduct of the election. However, others still believe that the 2011 Transitional Constitution has a lot of lacunas that need to be addressed through proposing amendments to the Constitution. For instance, the 2011 Transitional Constitution allows the President to remove from Office elected leaders, equally it gives the President a lot of unnecessary powers and authorities. There's need to reform the Constitution to appreciate the new realities in the Country and the urgent need for democratic transformation in the Country.

³⁴ <https://unmiss.unmissions.org/joint-statement-trilateral-taskforce-permanent-constitution-making-electoral-processes-support-south>.

2.3 Gender issues

South Sudan just like any other Country in the region and the world has gender issues as central to the Constitution Making Processes in order to empower them politically, socially and economically. South Sudan is deeply rooted in its cultural norms and practices which largely affects and limits women in political, social and economic spheres of the society. Some of such cultural norms or practices are repugnant to natural justice and affects women greatly. These issues include, women not owning land or inheritance issues, proactive participation of women in political life, gender-based violence against women and lack of economic empowerment. These cultural practices and norms render the women of South Sudan inferior to and largely affects their own livelihood and protection of their fundamental freedoms and rights. In most cases, gender issues are regarded as non-constitutional issues due to cultural rigidities.

As South Sudan, the world's youngest nation, works towards a permanent constitution and its first ever election in December 2024, women's participation at all levels of this process is paramount. The conflict that erupted in 2013 - two years after independence - and continued until 2016, affected women and girls disproportionately. Despite this, and despite making up nearly half the population, women and girls have been excluded from participating in the nation-building process³⁵.

The country's history of constitution-making tells a story of an exclusive and elite-driven process, detached from citizens' aspirations, resulting in limited ownership

³⁵ <https://www.kcl.ac.uk/why-women-must-seize-the-constitutional-moment-in-south-sudan> (Accessed on May 22, 2025)

and implementation. To ensure legitimacy for the new constitution, it is critical to include intergenerational women. Inclusion will bring valuable skills and experiences essential for achieving sustainable peace and addressing specific needs and concerns of women and girls³⁶.

South Sudanese women must evaluate their gains so far and fast track their progress. It is crucial to re-strategies beyond political affiliations and collaborate to influence processes more effectively. One method is to capitalise on younger women's expertise; this can lead to an exchange of generational knowledge and build a critical mass to advocate for women's inclusion. Robust engagement in civic education and participation is also essential.

Women's issues should not be kept separate from national-building processes. As stated in Article 16 of the amended Transitional Constitution 2011, women's participation shall be in public life. Hence their voices should be heard meaningfully, in all decision-making processes. By doing this, South Sudanese women can seize the 'Constitutional Moment' and create a better future for themselves and future generations³⁷.

2.4 Meaningful Public Participation

Although, the Constitution Making Process Act attempts to address the issue of public participation. However, it felt short of appreciating the extend to which different institutions or stakeholders should undertake in meaningful public participation or consultation. In the Kenya 2010, Constitution Making Process, the aspect of public

³⁶ ibid

³⁷

¹ <https://www.kcl.ac.uk/why-women-must-seize-the-constitutional-moment-in-south-sudan> (Accessed on May 22, 2025)

participation and consultation was the fundamental cornerstone of the process following a Court decision. For any public gathering in South Sudan requires a National Security clearance and its upon the National Security Service discretion to either grant permission or reject the event. Previously, there're attempts by the government to block conversation or public discourse on the process.

The process must at all times be made accessible to the broadest possible community. It is not sufficient to merely advertise the invitation to make submissions. It is important to ensure that ordinary members of the public are able to access the process both physically and intellectually, and access must be made possible for those without access to mainstream media³⁸.

Uganda, Eritrea and South Africa all disseminated documents needed for understanding the context of constitutional reform in their countries to the people in both national and vernacular languages in the early stages of the consultation process. In the case of Eritrea this involved translating international covenants into vernacular languages. 400 trainers were mobilised to educate the public, reaching half a million people. In Uganda the existing constitution was reprinted and disseminated along with booklets entitled “Guidelines on Constitutional issues”, “Guiding Questions on Constitutional Issues” and a booklet explaining how to prepare a memorandum to be submitted to the Constituent Assembly.

To remain true to the principles of public participation, constitution-making bodies responsible for consultation must be seen to be accountable. This was achieved in Uganda, Eritrea and South Africa through effective publication of developments, and

³⁸https://peacemaker.un.org/sites/default/files/document/files/2022/07/ssframeworkforpublicparticipation2012_0.pdf. (Accessed on 22 May 2025)

by maintaining transparency of the process. South Africa posted copies of all working drafts of the constitution to those who had made submissions, thereby ensuring that contributors were aware of developments and could track the Constitutional Assembly's responsiveness to the people. Given the pressure of time, the principle of accountability assumes an even greater importance in South Sudan. Accountability and continuous reporting are critical to the perception of transparency and would make for better ownership.

Inclusion in decision-making bodies is not the only way in which different sectors may have influence in a process. Vertical inclusion which's basically inclusion through contributions from the bottom up-to the top is also important. This is usually easier in a constitution-making process when violence is reduced. Thus, recent democratic constitution-making processes have included programmes of public education and enabled the public to engage with constitution makers. This has so far been absent in Sudan. What all constitution-making processes in post-independence Sudan have in common is that Sudanese civil society.

2.5 National Dialogue Resolutions implementation

After the 2013 conflict, the President of the Republic of South Sudan, Salva Kiir launched the National Dialogue Process meant to resolve historical injustices, reconcile the Country, address the governance, economic and social issues facing the Country. A national committee was instituted to oversee the whole process and indeed the committee did a wide consultation within South Sudan, the refugees camps in Uganda, Kenya, Sudan and Ethiopia. The citizens presented their views and opinions on the fundamental problems facing the Country and provided clear recommendations or framework on the way forward in addressing these issues. Most

of the recommendations were touching the political elites especially on the governance. The people vehemently stated that the fundamental problem of South Sudan is leadership failure and the best way to resolve this problem is to have the key principals President Kiir and his Vice President Dr. Riek Machar relinquished power to a new crop of leaders. The National Dialogue recommendations were never implemented; however, it is important to note that Constitution Making Process is more of a National Dialogue where different stakeholders to the process will agree on some important and critical aspect of the Constitutional issues including those controversial issues especially on governance³⁹.

On December 14, 2016, South Sudan's President, Salva Kiir Mayardit, declared the National Dialogue (ND) process and appointed eminent personalities and civil society representatives to lead it. At the time, the second spell of the civil conflict was raging in parts of Upper Nile, Equatoria, and Bahr El Ghazal regions. Numerous attempts by the Inter-Governmental Authority on Development (IGAD) to salvage the 2015 Agreement for the Resolution of Conflict in South Sudan (ARCSS) proved unsuccessful. Likewise, communal conflicts were driving widespread political violence. While the efforts to revitalize the ARCSS were underway, the framers of the ND realized that an elite driven process presented very limited prospects for stability in the country. In such a context, a "people centered" political process seemed more promising. Thus, the principal objective of the ND was to engender sustainable peace and establish national unity in reflection of people's voices. In his ND declaration speech, President Kiir referenced the ARCSS and the SPLM reunification agreement as an effort in the right direction but cautioned that 'there

³⁹ <https://dr.211check.org/wp-content/uploads/2021/07/NDSC-Final-Report-2nd-Draft-12-Dec-2020-.pdf>.

remain a number of fundamental issues that require a much broader South Sudanese forum.’ He declared that ‘political settlements have often ignored longstanding grassroots grievances,’ necessitating the institution of the ND⁴⁰.

The National Dialogues is concerned frequently include elements of constitution making. Less frequently, constitution-making processes include processes that resemble National Dialogues. In ‘normal’ times, constitution-making is generally not accompanied by a National Dialogue as understood in this paper⁴¹. The state institutions charged with constitution-making may be inclusive and deliberative and they may facilitate widespread public debate, engaging with specific interest groups and the public. In the best processes, the public debate is extensive and thoughtful and influences constitutional decision-making. It may also contribute to moulding a society’s sense of shared vision. But these processes usually differ from the National Dialogues as understood in this paper because they occur within established state institutions and processes, have an agenda limited to constitution-making and, unlike almost all National Dialogue processes, there is a definitive mechanism for making binding decisions on a proposed constitution or constitutional amendments.

National Dialogues as understood in this paper and more ambitious, dedicated constitution-making processes are both concerned with fundamental reform of the state. To succeed in deepening democracy, and promoting good governance and inclusive citizenship, both need to be inclusive, engaging with as broad a range of interest groups as possible.⁴ But, as noted above, both may take a wide range of

⁴⁰https://www.suddinstitute.org/assets/Publications/5fc607f47c50b_TheSouthSudanNationalDialogueWhatNext_Full.pdf. (Accessed on 22 May 2025)

⁴¹https://berghof-foundation.org/files/publications/NDH_Murray_ND_Constitution-making.pdf. (Accessed on 22 May 2025)

different forms, perhaps involving multiple stages and multiple forums.

2.6 Security related issues.

The atmosphere for the Constitution Making Process must be free from security threats and challenges, there must be relative peace and stability in the Country to enable the citizens meaningfully and constructively contributed to the process. Currently, South Sudan is engulfed in serious security challenges due to political tensions in the Country. Some of the areas are completely inaccessible by the government due to continued military operations happening in those areas which definitely hinders the effectiveness of the process⁴². The Constitution Making Process requires a relatively peaceful environment to create a room for constructive dialogue, engagement and conversations between different stakeholders. The current South Sudan security status doesn't create a free environment for citizens to contribute in writing their own constitution. There's need to create an enabling stable environment for dialogue and conversations on Constitutional matters or issues.

The ensuing war was marked by ethnic violence, mass atrocities, and a widespread humanitarian crisis. A peace deal signed in 2018, the Revitalized Peace Agreement, brought hope of a better future. However, the implementation of the agreement has stagnated, leading to several extensions of the transitional period and delays in holding the country's first democratic elections. Recently, tensions escalated between the country's two main parties, leaving the peace deal on the verge of collapse and the country at risk of sliding back into war.

⁴² The Struggle for South Sudan: Challenges of Security and State Formation. New York: I.B. Tauris, Kuol, Luka Biong Deng & Sarah Logan, eds, (2019).

The security situation in South Sudan has significantly deteriorated amidst rising tensions between the country's two main political parties, the Sudan People's Liberation Movement (SPLM), led by President Salva Kiir Mayardit, and the Sudan People's Liberation Movement in Opposition (SLPM-IO), headed by First Vice President, Riek Machar. This has put the already-fragile country at serious risk of a relapse into civil war. This deterioration will eventually affect the Constitution Making Process since other parts of the Country aren't accessible.

2.7 Peace Agreement Implementation

The Revitalized Peace Agreement provides for the parameters under which the Constitution Making Process should be undertaken by the government and other different stakeholders⁴³. However, lack of its implementation greatly affected the process in terms of missing timelines and committing resources to the implementation of the Peace Agreement. The parties to the Peace Agreement focused on distribution and allocation of political positions to themselves as opposed to genuinely implementing the Peace Agreement. The current Constitution Making Process in South Sudan is centered around the Peace Agreement implementation and apparently the implementation of the Peace Agreement is facing serious challenges and contradictions.

It is important to note that the implementation of the Agreement ground to a halt, as the Parties engaged in repeated violations and the political and security environment markedly worsened. In scenes not seen since the signing of the R-ARCSS over six years ago, armed conflict and violence erupted across the country, several high-ranking opposition members and Parliamentarians were detained and

⁴³ <https://docs.pca-cpa.org/2016/02/South-Sudan-Peace-Agreement-September-2018.pdf>.

imprisoned and the First Vice President Dr Riek Machar Teny was put under house arrest. In addition, ministerial positions at the state and national levels and those within the Presidency were reshuffled, and portfolios within some Agreement institutions and mechanisms were abandoned. In some parts of the country, civilians including women and children have borne the brunt of the fallout and have suffered serious human rights and humanitarian law violations including death, injury and displacement due to military operations and connected armed clashes⁴⁴.

Regional actors need to remain seized of the implementation process in South Sudan. Regional countries played a significant role in negotiating the current agreement, and they have significant cultural, political and economic influence and leverage over the implementation process compared to other outside actors.

2.8 Tumaini Peace Initiative

The current ongoing Tumaini Peace Initiative in Nairobi between the government of South Sudan and the Opposition groups who're not signatories to the 2018 Peace Agreement will have a great impact on the Constitution Making Process. The peace talks have also centered around the Constitution Making Process with fresh demands on the form and the processes, the Tumaini Peace Initiative seems to suggest new ideas or proposals to the process. The proposals might impact on the process either positively or negatively depending on the circumstances surrounding each step or process. The Tumaini Peace Initiative might breathe a new life to the Constitution

⁴⁴ <https://reliefweb.int/report/south-sudan/rjmecc-report-status-implementation-revitalised-agreement-resolution-conflict-republic-south-sudan-period-1st-january-31st-march-2025>. (Accessed on 22 May 2025)

Making Process by providing the parties with new avenues of proposing new suggestions in narrowing the lacunas⁴⁵.

CHAPTER THREE: LEGAL FRAMEWORK (DOMESTIC, REGIONAL AND INTERNATIONAL)

3.0 Introduction;

This chapter focuses on the legal framework (domestic, regional and international) on the Constitution Making Processes limiting it to the institutions established to oversee the process and the different fundamental phases of the Constitution Making Process.

3.1 The Transitional Constitution of the Republic of South Sudan, 2011 (As amended)

The Constitution provide that the executive of the Revitalized TGoNU shall, after adequate consultations with all stakeholders including the political parties, civil society organizations, women groups, youth, faith-based groups, reconstitute the existing National Constitution Review Commission and appoint a preparatory sub-committee for convening a National Constitutional Conference in accordance with the Act governing the Constitution Making Process⁴⁶.

Equally, the Constitution also provide for the fundamental principles of the Constitution Making Process which includes the supremacy of the people of South Sudan, a federal and democratic system of government that reflects the character

⁴⁵ <https://www.radiotamazuj.org/en/news/article/opinion-evaluating-the-success-and-significance-of-the-tumaini-initiative>.

⁴⁶ Article 202(1) of the Transitional Constitution of the Republic of South Sudan, 2011 (As Amended).

of South Sudan, guaranteeing peace and stability, national unity and territorial integrity of the Republic of South Sudan, promoting people's participation in the governance of the Country through democratic, free and fair elections, respecting ethnic and regional diversity and communal rights including the right of communities to preserve their history⁴⁷.

Fundamentally, it also provides for the different phases of the Constitution Making Process which shall begin with the workshop moderated and facilitated by an institute renowned internationally for Constitution Making. The outcome of the Workshop shall inform the drafting of the legislation to govern the Constitution Making Process. The Parliament shall be transformed into a Constituent Assembly to adopt the new constitution which shall be defined by law. The Constitutional text adopted by the Constitutional Conference shall be presented by the Minister of Justice and Constitutional Affairs to a Constituent Assembly for deliberation and adoption⁴⁸.

3.2 The Revitalized Agreement on the Resolution of Conflict in South Sudan (RARCISS);

The Executive of the Revitalized TGoNU after adequate consultations with all stakeholders including the political parties, Civil Society Organizations, Women groups, youth and Faith-based groups, shall reconstitute the National Constitutional Review Commission (NCRC) and appoints a preparatory subcommittee for convening a National Constitutional Conference (NCC) in accordance with the Act governing the constitution making process⁴⁹.

⁴⁷ Article 202 (3) of the Transitional Constitution of the Republic of Uganda, (As amended).

⁴⁸ Article 202A of the Transitional Constitution of the Republic of Uganda, (As amended).

⁴⁹ Article 6.6 of the Revitalized Agreement on the Resolution of Conflict in South Sudan (RARCISS).

In addition, the Peace Agreement state that in drafting the permanent Constitution, lessons shall be drawn from South Sudan common law, constitutional history, past experience and this agreement⁵⁰. Also, it provides that the process of the permanent constitution making process shall be led and owned by the people of South Sudan⁵¹.

The Peace Agreement provide that government shall provide in its budgetary provisions adequate funding for the Constitution Making Process⁵². Also, it states that both the government and the institutions established to oversee the constitution making process shall seek the assistance of regional and international experts to benefit from the experience, expertise and best practices to assist in the Constitution-Making Process⁵³.

The Draft Constitution Text presented by the Commission to the Executive shall be presented to a National Constitutional Conference (NCC) composed of selected representatives from all levels of administrations and registered institutions as shall be stipulated in the legislation governing the Constitution making process⁵⁴.

The Constitutional Text adopted by the Constitutional Conference shall be presented by the Minister of Justice and Constitutional Affairs to a Constituent Assembly for deliberation and adoption⁵⁵.

The Parties agree that the Transitional National Legislature shall be transformed into a Constituent Assembly on the 1st date of the 27th month of the Transition for

⁵⁰ Article 6.12 of the Revitalized Agreement on the Resolution of Conflict in South Sudan (RARCISS).

⁵¹ Article 6.13 of the Revitalized Agreement on the Resolution of Conflict in South Sudan (RARCISS).

⁵² Article 6.15 of the Revitalized Agreement on the Resolution of Conflict in South Sudan (RARCISS).

⁵³ Article 6.16 of the Revitalized Peace Agreement.

⁵⁴ Article 6.9 of the Revitalized Agreement on the Resolution of Conflict in South Sudan.

⁵⁵ Article 6.10 of the Revitalized Agreement on the Resolution of Conflict in South Sudan.

purposes of adopting the Permanent Constitution after which it shall be dissolved preceding the elections⁵⁶.

3.3 The Constitution Making Process Act, 2022.

It provides for the establishment of the National Constitution Conference⁵⁷ and also provide for the Composition of the conference which shall comprise of at least 1,200 delegates whereas 100 delegates shall be from each state, 30 delegates from each Administrative Area while 110 delegates shall be for other categories⁵⁸. Also, it provides for the functions and powers of the Constitutional conference which includes the approval and pass the final draft of the Constitutional text either by consensus or by two-third majority of delegates present and voting. Lastly, adopt the final draft constitutional text⁵⁹.

Notably, it also provides that the purpose of the Act is to establish a legal framework to govern the process of the permanent constitution making⁶⁰. It is to outline the design, procedures, form, powers and functions of the mechanisms to be involved in the Permanent Constitution Making Process. Equally, it provides for the guiding objectives in the performance of the institutions or mechanisms of constitution making process and shall include; be accountable to the people of South Sudan, ensure that no parts of the public are excluded from civil education and participation for reasons of physical disability, level of education, language, geographical location, religious beliefs, ethnicity and political affiliation⁶¹.

⁵⁶ Article 6.11 of the Revitalized Agreement.

⁵⁷ Section 29 of the Constitution Making Process Act, 2022

⁵⁸ Section 30 of the Constitution Making Process Act, 2022

⁵⁹ Section 31 of the Constitution Making Process Act, 2022

⁶⁰ Section 3 of the Constitution Making Process Act, 2022

⁶¹ Section 8 of the Constitution Making Process Act, 2022.

It also establishes the Reconstituted National Constitutional Review Commission as an independent body corporate having an official seal, legal entity with powers to sue or be sued in its own name⁶². Notably, the Act provide for the composition of the Commission which shall comprise of fifty-seven (57) members inclusive of the Chairperson and Deputy Chairperson appointed by the executive branch of government⁶³. However, forty-five (45) percentage of the commission members shall be representatives of the stakeholders and fifty-five (55) percentage of the commission members shall be representatives of the government and political parties.

Additionally, the Act provide for the powers and functions of the Reconstituted National Constitutional Review Commission which includes; formulation of its rules of procedures, develop its action or work plan, facilitate and conduct civic education, transmit the outcome of public consultations and validate the first draft constitutional text⁶⁴.

3.5 The Constitution of Kenya Review Act, 2008

The Act establish the Committee of Experts as a body corporate with perpetual succession and common seal. It can sue and be sued under its legal identity⁶⁵. The functions of the Committee of Experts include; identify the issues already agreed upon in the existing draft constitution, identify the issues which are contentious or not agreed upon in the existing draft constitutions, solicit and receive from the public written memorandum and presentations on the contentious issues, prepare a

⁶² Section 9 of the Constitution Making Process Act, 2022.

⁶³ Section 10 of the Constitution Making Process Act, 2022.

⁶⁴ Section 12 of the Constitution Making Process Act, 2022.

⁶⁵ Section 8 of the Constitution of Kenya Review Act, 2008.

harmonized draft Constitution for presentation to the National Assembly, facilitate civic education throughout the review process and other functions⁶⁶.

The Committee of Experts shall, in furtherance of the completion of the review process, facilitate and promote civic education in order to stimulate public discussion and awareness. Notably, the Committee of Experts shall ensure that civic education materials are made available in a form accessible to the various categories of persons with disabilities⁶⁷. It is important to note that the civic education activities were done by both the Commission and the Civil Society actors. They develop a robust inclusive civic education program which basically focused on reaching out to the ordinary Kenyans to solicit their views on the Constitution Making Process.

It also provides that the National Assembly shall within thirty days of the tabling of the draft Constitution, debate it and approve the draft Constitution without amendment and submit it the Attorney General for publication⁶⁸. The National Assembly can propose amendments to the draft Constitution and submit the draft constitution and proposed amendments to the Attorney General who shall within seven days submit them to the Committee of Experts for consultation and redrafting.

It also provides that the Interim Independent Electoral Commission shall within seven days of the publication of the draft Constitution by the Attorney General frame and publish the question to be determined by referendum⁶⁹. The question to be submitted to the referendum shall require the voter to indicate whether the voter

⁶⁶ Section 23 of the Constitution of Kenya Review Act, 2008.

⁶⁷ Section 27 of the Constitution of Kenya Review Act, 2008

⁶⁸ Section 33(4) of the Constitution of Kenya Review Act, 2008.

⁶⁹ Section 37 of the Constitution of Kenya Review Act, 2008

approves or does not approve the proposed New Constitution and shall be framed as to require the answer “yes” or the answer “no”.

The Act provide that the conduct or the result of the referendum may be challenged only by petition to the Interim Independent Constitutional Dispute Resolution Court, within fourteen days after the publication of the result of the referendum⁷⁰.

The expenses incurred by the Committee of Experts and the referendum in accordance with this Act shall be charged on and issued out of the Consolidated Fund without further appropriation than this Act⁷¹.

3.6 Uganda Constitution Commission Statute, 1988

The Statute established the Uganda Constitution Commission with twenty-one commissioners headed by a chairperson⁷². The functions of the Commission include; study and review the constitution with a view to making proposals for the enactment of a national constitution that would, inter alia guarantee the national independence and territorial integrity and sovereignty of Uganda, establish a free and democratic system of government that will guarantee the fundamental rights and freedoms of the people of Uganda⁷³.

The Uganda Constitution Commission was supported by a Secretariat and it was headed by a secretary who was also a commissioner. The Secretary was responsible for day-to-day functioning of the commission, the recording of proceedings and the writing of the Commission’s reports. The secretary acted a link between the secretariat and the Commissioner in bridging the communication gaps. The

⁷⁰ Section 44 of the Constitution of Kenya Review Act, 2008

⁷¹ Section 52 of the Constitution of Kenya Review Act, 2008

⁷² Section 1 of the Constitution Commission Statute

⁷³ Section 4 of the Constitution Commission Statute.

Secretariat basic function was to acquire the necessary resources and provide the facilities required for the Commission to operate. The resources needed were financial, human and material support.

The highest policy and decision-making body was the plenary session meeting which was attended by all commissioners and some senior legal officers. It is important to note that all important decisions were taken by the plenary, after the proposals from, the secretariat and reports from the standing or ad hoc committees were discussed and approved by the Plenary.

Government committed itself to funding the Constitution Making process when it provided that the expenses of the Commission including the allowances for the Commission and staff shall be charged on and issued out of the consolidated fund without further appropriation than this statute⁷⁴.

The Statute also mandated the commission to create and carryout public awareness about the constitutional issues and to seek the views of the general public by holding public meetings and debates, seminars, workshops and any other form of collecting public views⁷⁵. Basically, the commission was given power to summon any person to appear before it and produce any document or material that would be considered relevant to the function of the Commission. It was an offence for any person to fail to appear when summoned to produce a document or to present a false or fabricated document with intention to deceive or mislead the commission.

The Fundamental importance of publicity for the Commission needs no emphasis. The entire country must be well informed about the constitution making process so

⁷⁴ Section 8 of the Constitution Commission Statute, 1988.

⁷⁵ Statute No. 5 of 1988

that every citizen can full participate in it. The public must be informed about the objectives and functions of the commission so as to obtain maximum cooperation and response from them. They must also be educated about the past constitutions and the new to review them and write a new constitution⁷⁶. The Commission made good use of the media by organizing press conferences, radio talk shows and TV Panel Discussion, print media and other publicity materials.

On the Constituent Assembly, it is important to note the manner in which a constitution is finally adopted by the people is very important in demonstrating its legitimacy, popularity and acceptability. A constitution which is imposed on the people cannot form the basis of a stable, peaceful and democracy governance of the people. The Constituent Assembly was charged with the responsibility of deliberating and approving the final constitutional text⁷⁷.

3.7 East Africa Community Treaty, 2007

The Treaty provide that the fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include among others; good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples rights in accordance with the provisions of the African Charter on Human and Peoples' Rights⁷⁸.

The Partner States recognise that women make a significant contribution towards the process of socio-economic transformation and sustainable growth and that it is

⁷⁶ The Search for a National Consensus, The Making of the 1995 Uganda Constitution at page 107

⁷⁷ *Ibids* at page 253

⁷⁸ Article 6 of the East Africa Community Treaty

impossible to implement effective programmes for the economic and social development of the Partner States without the full participation of women⁷⁹.

The Partner States agree to adopt measures to achieve the free movement of persons, labour and services and to ensure the enjoyment of the right of establishment and residence of their citizens within the Community⁸⁰.

The objectives of the common foreign and security policies shall be to; safeguard the common values, fundamental interests and independence of the Community; strengthen the security of the Community and its Partner States in all ways; develop and consolidate democracy and the rule of law and respect for human rights and fundamental freedoms; preserve peace and strengthen international security among the Partner States and within the Community⁸¹.

⁷⁹ Article 121 of the East Africa Community Treaty.

⁸⁰ Article 104 of the East Africa Community Treaty.

⁸¹ Article 123 of the East Africa Community Treaty.

CHAPTER FOUR; SUMMARY OF FINDINGS, CONCLUSIONS AND RECOMMENDATIONS.

4.0 Introduction

This chapter basically focuses on the key findings of the study, identify key recommendations to policymakers or stakeholders engaged in the process and the conclusion. This is meant to address the lacunas in the existing law governing the Constitution Making Process in comparison with the regional experiences.

4.1 SUMMARY OF THE FINDINGS.

4.1.1 Question of independence of the national constitutional review commission;

The respondents observed that the current setting of the National Constitution Review Commission doesn't guarantee the independence of the Commission as anticipated by the law⁸². Apparently, the government and the political parties have about fifty-five percentage representation in all the institutions charged with responsibility of overseeing the process. Nominations to these institutions are done by the political parties and they equally have huge influence or interference on the process and it definitely affects the fundamental principle of the independence of the Commission in delivering people's centered Constitution. In comparison with Kenya, the Committee was independent by law and in practice. The nomination and appointment of the committee members was done in a transparent.

⁸² Interview with Mr. Edmund Yakani, Civil Society representative to the National Constitution Review Commission on May 03, 2025.

The National Constitution Review Commission ought to be independent and impartial without any huge influence from the political elites, however the current set-up of the Commission portray that the political class has huge influence over the activities and operation of the Commission. Such influence affect functionality of the Commission as provided for by law, the independence is also zeroed down to how it is constituted, funding and other support to the Commission.

South Sudan is ethnically polarized and deeply divided, there'll be serious controversial constitutional issues that might required the facilitation of someone deemed to be neutral and basically non-South Sudanese to moderate the conversations and discussions to build consensus. Such issues might include land, federalism, sharing of natural resources, devolution of powers and resources and others.

4.1.2 The question of constitutional referendum;

The Constitution Making Process Act, 2022 didn't consider the aspect of Constitutional Referendum to address controversial constitutional issues that requires that determination by the people of South Sudan⁸³. The Act doesn't provide for any remedy in circumstance where the Constitutional conference failed to agree on critical issues. The vagueness in the law in regards to constitutional referendum undermines the legitimacy of the process, the law should appreciate and incorporate the aspect of constitutional referendum to deal with critical constitutional issues that requires the overall decision of the people of South Sudan.

⁸³ An interview with Lorna Merekaje, Women Representative to the National Constitution Amendment Committee on May 4, 2025.

It was observed that the Constitutional referendum will address two fundamental issues of legitimacy and ownership; there're those from the school of thought which opines that power belongs to the people, and it is through them that such fundamental constitutional issues can be addressed and agreed upon. They would like to diffuse the narrative that Constitutions worldwide are written by well-educated lawyers or other professionals, and I must categorically state that the Constitution is written by the people because the sovereignty of any country is vested in them. They all have absolute powers to determine and decide their own destiny, which unfortunately is not the narrative in South Sudan. Most of the illiterate people at the grassroots do not understand these issues, and therefore their participation is always limited. Although the proposed Bill has talked about public participation extensively, my major concern is the end result of such consultations. Which forum will be provided for the people to validate their views and ideas collected from them? The narrative advanced by the promoters of the process, that the National Constitutional Conference (NCC) shall represent the rest of the people does not hold water, because the entire decision-making process of over 11 million people has been left in the hands of only a handful of people. Is this number a sufficient, reasonable, and meaningful representation? Remember parties have already allocated themselves 55% representation, and in case of any voting on critical fundamental Constitutional issues, political leaders have already achieved their target of manipulating and deciding for everybody.

Congruently, it is through a Constitutional referendum where the people of South Sudan will have an opportunity to validate and have a final say on the Constitutional document. It is equally through them that critical and fundamental constitutional issues will be resolved because power belongs to them. Remember, there is an

appointed and illegitimized Parliament which only represents various political parties' constituencies instead of the people.

4.1.3 Failure to implement the National Dialogue Resolutions;

During the national dialogue process, the people of South Sudan presented their views and opinions on various issues of governance, economy, natural resource management and utilization, federalism and others. These resolutions should've provided a clear yardstick or framework to consider in drafting the Constitutional Text because Constitution Making Process is more of national dialogue⁸⁴. The understanding of the people of South Sudan during the National Dialogue was that the resolutions of the dialogue should inform the Constitutional Making Process especially the drafting of the Constitutional Text.

4.1.4 Existence of draconian security laws;

The recent passage of the National Security Service Amendment bill into law by the Parliament and treated as a draconian law that restricts the fundamental freedoms and rights guaranteed and protected by the Constitution and other international human rights instruments⁸⁵. Apparently, for any public gathering to happen in the Country, the organizers must seek security clearance from the National Security and they seem to dictate the kind of public gathering should happen based on the event agenda. This restriction undermines the fundamental right to freedom of assembly and speech protected by the Constitution and other International Human Rights instruments.

⁸⁴ An interview with Rajab Muhandis, Civil Society Member.

⁸⁵ An interview with Dr. James Ukuk, Lecturer at University of Juba on May 5, 2025.

4.1.5 Adequate public participation;

The fundamental question of public participation in the process is very central to the success of the process, the law shouldn't only anticipate the processes and different phases of the Constitutional Making Process but rather appreciate the fact that public participation should cut across all the different processes from the very beginning phases of it. The public participation shall include consultations, public discourses, submission of written petitions, designed civic education programs and other public participation modes or mechanisms in facilitating the process⁸⁶. In the Kenya and Uganda, Constitution Making Process, public participation was the cornerstone of the process.

4.1.6 Limited Civic Education on the Process;

Since the inception of the process, there has been limited civic education to the public in terms of the processes and procedures involved in the Constitution Making Process. Creating awareness on the content of the Constitution Making Process, Act 2022 and failure to translate the document into different local languages since South Sudan has the highest rate of illiteracy. There's absolutely limited civic education on the process and this will definitely hinder the Constitutional Making Process.

4.1.7 Endless Peace Agreements jeopardize the Constitution Making Process;

It is important to note that since South Sudan independence in 2011, the Country has been engulfed in endless conflicts and negotiated peace agreements which always jeopardize the power of the people in deciding critical constitutional issues. The observation is that endless peace agreements greatly affect the Constitution

⁸⁶ An interview with Daniel Ayuel, Youth Representative to the National Constitution Amendment Committee.

Making Process because parties to the conflict will make different uncompromising demands on the process. Some of the demands are sometimes unrealistic to achieve or accompanied them. Apparently, there's the ongoing peace negotiation in Nairobi between the government of South Sudan and the opposition groups. They've place new demands on the Constitutional Making Process and might have a huge impact on the current process⁸⁷.

4.1.8 Political Elite Constitution Making Process;

South Sudanese considers the Constitution Making Process as an elite process meant to protect them from future accountability mechanisms or processes. The process is regarded as elite because it largely emanated from the Peace Agreement which document is treated as an elite agreement. The ordinary people of South Sudan have the feeling that the process has been hijacked by the political elites at the expense of the people of South Sudan.

There's absolutely trust deficit among and between the political leaders and already huge fear of politicization of the Constitutional Making Process as opposed to a process led and owned by the people of South Sudan. Equally, citizens have enormous trust deficits on the political leaders to deliver a genuine people's owned Constitution and these fears where even expressed during the National Dialogue. Therefore, there's need to establish an independent body to spearhead the process without any political influence and manipulation to favour few political elites.

⁸⁷ An interview with Lorna Merekaje, Women Representative to the National Constitution Amendment Committee (NCAC).

5.0 CONCLUSION.

It is important to note that the South Sudan Constitution Making Process based on this study exposes a lot of lacunas in the Constitutional Making Process Act, 2022 in comparison to the Uganda and Kenya processes. The law doesn't provide certain critical safeguards to guarantee the popular public participation especially the huge refugees population outside the Country, the public participation as anticipated by the law seems to suggest that it is an elite process of consultations. It is equally evidentially clear that continuous insecurity and conflicts in the Country greatly or largely affects the process because certain areas are inaccessible for public consultations and civic education. Also, lack of political will by the leadership to prioritize adequate budgetary allocation to the process affects the process because the National Constitution Review Commission lacks the required resources to facilitate and support their proposed activities, there's absolutely need to jump-start the process and narrow down the lacunas in the law to appreciate the popular participation of the people of South Sudan such as create a provision on constitutional referendum and the independent Constitution Commission.

5.1 Limitation of the Study;

Cognisant of the fact that Constitution Making Process in South Sudan is still evolving with limited reading materials on the subject matter, since the Country is still operating under a Transitional Constitution. Time factor also in terms of reaching out to noble personalities with certain scope of information necessary for this study and limited resources to facilitate the interviews of critical voices in the South Sudan Constitution Making Process. Lastly, the current existing political and military

tension in the Country has affected the aspect of interviewing important contacts since they've fear to speak freely on the subject matter.

5.2 Recommendation for future study;

In the future study, it's important to interrogate into the post independence constitution making process especially understanding the South Sudan Constitutional journey or history to understand certain critical aspect of the Constitution Making Process. Also, broaden the study to other African jurisdictions to fundamentally understand how Constitutions are written in times of conflict or in a situation where a Country is emerging from a destructive conflict.

6.0 RECOMMENDATIONS;

6.1 Review on the Constitution Making Process Act, 2022;

To narrow the lacunas in the law governing the Constitution Making Process, there's need to propose amendments to the Constitution Making Process Act to incorporate the missing gaps or issues in the Act. These issues include the independence of the National Constitution Review Commission, Constitutional Referendum, realistic budgetary allocation to the Constitution Making Process guaranteed by law and other critical issues to ensure a transparent and accountable process.

Kenya hosting the High-Level Mediation on South Sudan (Tumaini Initiative) had its 2010 constitution that gave Kenyans a new Constitutional and political dispensation drafted and written by only nine (9) members of hybrid Independent Panel of Experts who were nominated and appointed through a transparent process as provided for by law. So far, the Kenya 2010 Constitution has protected their democracy and rule of law. It has allowed peaceful transfer of power from one President to the another. It has equally provided unique safeguards to protecting independent institutions

including the judiciary. In Namibia Constitution Making Process, only three members committee drafted the Constitution and they were all foreigners from South Africa. In Uganda, the twenty-one Justice Benjamin Odoki committee did the public consultations and drafted the Uganda Constitution and presented it to the Constituent Assembly for deliberation and adoption.

6.2 Incorporation of the National Dialogue Resolutions into the Constitutional Text;

During the National Dialogue Process, the people of South Sudan expressed themselves in different aspect of constitutional issues including governance, economy, national identity and cohesion, natural resources management and utilization and others issues. These resolutions form the basis for informing the drafting of the Constitutional Text based on the fact that the people agreed on some of these issues. The Constitution Making Process Act should make reference to the National Dialogue Resolutions as one of the references to consider when drafting the constitutional text.

6.3. Safeguarding popular public participation;

It is important to safeguard, facilitate and protect the popular public participation in every stage or phase of the constitution making process. The people of South Sudan must be consulted at every phase of the process and ensure that their views and opinions are incorporated into the process or the Constitutional Text. This will definitely address the issue legitimacy and ownership or the outcomes of the process. The National Constitution Review Commission together with other stakeholders should develop a robust and inclusive civic education manuals or materials aiming at educating the masses on the process for their proactive

participation and engagement in the process. Parliament should consider enacting a law to safeguard public participation especially defining the threshold for it.

6.4 Ensure judicial independence and impartiality;

There's need to ensure that the judicial is independent and impartial in adjudicate on matters relating to the Constitution Making Process, there might be issues or matters that requires the intervention of the Court. By ensuring that the recommendations proposed by the Judicial Review Commission (JRC) on the necessary reforms required to safeguard the independence and impartial of the Judiciary are implemented without fear or favour to guarantee public trust and confidence on the Judiciary. These reforms include providing adequate funding to the judiciary from the consolidated funds.

6.5 Reform draconian Security Laws;

To guarantee citizens participation in the process, there's need to create a conducive environment free from intimidation, horsemint or any restriction to fundamental rights and freedoms protected by the Constitution. There's need to reform the draconian security laws such as the National Security Service Act (As amended) to restrict and limit their powers in demanding citizens to seek for security clearance for every public gathering. This restriction violates the constitutional right to freedom of movement and speech. Equally, the continued arrest and detention of dissenting voices or people in the Country always create an

atmosphere of fear and affects the meaningful participation of the citizens in the process.

6.6 Guarantee meaningful participation of women and youth in the process;

It is important to guarantee and ensure that women and youth pivotal participation in the process is safeguarding and protected by law and in practices. Experiences indicates that women and youth are always left out in most political processes happening in the country whereas they constituted the biggest percentage of population. The law must protect the meaningful participation of women and youth in the Constitution Making Process by ensuring that all restrictions and impediments affecting their participations are addressed at earlier stage of the process.

6.7 Organize and facilitate National Consensus Forum;

The National Constitution Review Commission (NCRC) should organize a national consensus forum for all South Sudanese stakeholders including; political parties, civil society, women, youth, traditional leaders, religious leaders, academia, refugees, diasporas and others as determined by the Commission. The forum might attempt to address some of the critical Constitutional controversial issues and allow different stakeholders to build Consensus on such issues. It also provides a platform for different stakeholders to dialogue on different Constitutional issues or matters.

QUESTIONARIES

My name is **Wani Saki Michael** and I am currently studying at Uganda Christian University pursuing a Bachelor of Laws. I am conducting a research dissertation on the South Sudan Constitution Making Process in comparison with the East Africa Countries. The questionaries consist of five questions and will take not longer than 10 minutes to complete. All responses will be kept anonymous unless granted permission. Once completed please email back to wanimichael57@gmail.com.

1. How is the South Sudan Constitution Making process crafted in comparison with the East African Countries?.....
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2. What are the existing lacunas in the law and institutional framework governing the Process?.....
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3. How transparent are these institutions in discharging their duties or responsibilities?.....
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4. What's the current status of the Constitution Making Process?.....

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5. Whether the law has addressed the question of public participation?

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6. What are your key recommendations?

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BIBLIOGRAPHY

STATUTE

Transitional Constitution of the Republic of South Sudan, 2011 (As Amended).

The Revitalized Agreement on the Resolution of Conflict in South Sudan, 2018.

The Uganda Constitution Commission Statute, 1988.

The Constitution of Kenya Review Act, 2008.

The East Africa Community Treaty.

BOOKS

Constitutionalism in Africa, creating opportunities facing challenges- J. Oloka Onyango

The Search for a National Consensus, The Making of the 1995 Uganda Constitution, Benjamin J. Odoki

The Root Causes of Sudan's Civil Wars: Old Wars and New Wars (Expanded 3rd Edition)- DOUGLAS H. JOHNSON.

Constitutional and Administrative Law, 15th Edition, AW Bradley & K D Ewing.

Uganda Development of its Laws and Constitution, H.F. Morris & James S. Read

JOURNALS.

The Struggle for South Sudan: Challenges of Security and State Formation. New York: I.B. Tauris, Kuol, Luka Biong Deng & Sarah Logan, eds, (2019).

Constitution-Making in Contemporary Kenya: Lessons from the Twentieth Century, KSR Volume 1, Number 1, December 2009 by Robert Maxon.

WEBSITE.

<https://www.radiotamazuj.org/en/news/article/opinion-evaluating-the-success-and-significance-of-the-tumaini-initiative>.

<https://dr.211check.org/wp-content/uploads/2024/02/Constitution-making-process-Act-2022.pdf>.

<https://docs.pca-cpa.org/2016/02/South-Sudan-Peace-Agreement-September-2018.pdf>.

<https://theradiocommunity.org/govt-urged-to-demonstrate-political-will-in-constitution-making-process-3097>.

<https://www.radiotamazuj.org/en/news/article/opinion-evaluating-the-success-and-significance-of-the-tumaini-initiative>.

<https://reliefweb.int/report/south-sudan/rjmec-report-status-implementation-revitalised-agreement-resolution-conflict-republic-south-sudan-period-1st-january-31st-march-2025>

<https://dr.211check.org/wp-content/uploads/2021/07/NDSC-Final-Report-2nd-Draft-12-Dec-2020-.pdf>.

https://www.suddinstitute.org/assets/Publications/5fc607f47c50b_TheSouthSudanNationalDialogueWhatNext_Full.pdf.

<https://berghof->

[foundation.org/files/publications/NDH_Murray_ND_Constitution_making.pdf](https://berghof-foundation.org/files/publications/NDH_Murray_ND_Constitution_making.pdf)