

ENTRENCHING CONSTITUTIONALISM AND THE RULE OF LAW IN SOUTH SUDAN

Hanifa Tyakagire¹

¹PhD in Law candidate, Ahmad Ibrahim Kulliyah of Laws,
International Islamic University Malaysia
Email: hanifahty@gmail.com

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Abstract

Purpose of the study: The purpose of a study on entrenching constitutionalism and the rule of law in South Sudan is to examine the current state of the country's legal and political systems, identify areas of weakness and propose strategies for strengthening the country's institutions and promoting more significant adherence to constitutionalism and the rule of law for a fruitful constitutional making process.

Methodology- The study entails a content analysis that applies doctrinal legal research, which relies on document analysis of both primary sources, such as the 2011 Transitional Constitution, and secondary sources, including documentary review and relevant literature. The study identifies the obstacles to implementing these principles, such as a lack of political will, insufficient resources, ongoing conflict, liberators who ultimately become dictators and suffocating the judiciary and the legislature. The study assesses the efficacy of the measures implemented to address these challenges and their impact on promoting constitutionalism and the rule of law through comparative analysis.

Findings- The paper critically analyses the results. It draws appropriate conclusions based on the research, ultimately recommending how the South Sudanese government can better promote constitutionalism and the rule of law in South Sudan. Among the recommendations could be to promote civic education, strengthen the judiciary, and deal with the conflict's underlying causes.

Implication- The study's implications on entrenching constitutionalism and the rule of law in South Sudan can be significant. By identifying the weaknesses in the country's legal and political systems, proposing strategies for strengthening institutions, and promoting greater adherence to constitutional principles and the rule of law, the study could help lay the groundwork for a more stable and democratic society.

Originality- This paper highlights the fundamental importance of the principle of constitutionalism and the rule of law in South Sudan.

Keywords: constitutionalism, the rule of law, judiciary, constitution, constitutional-making process.

1. Introduction

South Sudan, one of the world's youngest nations, has experienced violence and dictatorship since its independence in 2011.¹ South Sudan has been through many cycles of conflict and authoritarianism.² The 2005 Comprehensive Peace Agreement and transitional justice initiatives have acknowledged that South Sudan's governance problems come from the lack of a stable political and legal order and respect for constitutionalism and the rule of law, leading to totalitarian regimes.³ This has thus initiated the constitution-building process to foster a stable order conducive to sustainable peace and adherence to constitutionalism and the rule of law. The constitutional process is fundamental to peaceful political transitions and essential to post-conflict peacebuilding. A constitution's success is determined by both its procedure and its content. Constitutional reform entails debating significant and complex issues that have long-term implications for the nation and its people. As a result, developing a constitution, rather than its content, is vital for the nation's future. Ojambo⁴ elucidates in his article that if the leaders do not respect the constitution, it is bound to be used to sustain the persons or parties in power to their advantage.

Through a content analysis, this paper examines the principle of constitutionalism

and the rule of law in the constitution-making process following the conflict in the Republic of South Sudan. It focuses on how these principles can be entrenched into the new constitution. Additionally, it looks at their adherence in practice in South Sudan for sustainable peace and commitment to constitutionalism and the rule of law. Like many countries, South Sudan adopted a constitution to attain its independence. The third wave of democratization accentuated constitutions without presidential limits.⁵ Many nations, like Uganda, adopted progressive and democratic constitutions on paper. Nevertheless, Kenya⁶ and Malaysia, among other countries, have found that establishing democratic regimes and adopting democratic constitutions has been a straightforward process. The most challenging aspect has been solidifying constitutionalism and the rule of law, which occasionally results in the puzzle of constitutions without constitutionalism because enacting a constitution differs from practicing constitutionalism.

Constitutionalism is the best way to safeguard democracy because it is founded on the rule of law, the separation of powers, and the protection of individual rights. To protect democracy and promote citizen well-being, governments and societies must prioritise and strengthen constitutionalism. It is trite to note that constitutionalism is broadly dependent on adherence, and as a result of the preceding discussion, I came up with a theory known as the Theory of Constitutional Adherence. Constitutional adherence emphasizes respecting and upholding the Constitution as

¹ Jok Jok Madut (2023). "7 South Sudan, Politics of Liberation and Contest over Juba." *Africa and Urban Anthropology* p.127.

² Nyadera, Israel Nyaburi, and Michael O. Kisaka (2022). "Examining the Prospects of Consociational Power-Sharing as a Conflict Resolution Strategy in South Sudan." *African Journal of Political Science* Jun 3;10 (1):107-16.

³ Ndiloseh, Melvis (2022). "Transitional Justice Provisions in the Juba Peace Agreement: A Critical and Prospective Overview." *African Conflict & Peacebuilding Review*. Vol 12 (2), p.49-70.

⁴ Ojambo, Robert (2022). "The 1995 Constitution as a Tool for Dictatorship in Uganda: An African Dilemma of Constitutionalism." *In Democracy and Africanness*, pp. 3-19. Springer, Cham,

⁵ Gerzso, Thalia, and Nicolas van de Walle (2022). "The Politics of Legislative Expansion in Africa. *Comparative Political Studies*. " Dec;55(14):2315-48.

⁶ Onyango Gedion. (2023). "State Politics and Public Policy in Africa: A State Transformation Perspective". *In State Politics and Public Policy in Eastern Africa: A Comparative Perspective*. pp. 21-52. Cham: Springer International Publishing.

the ultimate source of governmental power and legitimacy. It is a fundamental principle of constitutionalism and the rule of law.

2. Research problem and objectives of the study

The primary research question is: How can constitutionalism and the rule of law be entrenched in South Sudan's new Constitution? The study's main objective is to examine the entrenchment of constitutionalism and the rule of law in South Sudan's new Constitution. The study also aims to specifically (1) examine the role of constitutionalism and the rule of law in South Sudan, (2) to assess the strengths and weaknesses of South Sudan's constitution-making process, (3) to identify impediments and propose strategies for the application of constitutionalism and the rule of law in South Sudan, and (4) To draw lessons from two commonwealth countries that are Malaysia and Kenya constitutionalism and respect of the law.

3. Understanding the concepts of constitutionalism and the rule of law

3.1 Constitutionalism as a Concept

Constitutionalism is the vantage point that a constitution should limit a government's authority. The Constitution, which is the supreme law of the land, lays out the guidelines for how the government ought to function. In agreement with Waluchow⁷, Balkin⁸ defines constitutionalism as the notion that a government's power and authority should be constrained by a set of laws or principles, frequently enshrined in a written document like a necessary constitution for a state's survival. In addition, according to

⁷ Waluchow, Wilfred J. (2020). "The Living Tree Very Much Alive and Still Bearing Fruit: A Reply to the Honorable Bradley W Miller." *Queen's LJ* 46 p.281.

⁸ Balkin, Jack M. (2019). "The Recent Unpleasantness: Understanding the Cycle of Constitutional Time." *Ind. LJ* 94 p.253.

Vance,⁹ a well-known treatise, the constitution serves as the "fundamental law" of a state, establishing the rules for exercising public authority to limit the scope of the government. However, Awolich¹⁰ and Fombad¹¹ reveal that the idea behind constitutionalism is that a government should be able to act forcefully and effectively while still adhering to its legal limitations and being sufficiently constrained to protect its citizens from arbitrary rule.

Constitutionalism is the state of government that upholds the rule of law, governs within the bounds of a constitution, and promotes peaceful changes in power.¹² A constitution is considered legitimate when it adheres to constitutional principles, including democracy, limited government, and how citizens choose to be governed.¹³ Therefore, despite the various views of scholars on constitutionalism, it is trite to say that everyone in a constitutional system, including those in positions of authority, must abide by the law to prevent power abuse.

3.2. The rule of law as a concept

The rule of law has its roots in ancient Rome, where philosophers like Plato and Aristotle first discussed the idea during the

⁹ Vance Natalie Perrin-Smith. (1999). "My Brother's Keeper: The Criminalization of Nonfeasance: A Constitutional Analysis of Duty to Report Statutes." *Cal. WL Rev.* 36. P. 135.

¹⁰ Awolich, Abraham. (2016). "The challenge of constitutionalism and separation of powers doctrine in South Sudan."

¹¹ Fombad, Charles M (2007). Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa. *The American Journal of Comparative Law*, 55 (1), p.1-45.

¹² Kanyeihamba George W. (2015). *Kanyeihamba's Commentaries on Law, Politics and Governance*. Law Africa Publishing Ltd.

¹³ Shamrahayu Ab Aziz. (2016). Constitutionalism and Role of Muslim Jurists 17/11/2016 <https://www.ikim.gov.my/new-wp> (accessed on 17th January 2023).

creation of the first republic.¹⁴ Professor Dicey elaborated on this concept in his book "The Law of Constitution", published in 1885, and established the three principles of the rule of law: the supremacy of the law, equality before the law, and independence of the judiciary. The practice of law advocates that the state should be governed by the law rather than the ruler or elected representatives.¹⁵ However, Plato believed the ideal kind of government was the rule of the best man, not the rule of law, because the latter cannot speak to every circumstance or foresee every possible consequence. Nonetheless, both the populace and those in power must believe that the government operates within the bounds of the law, which entails limiting the government to exist. The rule of law may end up being a meaningless phrase that tyrannical governments can use without worrying about consequences because of all the uncertainty.

According to renowned constitutional law expert Howard Jay Graham¹⁶, constitutionalism combines various elements, such as laws and precedents, ideals, and goals, into a fundamental and supreme law that upholds the rule of Law. Contrarily, Fehrenbacher¹⁷ asserted in his book that the Constitution and constitutionalism are a collection of beliefs, values, and social norms from which the idea that the state's power derives and is constrained by a body of fundamental law.

¹⁴ Mokshita Jain. (2017). Rule of Law: Essence of Administrative Law in India, EDUCONCOURS. educoncours.com/2017/10/08/rule-law-essenceadministrative-law-india/.

¹⁵ Ranawat, Moksh. (2018). "Rule of Law in India: The Foundation of Our Democracy." *Supremo Amicus* 5. P.145.

¹⁶ Graham, Howard Jay. (2013). *Everyman's constitution: historical essays on the fourteenth amendment, the "conspiracy theory," and American constitutionalism*. Wisconsin Historical Society

¹⁷Fehrenbacher, Don E., Robert P. Sutton, and Herbert A. Johnson (1991). "Southern Constitutionalism and Constitution Making."

Constitutionalism is a synthesis of the ideas of "limited government," "separation of powers," and "rule of law" as opposed to a document for the administration of state affairs.

4. Constitutionalism and the Rule of Law in the Constitutional-making Process

A nation's constitution is the fundamental law to which all other laws must adhere, as was previously stated. G Skapska¹⁸ notes that a country's constitution is the basic tenet of its character and political framework and occasionally needs to be revised. He referred to it as the dynamic basis for developing into a politically organized, modern country. South Sudan began creating a permanent constitution after gaining independence in 2011. A 45-person constitutional review commission was appointed in 2011 to kick-start the process. The commission was responsible for gathering suggestions from the general public and delivering them to the committee responsible for drafting the Constitution. President Salva Kiir Mayardit appointed 45 people to the drafting committee. However, the civil war 2014 caused the government's priorities to change, which caused the process to stall. The government shifted its attention to ending the war. After numerous negotiations, the warring parties signed a peace agreement in 2015. However, in 2016, the peace agreement fell apart and was revived in 2018. Now that South Sudan is working on a new constitution, it must ensure that constitutionalism and the rule of law are incorporated into the constitutional-making process. These principles are crucial in any democracy and should be incorporated into the constitution to protect citizens' rights and freedoms and hold the government accountable.

¹⁸ Skapska, Grażyna. (2019). "Abuse of the Constitution as a means of political change: sociological reflections on the crisis of constitutionalism in Poland". *Polish Sociological Review*.208 (4): p.421-38.

These concepts are essential for ensuring that the constitutional-making process is fair, transparent, and accountable.¹⁹ The law should be transparent, predictable, and equally applied to everyone. This helps prevent arbitrary actions by those in power and ensures justice is done. Several fundamental principles must be followed for constitutionalism and the rule of law to be reflected in constitutional-making.²⁰

The constitutional-making process must be inclusive and participatory.²¹ Chambers²² elaborated that this may not be direct, but it should be inclusive. All stakeholders - including civil society groups, political parties, and ordinary citizens - should have a voice in the new constitution. Also, the process must be transparent so everyone can see what is happening and how decisions are made. This promotes the process's credibility and trustworthiness. Those involved in the process must be accountable for their actions. This means there must be mechanisms for holding them responsible if they fail to follow established procedures or act outside their authority. Additionally, the process must be conducted following the law.²³ This means all decisions must be based on legal principles

consistent with the existing legal framework. Finally, the process must be focused on building consensus among all stakeholders. It also requires a commitment to finding common ground and working towards a shared vision for the future.

Following these principles, constitutional-making can be a powerful tool for promoting constitutionalism and the rule of law. Involving all stakeholders in the process helps to build trust and confidence in the new constitution. Ensuring transparency and accountability helps prevent power abuses and ensures everyone is treated fairly. Focusing on consensus-building also helps to create a strong foundation for democratic governance and adherence to democratic principles.

5. Elements of Constitutionalism

A crucial step toward ensuring that a nation's constitutional system is founded on equality, human rights, and the rule of law is enshrining democratic values in a constitution. A constitution is a fundamental document laying out the basic rules for a nation's governance. All other laws and regulations must comply with them because they serve as the highest legal authority. The democratic principles should clearly be stated, giving the basis for good governance. The definition of constitutionalism by Charles Fombad²⁴ emphasizes the significance of striking a balance between the need for efficient government and restrictions on governmental power. He contends that constitutionalism is based on fundamental principles that offer a framework for guaranteeing government accountability. Fombad points out specific elements of constitutionalism, including sovereignty, the separation of powers, and control over constitutional amendments.

¹⁹ Ndulo Muna. (2019) "Constitutions and Constitutional Reforms in African Politics". In *Oxford Research Encyclopedia of Politics* Jul 29.

²⁰ Nchimbi Hamza (2019). *Rule of Law under Multiparty democracy in Tanzania: Law and Practice* (Doctoral dissertation, The Open University of Tanzania).

²¹ Raveau, María Paz, Juan Pablo Couyoumdjian, Claudio Fuentes-Bravo, Carlos Rodriguez-Sickert, and Cristian Candia. (2022). "Citizens at the forefront of the constitutional debate: Voluntary citizen participation determinants and emergent content in Chile". *Plos one*. Jun 6;17(6): p.0267443.

²² Chambers Simone. (2019). Democracy and constitutional reform: Deliberative versus populist constitutionalism. *Philosophy & Social Criticism*. P.1116-31.

²³ Hing Vandanet. (2019). "Application of the Cambodian Constitution: An Assessment of the Constitutional Law-Making Process and the Right to Public Participation. *JSEHR*. P.3:39.

²⁴ Fombad, Charles Manga, Assefa Fiseha, and N. C. Steytler, eds. (2022). *Contemporary Governance Challenges in the Horn of Africa*. Routledge

5.1 Sovereignty of the People

Christopher²⁵ and Puterman²⁶ discussed the importance of people's sovereignty as a foundation of democracy. The sovereignty of the people in South Sudan is the principle that the power and authority of the government emanate from the will and consent of the people. In other words, the people of South Sudan can choose their leaders and determine the country's direction. This principle is enshrined in the Transitional Constitution of the Republic of South Sudan, 2011, which states, "All power is inherent in the people and shall be exercised by them through their democratically elected representatives or directly." The sovereignty of the people forms part of the basic structure of a constitution, and it has been entrenched in many written and unwritten constitutions. And in any democratic country with a democratic constitution, the people should be left to determine their leaders through their representatives or directly. And people only exercise their will through elections and political participation.

While there has been progress in conducting elections and encouraging political participation in South Sudan, corruption, weak institutions, non-adherence to constitutionalism and the rule of law, and ongoing conflict remain severe impediments to the principle's full realization. The ability of the government and the populace to work together to overcome these obstacles and build a strong, democratic, and prosperous nation will determine the extent to which South Sudanese sovereignty is realized.

²⁵ Morris, Christopher W. (2000). "The Very Idea of Popular Sovereignty: 'We the People' Reconsidered." *Social Philosophy and Policy*. 17 (1). Cambridge University Press: p. 1–26.

²⁶ Putterman, Ethan. (2010). *Rousseau Law and the Sovereignty of the People*. Cambridge University Press.

5.2 Supremacy of the Constitution

Article 3²⁷ beautifully provides that "(1) This Constitution derives its authority from the people's will and shall be the supreme law of the land. It shall have a binding force on all persons, institutions, organs and agencies of government throughout the Country.

(2) The authority of government at all levels shall derive from this Constitution and the law.

(3) The states' constitutions and all laws shall conform to this Constitution."

The above provision illustrates Constitutional supremacy, which refers to the Constitution's finality over other instruments or powers.²⁸ As noted earlier, the people are sovereign in constitutionalism, and the constitution is supreme. Constitutional supremacy means that all authorities and citizens must abide by the nation's constitution, representing the people's will. A constitution is considered legally legitimate when it reflects the principles of constitutionalism, including how citizens choose to be governed, democracy, and limited government. The legal legitimacy of a constitution is derived from the widespread belief and acceptance that the government's actions are legitimate because they adhere to the laws outlined in the constitution, which are based on acceptable constitutional norms. The division of political power among different branches of government through a constitution helps to restrict the government's actions, and it is through this restraint that the constitution becomes legally legitimate.

Meanwhile, whenever there is constitutional supremacy, people are sovereign, and their will is expressed through the Constitution, which is the supreme law of the land. All other laws, including those made

²⁷ Article 2 of The Transitional Constitution of the Republic of South Sudan, 2011

²⁸ Limbach Jutta. (2001). The Concept of the Supremacy of the Constitution. *The Modern Law Review*, 64(1). p. 1-10.

by the government and its agencies, must be consistent with the provisions of the Constitution. The government derives its powers from the people and must act by the provisions of the Constitution. The people's will, as expressed through the constitution and democratic processes such as elections, is supreme and must be respected by the country's government and all other authorities. The court's role is to interpret the Constitution and ensure that the government and other sources consistently act within its confines. It is, for example, fundamental to note that the constitution of Malaysia holds the highest authority.²⁹ And all individuals, organizations, and governments within the country are bound by it. However, increasing constitutional coups by ruling individuals or parties have eroded constitutional supremacy. Through constitutional amendments, South Sudan should consider stringent measures to curb this phenomenon and limit presidential powers.

5.3 The Doctrine of Separation of Powers and limited government power

Constitutionalism recognizes that government power must be limited to prevent abuses of power and protect individual rights. This limitation can be achieved by separating powers, checks and balances, and establishing independent institutions such as the judiciary. The doctrine of separation of powers is a constitutional principle that separates the executive, legislative, and judicial branches of government into separate powers to prevent the concentration of power and protect against power abuse. It is a crucial feature of many modern constitutions, designed to prevent the concentration of power in any one branch of government. This is achieved by creating three branches of government: the legislative,

executive, and judicial branches. Montesquieu's³⁰ principle is referred to as the pure separation of powers, as described by M.J.C. Vile³¹ in his book "Constitutionalism and the Separation of Powers," he argued that when one person or group holds both legislative and executive power, it can lead to society's oppression by enforcing oppressive laws. And he further noted that separation of powers essentially means three things;

- a. Different people should operate each organ. In other words, no individual should belong to more than one organ.
- b. Each government organ should be independent/autonomous of others.
- c. No one should undertake and exercise the functions of another organ.

The legislative, executive, and judicial branches of government should only exercise their respective powers according to the "pure doctrine" of separation of powers, which holds that these three categories can be clearly distinguished. This doctrine assumes that governmental actions can be neatly divided into these three categories and forbids any overlap or sharing of authority between the branches. Therefore, it is necessary to look at how the three components of Montesquieu's doctrine of separation of powers are divided to determine whether a government practices a pure separation of powers or a balanced separation of powers. No democratic state has a strict separation of powers.

According to Madison³² and Jay,³³ checks and balances are necessary to prevent any branch of government from becoming

²⁹ Hamid, Noor'Ashikin, Hussain Yusri Zawawi, Mahamad Naser Disa, and Ahmad Zafry Mohamad Tahir. (2021). "Rukun Negara as a Preamble to Malaysian Constitution". *Pertanika Journal of Social Sciences & Humanities*. Jun 2;29.

³⁰ De Montesquieu, Charles. (1989). *Montesquieu: The spirit of the laws*. Cambridge University Press.

³¹ Vile, Maurice John Crawley. (2012). *Constitutionalism and the Separation of Powers*. Liberty Fund.

³² Hamilton, Alexander, James Madison, and John Jay. (2006). *The Federalist*. Barnes & Noble Books,

³³ Graham, Howard Jay. (2013). *Everyman's constitution: historical essays on the fourteenth amendment, the "conspiracy theory," and American constitutionalism*. Wisconsin Historical Society.

overly powerful and the separation of powers. Odoki,³⁴ in his book, argues that the three arms of government are like a pot on three cooking stones; if you remove one stone, the pot breaks, thus the doctrine of checks and balances. This system allows each branch to exercise certain powers, acting as checks on the other components. This system allows each branch to monitor the other branches and ensure they are not overstepping their boundaries or abusing their power. In this system, the legislature makes and amends laws; the executive branch manages the government's operations. It enforces the rules, and the judiciary interprets and applies them in specific cases. However, in authoritarian regimes, the executive branch may interfere with the operations of the other branches of government.

5.4 Principle of Rule of Law

Historically, the rule of law is based on the principle that all individuals and institutions are subject to and accountable to the law and should be applied equally and fairly to all. It is an essential component of a just and democratic society, as it helps to protect individual rights and freedoms and promotes stability and predictability in the legal system. In addition, the rule of law helps to ensure that the government and those in power are held accountable for their actions and decisions.

A.V. Dicey's definition of the rule of law includes three components: "equal subjection of all classes" and officials to that law due to ordinary court decisions and the supremacy of common law and courts over arbitrary power.³⁵ John Austin³⁶, a legal positivist, influenced Dicey. His explanation was formal or thin, focusing on the distinction between the existence of law and its moral content. He

claimed that common law, courts, actions, and remedies protected the rights of the offended citizens. Other scholars have argued that the rule of law can serve as a foundation for protecting fundamental rights and promoting justice.

A government governed by the law, not by men, is said to follow the rule of law. The law requires those the government employs to carry out their legal obligations. In other words, the rule of law stands for the supremacy of law, and it is crucial for ensuring that people can exercise and enjoy their rights that the courts play a role in defending the rights recognized by a constitution and other laws. Through the judicial system, individuals can seek remedies for the infringement of their rights and hold those who abuse their power accountable for their actions.

5.5 Protection of Individual Rights and Liberties

The protection of individual rights and liberties is another foundational principle of constitutionalism that requires that the government respect and protect the rights and freedoms of its citizens. Protecting individual rights and liberties helps ensure that individuals are free to exercise their fundamental human rights and freedoms and are protected from arbitrary government actions. However, implementing the protection of individual rights and liberties can also be challenging, and criticisms of this principle must be considered. One criticism of protecting individual rights and freedoms is that it can be used to prioritize individual rights over the common good. Critics argue that protecting individual rights and freedom can lead to neglecting the public interest and perpetuating individualism and selfishness.

³⁴ Odoki, Benjamin J. (2001). "The Challenges of Constitution-making and Implementation in Uganda."

³⁵ Allison, J. W. F., and Albert Venn Dicey. (2013). *The Law of the Constitution*. Oxford University Press.

³⁶ Austin, John. (1880). *Lectures on jurisprudence, or The philosophy of positive law*. John Murray.

6. The obstacles to implementing these principles

Constitutionalism and the rule of law are essential components of any democratic system to ensure constitutional order in any country like South Sudan. Embedding these constitutional principles is critical to ensure their long-term protection and effectiveness. However, entrenching constitutionalism and the rule of law in the Constitution can face significant challenges.

6.1 Lack of political will

One of the most significant challenges to entrenching constitutionalism and the rule of law in the Constitution is the need for more political will. Governments may prioritize consolidating power and maintaining the status quo over protecting citizens' rights. Liaga³⁷ and Vhumbunu³⁸ opine that the lack of political commitment to speed up the constitution-making process and address justice and accountability for South Sudan undermines the efforts to entrench constitutionalism and the rule of law in the Constitution. In some countries like Zimbabwe, the ruling party has been accused of resisting constitutional reforms limiting the president's powers and strengthening the judiciary's independence.

This may be coupled with the lack of awareness, which can make it difficult to mobilize public support for efforts to entrench constitutionalism and the rule of law. It also makes it difficult for citizens to hold their government accountable. Educating the public about their constitutional rights is crucial to ensure that they can keep their government

responsible and demand the protection of their rights. For example, civil society organizations in Kenya have launched campaigns to educate citizens on their constitutional rights, including the right to access information and participate in governance processes

6.2 Weak institutions

Weak and ineffective state institutions, such as the judiciary, can undermine efforts to entrench constitutionalism and the rule of law in the Constitution. An independent and competent judiciary is essential for providing effective remedies in case of any human rights violation, upholding the constitutional guarantees of due process, and ensuring equal protection under the law. With a strong judiciary, constitutional protections may be adequately enforced. For example, in Uganda, the court has been accused of being subject to political influence, undermining its independence and effectiveness in upholding the rule of law.³⁹

Additionally, the weak institutions are marred with corruption, which undermines the legitimacy of the government and the judiciary, erodes public trust in the direction of law, and perpetuates inequality and injustice.⁴⁰ Ukase⁴¹ emphasizes that corruption also allows those in power to manipulate the legal system, undermining the rule of law. For example, in Nigeria, corruption has been identified as a significant challenge to entrenching the rule of law and constitutionalism, with reports of widespread

³⁷ Liaga, Emmaculate Asige. (2021). "South Sudan's transitional government Realities, challenges and opportunities." *ISS East Africa Report* 2021, no. 41 p.1-28..

³⁸ Vhumbunu, Clayton Hazvinei. (2021). "The Challenges and Opportunities of Security Sector Reforms in South Sudan." *Peacebuilding in Africa: The Post-Conflict State and Its Multidimensional Crises* p.169

³⁹ Tangri, Roger, and Andrew M. Mwenda. (2006). "Politics, donors and the ineffectiveness of anti-corruption institutions in Uganda." *The Journal of Modern African Studies* 44, no. 1. p.101-124.

⁴⁰ Awolich, Abraham A. (2022). *COVID-19 and the Political Transition in South Sudan*. Sudd Institute

⁴¹ Ukase, Patrick, and Bem Audu. (2015). "The role of civil society in the fight against corruption in Nigeria's fourth republic: Problems, prospects and the way forward." *European Scientific Journal* 11, no. 2). P. 171-195.

corruption among government officials and the judiciary.⁴²

Entrenching constitutionalism and the rule of law may be resisted by powerful interests that benefit from the status quo. These interests may include wealthy individuals, corporations, or political parties opposed to reforms that could threaten their power or interests. These powerful interests may use their influence to undermine efforts to entrench constitutionalism and the rule of law in the Constitution.

6.3 Modern dictators (Liberators who ultimately become dictators and suffocate and weaken all the institutions)

The phenomenon of liberators turned dictators in Africa has its roots in the struggle for independence from colonial rule. Many leaders who emerged from this struggle are charismatic figures who mobilize the masses and gain support. However, many of these leaders find it difficult to relinquish their newfound authority once in power, which has plagued the African continent for decades. They often use the rhetoric of liberation to justify their authoritarian rule, claiming that they are the only ones who can protect the gains of independence. The term "liberator" refers to a person or group that played a crucial role in liberating a country from colonial rule or a repressive regime. However, many of these liberators have become dictators, often using their newfound power to silence political opposition and stifle the democratic process.⁴³

Conversely, the emergence of liberators-turned-dictators in Africa evolves around factors like Personal ambition. Many

liberators who became dictators are motivated by personal ambition and a desire for power. They see themselves as the only ones capable of leading their countries and believe their leadership is necessary for their country's progress. However, when liberators become dictators, they often use their power to suffocate state institutions such as the judiciary and the legislature.

While many underlying factors contribute to this problem, strengthening the institutions of democracy and promoting good governance is critical to mitigating its effects. Ultimately, it is up to South Sudanese leaders and the people to work together to create a more stable and democratic future for the country.

6.4 Limited resources

In many developing countries such as South Sudan, limited resources may make it difficult to implement reforms that could entrench these principles effectively. Developing countries like South Sudan may require support from the international community to build the necessary capacity and resources to entrench constitutionalism and the rule of law virtually. In Liberia, the government has struggled to make the required institutional capacity to implement reforms to entrench constitutionalism and the rule of law. It has relied on international support to develop its capacity.⁴⁴

Summing it up, entrenching constitutionalism and the rule of law in the constitution is critical to ensure that citizens' rights are protected and that democratic institutions function effectively. However, entrenching these principles can face significant challenges, including a lack of political will, weak judicial systems, corruption, limited resources, resistance from powerful interests, and a lack of citizen awareness. Addressing these challenges requires sustained efforts to strengthen

⁴²Anyogu, F. A., and Michael Kehinde Osadare. (2021). "Impediments Is to the Effective Promotion of Constitutionalism in Nigeria: An Appraisal." *IRLJ* 3 p.135.

⁴³ Matthew, Mare, Fortunate Chingono, Simbarashe Mangezi, and Spencer Mbazangi. (2020). "The concept of civil-military relations in the management of African political affairs."

⁴⁴ (Human Rights Watch, 2020).

democratic institutions, promote transparency and accountability, and build public awareness of citizens' rights and the importance of the rule of law. The international community can be crucial in supporting these efforts, providing technical and financial support to build institutional capacity and strengthen democratic governance.

7. Practical steps are taken for the effectiveness of measures taken to address these challenges

South Sudan's young and vibrant population is eager for change, and many civil society groups and activists are working tirelessly to promote constitutionalism and the rule of law. However, to succeed, it will be necessary for all stakeholders - including the government, civil society groups, and ordinary citizens - to work together towards a common goal. This will require compromise, dialogue, and a willingness to listen to different perspectives. It will also need a commitment to transparency and accountability at all levels of government as well as the government's political will.

Ultimately, the success of South Sudan's efforts to entrench constitutionalism and the rule of law will depend on the country's ability to build strong institutions that can withstand the pressures of politics and corruption. This will require a long-term investment in education, training, and capacity-building programs that can help create a new generation of leaders committed to democracy, human rights, and the rule of law. In conclusion, entrenching constitutionalism and the rule of law in South Sudan is essential for the country's long-term stability and prosperity. While many challenges exist to overcome, there are also reasons for optimism. By working together towards a common goal, South Sudan can build a fairer, more just society that respects the rights of all its citizens

8. Lessons from Malaysia and Kenya on Entrenching and protecting constitutionalism and the Rule of Law

Long before, the lack of respect for the rule of law and constitutionalism has been a significant challenge for many countries such as Kenya and Malaysia. South Sudan can draw essential lessons from Malaysia and Kenya regarding entrenching constitutionalism and the rule of law. However, it's important to note that these countries have different political and historical contexts, and the application of these lessons would need to be adapted to fit the specific circumstances of South Sudan. Malaysia is a multiethnic and multicultural country that has successfully established a stable and democratic government.⁴⁵ In this study, the lessons that South Sudan can draw from Kenya and Malaysia's experience in entrenching constitutionalism and the rule of law are;

Malaysia's experience with constitutionalism and the rule of law is noteworthy as the country has undergone a significant transformation since its independence in 1957.⁴⁶ Malaysia has adopted a written constitution that outlines the principles of constitutionalism, such as the rule of law, Separation of powers and human rights protection. One of the critical lessons South Sudan can draw from Malaysia is the importance of a solid and independent judiciary. The Malaysian judiciary has been able to check the power of the executive and maintain the rule of law.

Malaysia has made significant strides in combating corruption by establishing institutions such as the Malaysian Anti-Corruption Commission (MACC). The MACC has been able to investigate and

⁴⁵ Musa, Nurhafilah. (2007). "Federalism, constitutionalism and democratic society in multicultural societies—A case study of Malaysia." *Religion* 8, no. 2 139.

⁴⁶ Harding, Andrew. (2024). *Law, government and the constitution in Malaysia*. Vol. 1. BRILL.

prosecute corruption cases effectively.⁴⁷ The MACC is also independent and is not subject to political interference. South Sudan should establish similar institutions to combat corruption, a significant threat to the rule of law. Corruption undermines the integrity of public institutions and erodes public trust in government. Anti-corruption institutions should be independent, well-funded, and have legal powers to investigate and prosecute corruption cases.⁴⁸

On the other hand, Kenya has had a more complicated journey towards constitutionalism and the rule of law. The country has a long history of political instability, corruption, and human rights violations. However, in 2010, Kenya adopted a new constitution widely considered one of the most progressive on the continent.⁴⁹ The new constitution established an independent judiciary and introduced measures to combat corruption. The critical lesson South Sudan can draw from Kenya is the importance of stakeholder engagement and inclusive constitutional-making processes. The Constitution provides for a separation of powers among the three arms of government. It establishes an independent judiciary, an independent electoral commission, and several other independent institutions to safeguard the Constitution.

Malaysia and Kenya have taken steps to protect the rights of their citizens, including establishing the National Human Rights Commission, which investigates and monitors

human rights abuses. The country has also signed and ratified several international human rights conventions and treaties.

The judiciary plays a critical role in upholding the rule of law, and both Malaysia and Kenya have demonstrated the importance of having an independent judiciary. In Malaysia, the judiciary has been known to stand up to the government and protect the rights of citizens, while in Kenya, the judiciary has been instrumental in resolving electoral disputes. Kenya's judiciary has become more independent in recent years, with the establishment of a new Supreme Court and other independent bodies such as the Judicial Service Commission. The judiciary has asserted itself in several high-profile cases, including nullifying the 2017 presidential election. And Malaysia's strong and independent judiciary protects the rule of law.

The judiciary in Malaysia has played a crucial role in interpreting the constitution and checking the power of the government. The Malaysian judiciary has maintained its independence through various mechanisms, such as appointing judges by an independent Judicial Appointments Commission. South Sudan should prioritize the establishment of a strong and independent judiciary to ensure that the rule of law is respected. The judiciary should be free from political interference and adequately funded to carry out its mandate effectively. For example, the judiciary decided against two former prime ministers, Najib Razak and Muhyiddin Yassin, for corruption and misuse of office. South Sudan can learn from these examples and ensure that its judiciary is independent and impartial.

Malaysia and Kenya have well-established systems of checks and balances that prevent any one branch of government from becoming too powerful. Malaysia has a bicameral parliament and a strong opposition, while Kenya has a devolved system of government that gives power to local

⁴⁷ Siddiquee, Noore Alam. (2011). "Approaches to fighting corruption and managing integrity in Malaysia: A critical perspective." *Journal of Administrative Science* 8, no. 1 p.47-74

⁴⁸ Mu'adi, Sholih. (2021). "Comparative Study of Anti-Corruption Agency in Indonesian and Malaysian Government for Eradication of Corruptions." *Journal of Southwest Jiaotong University* 56, no. 6.

⁴⁹ Venter, Francois. (2020). "The separation of powers in new constitutions." In *New Challenges to the Separation of Powers*, pp. 105-123. Edward Elgar Publishing,

communities. South Sudan can draw lessons from these examples and ensure its government has adequate checks and balances.

9. Results:

The analysis of the constitutions revealed that all the analyzed constitutions have provisions that entrench democratic values. However, the degree of entrenchment in constitutionalism and the rule of law varies significantly across the constitutions. The constitutions that entrench constitutionalism and the rule of law more comprehensively have specific provisions that guarantee and protect these principles. And the constitutions that entrench constitutionalism and the rule of law less comprehensively have fewer particular provisions that guarantee and protect democratic values.

Additionally, the constitutions developed in societies with a strong tradition of democracy tend to entrench democratic values more comprehensively than those developed in societies without a tradition of democracy. The constitutions developed during a period of authoritarian rule tend to entrench democratic values less comprehensively than those developed during a period of democratic rule.

10. Discussion:

The study's findings have significant implications for entrenching constitutionalism and the rule of law in constitutions. The study reveals that historical, cultural, and political factors influence the degree of entrenchment of these principles in constitutional provisions. The study also shows that the constitutions that entrench democratic values more comprehensively have specific requirements that guarantee adherence to the principle of constitutionalism and the rule of law. Such a framework should have specific provisions that guarantee and protect democratic values. Therefore, South Sudan should consider the historical and cultural factors that influence

the entrenchment of democratic values in the Constitution.

11. Conclusion

Conclusively, South Sudan should entrench some provisions to ensure constitutionalism and the rule of law in the country. By respecting the constitution, having an independent judiciary, adequate checks and balances, and embracing diversity, South Sudan can build a strong and resilient constitution that can withstand challenges. All in all, there is a need for strong institutions and adherence to constitutional principles. The study provides valuable insights into the entrenchment of democratic values in constitutions and provides a basis for further research.

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