

Participation on Paper but not in Practice?

The South Sudan Constitutional Review Process

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Abstract

South Sudan became independent in 2011, after 39 years of civil war with Sudan. Two and a half years later, new armed conflict broke out, this time, between different factions of the new political elite in South Sudan. This report looks at one of the most important yet contested political processes in South Sudan: the process of drafting a permanent constitution. It takes a social science perspective and focuses, in particular, on the dynamics of inclusion and exclusion in the constitution-making process. The report argues that temporary constitutions negotiated in closed settings can increase conflict levels within a country. In South Sudan, for example, the President failed to prioritise the review of the Interim Constitution. While it is difficult to conclude whether this decision was deliberate or not, it undoubtedly reinforced power contenders' beliefs that the only possibility they had to renegotiate the political settlement was through violent means.

About the Publication

This paper is one of three case study reports on South Sudan produced in the course of the collaborative research project 'Avoiding Conflict Relapse through Inclusive Political Settlements and State-building after Intra-State War', running from February 2013 to February 2015. This project aims to examine the conditions for inclusive political settlements following protracted armed conflicts, with a specific focus on former armed power contenders turned state actors. It also aims to inform national and international practitioners and policy-makers on effective practices for enhancing participation, representation, and responsiveness in post-war state-building and governance. It is carried out in cooperation with the partner institutions CINEP/PPP (Colombia, Project Coordinators), Berghof Foundation (Germany, Project Research Coordinators), FLACSO (El Salvador), In Transformation Initiative (South Africa), Sudd Institute (South Sudan), Aceh Policy Institute (Aceh/Indonesia), and Friends for Peace (Nepal). The views expressed in this paper are those of the authors and do not necessarily reflect the views and opinions of the Berghof Foundation, CINEP/PPP, or their project partners. To find more publications for this project please visit www.berghof-foundation.com. For further information, please contact the project research coordinator, Dr. Véronique Dudouet, at v.dudouet@berghof-foundation.org.

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List of Acronyms

GOSS	Government of South Sudan
NCRC	National Constitutional Review Commission
SPLA	Sudan People’s Liberation Army
SPLM	Sudan People’s Liberation Movement
TCSS	Transitional Constitution of South Sudan

1 Introduction

On 9 July 2011, shooting could be heard in Juba, the capital of South Sudan. The salutes marked South Sudan's independence and the end of the longest running civil war in Africa (Johnson 2011). South Sudan's birth was celebrated with boisterous partying, gratefulness, overwhelming happiness, as well as respectful remembrance of the 2.5 million people who died in the war (Carlstrom 2011).

The conflict between the Arabic, northern part of Sudan, and the African south, had been rooted in the cultural, economic, and religious marginalisation of the south. The authoritarian Sudanese regime had relied on ethnic cleansing, political repression, and the imprisonment of political opponents, to stay in power. The Southerners, who felt particularly targeted, thus formed the Sudan People's Liberation Movement (SPLM) in 1983 (Jok 2007).

Almost two and a half years after South Sudan's independence, in December 2013, shooting could once again be heard in Juba. A fight between the South Sudan Presidential guards triggered what later became labelled a "civil war" (International Crisis Group 2014). The main protagonists of this armed conflict were President Salva Kiir and his former Vice President Riek Machar. The President accused Machar of attempting a coup. Machar, however, denied having anything to do with the initial fighting. Nevertheless, he quickly declared himself the commander of the 'SPLM/A in Opposition', an armed opposition group. The fighting which followed forced 1.5 million people to flee their homes and left 3.8 million in desperate need of humanitarian assistance (OCHA 2014).

The media has, to a large degree, portrayed the current conflict in ethnic terms. President Kiir belongs to the Dinka tribe while his opponent, Riek Machar, is of the Nuer tribe. People belonging to either of these tribes have been slaughtered for the sole reason of being from the 'wrong' tribe (Copnall 2014; Karimi & Kangarlou 2014). There are, however, more complex reasons behind the new armed conflict. Limited political space for opposition groups, corruption and contest over oil resources, are but a few of them (International Crisis Group 2014).

One of the Government of South Sudan's (GoSS) 'New Deal' goals¹ is to foster an inclusive political settlement. Popular involvement in the review of the Transitional Constitution was seen as a priority in order to achieve this (GoSS 2012). While working in South Sudan in 2013, I repeatedly heard concerns, however, that the Constitutional Review Process was not genuinely inclusive, and that the new and permanent constitution that would evolve from it, would be a Government rather than a peoples' constitution.

This study focuses on the Constitutional Review Process – an arena in which the new political settlement of South Sudan was negotiated. It aims to provide a better understanding of how stakeholders dealt with the issues of inclusivity and participation in the design of the process, as well as its actual implementation. The paper starts with a brief scholarly literature review on participation and inclusion in constitution-making. It then offers a short background overview on the constitutional processes in Sudan before the 2011 secession. The bulk of the paper analyses both public and elite participation in the constitution-making process after independence, before addressing the possible connection between the Constitutional Review Process and the relapse to violence in late 2013.

The study is largely based on the author's MA-thesis 'Surviving Independence – South Sudan's Contested Constitutional Review Process', produced for the European Inter-University Centre of Human Rights and Democratisation in 2014. Ten semi-structured interviews were conducted for the study in May-June 2014, in Germany or over Skype. The respondents (three women and seven men) were drawn from the following stakeholder groups: Western diplomats (2), Western NGO worker (1), South Sudanese academia (1), South Sudanese civil society (2), SPLM/A in Opposition (2) and the National Constitutional Review Commission (2). All informants have been anonymised.

¹ The 'New Deal for Fragile States' is a partnership between fragile countries, developed countries and international organisations, such as the World Bank and the UN. It seeks to find new ways to engage with conflict-affected states. Being a New Deal pilot country, South Sudan was involved in a Fragility Assessment in 2012. In this assessment, the Government states that "Peacefully resolving and managing conflict and building the state require inclusive political settlements, and committed and able leadership". See: www.newdeal4peace.org/wp-content/uploads/2013/03/South-Sudan_FA-Summary_Draft_121212.pdf (accessed 24 April 2015).

2 Scholarly Approaches to Participatory Constitution-Making

The scholarly literature on constitution-making is characterised by a recent trend which emphasises the importance of participation and popular involvement. While, until recently, constitutions were judged almost exclusively on their content, and the drafting process received little attention, the first wave of democratisation revealed that pseudo-democratic institutions can be in place without the country being a liberal democracy (Moehler 2006; Banks 2008). Analysts and experts have therefore largely shifted their focus towards the *process* of writing a constitution, with the belief that a good process can help foster democratic culture. Participation is seen as being particularly important in order to achieve this. Thus, there is a clear trend towards more direct and extensive popular participation in constitution-making processes, even beyond referenda. This includes the introduction of civic education and popular consultation mechanisms. The focus on participation is now so common that some scholars refer to it as "new constitutionalism" (Moehler 2006; Blount et al. 2012; Hart 2001)

The form, scope, activities, perceived legitimacy and impact of participatory programmes vary, but they all seek to engage citizens rather than to solely rely on technical experts or appointed representatives. Participatory democratic scholars believe that participation generates debates which may lead to better solutions than those which are negotiated behind closed doors. In the constitution-making setting, elites are often seen as focusing on their own concerns, especially around security, economy and politics. Participation, however, enables those who are directly affected by a decision to propose better solutions and highlight problems which elites may not see. In order to draft constitutions that can positively contribute to peoples' lives, these scholars argue that people need to participate (Banks 2008). There is, however, little empirical data that assesses and compares the impact of different forms of Constitution-making processes (Auer et al. 2011).

Kirsti Samuels (2006) found, through studying constitution-making in twelve countries which emerged from civil conflicts from 1991 to 2006, that closed processes often contribute to increased violence or tension. A participatory process can provide people a shared understanding of the conflict and sense of ownership of the constitution. It can also play an important healing role, and contribute to reconciliation and sustainable peace. Samuels does however warn that a key challenge in participatory constitution-writing is to have a genuine participatory process which can simultaneously sustain the interest of elites, so that they may not be tempted to act as spoilers. In the scholarly literature, it is argued that in volatile post-war contexts characterised by high levels of violence, interim constitutional arrangements negotiated behind closed doors may be a key factor to ensure success and prevent further violence – while these arrangements might later be renegotiated, when trust between parties has increased (Widner 2008).

For her part, Moehler (2006) questions the assumption that participation enhances constitutional legitimacy. She argues that unhappy elites can easily spread their dissatisfaction among their constituency, especially in post-conflict societies where sources of independent information are scarce. She thus warns academics and policy-makers against a blind belief in participatory processes and the abandoning of elite negotiations.

Moreover, participation does not necessarily mean that people have the opportunity to influence decisions. According to Angela Banks (2008), (participatory) constitution-making exercises in post-conflict states are often characterised by 'internal exclusion' – meaning that people are physically present in decision-making forums, yet without power to influence decisions. As broad-based participation creates uncertainty for elites, they are often inclined to shape processes which appear to be participatory (especially for the sake of legitimation), but where they retain the exclusive power to influence outcomes. White (1996) labels such processes as 'nominal participation'.

3 Constitutional Processes in Sudan until 2011

From its independence in 1956 to South Sudan's independence in 2011, Sudan had four Constitutions. None of the related constitution-making processes, however, have been participatory, and Southerners, in particular, found themselves excluded from such processes. In addition, Johnson (2003) holds that the Constitutions were regularly disrespected by the elites.

The 2005 Comprehensive Peace Agreement between the Sudan Government and the SPLM gave the Southerners the right to hold a referendum to determine whether they should become an independent country. Indeed, on 9 January 2011, an overwhelming 99% of the population are reported to have voted for secession (Southern Sudan Referendum Commission 2011). After the referendum, the country had a six-month window to prepare for independence. An Interim Constitution was presented to the provisional Parliamentary Assembly in mid-September 2011 (Johnson 2011), and it came into force on 5 December of the same year (The Government of the Republic of the Sudan and the SPLM/SPLA 2005). It has proved impossible to find reliable sources on who drafted the Interim Constitution.

There was no legal pressure to change the Interim Constitution since it had provisions that would enable it to act as the Constitution for the independent South Sudan (Auer et al. 2011). However, there was, and still is, a widespread belief in South Sudan, that the country could not have become independent without a revised constitution. A few days after the result of the referendum was announced, the new President of Southern Sudan, and Chairman of the SPLM, Salva Kiir, issued a presidential decree appointing a Technical Committee to review the Interim Constitution of Southern Sudan and draft a Transitional Constitution that would suit an independent country. Both the name of the committee and its terms of reference stated that it should be a technical review (GoSS 2011b), but it soon became politicised. Opposition parties criticised the unilateral appointment of its members and claimed that there was little room for opposition parties in the process. SPLA officials countered these arguments, arguing that the six-month timeframe between the referendum and independence was far too short for a participatory process. They stressed that the review was strictly of a technical character and that a participatory process to transform the Transitional Constitution of South Sudan (TCSS) to a permanent one would follow after independence (International Crisis Group 2011).

The online newspaper, Sudan Tribune, reported that Riek Machar, the current leader of the SPLM/A in Opposition, voiced concern about the TCSS before independence (Sudan Tribune 2011b). Other representatives of the SPLM/A in Opposition who were interviewed for this paper, were also very critical towards the drafting of the TCSS. One interviewee believed that the people who drafted the TCSS used the process to secure their own political future. He was of the opinion, that the SPLM leadership did not dare to challenge the President in fear of being sidelined in future allocations of minister posts ("T.L.", Author Interview 2014). South Sudanese scholar, Professor Jok Madut Jok, paints a similar picture:

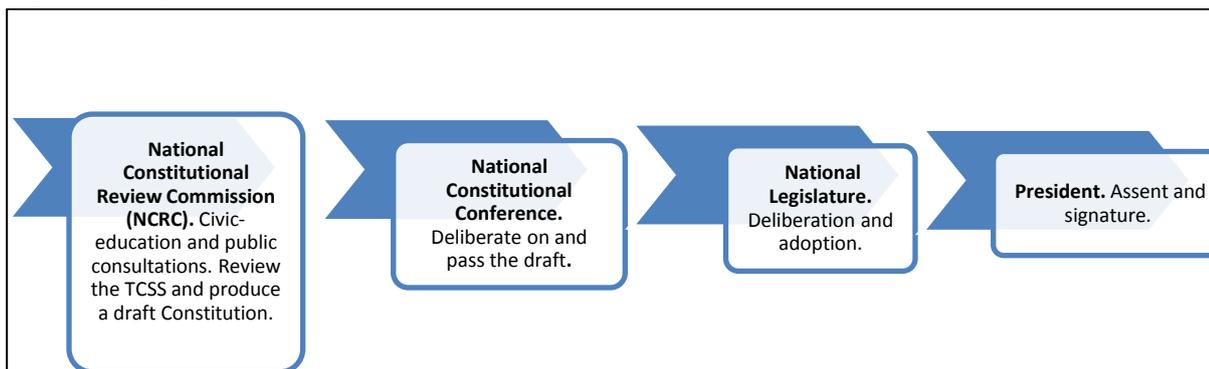
... These people wanted to write themselves into the constitution because the more powers they give the President, the more likely [it is] that the President will keep them close and offer them more powers. (Jok Madut Jok, Author Interview, 2014)

Throughout the civil wars, there had been serious conflicts within the South. There are reports that a major proportion of the Southerners who died during the war, died while fighting other Southerners (LeRiche and Arnold 2012). The level of inter-tribal trust was therefore low, right from the birth of the new country. A natural question is thus, whether the lack of transparency in the constitution-making process before independence led to a step away from democracy, increasing the level of conflict within the country. The Transitional Constitution nevertheless came into force on independence day – 9 July 2011 (GoSS 2011a).

4 Public Participation in the Constitution-Making Process after Independence

Paragraph 202 and 203 of the Transitional Constitution of South Sudan (TCSS) contains provisions for the permanent Constitution Making Process (GoSS 2011). Four different bodies were to be sequentially involved in the constitution-making process, as visualised in Figure 1.

Figure 1: The Steps of the Permanent Constitution Process



Based on Government of South Sudan (2011a)

≡ Step 1: The National Constitutional Review Commission

The TCSS mandates the President to appoint the National Constitutional Review Commission (NCRC) after consultations with political parties and civil society. These consultations will ensure that the NCRC “shall be established with due regard for gender, political, social and regional diversity of South Sudan in recognition of the need for inclusiveness, transparency and equitable participation” (GoSS 2011a). From the date it is established, the NCRC has one year to conduct public consultations and review the TCSS before it presents a draft constitution to the President.

≡ Step 2: The National Constitutional Conference

After receiving the draft, the President is to constitute and convene a National Constitutional Conference with members nominated from a variety of stakeholder groups. The meetings of the National Constitutional Conference are to be conducted in a transparent manner. Media will be present during the deliberations and will keep the public informed. The National Constitutional Conference will, after its discussions, approve and pass the draft constitution with a simple majority. It will thereafter submit the draft text to the President.

≡ Step 3: The National Legislature

The President then tables the draft constitution before the National Legislature, (GoSS 2011a) which consists of the National Assembly and the Council of States (Rift Valley Institute 2013). The National Legislature has a three-month deadline to deliberate and then adopt it.

≡ Step 4: The President

Finally, in the fourth and final step, the President will assent to and sign the adopted constitution (GoSS 2011a).

The outlined process, however, never evolved from step one. This paper thus focuses on this first phase of the constitution-making process.

4.1 Participatory political settlements: the GoSS's justification

Before independence, the Government had promised that the subsequent Constitutional Review Process would be participatory. Step 1 of the Constitutional Review Process did in fact promote participation by a wide variety of groups. All interviewees were very positive towards having public consultations as part of the constitution-making design. For instance, south Sudanese civil society worker “D. B.” (Author Interview 2014) believed that the public consultations launched in the early phases could have given the Constitution its legitimacy, had the process been conducted in a transparent and genuine manner.

There is little written documentation from the GoSS stating their reasons for having designed a participatory style of constitution-making, and it was not possible to talk to anyone in the Government for this study. One of the few publicly available documents that provide some insights about their justification for having designed a participatory review process is the GoSS Fragility Assessment of 2012. It states that “finalis[ing] the revision of the Transitional Constitution through inclusive consultations at central, state and Boma level” (GoSS 2012) is a priority action for the Government in order to foster an inclusive political settlement. It is, however, unclear what the GoSS meant by an inclusive political settlement. Given that there is no commonly agreed definition in the literature, it is puzzling that the GoSS did not spell out a working definition.

The political settlement indicators stated in the document, however, offer some understanding of its authors' conceptualisations of an inclusive political settlement. These include: (1) “Diversity in representation in key decision making bodies”, (2) “Perception of representation (and its effectiveness) in government” and (3) “% of provisions of political settlements honoured and implemented” (GoSS 2012). The document, however, does not define key decision-making bodies nor specify the kinds of diversity to be promoted. Given the multi-ethnic nature of the country, one can assume that linguistic, regional or tribal diversity are meant. Given the importance granted to gender in the rest of the document, it can also be assumed that women representation is implied as a core dimension of diversity. The second indicator resonates with what the Organisation for Economic Cooperation and Development (OECD) refers to as the 'subjective dimension' of political settlements, namely, that when people perceive a political settlement (or the negotiations leading to it) to be inclusive, they will also find them legitimate (OECD 2011). The third indicator reveals that political settlements can be measured and quantified, and are conceived as inherently positive. Altogether, all three indicators seem to focus on a formal understanding of political settlements as concrete and measureable agreements – not so much on the informal power structures, long-term political processes or power bargains between elites, or between state and society.

Prof. Jok contends that many international actors, including the EU and various embassies, were involved in the drafting of the New Deal Fragility Assessment, and that the Government was under pressure to use the political settlement language. When asked what an inclusive political settlement would mean in South Sudan he retorted: “It sounds smart, but it is not something that is actually clear” (Jok, Author Interview 2014). He holds that one should use terms that are more concrete. This leads to the question of whether the participatory aspects of the constitution-making process were mainly in place to please international and national actors, and to legitimise the process (a process described earlier as ‘nominal participation’). A more in-depth examination of the implementation of Step 1 of the constitution-making mechanism, namely, the work of the National Constitutional Review Commission (NCRC), can help shed light on this.

4.2 The Work of the NCRC

The TCSS gave the President a six-month time limit, from the onset of independence, to appoint the NCRC. He established the Commission on 9 January 2012, the very last day before this deadline expired. On the same day, he appointed 44 out of the 45 Commissioners through a Presidential Order. Twenty-five of the seats were allocated to SPLM members, 16 were divided between 14 opposition parties, one seat was given to civil society and one to faith-based groups. In addition, a Chairperson and a Deputy Chairperson were appointed as independent members

without any political affiliation. Seven of the Commissioners would serve on full-time basis – including three members of opposition parties and four SPLM members. The rest of the Commissioners would work part-time (RoSS 2012). A Commissioner interviewed for this study argued that various political opposition parties nominated members to join the Commission (“K.C”, Author Interview 2014). According to reports in the Sudan Tribune (Uma 2011), the civil society representative was handpicked by the President. The TCSS only requires the President to consult with the various groups, not to ask them to nominate representatives. One could therefore argue that first phase was in some ways more inclusive than what the TCSS had required.

The Commission was originally given six months to present a draft constitution to the President (GoSS 2011). Lack of funds, however, made it impossible for them to carry out their mandate. Under pressure from civil society groups, on 26 February 2013, the President extended the period for two years – until 31 December, 2014 (GoSS 2013; South Sudan Human Rights Society for Advocacy 2012). The Parliament allocated money to the NCRC, but according to an internal source, the funds never reached the Commission. More than a year after it was established, on 3 May 2013, the NCRC acquired office facilities and computers with the help of international support from the International Foundation for Electoral Systems. From May/June, 2013, the Commission was able to start carrying out its work (“N.C”, Author Interview 2014).

According to a member of the NCRC, the outreach work of the Commission was divided into two phases: a civic education phase from spring 2013 to December 2013, and subsequently, a public consultations phase. In the first phase, the Commissioners largely focused on informing people about the Constitution and Constitutional Review Process. Depending on the knowledge of their interlocutors, they also in some instances, collected their views and suggestions. The bulk of suggestions were however scheduled to be collected in the public consultation phase. One of the Commissioners interviewed for this study said they had challenges reaching *bomas* (the smallest administrative unit in South Sudan) due to security and logistical constraints, albeit everything else went as planned. The source also stressed that they launched media campaigns in order to reach out to more people. Due to the violence that broke out in December 2013, they were unable to embark on the public consultation phase (“N.C”, Author Interview 2014).

4.3 Independence of the NCRC

All informants interviewed for this paper, apart from the Commissioners, were critical towards how the Constitutional Review Process developed. One of the civil society sources confirmed that the NCRC travelled and talked to people. He believes, however, that the members had personal interests in the Constitution and that they did not make use of the ideas they had collected (“D.B”, Author Interview 2014). It is not clear whether the other interviewees were aware that the NCRC was planning to start a public consultation phase in December 2013. A member of the SPLM/A in Opposition believed that the process was heavily controlled by the State and criticised the way participation was used to gain legitimacy when the decisions would in fact be taken by a small group of elites. He also claimed that there is no freedom of speech in South Sudan (“N.O”, Author Interview 2014). Another member of the same opposition group believes that if the President would not be satisfied with the Constitution the Commission produce, it would not be ratified (“T.L”, Author Interview 2014).

It has proved difficult to acquire information on the exact content of the civic education campaign, including data on how many meetings were conducted, how much media exposure the campaign received and how many people were reached. It is thus impossible to verify the informants’ statements on what actually happened during this phase.

The members of the NCRC are familiar with the allegations that they were not independent. When countering them, they focused on the membership of the NCRC but did not address the claim whether someone behind the scenes was controlling the process. One member argued that the Commission is composed of different stakeholders and that there were no signs of partiality. This person could not see any connection between the December 2014

conflict and the Constitutional Review Process, arguing that some of those who are now in the SPLM/A in Opposition were Commissioners in the NCRC. As to the fact that some members of the NCRC have close links to the President (for instance the President's adviser), the source retorted that those members were only part-timers and could thus not influence the work of the Commission ("N.C", Author Interview 2014). Given that a great majority of the Commissioners worked on a part-time basis, one can therefore question whether this person meant that only the seven Commissioners that worked full-time had any real influence.

Another NCRC member ("K.C, Author Interview 2014) also claimed that the SPLM were in numerical minority, while in fact, party members were in the majority from the moment the Commission was established. The President later appointed eight additional members (RoSS 2012), but in the course of this research, it has not been possible to establish who they were and which parties they represented. Even if they all belonged to opposition parties and civil society, they would have shared 27 members and the SPLM would have 26 members. Given that the SPLM were the only unified group, one could still argue that they had a strong upper hand in the Commission. The representatives of the SPLM/A in Opposition that were interviewed for this study seemed to be of the opinion that all Commissioners were closely connected to the President, making it irrelevant, from their perspective, which stakeholder had the most representatives.

4.4 Delays

The heavy delay in the work of the NCRC is perhaps the main aspect that raised concerns that participation was not genuine. The two Commissioners interviewed for this paper attributed these delays to financial constraints. Shortly after the Commission was appointed, the Government shut down its oil production, causing strict austerity measures which also affected the Commission's work ("K.C", Author Interview 2014). One of the two Western diplomats interviewed for this research described the South Sudanese Government's way of handling the Constitutional Review Process after independence, as "foot dragging". He did not believe that the delays were intentional but rather attributed them to an underestimation of the importance of the process ("W.D", Author Interview 2014).

The second diplomat was more openly critical, arguing that President Kiir did not want the constitutional review to take place. He allegedly knew that a lot of demands would come through such a process and was not ready to make any concessions. The diplomat holds that the international community did not realise this before it was too late, when the process was dead. The Government of South Sudan was, according to the source, excellent at what he describes as "double talk": telling the international community all they wanted to hear about participation, gender and equality, and thus managing to divert attention away from the lack of progress in the process ("K.M", Author Interview 2014). One of the members of the SPLM/A in Opposition was equally critical towards these delays and believed they were not accidental and that someone was blocking the process ("N.O", Author Interview 2014).

The Commissioners interviewed for this study were careful not to criticise the Government and refused to blame anyone for the delays. One could question whether they are intimidated and scared of speaking out openly. They are, however, open about the critique they have received from the public, also concerning the powers of the President ("K.C", Author Interview 2014). This gives the impression that they enjoy freedom of speech. The Chairman of the NCRC, Professor Akolda Tier, has publicly voiced his critique over the Government. The online newspaper Gurtong reported on 11 March 2013 that Tier said:

It seems that the Government has its own priorities and the Constitutional Review Commission does not seem to be a priority. Even the money that has been voted by the Parliament to us since July last year has not been released. (in Wudu 2013)

In a public meeting the same year, he stressed that the Constitution should be ratified by a body appointed by the people. He indicated that the current Parliament is not representing the people since the "two houses of Parliament consist of members who were partly elected and partly appointed" (Rift Valley Institute 2013, 10).

Given the vast powers given to the Presidency in the TCSS, one could argue that they had the incentive to design a process whereby power contenders (opposition groups or people within the SPLM that could challenge the power of the President) and the public did not have any power to influence the decision. One should, however, be careful not to jump too hastily to such conclusions. Despite the aforementioned claims made by the SPLM/A in Opposition and the diplomat “K.M” (Author Interview 2014), Prof. Jok was of the opinion that: “there are clear practical reasons for why the process was delayed, but there is no clear evidence on whether it was deliberate or not”. The only reasons he could offer with some degree of certainty was the inefficiency of the Commission, challenges related to its leadership, and the financial difficulties faced by the country.

Overall, these critiques of the Constitutional Review Process reveal, particularly when considered against the OECD’s subjective definition of inclusivity - as mentioned above -, that the Government failed to use the constitution-making process to achieve an inclusive political settlement.

5 Elite Participation and Conflict Relapse

While the previous Section mainly focused on public participation, the remainder of this paper focuses on elite participation, shedding light on the possible connection between the exclusive nature of the constitution-making process and the December 2013, relapse to violence.

As argued in Section 2, most scholars find constitution-making processes with a degree of vertical (popular) inclusivity, to be most stable (see, for instance, OECD 2011 and Samuels 2006). Widner (2008) takes a slightly different approach. She argues that closed elite-centred interim constitutional arrangements can help limit violence in situations where countries are transitioning from armed conflict. Such constitutional arrangements, however, should be temporary and renegotiated once inter-party trust has increased.

When asked directly if there was any link between the current conflict and the Constitutional Review Process, a central member of the SPLM/A in Opposition responded positively. He did, however, focus more on the provisions in the TCSS rather than the drafting of a permanent constitution. He asserted that the President had fired elected Governors on three occasions and had appointed new ones without elections, and that this was a right given to the President in the Constitution (“N.O”, Author Interview 2014). Jok (Author Interview 2014) also views the President’s vast constitutional powers as an important component of the current conflict. The delay in the participatory process was a cause of major concern for many.

Several interviewees, however, pointed to the process *before* independence to explain why they did not have much trust in the permanent constitution process. A small caution against Widner’s conclusion may therefore be in order. The temporary constitution might have been so favourable to the elites in power that they lost interest in engaging in a genuine constitution-making process after independence. This was certainly a fear among the respondents interviewed for this paper (apart from the Commissioners), and fits well with Mendez and Wheatley’s findings from other constitution-making processes:

[...] constitutions that are enacted in the aftermath of a conflict may be intended not as a mechanism for resolving the conflict, but instead as a means of institutionalizing the gains of the strongest party. In such cases the constitution is a product of the conflict dynamic, rather than a solution, and it is likely to fail as a long-term instrument for solving conflict. (Mendez & Wheatley 2013, 15).

The South Sudan case suggests that some degree of vertical inclusion is important in temporary constitutional arrangements, since it might make it more difficult for the drafters to make a constitution that is highly favourable to themselves. Nevertheless, as will be seen below, the connection between inclusion in the constitution-making process and relapse to violence is not straightforward.

Four members of the NCRC chose to leave the Commission and joined what the Government calls 'the rebels', namely, the SPLM/A in Opposition (“K.C” Author Interview 2014). They were, at least on paper, people in the

country who enjoyed the highest levels of inclusion in the state-building process.² There can be at least two possible explanations for their exit: either they did so because they felt that the NCRC was controlled by the Presidency and there was therefore a high degree of ‘internal exclusion’; or alternately, other developments outside the NCRC might have prompted the Commissioners to join the SPLM/A in Opposition. Although I did not interview the people who left the Commission and cannot know their motivation(s), most actors interviewed for this study, apart from the NCRC Commissioners themselves, were of the opinion that the President controlled the constitution-making process. However, there is not enough data available to make a causal connection between the President’s control and the actions of the ex-Commissioners.

According to analyst Jan Pospisil (2014), the political settlement in South Sudan is primarily negotiated within the realm of the SPLM. When sacking the Vice President in July 2013, the President did not even attempt to justify his decision along constitutional lines (Hirblinger 2014). The Constitutional Review Process, at least in its early stage, was perhaps seen by the elites as less important than intra-party negotiations and power bargains within the ruling party.

The lack of political space created tensions within the party and the country. Although the political settlement is negotiated within the SPLM, people outside the inner sphere of the President seem to have hoped that the constitution-making process would open political space. Most notably, they wanted a new constitution to reduce the powers of the President. They believed that there was little interest from the political leadership of the SPLM to change the political settlement. The constitution-making process proved unsuccessful in making the political settlement more inclusive.

6 Conclusion

All the people interviewed for this paper believe that involving the public in the constitution-making process is a key component of nation-building and helps to increase the legitimacy of the Constitution. Public participation was also a key feature of the first two phases of the South Sudan Constitutional Review Process, which provisioned mechanisms for consultation with grassroots and marginalised communities. There were, however, two major impediments to making the process genuinely inclusive. Firstly, there was little political will from the Government to support the NCRC, and secondly, the bodies in charge of eventually adopting the Constitution were appointed by the elites. In addition, several interviewees argued that the Transitional Constitution was written in such a favourable manner for the President, that he had little incentive to review it. A pertinent question is thus, did the Presidency design the process to look inclusive without ever intending it to be? Even if the first phases had been genuinely participatory, the Constitution would have been adopted by an elite-appointed body. The people of South Sudan were not granted the opportunity to elect the body mandated to adopt the Constitution, nor did they have the possibility to hold a referendum. More research is needed to assess with confidence the extent to which power contenders were excluded from the constitution-making process. The South Sudan experience nevertheless seems to support Wheatley’s thesis, that if the political elites are not interested in strengthening democracy, a constitution-making process can easily lead to increased authoritarianism (Wheatley 2013).

Since the constitution-making process was delayed, and many lost hope in its achievements, some actors may have felt that the only arena that was left to negotiate the political settlement was within the SPLM. However, there was also a lack of democratic space within the ruling party. Power contenders thus seem to have felt that the only way to negotiate the political settlement was through violent means. This study therefore indicates that exclusion in the Constitutional Review Process contributed to the December 2013 relapse to armed violence. More research is needed to validate this finding and to examine what factors triggered the opposition to take up arms.

² I have not been able to identify reliable sources over the dates when they left the Commission, however, the representatives from the NCRC indicated that it was in connection to violence which arose in December 2013.

The Government of South Sudan failed to achieve their goal of fostering an inclusive political settlement through a participatory constitutional process. At the time of writing (March, 2015), the peace negotiations in Addis Ababa have also failed to produce a settlement that can satisfy both the Government and armed opposition groups. Under heavy criticism from the SPLM in Opposition and civil society activists, the Parliament extended the President's term for three more years on 24 March 2015.³ Ensuring that various actors can participate genuinely in the state-building processes in the country is key towards a more peaceful South Sudan.

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³ See www.reuters.com/article/2015/03/24/us-southsudan-unrest-idUSKBN0MK1Z320150324.

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List of Interviews

Informant D.B. (South Sudanese Civil Society worker), Personal interview by author. Germany, 5 June 2014.

Informant K.C. (Member of the National Constitutional Review Commission), Personal interview by author. phone interview, 27 June 2014.

Informant K.M. (Western Diplomat with focus on Sudan and South Sudan), Personal interview by author. Germany, 4 June 2014.

Informant N.C. (Member of the NCRC and SPLM-member), Personal interview by author. Skype interview, 15 June 2014.

Informant N.O. (Central member of the 'SPLM/A in Opposition' and former SMPL-member), Personal interview by author. Germany, 4 June 2014.

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