CONSTITUTIONAL IMPLICATIONS OF REVITALIZED PEACE AGREEMENTS ON RESOLUTION OF CONFLICTS: THE CASE OF SOUTH SUDAN

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Abstract

This article examines the nature, role, application and scope of peace agreements generally but with specific focus on South Sudan's post independence peace agreements signed from 2011 between the Government and armed oppositions groups in 2013 and 2016. It also evaluates the environment created for constitutionalism as a result of the Revitalized Peace Agreement on the Resolution of Conflict in the Republic of South Sudan (R-ARCSS) signed in 2018. It focuses on the peace-making process, basic features, status and validity of the peace agreements in the context of democratic constitutional principles.

Key Words: *Peace agreements, state and non-state actors, constitutionalism, rule of law, separation of powers, South Sudan.*

1.0. INTRODUCTION

After independence in July 2011, South Sudan's shift from a colonial past tainted with oppression and marginalisation under an Arab dominated Sudan Government which started on 1st January, 1956 after proclamation of independence by Great Britain did not result in a true transition to democracy.

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After war erupted in 2013 and 2016, a Revitalized Agreement on the Resolution of the Conflict in South Sudan 2018 (R-ARCSS) was signed. It made the peace agreement superior to the country's Constitution and formed the basis to lead the country through the transitional period until elections are held. A Revitalized Transitional Government of National Unity (RTGoNU) was set up under the agreement and established the organs of state namely; the Executive, Legislature, Judiciary and Independent Institutions and Commissions. These organs of state were established under the various Peace Agreements like the Comprehensive Peace Agreement signed in 2005 under the then Republic of Sudan. They remained operational until South Sudan became independent in 2011.

The institutions were also reconstituted or restructured under the Agreement on the Resolution of Conflict in South Sudan (ARCSS) in 2015 and lastly by the Revitalized Agreement on the Resolution of Conflict in the Republic of South Sudan (R-ARCSS) in 2018. However, they still failed to observe the doctrine of separation of powers, rule of law, independence of the judiciary. They failed to respect the limitation set by the Constitution of the Republic of South Sudan and laws of South Sudan. Consequently, R-ARCSS transcended its constitutional limits and authority, ignored and undermined the independence of the Legislature, Judiciary and Independent Commissions,[1]deliberately interfering and weakening them henceforth reducing efficiency, accountability and rule of law in the country.

This article evaluates the peace agreements that have been signed since 2011 and notably the Revitalized Peace Agreement(R-ARCSS) and the Transitional Government of National Unity (R-TGoNU) in South Sudan. It is divided into four parts. The first part deals with the introduction, the second part examines the general overview of peace

1 Bertelsmann Stiftung, BTI Country Report-South Sudan, Gutersloh: Bertelsmann Stiftung, 2020, p. 5.

agreements. The third provides an overview of peace agreements that has been signed on enforced while the fourth part examines the concept of Constitutionalism The fifth part focuses on the impacts of RARCSS on constitutionalism and the sixth part examines the challenges undermining Constitutionalism in the country. Part seven provides for the conclusions and part eight the recommendations.

2.0. OVERVIEW OF PEACE AGREEMENTS

2.1. Meaning of Peace Agreements

The term 'Peace Agreement' is often attached to document agreements between parties to a violent internal conflict to establish a cease-fire together with new political and legal structures.[2] Peace agreements share a legal-looking structure, with preambles, sections, articles, and annexes.[3] They also share legal-type language, speaking of parties, signatories, and binding obligations.[4] The structure and language of peace agreements suggests that the parties mutually view them as legal documents.

Peace agreements are hybrid international and domestic documents dealing with hybrid conflicts and hybrid solutions to conflict, standing uneasily between the category of 'treaty' and 'constitution.' They therefore require new understanding of the relationship between international and domestic law in implementation.[5] Peace negotiations and peace agreements have been on the agenda in South Sudan even before it became an independent state in 2011.

2 Bell, C., "Peace Agreements: Their Nature and Legal Status", 100 the American Journal of International Law, 2006, p. 374.

3 Id, p.378.

4 Ibid.

5 Bell, C., On the Law of Peace, Oxford: Oxford University Press, 2008, p. 22.

2.2. Importance of Peace Agreements

Around the globe, some 650 peace agreements aiming to bring to an end to intrastate armed conflicts have been concluded between governments and armed Opposition Groups (AOGs) since 1990.[6]

Firstly, peace agreements' provisions helps in halting fighting/wars and restore peace. The Comprehensive Peace Agreement (CPA) signed between the Government of the Republic of Sudan and the Sudan People's Liberation Movement/Army (SPLAM/A) in 2005 ended a twenty-one (21) year old conflict that was by then the longest conflict in Africa. Similarly, heavy fighting was taking place until the ARCSS was signed in 2015 and again when another fighting erupted in the national capital in 2016, the Revitalized Peace Agreement became the only tool to stop it.[7]

Secondly, peace agreements have become relevant in efforts to reconstruct societies in the wake of both interstate and intrastate conflicts like in Kosovo, Afghanistan, Iraq, Sudan, and South Sudan. The intestate use of force has led to international involvement in internal state building.[8] This has required the forging of accords between conflicted groups through a process of constitution making as negotiated agreement.[9] Parties to R-ARCSS agreed that the Revitalized Transitional Government of National Unity (RTGoNU) set up under the RARCSS will have a mandate to restructure, rehabilitate and ensure radical reform of the civil service. It was also agreed that the process would rebuild and recover destroyed physical infrastructure and accord special attention to

6 Ozcelik, A., "Entrenching Peace in Law: Do Peace Agreements Possess International Legal Status?", 21 Melbourne Journal of International Law, 2020, p. 1.

7 See the preamble of the Revitalized Agreement on the Resolution of Conflict in the Republic of South Sudan (R-ARCSS), 2018.

8 Bell, "Peace Agreements: Their Nature and Legal Status", 2006, p. 373.

9 Ibid.

prioritizing the rebuilding of livelihoods of those affected by the conflict.[10]

However, in some situations, peace agreements fail, social scientists and conflict resolution analysts have examined what makes peace agreements succeed or fail. They have tried to isolate the different elements of settlements, so as to test empirically and through case studies the extent to which they reduce conflict.[11]

2.3. Patterns of Peace Agreements

As peace processes evolve, a wide variety of documents that can be termed "peace agreements" are produced which can be classified into three main types, namely; prenegotiation agreements, framework/substantive agreements, and implementation/renegotiation agreements.[12] These documents tend to emerge at different stages of a conflict.

2.3.1 Prenegotiation Agreements

The prenegotiation stage of a peace process, often termed "talks about talks" typically revolves around how to get everyone to the negotiating table with an agreed-upon agenda.[13] The road leading to the signing of the CPA that paved way for the referendum for self-determination of South Sudan was long, rough and included many setbacks. Nevertheless, the National Congress Party (NCP) and the SPLM/A committed themselves from an early stage to enter into negotiations, both parties

10 Articles 1.2.10 and 1.2.12 of the Revitalized Agreement on the Resolution of Conflict in the Republic of South Sudan 2018.

11 Stedman, S.J., Rothchild, D. and Cousens, E.M. (eds.), Ending Civil Wars: The Implementation of Peace Agreements, London: Lynne Rienner Publishers, 2002, p. 3.

12 Bell, "Peace Agreements: Their Nature and Legal Status", 2006, p. 376.

13 Ibid.

saw that it was in their best interest to engage in talks.[14] To get the warring parties to the conflict in South Sudan, the Inter-Governmental Agency for Development (IGAD) Assembly of Heads of State and Government met at its 31st Extra-Ordinary Summit of 12 June 2017 in Addis Ababa, Ethiopia. It decided to urgently convene a High-Level Revitalization Forum of the parties to the agreement on the Resolution of the Conflict in the Republic of South (ARCSS), including estranged groups to discuss concrete measures, to restore permanent ceasefire, full implementation of the ARCSS.

For face-to-face or proximity negotiations to take place at all, parties need assurances that the talks will not be used by the other side to gain military and /or political advantages.[15] The prenegotiation stage tends to focus on who is going to negotiate and with what status, raising issues such as the return of negotiators from exile or their release from prisons; safeguards on future physical integrity and freedom from imprisonment; and limits on how the war may be waged while negotiations take place.[16]

The agreements made at this stage, if published at all, have much more the feel of context setting declarations or political pacts than binding legal agreements.[17] They tend to be recorded as "declarations" or "records" of agreement or mutual understanding, rather than as obligatory agreements.[18]

14 Einas, A., "The Comprehensive Peace Agreement and the Dynamics of Post-Conflict Partnership in Sudan". 44(3) African Spectrum, 2009, p. 136.

15 Mitchel, C.R., the Structure of International Conflict, London: Palgrave Macmillan, 1981, pp. 206-16.

16 Ibid.

17 Bell, "Peace Agreements: Their Nature and Legal Status", 2006, p. 376

18 Ibid.

2.3.2 Substantive/ Framework Agreements

Substantive or framework agreements are aimed at sustaining cease-fires; they provide a framework for governance designed to address the root causes of the conflict and thus to halt the violence more permanently.[19] The agreements reached at this stage most clearly deserve the label "peace agreement." They tend to be more inclusive of the main groups involved in waging the war by military means. They are usually public and formally recorded in writing, signed and include international participants.[20] Examples include the Arusha Peace and Reconciliation Agreement for Burundi signed on 28 August 2000, and the Agreement on the Resolution of Conflict in South Sudan signed in 2015.

Once framework agreements are reached in formal talks, their implementation requires parties to make fundamental compromises with respect to their preferred outcome and their use of force.[21] During the negotiations of the R-ARCSS, the Government of South Sudan had to give up the position of First Vice President and also surrender 45 percent positions in the national government to the opposition groups. Pressure or coercion is not unknown in such circumstances. Coercion or "power" mediation is a strategy that is thoroughly addressed in mediation literature. The associated mediation style of "manipulation" is seen to be particularly effective when the aim is to secure formal agreements and overall crisis abatement.[22] In negotiating the R-ARCSS, "manipulative" mediation was used together with elements of "facilitative" and "formulative mediation" during the process the three year long process that led to the Comprehensive Peace Agreement in 2005.[23] Without some

19 Id, p.374.

20 Ibid.

21 Id, p.378.

22 Stamnes, E, and Coning, C., the Revitalized Agreement on the Resolution of Conflict in the Republic of South Sudan, Oslo: Peace Research Institute, 2018, p. 7.

23 Ibid.

degree of pressure, it is very unlikely that the parties would have ever come to the negotiation table.[24] They would often do where they are certain that the commitments they obtained from the other side are going to be implemented.[25]

2.3.4 Implementation Agreements

Implementation agreements begin to advance and develop aspects of the framework, flashing out their detail.[26] By their nature, implementation agreements involve new negotiations and in practice often undergo a measure of renegotiations as parties test whether they can claw back concessions made at an earlier stage. Implementation agreements typically include all the parties to the framework agreement.

At the domestic level, peace agreements are often taken forward in the form of constitution making or legislation, a step removed from the main peace agreement.[27] Implementation may be uneven or non-existent. In such cases, implementation agreements may involve renegotiation and new agreements whose relationship to the former peace agreement is often unclear.[28] The best example is the Agreement on the Resolution of Conflict in the Republic of South Sudan (ARCSS) that was signed in 2015 between the Government of the Republic of South Sudan led by President Salva Kiir and the Armed opposition group, the Sudan People's Liberation Movement/Army-in Opposition headed by Dr Riek Machar the former Vice President to President Salva Kiir before his removal in 2013. When this agreement failed to materialize, conflict erupted once again in South Sudan in 2016 and the parties had to renegotiate the agreement which resulted into the Revitalized Agreement

24 Allard, D., "The Use of Smart Pressure to Resolve Civil War", 6(8) Policy Perspectives, 2018, pp. 1-4.

25 Bell, "Peace Agreements: Their Nature and Legal Status", 2006, p. 378

26 Ibid.

27 Id, p. 379.

28 Ibid.

on the Resolution on the Conflict in South Sudan (R-ARCSS) signed in 2018 at Adis Ababa. The R-ARCSS 2018 differed from the ARCSS 2015 since it created five Vice presidents compared to two Vice Presidents as had been agreed in the ARCSS of 2015.

2.4. Capacity to Make Agreements

Not everybody involved in conflict is competent to make a binding peace agreement. In most cases, it is government and armed opposition group/non state actor. It can be between one or more states and non-state actors and may also involve third party organizations.

2.4.1 Power of Transitional or Caretaker Governments to negotiate Peace Agreements.

Constitutional transition periods present a twilight time between two executives. At such times, the outgoing executive's authority is questionable because of the democratic difficulties and agency concerns that arise at the end of executive term. Thus, parliamentary systems developed constitutional conventions that restrict caretaker governments action.[29]

In *Weiss v. Prime Minister of Israel,* a petition was filed to the High Court of Justice by professor Hillel Weiss that it was unreasonable for a government to conduct such fateful negotiations involving painful territorial concessions so close to the elections without support of the Knesset (Israel Parliament) [30] An order for the government to stop the negotiations until a new government formed following the elections was sought. In a judgment delivered by president Aharon Barak, the high court of justice dismissed the petition on the merits. It was unanimously ruled that a caretaker government enjoys the same powers as a regular

29 Rivka, W., "Judicial Review of Constitutional Transitions: War and Peace and Other Sundry Matters", 45 Vanderbilt Journal of Transitional Law, 2012, p.1381.

30 55(2) PDF 455 (2001)

government. The court emphasized that a caretaker government must act with restraint, unless there is a vital public need for action, the caretaker government must act with proportionality in fulfilling that need. The court further emphasized that the test is not whether the circumstances required action or restraint. Exercising restraint is the default position, especially after elections when a new government is being formed.

Governments that were elected democratically or that were legitimate but hardly control all the territories in their country can still make valid and binding peace agreements regardless of the fact that rebel forces control a huge sway of the country's territory. In *Prosecutor v. Morris Kallon and Brima Buzzy Kamara,*[31] the special court dismissed the argument that the treaty made by the government to establish the special court was defective because the then government controlled less than a third or a quarter of the country and more than two thirds were in rebel hands.

2.4.2 Treaty Making Capacity of Armed Opposition Groups (AOGs) in International Law

Due to the presence of non-state parties and their disputed treaty - making capacity in international law, peace agreements between governments and AOGs are not accorded recognition as international treaties under the Vienna Convention on the Laws of Treaties.[32]

In *Prosecutor v. Morris Kallon and Brima Buzzy Kamara*[33], the Appeals Chambers of the Special Court for Sierra Leone considered the issue whether the RUF had treaty-making capacity under international. The judges opined that the mere fact that insurgents are subject to international humanitarian law may not lead to the conclusion that they

31 SCSL-2004—15-AR72

32 Vienna Convention on the Laws of Treaties, 23 May 1969 1155 UNTS 331.

33 SCSL-2004—15-AR72.

are provided with an international personality under international law. The fact that the Sierra Leone government regarded the RUF as an entity with which it could enter into agreement could not suffice for concluding that the RUF had international treaty-making capacity, since no other state granted them recognition as an entity under international law.[34]

2.4.3 Peace Agreements with a Double Character-Third States as signatories

Some intrastate armed conflicts have been brought to an end with the conclusion of peace agreements that have been signed by more than one state and one or more AOGs. A good example is the General Framework Agreement for Peace in Bosnia and Herzegovina of 1995 commonly referred to as the Dayton Peace Agreement.[35] The main agreement was concluded in the form of an international treaty signed by three states; the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia. However, the 12 annexes attached to this main agreement were signed by varying combinations of these three states and two sub-state entities; the Republika Sprska and the Federation of Bosnia and Herzegovina. Such peace agreements may be considered agreements with a double character; they may constitute international treaties between the States party and intrastate political agreements between the state and non-state parties (AOGs) to the Conflict.[36]Although, peace agreements with a double character can be sources of International legal rights and obligations as between their state parties. The same cannot be said for the obligations assumed by the state party towards the AOGs under such an agreement and vice-versa. The

34 Id, paras 47-48

35 See Letter Dated 29 November 1995 from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General, UN GAOR 50th Session Agenda item 28.

36 Ozcelik, "Entrenching Peace Agreements in Law: Do Peace Agreements Possess International Legal Status?", 2020, p.12.

legal status of such obligations remains disputed under international law, as in the case of peace agreements between only a state and an AOGs.[37]

2.5. Legalization of Peace Agreements

It should be noted that in most cases, state and non-state parties to a peace agreement have great interest in giving it a legal status, only agreements between states are granted treaty status under international law.[38] Domestic law, therefore, can be (and has been) one way to legalize the entirety of their agreements. By turning to domestic law, parties think carefully about how best to bring their state's legal order in line with the terms of the peace agreement, many of which may reorganize the nature of the state itself.[39]

The design of the legalization process can have enormous implications for the success of the post-conflict implementation period. It is believed that, poor design can open the door to successful challenge by spoilers, to the frustration of implementation efforts, and even, in part, to resumption of the conflict. Thus, it is paramount that parties and practitioners examine and understand the options on the table and the associated risks.

2.6. Legalizing Peace Agreements

It is now well-established that there currently exists no route for a state and non-state actor to directly conclude an intrastate peace agreement that is binding under international law as a treaty.[40]

37 Id, p. 13.

38 Davies, B., Implementing Peace Agreements through Domestic Laws, Edinburgh: PSRP, 2021, p.1.

39 Ibid.

40 Bell, C., On the Law of Peace, Oxford: Oxford University Press,2008, p. 310.

Legalization matters greatly to parties for two main reasons; First, legalization helps to mitigate commitment problems, because it legally binds parties at the international level and hence become costly to breach or refuse to comply.[41] Secondly, legalization establishes exactly how the domestic legal order would be when brought in line with the peace agreement's terms. As such, it's an important part of the implementation process.

2.7. Domestic Mechanism

Intrastate legalization process, by contrast, face dilemmas on two fronts, most constitutions have no general legalization procedure for peace agreements with non-state actors, and parties must invent them on an ad hoc basis.[42] Moreover, intrastate peace agreements commonly reorganize the very nature of the state. They create new governance provisions that may be incompatible with existing law. Conseqently, Consequently, parties would most likely not sign such a peace agreement into law as a legislature might ratify a treaty. To grant peace agreement legal status through domestic law, parties must make two sets of choices.

First, they must decide whether to give domestic legal status to their agreement through (1) legislation or executive decree; (2) constitutional amendment; and /or (3) constitutional replacement.

Secondly, they must decide whether to pass this legislation/decree, amendment, replacement in line with procedures prescribed by the constitution (the legal continuity) or through procedures that break in whole or in part with the Constitution (Legal rupture).[43]

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41 Id, p. 2.

42 Davies, B., Implementing Peace Agreements Through Domestic Laws, 2021, p. 13.

43 Bell, On the Law of Peace,2008, p. 310.

Some provisions may be expressly transitional while others seek to establish the permanent law of the land. South Africa's interim Constitution was designed to expire once the parties drafted a permanent document.[44] The Interim Constitution or transitional constitution was mainly intended to provide an "historic bridge" between the past and the future and facilitate the continued governance of South Africa, while an elected Constitutional Assembly drew the final Constitution. The interim Constitution represented the compromise between the National Party which ruled South Africa since 1948 to 1989 and African National Congress (ANC) which was banned from 1960 to 1990.

2.7.1 Use of Legislation/Executive Decree

Legislative/decree provisions can be used to constitutionalize the agreement or merely give legal status to discrete tasks that must be implemented in the course of the transitional phase, like the demobilization of arms or deployment of the police force. The peace process provisions may create an ad hoc cabinet to pass legislation that the permanent legislature must actually approve; they may give a direction for the legislature to pass a law, or the head of state to sign a decree, that should have been passed through constitutional amendment instead; or they may demand that the parties do nothing to challenge an action or arrangement that would have otherwise been illegal.[45]

2.7.2 Use of Constitutional Amendment

Constitutional amendment provisions are commonly used, and often in tandem with legislative/decree provisions. Sierra Leone's Lomé Agreement expressed this goal outright when its legalization provision stated that "no constitutional or any other legal provision prevents the implementation of the present Agreement." It then established a constitutional Review Committee to propose amendments to make the

44 The Interim South African Constitution 1993.

45 Ibid.

Constitution comply with the agreement's terms.[46] Parties using an amendment provision often wish to revise parts of the constitution that are necessary to implement the peace agreement without overhauling the entire order, although these amendments can be so comprehensive as to comprise a de facto replacement.[47] Amendment provisions that rupture the constitutional order may prescribe the amendment's passage through procedures that differ from the procedures in the Constitution; abrogate specific articles in the constitution without further comment; or create a new cabinet or council to pass an amendment that the permanent legislature may have passed instead.

2.7.3 Use of Constitutional Replacement

Constitutional replacement provisions necessarily stand as a substantive break with the old order. Most constitutional replacement provisions rupture with the old constitution, both in substance and procedure. In Sudan, the 2005 Interim National Constitution was created to constitutionalise or legalize the Comprehensive Peace Agreement (CPA).[48] The CPA was the result of years of negotiations starting as early as 2002, which was finally completed and signed on the 9th January 2005. The replacement of the constitution can be done in a variety of ways; including, replacing the old constitution with a new constitution included in the peace agreement itself; by placing the agreement as higher law above the constitution without any other legalization procedure to grant it such a status; or by replacing the constitution through a constituent assembly that does not have the power to do in the old constitution. The 1998 Constitution of the Sudan was replaced with the 2005 Interim National Constitution of the Sudan which was branded on the wording

46 See Peace Agreement between the Government of Sierra Leone and the RUF, July 7, 1999. Available at <https://www.peaceagreements.org/viewmasterdocument/478> (Acessed on 13 May 2023).

47 Bell, On the Law of Peace,2008, p. 310.

48 Kristine, M., "Contested Constitutions: Constitutional Development in Sudan 1953-2005", Master's Thesis, University of Bergen, 2014, p. 54

and provisions of the CPA. Not only was a new national constitution enacted but also an Interim Constitution for Southern Sudan as an autonomous region and state constitutions for all the states in the Sudan.

2.7.4 Internationalised Peace Agreement/Mechanism

The 1994 Lusaka protocol between the Angolan government and the National Union for the Total Independence of Angola (UNITA), co-signed by secretary-General in Angola in the presence of the representatives of the United States, Portugal and Russia, is one of the many examples of "Internationalised peace agreements".[49]

The case of *Province of North Cotobato v. Philippines Peace Panel on Ancestral Domain*[50], concerned constitutionality of the 2008 memorandum of agreement on the Ancestral Domain Aspect of the GRP-MILF Tripoli Agreement of 2001 (MOA-AD) between the government and the Moro Islamic Liberation Front (MLF). The court rejected the argument, opining that the roles assumed by international actors in Peace agreements did not in and of themselves make these actors parties to the said agreements. The supreme court of the Philippines further emphasized that the obligations assumed by the Philippines in the MOA-AD were addressed not to third states or international organizations but only to the MILF.[51] The court held that "the mere fact that in addition to the parties to the court, the peace settlement is signed by representatives of states and International Organizations does not mean that the agreement is Internationalised so as to create obligations in international law.[52]

49 See Letter dated 9 Dec 1994 from the Permanent Representative of Angola to the United Nations Addressed to the President of the Security Council, UNSCOR, UN DOC S/1994/1441 (22 December 1994) annex (Lusaka Protocol)

50 (2008) 589 Philippine Reports 387.

51 Id, n. 31.

52 Ibid.

3.0. OVERVIEW OF PEACE AGREEMENTS SIGNED IN THE REPUBLIC OF SOUTH SUDAN SINCE 2011

The path that led to the emergence of South Sudan as the world's newest nation resulted from a peace agreement[53] signed between the Government of the Republic of Sudan and Sudan People's Liberation Movement/ Army (SPLM/A) in 2015 at Naivasha, Kenya.

After independence in 2011, South Sudan has descended into several conflicts, war between government forces and armed opposition groups erupted in 2013, and 2016 which culminated into two peace agreements name the Agreement on the Resolution of Conflict in the Republic of South Sudan signed on the 17th August 2015 in Addis Ababa and the Revitalized Agreement on the Resolution of Conflict in the Republic of South Sudan (R-ARCSS) signed in 2018

3.1. Agreement on the Resolution of Conflict in the Republic of South Sudan 2015 (ARCSS)

The Agreement on the Resolution of Conflict in the Republic of South Sudan was signed in Addis Ababa on the 17th August 2015. The agreement sought to bring to an end the tragic conflict on-going in the Republic of South Sudan since the 15th December 2013. This conflict had disastrous economic, political and social consequences for the people of South Sudan.[54]

The ARCSS established a Transitional Government of National Unity (TGoNU) entrusted with the Task of implementing the agreement with its seat at Juba. The parties agreed to share power in the Executive of TGoNU as follows; Government of the Republic of South Sudan fifty-three percent; the South Sudan Armed opposition, thirty three percent;

53 Comprehensive Peace Agreement 2005 (CPA) signed at Naivasha, Kenya.

54 Preamble to the Agreement for the Resolution of the Conflict in the Republic of South Sudan, 2015, p. 3.

former Detainees, seven percent; and other political parties, seven percent.

The mandate of the TGoNU was set in Article 2.1 of the ARCSS among others to include; the need to restore peace, security and stability in the country; oversee and ensure the permanent constitution-making process is successfully carried out; establish a competent and impartial National Elections Commission (NEC) to conduct free and fair elections before the end of the Transitional period and to ensure that the outcome is broadly reflective of the will of the electorates; and devolve more powers and resources to states and county levels.

With regards to establishment of the organs of state, The ARCSS established the Executive,[55] Judiciary,[56] Legislature,[57] and the Independent Commissions. However, these organs did adhere to the doctrine of separation of powers. The President as the head of the Executive Organs was granted powers to remove elected governors and constitutional post-holders and no mechanisms were set, to check and balance the exercise of this power by the ARCSS. This state of affairs let to undermining one of the core pillars of constitutional law, the doctrine of separation of powers and the system of checks and balance.

Chapter five of the ARCSS focused on Transitional Justice, Accountability, Reconciliation and Healing. It laid a foundation for the future establishment of three more independent institutions. The ARCSS required the TGoNU to initiate legislation for the establishment of the Commission for Truth, Reconciliation and Healing (CTRH) and independent hybrid judicial body to be known as the Hybrid Court for

55 Article 4 of the Agreement on the Resolution of Conflict in the Republic of South Sudan 2015.

56 Id, Article 12.

57 Id, Article 11(1).

South Sudan (HCSS); and Compensation and Reparation Authority (CRA).

Article 3.1 of the ARCSS establishes an independent hybrid judicial court. It requires the court to be established by the African Union Commission to investigate and prosecute individuals bearing the responsibility for violations of international law and or applicable South Sudanese law, committed from the 15th December 2013 through the end of the transitional period.

The ARCSS failed to address the root causes of instability in South Sudan and also failed to properly balance the powers of the Executive which had become excessive. The reforms envisaged for the Judiciary were never implemented. The judiciary remained a rubber stamp for President Salva Kiir and the access to the Constitutional Court was impossible. The Judiciary was unable to check and balance the Executive.

The ARCSS was not properly respected and implemented and on the 8th July, 2016, fresh fighting erupted once again in the South Sudanese Capital juba between the forces allied to President Salva Kiir and the forces allied to his first Vice President Dr Riek Machar which started inside the Presidential Palace and later spread to the whole country.

3.2. Revitalized Agreement on the Resolution of Conflict in the Republic of South Sudan 2018 (R-ARCSS)

The Revitalized Agreement on the Resolution of Conflict in the Republic of South Sudan (R-ARCSS) signed in 2018 was an attempt to start from where the ARCSS 2015 had failed. The preamble of the Revitalized Peace Agreement on the Resolution of the conflict in South Sudan 2018 states that the parties to the agreement were determined to compensate the people of South Sudan by recommitting themselves to peace and Constitutionalism and not to repeat mistakes of the past.

The R-ARCSS is a set of agreements that seeks, as the title suggests, to revitalize the ARCSS. Its provisions are very similar to those of its predecessor: a permanent ceasefire; a power-sharing transitional government; followed by elections after three years. However, compared to the ARCSS, it has more ambitious timeline for establishing a unified army, and it includes provisions to determine the country's internal borders, which were the subject of considerable gerrymandering during the war.[58]

The Revitalized Peace Agreement has reduced large-scale political violence between main parties, but vital parts of the implementation are incomplete, particularly those concerning political commitments and the unification of military forces.[59] The delay in implementation has caused frustration and an increase in sub-national and intercommunal violence.[60] In April 2021, the UN Panel of experts on South Sudan warned of a potential return to large scale conflict and stressed that urgent engagement was needed to avert this scenario.[61]

On 8th May 2021, President Salva Kiir dissolved parliament, paving the way for the appointment of MPs from the opposing sides in the country's five- year civil war. The majority of the 550 legislators were to be drawn from the governing SPLM Party.[62] On 10 May 2021, President Kiir through a Presidential decree read on the State Television, SSBC

58 JMEC, A summary of the Revitalized Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS), Juba: Joint Monitoring and Evaluation Commission, 2018, p. 1.

59 Berdal M, and Shearer, D., "Hard Lessons from South Sudan" 63(5) Survival,Global Politics and Strategy, 2021, pp. 69-96.

60 Ibid.

61 UNSC, Letter dated 14th April 2021 from the Panel of Experts on SouthSudan addressed to the President of the Security Council, New York: UNSecurity Council, 2021, pp. 7-31.

62 BBC News, "South Sudan's President Salva Kiir Dissolves Parliament" 9th May 2021, Juba. Available at <https://www.bbc.com/news/world-africa-57046645.amp> (Accessed on 17th September 2022).

appointed all the 550 law makers from all parties who signed the revitalized Peace Agreement.[63]

3.3. Khartoum Peace Agreement

The Khartoum Peace Agreement refers to a peace deal that was signed between the Sudan People's Liberation Movement/Army (Government of South Sudan) and rebel forces that had split from the Sudan People's Liberation Movement/Army-in Opposition (SPLM/A-IO) by then, the main armed opposition group. The group had allied itself with another militia group (Agwelek) commanded by Gen. Johnson Olony who at one time was an ally of Dr. Rieck Machar, the first Vice President and commander-in-chief of the SPLM/A-IO. Serious fighting took place between these forces and the main string SPLM/A-IO leading to the death of thousands of civilians in the Upper Nile region, one of the oils producing regions in the country.

3.3.1 Agreement between the Sudan People's Liberation Movement in Government (SPLM-IG) and the Sudan People's Liberation Movement /Army-in Opposition (SPLM/A-IO) Kit-Gwang

On 16th January 2022, the South Sudan Government in an attempt to stop fighting and massive destruction taking place in the Upper Nile signed a peace deal with a breakaway faction of the Sudan People's Liberation Army-in Opposition (SPLM-IO) commonly known as the kit-Gwang faction.

The parties agreed that the period for implementation of the agreement shall be determined by the respective joint security committee which would be formed immediately after signing the agreement and would not

63 The East African, "South Sudan's President Salva Kiir Announces New Parliament" 11th May, 2021, Nairobi. Available at <https://www.theeastafrican.co.ke/tea/news/east-africa/south-sudan-new-parliament-3396518? view=htmlamp> (Accessed on 17th September 2022).

exceed a period of three months.[64] This agreement was signed simultaneously with the Agwelek forces.

3.3.2 Agreement between the Sudan People's Liberation Movement in Government (SPLM-IG) and Agwelek Forces

The Khartoum Peace Agreement between South Sudan government (SPLM-IG) AND Agwelek forces came into effect on January 16, 2022. The two parties, as part of the peace deal, agreed on political representation of the Agwelek forces both in the state and national levels.[65] The two parties also agreed that amnesty will be granted to the leadership and Agwelek forces within a period of one week of the force disengagement as outlined in the agreement between the SPLM-IG and the SPLM/ -IO Kit-Gwang faction.[66]

4.0. OVERVIEW OF CONSTITUTIONALISM

Constitutionalism is a political theory and practice that posits that the powers of government must be structured and limited by a binding Constitution incorporating certain basic principles if the protection of values like human liberty and dignity are to be assured.[67]

4.1. Importance of Constitutionalism

The R-ARCSS directs that the permanent constitution making process must result into a federal and democratic government that takes into consideration among others, the principles guaranteeing good governance, constitutionalism, rule of law, human rights, gender equity

64 Para 3, Khartoum Peace Agreement, January 2022, available at <https://www.peaceagreements.rg/viewmasterdocument/2397> (Accessed on 13 March 2023).

65 Sudan Tribune, "South Sudan Gov't, SPLM-IO Splinter Group Sign Peace Agreement", Juba, January 16, 2022. Available at <https://sudantribune.com/article254152/> (Accessed on 13 March 2023).

66 Ibid.

67 Daintith, T., "Constitutionalism" in Cane, P., and Conghan, J., (eds.), The New Oxford Companion to Law, Oxford: Oxford University Press, 2008, pp. 209-10.

and affirmative action. This simply shows, that while negotiating the Revitalized Peace Agreement, the parties and stakeholders saw the importance of constitutionalism and therefore included it. The following can be deduced as importance of constitutionalism;

First, one important fundamental preoccupation of constitutionalism is the avoidance of governmental tyranny through the abuse of power by rulers pursuing their own interests at the expense of the life, liberty and property of the governed.[68]

Secondly, if well practiced, constitutionalism , is bound to bring forth a culture of respecting a country's constitutional normative and institutional frameworks and straddles both constitutional and political ethos. Such aspects of constitutionalism can only be achieved if parliament lives up to its core business being the consideration of legislation.[69]

Thirdly, constitutionalism is primarily a point of reference for the socio-political system: indeed, the highest point of reference, overriding parochial concerns. Constitutionalism reflects the recognition by all political actors that a particular political process, established democratically, must be respected for valid political activity to take place. The crucial element is that whatever the constitutional structure, it must reflect the will of the people, and it must command sufficient respect from all political actors to serve as an effective limitation on the unprincipled exercise of public power.[70]

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68 Fombad, C.M., "The Separation of Powers and Constitutionalism in Africa: The Case of Botswana," 25 BC Third World LJ, 2005, pp. 301-10.

69 Kindiki, K., "The State of Constitutionalism in the East Africa for the Year 2005: The Role of the East African Community", Available at<http://www.kituochakatiba.co.ug/constm%20-EAC% 202005. pdf>(Accessed on 14th April 2022).

70 Greenberg, D., et al, Constitutionalism and Democracy: Transitions in the Contemporary World, 1993, New York, Oxford University Press, p. 16.

To Murphy, constitutionalism refers to liberal individualism. He states that constitutionalism enshrines respect for human worth and dignity as its central principle. To protect that value, citizens must have a right to political participation, and their government must be hedged in by substantive limits on what it can do, even when perfectly mirroring the popular will.[71]

4.2. Theories of Constitutionalism

Constitutionalism is an ambiguous concept, or at least the term is used in ambiguous ways. Virtually every political theorist of the modern period, certainly during the last two hundred years or more, has used the concept of a political constitution in some way or another. There is very little agreement, however, on what the term constitutionalism actually represents. Some mean it in a restrictive way, others in a more expansive way. Some use it in a proscriptive manner, while others employ it prescriptively (some, perhaps, even use it pejoratively). What nearly everyone who uses the term shares, though, is the thought that modern societies need a constitution in order to be properly constructed.[72]

Many scholars have attempted to come with theories and concepts of constitutionalism such as; the Liberal Constitutionalism, Political Constitutionalism, Legal Constitutionalism, Transnational Constitutionalism, Common law constitutionalism, Modern, and Radical Constitutionalism. Each of them has varying elements or characteristics which is advanced by the advocates of the theory or concept for example advocates of political constitutionalism believe in Parliamentary Supremacy basing their arguments that it is the elected parliament which

71 Id, p. 3.

72 Lane, J.E., Constitutions and Political Theory, Manchester: (2nd Edn) Manchester University Press, 1996, p. 42.

serves or represents the will of the citizens and thus believe parliament was superior to the courts.[73]

4.3. Transnational Constitutionalism

In *East African Civil Society Organization Forum (EACSOF) v. The Attorney General of the Republic of Burundi & Others*[74], the court was about was called upon to determine a ruling of the constitutional court of the Republic of Burundi regarding case No. RCCB 303. It had been alleged in case No. RCCB 303 that the impugned decision violated the letter and spirit of the Arusha peace and Reconciliation Agreement for Bundi, 2000 and in particular article 7(3) of protocol II to the Arusha Accord and the Constitution of Burundi.

In *EACSOF*, the appellant argued that the trial court disavowed itself of jurisdiction to review and quash the judgment of the constitutional court of Burundi in case Number RCCB 303 on the grounds that it violated the letter and spirit of the Arusha Accord and also articles 5(3), 6 (d), 7(2) among other provisions of the EAC Treaty. The court held that the East African Court is an international court and exercises jurisdiction like any other international court in accordance with international law.[75] The Court further held that, pursuant to the EAC Treaty, partner states have undertaken to abide by and carry out the obligations as provided for in the Treaty which, at international law creates state responsibility to each and every partner state that is attributable to them. The court held further that it is it's duty under article 23(1) of the EAC Treaty to ensure adherence to law in the interpretation and application and compliance with the EAC Treaty.[76]

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73 Bellamy, R., "Political Constitutionalism and the Human Rights Act", 9(1) International Journal of Constitutional law, 2011, p. 91

74 Appeal No. 4 of 2016, EACJ, Appellate Division, Arusha

75 Id, para 46.

76 Id, para

The case of *EACSOF* raises the issue of the responsibility of states for international wrongful acts of states committed by its judicial organ.

This issue has been also addressed by the International Law Commission (ILC) commentary on the Responsibility of States for International Wrongful Acts which provides that every international wrongful act of a state entails the international responsibility of that state. The state therefore takes responsibility for any wrongful act of that state. This is the principle of state responsibility.

Furthermore, the ILC Commentary in Article 4 on the conduct of an organ of state provides that; the conduct of any state organ shall be considered an act of that state under international law, whether the organ exercises legislative, executive, judicial or any other functions. This is notwithstanding such organ's position in the organization of the state, and whatever its character as an organ of the central government or a territory unit of the state. It follows therefore, that a state under international law, assumes international responsibility for the wrongful acts of the judicial organ of that state.

The European Court of Justice in the case of *Gerhard Kobier v. Republik Osterreich*[77], held that the principle of state liability would also apply to violations of EU law by national courts of final appeal. The ECJ dismissed arguments against the said application on the basis of state liability to the conduct of courts of last instance based on principles like certainty, res judicata, the independence and authority of the judiciary.[78]

77 (2003) ECR 1-10239

78 Craig, P., and De Burca, G., EU Law: Texts, Cases and Materials, (5th edn.) Oxford: Oxford University Press, 2011, p. 245.

5.0. IMPACT OF REVITALIZED AGREEMENTS (R-ARCSS) ON ELEMENTS OF ONSTITUTIONALISM

According to PLO Lumumba,[79]one would not be persuaded, to proclaim the existence of constitutionalism where, among others, the following conditions associated with democracy do not exist; a government genuinely accountable to an organ distinct from itself; a government freely elected on a wide franchise at regular intervals; political parties able to freely organize in opposition to government and fundamental civil liberties enforced by independent courts.

Henkin,[80]identifies popular sovereignty, rule of law, limited government, separation of powers (checks and balances), civilian control of the military, police governed by law and judicial control, an independent judiciary, respect for individual rights and the right to self-determination as essential features (characteristics) of constitutionalism.

5.1. Doctrine of Separation of Powers

In 1690, John Locke, in his Second Treatise of Civil Government, noted that it may be temptating to human frailty to apt to grasp at power, for the same persons who have the power of making laws, to have also the power to execute them. He argued that if this was the case, they may exempt themselves from obedience to the laws they make, and suit the law both in its making and execution, to their own private advantage.[81] The principle of separation of powers refers to the idea that the three pillars of the state should be functionally independent and that no individual should have powers that span three pillars.[82] According to

79 Lumumba, et al., the Constitution of Kenya: Contemporary Readings, LawAfrica, 2011, p. 16.

80 Rosenfeld, M., Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives, Durham: Duke University Press, 1994, p. 42.

81 Locke, J., Two Treatises of Government, New York & London: Mentor Books, 1965, p. 576, Ch xii, para 143.

82 Kamau, C.M., Principles of Constitutional Law, Nairobi: Law Africa, 2017, p.41.

Fombad,[83]five main reasons have been historically been advanced for requiring that the Legislative, Executive and Judicial functions not be exercised by the same people; the rule of law, accountability, common interest, efficiency, and the balancing of interest. This was reiterated in *Appollo Mboya v. Attorney General & 2 Others*.[84]

Under the article 1.1 of the R-ARCSS, a Revitalized Transitional Government of National Unity (RTGoNU) was formed with all the three organs of state namely; the Executive, Legislature, Judiciary as well as Independent Institutions and Commissions.[85] A grave mistake and a huge attack was made on the doctrine of separation of powers by the R-ARCSS when President Kiir was given powers to appoint and relieve members of Parliaments. On 10th May 2021, President Kiir reconstituted Parliament, paving way for the formation of the Revitalized Legislative Assembly as stipulated in the 2018 Peace Agreement. Kiir appointed all the 550 members of Parliament as nominated by the parties who signed the R-ARCSS.[86] It is a universal principle that Parliament represents the will of the electorate and its members are elected or chosen by the citizens. However, unfortunately, the R-ARCSS deviated from this and introduced a parliament comprising of appointed members who can be decreed in or out at will by the President.

5.2. Installation of the System of Checks and Balances

Under the system of checks and balances, each branch of state should restrain abuses or excesses of power by the other branches. This means that the power wielded by one organ of state is restrained through the

83 Fombad, "The Separation of Powers and Constitutionalism in Africa; theCase of Botswana", 2005, p. 301.

84 Petition No. 474 of 2017 [2018] e KLR.

85 See articles 1.5.1, 1.14 and 1.17.1 of the R-ARCSS 2018.

86 The East African, "Kiir Names more MPs, Fulfils Provision in 2018 Peace Deal", Juba, 20th September 2021. Available at <https://www.theeastafrican.co.ke/ke/ news/east-africa/salva-kiir-appoints more-mps-south-sudan-3556454?view=htmlamp> (Accessed on 17th September 2022).

exercise of certain powers granted to other organs of state. In this way, no organ of state becomes too powerful and tyrannical.

In *Appollo Mboya v. Attorney General & 2 Others*,[87]the High Court of Kenya stated that constitutions adhering to the doctrine of separation of power do not typically keep the branches of government entirely separate. The court relied on the argument of James Madison stating that the doctrine allows for each of the three branches of government to have some involvement in, or control over, the acts of the other two. This partial mixture of mutually controlling powers is known as a system of checks and balances.

The R-ARCSS has been one of the worst documents to be enacted in South Sudan's history that violates the principle of checks and balances. Previously the appointment of all Ministers, Deputy Ministers, heads and members of Independent Institutions and Commissions, judicial officials of the superior courts required vetting and approval by Parliament (TNLA). The President had the powers under article 101 of the Constitution but was subject to Parliamentary approval. But surprisingly, article 1.6.2.4 of the R-ARCSS empowers the President to appoint and preside over the swearing into office of the First Vice President, and the Vice Presidents, Ministers and Deputy Ministers. No requirement for vetting by the Legislature has been provided which is a clear departure from 2011 the Transitional Constitution of South Sudan.[88] Furthermore, the R-ARCSS gives the President powers to appoint undersecretaries of the ministries as proposed by the ministries and this was subjected to vetting and approval by the Council of Ministers.[89] The appointment of state Governors and judicial officers, members of independent

87 Constitutional Petition No. 472 of 2017 [2018] e KLR.

88 Article 57(h) of the Transitional Constitution of the Republic of South Sudan 2011 (as amended).

89 Article 1.6.2.5 of the R-ARCSS 2018.

commissioners are not subjected to vetting by Parliament.[90] The lack of vetting by Parliament partly explains why corruption in the national ministries has been massive because the corrupt and incompetent individuals circumvent the system of checks and balances.

5.3. Rule of Law or Supremacy of the Constitution

The rule of law is a component of constitutionalism.[91]The general irreducible minimum content of the rule of law would include the setting of limits to power's all intrusive claims - the supremacy of law and legal process over arbitrary action.[92] Constitutions need not only reflect the rule of law principle but also the aspirations or the realities of a given society. The community specifies its basic rules, agrees to abide by the rule of law and established governance structures which guarantee adherence to the set societal values.[93] Rule of law could be summarised into six components. That is 'a government of laws, not of men'.[94]According to Shivji, a constitution is an amalgam of constitutional rules and constitutional principles which goes under the name of constitutionalism. [95]

The R-ARCSS is a document that does not respect the rule of law or supremacy of the Constitution. Article 1.18.2 of the R-ARCSS provides that in case of contradiction between the provisions of the Agreement and the 2011 the Transitional Constitution of the Republic of South Sudan, the provisions of the Agreement shall prevail. This is a direct slap in the face of constitutionalism. It is a universal principle that it is the

90 Id, 1.9.2 and 1.9.2.3.

91 Lumumba, et al., the Constitution of Kenya: Contemporary Readings, 2011, p. 55.

92 Id, p. 57.

93 Katz, S.N., "Constitutionalism in East Central Europe: Some Negative Lessons from the American Experience" (A Paper Presented at the Seventh Annual lecture, German Historical Institute), Washington D.C., November 15, 1993, p.14.

94 Kamau, Principles of Constitutional Law, 2017, p. 27.

95 Shivji, I.G., et al., Constitutional and Legal System of Tanzania, Dar es Salam: Mkuki na Nyota, 2016, p. 41.

constitution that is the supreme law in every nation and if other laws and provisions contradict the Constitution, they remain null and void to the extent of the inconsistency. Instead the framers of the R-ARCSS opted for the "constitutional rupture" method to implement the agreement by destroying what was available or ignoring the existing constitution.

Furthermore, the Peace Agreement is negotiated and discussed between political parties without the participation of the masses, no referendum has been done or elections made to seek the views or opinions of the masses. The R-ARCSS has provided no mechanism or avenue for aggrieved citizens to challenge any provision in the agreement. An illegitimate insubordination of the country's constitution has been made by the agreement. The parties have up to 2023, failed to incorporate the Peace Agreement into a constitutional text which they were bound to follow, instead the parties are running or governing South Sudan with two documents that contradict. The whole concept of Constitutionalism is to limit the powers of the government to avoid tyranny and wanton exercise of power, and this fear has been proved by the R-ARCSS which gives massive unchecked powers to the signatories of the agreement without constitutional justification. In short, the R-ARCSS is an attack on principle of rule of law.

5.4. Democracy or Representative Government

Another element considered as an essential restrain required to constitute constitutionalism is a government that conducts free, fair and periodic elections that embrace the principle of universal adult suffrage and in which a multi-party system is duly recognised.[96] The modern concept of democracy is representative. In other words, Parliament is regarded as representative since the citizens directly choose members of Parliament

96 Nwabueze, Constitutionalism in the Emergent States, 1973, p. 3.

in regular elections.[97] Democracy is a system which at its best optimises participation by the ruled and accountability of the ruler. Participation at every level is essential for the proper functioning of democracy. Democratic theory rests on the assumption that the voters are at least for political purposes equal.[98]

5.4.1 Absence of Elections

The R-ARCSS mandates the R-TGoNU to reconstitute a competent and independent National Elections Commission (NEC) to conduct free, fair and credible elections 60 days before the transitional period.[99] This is a huge step in bolstering and laying foundations for democracy which is one of the tenets of constitutionalism. However, from the date of signing the Revitalized Agreement in 2018, todate democratic elections have not been held. The Agreement has been extended countless times by the parties in an attempt to cling onto power and by pass elections. The R-ARCSS has no modalities or mechanisms on conducting elections. It short, the R-ARCSS has turned out as a double edged sworn which is now used by the parties to the R-ARCSS to defeat democracy by signing extensions of transitional period citing excuses from lack of progress or implementation of certain provisions of the peace agreement.

The R-ARCSS prescribes that the Permanent Constitution that shall be made at the end of the Transitional Period must be grounded on federal and democratic system of governance that reflects the character of the Republic of South Sudan and ensures unity in diversity.[100]

5.4.2 Constitution Making Process

97 Ratnapala, S., and Crowe, J., Australian Constitutional Law: Foundations and Theory, (3rd ed.) Oxford: Oxford University Press, 2012, p. 33.

98 Kamau, Principles of Constitutional Law, 2017, p. 384.

99 Article 1.20.4 of the Revitalized Agreement on the Resolution of Conflict in South Sudan 2018

100 Id, Article 1.4.11.

The R-ARCISS provides that the permanent constitution making process shall be based on the principles of supremacy of the people of South Sudan,[101]and also initiate a federal democratic system of government that reflects the character of South Sudan in its various institutions taken together. It guarantees good governance, constitutionalism, rule of law, human rights, gender equity and affirmative action.[102] 'Even though it is called a permanent constitution, it is subject to future amendments. You cannot tie future generations to what we have adopted now. So even if you are not happy with the way things are going you can come back and amend the constitution.'[103]

Constitutionalism and Constitutions are not new phenomena in Africa.[104] Notoriously violent and oppressive states such as the apartheid system in South Africa had a constitution and practiced some form of constitutionalism. Authoritarian regimes and military dictatorships, including those of Sani Abacha in Nigeria, Idi Amin in Uganda and Jean -Bedel Bokassa in the Central African Republic had Constitutions. Regardless of the claims made by them and their apologists, one can hardly consider these governments to have been practicing genuine constitutional governance or constitutionalism. While the so-called constitutions were legal documents, they were not legitimate instruments of governance. This is the difference between the mere existence of a constitution, and the real existence of a living constitution, owned by the people that serves as the basis of democratic politics and governance-the difference between constitutions and constitutionalism.[105] The R-ARCSS has not provided adequate space or mechanism for public participation

101 Id, Article 6.2.

102 Id, Article 6.2.2.

103 Akolda, "Consulting the Nation, South Sudanese Debate the Constitution", 2013, p. 8.

104 Ihonvbere J.O, "Constitutions without Constitutionalism? Towards a New Doctrine of Democratization in Africa" in Mbaku, J.M. and Ihonvbere, J.O. (eds.) Transition to Democratic Governance in Africa: The continuing Struggle, Praeger: Westport, 2003, p. 139.

105 Ibid.

in the making the transitional constitution which incorporates the provision of the R-ARCSS or even the Permanent Constitution which is envisaged to be made towards the end of the Transitional Period based on which elections will be held.

5.4.3 Lack of inclusivity

The negotiation process that resulted into the R-ARCSS was not characterized by inclusiveness, but rather by pragmatic considerations such as how to effectively halt the widespread violence and suffering.[106] As such it represents an interesting case in the discussion of what fairness means in peace negotiations.

The R-ARCISSprovides that the permanent constitution making process shall be based on the principles of promoting people's participation in the governance of the country through democratic, free and fair elections, and the devolution of powers and resources to the states and counties. This is a great step envisaged in the R-ARCSS to bolster popular participation of the masses in important decision making about their country.[107]

In summary, in the absence of elections, the move to allow non-state groups, a share of state power creates an incentive structure for would be leaders to embark on insurgent pathways to power, thereby reproducing insurgent violence.[108]Already the previous ARCSS faced this challenge leading to more contenders for state powers who ended up

106 Stamnes, E, and Coning, C., The Revitalized Agreement on the Resolution of the Conflict in the Republic of South Sudan, Oslo: Peace Research Institute Oslo, 2018, p. 3.

107 Article 6.2.3 of the Agreement on the Resolution of Conflict in South Sudan, 2018.

108 Mehler, A., Not Always in the People's Interest: Power-sharing arrangements in African Peace Agreements, Hamburg: Brooks World Poverty Institute, 2008, p. 9

being absorbed in the R-ARCSS (from initial four to five and still more who are yet to sign the R-ARCSS).

5.4.4 Guarantee of Individual Rights and Liberties

A guarantee of civil liberties enforceable by the judiciary is considered another essential prerequisite of constitutionalism.[109] A crucial part of any written constitution is the guarantee of citizen's right called the Bill of Rights which includes a clear declaration of the rights of all people. Such rights precede and transcend the state. That is, they are inherent to each human being, just by virtue of being human, and they are granted by the state.[110]

Article 1 of the UN Charter included the promotion and encouragement of respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. Similarly, Article 55 of the UN Charter states that the United Nations shall promote universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. In addition, Article 56 of the Charter imposes obligation on member states to ensure the observance of Article 55 of the Charter.

A similar provision is enshrined in the International Covenant on Civil and Political Rights, 1966 (ICCPR). Article 2 of the Covenant stipulates that "each state party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subjects to its jurisdiction the rights recognised in the present Covenant without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or

109 Nwabueze, Constitutionalism in the Emergent States, 1973, p. 3.

110 Lumumba, et al., the Constitution of Kenya: Contemporary Readings, 2011, p. 62.

other status." There are certain basic rights which may not be derogated from even at the time of state of emergency.

Article 6.2.2 of the R-ARCSS prescribes the standard and qualities the Permanent Constitution of the Republic of South Sudan which is under process of enactment should have and one of them is human rights. Despite mentioning this, the R-ARCSS does not take a robust step or has no mechanism to bolster fundamental human rights collectively called the Bill of Rights. Unlike the Transitional Constitution of the Republic of South Sudan 2011(as amended) which contains a bill of rights provision, the R-ARCSS does not mention the bill of rights nor does it contain an express provision or safeguards for it.

5.4.5 Freedom of Expression

Article 24(1) of the TCSS, 2011 provides that every citizen shall have the right to the freedom of expression, reception, dissemination of information, publication, and access to the press without prejudice to public Order, safety or morals as prescribed by law. Section 6(2) of the Media Authority Act, 2013 also recognises and affirms that the right to freedom of expression, including the public right to a pluralistic media is a fundamental human right protected under Article 24 of the Constitution. The African Commission observed in *Media Rights Agenda and Others v. Nigeria*, that freedom of expression is a basic human right, vital to an individual's personal development, his political consciousness, and participation in the conduct of public affairs in his country.[111]

5.5. Right to Access Justice or Courts of Law

It is a common law general rule that no person is to be adversely affected by a judgment in a legal proceeding to which he was not a party, because

111 Communications 105/93, 130/ 94, Twelfth Annual Report of the African Commission on Human and Peoples' Rights (Annex V), (1998).

of the injustice of deciding an issue against him in his absence.[112] One of the purposes of law is to regulate and guide relations in a society.

In *Appollo Mboya v. Attorney General & 2 Others,* the High Court of Kenya stated on regard to right to access the courts that:

> In our constitutional dispensation, everyone is guaranteed access to a competent court to have their dispute resolved by the application of law and decided in a fair manner. Access to courts is fundamentally important to our democratic order. It is not only a cornerstone of the democratic architecture but also a vehicle through which the protection of the Constitution itself may be achieved. It also facilitates an orderly resolution of disputes so as to do justice between individuals and between private parties and the State. Countries, such as South Africa, also have these clauses.[113]

In the above case, the court further stated that courts are mandated to review the exercise of any power by State functionaries, from the lowest to the highest-ranking officials. Legislation based on the Constitution is supposed to concretize and enhance the protection of these rights, amongst others, by providing for the speedy resolution of disputes.[114]

112 Peter, C.M. and Kijo-Bisimba, H. (eds), Supremacy of Law-Selected Judgements, Speeches and Writings by Justice Barnabas Albert Samatta, Dar es Salam: E & D Vision Publishing Limited, 2020, p.131.

113 Article 37 of the Constitution of the Republic of South Africa, 1996.

114 Appollo Mboya v. Attorney General & 2 others [2018] eKLR para 55-56.

5.6. Accountability

One of the most essential restraints recognised by Nwabueze[115]to be essential in constitutionalism is a government that is genuinely accountable to a certain entity distinct from itself.

In the *Prosecutor v. Morris Kallon and Brima Buzzy Kamara*case, the Special Court for Sierra Leone (SCSL) had to decide whether the amnesty granted by virtue of the 1992 Lomé Peace Agreement constituted a bar to its jurisdiction.[116] Article 9 (3) of the Lomé Peace Agreement provides that the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL, ex-AFRC, ex-SLA or CDF in respect of anything done by them in pursuit of their objectives as members of those organizations since march 1991, up to the time of the signing of the Lomé Agreement. The Appeals chambers of the SCSL ruled that amnesties granted to persons of the warring factions in the Sierra Leone civil was by the Lomé Peace Agreement did not bar prosecution before it.

This became the first decision before an international criminal tribunal unequivocally stating that amnesties do not bar the prosecution of international crimes before international or foreign courts.[117]

In its decision in *Kallons* case (supra), the Appeals Chambers set forth its deliberations in three key steps and arguments. First it examines the status of the Lomé Agreement and whether insurgents have treaty-making capacity to international law, and the legal consequences thereof for article 10 of the Lomé Statute. Secondly, the Appeals chambers

115 Nwabueze, Constitutionalism in the Emergent States, 1973, p. 1.

116 SCSL-2004-15-AR 72(E)

117 Meisenberg, S.M., "Legality of Amnesties in International Humanitarian Law: The Lomé Amnesty Decision of the Special Court for Sierra Leone", 86 (856) IRRC, 2004, p. 843.

considered whether it wa authorized to review the legality of its statutory provisions. Thirdly, it examined the limits of amnesties in international law. The judges further discussed whether a prosecution predating the Lomé Agreement amounts to an abuse of process.

With reference to the first argument, the Appeals Chamber held that the mere fact that the United Nations and other third state parties signed the Lomé Agreement cannot naturally categorize the agreement as an international treaty, creating obligations towards signatories.[118] The court did not accept the opinion of Kooijmans, who suggested that in certain cases peace agreements could be of an international character if the United Nations were strongly involved in the conflict through peace-keeping forces and had played an active role as mediator in the peace negotiations.[119] In such cases it should be assumed that a non-state entity had committed itself to its counterparts, the government and the United Nations. The judges, however, argued that the United Nations and third State parties were mere "moral guarantors" with the purpose of observing that the Lomé Agreement was enacted in good faith by both parties. Such moral functions of the guarantors could not presuppose any legal obligation. International agreements in the nature of treaties had to create rights and obligations towards all parties. The Lomé Agreement only created a factual situation to the restoration of peace; it did not create rights or duties which could be regulated by international law.

5.6.1 Amnesty

In Prosecutor v. Morris Kallon and Brima Buzzy Kamara, the Appeals Chamber examined the limits of amnesties in international law.[120] The judges mainly drew on the doctrine of universal jurisdiction to justify their

118 SCSL-2004-15-AR 72, para37-42.

119 Kooijmans, P.H., "The Security Council and Non-State entities as parties to Conflicts", in Wellens, K. (ed.), and International Law: Theory and Practice- Essays in Honour of Eric Suy, Hague: Nijhoff Publishers, 1998, p. 338.

120 SCSL-2004-15-AR 72(E) paras 67-74

opinion, they concluded that the grant of amnesties falls under the authority of the state exercising its sovereign powers. However, where a jurisdiction is universal, such state could not deprive another state of its jurisdiction to prosecute perpetrators by granting amnesties. The Appeals chambers opined that; "A State cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other states are entitled to keep alive and remember."[121] The Appeals chamber of the SCSL also finds that, there is no customary rule prohibiting national amnesty laws, but only a development towards an exclusion of such laws in international law.

The Khartoum Peace Agreement between the Sudan People's Liberation Movement/Army in Government and Sudan People's Liberation Movement/Army (SPLM/A-IO) Kit-Gwang faction grants amnesty to the leadership of the SPLM/A-IO Kit-Gwang and Agwelek forces for their actions during the war. Within this Khartoum agreement, the parties agreed to be bound by the Revitalized Agreement on the Resolution of Conflict in the Republic of South Sudan signed in 2018.[122]

Article 5.3.5.4 of the R-ARCSS provided that the Hybrid Court for South Sudan shall not be impeded or constrained by any statute of limitation or the granting of pardon or amnesties. This is an important step in the promotion of accountability and access to justice to victims of heinous crimes and atrocities perpetuated by the top leadership of the Government forces and rebel groups. It can be proudly stated that one important step brought by the R-ARCSS is to remove blanket amnesty or pardons to perpetrators and also establishing the supremacy of the Hybrid Court which is yet to be established to be above the domestic

121 Ibid.

122 Radio Tamazuj, "Kitgwang Group now part of SSPDF-First Vice President Machar," Juba January 2022, available at< https:// radiotamazuj.org/en/news/articles/ kit-gwang- group- now-part-of-sspdf-first-vice-president- machar> (Accessed on 9 March 2023).

courts of South Sudan. The only failure of the R-ARCSS is that it does not establish a mechanism for collection of admissible evidence that can be used later for prosecution of persons bearing responsibility for violations of international law, and applicable South Sudanese law.

5.7. Independence of the Judiciary

According to Barnett, an independent judiciary is one of the essential characteristics of constitutionalism.[123]According to Lord Bighamthe functions of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself.[124] In liberal democracy, the individual is at the centre, and the judicial independence is the hallmark of liberal democracy.[125]

The R-ARCSS was alive to the principle of independence of the Judiciary. It provided that the Judiciary of South Sudan shall be independent and subscribe to the principle of separation of powers and the supremacy of the rule of law.[126] However, the R-ARCSS directed the parties to undertake reforms of the Judiciary that should not be limited to the review of the Judiciary Act during the Transition notwithstanding, efforts was to be made to build the capacity of judicial personnel and infrastructure. As of 2023, no judicial reforms have been concluded, the judiciary remains in the same dire condition it had from 2013. One positive development has been the commencement of the work of the Judicial Reform Committee which has started conducting consultations and sessions to gather opinions of stakeholders.

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123 Barnett, H., Constitutional and Administrative Law, (3rd Edn.) London: Cavendish Publishing Limited, 1995, p. 5.

124 X and Anor v Secretary of State for the Home Department [2004] UK HL 56.

125 Goldin, R.A., and William, A., the Constitution, the Courts and the Quest forJustice, Washington DC: American Enterprise Institute Press, 1999, p. 25.

126 Article 1.17.1 of the R-ARCSS 2018.

Article 1.17.6 of the R-ARCSS prescribes that the reconstituted Judicial Service Commission shall undertake appropriate judicial reforms and restructuring of the judiciary during the Transitional period. This has remained on paper, the original transitional period ended with no such reform undertaken by the Judicial service Commission and now the parties made two years extension that is bound to expire end of 2024.

On 24th November 2022, the Juba County Court issued an order freezing the bank account of Jonglei State Government as part of execution of civil case between *Amama General Trading Co. Ltd v. Government of Jonglei State.*[127] On 2nd December 2022, the Minister for Presidential Affairs acting under instructions of the President directed the Chief Justice of the Republic of South Sudan to unfreeze restrictions on withdrawal from Jonglei State Government Account at Ecobank that was frozen by the Juba County.[128] This was a big slap and embarrassment in the field of judicial independence. There was no provision or basis in law for the Presidency or Executive to direct the Chief Justice to overturn a decision of a county court during execution and the proper recourse would be to file an appeal to the High Court, then wait for the High Court to make a decision.

The above case shows that the independence of the Judiciary envisaged in the R-ARCSS is a hoax and the perpetrators of the interference in the independence of the Judiciary are mostly members of the Executive, especially the Presidency and Council of Ministers.

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127 Execution case No. 129/2022, Juba County Court of South Sudan (Unreported).

128 See Letter Ref No. RSS/MPA/OM/CJ/J/12/01 from Dr Barnaba Marial, Minister for Presidential Affairs dated 2nd December 2022 titled "Unfreezing Restrictions on Withdrawal from Jonglei State Government Account No.6940033413".

5.8. Judicial Review

Judicial review is the law concerning control by the courts of the powers, functions and procedures of administrative authorities and bodies discharging public functions. [129] It is a specialized remedy in public law by which the High Court exercises supervisory jurisdiction to review acts, decisions and omissions of inferior courts, tribunals, public authorities and private bodies performing public functions (the determinant factor being what the body does and not how it was formed) and the legislature in order to establish whether they have exceeded or abused their powers.[130]

The R-ARCSS provides for the establishment of an independent, impartial and credible constitutional court whose composition, functions, and duties shall be prescribed by law.[131] At the time of writing, no law has been enacted by the Reconstituted Transitional Legislative Assembly to breathe life into the provision of the R-ARCSS. Thus, the fundamental right of the citizens of South Sudan to access justice in regard to violation to their constitutional rights have been curtailed by the parties to R-TGoNU or R-ARCSS. The R-ARCSS did not provided an opportunity or room to challenge its legality by citizens or any aggrieved party. It ousted Jurisdictions of the Courts by making the agreement superior to the constitution and other statutory laws in South Sudan. No mechanism has been set or contemplated by the parties to the R-ARCSS nor a time frame set within which to complete the process of establishment of the Constitutional Court.

This has been one of the failures of the R-ARCSS in terms of promoting or strengthening constitutionalism in South Sudan since the power of the courts to review constitutional of provisions, laws and amendments

129 Kaluma, Judicial Review: Law Procedure and Practice, 2016, p. 1.

130 Alhaj A.J. Mungula v. Baraza Kuu la Waislam wa Tanzania [TLR] 50 HC.

131 Article 1.17.7 of the R-ARCSS 2018.

cannot be questioned. This is because of the absence of a functioning court, the Supreme Court which has such powers granted to it by the Transitional Constitution of the Republic of South Sudan 2011(as amended). The Court has a shortage of personnel and cannot constitute a quorum to sit as a constitutional panel. In conclusion South Sudan judiciary cannot undertake judicial review in the arena of the courts involving the national Executive or Parliament.

6.0. CHALLENGES UNDERMINING CONSTITUTIONALISM IN SOUTH SUDAN

Despite having the Transitional Constitution of 2011 and the Revitalized Agreement on the Resolution of Conflicts in the Republic of South Sudan (R-ARCSS) as two main documents to steer the country, Constitutionalism has not strived well due to many factors.

First, although the R-ARCSS created institutions of governance, these have remained weak making it difficult to carry out oversight roles. The Independent Commissions and Institutions are so weak, crippled to a level that, since their establishment, they have failed to carry out any meaningful oversight activity to check and balance the three organs of state. The independent Institutions and Commissions and the Judiciary have little resources and operate on a tight budget, hampering its activities.

Secondly, war and insecurity in the country have impacted alot, the entire history of the Sudan and later South Sudan, has been shrouded by conflicts ranging from rebellions, inter-communal conflicts over grazing land and cattle theft. Even though the R-ARCSS is being implemented, some warring parties like the National Salvation led by Thomas Cirilo, the SPLM/A-IO Kit-Gwang faction led by Gen Gatwech Dual are out of the Revitalized Transitional Government of National Unity (R-

TGoNU). This has disastrous effects on constitutionalism and rule of law, the wars have caused untold suffering, human rights violations with impunity. In 2013, just two years after independence, South Sudan descended into war despite two peace agreements in 2015 and 2018, until now, peace has evaded South Sudan.

Thirdly, there is no separation of powers and functions among the organs of state, although the R-ARCSS established a Revitalized Transitional Government of National Unity comprising of the Executive, Legislature, Judiciary and Independent Commissions. The Executive, headed by President Salva Kiir, operated without restraint and in the process has taken over most of the functions of the Legislature and deactivated the oversight role of the Legislative and the Judiciary.

7.0. CONCLUSION

This article has revealed that for constitutionalism to be upheld and reflected in the implementation of the peace agreement, the entire process, from prenegotiation agreements, framework agreements and implementation agreements, should reflect the key tenets of constitutionalism. These are separation of powers, democracy, rule of law, accountability, independence of the judiciary, access to courts of law, a guarantee of rights and freedoms. Further, the R-ARCSS, although not perfect, is the best option to steer the country out of the current mess and has transformative elements such as institutional and constitutional reforms which if faithfully implemented, South Sudan might achieve peace and stability, rule of law, economic recovery and development.

8.0. RECOMMENDATIONS

The following recommendations are made with to view to improving adherence to constitutionalism in South Sudan.
First, peace guarantors like IGAD, Troika and AU need to protect the R-ARCSS from factionalisation that might recreate insurgent groups and violence like what has become of the SPLM/A-IO that has fractured into SPLM/A-IO Kit-Gwang faction under Gen Gatwech Dual and the Agwelek forces under Gen. Johnson Olony. As a result, fragmentation has led to heavy fighting in Upper Nile among the Nuer and Shilluk communities that backs rival factions leaving at least five thousand civilians dead and hundreds displaced or seeking shelter in UN protected sites.

Secondly, there is need to enact a new Constitution for South Sudan. The current Transitional Constitution of the Republic of South Sudan 2011, has been subjected to incorporate so many peace agreements like the ARCSS and R-ARCSS signed in 2015 and 2018 respectively. These have drastically changed its structure and undermined it objectives. The Transitional Constitution of the Republic of South Sudan 2011 has outlived its mandate since at the eve of independence in 2011, it was prepared as transitional document to last for three years pending enactment of the permanent Constitution. Instead of being the supreme law in the country and binding on all organs, it has lost its supremacy to the Revitalized Peace Agreement signed in 2018 which is now the supreme law binding the entire country. Parliament needs to enact a new constitution whether it is named permanent constitution or not, to reclaim its place as the supreme law in the Country.

Thirdly, there is need to expedite the reform of the judiciary as well as the establishment of an independent Constitutional Court that shall have exclusive jurisdiction to handle constitutional cases. Currently, no

independent constitutional Court exists. As the end of the transitional period approaches, with it comes democratic elections which at times results in disputes which needs an independent judiciary to hear and dispose. The current judiciary under Justice Chan Reech is nothing but a pro-government judiciary that serves to protect the interest of the ruling SPLM-IG. The current practice of making the Supreme Court of South Sudan to constitute a panel at the pleasure or discretion of the Chief Justice to sit as a constitutional court has proved to be ineffective and unreliable. Peace guarantors and regional and international bodies like the UN, AU, Troika, and IGAD should accelerate the process of judicial reform before elections are conducted.

Fourthly, the power of the Parliament to vet and approve ministerial and other appointments should be returned or restored as a way of bolstering checks and balances among the organs of state and in particular between the Legislature and the Executive. Leaders of warring parties should not make critical decisions like extending the Transitional period, and postponing elections and extending their mandate in office. Rather, these roles should be left to Parliament which is the competent body under the constitution. Emphasis should be put on the Permanent Constitution whose process is under way to enact a provision that is non-derogable with effect to the oversight role of Parliament in vetting and approving ministerial appointments.

Fifthly, judicial activism should be promoted with regard to justices and judges in the Judiciary of South Sudan. The R-ARCSS and the manner in which the parties' that are signatories to it, are implementing the agreement has a lot of constitutional questions that have remained unanswered. The competent body tasked with interpreting and resolving legal and constitutional disputes is the Judiciary but the Executive and political parties have encroached into this territory and the judges have remained silent. The judges must come out and face the other organs of

state. They should venture into areas of developing case law and jurisprudence on constitutionalism in the country. Judges must not hesitate to make decisions they consider just however unpopular those decisions are likely to be to Parliament, the Executive or political parties and regardless of their impact on the relations between the judiciary and other pillars of the State. Their destination must be justice, that is the only highway. They must always play their role in ensuring that amendment of the paramount law promotes in the minds and hearts of the people, a deep emotional respect for the constitution as a symbol of sanctity and permanence.