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State Formation through Constitution Making in Emerging South Sudan: Unveiling the Technicity of the Rule of Law

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Abstract

The paper focuses on constitution making as part of broader *Rule of Law* (RoL) frames in emerging South Sudan where negotiations on the mode of statehood are on-going by multiple actors with different claims of authority. The RoL comes with the inherent contradictions between its promises and the effects of practices pursued in its name. Driven by problematic underlying ideas of a ‘modern’ territorial state, the RoL promotion is nourished through ‘technical assistance’ of international actors coming with their manifold programmes, models and guidelines for establishing the rule of law and for producing a constitution. It will be argued that this ‘technical assistance’ regulates South Sudan’s state-formation process in a way that risks the chances of integrating the ideas and interests of the highly segmented society. The more so since international actors proclaim at the same time the idea of ‘local ownership’.

The article sheds light on the resulting dilemma between the hasty production of a constitution and the idea of deriving ‘its authority from the will of the people’, implying the existence of a certain societal consensus. The makings of both, the pre-modelled *Transitional Constitution of the Republic of South Sudan* of 2011 (TCRSS), and the upcoming ‘permanent’ constitution, show that many actors are ousted from the decision making process. Moreover, TCRSS has already become a powerful legitimizing tool in the hand of a few political actors. Thereby, this instrument seems to rather fuel the political struggle as well as the violent negotiation. It will be argued that a slowing down of the constitution making without an immediate claim to consent on substance seems to be more sensible.

A. Introductory remarks

Normative ideas are constantly circulating around the globe through processes of contacts and exchange,¹ whereby they are constantly produced in processes of negotiations. The

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1 See Benda-Beckmann, Franz von et al., *Mobile People, Mobile Law: Expanding Legal Relations in a Contracting World*, Aldershot 2005.

making of constitutions is no exception in this respect. Even though external actors have influenced the making of constitutions throughout history² “the extent to which the international community has become involved [...] adds a new dimension to constitution-making”.³ Particularly, during the last two decades extensive assistance of international actors has become an integral part of ‘post-conflict reconstruction’ with constitution making used as a normative tool within the context of broader *Rule of Law* frameworks.⁴ Agreeing with *Kendall*, “the process of producing state constitutions has transformed into a veritable industry [...] whereby constitutional technicity – exemplified in the provision of technical expertise – has become a central feature of contemporary constitution-making practice”.⁵

This article focuses on the ‘internationalized constitution-making’,⁶ on the effects of norm transfer between centres of hegemonic *Rule of Law* technicity and a new member of the international community: South Sudan. In the emerging Republic of South Sudan political and military (re-) negotiations on South Sudan’s modality of statehood are still on-going. Accordingly, constitution making revolves around the construction of sovereignties in an attempt to control territorial borders, to define clearly an interior, and to convince people that this imagined interior exists.⁷ In order to grasp the complex translation processes that accompany processes of constitution making, attention needs to be drawn not only to negotiations by South Sudanese actors, but also to the involvement of international actors⁸ with their virtual toolbox of models. The on-going constitution making in South Sudan offers a unique possibility to better understand how different normativities are negotiated and how certain normative ideas – under the rhetoric of the ‘rule of law’ has become the engine for external legal interventions. It will be shown that the international ‘technical assistance’ seems to rather regulate the constitution-making process in a way that reduces the chances of substantially assessing and integrating the interests of the different parts of the segment-

2 *Schauer, Frederick*, On the Migration of Constitutional Ideas, in: *Connecticut Law Review* 37 (2004), 907-919.

3 *Dann, Philip and Al-Ali, Z.*, The Internationalized Pouvoir Constituant: Constitution-Making under external Influence in Iraq, Sudan and East Timor, in: *Max Planck UNYB* 10 (2006), 423-463 (424).

4 *Sannerholm, Richard Zajac*, *Rule of Law after War and Crisis: Ideologies, Norms and Methods. Series on Transitional Justice*, Cambridge 2012. *Humphreys, Stephen*, *Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice*, Cambridge 2010. *Carothers, Thomas*, The Rule of Law Revival, in: *Foreign Affairs* 77 (1998) 95-106. *Rajagopal, Balakrishnan*, Invoking Rule of Law in Post-Conflict Rebuilding: A Critical Examination, in: *William and Mary Law Review* 49 (2008), 1346-1374 (1347f).

5 *Kendall, Sara*, ‘Constitutional Technicity’: Displacing Politics through Expert Knowledge, *Law, Culture and the Humanities*, 2013, 2f.

6 *Dann and Al-Ali*, 426f.

7 *Anderson, Benedict*, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, London 1983, 6. *Sharma, Aradhana and Gupta, Akhil*, *The Anthropology of the State: A Reader*, Malden 2006, 226.

8 The vague term ‘international actors’ comprise individual activists and academics, individual and groupings of states, (supra-)regional institutions, non-local NGOs, commercial enterprises, research institutions/ think tanks, etc.

ed society while proclaiming the idea of the so-called national and popular ownership. Moreover, the pre-modelled *Transitional Constitution of the Republic of South Sudan* of 2011 (TCRSS), which serves as a national normative frame of reference for the ‘transitional’ period, has already been used as legitimizing tool by dominant local political actors. Thereby, this instrument seems to rather fuel the political struggle as well as the violent negotiation.

Accordingly, it will be demonstrated how constitutions are produced in processes of translation. Translation emphasizes the circulation of various perceptions, values, norms, practices and procedures, institutional frameworks, and interpretations between and across contexts as well as across scales. It is always an interactive process of interpretation and negotiation of frames of references and meanings. Thereby, pre-formulated models⁹ are adapted from one local context to another which implies appropriation and localisation or “vernacularization”. In order to grasp the complex translation processes, we need to draw attention to the frames of references and events and their respective perceptions and ranks in the hierarchy of major discourses. In addition, we need to identify the ‘translators’ and the “technologies of social ordering”¹⁰ they help to establish, and the impacts they have. That leads to an analysis of power relations as processes of negotiation between different frames of references among actors.

Before turning to the South Sudanese context, I want to clarify what is specifically meant by ‘internationalized constitution-making’ within the *Rule of Law* frameworks.

B. ‘Internationalized constitution making’ and the technicity of the Rule of Law

Contemporary constitutionalism as cornerstone of the *Rule of Law* has been “fetishized”¹¹. RoL itself has turned into “the dominant paradigm for state governance in the international arena”¹² not least because it is commonly seen as the “antithesis of arbitrary rule”¹³. It has become what *May* calls “Grundnorm”¹⁴ and Maldonado the “basic grammar of constitu-

9 Models can be understood as an “analytical representation of particular aspects of reality created as an apparatus or protocol for interventions in order to shape this reality for certain purposes; models come always objectified and combined with material technologies to put them into practice”, see *Behrends, Andrea, Park, Sung-Joon and Rottenburg, Richard*, *Travelling Models*, *Introducing an Analytical Concept to Globalisation Studies*, in: *Behrends, Andrea, Park, Sung-Joon and Rottenburg, Richard* (eds), *Travelling Models in African Conflict Management. Translating Technologies of Social Ordering*, Leiden 2014, 1-40 (1-2).

10 *Behrends, Andrea, Park, Sung-Joon and Rottenburg, Richard*, 35.

11 *Adelman, Sammy*, *Constitutionalism, Pluralism and Democracy*, in: *Journal of Legal Pluralism* 42 (1998) 73-88 (74, 78).

12 *Grenfell, Laura*, *Promoting the Rule of Law in Post-Conflict States*, Cambridge 2013, 15.

13 *McIlwain, Charles Howard*, *Constitutionalism: Ancient and Modern*, Clark 2005, 24.

14 *May, Christopher*, *The Rule of Law as the Grundnorm of the New Constitutionalism*, in: *Gill, Stephen and Cutler, A. Claire* (eds), *New Constitutionalism and World Order*, Cambridge 2014, 63-76 (75).

tionalism”. “This grammar constitutes an important part of legal and political imagination [...] consist[ing] of series of rules and principles about the appropriate use of concepts like people, self-government, citizen, rights, equality, nation, and popular sovereignty.”¹⁵ By claiming that RoL represents a global consensus towards technical problems of governance, influential global governance institutions have urged various countries to undertake legal reforms in order to implement RoL. For example, the 2012 *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels* reaffirmed that good governance is fundamental for strengthening the *Rule of Law*. The declaration encourages international actors to support the implementation of RoL on request of states.¹⁶ Consequently, it “socialise[s] elites and legislators into the Rule of Law mind-set”.¹⁷ The increasing pre-commitment to RoL seems to be sustained by political self-maintenance of the legal profession and the commercialised professionalization of global civil society.¹⁸ Accordingly, not only global governance institutions offer their RoL programmes, guidelines and ‘good/best practices’, but increasingly private enterprises and transnational law firms are sprouting up everywhere. Subsequently, even though *Rule of Law* is *de facto* a *locus* of diverse, and sometimes contradictory and incompatible claims tackling ideas of universalism and diversity alike, RoL reforms have become a vehicle through which certain notions of law are promoted, partly imposed by dominant international actors. Particularly, in light of the often heavily relying of ‘post-conflict’ settings on international funding, RoL has become a layer of conditionality. Thus, competing international RoL actors are eager to find their ‘niche’ for ‘supporting’ post-war countries such as South Sudan in its transition to a ‘modern’ democratic state. Agreeing with *Migdal* and *Schlichte*:¹⁹

There is always something for international actors to fix, always a plan that the international community should contribute something to, and always something that goes wrong and needs fixing through further intervention and programs. Global discourses on development, democratization, human rights, peace and more have become the code for institutionalized involvement of all kinds of externally-rooted agencies that shape states on all continents.

15 *Maldonado, Daniela Bonilla*, *Towards a Constitutionalism of the Global South. The Activist Tribunals of India, South Africa, and Colombia*, Cambridge 2012, 1.

16 United Nations, *Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, New York 2012, UN Doc. A/RES/67/1.

17 *May*, 75.

18 *May*, 15.

19 *Migdal, Joel* and *Schlichte, Klaus*, *Rethinking the State*, in: *Schlichte, Klaus* (ed.), *Dynamics of States: The Formation and Crises of State Domination*, Aldershot 2005, 33.

One has to bear in mind, RoL promotion fatally assumes the existence of the ‘modern’ territorial state which belongs to the “fundamental ontology of political thought”.²⁰ Even though the idea of the state has been attributed with different meanings over time, the notions of territoriality (borders), internal and external sovereignty, and the state as a body of administrative institutions seem to prevail²¹. For instance, the presumption of state’s monopoly on the use of force does not take into account that in most states there are multiple structures of law and authority that (co-)exist interdependently with ‘the state’. The myth of the existence of a ‘territorial state’ becomes particularly obvious in post-conflict settings such as South Sudan where its constitutive elements (at least partly) do not exist.²² This state-centric assumption often leads to top-down rule-of-law efforts on state institutions and state legal systems whose impacts appeared to be rather doubtful. This ‘problem’ of implementation or the gap between ideas and practice has led to a certain self-reflexivity within the international actors’ scene. The 2004 UN Report on the *Rule of Law and Transitional Justice in Conflict and Post Conflict* states:

*The international community has not always provided rule of law assistance that is appropriate to the country context. Too often, the emphasis has been on foreign experts, foreign models and foreign-conceived solutions to the detriment of durable improvements and sustainable capacity [...] We must learn better how to respect and support local ownership, local leadership and a local constituency for reform.*²³

Accordingly, during the last decade a slight shift in the international conceptualisation of RoL can be observed: “some serious consideration [has been given] to legal pluralism”²⁴ dynamics taking into account that legal plurality is a “universal feature of social organisation”.²⁵ Besides the recognition of normative plurality the idea of ‘natural justice’ seems to be inherently ingrained within most of RoL narratives. They are connected to the belief that RoL has ‘universal qualities’, that it stands apart “as a non-ideological, even technical solution”.²⁶ Moreover, it is also assumed to be a precondition for establishing principles such as

20 Schlichte, Klaus, Staatlichkeit als Ideologie: Zur politischen Soziologie der Weltgesellschaft – Statehood as Ideology: Political Sociology of World Society, in: Giesen, Klaus-Gerd (ed.), *Ideologien in der Weltpolitik*, Opladen 2004, 150.

21 Schlichte, 150f.

22 See Seidel, Katrin and Sureau, Timm, Introduction: Peace and constitution making in emerging South Sudan and beyond the negotiation tables, in: Seidel, Katrin and Sureau, Timm (eds), *Emerging South Sudan. Negotiation Statehood* (Special collection), *Journal of Eastern African Studies* 9/4, (2015), 612-633.

23 United Nations, Report on the Rule of Law and Transitional Justice in Conflict and Post Conflict States, New York 2004, UN Doc S/2004/616, 6f.

24 Grenfell, 7.

25 Griffiths, John, What is Legal Pluralism, in: *Journal of Legal Pluralism and Unofficial Law* 24 (1986), 1-55 (38); Merry, Sally Engle, Legal Pluralism, in: *Law and Society* 22 (1988), 869-896 (871).

26 Carothers, 99.

human rights and democracy.²⁷ Some scholars have suggested that “the human rights movement has pushed an agenda of constitutionalism across the world in the belief that constitutional guarantees of judicial review, judicial independence, and separation of powers will aid the protection of Human Rights and the RoL”.²⁸

One of the cornerstones of the ‘rule of law industry’ seems to be the diffusion of a specific scheme of constitutionalism. When taking a closer look at the widespread constitution making in Africa since the 1990s, one can observe that the proclaimed so called “third wave of constitutionalism”²⁹ seemed to have opened up political space for new “experimentation”³⁰ under the guise of ‘democratic development’. African political elites have undertaken ‘liberal constitutional reforms’³¹ “to re-establish their credibility with external donors and assuage popular internal pressure”.³² Thereby, key elements of the constitutionalism grammar have become amongst others the recognition of civil, political and economic rights and freedoms, the separation of powers, an independent judiciary, the review of the constitutionality of laws, the control of the amendment of the constitution, and institutions that support democracy.³³ Moreover, the existence of a constitution is believed to solve ethnic or regional problems, and it will facilitate development – which can only take place through undiluted market forces”.³⁴ The endeavour seems to follow the problematic logic that the “adoption of the appropriate constitution is sine qua non for development”.³⁵ This faith inherently narrows down constitutional pluralism since it does not take much into account the legal pluralist realities despite its claim of ‘accommodating diversity’. When taking normative pluralities seriously, “constitutional change [...] must be informed by our recent historical experiences and take account of the fears, aspirations and hopes of the people as well as tailored to counteract the perennial and predictable problems of African politics”.³⁶ Thus, the emphasis of “participation of the broad spectrum of civil society [...] as guidelines for defining major contours of the constitution and the general political order”³⁷

27 *Rajagopal*, 1359-1362.

28 *Grenfell*, 33; see also UN Doc S/2004/616, 6, 10.

29 *Akiba, Okon*, *Constitutionalism and Society in Africa*, Aldershot 2004, 9.

30 *Ibid.*

31 *Prempeh Kwasi H.*, Africa’s “Constitutional Revival”: False Start or New Dawn? in: *International Journal of Constitutional Law* 5 (2007), 469-506.

32 *Fombad, Charles Manga*, Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa, in: *The American Journal of Comparative Law* 55 (2007), 1-45 (3).

33 *Fombad, Charles Manga*, Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects, in *Buffalo Law Review* 59 (2011), 1007-1108 (1014f); *Akiba*, 6.

34 *Adelman*, 78.

35 *Ibid.*

36 *Fombad*, Challenges to Constitutionalism, 32.

37 *Akiba*, 10.

seems too often have become a catchword in light of the underlying grammar of constitutionalism which promotes certain schemes of constitutionalism as the current experimentation in emerging South Sudan shows.

International constitution-making assistance is provided primarily to governmental actors in form of technical support and legal advisory services of ‘experts’.³⁸ National actors seem to be caught between competing international actors and often find themselves in a dilemma of how to manage the ‘well-meaning offers’. Offered services are based on certain conditions; coming with a range of normative and practical international benchmarks and conflict-resolution mechanisms,³⁹ and are almost always interwoven with political and economic interests. Particularly, since constitution-making processes in post-war settings severely rely on international funding, tensions between the different agendas of international actors and objectives of national actors seem to be accompanied by a complex mix of normative orders, as well as legal and political imperatives. Thereby, “[t]he discourse of constitution making now commonly employs terminologies of ‘stakeholders’, ‘clients’, and ‘best practices’, suggesting that the relationship between citizens and states can benefit from a market of expert knowledge”.⁴⁰ Thus, the ‘clients’ attempt to entrench offered RoL scheme into already pre-modelled constitutional frames in the hope of shoring up international legitimacy but also in the hope [that] over time [RoL] becomes fused with local legal cultures’.⁴¹ Even though there are no comprehensive blueprints as such,⁴² external interventions are led by model constitutional frames, which are creating ‘procedural objectivities’⁴³ through supporting handbooks and guidelines.⁴⁴ In one such case, the current Secretary-General of the UN sent a guidance note on ‘United Nations assistance to constitution-making processes’ to the heads of all UN departments, agencies, and programmes in June 2009. This document states:

Certain elements of a constitution-making process require careful early advance planning to be carried out successfully in an inclusive, participatory and transparent fashion. The UN should advise national actors of these requirements and assist them to begin the process in a timely fashion, taking into account the country-specific circumstances [...].

38 See Kendall, 1-15.

39 Eriksson, Mikael and Kostič, Roland, Peacemaking and Peacebuilding: Two Ends of a Tail, in: Eriksson, Mikael and Kostič, Roland (eds), *Mediation and Liberal Peacebuilding: Peace from the Ashes of War?* New York 2013, 5-21 (6); Sannerholm, 103f; Humphreys, 7ff; Kendall, 9f.

40 Kendall, 2.

41 Grenfell, 13.

42 Sannerholm, 119.

43 Rottenburg, Richard, *Far-Fetched Facts: A Parable of Development Aid*, Cambridge 2009, 140.

44 See Boutros-Ghali, Boutros, *An Agenda for Peace: Preventative Diplomacy, Peacemaking and Peacekeeping*, New York 1992; Ki-moon, Ban, *Building a Better Future for All: Selected Speeches of United Nations Secretary-General Ban Ki-moon 2007-2012*, New York 2013.

In particular, the creation and implementation of public education and consultation campaigns, and the securing of funds, human and material resources require advance planning. [...] The process should than be followed by a structured national dialogue or consultation process that feeds back the views of the people to the decision makers involved in the drafting and debating of the constitution.

Attached to this guidance note is an example of a constitution-making process timeline [...].

This guideline reflects international policy discourses on ‘local ownership’: “The common people in post-conflict societies are [...] expected to be consulted and have their say on the formulation of new constitutional frameworks”.⁴⁵ However, as experiences in constitution making have demonstrated,⁴⁶ public participation does not serve as a significant source of legal ideas. Rather, symbolic participation may stimulate ‘talks’ among the people on constitution (-making) whereby a certain legitimacy is produced through the feeling of participation and through processes of ‘naturalization’. One has to bear in mind that the concept of ‘ownership’ has emerged as a lesson learned in the general debate on what is known as ‘aid’ or ‘development’ assistance as the 2004 UN ‘*Report on the Rule of Law*’ illustrates.⁴⁷ A paternalistic attitude of international donors appears to live on in a new disguise that can be illustrated by way of example with the chosen case study.

C. South Sudan’s constitution making within Rule of Law frameworks

In view of this, the South Sudanese constitution making is a product of the ‘industry’, whereby the constitution itself has become a crucial instrument of normative state building. The current devastating political and military re-negotiations bluntly unveil that neither the production of the transitional constitutional arrangements nor the current efforts towards a ‘permanent’ constitution could establish or consolidate state actors’ legitimacy and the identity of the new state.

Already the earlier produced *Comprehensive Peace Agreement* of 2005 (CPA) with its *Interim Constitution of Southern Sudan (ICSS)* was not only shaped by international interventions, but also paved the way for a bunch of new models of constitution making. The making of both, the *Transitional Constitution of the Republic of South Sudan (TCRSS)*, and the upcoming ‘permanent’ constitution show that many local actors are ousted from the decision-making process as well as the new models are locally redefined through adaptation and appropriation.

45 Sannerholm, 124.

46 Klug, Heinz, South Africa’s Experience in Constitution-Building, in: Morris, Caroline, Boston, Jonathan and Butler, Petra (eds), *Reconstituting the Constitution*, Berlin 2011, 51-82 (70f); Saati, Abrak, *The Participation Myth. Outcomes of Participatory Constitution Building Processes on Democracy*, Umeå 2015.

47 United Nations, *Report on the Rule of Law and Transitional Justice in Conflict and Post Conflict States*, New York 2004, UN Doc S/2004/616, 6f.

After the TCRSS have been adopted in July 2011, a few local political actors utilizes already the constitution-making process to secure own ideas and interests, whereby the TCRSS has become a perfect power tool with unpredictable effects on the governmental arrangement. It has effects on the current political order since the *Transitional Constitution* is even more under question:

For instance, a 2015 Amendment of the TCRSS not only extended the mandate of the *National Constitutional Review Commission* (NCRC) until 2018, but also the tenure of the president office and of the parliament. This was only allowed to happen because numerous still unanswered fundamental questions regarding the governmental structure, division of powers and competencies have been already predetermined in the transitional constitutional arrangements on the basis of respective modules taken from the international constitution-making toolboxes. It becomes visible in the constitutionally enshrined excessive powers of the president. The political reality since 2012 has shown that President *Salva Kiir Mayardit* used his ‘hyper-powers’ to his favour. Since *Riek Machar’s* announcement to run for presidency, *Kiir* ousted his vice president, as well as his entire cabinet, and eight out of ten state governors and appointed ‘caretakers’. The president’s ability to dissolve, for instance, “a state Legislative Assembly in the event of crisis in the state”,⁴⁸ seems to be a break with the conventional separation of powers.

The making of the TCRSS had been controlled by a *Technical Committee to Review the Interim Constitution of Southern Sudan*, appointed by the president, comprised of a two third dominance of the ruling *Sudan People’s Liberation Movement* (SPLM).⁴⁹ This proved to be convenient as a two-third quorum was required for the adoption of the draft of the TCRSS.

Certainly, the way the TCRSS was drafted might be at least partly due to (international) political pressure and time constraints. The adoption of the TCRSS by the parliament was pushed through only a few days before the declaration of independence even though crucial issues regarding the political order, such as government structure, the distribution of state functions, and issues involving the distribution of powers between the federal and state governments⁵⁰ remained unresolved. During a last seven-hour legislative debate, many members of parliament (MPs) complained about the haste in which the draft was negotiated behind closed doors. The TCRSS draft was even referred to polemically as the “SPLM constitution”.⁵¹ Concerned MPs were reassured with the argument that full participation and

48 Art. 101[r] TCRSS.

49 *Seidel, Katrin and Moritz, Janine*, The Transitional Constitution of the Republic of South Sudan. Ein kontroverses Dokument des jüngsten Mitglieds der Staatengemeinschaft, in *GAIR-Mitteilungen* 3 (2011), 92-98 (92).

50 *Jok, J. L.*, Presentation of the Transitional Constitution of the Republic of South Sudan, SSLA Ordinary Sitting 18, 7 May 2011, Juba [recordings provided to the author by NLA on 2 May 2013].

51 Southern Sudan Legislative Assembly, The Transitional Constitution of South Sudan. Ordinary Sitting 25, Second Session, 6 July 2011, Juba [recordings provided to the author by NLA on 2 May 2013].

discussions of all contentious issues would be constitutionally guaranteed by the *National Constitutional Review Commission* (NCRC) and subsequently by the *National Constitutional Conference* (NCC).⁵² The TCRSS outlines the process of how to achieve the objective of a ‘permanent’ national constitution⁵³ with the proclaimed goal of “providing the new nation with a more people driven constitution [than the TCRSS]”.⁵⁴ The chosen constitution-making design follows the internationally widespread applied stages of constitution making, which are also promoted by the 2009 UN guidance note on “United Nations assistance to constitution-making processes”:⁵⁵ drafting, consultation, deliberation, adoption, and ratification.

Accordingly, the drafting of the ‘permanent’ constitution has been delegated to the NCRC, consisting of fifty-four members.⁵⁶ A closer look at its composition, however, reveals that forty-three of its members represent political parties while twenty-six were appointed by the SPLM.⁵⁷ As was the case for the TCRSS drafting process, the ruling political party and its alliances carved out again for themselves a privileged position for the negotiation of the political leeway necessary to assert significant control over the constitution-making process.

Moreover, the mandate of the NCRC is again limited to ‘reviewing’ not ‘revisiting’ the constitutional document.

The general constitution-making design discloses another dilemma: It seems to prevent a citizens’ driven constitution since governmental actors debate rather among themselves not only in the first stage, in the NCRC. Whatever input from the citizens will arise in the second stage, during the *National Constitutional Conference*, it will be decided afterwards in the third stage, the *National Legislative Assembly* (NLA) by the politicians whose overwhelming majority are members of the SPLM.

Additionally, the envisioned time frame of the project ‘permanent’ constitution of 2015 was obviously over-ambiguously set in light of already two periods of extensions, currently until 2018.⁵⁸ Already by August 2012 the NCRC chairperson *Akolde M. Tier* admitted, the commission “is in a state of coma” due to a dearth of key resources such as financial means and appropriate locations and “due to a lack of political will” as informants critically re-

52 The NCC is to deliberate on the NCRC draft and gather public input. Subsequently, ‘the President shall deliberate and adopt (Art. 203 TCRSS).

53 See Art. 202-3 TCRSS.

54 *Akolde M. Tier*, Juba Lecture Series 2013 on ‘Building the constitution in South Sudan’, University of Juba, 6 March 2013 [recording provided to the author by Rift Valley Institute].

55 *Ki-moon, Ban*, Guidance Note of the Secretary-General: United Nations Assistance to Constitution-Making Processes, New York 2009.

56 Presidential Decrees: RSS/PD/J/02/2012; RSS/PD/J/03/2012; RSS/PD/J/09/2012; RSS/PD/J/36/2012.

57 Presidential Decree RSS/PD/J/03/2012.

58 TCRSS (Amendment Act 2013); TCRSS (Amendment Act 2015).

marked.⁵⁹ Moreover, accommodating the aims of having a pluralist commission and at the same time the people who have knowledge and experience in constitutional matters seemed to be problematic.⁶⁰ Many informants – including members of the SPLM political leadership – expressed their dissatisfaction with the constitution making conducted so far, but regarded it as a “national duty” to continue working within the NCRC.⁶¹ Members of CSOs criticised the prevailing view that “a constitution is an agreement between political parties”⁶² instead of including all the people and doing it in public.⁶³

The constitution making is accompanied by many international experts. The ‘technical assistance’ is provided not only by comparative constitutional law experts, but also by manifold international actors such as the United Nations (UN) agencies, the United States Agency for International Development (USAID), the Department for International Development (DFID), the International Development Law Organisation (IDLO), Swiss Peace, etc. Moreover, private enterprises and transnational law firms such as Public International Law & Policy Group [PILPG] promoting their tool (law) as a solution to problems of order. The aforementioned 2009 UN guidance note on “United Nations assistance to constitution-making processes” recommends: “At various stages throughout th[e constitution-making] process national and transitional authorities may choose to engage international assistance, both in terms of the process and on substantive constitutional law”.⁶⁴ Following the guideline and in an attempt to limit competition among the international actors it is interesting to note, that some international actors are specifically named by a presidential order. Accordingly, the *National Constitutional Review Commission* is to “recruit or invite experts whenever required, to assist it in its work’ and ‘the secretariat may seek technical assistance from international partner organizations such as IDLO, PILPG, UNMISS [...]”.⁶⁵ One might ask who is in fact negotiating the constitution and in which frames of references?

The influence of international actors on the constitution making becomes e.g. visible in the 2013-14 NCRC-Action Plan.⁶⁶ The constitution-making project is not only pre-designed by international guidelines and templates, but also by ‘procedural objectivities’. Thereby, “superficially neutral, elementary procedures are introduced, which are supposed to correspond to an unproblematic reality of facts and data”⁶⁷ masking underlying normative cat-

59 Interview with *G. N. Aciek*, Juba University, Juba, 14 April 2013.

60 *A. M. Tier*. A Note on the Present State of the NCRC, August 2, 2012, Juba [unpubl.].

61 Interview with *A. R. Thiik*, Nyakulan Cultural Center, Juba, April 8, 2013.

62 *A. M. Tier*, Building the constitution in South Sudan, University of Juba, 6 March 2013 [recording provided to author by Rift Valley Institute].

63 *Adigo*, Juba Lecture Series 2013 on ‘Building the constitution in South Sudan’, University of Juba, Juba, 6 March 2013 [recording provided to author by Rift Valley Institute].

64 *Ki-moon*, Guidance note, 5.

65 See Art. 14(7) Presidential Decree RSS/PD/J/02/2012.

66 IDLO, Strengthening Constitutionalism and Rule of Law in South Sudan, Project Briefing Notes [unpubl.].

67 *Rottenburg*, 137.

egories. Such plans and schedules determine what actions are viewed as necessary to achieve specific goals, as well as the conditions, timing, and personnel involved.

The NCRC-Action Plan follows the aforementioned 2009 UN guidance note⁶⁸ and the attached example of a process, in terms of structure, activities, and timeline. The plan has been adapted to the abovementioned first prolonged timeline and to the country-specific setting. It takes into account specific geographical conditions such as the rainy season, which does not allow for many activities for the NCRC outside of more accessible cities. Three interrelated components are involved in the sequencing: 1) civic education and public consultation proceedings; 2) constitutional review proceedings; 3) NCRC deliverables; three months each. Each component is subdivided further into several activities. Besides, the NCRC Action Plan attempts to determine temporality by sequencing time in which the respective activities are expected to be fulfilled. Specific type of project management language is used as well, making particular use of procedural verbs such as organize, execute, consult, recruit, create, constitute, and produce. This language reflects a linear process and objective procedures.

Moreover, the plan shows how international concepts of ‘ownership’ are ingrained and translated into the local setting. With regard to the idea of ‘national ownership’, the Action Plan determines ‘responsible actors’ and ‘implementing actors’. By and large, the NCRC is defined as the responsible actor whereas the international partners are *de jure* implementing actors. However, activities relating to technical assistance and to special expertise are constructed conversely, e.g. international actors are responsible for creating online public submission forms, recruiting experts for research on South Sudan, producing comparative studies, recruiting constitution drafting experts, etc.

Having this in mind, one may ask who actually owns the process. Even though it is the NCRC that officially ‘owns’ it as part of the national elites (as they are accountable for its outcome), strategic key activities such as ‘recruiting, establishing, drafting, and finalizing’ are carried out by the international partners. Accordingly, ‘national ownership’ in emerging South Sudan might be rather seen ‘as expressions of the end result, while during the actual process ownership is curtailed through notions of shared ownership or by external supervision’.⁶⁹

This brings us to the issue of ‘popular ownership’ mentioned in the 2009 UN guidance note as well as to the constitutionally enshrined goal of an inclusive constitution-making process⁷⁰. The NCRC Action Plan foresaw civic education and public consultation campaigns of about six months in length. Accordingly, the NCRC launched a civic education programme to involve the public in the ten states of South Sudan in the constitution-making

68 *Ki-moon*, Guidance note, 6f.

69 *Narten, Jens*, Post-Conflict Peacebuilding and Local Ownership: Dynamics of External-Local Interaction in Kosovo under United Nations Administration, in: *Journal of Intervention and State Building* 2 (2008), 369-390.

70 The NCRC shall “collect views and suggestions from all the stakeholders on any changes that may need to be introduced to the current system of governance” (Art. 202(6) TCRSS).

process in July 2013. Due to a continuous lack of funding to fully implement the civic education programme in all ten states, the process floundered and the campaign was doomed to failure.⁷¹ Moreover, the December 2013 political crisis “has increased such lack of funding, limited the availability of technical support and has restricted the NCRC’s ability to continue its work due to security concern”.⁷² The NCRC chairperson admitted after three years: “in any event constitution making process is not a switch on switch off operation”.⁷³ Moreover, he emphasised the significance of civic engagement and questioned the chosen constitution-making design which does not seem to fulfil the proclaimed idea of a peoples driven constitution.⁷⁴ According to him:

*The current constitutional making process could be a real basis and catalyst for a durable peace in the country; Acknowledging the need for the people of South Sudan to be given the opportunity in determining their socio-economic and political destiny through nationwide civic education, we strongly recommend that the mandate of the commission be extended for a period not less than three years subject for review when a permanent peace is realised in the country.*⁷⁵

It remains to be seen how the current political re-negotiations are impacting the continuation of NCRC’s work, what effects the general re-structuring of the state arrangement and the re-shuffling now taking place among the presidential appointees will have, and what an amended action plan will look like. Thus, the question is still open whether the civic education and public consultation tools will go beyond a mere awareness campaign on the ‘official’ constitution-making process of the (inter-)national elites. Moreover, one could ask how the NCRC will deal with the idea of popular ownership while following the convincing logic of the ‘procedures of objectivity’. A conceptual dilemma exists between the public consultation process and the application of the “technical game”⁷⁶ as, for example, the timetable draft is not open and flexible enough for the introduction and re-evaluation of ideas, which might arise within the public consultation process.

D. Concluding remarks

Let me conclude by emphasising again that the ‘assisted’ constitution-making process takes place in a highly segmented South Sudan where violent and non-violent negotiations on the

71 NCRC, Update on the Activities of the Commission and Request for Extension of Mandate, (RSS/NCRC/LT/No.108/2014), Juba, December 19, 2014 [unpubl.].

72 *Ibid.*

73 *Ibid.*

74 Conversation with *Akolda M. Tier*, NCRC, Juba, May 14, 2015 [conducted by *K. Seidel*].

75 NCRC, Timelines for Constitutional Review Entities in Other Countries, March 23, 2015 [unpubl.].

76 According to *Rottenburg*, 142, the “[t]echnical game is not an instrument of hegemony, but the only code available for carrying out transcultural negotiations”.

mode of statehood are still on-going. Numerous issues to be agreed on but already predetermined in the Transitional Constitution of 2011 are opposed by a multitude of actors with different claims. In light of the absence of a ‘nation’ a predetermination of national ideas in the ‘supreme law of the land’ seems to be questionable.

It has been shown that the NCRC’s rush to draft a ‘permanent’ constitution serves only to keep many actors from participating instead of integrating them and seems to be chiefly a matter for the ruling national elite and international actors. The national actors involved are prone toward applying and redefining constitutional frameworks according to their own interests, creating procedural objectivities, and utilizing elementary procedures such as guidelines and templates, and in effect adapt their normative frameworks to international ones. They deal with this dilemma through the repetition of the mantra of ‘public ownership’, with its participatory ideas. Thereby, this idea of ‘public ownership’ seems to have become rather a tool of gaining legitimacy. Not only this, particularly the Transitional Constitution of 2011 has become a perfect legitimizing power tool for the governmental elite to secure own interests and positions.

The so far conducted constitution-making endeavour shows once again that international assistance seems to be predominantly focussed on homogenising local settings with the support of international guidelines, taking not much into account the specific local plural political constellation with its manifold normative contestations. Accordingly, the Rule of Law toolsets provided by international actors regulate the constitution-making process in a way that seems to reduce the chances of integrating ideas from different parts of the segmented society while proclaiming the idea of ‘popular ownership’. The question arises whether those tools in the emerging South Sudan become rather an obstacle in the quest for ‘legal certainty’, ‘stability’ and ‘peace’. Recognizing some of the claims, while legally regulating disputes through legal provisions, can impede on-going negotiation processes and may rather intensify than solve conflict dynamics.

The hitherto constitution-making efforts uncovered bluntly that the *Rule of Law* recipes of the international actors are not working. One reason for this can be seen in the underlying assumption to perceive South Sudan as a ‘re-construction state’ instead of a ‘construction state’, assuming a certain degree of institutionalisation, which de facto does not exist. Currently, the international ‘technical support’ has shifted from state actors to ‘non-state actors’ such as civil society organisations, religious and traditional authorities which will set in motion new dynamics. Without the massive international funding and ideas of how to produce a constitution, South Sudan governmental actors are forced to rely on themselves and have started rethinking their constitution making. The ‘political crisis’ of 2013 unveils that South Sudanese actors need to reflect on the internal political dynamics and root causes and to negotiate on the fundamental issues to be inscribed in the constitution. The extended transition period until 2018 without any kind of ‘supreme law of the land’, while refraining from using a constitution as a symbol of state and thus relieving the pressure to produce one quickly seems to be a first step forward.