European Master's Degree
In Human Rights and Democratisation

Awarded Theses
of the Academic Year
2013/2014

"Surviving independence. South Sudan's contested
constitution-making process"

Thesis *by* Storaas Guri Gjestrudsdotter

E.MA European Master's Degree in
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FOREWORD

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• Storaas, Guri, *Surviving Independence. South Sudan's Contested Constitution-making Process*, Supervisor: Prof. Véronique Dudouet, University of Hamburg.
• Venturi, Denise, *The Prominence of the Body as an Instrument of Border Control. Assessing the Age of Unaccompanied Migrant Children in the European Union*, Supervisor: Prof. Marie-Claire Foblets, Catholic University of Leuven.

This volume includes the thesis *Surviving Independence. South Sudan's Contested Constitution-making Process* by Storaas, Guri, and supervised by Prof. Véronique Dudouet, University of Hamburg.

BIOGRAPHY

Guri Storaas holds a BA in Human Geography from the University of Oslo. Her professional career started as an intern at the Royal Norwegian Embassy in Nairobi. She continued working in Kenya as a Climate Policy Officer for the Norwegian Church Aid, and later worked on policy campaigns for the same NGO in Norway. Prior to

joining the EIUC, she worked as a Gender Justice Officer for the South Sudan Council of Churches in Juba. She is currently working at the Norwegian Ministry of Climate and Environment, focusing on the intergovernmental process around UN Sustainable Development Goals.

ABSTRACT

South Sudan got its independence in 2011, after 39 years of civil war with Sudan. Two and a half years later a new armed conflict broke out, this time between different fractions within South Sudan. This study looks at one of the most important, yet contested political processes in South Sudan; namely the process of drafting a permanent constitution. It takes a social science perspective, using constitution-making theories, participation theories and theories on inclusive political settlements as an analytical framework, and focuses particularly on inclusion and exclusion in the process. The study challenges the assumption that closed processes that produces a temporary constitution is favorable to prevent a relapse to armed conflict in post-conflict societies. The South Sudan case shows that temporary constitutions negotiated in closed settings in fact can increase the conflict levels within a country. The President's failure to prioritise the review of the Transitional Constitution, whether deliberately or not, made possible power contenders believe that the only possibility they had to negotiate the political settlement was through violent means.

Like past editions, the selected theses amply demonstrate the richness and diversity of the E.MA programme and the outstanding quality of the work performed by its students.

On behalf of the Governing Bodies of EIUC and E.MA and of all participating universities, we congratulate the author.

PROF. FLORENCE BENOÎT-ROHMER
EIUC Secretary General

PROF. RIA WOLLESWINKEL
E.MA Chairperson

GURI STORAAS

SURVIVING INDEPENDENCE.
SOUTH SUDAN'S CONTESTED
CONSTITUTION-MAKING PROCESS

CPA	Comprehensive Peace Accord
DFID	UK Department for International Development
GoSS	Government of South Sudan
ICSS	Interim Constitution of South Sudan
NCRC	National Constitutional Review Commission
PPLF	Political Parties Leadership Forum
SPLA	Sudan People's Liberation Army
SPLM	Sudan People's Liberation Movement
SSLA	South Sudan Legislative Assembly
TCSS	Transitional Constitution of South Sudan

TABLE OF CONTENTS

1.

INTRODUCTION

[...] how is a poverty-stricken, landlocked state with strong internal tension and a heavy reliance on diminishing oil revenue going to survive its own independence?[1]

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[2]. 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[3].

The war between the Arabic northern part of Sudan and the African southern part had mainly been caused by cultural, economic and religious marginalisation of the south. The authoritarian Sudan regime had relied on ethnic cleansing, political repression and imprisonment of political opponents to stay in power. The southerners felt particularly targeted, and formed the Sudan People's Liberation Movement (SPLM) in 1983[4].

Two years and five months after the independence, shooting could again be heard in Juba. A fight between the South Sudan presidential guards triggered what has later been labelled a civil war[5]. The main protagonists of the new armed conflict were President Salva Kiir and his former Vice President Riek Macher. The President accuses Machar of attempting a coup. Machar however denies having anything to do with

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[1] LeRiche & Arnold, 2012, p. 2.
[2] Johnson, 2011, p. 1.
[3] Carlstrom, 2011.
[4] Jok, 2007, pp. 13, 14, 33.
[5] International Crisis Group, 2014, p. 5.

the initial fighting, but quickly declared himself the commander of the "SPLM/A in Opposition," an armed opposition group. The fightings that followed have forced 1.5 million people to flee their homes and left 3.8 million in desperate need of humanitarian assistance[6].

The media has mainly portrayed the conflict as an ethnic conflict. President Kiir is Dinka and his opponent Riek Machar is of the Nuer tribe. People belonging to the two tribes have been slaughtered for the sole reason of being of the "wrong tribe[7]." 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[8].

One of the most controversial political debates since the independence has been the process of making a permanent constitution for the young state. The progress has been slow and South Sudan is still governed under its 2011 Transitional Constitution. Despite its importance, the process has received little attention by commentators trying to examine the reasons for the armed conflict. The constitutional review process was seen as a trust-building and nation-building exercise[9]. Public consultations and participation in the process was meant to help foster an "inclusive political settlement" and create stability[10]. Concerns were raised however that the process wasn't genuinely inclusive, and that the new and permanent constitution that would evolve from it would be a government constitution more than a peoples' constitution[11]. By researching the constitutional review process from the referendum to the start of the fighting in December 2013, this study hopes to shed new light on the causes of the current conflict and also the connection between inclusivity in constitution-making and relapse to conflict. Was the process genuinely inclusive? Is there a connection between inclusion and exclusion in the constitution-making process and the current conflict?

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[6] United Nations Office for the Coordination of Humanitarian Affairs, 2014.
[7] See for instance Karimi & Kangarlou, 2014; Copnall, 2014.
[8] International Crisis Group, 2014, pp. 1-26.
[9] UN News Centre, 2013.
[10] Government of the Republic of South Sudan, 2012; Interview with Margaret Mathew Deng, Chairperson of the Civic Education Sub-Committee of the National Constitutional Review Commission, SPLM-member and former Undersecretary of the Ministry of Gender, Child and Social Welfare, Skype interview, 15 June 2014.
[11] Interview with Hussein Maar Nyuot, Spokesperson and Head of Humanitarian Affairs, "SPLM/A in Opposition," former Deputy Governor of Jonglei State, Minister for Information and Communication in Jonglei State and Deputy Chair Person of SPLM in Jonglei State, Hermannsdorf, 4 July 2014.

1.1. POLITICAL AND SCHOLARLY RELEVANCE OF THE WORK

The study is relevant on two levels; politically in South Sudan, and theoretically.

Political Relevance

The inspiration for this study came while working in South Sudan for a local non-governmental organisation from January to August 2013. The National Constitutional Review Commission (NCRC) had just started its work. They were supposed to conduct civic education activities and collect views on how a new constitution should be. Civil society organised parallel consultations with great vigour and many saw the whole process as an important nation-building exercise[12]. But some were cautious with their praise[13]. Behind closed doors some people worried that the process might actually contribute to intensifying the political conflict-lines in the country.

South Sudan is still governed under its 2011 Temporary Constitution, which was hastily drafted in the months leading up to independence[14]. The scholar Andreas Hirblinger holds that this constitution lacks legitimacy among the people of the country and that South Sudan doesn't have a "constitutional order to rely on[15]." The process of reviewing the Transitional Constitution of South Sudan (TCSS) has stopped up due to the conflict[16]. The "constitutional vacuum" due to the lack of consensus around the current one is one of the agenda points for the "Sudan People Liberation Movement/Army (SPLM/A) in Opposition" in its negotiations with the SPLM-led government[17]. There is little academic research on the constitution-making process in South Sudan, particularly with the use of primary sources[18]. A study of the process might provide valuable information to stakeholders as the process moves forward.

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[12] Republic of South Sudan, 2012b; Civil Society Resource Team on the Constitutional Review Process, 2013.
[13] See for instance Rift Valley Institute, 2013.
[14] Cope, 2013, pp. 686, 695-696.
[15] Hirblinger, 2014.
[16] Interview with Margaret Mathew Deng, cit
[17] Interview with Stephen Par Kuol, Legal Advisor of SPLM/A in Opposition, Hermannsburg, 4 June 2014.
[18] One of the few exceptions are International Crisis Group, 2011.

Scholarly Relevance

Scholars have found that the process of making a new constitution can lead to a transition to democracy and spark a healing and reconciliation process. The negotiating process might prompt competing parties to slowly start trusting each other[19]. But on the contrary a constitution-making process can also lead to an entrenchment of authoritarian rule, deepen ethnic divides and revive and generate conflicts[20]. Academically there is a broad consensus on the importance of participation in constitution-making. International actors and civil society promote it extensively. The empirical evidence of the benefits of participation is however limited[21]. Using South Sudan as a case to assess the connection between a (participatory) constitution-making process and stability may therefore add important knowledge to an under-researched field. One of the findings in the constitution-making literature is that "[t]he unobservable deep structures of societies, rather than consciously designed institutions, may, in the end, be what are determining outcomes[22]." This study examines whether the political settlement theories can help explain how these "unobservable deep structures" influence constitution-making processes.

1.2. RESEARCH QUESTION, HYPOTHESES, DEFINITIONS

The purpose and aim of this thesis is to analyse the degree of inclusivity (as defined below) in the constitutional review process in South Sudan in order to (1) see if there is a connection between inclusivity in the process and the December 2013 relapse to violence and (2) to add to the growing body of literature on constitution-making and political settlement.

1.2.1. Research Question and Hypotheses

The focus is particularly on participation, given the importance it is given by academics as well as international and local actors working

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[19] Choudhry, 2008, p. 6; Samuels, 2006a, p. 664.
[20] Wheatley & Germann, 2013, pp. 56, 66; Ginsburg & Huq, 2014, p. 122.
[21] Blount, Elkins & Ginsburg, 2012, p. 59.
[22] Ginsburg, 2012, p. 5.

on the constitutional review process in South Sudan. The overall research question for this study is: *How did national and international stakeholders deal with the issue of inclusivity and participation in the South Sudan constitutional review process?*

Two hypotheses are made in order to analyse the research question:

Hypothesis 1: The permanent constitution process was designed by the Presidency to look inclusive with mechanisms for participation from the grassroots and marginalised communities, but was not genuinely inclusive and excluded possible power contenders.

Hypothesis 2: Exclusion in the constitutional review process contributed to the December 2013 relapse to armed violence.

The hypotheses are written in a way that will both help analyse the situation in South Sudan but also test some of the assumptions in the literature on constitution-making and inclusive political settlement.

1.2.2. Definitions

Two of the keywords in the research question, inclusivity and participation, can be used to describe a variety of different phenomena or processes. It is therefore necessary to define the terms.

Inclusion is, according to Banks, a way to secure that people can influence decisions[23]. Samuel uses inclusiveness as a way to differentiate agreements negotiated between broad and diverse bodies from agreements negotiated amongst narrow (political) elites[24]. Others argue that agreements negotiated between elites can be inclusive even though the wider population can't influence the decisions, and call this horizontal inclusion. Vertical inclusion is when larger segments of the populations contribute to the decision-making[25]. Another aspect of inclusion is input and output inclusion. This refers to whether the interests of the population are taken care of. A process can have high degrees of exclusion and still be output inclusive and vice versa[26].

Participation is a method to secure inclusion and is often defined by political theorists as "conventional acts aimed at influencing government

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[23] Banks, 2008, p. 1044.
[24] Samuels, 2006b, p. 25.
[25] Castillejo, 2014, p. 2.
[26] Ibidem, p. 8.

[…],” traditionally seen as the act of voting[27]. For the purpose of this thesis the meaning of participation is broader than voting. The Office of the High Commissioner for Human Rights holds that the right to participate includes "exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves[28]." This must be interpreted to also include demonstrations and lobbying. Participatory democracy is by Banks seen as theories that promote public involvement in decision-making at the government level[29]. There is no blue print to how participation should be conducted, and participatory programmes vary in scope of inclusion, the kind of activities used, to what degree people find it legitimate and impact. But Moehler holds that the methods have in common that they rely on active participation from citizens and not only on selected representatives or experts[30].

1.3. METHODOLOGY

1.3.1. Research Approach

My academic background in development studies, human geography and political science inspired me to take an interdisciplinary approach to this study. The research methodology is qualitative with interviews as the main method of information gathering. Qualitative studies are useful for gaining in-depth knowledge of a phenomenon; they help to give people a voice and to advance theory[31]. In this case, interviews were done in order to (1) document the events, as there is little written (publicly available) documentation on the matter and (2) to get primary data to analyse how actors dealt with the issue of inclusivity in the constitutional review process.

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[27] McAllister & White, 2009, pp. 186-200.
[28] UN Human Rights Committee (HRC), 1996, para. 8.
[29] Banks, 2008, p. 1046.
[30] Moehler, 2006, p. 278.
[31] Ragin & Amoroso, 2011, p. 113.

1.3.2. Analytical Framework

To participate in constitution-making is a human right, according to the United Nations Human Rights Committee (UNHCR). It states in its General Comment no. 25 that "[…] peoples have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government[32]." It is however up to the state to determine the modalities of the participation, as long as they don't discriminate on the basis of race, sex and other statuses[33]. There are a wide variety of ways to design a constitution-making process[34]. Different schools promote different methods and degrees of participation[35]. In the political settlement literature, too, there is a strong focus on inclusion/exclusion. Still, Jones, Elgin-Cossart and Esberg find that the research has left many questions unanswered. A model case of good balance between inclusion and exclusion in order to secure stability in fragile states is still to be discovered[36].

The analytical framework is focused on a review of theories on constitution-making, especially participatory constitution. One of the emerging suggestions from this literature is that in fragile states, the interests of the elites are often more important than the design of the process. If the elites are not satisfied with the results or the process, they are likely to find ways to manipulate it to suit their needs better[37]. This is however still under-researched in the constitution-making literature. Both conventional participation theories and the relatively new political settlement framework are therefore used to examine elite interests and how they can influence a constitution-making process. I use Alex de Waal's text on the "political marketplace" to give a concrete example of how political settlements can evolve, structure and manifest themselves.

Using different frames, or theories, might help seeing the case from different angles. A loose analytical frame like the one outlined above might enable discoveries of new perspectives that would have been difficult to find if the framework was fixed to one scholarly discipline

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[32] UN Human Rights Committee (HRC), 1996, para. 2.
[33] United Nations Human Rights Committee, 1991, para. 5.4; UN Human Rights Committee (HRC), 1996, para. 3.
[34] Mendez & Wheatley, 2013a, pp. 32-33.
[35] See for instance Moehler, 2006; Banks, 2008; Widner, 2008.
[36] Jones, Elgin-Cossart & Esberg, 2012, pp. 3-4.
[37] Wheatley, 2013, p. 85.

only[38]. As will be seen in the analysis, using this kind of "rich" analytical framework is particularly useful when analysing the multi-layered context in South Sudan.

1.3.3. Data Collection

In the current political environment you cannot collect authentic views. Even researchers find it difficult. If you go today and you do research in this issue in South Sudan you will not get the authentic views, because there is no freedom of expression in that country[39].

Primary data collection through interviews is a key part of the research methodology of this thesis. Interviews are seen by Johannessen, Tufte and Kristoffersen as a good tool to get in-depth knowledge on a topic[40]. Conflicts can encourage distortion of data and drive different groups to seek to control information. The "truth" is in fact often said to be "the first casualty of war[41]." Höglund and Öberg see empirical peace research as important, but hold that it demands careful considerations by the researcher. When done properly it can help gaining an understanding of the opinions, arguments motivations and assessments of parties to a conflict[42]. In-depth interviews were therefore chosen as the main source of data in order to get peoples' perceptions of the constitutional review process.

An interview is not aiming to be representative, but to be a method to understand how individual people experience and make sense of events. In-debt interviews are criticised by positivists for not being objective. They argue that the interviewee will bring her values, experiences and aims with her and that this will influence the respondent. Humanists and post-structuralists counter the argument by saying there is no such things as objectivity in social research. Also quantitative research is coloured by the researcher's expectations through the choice of question or scope. When conducting interviews one seeks to explore subjective values and beliefs. Interviews do not have to be used in isolation. Using the technique of triangulation, a researcher uses a multitude of sources

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[38] Ragin & Amoroso, 2011, pp. 65, 78.
[39] Interview with Stephen Par Kuol.
[40] Johannessen, Tufte & Kristoffersen, 2004, pp. 132-133.
[41] Höglund & Öberg, 2011, p. 3.
[42] Ibidem, pp. 3-13.

and methods to explore the research question[43]. This is important in order to strengthen the validity and credibility of the research[44]. The data material for this thesis therefore also includes interviews published online, presidential decrees, reports from the Government of South Sudan (GoSS) and civil society, as well as other scholarly work on South Sudan.

To get different perspectives on the research question, and to improve the research validity, I wanted to talk with government representatives, members of the opposition, national and international civil-society representatives and diplomats. I therefore did a purposeful sampling of informants using a mix of recruitment techniques in order to interview people from these different categories. At the time of writing this dissertation, both the British, Norwegian and American governments advise against all travels to South Sudan[45]. Conducting research in South Sudan on a sensitive topic might risk putting the informants and also myself in danger. The main method of finding people to interview was therefore to participate at relevant events in Germany in order to meet and recruit possible interviewees. Secondly, I used the snowballing method, meaning that I used my contacts to recommend people I could interview. Lastly, I searched for and found the contact details of representatives of the National Constitutional Review Commission (NCRC) online and contacted them directly. Not doing fieldwork in the country in question has its disadvantages. It would for instance have been good to observe some of the NCRC public consultations and to interview people who participated. The way of recruiting interviewees has increased the chances that the research will reflect the views of one particular group of the society with like-minded people. They are for instance all literate and part of what one could call an urban elite. Valentine warns against the risk of having interviewees with very similar background[46]. The different entry-points to recruit respondents for this research should help minimise this risk. The benefits of the recruitment technique used include that face-to-face interviews might help create a more relaxed situation and help the interviewee open up. For some

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[43] Valentine, 2005, pp. 111-112.
[44] Johannessen, Tufte & Kristoffersen, 2004, p. 195.
[45] Government of Norway 2014; Government of the UK, 2014; Government of the United States of America, 2014,
[46] Valentine, 2005, p. 117.

it might also be easier to discuss sensitive issues when they are outside South Sudan.

In total, ten interviews were conducted, of which three were with women and seven with men. The respondents are 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), the National Constitutional Review Commission (2). Four of the respondents chose to be anonymous; the others agreed to speak under full name and title. The full list of the interviewees can be found in the bibliography. I was unfortunately unsuccessful in recruiting anyone from the government. One of the members of the NCRC that is interviewed for the thesis is a former Undersecretary of the Ministry of Gender, Child and Social Welfare and was appointed to the NCRC to represent the SPLM. It is however difficult to determine to which degree she represents the current government.

The interviews were semi-structured with open questions. They lasted between 22 and 70 minutes, and were all transcribed. All but one interview was in English. The last was conducted and transcribed in Norwegian, but the quotes are translated into English.

1.3.4. Research Ethics

Ethical considerations are a crucial part of all social science research. Research on, or during, on-going conflicts raises even more ethical dilemmas[47]. The constitutional review process isn't a conflict in itself, but given the political situation in South Sudan at the time when this research was conducted, it can be seen as a highly sensitive issue. Brounéus holds that the "ethical golden rule of research is do no harm[48]." Taking security concerns for oneself and everyone else included in the research into account is pivotal. As mentioned above, field research in South Sudan was ruled out due to security reasons. For the South Sudanese respondents it might still entail a security risk to participate in the research. All respondents were informed orally about the purpose of the research and that they were free to choose not to

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[47] Höglund & Öberg, 2011.
[48] Brounéus, 2011, p. 141.

participate. Four of the respondents agreed to be interviewed under the condition that I don't reveal their identity.

When conducting interviews, it is important for the researcher to be aware of the power balance between her and the person who is being interviewed. The researcher can be in a dominant or privileged position or can be in a subordinate position depending on the situation. It is impossible to eliminate the power balance completely. It is however important that the researcher is aware of it and reflects upon it[49]. All the people interviewed for this research have good positions and standings in their respective constituencies. I did my best to make sure they were comfortable during the interviews and took a humble approach, stressing my genuine interest in their perspectives and opinions.

1.3.5. Time Period

The period analysed in this thesis spans from the referendum in 2011 to 13 December 2014 when the fighting broke out. There will however also be a brief historical background to the Sudan/South Sudan war, the splits within the Sudan People's Liberation Army during the war and the Comprehensive Peace Agreement (CPA), as these events are important to understand the political settlement and constitution-making process after the referendum.

1.4. LIMITATIONS AND DELIMITATIONS OF THE RESEARCH

South Sudan is still ruled under its 2011 Temporary Constitution. The process of drafting a new and more permanent one was, due to the current political crisis, halted during the period of time when the research for this thesis was conducted[50]. Some of the findings must therefore be seen as preliminary. The interviewees' perceptions of the parts of the process that were still to be implemented are nevertheless relevant in order to understand the current political situation. In an ideal situation I would also have used more observation and followed the process over longer time in order to improve the validity of the

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[49] Valentine, 2005, pp. 111-114.
[50] Interview with Margaret Mathew Deng, cit.

research. Time and security constraints however made it impossible.

Peace negotiations between the SPLM and the "SPLM/A in Opposition" was ongoing when I conducted the interviews for this thesis. The different actors, both national and international, might have had an interest of portraying previous events in a way that would benefit their current position. Research on the same topic later in time when (or if) the relationship between the warring parties improves might have yielded other results. As one of the hypotheses is that there is a connection between the constitutional review process and the violent conflict, it is nevertheless interesting to see how the actors reflect on the process at this moment of time. I will show in the analysis how some actors might be inclined to portray the process as more exclusionary than it actually was.

The interviews with the representatives from the NCRC were done by telephone. There is a possibility that the face-to-face setting I had with the other informants created a more relaxed atmosphere than what was possible by telephone.

I worked in South Sudan from January to August 2013. Part of my job was supporting local organisations in their advocacy on the constitutional review process. The South Sudanese society and cultural norms are very different from where I grew up. Having lived there and worked with only local colleagues I have gotten a basic first-hand understanding of the society and the political situation. This might be an advantage when analysing the material. On the other hand, there is also a risk that my experience can lead me to making hasty conclusions. Bias both in data collection and when analysing data is, according to Ragin and Amoroso, not uncommon. It might be difficult for the researcher to recognise her own bias, and peer-reviews of the research is seen as the best safeguard against scientific bias[51]. It is therefore up to the reader to challenge my findings and question the analysis. I have however, in order to limit the risk of prejudice, aimed at interviewing actors representing different nationalities, ethnicities and roles in the constitutional review process.

The thesis has a social science perspective on the process and will not give any legal analysis of the various paragraphs in the constitution.

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[51] Ragin & Amoroso, 2011, pp. 69-70.

1.5. METHOD OF INQUIRY AND STRUCTURE OF THE WORK

The thesis starts with a literature chapter with a review of constitution-making theories and political settlement theories. In the case study chapter, a historical background to the situation in South Sudan is given before findings from interviews with stakeholders in the constitutional review process are presented in the light of the research question. An analysis, centred on the three hypotheses, then follows.

2.

THEORETICAL FRAMEWORK

The first part of this chapter outlines the main literature and theoretical approaches to constitution-making. It shows that one of the main findings from previous research is that even though *how* a constitution is made matters, similar processes can lead to different results, depending on the political setting in the country or the interests of the elites. The second part of the chapter is a literature review of the relatively new concept *political settlements*. In addition to being a concept both donors and the Government of South Sudan use in connection to the constitutional review process, it might help explain why similar process leads to different results and how the interests of the elites influenced the results in South Sudan. To get a more concrete understanding of how political settlements can evolve, structure and manifest themselves, I also take a closer look at a text by Alex de Waal about the "political marketplace."

2.1. THEORIES ON CONSTITUTION-MAKING PROCESSES

2.1.1. Operational Dimensions to Analyse Constitution-Making

A constitution was, until recently, judged almost exclusively on its content. The drafting process received little attention. The first wave of democratisation however revealed that pseudo-democratic institutions can be in place without the country being a liberal democracy[52]. The focus has therefore shifted towards the *process* of writing a constitution,

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[52] Moehler, 2006, p. 278.

with the belief that a good process can help foster a democratic culture and that inclusion and participation is particularly important to achieve this[53]. The processes leading to the drafting and ratification of new constitutions vary widely[54]. Even though five to ten countries go through major constitutional reviews every year[55] and despite the renewed interest in the constitution-making process, there is little empirical data that assesses the impact of different forms of constitution-making[56]. Through a comparative approach Fermando Mendez and Jonathan Wheatley try to fill this knowledge gap. In their book *Patterns of Constitutional Design. The Role of Citizens and Elites in Constitution Making* they study to which extent the constitution-making process matters in relation to mitigating conflict, stability of the constitutional order and democracy. They identify three operational dimensions for analysing the inclusivity in the process of making a constitution:

1) Mode of Representation

It is unpractical that all the citizens of a country participate at the same level in a constitution-making process. It is therefore common to have a body entrusted with the task of negotiating and drafting a text. The mode of representation in this body varies. Mendez and Wheatley[57] use the term *elite appointment* to explain constitutional bodies that are appointed by the executive or the legislature, without them being mandated to establish the constitutional body. On the other end of the spectrum, they find *direct election*. This is a body in which the members are directly elected with the mandate to draft a constitution. Between *elite appointment* and *direct election*, the authors find other modes of representation, for instance bodies in which the delegates are selected to represent a geographical area. They call these modes *indirect selection*.

2) Style of the Constitution-Making Process

Mendez and Wheatley identify two extremes in terms of the openness of the process and name them *open* and *closed* styles. In the open style people have, and exercise, their right to submit suggestions and

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[53] Ibidem; Banks, 2008, p. 1046.
[54] Elster, 1998, pp. 97-123; Moehler, 2006, p. 278.
[55] Ginsburg, 2012, p. 4.
[56] Auer, Bisaz & Thürer, 2011.
[57] Mendez & Wheatley, 2013b, pp. 16-17.

comment on the process. In the closed style, the negotiations happen behind closed doors and the public have limited opportunities to submit their comments. Compromises and bargains might be easier to reach if the delegates can discuss without being subject to public scrutiny. On the other hand, an open style has a greater focus on arguments than pure bargains[58].
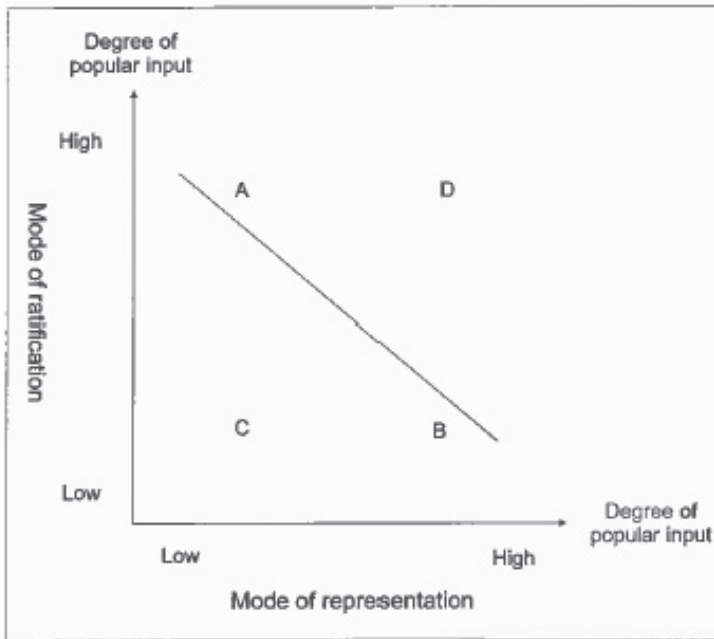
3) Mode of Legitimisation

The third and last dimension deals with the ratification of the constitution. The authors identify two extremes in the way a constitution can get its legitimacy: *elite adoption* and *popular vote.* Elite adoption refers to cases in which the final text is ratified by the constitution-making body itself. Popular vote is when the people ratify the text through a referendum. There are other ways of adopting a constitution, for instance that a separate institutional body approves the draft. Mendez and Wheatley call this *institutional ratification*[59].

The different modes open up a wide variety of configurations for constitution-making processes. After assessing a representative sample of 160 constitution-making processes, Mendez and Wheatley found, not very surprisingly, that the chances of an open public debate are greater if the drafters are elected than if they are appointed by elites. Perhaps more surprisingly, they also found that referendums were common in the cases where the constitution-making body was appointed by elites. The connection between mode of ratification and mode of representation is visualised in Figure 1.

[58] Ibidem, p. 17.
[59] Ibidem.

Figure 1. "A trade off"[60]

Letter A represents direct popular input in the ratification of the constitution through a referendum, and letter B represents popular input through elections of members to a Constituent Assembly. The downward sloping line shows that most constitution-making processes can be found somewhere between the two modes of popular legitimisation. This trade-off between mode of representation and mode of ratification reveals that most elites involved in constitution-making see the need for some kind of popular input to legitimise the process, either at the beginning or at the end. The situation is however slightly different when a constitution is written directly after a conflict. In those situations there is often little or no popular input at all. This can be represented in the letter C. The authors also found some cases with high degree of popular

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[60] Mendez & Wheatley, 2013a, p. 37.

input in all stages of the constitution-making (letter D)[61] .

Mendez and Wheatley's analysis suggests that the mode of representation is the most relevant mode when it comes to explaining whether a constitution-making process leads to democratisation or not. If the constitution-making body is appointed by elites, the chances are greater that the process will institutionalise authoritarianism. Referendums are often used to "rubber stamp" what the (non-democratic) elites have decided[62].

2.1.2. Participatory Constitution-Making Processes

Despite the finding that the *style of the constitution-making process* (the degree of openness in the process) is less relevant in explaining whether a constitution-making process leads to democratisation or not[63], there is a clear trend towards more direct and extensive popular participation in constitution-making processes, beyond referendums. This includes civic education and popular consultations. The focus on participation is now so common that some scholars are referring to it as "new constitutionalism[64]." The form, scope, activities, perceived legitimacy and impact of the participatory programmes vary, but they all have in common that they seek to engage citizens rather than solely rely on technical experts or appointed representatives. Moehler found that the belief in participation now is so strong that it is encouraged even in states such as Iraq where the security situation makes extensive participation challenging, if not impossible. Participatory democratic scholars believe participation generates debates which might lead to better solutions than those negotiated behind closed doors. In the constitution-making setting, the elites are seen as focusing on the concerns of the elites, especially around security, economy and politics. Those who are directly affected by a decision might have a better solution to it, or might highlight problems the elites don't see. In order to draft a constitution that will contribute positively on peoples' lives, these scholars argue that people need to participate[65].

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[61] Mendez & Wheatley, 2013a, pp. 21-41.
[62] Wheatley & Germann, 2013, pp. 56-57; Banks, 2008, p. 1055.
[63] Wheatley & Germann, 2013, pp. 56-57.
[64] Moehler, 2006, p. 278; Blount, Elkins & Ginsburg, 2012, p. 35; Hart, 2001, pp. 153-168.
[65] Banks, 2008, pp. 1047-1048.

Kirsty Samuels studied constitution-making in twelve countries emerging from civil conflict or authoritarian rule from 1991 to 2006. The research showed that many of the assumed benefits of a participatory constitutional process holds true. Samuels' evidence suggests that a participatory process can give people a shared understanding of the conflict and a sense of ownership of the constitution. It can also play an important healing role and contribute to reconciliation and sustainable peace. She uses Guatemala and Colombia as examples to show that inclusive and consultative process can help end protracted conflicts. The participatory constitution-making processes in the two countries inspired armed groups to use political means to achieve their goals. Despite being seen as successful at the time, the constitutions were however later disregarded by the political elites and not implemented. This points, according to Samuels, to a key challenge in participatory constitution-writing; having a genuine participatory process that at the same time sustains the interest of elite(s) so that they don't act as spoilers. One should however not undermine the finding that a participatory process can have significant impact on a constitution. Samuels found that closed processes often contributed to increased violence or tensions. The escalation of violence that followed the imposed constitutions in Bahrain, Nigeria and East Timor are used to illustrate the point. It is worth noting that the constitution-making process in Bahrain started off as participatory and ended as highly exclusionary[66].

2.1.3. Critique of Participation

Moehler questions the assumption that participation enhances constitutional legitimacy. By constitutional legitimacy she means a constitution that the citizens will support and defend. She argues that although policy makers often promote participatory methods, there is little empirical evidence that it actually enhances legitimacy. Through a quantitative and qualitative study of the constitution-making process that led to the 1995 Constitution in Uganda, she found that participation helped educate people about the constitution, but it did not increase constitutional legitimacy. Moehler looked at the individual level, comparing people who in one way or another participated in the

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[66] Samuels, 2006b, pp. 23, 25, 29.

process in Uganda with people who didn't. Moehler admits that if one moves the analysis to the national level, one finds that the Ugandan Constitution receives higher levels of support than the constitution in seven other Sub-Saharan countries[67]. Her conclusion is nevertheless interesting. The perceptions of the local elites are more important in framing peoples' perception of the legitimacy of the constitution than whether people participated in the process themselves or not:

If elites are divided and debates are antagonistic, citizens are likely to develop polarized views of the process and the constitution. In a polity with robust opposition and no consensus, participatory constitution-making may significantly reduce rather than enhance constitutional legitimacy[68].

Moehler warns academics and policy-makers against a blind belief in participatory processes and an abandoning of elite negotiations. An unhappy elite can easily spread its dissatisfaction among its constituency, especially in post-conflict societies where the information sources often are few[69]. Wheatley seems to confirm the conclusion that a constitution-making process that is open and inclusive *may* contribute to a more democratic consensus among the political elites and, gradually, the society as a whole. He does however stress that it doesn't necessarily happen[70].

2.1.3.1. Internal and External Inclusion

Angela Banks focuses on internal and external exclusion/inclusion in constitution-making processes. Her analysis might help explain why inclusion can yield different results in different contexts. To Banks, inclusion does not only mean physical presence in decision-making forums, or the opportunity to raise one's voice. Real inclusion entails the power to influence decisions. Participation without this power is labelled *internal exclusion*. Internal exclusion is quite common in (participatory) constitution-making exercises in post-conflict states. The reason for this is that broad-based participation creates uncertainty for the elites. To reduce this tension, they are inclined to shape processes that seem participatory, but where only the elites can influence on the

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[67] Moehler, 2006, pp. 275-308.
[68] Ibidem, p. 276.
[69] Ibidem, pp. 275-308.
[70] Wheatley, 2013, p. 85.

outcome. External exclusion is when people are excluded from the arenas in which decisions are taken altogether[71].

The constitution-making process in Rwanda is used as an example of a constitution-making process with high levels of internal exclusion. People were informed about the process through TV and radio broadcasts and were asked to submit their opinions at public meetings or through questionnaires. The substantive engagement was however reserved to the meetings of the Legal and Constitutional Commission and its engagement with the government. Banks holds that this created a system of participation without power. According to Banks, the international community should acknowledge and recognise the difficulties the elites face in post-conflict states in order to help finding strategies that are internally inclusive. If they fail to do so they might unconsciously support internally exclusive institutions and procedures[72].

2.1.3.2. Interest in Participation

The relatively new focus on participatory constitution-making processes must be seen in connection with theories on participation. The underlying notion of these theories is that participants are more supportive of the system, agreement or process due to their increased knowledge and psychological attachment towards it[73]. But some participation scholars are critical towards this rather simplistic assumption. Sarah White writes about participation in development projects, but her focus on the interests different actors have in promoting participation makes it relevant for constitution-making processes as well. She criticises the normative acceptance of participation as something inherently positive and stress how both participants and those who design the participatory mechanisms often have hidden (and sometimes open) agendas connected to participation. For the elite, "[i]ncorporation, rather than exclusion, is often the best means of control[74]." White's table "Interest in participation" can be used to further elaborate on Banks' analysis on internal/external inclusion and exclusion. White sees four different forms of participation and investigates the interests connected to each of them:

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[71] Bank,s 2008, pp. 1057, 1061, 1062.
[72] Ibidem, pp. 1044-1046, 1069.
[73] Moehler, 2006, p. 278, 279.
[74] White, 1996, p. 7.

Table 1. "Interest in participation"[75]

Form	Top-Down	Bottom-up	Function
Nominal	Legitimation	Inclusion	Display
Instrumental	Efficiency	Cost	Means
Representative	Sustainability	Leverage	Voice
Transformative	Empowerment	Empowerment	Means/end

The first column refers to the form of participation. The second column, "top-down," shows the interest the people designing and implementing development programmes have in using participation and the third column refers to the interests of the participants. The fourth and last column describes the function of each form of participation.

Nominal Participation

White explains nominal participation as when participation is used to justify claims for recourses but there is little actual involvement by the participants. As an example she uses women groups in Zambia that have been set up by the local government. The groups have little or no activities, but the fact that they exist can help justify the local government's claim for recourses from the state. The local elites' interest in participation is therefore *legitimisation*. The women rarely attend any meetings, but participate in case an interesting offer, like a loan, suddenly comes on. Their interest is, according to White, *inclusion*. Participation is therefore *nominal*, meaning that it exists in the name only[76]. White seems to have a different interpretation of the word inclusion than Banks[77], given that the women in the example don't have any decision-making powers in the project.

Instrumental Participation

Instrumental participation is when participation is used in order to serve an efficiency need of donors. If they are to build a school, local people may be asked to participate in the construction. This will

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[75] Ibidem.
[76] Ibidem, p. 8.
[77] Banks, 2008, pp. 1057, 1061, 1062.

both save costs, and is seen as a way to increase local commitment for the project. For local people, who might have to spend time they would otherwise have used on household work or paid employment, participation is seen as a *cost*. But if they want the school they need to participate. The function of participation is to be a *means* to achieve cost-effectiveness and to get a school[78].

Representative Participation

Representative participation refers to the instances in which participation is an effective way for people to express their own interest; that they have a *voice* and *leverage*. A NGO uses participation to ensure that the project doesn't create dependency, and to ensure sustainability[79].

Transformative Participation

Transformative participation has *empowerment* as its goal. Participation is both a means and an end in it itself. The idea is that people jointly discuss their problems and that they come to common analyses of their problems and possible solutions. Outsiders can facilitate it, but it is impossible for them to bring about the transformation[80].

White's table is made for development programmes and focuses on the relationship between donor/government and local people. Although constitution-making processes are complex with checks and balances at different levels, one can draw some important lessons: (1) Participation is political. One should therefore cautiously analyse who should be included, how and on which, or whose terms they should be asked. One should also be aware that people might participate without wanting to. (2) One should analyse the interests behind participation. Does it challenge existing power relations or does it reproduce them? (3) The interests behind participation are rarely reflected openly, but White argues that they should be. "However participatory a development project is designed to be, it cannot escape the limitations on this process that derive from the power relations in the wider society[81]."

[78] White, 1996, p. 8.
[79] Ibidem.
[80] Ibidem, pp. 8-9.
[81] Ibidem, p. 13.

2.1.3.3. Closed Constitution-Making Processes

The paragraphs above show that some authors question whether increased participation automatically leads to better processes or results. Widner found that *closed* processes are favourable in order to reduce violence in countries emerging from conflict[82]. As seen in Figure 1, closed processes ("C") are often used in situations where a country is emerging from conflict. Widner uses a dataset of over 195 cases of constitutional reviews that took place between 1975 and 2002, as well as qualitative interviews to research whether some types of constitutional reform processes are more likely to reduce the level of violence than others. Her research suggests that, in situations with high levels of violence, interim constitutional arrangements negotiated behind closed doors may be a key factor to ensure success. There are several reasons for this. It is more likely that trust will grow in a small, closed group where the delegates can speak without fear of intimidation from outsiders than in an open participatory setting. Passions are often high and trust low during peace negotiations. This makes it difficult for the parties to agree on a permanent constitution. In addition, not all parties will be present at the peace talks where a post-war constitution might be discussed. An interim constitution, negotiated behind closed doors, which will be negotiated later when trust between the parties has increased is, by Widner, seen as preferable. Widner does not give any suggestions for how long the interim constitution should be in place before one start drafting a more permanent constitution or how inclusive the process should be horizontally. The research suggests that participatory ideals cannot be achieved in a post-conflict constitution-making process. In peaceful societies, more representative processes might yield better results, in terms of fundamental rights enshrined in the new constitution (output inclusivity)[83].

The paragraphs above show that there is no clear consensus on what kind of constitution-making process is favourable. Both constitution-making theories and more traditional participation theories do however stress that the interests of elites matter. In the words of Wheatley and Germann:

[If] democracy is not in the interest of the main political actors, almost *any*

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[82] Widner, 2008, p. 1533.
[83] Ibidem, pp. 1513-1540.

constitution-making process can lead to an entrenchment of, rather than a release from authoritarianism[84].

Many authors seem to agree with Wheatley's conclusion that also after the constitution is in place, most ambitious leaders will be able to find ways to circumvent it, possibly even by annulling it. An inclusive or participatory constitution-making process might make this more difficult, as it might contribute to the establishment of a democratic consensus, but this isn't always the case[85]. The political settlement literature is a relatively new analytical framework that focuses on inclusivity and the interests of elites, particularly in post-conflict countries[86]. It might help analyse some of the challenges connected to inclusion/exclusion and sustainability of a constitution and provide valuable insights to the constitution-making literature.

2.2. POLITICAL SETTLEMENTS

The political settlement framework provides, with its focus on motivation and power, an alternative to a development approach focusing on capacity-building and technical assistance as the solution to poor governance, conflict and dysfunctional institutions[87]. The Government of South Sudan (GoSS) holds that popular involvement in the review of the Transitional Constitution is a priority in order to achieve an inclusive political settlement[88]. This sub-chapter will therefore map out the main approaches to the concept and see whether it can help explain why participation and similarly designed constitution-making processes can yield so different results in different settings.

2.2.1. Defining Political Settlements

Development doesn't happen in a vacuum. Actors often have competing agendas. International organisations have found their carefully designed and fully funded development programmes undermined and

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[84] Wheatley & Germann, 2013, p. 66.
[85] Wheatley, 2013, p. 85.
[86] Parks & Cole, 2010, pp. viii-1.
[87] Ibidem.
[88] Government of the Republic of South Sudan, 2012, pp. 2-3.

ultimately impeded by local elites. This holds true for a wide spectrum of initiatives, including civil society mobilisation, peace processes and state building in fragile states. The political settlements framework is seen as a promising new approach for international development organisations to make their programmes more effective by understanding and responding to the local power balance[89].

The "New Deal for Fragile States" is a partnership between fragile countries, developed countries and organisations like the World Bank and the UN, and seeks to find new ways to engage with conflict-affected states[90]. One of the New Deal goals is to foster inclusive political settlements[91]. There is however no clear consensus on what a political settlement is. Broadly speaking, most actors dealing with political settlements agree that it has to do with agreements between elites. They also agree that it is a useful framework to analyse the political dynamics in fragile states. But when applied to case studies or unpacked as policy tools, Edward Laws finds that things get confusing. Peace agreements, elite pacts/bargains, signing of a declaration, state building and long-term political process are all political phenomena that have been described as political settlements[92]. Jones, Elgin-Cossart and Esberg divide the approaches to political settlements in two: (1) informal and long-running dynamics between actors, particularly political elites; and (2) concrete political renegotiations of agreements and arrangements, be it power-sharing deals, constitutional conferences, peace agreements or similar arrangements. They also highlight that some see political settlements as temporal, others as an ongoing process, some see them as an agreement between elites only, while others find that they incorporate broader elements of society[93].

Many scholars refer to the UK Department for International Development's (DFID's) definition when explaining what a political settlement is[94]. DFID defines political settlements as "[...] the expression of a common understanding, usually forged between elites, about how power is organized and exercised[95]." Political settlements include,

[89] Parks & Cole, 2010, p. 1.
[90] New Deal, 2014b.
[91] New Deal, 2014a.
[92] Laws, 2012, pp. 1-17.
[93] Jones, Elgin-Cossart & Esberg, 2012, pp. 10-11.
[94] See for example: John & Putzel, 2009; Laws, 2012; Parks & Cole, 2010.
[95] Department for International Development, 2010, p. 22.

according to DFID, formal institutions and mechanisms like electoral processes, constitutions, market regulations and parliaments, but also unarticulated deals between elites[96]. DFID holds that this mix of formal regulations and informal agreements makes up the basic rules of how a state or region is governed. It is however unclear how DFID thinks that this common understanding will be expressed, or how they measure when one political settlement is over and a new one starts[97]. Jones, Elgin-Cossart and Esberg find DFID's definition very broad[98].

Like DFID, John and Putzel hold that the design of state institutions alone doesn't determine how they perform. A system that works perfectly in one place might enable corruption and fuel conflict in another place. The political settlement framework is seen as a useful tool to explain this: "understanding the elite bargain that lies at the heart of any political settlement provides a window for assessing state fragility and resilience as well as possibilities for reform and change[99]." These scholars highlight to a stronger degree than DFID that the elites that are part of a political settlement often are competing against each other. They see political settlements as "[…] *bargaining* outcomes among *contending* elites[100]." The competition is often connected to control over economic resources. Laws stress that most societies, particularly in developing countries, are far from homogeneous. A political settlement framework should, according to Laws, have bargaining and compromises between competing elites at its centre of understanding. The bargaining and the informal part of a political settlement seem to be particularly important in developing countries. Laws holds that local elites can act as powerful spoilers if their interests aren't taken care of[101].

Edward Laws aims to come up with a definition that both gives it an analytical precision and makes it possible for practitioners to distinguish one political settlement from another. To do this he focuses on processes and events. Processes or long-term development of a political settlement deals with the power structure, horizontally and vertically, and can help

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[96] Elites are seen as people with power to influence the behaviours of others. Examples might be elected representatives, other people with popular support, wealthy people, warlords or religious authorities. Ibidem.
[97] Ibidem.
[98] Jones, Elgin-Cossart & Esberg, 2012, p. 11.
[99] John & Putzel, 2009, p. 17.
[100] Ibidem, p. 4. Original italics.
[101] Laws, 2012, pp. 1-17.

explain why similar institutions and forms of organisation can yield very different outcomes. The events part of the political settlement helps give the concept its analytical precision. Without events political settlements could easily become another synonym for "politics." The events can for instance include formal institutional details, pacts and agreements. This leads Laws to defining political settlements as "on-going and adaptable political processes that include specific one-off events and agreements[102]."

The paragraphs above show that a political settlement can be negotiated openly, but it can also be part of informal agreements. At the heart of the concept lies that the political settlement often is a result of a bargain. Events might change the power balance and open up for new negotiations.

2.2.2. Inclusive Political Settlements

Research has highlighted that a political settlement should be inclusive in order to last[103]. DFID holds that inclusiveness will help create state legitimacy, increase public perceptions of fairness and foster sustainability[104]. Castillejo found that inclusive political settlements are seen as reducing the incentives for excluded elites to challenge the existing order through violent means. There is however a debate on what kind of inclusion is important[105], and Lindemann holds that many agencies that promote inclusive political settlements lack a clear definition of what it actually is[106]. The following section will provide an overview over the literature on inclusive political settlements.

2.2.2.1. Horizontal Inclusivity

An inclusive political settlement is for John and Putzel a settlement where powerful elites have a share in the distribution of rights and entitlements. Since the cost of an exit from the coalition is high, elites are less likely to resort to violent means to solve conflicts. The authors also argue that when national political organisations comprise of people

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[102] Ibidem, p. 21.
[103] OECD, 2011, p. 11.
[104] Department for International Development, 2010, p. 23.
[105] Castillejo, 2014, p. 2.
[106] Lindemann, 2011, p. 1844.

with different ethnicities, it might limit horizontal inequalities and therefore also limit the risk of political violence. Botswana is used as an example to illustrate this. The country has one of the world's most unequal income distributions, but it still has effective governance, political stability and rapid economic growth. John and Putzel argue the main reason for the stability is a political settlement with broad-based elite inclusion. Their main argument seems to be that as long as the most powerful groups have a share in the political settlement (more specifically power to distribute assets) there will be stability in a country. This leads to their conclusion that a political settlement can be inclusive even though large segments of the population are excluded[107]. In other words, it is horizontally inclusive but not output inclusive.

Lindemann focuses on one aspect of a political settlement, namely elite bargains, in an attempt to make it more measurable. He conceptualises an elite bargain as "the distribution of positions of state power between representatives of contending social groups[108]." In an inclusive elite bargain there is a balanced access to power between contending social groups. Lindemann uses three indicators to measure whether an elite bargain is inclusive: intergroup distribution of composition of (1) government positions; (2) top party organs and permanent secretaries of the ruling party; and (3) the army, particularly the upper levels. He doesn't specify how to define a social group, if all social groups should be included for a bargain to be inclusive, or how to decide that a bargain is inclusive enough. Through a case study in Zambia, Lindemann finds that inclusive elite bargains might help limit the risks of a civil war, but that they have made economic growth more difficult. Since limited economic growth might be a source of renewed conflict, it is unclear what effect inclusive elite bargains have on long-term stability[109].

2.2.2.2. Perceptions of Inclusivity

The Organisation for Economic Co-operation and Development (OECD) focuses more on *perceptions* of inclusivity than measurable indicators. They argue that when a population perceives a political settlement, or the negotiation leading to a political settlement to be inclusive they will also find it legitimate. The population's idea of

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[107] John & Putzel, 2009, pp. 21-22.
[108] Lindemann, 2011, p. 1844.
[109] Ibidem, pp. 1843-1865.

legitimate political settlement does not necessarily correspond with international standards for inclusivity or legitimacy[110]. Since perceptions are context-specific, it might be difficult to find a way to measure how inclusive a political settlement is, based on OECDs understanding. OECD still holds that "at least some degree of inclusivity increases a settlement's odds of being perceived as legitimate, and this improves its changes of enduring[111]."

2.2.2.3. Exclusion of Particular Groups

Laws cautions against making a direct connection between an inclusive political settlement and the stability of a state. He holds that excluding one particular group might, in some instances, be a key to ensuring stability. He therefore suggests using the term "inclusive enough" when talking about inclusive political settlements[112]. John and Putzel warn against confusing input inclusivity and output inclusivity: "Determining how inclusive or exclusionary a political settlement is cannot be understood simply at the extent of participation in the bargaining process[113]." The scholars go so far as to suggest that the outcome of an imposed political settlement might be more output inclusive than a settlement reached through participatory processes[114]. Jones, Elgin-Cossart and Esberg criticise DFID for having a normative bias towards horizontal inclusion. They argue that an exclusive political settlement can be just as, if not more, responsive to the public needs (output inclusive)[115].

2.2.3. The Political Marketplace

Alex de Waal's analysis on the political marketplace might help explain what political settlements can mean in practice. De Waal uses an example from Sudan to show how monetary transactions to a compensation fund convinced the leader of the "Darfur rebels," the Sudan Liberation Movement, to sign the Darfur Peace Agreement with the Sudanese government in 2006. The compensation was neither captured in the formal negotiations nor in the 87-page Peace Agreement. According

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[110] OECD, 2011, pp. 30-32.
[111] Ibidem, p. 32.
[112] Laws, 2012, p. 18.
[113] John & Putzel, 2009, p. 5.
[114] Ibidem.
[115] Jones, Elgin-Cossart & Esberg, 2012, p. 14.

to de Waal, seeing Darfur as a political marketplace or as an auction of loyalties is common in Sudan[116]. The provincial elites want the highest possible price for their allegiance and the ruler wants to keep the costs low for maintaining his patronage system. Electoral votes, public protests, strikes and violence can be used as bargaining sticks and the price can be positions, cash, and trading licenses, etc. In these settings deals on money and resources are seen as temporary. It is therefore often relatively easy to strike a deal quickly. More permanent arrangements, perhaps like a constitution, are a far bigger cause of concern for the affected elites[117]. The "political marketplace" is a new concept and it is not widely used. It does however help to give a more concrete idea of what a political settlement can mean in practice. Inclusivity is also in this theory seen as important for stability. De Waal writes about simultaneously versus rotational inclusivity. A rotational inclusive system means that the ruler does not try to include all peripheral elites at the same time. The peripheral elites therefore rotate on who is included. A simultaneous system means that they are all included simultaneously. The former might be favourable to the ruler, as it helps avoiding making the peripheral elites too strong as well as limits the costs of keeping people loyal[118].

Alex de Waal argues that the international community should deal with the political marketplace more consciously. Which patronage systems create stability and which are sources of instability? Is there a chance that international actors might "distort the marketplace" when they start giving development assistance, humanitarian relief or engage in peacekeeping, and thus make the price for loyalty higher, and possibly prolong a conflict? Although there is little research on how the political marketplaces operate and affect conflicts, de Waal suggests that foreign attempts to strengthen state capacities in a fragile state, often strengthens the rulers. Any political agreement (or perhaps political settlement to use the terminology of this thesis), made when the international actors are present will have to be renegotiated when they leave or scale down their support. The power balance changes and provincial elites might want to heat up the conflict again in order to strike a better deal. The political marketplace might explain why it sometimes takes time to

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[116] At the time of writing his paper, South Sudan was still a part of Sudan. The focus of his paper is however more on the northern part of Sudan.
[117] Waal, 2009, pp. 7-9.
[118] Ibidem, p. 13.

negotiate a peace agreement and to put it into force. Local actors who are not involved in the peace talks might renegotiate their agreement with the elite before they agree to lay down their weapons[119]. Jones, Elgin-Cossart and Esberg criticise the WDR 2011 and the OECD work on state building for focusing too much on elites, and forgetting the wider relationships with social groupings[120].

2.3. summary

The theories on constitution-making, participation and inclusive political settlements show that there is a wide range of ways to implement inclusivity. Some argue that representative inclusion is the most important factor to determine whether a constitution-making process leads to democratisation or not[121]. Others hold that temporary constitutions negotiated in closed settings between elites are favourable when a country is emerging from conflict[122]. Moehler argues that elite perceptions are more relevant than participation to form people's perception of a constitution[123], while Samuels finds that participatory constitution-making processes can increase the peoples' ownership over the constitution and enhance its legitimacy[124]. Although there is growing evidence that inclusion limits the chances of a relapse to violence, further studies are needed in order to find out how inclusive is inclusive enough and when exclusion can help ensure stability[125].

Participation is political. Analysing the interest of different actors can help explain why participation doesn't automatic lead to the wanted results[126]. Political settlement theories might also help to analyse the local context and explain why similar processes might produce different results. This thesis borrows from Parks and Cole's conceptualisation and sees political settlements as fluid and informal elite pacts. By fluid I mean that they aren't necessarily reflected in formal institutions and procedures[127].

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[119] Ibidem, pp. 17-19.
[120] Jones, Elgin-Cossart & Esberg, 2012, p. 13.
[121] Wheatley & Germann, 2013, pp. 56-57.
[122] Widner, 2008, pp. 1513-1540.
[123] Moehler, 2006, pp. 275-308.
[124] Samuels, 2006b, pp. 23, 25, 29.
[125] Jones, Elgin-Cossart & Esberg, 2012, pp. 15-21.
[126] White, 1996, pp. 7-13.
[127] Parks & Cole, 2010, p. 5.

3.

THE CONSTITUTIONAL HISTORY OF SOUTH SUDAN

Many historical events have impacted the current political, social and economic situation in South Sudan. The most relevant period for this study begins in 1956 when Sudan got its first constitution as an independent country. I will in the following paragraphs map out the historical constitutional processes from the first Temporary Constitution of 1956 to the current Transitional Constitution of South Sudan. The section will also give a brief background to the various levels of conflict in contemporary South Sudan.

3.1. INDEPENDENCE AND THE 1956 TEMPORARY CONSTITUTION

Sudan gained its independence in 1956 after power-struggles between its two colonial powers, Egypt and Britain. Neither of the countries was eager to give up their rule over Sudan. The British had however realised that the only legal way they could avoid Sudan ending up in the hands of Egypt was to invoke the principle of self-determination for Sudan. It is said that independence therefore was brought on Sudan more as a consequence of international politics than due to a push from within. Both the British and the Egyptians were mainly communicating with the northern elite and excluded the southerners. Since independence was more or less given to the northern nationalists "for free," they had few reasons to build alliances with the southern elite in order to strengthen their cause for independence. They did however insist on the importance of the north and the south staying together as one country. Johnson holds that the main reason for the north's call for unity was the importance of the south for the economic prosperity of the north. The southerners were excluded from the meetings where the terms of

independence were discussed and their calls for a federal state were declined. In the end, Johnson holds that the colonial powers over the south were merely moved from the hands of the British to northern Sudan[128].

The fear of northern domination led to mutiny within the army in the southern town of Torit in 1955. The unrest quickly spread to other parts of the south and made the British eager to quickly hand over full responsibility of the government to Sudan. A British constitutional expert wrote a temporary constitution and the Sudanese government, where also Southern Sudanese politicians were represented, hastily voted for independence. The southerners voted for independence on the premise that a more permanent federal constitution would be considered seriously once Sudan was independent. Sudan gained its independence on 1 January 1956. No referendum was held, and scholars indicate that the decision might not have reflected the will of the people[129].

A precedent was set that has haunted Sudanese politics ever since: the precedent of taking the popular will for granted, and therefore circumventing agreed legal procedures in all major constitutional issues[130].

After independence widespread Arabisation and Islamisation followed throughout the country. Protests were met with arrests, torture and massacres. The 1955 Torit mutiny rapidly developed into a nation-wide rebellion and civil war[131].

3.2. THE ADDIS ABABA AGREEMENT AND THE 1973 PERMANENT CONSTITUTION

The war lasted until 1972, when the peace talks bore fruits and the Addis Ababa Agreement was signed. Despite the earlier promises of revisiting the constitution, Sudan was still governed under the (much amended) 1956 Temporary Constitution. The Addis Ababa Agreement made it possible to replace it with a permanent constitution. After

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[128] Johnson, 2003, pp. 21-24.
[129] Ibidem, pp. 29-30; Deng, 1995, pp. 132-133; Jok, 2007, pp. 40, 56-59.
[130] Johnson, 2003, p. 29.
[131] Jok, 2007, pp. 40, 56-59.

a heated debate about religion and identity, the Assembly passed and promulgated a secular constitution on 8 May 1973 in which Southern Sudan was allowed to form a regional government. But the constitution did not have a long life. Just a few years later, President Jaafar Nimeri[132] initiated an amendment in which human rights were curtailed. In addition, he soon eroded the powers of the Legislative Assembly and made their approval of legislation a pure formality[133]. As stated by Collins: "Since Sudan possessed no tradition of constitutional history, the President was able to interpret the constitution to his own satisfaction by twisting the meaning of the text[134]." The country grew increasingly autocratic.

3.3. THE 1998 *SHARI'A* LAWS

The issue of religion was a continuous challenge for the government. Strong forces within the country wanted to introduce *shari'a* laws. In 1983 President Nimeri violated the Addis Ababa Agreement by starting to introduce Islamic laws[135]. The introduction of *shari'a* laws and suspicion that the north was exploiting the resources of the south led to the second civil war, a war over national identity, in 1983[136]. In 1998 the National Assembly presented a draft constitution in which *shari'a* was the sole source of legislation. It also strengthened the power of Umar al-Bashir who had become President ten years earlier through a military coup. The draft constitution was presented to a referendum in which 96% voted in favour of it, and it was signed into law on 30 June 1998[137]. Widner points out that there were no external observers to this election. Despite calls for boycott by opposition groups from the north and the south, 91.9% of the population are reported by the election commission to have casted their votes[138].

[132] Also known as Gaafar Muhammad an-Nimeiry, Gaafar Nimeiry or Ga'far Muhammad Numayri.
[133] Collins, 2008, pp. 116-117.
[134] Ibidem, p. 117.
[135] Jok, 2007, pp. 158-159; Johnson, 2003, p. 56.
[136] Jok, 2007, pp. 1-80.
[137] Collins, 2008, p. 224.
[138] Widner, 2005.

3.4. THE COMPREHENSIVE PEACE AGREEMENT
AND THE 2005 INTERIM CONSTITUTIONS

The twenty-four-year-long civil war left over 2.5 million people dead, and more than 5 million others displaced[139]. After difficult negotiations with heavy international pressure, the Comprehensive Peace Agreement (CPA), signed on 9 January 2005, put an end to the war[140]. The CPA gave Southern Sudan more autonomy[141]. The CPA further gave provisions for two Interim Constitutions, one for the whole of Sudan, and one for the region that was then called Southern Sudan. The Interim Constitution of the Government of Southern Sudan was presented to the provisional Parliamentary Assembly in mid-September[142], and it came into force on 5 December the same year[143]. It has proved impossible during this study to find reliable sources on who drafted it. The CPA further gave the south the option of having a referendum for a possible secession in 2011. The SPLM/A and the Government of Sudan were the only parties, apart from the international actors, that were involved in the CPA negotiations. Other opposition forces in Sudan and Southern Sudan were not invited[144]. National critics and international observers criticised the CPA for neither being inclusive nor comprehensive[145].

3.5. SECESSION AND THE 2011 TRANSITIONAL CONSTRUCTION OF SOUTH SUDAN

The southerners used the right given to them in the CPA to hold a referendum to determine whether they should become an independent country on 9 January 2011. Throughout the civil wars the question of unity versus dividing Sudan in two had caused major conflicts within the South[146]. But on the day of the referendum, an overwhelming 99% voted for secession[147]. There are however reports that some people were

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[139] Jok, 2007, p. 15.
[140] Johnson, 2011, p. 173.
[141] Government of the Republic of the Sudan and the Sudan People's Liberation Movement / the Sudan People's Liberation Army, 2005, para. 2(5).
[142] Johnson, 2011, p. 203.
[143] Refweb, 2005.
[144] Cope, 2013, p. 690.
[145] LeRiche & Arnold, 2012, p. 19.
[146] Ibidem, pp. 39-40.
[147] Southern Sudan Referendum Commission, 2011.

intimidated to vote for secession and that there was a "competition" to report the most votes for independence[148]. The international observers did however not see the irregularities as affecting the outcome of the vote[149].

A few days after the election results came in, the newly elected President of Southern Sudan and Chairman of the SPLM, Salva Kiir, issued a presidential decree. In it he appointed a Technical Committee to review the Interim Constitution of Southern Sudan and draft a transitional constitution which would suit an independent country. Both the name and the terms of reference stated that it should be a technical review[150], but it soon became politicised. At the Political Parties Conference, held a few months earlier in October 2010, the parties had agreed that the GoSS should establish a "National Constitutional Review Commission" who would review the Interim Constitution. The Review should be adopted by the South Sudan Legislative Assembly (SSLA). In addition, a constitutional conference was to be convened with the mandate to adopt a constitutional system for South Sudan[151]. The President's unilateral move to appoint a Technical Committee consisting of 19 SPLA members and one member from the opposition was seen as a violation of this agreement. Suspicion grew that the SPLA was moving to become more and more autocratic, and that the previous promises for a multi-party state given at the October conference was given merely to get the other parties to support secession. The SPLA officials countered the argument by saying that the six months' time frame between the referendum and independence was far too short to have a participatory process. They stressed that this review was of technical character only, and that a participatory process to transform the Transitional Constitution to a permanent one would follow after independence[152]. As a response to the criticism, President Kiir however agreed to expand the committee with fourteen additional members. Among these, there was one civil society representative, two faith-based representatives and eleven members of the opposition. Immediately after this the President issued yet a new decree, appointing seventeen

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[148] Young, 2012, pp. 214-218; Interview with anonymous source, "W.D", Western diplomat, Berlin, 14 May 2014.
[149] Young, 2012, p. 222.
[150] Office of the President of the Government of Southern Sudan, 2011.
[151] International Crisis Group, 2011, pp. 10, 32; Young, 2012, p. 289.
[152] International Crisis Group, 2011, pp. 8-10.

new SPLM representatives to the Committee. Confusion with regards to the mandate of the Committee (whether it was technical or political) followed. People close to the process reported to the International Crisis Group that the members were shaping constitutional provisions that would enable them to claim certain positions later. In early March 2011 a group of five opposition parties withdrew from the Technical Committee, stating that the SPLM were not interested in real involvement of the opposition and that the procedures were undemocratic. The Committee continued its work anyway and finalised its draft in late March the same year[153]. The Political Parties Leadership Forum (PPLF) received the draft in April, but it soon became clear that the PPLF would not be given the authority to amend the draft constitution. The same five parties that had left the Technical Committee, walked out of the PPLF. The remaining opposition parties saw their suggestions rejected and not forwarded to the SSLA and the Council of Ministers, as they had requested[154]. The Transitional Constitution came into force on the day of independence, 9 July 2011[155].

3.6. DIVISIONS WITHIN SOUTH(ERN) SUDAN

The SPLM was formed in 1983[156]. During the war with Sudan, the movement was constantly ridden with conflicts. There are reports that a major proportion of the southerners who died during the war died while fighting other southerners[157]. The fighting was mainly connected to disagreements over leadership style and had ethnic dimensions. The most dramatic split occurred in 1991 when SPLM Commander Riek Machar (Nuer) left what he argued was a highly centralised SPLM led by John Garang (Dinka). In the fighting that occurred between the two SPLM groups, 2000 Bor-Dinka civilians were killed in what was called the Bor massacre. The armed conflict between the SPLM fractions was settled in 2002 and Machar took responsibility for the massacre and asked for forgiveness in 2011[158].

[153] Ibidem, pp. 8-12; Young, 2012, pp. 293-294.
[154] Young, 2012, pp. 294-295.
[155] Government of South Sudan, 2011.
[156] International Crisis Group, 2014, p. 4.
[157] LeRiche & Arnold, 2012, pp. 44, 252.
[158] Johnson, 2003, pp. 97-99, 120-126.

John Garang died in a plane crash in July 2005. He was one of few southern leaders that had managed to garner support for a unified and "new" Sudan, and spoke warmly of democracy, equality and diversity. He is however reported to have had an autocratic leadership style and was accused of removing competitors with violence and intimidation. His death opened a competition within the SPLM/A for the control of the movement. Salva Kiir, Garang's long-term deputy, became the leader of the SPLM, much because of support from the widow of Garang. After Kiir took the leadership position, he gave amnesty to armed groups who had been fighting SPLM, and co-opted them into the army. This ended many violent conflicts, but some SPLA officers believe it also encouraged more violence. The rationale was that if you take up arms, you will eventually get a job in the army[159].

The six-year time frame between the signing of the CPA and the referendum in 2011 was created partly to give SPLM time to transform from a liberation movement to a political party[160]. The interim period was characterised by relative stability[161], but the transformation was modest. Important meetings, like the national SPLM convention, were postponed or cancelled. The International Crisis Group believes the reason for the postponements is the Presidency's fear that someone would use the fora to challenge the leadership. Presidential and Legislative Assembly elections were held in Southern Sudan in 2010. John Young holds that there was widespread rigging and that the process marginalised the opposition. The international community did little to stop this, as they believed keeping the SPLM in power was important to keep the peace process on track. The elections embittered opposition groups outside the SPLM[162]. After the elections it became increasingly clear that President Salva Kiir was working for an independent South Sudan. This was not only controversial among the northern constituencies, but also among southerners. Many people had voted for SPLM and Kiir based on the promises that the country would stay united[163].

The unity within South Sudan ended, according to Young, on the day of the referendum. Most felt more close to one of the estimated 151

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[159] International Crisis Group, 2014, p. 6.
[160] Ibidem, pp. 4-5.
[161] LeRiche & Arnold, 2012, p. 145.
[162] Young, 2012, pp. 135, 165-186.
[163] Ibidem.

tribes than to the nation[164]. There was also little unity at the political level. The leadership conflicts reached a peak in July 2013 when president Kiir dismissed Vice President Riek Machar, suspended the SPLM Secretary General Pagan Amum and replaced most of the cabinet and removed three out of ten elected governors. Many of the dismissed people, including Machar, called a press conference on 6 December 2013 where they accused the President of dictatorial tendencies. The armed conflict started on 13 December, but it is disputed who took up arms first. The group that is connected to Machar calls itself the "SPLM in Opposition." The International Crisis Group stresses that the opposition is not a united group[165].

3.7. Summary

This chapter has shown that South Sudan has a constitutional history of little horizontal and vertical inclusion. In addition, Johnson holds that the constitutions often have not been respected[166]. Johnson traces this back to Sudan's independence process: "they [Sudanese leaders] learned from Britain at the very inception of Sudan's independence the rewards for ignoring democratic and constitutional procedures[167]." The lack of inclusiveness in constitution-making and rigging of elections has not gone unnoticed by the opposition[168]. The next two chapters look more closely into the constitution-making process(es) after the referendum and present primary data on inclusion in the process(es).

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[164] Ibidem, p. 291.
[165] International Crisis Group 2014, pp. 4, 5, 8.
[166] Johnson 2003, p. 29.
[167] Ibidem.
[168] Young 2012, pp. 165-168.

4.

INCLUSIVITY IN THE CONSTITUTION-MAKING PROCESS

The research question for this thesis is: *How did national and international stakeholders deal with the issue of inclusivity and participation in the South Sudan constitutional review process?* This chapter presents and analyses the findings from the research, focusing on hypothesis 1:

The Permanent Constitution Process was designed by the Presidency to look inclusive with mechanisms for participation from the grassroots and marginalised communities, but was not genuinely inclusive and excluded possible power contenders.

As seen in section 2.1.1, Mendez and Wheatley suggest three different modes to analyse the level of inclusiveness in a constitution-making period[169]. The three modes are used as a frame to analyse hypothesis 1.

Since a part of hypothesis 1 is that possible power contenders were excluded from the process, a clarification is needed. "Possible power contenders" refers to people or groups within the SPLM who could challenge the power of the President. These are mainly people loyal to the former Vice President Riek Machar. Other opposition groups will also be discussed, but to a lesser degree since none of the opposition groups that existed before the SPLM in Opposition was formed, are seen as likely to challenge the power holders[170].

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[169] Mendez & Wheatley, 2013b, pp. 16-17; Mendez & Wheatley, 2013a, pp. 21-41.
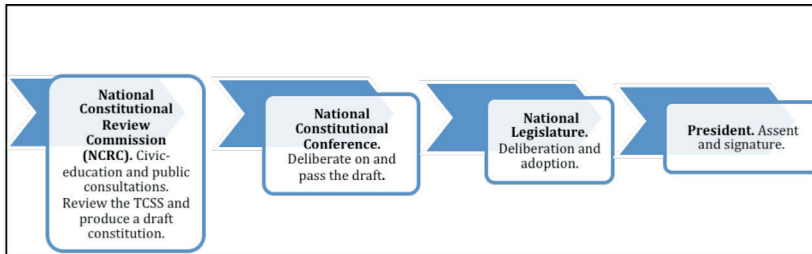[170] Pospisil, 2014, pp. 7, 11.

4.1. MODE OF REPRESENTATION AND MODE OF LEGITIMISATION

This section starts off by providing necessary information on the various steps of the constitution-making process before presenting and analysing the primary data collected through the interviews.

4.1.1. The Four Steps in the Constitution-Making Process

Paragraphs 202 and 203 of the Transitional Constitution of South Sudan (TCSS) contain the provisions for the permanent constitution-making process[171]. Four different bodies were to be sequentially involved in the constitution-making. This is visualised in Figure 2.-

Figure 2: The Steps of the Permanent Constitution Process[172]

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[173]." From

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[171] Government of South Sudan, 2011, paras. 202-203.

[172] Based on ibidem. The cited Constitution is published on the webpage of RefWorld. The GoSS has a slightly different version of the constitution on their webpage Government of Southern Sudan (2011), available at www.goss.org/docs/Transitional Constitution of South Sudan.pdf (accessed on 23 May 2014). None of them are dated or signed, but both have the GoSS seal. As both international commentators and members of the South Sudan Justice and Legislation Committee have referred to articles that only exist in the version published on the RefWorld webpage, I also chose to use that version.

[173] Government of South Sudan, 2011, para. 202(5).

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[174], which consists of the National Assembly and the Council of States[175]. 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[176].

4.1.2. Mode of Representation

As seen in section 2.1.1, mode of representation refers to inclusiveness and representation in the body that is entrusted with drafting a constitution. This body can be directly elected by the people, or it can be appointed by elites. As we will see later in this chapter, the process in South Sudan has for various reasons been delayed. Of the three bodies entrusted with drafting or reviewing the constitution, only the NCRC has started working. The analysis will still look at all the four phases as they are planned.

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[174] Ibidem, para. 202-203.
[175] Rift Valley Institute, 2013, p. 10.
[176] Government of South Sudan, 2011, para. 203(8).

Step 1: The National Constitutional Review Commission

The NCRC was established on 9 January 2012, and 44 of the 45 commissioners were on the same occasion appointed through a presidential order. 25 of the allocated seats were given to SPLM members, 16 were divided between 14 to the opposition parties, 1 seat was given to civil society and 1 to faith-based groups. In addition, there was a Chairperson and a Deputy Chairperson who were appointed as independent members without any political affiliation. Seven of the commissioners would serve on full-time basis. These included three members of opposition parties and four SPLM members. The rest of the commissioners would work part-time[177]. James Batikayo, who is representing the opposition party as a full-time member of the National Democratic Front in the NCRC, says that his party nominated him to join the Commission[178]. The civil society representative was however, according to reports in the *Sudan Tribune*, handpicked by the President[179]. The TCSS only requires the President to consult with the various groups, not ask them to nominate representatives. We can therefore say that the first phase in some ways was more inclusive than what the TCSS required. Since it is the President who decides how many representatives each party or stakeholder shall get and he takes the final decision on the appointments, the mode of representation in the first phase is however what Mendez and Wheatley categorise as *elite appointment*[180].

Step 2: The National Constitutional Conference

The representation in the second phase, the National Constitutional Conference, is similar to the first phase, with the exception that the participation is broader. The TCSS lists 13 different stakeholder groups and opens up for participation from more groups. The TCSS explicitly states that the various stakeholder groups are to nominate representatives. It is however unclear how for instance war widows and veterans, disabled people or women will organise themselves to nominate representatives[181]. How do you define veterans in a country where most

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[177] Republic of South Sudan 2012b, p. 9.
[178] Interview with Honorable James Batikayo, Permanent Member of the National Constitutional Review Commission representing the National Democratic Front, phone interview, 27 June 2014.
[179] Uma, 2011.
[180] Mendez & Wheatley, 2013b, pp. 16-17.
[181] Government of South Sudan, 2011, para. 203(1), (2).

people have contributed to the liberation, be it through providing food, shelter or through fighting? Who will decide which woman (or women) will represent all the women of the country, taking into account that they are a diverse group that don't even speak the same languages? (68 different languages are spoken in South Sudan today)[182]. The potential for corruption, delays and conflicts are huge. Despite the nominations from the stakeholders, it is also in this phase the President who takes the final decision both on the number of delegates and who will be appointed. The mode of representation is thus still *elite appointment*.

Step 3 and 4: The National Legislature and the President

Despite the lack of representation in step 1 or 2, the mode of representation for the whole process would have been *direct election* if the members of the Legislative Assembly or the President were elected with the explicit mandate to draft a constitution. Both the members of the Legislature and the President were however elected in 2010, before South Sudan became an independent country and before the TCSS, which sets out their constitution-making powers, was adopted. They were thus *not* elected with the explicit mandate to adopt the constitution and the conclusion that the mode of representation is elite appointment is therefore still valid.

4.1.3. Mode of Legitimisation

Mendez and Wheatley refer to *popular vote, elite adoption and institutional ratification* when explaining how constitutions are ratified and become law[183]. Figure 1 shows that most constitution-making processes have a trade-off between mode of representation and mode of ratification. If the mode of representation is elite appointment, it is common that the mode of legitimisation is a referendum or another popular way of ratifying the text, for instance institutional ratification. This is however not the case in South Sudan. The TCSS opens for two interpretations on how the constitution will come into law, neither which are popular referendum or institutional ratification.

The National Legislature is to adopt the constitution. But because the

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[182] Ethnologue. Languages of the World, 2014.
[183] Mendez & Wheatley, 2013b, p. 17.

speaker after the adoption will "[...] present the adopted Constitution to the President for assent and signature[184]" it might seem as the President is the one who actually ratifies the constitution. The question is how to interpret "assent." Assent could be a mere formality, but this view is according to Auer, Bisaz and Thürer naive. They find the wording "by no means innocent[185]" and believe that the constitution will come into force by the will of the President only. It should also be noted that the President has appointed 66 of the members to the Legislative Assembly. The composition of the Assembly is therefore likely to be favourable to him[186]. Auer, Bisaz and Thürer caution against the approach saying that "The Permanent Constitution Process as designed by the TCSS might indeed not give birth to a constitution that will be seen, by all or almost all citizens of South Sudan, as [legitimate][187]." In both instances the mode of legitimisation is *elite adoption* since the constitution-making body itself ratifies the final text. This puts South Sudan in the letter C in Figure 1, which shows that the degree of popular input is low in both modes.

Mendez and Wheatley's quantitative research on 160 constitution-making processes suggests that constitution-making processes that are elite-centred in the mode of legitimisation and representation often lead to institutionalising authoritarianism[188]. But the design of the process didn't concern most of the people interviewed for this study, particularly not the international actors. W.D., a Western Diplomat, is not aware that any international actors at any point have questioned the way the process was set up[189]. Johannes Lehne is the Deputy Head of the East Africa Section and especially responsible for Sudan and South Sudan at the German Ministry of Foreign Affairs. He says the Germans believed the GoSS was going to implement the process as set out, and thus didn't question the process[190]. An anonymous Western NGO worker, H.G., doesn't see any problems with the process design itself. She does

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[184] Government of South Sudan, 2011, para. 202(8).
[185] Auer, Bisaz & Thürer, 2011, p. 41.
[186] Ibidem.
[187] Ibidem, p. 43.
[188] Mendez & Wheatley, 2013a, pp. 36-37.
[189] Interview with anonymous source, "W.D.", cit.
[190] Interview with Johannes Lehne, Deputy Head of the East Africa Section and especially responsible for Sudan and South Sudan, German Ministry of Foreign Affairs, Hermannsburg, 4 June 2014.

however highlight that there is relatively little time for civic education[191].

The South Sudanese actors are more critical. A civil society actor interviewed for this thesis, Mr. D.B., is positive to most of the design, but would have preferred that there was a referendum at the end. He fears that "[...] the Constitution or the draft will be just passed by the Parliament, because the majority of the parliamentarians are SPLM, and they will just pass it in their favour[192]." The "SPLM/A in Opposition" were, at the time the interviews were done, very critical towards the design of the process: "[...] the current Constitutional Review Process, which is now overseen by the current President, is likely to produce even worse constitution, worse than this [Transitional Constitution][193]." In an interview conducted for this study, the legal advisor of the "SPLA/M in Opposition," Stephen Par Kuol, suggests a Constituent Assembly elected by the people as an alternative to the current process. The Assembly should have the sole purpose of drafting a constitution. The public should have time to respond to it, and if there are any concerns, the constitution should be subject to a referendum. Kuol holds that it would give a genuinely "people driven constitution[194]." The Chairman of the NCRC, Professor Akolda Tier, has also raised some concerns about the process. At a public meeting in Juba he drew the audience's attention to the fact that it is not clear what will happen with the constitution if the National Constitutional Conference or Parliament don't agree on a text. The only thing that is certain is that the current Transitional Constitution will be valid until another one is in place[195].

One of the leading South Sudanese scholars, Professor Jok Madut Jok, says there has been relatively little criticism on the process design by South Sudanese civil society. He explains this by saying "[...] you pick your battles. And the civil society and other activists were more concerned in the immediate sense about the [...] the review process itself[196]." The civil society could have challenged the process later "[...] but since it didn't even leave the level of review, there was no point

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[191] Interview with anonymous source, "H.G.", Western NGO worker and legal expert, Germany, 12 May 2014.
[192] Interview with anonymous source, "D.B.", South Sudanese Civil Society worker, Germany, 5 June 2014.
[193] Interview with Stephen Par Kuol, cit.
[194] Ibidem.
[195] Akolda Tier, cited in Rift Valley Institute, 2013, pp. 10-11.
[196] Interview with Jok Madut Jok, founder of the Sudd Institute, Professor at Loyola Marymount University in California, Hermannsburg, 3 July 2014.

challenging what steps it was going to take[197]." If the later stages would act as "stumbling blocks," Professor Madut believes the process would have been challenged[198]. It is difficult to determine whether the local actors interviewed for this study also raised concerns about the design of the process before the violence broke out, or if it is an opinion they first articulate now. No matter what they thought about the design of the process, all interviewees were very positive towards having public consultations as part of the design. They believed that the consultations could give the constitution its legitimacy[199]. As seen in Chapter 2, the focus on public participation in constitution-making processes is quite recent, but has already influenced many constitution-making processes[200]. In what they classify as *style of constitution-making* in their operational framework, Mendez and Wheatley focus on participation.

The next sub-chapter will analyse the *style* of constitution-making in South Sudan. I will first briefly explain what kind of style the constitution-making process was, before I study more in detail how the different actors dealt with participation in the process.

4.2. STYLE OF CONSTITUTION-MAKING

The *style* of the constitution-making process refers to in which degree the public can engage with the process. If the constitution is negotiated in a closed setting with no media attendance, the style is *closed*. If the public has and exercises the right to submit suggestions, the style is *open*[201]. In their research, Mendez and Wheatley found a clear positive correlation between the mode of representation and the style of constitution-making. If the body drafting the constitution is appointed by the elites, there is most often little or no public involvement in the process. Any public involvement would most often be towards the later stages of the process when the constitution is more or less already decided upon. This is common in post-conflict settings. If the constitution-drafting body is elected, there are great chances that

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[197] Ibidem.
[198] Ibidem.
[199] Interview with anonymous source, "W.D.", cit.; Interview with anonymous source, "D.B.", cit.
[200] See for instance Moehler, 2006.
[201] Mendez & Wheatley, 2013b, p. 17.

the style of constitution-making will be open[202]. The South Sudan case seems to be an exception.

As seen above, both the mode of representation and the mode of legitimisation are decided by the elites. The public are however very much invited to submit suggestions in the early phases of the process. The NCRCs mandate is to review the TCSS, conduct a nation-wide civic education on constitutional matters, consult with stakeholders and get their views on the permanent constitution, and produce a draft constitution "taking into account views and suggestions for revisions from stakeholders[203]." The National Constitutional Conference was also designed to keep the public informed about its progress through media reports, and journalists were to be granted access to the meetings[204]. This suggests a very open style of constitution-making. The TCSS contains however no information on whether the deliberations in the Legislative Assembly should be open to the public or not. Due to the lack of information about the third phase of the constitution-making, we cannot say if it will be open or not. I will therefore limit the conclusion to say that the style of the first two phases of the constitution-making were *open*, in Mendez and Wheatley's terminology[205].

The rest of this chapter looks more closely into different aspects of the style of constitution-making by studying how the different actors dealt with inclusivity and participation in the constitution-making process in South Sudan. During the interviews, the stakeholders repeatedly referred to the drafting of the Transitional Constitution when discussing the problematic aspects of the current constitution-making process. These views are presented first since they give a context to the process after the independence. The focus then shifts to the work of the NCRC and how the stakeholders perceive the rest of the process as it is designed. This makes it possible to assess whether the style of constitution-making was genuinely open or inclusive, or if it in fact excluded possible power-contenders.

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[202] Mendez & Wheatley, 2013a, pp. 37-38.
[203] Republic of South Sudan, 2012b, p. 2.
[204] Government of South Sudan, 2011, para. 203(3c).
[205] Mendez & Wheatley, 2013b, p. 17.

4.2.1. National Responses to the Drafting of the Transitional Constitution

Paragraphs 202 and 203 of the Transitional Constitution of South Sudan (TCSS) contain the provisions for the permanent constitution-making process[206]. As mentioned in section 3.4, the TCSS was drafted in the six months period between the referendum and the independence.

My findings confirm the International Crisis Group's suggestion (as seen in section 3.5) that the "technical" process of making the TCSS became politicised. The representatives of the "SPLM/A in Opposition" who were interviewed for this thesis, were, at the time when the interviews were conducted, very critical towards the drafting of the TCSS. The Legal Advisor of the "SPLM/A in Opposition," Stephen Par Kuol, holds that the people who drafted the Transitional Constitution wrote it "with the view of maintaining the status quo or empowering themselves[207]." When asked whether people objected to this before independence he said that many did.

But the SPLM leadership as a whole was also influenced, forced by the President, because if you voice out this kind of thing you may not become Minister or you can be sidelined in the political process as a party[208].

Stephen Par Kuol paints a picture of a parliament that more or less consisted of the President's men. The President had, according to him, appointed 40% of the legislature, and Par Kuol doesn't find it surprising that the parliamentarians decided to vote in favour of the TCSS. Some representatives tried to raise some concerns. Par Kuol, who was not present during the deliberations at the Southern Sudan Legislative Assembly, has been told that one of the MPs said:

We must work for our president and our Chairman of our party. We have seen some people here talking oppositionally here, and that is not acceptable. [...] Who's not for the president here?[209]

After this speech, the constitution was allegedly passed[210].

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[206] Government of South Sudan, 2011, paras. 202-203.
[207] Interview with Stephen Par Kuol, cit.
[208] Ibidem.
[209] Ibidem.
[210] Ibidem.

The short time span between referendum and independence can be one of the reasons why the Legislative Assembly agreed to approve the constitution with relatively little debate. There was, and still is, a widespread belief in South Sudan that the country couldn't have become independent without a revised constitution. Par Kuol is also of this opinion[211]. There was however 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[212]. Another reason why the TCSS was hastily approved could therefore be the parliamentarians' own political ambitions. Hussein Maar Nyuot is the Spokesperson of the "SPLM/A in Opposition." Before December 2013 he has worked as Deputy Governor, Minister for Information and Communication and Deputy Chairperson of the SPLM in Jonglei State. He holds that the drafters of the TCSS wrote it as favourably to the President as they possibly could[213]. They thought supporting him would give them increased powers in the future. 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[214].

The former Minister of Justice, John Luk Jok serves as an example of a person who edited the TCSS with himself in mind. The Minister was chairing the group that revisited the constitution. From the ICSS to the TCSS the whole justice system was centralised. This enhanced the power not only of the President, but also of the Minister himself. Ironically, when the drafters for different reasons were in disagreements with the President, it was easy for him to dismiss them due to his extensive powers[215]. The end result was therefore a constitution that "[...] was tailored for one person, the President[216]," according to Stephen Par Kuol. The online newspaper *Sudan Tribune* reported that Riek Machar, the current leader of the "SPLM/A in Opposition," voiced concerned

[211] Ibidem.
[212] Auer, Bisaz & Thürer, 2011, p. 25.
[213] Interview with Hussein Maar Nyuot, cit.
[214] Interview with Jok Madut Jok, cit.
[215] Interview with Stephen Par Kuol, cit.
[216] Ibidem.

about the constitution before independence[217]. That was, according to Nyuot, the start of the current crisis:

When he [Riek Machar] said "no, no, no, we shouldn't do this, don't put powers in the President, don't do this and don't do that," this is the beginning of him falling out actually with the President[218].

Despite this, Professor Jok holds that the process up to independence wasn't very contested[219]. This can particularly be seen in the international responses.

4.2.2. International Responses to the Drafting of the Transitional Constitution

Up to the referendum, the official line of the Sudan government, including the southern representatives, was to "make unity attractive" due to the relationship with northern Sudan. There was therefore little focus on preparing the south for independence[220]. After the referendum there was suddenly very little time to put all the formal institutions in place. The international community, together with the Southern Sudanese government, had to make some tough priorities. The review of the constitution was not, by the international community, seen as one of the key issues. A Western diplomat, "W.D.," said they at the time thought: "This Constitutional process is only technical. The big, new and real process comes after July 9th[221]." In hindsight the diplomat acknowledges that substantial changes took place. The few international actors who were invited to give technical advice found it difficult to keep track of the process. The German Diplomat Johannes Lehne says that the German organisation Max Planck, with support of the German Ministry of Foreign Affairs, was involved in the process leading up to independence. The process was however confusing, also for the organisations who were working on it from the inside:

[...] at the end of this process, sort of all the international experts, the Swiss, German, Americans who were working on this, was actually confused what was

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[217] Sudan Tribune, 2011.
[218] Interview with Hussein Maar Nyuot, cit., p. 5.
[219] Interview with Jok Madut Jok, cit.
[220] LeRiche & Arnold, 2012, p. 47.
[221] Interview with anonymous source, "W.D.", cit.

the latest version, they didn't even know. Because in the South Sudanese Drafting Committee there were several versions circulating and when the Constitution was decided they didn't even know. They weren't included in the process[222].

The international actors were sometimes asked to give advice, mainly on technicalities, but they were not included in the final phases[223].

The section above shows that the process leading up to independence was highly exclusionary and contested. The technical process turned political and provisions that gave vast powers to the President were included in the new Transitional Constitution. There was however a widespread belief that the Interim Constitution had to be revisited in order for South Sudan to become an independent state, and there were promises that a new, transparent and participatory process would start after independence[224]. This can be one of the reasons why the TCSS was passed and became law. The following section focuses on the process after independence with a particular focus on the work of the NCRC.

4.2.3. Views on the Work of the National Constitutional Review Commission

My main impression is that this Constitutional Review Process best can be described as a lost opportunity for the nation building project in South Sudan[225].

The TCSS gave the President a six-month time limit from independence to appoint the NCRC. He established the Commission on 9 January 2012, the very last day before the deadline expired[226]. The Commission was originally given six months to present a draft constitution to the President[227]. Lack of funds however made it impossible for them to carry out their mandate. After pressure from civil society groups, the President on 26 February 2013 extended the period with two years to 31 December 2014[228]. In March 2013 the Commission still hadn't received the promised 9 million South Sudan pounds as approved by

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[222] Interview with Johannes Lehne, cit..
[223] Ibidem.
[224] Cope, 2013, p. 667.
[225] Interview with anonymous source, "W.D.", cit.
[226] Republic of South Sudan, 2012b, p. 9.
[227] Government of South Sudan, 2011, para. 3(1)a, b.
[228] Government of South Sudan, 2013, para. 3(1)a, b; South Sudan Human Rights Society for Advocacy, 2012.

the Parliament[229]. More than a year after it was established, on 3 May 2013, the NCRC got office facilities and computers with the help of international support[230]. The money allocated from the Parliament has, according to the NCRC Commissioner Margaret Mathew Deng, up to June 2014, not reached the Commission. The International Foundation for Electoral Systems has supported some activities, so the Commission was from May or June 2013 able to start carrying out their work[231].

SPLM member and former Undersecretary of the Ministry of Gender, Child and Social Welfare, Margaret Mathew Deng, is one of the seven people who were appointed as full-time members of the NCRC on 9 January 2014[232]. She was later chosen to be the Chairperson of the Civic Education Sub-Committee. Margaret Mathew Deng says that the Committee decided to conduct a period of civic education from Spring 2013 to December 2013 and thereafter a phase of public consultations. In the first phase they were mainly focusing on informing people about the constitution and the review process. Depending on the knowledge of the people they talked to, they also in some instances collected views and suggestions from the participants. The bulk of suggestions would however be collected in the public consultation phase[233]. Margaret Mathew Deng is relatively satisfied with the civic education phase:

[...] we did an official launching of the civic education campaign. And we deployed some teams to different states. And they went. Of course we had some challenges, logistical challenges but everything went on as planned, except reaching the bomas.* We were unable to access because it was the rainy season and also there were some insecurity in some locations. So the civic education part went well and especially [in] the media. And we were in different media houses and different teams went to different locations and they also met local authorities and it was on the TV most of the time. But that is the first part, the civic education. Now the public consultations were interrupted by the crisis in December[234].

Margaret Mathew Deng left South Sudan in August 2013 for maternity leave, and doesn't have any written reports on the content of

[229] Wudu, 2013.
[230] International Federation for Electoral Systems, 2013.
[231] Interview with Margaret Mathew Deng, cit.
[232] Republic of South Sudan, 2012b, p. 9.
[233] Interview with Margaret Mathew Deng, cit. * Boma is the smallest political unit in South Sudan, usually comprising of a few thousand people.
[234] Ibidem.

the civic education or statistic on how many meetings were conducted, how much media exposure the civic education campaign received or how many people they reached. The Commission has written reports, but it has proved impossible to get hold of them for this research. It is therefore difficult to verify her statements. All the other informants for this thesis, except the other NCRC member, are however critical towards how the constitutional review process has developed. There is even some confusion on whether there actually were any consultations at all. The Western NGO worker H.G., who has followed the constitution-making process closely, was not aware of the NCRC having conducted any consultations at all[235]. Johannes Lehne believes the German Foreign Ministry supported four outreach workshops outside Juba[236]. The local actors confirm that there were some consultations, but they are critical towards how they were implemented. The South Sudanese civil society representative D.B. says, when questioned on whether the NCRC did any consultations:

D.B.: "They did, they travelled, but always there was some form of individual interest in it. So it is one thing to solicit the ideas, and there is one thing to put them in the draft. So they have good ideas, but ideas are not wanted."

Interviewer: "So you are saying they come and talk to people and…"
D.B.: "And when they go back, nothing is put [into the draft constitution][237]."

Stephen Par Kuol of the "SPLM/A in Opposition" indicated that the whole process is heavily controlled by the state and is critical towards the way participation is used to gain legitimacy when the decisions in fact will be taken by a small group of elites.

[If] you look at the participation, and I attended one of the workshops of what is called a participatory process, the people are called to put their views, but their views at the end do not prevail because the process is not theirs. And they are not doing it freely. In South Sudan today, you don't even have freedom of speech[238].

The "SPLM/A in Opposition"'s Spokesperson, Hussein Maar Nyout share this sentiment. He holds that if the Commission doesn't come out

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[235] Interview with anonymous source, "H.G.", cit.
[236] Interview with Johannes Lehne, cit.
[237] Interview with anonymous source, "D.B.", cit.
[238] Interview with Stephen Par Kuol, cit.

with a draft constitution "to the taste of the president[239]," there will not be a new constitution.

The members of the NCRC are familiar with these allegations. When countering them, they focus on the membership of the NCRC and not on whether someone "behind the scenes" is controlling the process. Margaret Mathew Deng argues that the Commission is comprised of different stakeholders and that "[...] there is nothing I have seen that can lead to partiality or something like that[240]." She can't see a connection between the December 2014 conflict and the constitutional review process and argues that some of the people who are now in the "SPLM/A in Opposition" were commissioners in the NCRC. And although some of the members of the NCRC are close to the President, Margaret Mathew Deng doesn't think that constitutes any problem for the Commission:

[...] we have like the advisor to the President, he's a member and some other ministers. However, they were very busy with other activities, so they were not like fully involved, they cannot influence what we are talking about, they were not fully involved, they are part-timers[241].

James Batikayo stresses that the SPLM was not in numerical majority.

The numbers they have are less than half. So they cannot have the majority that can bulldoze decisions, that can enable them to do whatever they want to do with the... with our situation in this commission. They don't have that majority. So it is not true that the SPLM is equalizing the decisions of the Commission[242].

He also stresses that four of the people who are now fighting the President were in fact members of the Commission until the violence broke out[243]. Contrary to what James Batikayo says, the SPLM was in fact in numerical majority in the NCRC from the inception. The President appointed two more members in February 2012, one of which was a SPLM member and one a civil society representative[244]. An additional eight members have later been added, making the total number of commissioners 55 (including the independent Chairperson and Deputy

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[239] Interview with Hussein Maar Nyuot, cit.
[240] Interview with Margaret Mathew Deng, cit.
[241] Ibidem.
[242] Interview with Honorable James Batikayo, cit.
[243] Ibidem.
[244] Republic of South Sudan, 2012a.

Chairperson)[245] . It has not been possible for this study to find out who the last eight commissioners are representing. If they were all given to opposition parties and civil society, they would have shared 27 members and the SPLM would have 26 members. Given that the SPLM is the only, at least on paper, unified group, one could still argue that they have a strong upper hand in the Commission. The "SPLM/A in Opposition" seem to be of the opinion that all commissioners were closely connected to the President, making it irrelevant which stakeholder had the most representatives. Hussein Maar Nyuot claims that the commissioners are friends of the President and that they were participating in the Commission in order to cash in some money[246].

The heavy delays in the work of the NCRC is perhaps the key aspect that has made stakeholders outside the NCRC concerned that the participation isn't genuine. The two commissioners interviewed for this thesis point to financial constraints when explaining the delays. Shortly after the Commission was appointed, the government shut down the oil production, causing strict austerity measures[247]. The Western Diplomat W.D. describes the South Sudanese government's way of handling the constitutional review process after independence as "foot dragging." He does however not believe the delays were intentional. The main reason for the delays was, according to him, an underestimation of the importance of the process. When the oil flow was shut down by the end of January 2012, it heavily affected the budget of the state. Even though the funds needed for the constitutional review process were relatively modest, the state didn't prioritise it[248]. Johannes Lehne from the German Ministry of Foreign Affairs has a more critical view. When asked why the process took so long he said:

Because they didn't want it. Salva Kiir was perfectly happy with his Transitional Constitution which gave him so much power. And he did not want to have a new one. And he did not want to have a consultative process nationwide. Because he knows a lot of demands would come up and he was not ready to agree to that[249].

Lehne holds that the international community didn't realise this

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[245] Security Council Report, 2013.
[246] Interview with Hussein Maar Nyuot, cit.
[247] Interview with Honorable James Batikayo, cit.
[248] Interview with Anonymous Source, "W.D.", cit.
[249] Interview with Johannes Lehne, cit.

before "[…] it was too late. When the process was already dead[250]." The Government of South Sudan was, according to Lehne, excellent at what he describes as "double talk." He says that they told the international community all they wanted to hear about participation, gender, process and equality, and in that way managed to divert the attention away from the lack of progress. Lehne holds that the international community didn't realise that nothing happened before it was too late[251]. The Spokesperson of the "SPLM/A in Opposition," Hussein Maar Nyout, is equally critical towards the delays. He met with the NCRC when they came to Jonglei State for an introductory visit. In that meeting the NCRC informed people of their existence, that the constitutional review is ongoing and that they wanted to see how people could participate in the process. They were supposed to come back to conduct public consultations later. Hussein Maar Nyout says that nothing happened after the initial visit and that he believes the delays weren't accidental: "Up to the time when I left the country [due to the conflict] this still didn't take place. This tells you somebody somewhere is blocking the process, ok?[252]"

The commissioners interviewed for this study are careful not to criticise the government. They don't blame it for any of the delays or accuse it of putting secret guidelines for what kind of draft constitution they should produce. One could question whether they are intimidated and scared of speaking openly. They are however open about the kind of critique they have heard from the public, even regarding the powers of the President[253]. This gives the impression that they enjoy freedom of speech. The Chairman of the NCRC, Professor Akolda Tier, was not available for interviews for this study. He has however been publicly quite vocal in his critique of 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[254].

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[250] Ibidem.
[251] Ibidem.
[252] Interview with Hussein Maar Nyuot, cit.
[253] Interview with Honorable James Batikayo, cit.
[254] Akolda Tier, cited in Wudu, 2013.

In a public meeting the same year, he stressed that the Constitution must be ratified by a body appointed by the people. He indicates that the current Parliament isn't representing the people since the "[...] two houses of Parliament consist of members who were partly elected and partly appointed [...][255]." These statements indicate that he is critical towards the process.

This section has shown that the constitution-making process got delayed. The NCRC Chairman indicates that the government didn't want the review of the process to go ahead and Johannes Lehne and the "SPLM/A in Opposition" are confident that the delays were intentional. The vast powers given to the President in the TCSS might have given him a motivation to keep the TCSS in place for as long as possible. Despite the claims from the "SPLM/A in Opposition" and the German diplomat Johannes Lehne, Professor Jok Madut Jok is of the opinion that we can't say whether the delays were deliberate or not: "[...] there are clear practical reasons for why the process was delayed, but there aren't any clear evidence on whether it was deliberate or not[256]." The only reasons he can give with some degree of certainty, is the inefficiency of the Commission, challenges with the leadership of the Commission and the financial difficulties of the country. In the beginning of this section I said that the style of constitution-making in the two first phases of the constitutional review process is open. This does however require that the participation is genuine and that the public can influence the process[257]. To conclude on whether the participation is genuine, more data on why the government promoted participation is needed. This is presented in the section below.

4.2.4. Inclusive Political Settlements and the Constitution-Making Process

As seen in section 2.1.3.2, White holds that participation is political. Actors have various interests in promoting it, but the interests are rarely discussed openly[258]. There is little written documentation from the GoSS stating their reasons for having a participatory style of constitution-

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[255] Akolda Tier, cited in Rift Valley Institute, 2013, p. 10.
[256] Interview with Jok Madut Jok, cit.
[257] Mendez & Wheatley, 2013b, p. 17.
[258] White, 1996, pp. 7-13.

making, and it was not possible to talk to anyone in the government for this study. It is therefore difficult to analyse their interest in participation. One of the few publicly available documents that says something about their justification for a participatory review process is the GoSS Fragility Assessment of 2012. Despite being drafted after the constitution-making process was designed, it provides some valuable insights to the government's reasoning. The following paragraphs therefore use the Fragility Assessment to analyse the government's interest in participation and their use of the political settlement framework. The aim is to analyse whether the participation was genuine or not.

The Fragility Assessment has "Finalise the revision of the Transitional Constitution through inclusive consultations at central, state and Boma level[259]" as a priority action in order to foster an inclusive political settlement. It is however unclear what the GoSS means by an inclusive political settlement. Given that there is no commonly agreed definition in the literature, it is puzzling that the GoSS doesn't have a working definition. Through looking at the political settlement indicators in the document it is however possible to get an understanding of their conceptualisation. The indicators under the political settlement heading are (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[260]." They do not define key decision-making bodies, or specify the kind of diversity. Given the multi-ethnic context in the country, one can assume they mean linguistic and regional or tribal diversity. Given the importance gender is given in the rest of the document, we can also assume women representation to be an aspect of diversity. Although the word "representation" indicates that different groups are represented in the decision-making bodies, we can assume that the actual representatives in the key decision-making bodies are elites. It might therefore appear that their definition is similar to the one of Lindemann, who focuses mostly on elite bargains[261]. The second indicator is similar to OECD's definition. They argue that when people think that a political settlement is inclusive they also find it

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[259] Government of the Republic of South Sudan, 2012, p. 3.
[260] Ibidem, p. 12.
[261] Lindemann, 2011, p. 1844.

legitimate[262]. The third indicator reveals that political settlements are seen as something that can be measured and that a political settlement is inherently good. All indicators seem to indicate that the main focus is on a formal understanding of political settlements as concrete and measureable agreements, and not so much on the informal power structures, long-term political processes or power bargains.

Professor Jok says 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 says: "It sounds smart, but it is not something that is actually clear[263]." 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 implemented mainly to please international and national actors and to legitimize the process, and that the function of the participation was what White would term nominal[264]. There are indeed many things that point to a process with high degrees of internal exclusion in the South Sudan constitution-making process. There are for instance no systematic ways of recording and comparing the views of the public, and neither of the NCRC commissioners interviewed for this thesis could explain concretely in which ways the public views will influence the decisions of any of the four phases in the constitution-making. Honorable Batikayo of the NCRC said they would register the issues raised at the consultations and report them in the plenary of the NCRC, but it was not clear how the inputs would be reflected in the final draft constitution from the NCRC, or how they would deal with issues where the public had diverging views. This is not to say that they couldn't have managed the inputs in a professional and genuine manner if the process hadn't been interrupted by the violence, but the systems seemed not to be in place for it to be done in a transparent manner. The delays were seen as deliberate by the civil society actors and the representatives from the SPLM in Opposition interviewed for the thesis.

We saw in Chapter 2 that participation can create uncertainty for elites. They are therefore sometimes inclined to control the process in

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[262] OECD, 2011, pp. 30-32.
[263] Interview with Jok Madut Jok, cit.
[264] White, 1996, p. 7.

a way that makes it look participatory, but has high degrees of internal exclusion, meaning that people participate without having the power to make or influence decisions[265]. Bearing in mind the vast powers of the Presidency in the TCSS, one can argue that they had the incentives to design a process where power contenders and the public didn't have any power to influence the decision.

4.3. summary

This chapter has sought to show how different stakeholders dealt with the issue of inclusivity and participation in the South Sudan constitutional review process. We have seen that the initial phase of the four-step process to create a permanent constitution was designed to have widespread civic education and public consultations. Both national and international stakeholders find inclusivity and participation important, but there are disagreements on whether the participatory phase of the constitution-making process was genuinely inclusive. The people responsible for the civic education are satisfied with the progress they made, but say progress was challenged by lack of funds and the violence that erupted in December. This is contested by civil society, the "SPLM/A in Opposition" and members of the international community. They hold that someone is controlling the process, and they are doubtful to whether the ideas collected during the consultation phases would be reflected in the final document. It should be noted that it is not clear whether the other stakeholders were aware that the NCRC were planning to start the public consultation phase in December 2013.

Although I cannot conclude on whether the delays were deliberate or not, I found that international and national stakeholders believed that the participation wasn't genuine and that the views that were collected wouldn't be taken into consideration. The findings of this study therefore confirm part of hypothesis 1. The question of whether possible power contenders were excluded is however more complicated, as will be seen in Chapter 5.

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[265] See for instance Banks, 2008 and White, 1996.

5.

CONSTITUTION-MAKING
AND THE RELAPSE TO VIOLENCE

Chapter 4 showed that civil society and the "SPLM/A in Opposition" found the process exclusive and believed the participation was not genuine. The focus of this chapter is hypothesis 2: "Exclusion in the constitutional review process contributed to the December 2013 relapse to violence." In Chapter 2, we saw that most scholars find constitution-making processes with some degree of vertical inclusivity the most stable[266]. Widner takes a slightly different approach and argues that closed processes that produce a temporary constitution can be favourable in countries emerging from war and that a closed process might reduce the level of violence[267].

When asked directly if there is a link between the current conflict and the constitutional review process, Hussein Maar Nyuot, the Spokesperson of the "SPLM/A in Opposition" has few doubts: "Of course! Of course![268]" He does however focus more on the provisions in the TCSS than the drafting of the permanent constitution. Par Kuol is particularly critical towards the fact that the President can dismiss elected governors. "If he knows you are not in agreement with him, he will use the constitution to dismiss you to replace you with a caretaker governor[269]." The President has fired elected governors on three occasions and appointed new ones without elections[270]. Jok Madut Jok also sees the President's vast constitutional powers as an important part of the current conflict[271]. The delays in the participatory process were

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[266] See for instance Samuels, 2006b; OECD, 2011.
[267] Widner, 2008.
[268] Interview with Hussein Maar Nyuot, cit.
[269] Interview with Stephen Par Kuol, cit.
[270] Ibidem.
[271] Interview with Jok Madut Jok, cit.

a cause of major concern for many. The limited progress created a fear that the process will end up similarly to the process in which the TCSS was made.

> So what we are worried of is... is that it is again going to be like the Transitional Constitution which was done by the politicians. [...] What information are they putting in, unless it is again the elite who have their own personal interest to push for this constitution to remain the way the felt it[272].

As seen in Chapter 2, Widner held that closed, elite-centred constitutional processes can help limit violence in situations where countries are transitioning from armed conflict. The constitution they agree on should however be temporary and be renegotiated when trust has increased. The TCSS was negotiated in a closed process in the months before independence. Although the process was closed, the Presidency stressed that it was a temporary constitution that would be renegotiated later[273]. Trust did however not increase, and when the constitutional review process after independence was delayed it was interpreted in the worst meaning. Many of the interviewees do in fact point to the process *before* independence to explain why they do not have much trust in the permanent constitution process. A small caution against Widner's conclusion might therefore be in place. The temporary constitution might have been so favourable to the elites in power that they lost interest in having a genuine process after independence. This fits well with Mendez and Wheatley's finding 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[274].

The South Sudan case suggests that some degree of vertical inclusion is important even in temporary constitutional arrangements. But as presented in the paragraphs below, the connection between inclusion

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[272] Interview with anonymous source, "S.M.", South Sudan Civil Society worker, Germany, 5 June 2014.
[273] Cope, 2013, p. 696.
[274] Mendez & Wheatley, 2013b, p. 15.

in the constitution-making process and the relapse to violence isn't straightforward.

Four of the members of the NCRC chose to leave the Commission and join what the government calls the rebels: the "SPLM/A in Opposition[275]." They were, at least on paper, some of the people in the country who enjoyed the highest level of inclusion in the process[276]. There can be at least three possible explanations for their exit: (1) inclusion is not significant to explain the current conflict and relapse to violence; (2) the NCRC was controlled by the Presidency and there was therefore a high degree of internal exclusion; or (3) developments outside the NCRC prompted the commissioners to join the "SPLM/A in Opposition." Since I didn't interview the people who left the Commission I cannot judge their motivation. But previous research from other countries suggests that number 1 is unlikely[277]. Most actors interviewed for this thesis, apart from the NCRC commissioners, indicate that the President controlled the constitution-making process. There could thus have been a high degree of internal exclusion within the NCRC. There is however not enough data to make a causal connection between the President's control and the actions of the ex-commissioners. Although the evidence base is limited, the main reason for four former commissioners joining the opposition is most likely found in explanation number 3.

Jan Pospisil holds that the political settlement in South Sudan is negotiated within the realm of the SPLM. SPLM is not only a political party but also the main arena where the negotiations over the national political settlement take place[278]. When sacking the Vice President in July 2013, the President didn't even try to justify it along constitutional lines[279]. The constitutional review process was perhaps, at its early stage, seen by the elites as less important than negotiations and power bargains within the realm of SPLM/A.

The lack of political space created tensions within the party and the country: "You know, the same dictatorship you had in Khartoum, which is what I call Islamic political dictatorship, and the tribal political

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[275] Interview with Honorable James Batikayo, cit.
[276] I have not been able to find reliable sources on the dates when they left the Commission, but the representatives from the NCRC indicated that it was in connection to the December 2013 violence.
[277] See for instance Samuels, 2006b and Wheatley & Germann, 2013.
[278] Pospisil, 2014, p. 7.
[279] Hirblinger, 2014.

dictatorship you have now in Juba are almost the same[280]." 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 the political space. Most notably, they wanted a new constitution to reduce the powers of the President. The delays revealed that there was little interest from the political leadership of the SPLM to change the political settlement. The Legal Advisor of the "SPLM/A in Opposition," Stephen Par Kuol says: "I have been predicting that this nation will die, maybe a very violent death, if the political situation, the political status quo, continues[281]." The constitution-making process proved unsuccessful in changing the political settlement and Kuol's prophecy is more relevant than ever.

[280] Interview with Stephen Par Kuol, cit.
[281] Ibidem.

6.

CONCLUSION

This study has explored how stakeholders deal with the issues of inclusivity and participation in the South Sudan constitutional review process. It has sought to examine whether the process was genuinely inclusive, and to analyse the connection between exclusion in the constitutional review process and the December 2013 relapse to violence. Primary data collected through interviews with 10 South Sudanese and international stakeholders was used to analyse the research question and the hypotheses (see section 1.2.1). Some actors might have had an interest in portraying the events in a way that would be favourable to them. The fact that interviewees with very different backgrounds gave a similar picture of the events makes me however confident about the reliability of the research.

Everybody who was interviewed for this study believes involving the public is important for the nation building and for increasing the legitimacy of the constitution. Public participation is also a key aspect of the two first phases of the South Sudan constitutional review process. There are however two things that point to a process that wasn't genuinely inclusive. 1) There was little political will from the government to support the NCRC. 2) The bodies that will eventually adopt the constitution are appointed by the elites. In addition, stakeholders argue that the Transitional Constitution was written in such a favourable manner to the President that he wasn't sufficiently interested in reviewing it.

The study confirms hypothesis 1. The permanent constitution process was designed by the Presidency to look inclusive. It had mechanisms for participation from the grassroots and marginalised communities, but was not genuinely inclusive. Even if the first phases had been genuinely participatory, the adoption of the constitution would still be by an elite

appointed body. The constitution-making process was therefore not genuinely inclusive. More research is however needed to give a certain answer to which degree possible power contenders were excluded from the process.

South Sudan is still governed under its 2011 Transitional Constitution. This constitution was drafted by people handpicked by the President in the few months between the referendum and the independence. The process was closed and created a lot of tension within the country. The final provisions were highly favourable towards the President. The South Sudan process confirms what Wheatley suggests: if the political elites aren't interested in strengthening democracy, a constitution-making process can easily lead to increased authoritarianism[282]. The process of making a permanent constitution got delayed, most likely because the President wasn't interested in losing the powers given to him in the Transitional Constitution. The only arena that was left to negotiate the political settlement was within the SPLM. When the political party also lacked real democratic space, power contenders might have felt that the only way to negotiate the political settlement was through violent means. The study therefore indicates that hypothesis 2 is true: exclusion in the constitutional review process did contribute to the December 2013 relapse to armed violence. More research is however needed to improve the validity of this finding and to examine what exactly triggered the opposition to take up arms.

When ending her three-year term as the Head of the United Nations Mission in South Sudan on 8 July 2014, Hilde Frafjord Johnson said, referring to the warring parties: "The SPLM-leadership, whether they are in office, in Addis or Nairobi, or in the bush, are now facing their greatest test ever. The test of solving this crisis, of saving their country[283]." Moving the negotiations on the political settlement outside the realm of the SPLM and into the constitution-making process could be an important step towards surviving independence.

[282] Wheatley & Germann, 2013, p. 66.
[283] Johnson, 2014.

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Interview with Honorable James Batikayo, Permanent Member of the National Constitutional Review Commission representing the National Democratic Front, phone interview, 27 June 2014.

Interview with Hussein Maar Nyuot, Spokesperson and Head of Humanitarian Affairs, "SPLM/A in Opposition," former Deputy Governor of Jonglei State, Minister for Information and Communication in Jonglei State and Deputy Chair Person of SPLM in Jonglei State, Hermannsdorf, 4 July 2014.

Interview with Johannes Lehne, Deputy Head of the East Africa Section and especially responsible for Sudan and South Sudan, German Ministry of Foreign Affairs, Hermannsburg, 4 June 2014.

Interview with Jok Madut Jok, founder of the Sudd Institute, Professor at Loyola Marymount University in California, Hermannsburg, 3 July 2014.

Interview with Margaret Mathew Deng, Chairperson of the Civic Education Sub-Committee of the National Constitutional Review Commission, SPLM-member and former Undersecretary of the Ministry of Gender, Child and Social Welfare, Skype interview, 15 June 2014.

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