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Culture and Constitution-Making in South Sudan

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Summary

Cultural contextualization of constitutionalism is a pervasive post-colonial challenge in Africa, where operating constitutions remain Eurocentric. Not only are these constitutions European in origin, but the normative ideals they embody were not applied even by the colonial governments who bequeathed them to the independent African states. The challenge for the African states is to develop constitutions that reflect the aspirations and norms of the people. What is needed is a system of governance that is grounded on the endogenous cultural values and Institutions of the communities. This does not only require popular participation of the people in constitution making, but also grounding of the constitution on the endogenous cultural values and institutions. In a pluralist country like South Sudan, with a multiplicity of ethnic groups with presumably diverse cultures, this requires a close understanding of the value systems involved to discern the commonalities, the differences and potential syntheses and complementarities.

The goal should be to develop a shared national value system and related normative principles to guide the development of a culturally contextualized constitutionalism. On the assumption that

there is much in common in the fundamental cultural values of the South Sudanese ethnic groups, a culturally centered constitution might include the following guiding principles:

- i. Stating in the preamble the overriding importance of culture as a source of inspiration and guidance in the construction and functioning of state institutions and decision-making processes to consolidate independence, promote an endogenous state and generate a self-sustaining process of nation-building with confidence, dignity, and national pride.*
- ii. Enshrining various forms of consensus-building approaches in decision making, including the prevention, management, and resolution of conflicts and the sharing of power and resources based on constructive management of diversity aimed at inclusivity, equality and dignity for all ethnic groups to promote national unity, harmony, and solidarity.*
- iii. Ensuring the democratic choice of the people of their leaders through a culturally oriented system of elections that balances majority rule with deferential recognition and accommodation of minorities in the government.*
- iv. Respecting the dignity of every individual and group by stipulating a Bill of Rights based on core elements of the African values and normative principles that balance the rights and duties of the individual with those of the community, building on the African Charter of 'human and people's rights;'*
- v. Adopting an enhanced form of decentralization that devolves power to the local communities as a basis for ensuring self-administration as a form of internal self-determination to safeguard consensual unity in diversity.*
- vi. Recognizing and strengthening the role of traditional authorities in the modern governance system and giving them the powers and resources to enhance their capacity to effectively govern and maintain the rule of law, peace, and security in their areas and with neighboring communities.*
- vii. Incorporating fundamental principles of African jurisprudence in the administration of justice, which would prioritize mediation, compensation for wrongs, and reconciliation above punitive measures that are not germane to the African context of maintaining the rule of law and public order.*
- viii. Creating mediation committees of 'wise persons' previously known in the Sudan as Ajaweed to intercede and mediate the resolution of inter-communal conflicts, if those mandated to mediate in any given conflict be recruited from neutral communities.*
- ix. Recognizing the youth age-set system, which is common in most South Sudanese societies, and transforming it from a means of recruiting fighters into a collective force for sanctioning moral and social responsibility and deployment for public service in reconstruction and development and providing them with employment incentives to make their peace-building role more attractive than the lure of engaging in violence.*
- x. Incorporating culture in the educational system at all levels, from schools to universities and other institutions of higher learning to ensure that the curriculum is indigenized to include national history, cultural value systems, indigenous production skills, and employment opportunities, the overriding objective being to make education responsive to the country's self-reliant development strategies.*

1. Introduction

It is widely recognized that African constitutions are of foreign origins and for the most part, remain persistently Eurocentric. While there are universally shared structures, parameters, and principles that generically characterize virtually all constitutions worldwide, every constitution is supposed to reflect the aspirations, characteristics, values, and norms particular to the country concerned. There is therefore a demand for African countries to reform their constitutions and contextualize them, building upon their own cultural values and norms.

While there is a consensus on this vision, realizing it presents considerable challenges that can thematically be classified as conceptual and operational. The main conceptual issues relate to the role of identity as determined by a variety of factors, prominent of which are ethnicity and culture, how they play out in the context of diversity in a pluralistic State, resulting in competition over power and national resources, and the ensuing threat to the peace, security, and stability of the country. The operational dimension of the challenge is how to discern the shared principles from the multiplicity of national cultures that should be constitutionally recognized and utilized, what areas of the constitutional frameworks are amenable to cultural incorporation, and how the relevant cultural values and norms can be infused in the drafting of the constitution.

How these conceptual and operational dimensions can effectively be addressed in drafting a contextualized constitutional document and application in the broader functional process of constitutionalism is the challenge facing constitutional experts and scholars and practitioners from related disciplines and professions. This paper is part of a wider project aimed at influencing the constitution-making process in South Sudan, inter-communal cultural dialogue, cross-cultural understanding toward promoting peace and reconciliation, and a broad culturally based contribution to education in South Sudan. Indigenizing constitutionalism in Africa has both a generic dimension relevant to African countries in general, and a specific focus on individual countries, in this case, South Sudan, and as a mechanism for preventing, managing, and resolving ethnic conflicts.

2. Culture and Constitutionalism in South Sudan

South Sudan became independent on July 9, 2011, after decades of armed struggle against successive governments in Khartoum dominated by an Arab-Islamic elite in Northern Sudan which had inherited power from the Anglo-Egyptian colonial administration. This system of domination was fueled by a crisis of national identity with two principal dimensions. One was that the ruling Arab-Islamic minority, which is essentially African, interfused with assimilated Arab and Islamic elements, identified itself as purely Arab, reinforced by Islam. The second is that this distorted self-identification was imposed on a country of immense racial, ethnic, cultural, and religious diversity, which was then labeled as Arab, with stratifying discriminatory implications for non-Arabs and non-Muslims. The so-called Arabs of central Sudan occupied the status of first-class citizens, the non-Arab Muslim groups of Darfur in the West, the Nuba and Fung bordering the South, and the Beja in the East became second-class citizens. And as a leading member of the Ethiopian-Eritrean refugee community in the Sudan said to me, the refugees from those countries with a complexion close to that of the Sudanese ‘Arabs,’ fell into the third class, while South Sudanese became fourth-class citizens in their own country. If one adds to the equation the Falata

Muslims from Nigeria and other West African countries, they in effect occupied the fourth-class status, which relegated the South Sudanese to fifth-class citizenship.

South Sudanese struggle was waged in two phases. The first phase began with a military rebellion that erupted in August 1955, four months before the Declaration of Independence on January 1, 1956, and escalated into a full-fledged civil war, spearheaded by the South Sudan Liberation Movement and its military wing Anya-Nya. That first phase of armed struggle aimed at independence for South Sudan and raged for seventeen years and was ended by the Addis Ababa Agreement of 1972 in which South Sudan accepted a compromise of regional autonomy within unity. Ten years later, that agreement was unilaterally abrogated by the government in Khartoum, which triggered the second phase of the struggle that broke out in 1983, championed by the SPLM and the SPLA.

Unlike the first liberation struggle that aimed at the independence of South Sudan, the SPLM stipulated a New Sudan Vision that would address the stratifying crisis of identity by creating a framework of full equality without any discrimination based on race, ethnicity, religion, culture, or gender. That Vision transcended the North-South divide and inspired the marginalized groups in the North, which joined the Sudanese People's Liberation Movement/Army in large numbers. Although the Movement posed a credible threat to the Arab-Islamic agenda of the successive regimes in the North, it could not impose the Vision of New Sudan by military means, and through a peace process initiated by the sub-regional organization, the Inter-Governmental Authority for Development, supported by the African Union, the United Nations, and the Troika countries of the United States, the United Kingdom, and Norway, the SPLM/A settled for the CPA that granted the South the right of self-determination through a referendum which it exercised in favor of independence. The Agreement gave the rebel areas of the North the right to vote for an administrative system of their choice, but this remains to be fully exercised.

Less than two years after independence from the North, South Sudan fell into a devastating conflict that soon assumed an ethnic dimension that demonstrated the relativity of identity and the crisis associated with the mismanagement of diversity. South Sudan is essentially experiencing the same crisis of national identity that generated the liberation struggle in the first place, albeit with differences in form and degree. What is incontrovertible is that the liberation of South Sudan for over half a century and longer has been pursued under a negative identity framework of being non-Arab and non-Muslim, and vaguely identifying as African, without a clear sense of what they are culturally. The challenge posed by this paper is therefore twofold. First, it tries to address the generic African quest for a system of governance and constitutionalism that is grounded on African cultural values and institutions. And second, it focuses this challenge on the context of South Sudan to identify the cultural values that are representative of the people of South Sudan. Since the population of South Sudan comprises an estimated 64 ethnic groups, each with its own sense of identity and related cultural values, this challenge is further amplified by the need to know their individual value systems, the extent to which there are common values, any differences existing among them, and the extent to which they complement each other to create a synthesis.

Although South Sudan is currently torn apart by a myriad of crises, inter-communal conflicts constitute one of the major concerns. While the long wars that devastated the country for decades brought the people of South Sudan together in the liberation struggle and the ethnic communities

are getting to know each other better than they did in the past when they were still isolated from one another, they are paradoxically also revealing that they do not know much about one another and their respective sub-cultures. This is at the core of the country's identity crisis that is paradoxically becoming increasingly ethnically based for a people who resisted Arab-Islamic domination based on a shared identity as South Sudanese.

The inter-communal conflicts now threatening national unity are at least in part due to the way diversities have been managed or perhaps more accurately mismanaged. This is, in significant part, due to the relative ignorance about one another and the values of inclusive mutual accommodation and respect that should provide a common ground and be among the cardinal principles of building the nation.

Several concerned South Sudanese representing different ethnic groups, (including the author of this paper), recently initiated a project of inter-communal cultural dialogue that aims at addressing this challenge but is still to be more functionally developed. The project initially targeted twenty-six representatives from a sample of twelve ethnic groups, including Azande, Bari, Dinka, Chollo (Shilluk), Kakwa, Kuku, Latuka, Luo, Madi, Moro, Nuer, and Pajulu. The objectives of the project include:

- a) To know the cultural values of the various ethnic groups or communities which have been ignored or undermined by the forces of modern education and development.
- b) To learn about each other's cultural values, the shared elements in the respective cultural models, and the prospects of complementarity and synergy among them.
- c) To make effective use of this complementarity and synergy to develop a common ground toward a national cultural framework that is enriched by diversity.
- d) To formulate a framework of good governance and constitutionalism that is oriented to indigenous cultural values and institutions, and
- e) To formulate a set of principles to guide South Sudanese diplomacy in its relations and negotiations with regional and international partners and interlocutors.

The project was envisaged to be implemented through a two-prong approach. One is a survey based on specific questions that could be answered in writing or tape-recorded interviews. The second was to focus on group discussions around the same questions and the reports from the survey. It is planned that the result will be widely shared to inform policies internally and with international partners. The project required immediate action in several areas:

- a) Convening a meeting of experts representing ethnic groups from the ten states of South Sudan.
- b) Facilitating the conduct of the surveys technically and logistically in the ten states and an expert analysis of the results.
- c) Convening an enlarged meeting representing major ethnic groups to evaluate the results and formulate a consensus document, and
- d) Commissioning an expert to prepare a constitutive or governance document that applies the relevant principles of the South Sudanese value system to the major concepts or

elements of established constitutionalism that lend themselves to cultural contextualization.

Although the initiative for inter-communal cultural dialogue was widely well received, it remains an idea that is still to be more fully developed and operationalized. Encouraging consultations were conducted with several partners representing the Ministry of Justice and Constitutional Affairs, Ministry of Peace, Ministry of Education, Ministry of Culture and National Heritage, and pertinent United Nations agencies. The goal of the project, therefore, was and remains to contribute to the making of a culturally sensitive constitution, infuse cultural values into the curriculum of education at all levels, promote an overall appreciation of individual and collective cultural values, and through recognition and respect of diversity as a source of enrichment and strength, and foster peace, unity, and harmony among the ethnic groups. This is a process that will be ongoing, but judging from the enthusiastic response to the proposal, it is hoped and expected that the visibility of the process will have a positive impact on the cultural crisis in the country.

3. The Generic Quest for Indigenous Constitutionalism

Constitutions are largely concerned with access to state power, division of powers, the functioning of major state institutions, relationships between and among state organs, and respect for human rights and fundamental liberties. The process of drafting, adopting, implementing, monitoring and operationalizing, and monitoring the application of a constitution is mostly an exercise by the elite at the national level, with the help of legal experts. Generally, the political leaders and senior government officials responsible for constitution-making are often concerned with the way the constitution will serve their own political objectives, even though they claim to be serving the interest of the nation and people whose interests they purport to represent. In principle, it is the people who should determine the constitutional identity of the country. In practice, few citizens, even in advanced countries, understand what the constitution is about; it is even less likely that the few who do appreciate the intricacies of constitutional identity. It is therefore incumbent upon the constitutional experts, scholars, and practitioners responsible for drafting the constitution to cater to the wider interest of the country and its citizens.

While there are recognized structures, parameters, and normative principles that form a constitution generically speaking, every constitution must embody the fundamental values and norms that are particular to the specific country concerned. A constitution is supposed to reflect the spirit of the people of the country. Ideally, what is involved is not only the broad participation of the people in constitution-making, crucial as that is, but the embodiment of their cultural values, norms, and functional principles.

This is particularly true of a people emerging from foreign domination which typically denies the subject population the dignity of their cultural values and the normative principles of their indigenous social order. As the authors of *The Nation State: A Wrong Model for the Horn of Africa* opined, “colonial education was not designed to grow out of the African environment... designed to give young people pride as being members of African societies, but one that sought to install deference towards all that was European and capitalist. No concession was made to the past, and no attempt was made to recognize, interact, or integrate with anything the African tradition might

have to offer. This was not a process of cultural diffusion familiar in world history, but of cultural deracination.”¹

This is the case with the people of South Sudan who have not only struggled for ideals of freedom, liberty, equality, and dignity that must continue to be a source of inspiration and guidance but have been subjected not only to the domination of British colonial rule but an Arab-Islamic ‘internal colonialism’ within an otherwise ‘independent’ country. Both imposed their cultural frameworks that disregarded and denigrated the cultural values of the people that now need to be revived, respected, and applied. The constitution of South Sudan must therefore reflect both the ideals for which the people struggled for decades and make use of the fundamental norms of their cultures.

4. Foreign Roots of African Constitutionalism

It is well known that post-independence constitutions in Africa were modelled after the constitutions of the colonizing countries. It is also a historical fact that colonial rulers put in place the basic institutional structures of the constitutions of their home countries, without adhering to the ideals of fundamental rights and civil liberties embodied in those constitutions as practiced in their home countries.

Paradoxically, the constitutions which the exiting colonial powers bequeathed to their successors in the post-colonial state contained those lofty principles which they themselves never observed during their colonial rule. For the same reason, the independence constitutions did not last long. Political leaders were not familiar or comfortable with a democratic system and were indeed fearful of limitations on their powers, which they knew colonial authorities themselves did not observe. These foreign model constitutions were often overthrown by military coups with little or no tears shed and a trend toward developing homegrown constitutionalism began. As Yash Ghai observed, “It is indeed a brave and perhaps a foolish academic who undertakes a major study of an African Constitution, for the probability, is that its overthrow will precede the publication of the study.”²

There is now an increasing demand and trend toward involving the people in constitution-making. The reality, however, is that constitution-making remains an elite exercise by constitutional lawyers and politicians, with expertise in generic constitutionalism. Even when the people participate in the drafting of their constitutions, the substantive content remains basically the same, with some reforms within the normative framework of the centralized power structure. And because a constitution essentially aims at regulating, controlling, and limiting the exercise of power by the national wielders of state power, the tendency is to adopt a constitution as a matter of formality, with substantive contents that favor the status quo or the major players in the constitutive process. Even when adopted, constitutions are, in practice, usually ignored, undermined, self-interestingly amended, or unconstitutionally abrogated.

¹ John Markakis, Günther Schlee and John Young, *The Nation State: A Wrong Model for the Horn of Africa*, Max Planck Research Library for the History and Development of Knowledge Studies. 14, 2021, p. 22.

² Yash Ghai, ‘Constitutions and the Political Order in East Africa,’ *International and Comparative Law Quarterly*, 21, No 3, July 1972.

It is noteworthy and laudable that post-colonial governments have embarked on different degrees of decentralizing power from the centralized colonial systems to disperse and share powers at all levels, from national to local. This is a positive and laudable development but orienting African constitutionalism cannot be achieved merely through decentralization while maintaining the normative framework of imported constitutionalism. Nor is granting authority to traditional leaders to manage local administration sufficient for indigenizing the system of administration. Decentralization therefore only partially addresses the call for the cultural contextualization of African constitutionalism. If a nation's constitution and the attendant governance framework are to establish a viable system for constructively managing diversity, it must embody the soul of the nation by reflecting the cultural values and norms of all the peoples of the country as central elements of constitutionalism.

An appropriate African constitutional identity should be more than dressing up Eurocentric constitutional models with colorful African garbs. Ultimately, the political stability needed to promote peace, security, and development can only take place within the framework of a constitution that promotes the generic principles of constitutionalism that are universally stipulated, while taking full account of the country's ethnic, religious, cultural, and linguistic particulars. While there will continue to be tensions as countries strive to accommodate the often-divergent aspirations of the different communities, this is critical to establishing a sense of self-identification and self-determination needed for a credible, shared constitutional identity to emerge.

The challenge for Africa is more than designing a culturally appropriate constitution, that applies to the African state model itself. As the authors of *The Nation State* noted, in much the same way the African cultural values were disregarded in developing constitutional models appropriate to Africa, in building the state in Africa, "colonial organizers eradicated indigenous history and culture, and quelled any beliefs and values that could obstruct the assimilation process. In Walter Rodney's words: 'to be colonized is to be removed from history, except in the most passive sense.' The assimilated was taught to disdain the past. Tradition was 'primitive,' 'savage,' 'primordial,' and 'uncivilized.' Local religions were called 'idolatry' and 'animist'; its practitioners were 'wizards,' 'sorcerers,' and 'witch doctors.' Universal creeds like Islam and Christianity that had already taken root in the continent were the exception and became integral components of national identity in places like Ethiopia, Sudan, and Somalia."³

Although the *Nation State* study focuses on the Horn of Africa, the argument of the authors is relevant to the continent of Africa as a whole. As they state, "The Horn of Africa is an extreme example of a phenomenon that is not uncommon in sub-Saharan Africa: the imposition of a model of political organization in an entirely alien setting regardless of consequences. Fundamental to this phenomenon are the divisions opened between tradition and modernization, nation and tribe, urban and rural society, the ruling elite, and the rest of the population. Much of sub-Saharan Africa's political turmoil is the result of this Procrustean experiment."⁴

³ John Markakis, Günther Schlee, and John Young, *The Nation State: A Wrong Model for the Horn of Africa Studies 14*, Max Planck

Research Library for the History and Development of Knowledge Studies 14, 2021, p. 22.

⁴ Ibid, p. 54.

The responsibility for the alienation of the African elites from their own cultural values and institutions has now shifted to the African scholars and intellectuals who have internalized the Western World view. As the authors of the *Nation State* observed, “The success of the hegemonic project drove a wedge between the urban, Westernized elite—a small minority—and Africa’s rural population—a vast majority—whose life still follows a traditional rhythm. The two are separated by a cultural gap that alienates the masses from their rulers; it is a disjunction that is the source of many of Africa’s problems.”⁵

Being Western-oriented, social sciences, even when they produce African scholars, are too ingrained in the problem to be the engineers of a solution. As the authors of *The Nation State* observed, “Founded in the West and dominated by Western scholars, the discipline thrives on modes of analysis that privilege European categories or ascribe greater rationality and agency to Western actors above all others. It is impossible to question the universal validity of the Western model within the limits of this discipline for there is no room for an alternative within its analytical spectrum. Because this methodology is part of the standard curriculum, scholars of African studies, including Africans, tend to be unprepared to challenge it. Any attempt to raise the topic elicits the stock response: what is the alternative?”⁶

The authors do not venture to offer an answer to the question, their objective being “to provoke a debate on the crisis of the nation-state that will focus on the alien model itself, not on the African setting. They aim to do this by presenting the manifold impact of the crisis on two levels of society in the Horn: national and local.”⁷

5. Genesis of Constitution Making in the Sudan

Modern Sudan was a creation of the Turko-Egyptian Conquest that ruled the country from 1821 to 1885. Infamous for extreme corruption and misrule, the Turko-Egyptian administration was overthrown in 1885 by the forces of the religiously inspired revolutionary, Mohamed Ahmed, who became known as the Mahdi, the Islamic Messiah. Initially armed only with spears, the Mahdi scored victory after victory, acquiring arms from the defeated and demoralized government forces until he miraculously liberated the country from foreign rule, giving the Sudan its first glory of independence. The Mahdists killed and beheaded the Governor-General, Charles George Gordon, a British war hero popularly known as the Chinese Gordon because of his military exploits in China, who was then in the service of the Turo-Egyptian administration of the Sudan. He was killed on January 26, 1885, only two days before a force that was sent to rescue him arrived.

The Mahdi died shortly after his miraculous victory and was succeeded by Abdullahi ibn Muhammad El-Taishi from Darfur, better known as The Khalifa. Although the Mahdiyya, as the Mahdist Revolution is known, was initially popular with the people of the Sudan, including the South, as a liberation movement, Khalifa’s rule turned out to be a period of gruesome suffering from a myriad of tragedies, including the intensification of slave raids in the South, pervasive famines, and mass atrocities from internal wars, all leading to the virtual collapse of the state. That reign of terror lasted until 1898 when the bitter memory of the humiliating murder of General

⁵ Ibid, p. 23.

⁶ Ibid, p. 4.

⁷ Ibid.

Gordon prompted Britain to join Egypt in the reconquest of the Sudan and the establishment of the Anglo-Egyptian Condominium Administration, an unprecedented form of colonial rule that governed the country until independence on January 1st, 1956, making the Sudan the first African country to achieve independence a year before Ghana.

The British, who were the dominant partner in the Condominium, decided to rule the Sudan as two separate parts, North and South, which were racially, religiously, and culturally distinct. The British in the Sudan moderated the imposition of the Eurocentric system of governance. Mindful of the remnants of the Mahdist Movement and the threat of Islamist revivalism, they respected the Islamic orientation of the North and its related notion of Arabism as a racial and cultural concept. More by omission than by design, Southern Sudan was also saved from the colonial practice of imposing a culturally Westernized system of governance, except for basic military domination. The South was kept separate and largely neglected under strong military administrators. Christian Missionaries were encouraged to proselytize and introduce basic education and health services aimed at making the South contrastingly Christian and African. Through the Closed Districts Ordinance, contact between the two parts of the country was severely restricted. That was the root of the separatism that would later haunt the national movement for independence and the development of a constitution of a unified country, with the North favoring a centralized Islamic state and the South demanding a federal secular state or the exercise of full independence from the North.

Sudan's tortuous path in constitution-making after independence from Anglo-Egyptian rule has been mired in intense political rivalry between various sectarian Islamist factions and the major political parties that they patronized. All of them shared the vision of an Islamic State but were divided by their competition for political power. Sectarian parties were, however, pitted against the leftist movement, championed by a strong Communist Party that was sympathetic to the cause of Southern Sudan. Although the Communists favored a secular state, they maintained due regard for the popular Islamic sentiments of the North. And, of course, the South was vehemently opposed to any form of an Arab-Islamic constitution. It is the resistance of the South to the Arab-Islamic orientation of the political parties and the military dictatorships that alternated with them in the control of the government that accounted for the intermittent wars the country suffered since independence.

Sudan became independent under the Self-Government Statute of 1953 which operated as the Transitional Constitution, pending the adoption of a permanent national constitution. That objective was to elude the country for half a century as Sudan went through a succession of wars and military dictatorships. The first war broke out in the South in August 1955, only four months before independence. By 1958, the country had its first military coup under the leadership of General Ibrahim Abboud, primarily aimed at ending the war in the South. Abboud's failure and the Sudanese resentment of his dictatorial rule led to a popular uprising and the restoration of parliamentary democracy in 1964. The elected government tried to promote the adoption of an Islamic Constitution without success, as the South and sympathetic Northern allies opposed it.

Despite the ruthlessness with which the government intensified the war against the South, the elected government also failed to achieve a decisive victory. The army again seized power in 1969 under the leadership of Colonel Jaafar Mohamed Nimeiri, in alliance with the Communists. As the

Communists sympathized with the cause of the South, the regime immediately took steps to find a solution to what was popularly viewed as the Southern Problem. The Communist allies however tried to seize power from within in 1971 to affect a more complete socialist system, and the regime was on the verge of defeat, but Nimeiri triumphantly returned even more popular. Having now alienated both the right and the left, he turned to the moderates and enlightened technocrats at the Center, who favored a negotiated peace with the South. The regime was able to conclude with the Southern Sudanese Liberation Movement in 1972 the Addis Ababa Agreement, which granted Southern Sudan Regional Autonomy. The government moderated the role of religion by stipulating Sharia as a source of legislation, from which the South was exempted, a thin disguise that the South accepted as a compromise. The terms of the Agreement were incorporated into the first attempt at a permanent constitution.

The Sectarian Right continued to pose a threat to the regime and even waged an attack in 1976, which became known as the Libyan Invasion because it was staged from Libya with the support of its strong man, Colonel Muammar Gadhafi. Nimeiri, believing that the South had been decisively neutralized, concluded a reconciliation agreement with the opposition and the Religious Right. This was eventually followed by a full-scale imposition of Sharia on the whole country and the amendment of the relatively secular constitution to become more Islamic. Nimeiri had underestimated the determination of the South to resist the imposition of an Arab-Islamic agenda on the country. In 1983, Southern Sudanese staged the most formidable rebellion that culminated in the creation of the Sudan People's Liberation Movement, SPLM, with its military wing, Sudan People's Liberation Army, SPLA. The stated objective of the SPLM/A was no longer Southern secession, but the creation of a unified New Sudan of full equality, without any discrimination on the ground of race, ethnicity, religion, culture, or gender.

The vision of the SPLM began to inspire the Sudanese across the North/South divide and attracted rebels from the marginalized non-Arab regions of the North, particularly from the Nuba Mountains, Southern Blue Nile, and Darfur to join the revolution. Nimeiri was in turn overthrown in 1985 and an elected civilian government took power. The failure of the elected government to end the war led the army to openly threaten another military takeover. The Islamists seized the opportunity to piggy-back on that threat and staged their own military coup, led by General Omar Hassan Ahmad Al-Bashir, with the objective of imposing an Islamic Constitution, even if that led to the separation of the South, now seen as a chronic threat to the Arab Islamic agenda of the North. After years of extremely difficult negotiations involving the region, with international support, the military regime of Omar Al-Bashir concluded the Comprehensive Peace Agreement, CPA, with the SPLM. This eventually led to the SPLM conceding the New Sudan Vision for the whole country by accepting the right of self-determination for the South which eventually ended in the independence of South Sudan on 9th July 2011.

The CPA installed an interim constitution for Sudan and Southern Sudan, but in the wake of South Sudan's secession, both countries undertook appropriate constitutional review processes. On the verge of independence, South Sudan amended its interim constitution into a transitional constitution of a sovereign state. However, less than two years after independence, in December 2013, a devastating civil war broke out and raged until it was ended in 2015 by the Agreement for the Resolution of the Conflict in South Sudan, (ARCSS). The Agreement was brokered by the Sub-Regional organization, Inter-Governmental Authority for Development, (IGAD). A Joint

Evaluation and Monitoring Committee, (JMEC), was established to oversee its implementation. But violence again erupted in 2016, which once more necessitated the intervention of IGAD, resulting in the revitalization of the 2015 Agreement. The Revitalized Agreement for the Resolution of the Conflict in South Sudan, (R-ARCSS), was signed on September 12, 2018, with the Revitalized Joint Monitoring and Evaluation Committee, (R-JMEC), to oversee its implementation.

Pursuant to Article 6.7 of R-ARCSS, the reconstituted R-JMEC was mandated to convene a Workshop for the Parties to the R-ARCSS to agree on the details for the Permanent Constitution-making process. Accordingly, the Workshop on the Permanent Constitution-making process was convened from 25th to 28th May 2021 in Juba. The Max Planck Foundation for International Peace and the Rule of Law, a German think tank that specialized in constitution-making, facilitated the Workshop. The resolutions of the Workshop on the Permanent Constitution-Making Process for the Republic of Southern Sudan, convened and facilitated by R-JMEC and Max Planck Foundation, 28 May 2021, Juba, South Sudan. The outcome of the Workshop was to form the basis of the legislation that would govern the process of making the Permanent Constitution for the Republic of South Sudan.

In a meeting convened in preparation for the workshop, the need for cultural orientation of constitution making was raised. The representatives of Max Planck Foundation responded that their role was to assist with the technical aspects of constitution-making and that issues related to the substantive content of the constitution were entirely for the people of South Sudan to determine. The issues on which the Workshop was designed to engage the participants, in small groups and during plenary sessions, to discuss and reach an agreement, focused on the following:

- (i) To outline the process for preparing the draft constitutional text.
- (ii) To clarify the roles and mandates of the various institutions involved in the constitutional process, as identified under chapter VI of the R-ARCSS, and
- (iii) To define civic education and public participation in the Permanent Constitution-making process, to ensure meaningful participation.

Although not explicitly stated, these issues exclude the cultural consideration in constitution-making. This raises the question of whether the technical aspects of constitution-making identified can be totally separated from the substantive content of the outcome document. It becomes incumbent upon those who support the role of culture in constitution-making to be more diligent in ensuring that the fundamental cultural values of the people feature in all aspects of the constitution-making process.

The challenge for constitutionalism in South Sudan is not only to make effective use of indigenous cultures in the making of an appropriate constitution but also to implement the provisions of the constitution. It can be argued that the failure to implement the constitution may directly relate to its alien form and content. But as Yash and Jill Ghai observe in their constitutional study for the National Dialogue, the view of the people who participated in the grassroots consultation was that the current transitional constitution is generally good, though not culturally adapted, but that the main problem is lack of implementation.

It can be reiterated with credibility that the failure to adhere to the commitments under the constitution emanate from ignorance of its provisions which can also be related to the fact that the constitution is a dead letter that does not represent or reflect the spirit of the nation and its people. Unless the constitution is embedded in the cultural values and aspirations of the people, it will remain alien to the body politic and rejected, ignored, or simply irrelevant.

6. The Challenge of Diversity in Constitutionalism

The evolution of the crisis of constitutionalism and the mismanagement of diversity that is a major constraint in nation-building in Africa goes back to the paradoxical legacy of colonialism that established a unified modern state in Africa, but also sew the seeds of ethnic tensions and conflicts by bringing together within the colonial state tribes with different cultures, lifestyles, and economies. For a considerable length of time into the colonial rule, these different tribes in their relative isolation did not know much about each other and the colonizers kept them apart, to prevent them from uniting against foreign rule. People were given unequal access to education, the language of the rulers, and employment opportunities, because of which their erstwhile differences were deepened, and inequalities emerged that eventually generated tensions and conflicts.

Under colonial rule, the independent and confederal systems that had prevailed among indigenous communities were replaced by a centralized system in which the foreign rulers monopolized power, with civil servants trained to assist them in junior positions. A significant concession was made to accommodate indigenous cultures in the rural areas, where tribal chiefs were deployed as an inexpensive mechanism for maintaining law and order and were given limited authority to apply customary law and administratively manage their communities' local affairs. This became known as the indirect rule in British colonies. Hardly any attention was given to developing a sense of nationhood to constructively manage the diversity of races, ethnicities, tribes, languages, religions, and inter-communal relations. Doing so would have contradicted the divide and rule strategy of the colonial government.

Experience around Africa demonstrates that a major threat to peace, stability, and progress on the continent is the manipulation of "tribe" and ethnicity for political ends. The very notion of the tribe was seen as a backward concept that is at best eradicated and at worse exploited initially by the colonial powers and after independence by political entrepreneurs. As the study of *The Nation State*, in the Horn of Africa observes, "African nationalism rejected Western political and economic domination, but it did not reject cultural domination. It embraced it and reinforced it through the rapid expansion of Western education, one area of development in which African states made great progress."⁸ The result was an even greater vigor in fighting tribalism which was viewed as encouraged by colonial domination as part of their strategy of divide and rule. "Nation-building required the transcendence of ethnicity, the living cell of society, and replacement with a nation that did not yet exist. Nation-building was launched with a frontal attack on African tradition and its defenders. 'Tribalism' became a social defamation and a handy weapon in political contests; in some instances, reference to one's 'tribe' was out-lawed. The accusation of tribalism was

⁸ John Markakis, Günther Schlee, and John Young, *The Nation State: A Wrong Model for the Horn of Africa*, Studies 14, Max Planck

Research Library for the History and Development of Knowledge Studies 14, 2021, p. 23.

successfully used to preempt claims to a share of political power by traditional authorities, who could have served as intermediaries with the masses, but were sidelined instead.”⁹

In *The Nation State*, Africa is negatively compared with Asia and the Middle East in the ability to negotiate a synergy in cultural interaction, perceived as an African intellectual failure: “The internalization of the Western worldview by the African elite deprived Africa of its own organic intellectuals, born from its own womb to represent and convey the values, norms, and logic of its own history, culture, and tradition to future generations. The African elite proved unable to negotiate and mediate the process of breakneck acculturation that threatened to overwhelm their societies; in other words, they could not ‘resist, appropriate, interpret, and transform’ as Asian and Arab nations have done to mitigate the impact and protect their own cultures and identities. As a result, sub-Saharan Africa does not produce knowledge relevant to its own reality and remains as dependent on imported knowledge as it does for capital and technology. Africa does not produce solutions for its own problems but depends on foreign ‘specialists’ whose expertise does not derive from their knowledge of Africa. In the bitter words of one of their own, African intellectuals function as ‘paid native informants for foreign donors.’”¹⁰

The interplay between the role of political entrepreneurs and the legitimate grievances of the ethnic groups they purportedly represent in identity-related conflicts has been a subject of considerable debate among scholars. Political scientists generally contend that ethnic conflicts are driven by politicians exploiting ethnicity and not by ethnicity itself. This is usually linked with the tendency to dismiss or downplay ethnic identity as a significant variable in conflict analysis and resolution, allegedly because the concept is viewed as too nebulous and intangible, difficult to define, and therefore not a meaningful subject of negotiation. This amounts to dismissing ethnicity or the broader concept of identity as a fictional construct that is not an easy subject of analysis or conflict mediation and resolution.

This is however contested by some social scientists. Professor Catherine Kelly, a political scientist at the United States Defense University, in reaction to an earlier version of this paper, denied the allegation while conceding the difficulties of studying ethnicity, “I generally agree with the critique and approach in the paper, but I disagree that political science entirely dismisses the relevance of cultural/social identities. We are ham-handed about how we talk about it on many occasions, but there are a few good analyses that scope the conditions that make such identities more or less politically detrimental to peace and stability... The takeaway there is not that identity doesn’t matter, but that it does so profoundly.”¹¹ Professor Kelly acknowledges that “There is no question that much of the academic literature on constitutionalism is Eurocentric. So, the job of reconsidering what we know about what works for constitution-making in Africa is a formidable one, and one that is likely to be different in different contexts on the continent, with the case of South Sudan being a very particular but important one... Even if we know the elements of a particular sociocultural context that could be useful for making a legal order more resilient, elite political interests can often get in the way of us properly integrating those elements into the system. This is especially difficult because often what we need for more resilience are social and

⁹ Ibid.

¹⁰ Ibid.

¹¹ Professor Catherine Kelly, personal correspondence.

cultural mechanisms that create or reinforce a set of checks and balances (whether from state or society) on predatory elite behavior that could spoil the peace and erode the constitutional order.”¹²

This point is also stressed by the authors of *The Nation State*, “Ethnoculturalism (derided as tribalism) is invariably cited as the source of political instability that has undermined modern government in Africa. However, ethnoculturalism is a reality, a fact of life. Like the nation, it is a social construct, neither timeless nor universal. While there has always been cultural and linguistic variation in Africa, the features that define these variations often shifted gradually and formed cultural continua, rather than delineating discrete groups. In many cases, strictly defined ethnic groups were created in the colonial period, solely for administrative purposes. Nevertheless, the concept of ethnic groups has a remarkable appeal for political identification and is much more of a reality on the ground than the concept of a nation. African states comprise dozens or hundreds of ethnic groups, some of them representing millions of people and larger than many nations.”¹³

Putting the blame solely on the explication of ethnicity by political entrepreneurs is setting up a straw man. Obviously, one cannot exploit what does not exist. It is not only unrealistic but indeed dangerous to deny the existence of ethnicity or other forms of identity. What seems to be overlooked or underestimated is the fact that the distribution of power and material assets, the question of who gets what and how, is often based on identity, whether racial, ethnic, cultural, religious, or defined by other factors. What is critical then is not the mere fact of identity differences, but how those differences are managed, and the consequences of such management.

Peter Lam Both, a South Sudanese politician and statesman, has written an insightful book, at the point of writing was still to be published, on the conflict that erupted in 2013 in South Sudan and has devastated the country ever since. The conflict is widely perceived as pitting the ethnic Dinka and Nuer communities against each other. Lam, himself a Nuer, succinctly refutes this perception. He writes, “It is tribalism that threatens national unity and stability, not the tribes per se. Tribalism, therefore, is a manipulative method used by political leaders to mobilize their ethnic groups against others in order to gain their political objectives in a given country.” He elaborates: “Though the main driver of the conflict was power struggle between and among leaders within SPLM (Sudan People’s Liberation Movement) as to who should lead the country after the independence was achieved, certain leaders presented the problem to their people as an ethnic conflict.”¹⁴

The author concedes that the war was fought predominantly along ethnic lines as though ethnicity were the cause. “Due to this myopic view of the conflict, it was difficult for many South Sudanese leaders to remain objective and view the conflict for what it was. Instead, they considered it as a war between the Nuer and Dinka, which was not true. Consequently, many South Sudanese people lost their lives believing that they were fighting an ethnic war. They did not know that they were fighting for the interest of their leaders to gain power. The worst thing was that by the time some

¹² Ibid.

¹³ John Markakis, Günther Schlee, and John Young, *The Nation State: A Wrong Model for the Horn of Africa*, Studies 14, Max Planck

Research Library for the History and Development of Knowledge Studies 14, 2021, p. 13.

¹⁴ Peter Both Lam, *South Sudan: Beyond Ethnic and Political Inertia*, Africa World Books, 2022, p. 5.

of them realized, it was too late. The genie had already left the bottle. The country was already in flames.”¹⁵

So, what precisely is it in tribal or ethnic identity that the politicians exploit? The answer lies in a shared sense of collective grievance against what is seen as inequitable management of diversity. This is often reflected in allegations of intolerable injustice in the shaping and sharing of power, national wealth, and other values, material, or intangible, or even symbolic. Injustice means that some groups enjoy the full rights of belonging to the national identity framework, while others are discriminated against, marginalized, and even excluded from fully sharing the rights of citizenship. The alleged inequality may only be perceived rather than real, but that does not prevent political entrepreneurs from exploiting it with what Peter Lam describes as the “myopic view”¹⁶ of the leaders, backed by an ill-informed mass following.

In the South Sudanese conflict, according to Peter Lam, “South Sudanese leaders who advocated and called this war ethnic knew that it was not true.”¹⁷ So, the politicians were deliberately misleading the people, which underscores the element of exploitation. “They knew that such description was deceptive, yet they used it to discredit the South Sudanese body politic as a Dinka system to have the legitimacy to mobilize their ethnic bases for support to challenge the government militarily. As is well known, the Government of South Sudan has never been a Dinka government. It represents South Sudanese people across the world.” It is particularly noteworthy that Peter Lam, a Nuer leader, an intellectual, and himself a politician, is disputing the Nuer allegation against the Dinka as an ethnic group and sees this myth as promoted by vested interests nationally, and internationally. “This narrow characterization of war as being ethnic was influenced by opposition leaders, activist groups, authors of books and articles on the war in South Sudan as well as reports by international human rights and humanitarian organizations which were influenced by the agenda of the opposition political parties.”¹⁸

Peter Lam is not arguing that the Nuer were not killed by the Dinka in the conflict, nor is he saying that the Nuer as a people had no collective concerns or grievances. His argument that the Government is not Dinka does not refute the allegation that the government is Dinka dominated. Lam’s main point is that Nuer leaders were fighting for their own ambition for power, not for the genuine cause of their people. This is of course a very thin line which may not be easily understandable to ordinary people, which is why it is relatively easy for politicians to exploit their grievances.

It must be emphasized that identity-related conflicts are not caused by differences per se, but by the way diversity is inequitably mismanaged, thereby triggering a demand for equality. Mismanagement of diversity often classifies and stratifies groups, with some occupying a privileged status that entitles them to the rights of citizenship, while others are discriminated against and denigrated into second or lower-class citizens. Reacting against such injustice, sometimes through armed resistance, risks provoking a counter-insurgency onslaught that could escalate to genocidal levels. Preventing and resolving such conflicts, therefore, requires

¹⁵ Ibid, p. 10.

¹⁶ Ibid, p. 6.

¹⁷ Ibid.

¹⁸ Ibid, p. 10.

acknowledging and respecting the identity and dignity of every group through constructive management of diversity to promote inclusivity and full equality, without discrimination. This also means that national sovereignty must be seen as entailing state responsibility to protect and assist all citizens on an equal basis and not be seen as primarily a concept of barricading the state against foreign intervention. If the state manifestly fails to provide the needed protection and assistance for its people, with the consequence that its citizens suffer and die in large numbers, it is incumbent upon the international community to step in and provide remedial protection and assistance. This is the essence of ‘Sovereignty as Responsibility,’ which I developed with colleagues at the Brookings Institution African Studies Program.¹⁹

The concept has been restated by the Canada-sponsored International Commission on Intervention and State Sovereignty as The Responsibility to Protect (R2P or RtoP), which has been construed as calling for international intervention and is therefore controversial among the weaker Third World countries.²⁰ The most effective way of safeguarding national sovereignty is discharging the associated responsibility and seek international support if needed. This is a global challenge from which hardly any country is immune.

Options for the management of diversity remain contestable. Several questions pertaining to the options need to be addressed. Should the goal be integration into one unifying national identity? If so, based on which of the contending identities? Should diversities be acknowledged and equitably accommodated? If so, can some form or degree of inequality be avoided? Is unity an overriding goal that should be preserved at all costs or should extreme cases of incompatible differences warrant partition? Is a newly invented framework of unity that is not based on any of the existing models possible? These are daunting questions for which there are no easy answers.

Several country cases offer contrasting models worthy of comparative consideration. Rwanda is decisively following the integration model which asserts that all their people must identify themselves as Rwandese and not as Hutus, Tutsis, or Twas. As Marc Lacey observed, Rwanda, a “country where ethnic tensions were whipped up into a frenzy of killing, is now trying to make ethnicity a thing of the past. There are no Hutu in the new Rwanda. There are no Tutsi either. The government, dominated by the minority Tutsi, has wiped out the distinctions by decree.”²¹ According to Lacey, “it is not just considered bad form to discuss ethnicity in the new Rwanda. It can land one in jail. Added to the penal code is the crime of ‘divisionism,’ a nebulous offense that includes speaking too provocatively about ethnicity.”²²

Brett Hartley approaches the policy from the perspective of the third ethnic group, the Twa, (Batwa), whom he sees as negatively impacted by the denial of ethnicity: “Constituting less than

¹⁹ Francis M. Deng, Sadikiel Kimaro, Terrence Lyons, Donald Rothchild, and I. William Zartman, *Sovereignty as Responsibility:*

Conflict Management in Africa, The Brookings Institution Press, 1996 - see p. 86.

²⁰ *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, International Development

and Research Center, IDRC, Co-Chairs, Gareth Evans and Mohamed Sahnoun 2001. See also *The Responsibility to Protect: Ending*

Mass Atrocity Crimes Once and For All, Garth Evans, The Brookings Institution Press, 2008.

²¹ A Decade After Massacres, Rwanda Outlaws Ethnicity,’ Mark Lacey, *New York Times*, April 9, 2004.

²² Ibid.

one percent of the population, Batwa have fared poorly in Rwanda's reconstruction, which is centered on an ambitious program of reconciliation and nation-building in which the Policy of National Unity and Reconciliation acts as a lodestar for reconfiguring Rwandan society. Designed to promote unity by rejecting traditional divisions of ethnicity "creating one Rwanda for all Rwandans," the policy "officially abolishes ethnicity." It is premised on the argument that (Ba)Hutu, (Ba) Tutsi, and (Ba)Twa are social categories racialized by colonial rulers, and means officially 'there are no Hutu or Tutsi (or Batwa) in today's Rwanda, only Banyarwanda (people of Rwanda).'²³

Burundi, whose population comprises those very three ethnic groups of Hutu, Tutsi, and Twa, has chosen to recognize diversity as a reality that should be equitably managed. Lacey noted that "Rwanda's approach contrasts markedly with that employed in neighboring Burundi, which has the same ethnic makeup as Rwanda and the same recent history of ethnic violence. Burundi's transitional government has opted to set aside certain positions for Hutu and certain positions for Tutsi. The two ethnic groups rotate the presidency. A Tutsi held it for 18 months, and now a Hutu fills the seat."²⁴

Sudan was torn apart by a crisis of national identity in which the ruling minority mislabeled their mixed African-Arab mold as simplistically Arab, with Islam as an integral component, and then imposed this distorted mold as the national identity framework that then misrepresented the country as Arab Islamic. Attempts by the rebel SPLM to manage diversity constructively by stipulating a Vision of New Sudan of full equality without discrimination failed and ended in partitioning the country with the independence of South Sudan. And of course, the other model followed by most African countries is a composite management system that juggles with different forms and degrees of unity in diversity.

It can be argued that all these models are contextually plausible. The Rwandan model is largely aspirational, what ought to be. The Burundian model is a pragmatic management of the reality of diversity. The synthesis between them may well be a phasing process, to recognize and manage diversities as they exist as a first phase, but to facilitate a process of progressive interaction toward a fully integrated model that transcends the diversity of identities. Sudan experimented with this arrangement through the 1972 Addis Agreement that granted South Sudan regional autonomy and the 2005 Comprehensive Peace Agreement that was based on a model of 'One Country, Two Systems.' These two arrangements envisaged a process that would gradually evolve into a New Sudan of integrated Sudan of full equality. The failure of this creative experimental model based on constructive compromise of idealistic pragmatism led to the partition of the country. The hybrid model being followed by most African countries is probably a normative starting point that requires reform and improvement toward a more effective utilization of indigenous cultural values.

Reform generally means building on what exists. Every stable social order is based on fundamental values and institutional structures that determine the way it manages and resolves conflicts and mobilizes and utilizes its human and material resources. These cultural values and related

²³ B.R. Hartley, Rwanda's Post-Genocide Approach to Ethnicity and Its Impact on the Batwa as an Indigenous People: An

International Human Rights Perspective, *QUT Law Review*, Vol 15, Issue 1, pp. 51-70, 2015.

²⁴ *Ibid*, p. 52.

institutions form a holistic model that should be relevant to the development of a normative framework of good governance, conflict prevention, human rights protection, socio-economic development, and nation-building, in other words culturally contextualized constitutionalism.

Toward that objective, people need to have a sound appreciation of their own local cultures to enter a constructive dialogue with other groups in the country to promote mutual understanding, accommodation, and a cross-cultural process of give and take toward equitable integration. This process of dialogue between and among cultures can then be extended to more inclusive regional and international contexts and should play a role in negotiating international human rights and humanitarian norms and instruments. This is critically important to the documentation and promotion of culture and to the cultural contextualization of constitutionalism, good governance, and nation-building. Modern education is externally oriented and transmits knowledge that deprives young people of information about their indigenous cultures, their values, their traditions, and their history. Currently, modern education essentially alienates school children and students of higher learning from their background and related cultural values.

The problem is compounded by the ethnic plurality in a state and how to realistically select the one to incorporate into the national framework of education, governance, and constitutionalism. As Catherine Kelly asked, “Which of many delineations of cultural pluralism are most strategic for African constitutionalists to embrace? How many ethnic or linguistic groups get formal recognition in national laws and policies? What does that formal definition of such groups mean for other ‘imagined communities,’ that are not included there? How do the politics behind specific choices in this domain affect whether a constitution is likely to ‘stick’? This is a social dilemma, but it is also a math problem of sorts.” Of the groups getting formally recognized as part of a culturally contextualized constitutional process, to what extent do formal institutions provide explicit provisions for ethnic, linguistic, or religious balance in the legislature, judiciary, and executive branches.”²⁵

7. Identifying Appropriate African Cultural Values

One of the most operationally challenging tasks in the cultural contextualization on constitutionalism is identifying the cultural values that need to be built upon in constitution-making. As noted earlier, every cohesive society has an integrated, coherent, and established system based on fundamental values and institutional structures that determine the way it mobilizes and utilizes its human and material resources and allocates rights and duties. Over a long period of experience, trial and error, this eventually results in a functional framework of optimum communal acceptance by broad consensus and establishes a system that is stable, self-sustaining, and resistant to disruptive change. Such shocks as violent conflicts may be so severe as to shatter the existing order, necessitating the development of a new logic for determining and allocating operational roles. But change must be a process of reforming what exists, not the obliteration of what is existing, to be replaced by something totally new or novel to the society. At the core of what exists is identity, individual and collective, around which the value system evolves.

Identity, which begins from early life in a family, community, and wider social formations, and related cultural values-systems, is essential to the integrity and dignity of the individual and the

²⁵ Professor Catherine Kelly, personal correspondence.

community to which he or she belongs. It is from those roots that an individual or a particular group finds the moorings of inner security in the broader context of a pluralistic nation and beyond. The diversity resulting from cross-cultural interaction causes comparative stratification that generates the demand for equality.

In his innovative study of reconciliation in South Africa and the leadership role of Nelson Mandela, Fanie du Toit highlights the relevance of indigenous cultural values in Mandela's political transition, an individualized expression of a normative reality that is more widely shared by urbanized cosmopolitan Africans: "Mandela seemed to be able to adopt ever-widening allegiances and causes, yet it is equally clear that he never renounced the traditional loyalties and deeply held beliefs that first promoted him to join the liberation struggle... By not abandoning his identity as a Xhosa and an African, and by valuing the universal dimensions reflected in his local identity, he was able to demonstrate how the universal should be anchored in and justified in terms of the local and the particular. In other words, it is possible to conclude that his embrace of the fight for the rights of all South Africans while drawing on his identity and heritage to do so, played some role in his decision to pursue reconciliation as political strategy."²⁶

The author explains that it was indeed the contrast between the identity and dignity he enjoyed in his local background and the indignities of discrimination under apartheid that provoked Mandela to rebel: "When he moved to Johannesburg as a young lawyer some years later, Mandela discovered that his boyhood freedom had in fact been limited to those idyllic childhood days and that the freedom to be a professional adult simply did not exist for him as he set out to start a career in law. That began his fight for basic individual rights... In time, after he experienced firsthand, the recalcitrance and racism of the regime, he joined the ANC and eventually turned freedom fighter, beginning a new clandestine life in pursuit of rights for his people."²⁷

From the studies of the cultures of South Sudan that are already available, there are cultural concepts with well-established values that are reflected in different terms in the local languages but share normative principles of unity and harmony, balance the interest of the individual with that of the community, and protect the dignity and integrity of every individual as an integral part of the community. These normative principles are almost identical to the famous Bantu concept of *Ubuntu*, which Nelson Mandela, Archbishop Tutu, Thabo Mbeki, and other African leaders and scholars universalised. Essentially, *Ubuntu* is a concept of shared humanity in which the interests of the individual are in harmony with the community or humanity. In the words of a white South African scholar, *Ubuntu* "is a cultural ideal popular throughout Sub-Sahara Africa that emphasizes social interconnectedness as the most basic reality that shapes both individual and society."²⁸

A similar concept prevails in Ethiopia, though not effectively applied. Prime Minister Abiy Ahmed Ali, in his acceptance speech for the Nobel Peace Prize, invoked the Amharic concept of *Medemer*, which means togetherness for synergetic unity, peace, and reconciliation. The Prime Minister saw *Medemer* as a concept of a social compact of love, forgiveness, and reconciliation. According to the Prime Minister, *Medemer* stipulates that you are your brother's or sister's, keeper. He called on the Ethiopians to use the best of their past to build a new culture. The Prime Minister later wrote

²⁶ Fanie du Toit, *When Political Transitions Work: Reconciliation as Interdependence*, OUP, 2018, pp. 11-12.

²⁷ *Ibid.* p. 21.

²⁸ *Ibid.* p.195. (See also Francis Mading Deng, *Identity, Diversity, and Constitutionalism in Africa*, pp. 89-100).

a book on the concept.²⁹ In a two-part review of the book, Professor Alemayehu G. Mariam wrote in Part I, “I regard ‘*Medemer*’ not so much as a ‘book’ but as the ‘philosophical’ equivalent of an open source ‘software’ such as Ubuntu *for use or modification as users/practitioners or other ‘developers’* see fit.”³⁰

Under the title, ‘Why did the author write ‘*Medemer*’?’ Professor Mariam identifies five reasons:

- 1) Ethiopians (Africans) need to develop a modern Afro-centric philosophy/system of ideas that reflects their history, culture, traditions, and challenges.
- 2) Ethiopians (Africans) have failed miserably in their efforts to indigenize imported ideologies they barely understood and which at best have marginal relevance to their circumstances. Wholesale imported ideologies have done considerable long-term damage to Ethiopian (African) politics, societies, and economies.
- 3) Ethiopians (Africans) should be eclectic and selective in adopting beliefs, ideas, and methods from the West and the East and carefully integrate only those ideas that harmonies with the African experience, traditions, practices, and realities.
- 4) Ethiopians (Africans) need to take a fresh look at their deeply seated and longstanding problems, issues, and aspirations through an African lens and not through the distorted lens they have chosen or have been forced to use. Their lens should be focused squarely on contemporary African realities including poverty, disease, ignorance, one-man, one-party rule, widespread human rights violations, abuse of power and disregard for the rule of law, corruption, and so on.
- 5) Ethiopians (Africans) can use *Medemer* as their own homegrown forward-looking philosophy/system of ideas to overcome the burdens of the past and to find a pathway to lasting peace and prosperity in their country and in the continent.³¹

In Part II of the review, Professor Mariam observes “The author proposes Ethiopians use their commonly shared values that have been the bedrock of their common heritage to develop consensus. Ethiopians have lived in peace and harmony for much of their history. They have shed their blood together against foreign aggression time and again as one people. They share deeply rooted faith, cultural and family ties.”³² It is painfully ironic that Ethiopia subsequently experienced its worse threat to unity under a leader who has advocated the traditional values of togetherness and received international acclaim for his vision of peace, unity, and harmony.

The normative principles of ‘Personhood’ among the Akan people of West Africa also emphasize similar indigenous values of interpersonal and inter-communal relations that share much with the East African and Southern African just outlined. Ajume Wingo, writing on the Akan concept of personhood states, “The culture of the Akan people of West Africa dates from before the 13th century. Like other long-established cultures the world over, the Akan have developed a rich conceptual system complete with metaphysical, moral, and epistemological aspects. Of particular

²⁹ Abiy Ahmed, *Medemer*, Tsehai Publishers, Amharic Version, launched on October 21, 2019.

³⁰ Al Mariam's Commentaries, “*Medemer*” by Abiy Ahmed, Ph.D., An Interpretive Book Review, (Part I), *Commentary, Ethiopian*

News Agency, Reliable News Resource, October 20, 2019.

³¹ *Ibid.*

³² *Ibid.*

interest is the Akan conception of *persons*, a conception that informs a variety of social institutions, practices, and judgments about personal identity, moral responsibility, and the proper relationship both among individuals and between individuals and community.”³³

H. M. Majeed, writing on the works of Kwame Gyekye and Kwasi Wiredu noted, ”The moral foundation of personhood, to a large extent, links the individual with the community. For the one described as a ‘person’ does not act with total disregard for the well-being of the community. After all, at the human level, morality is not something that an individual alone can bring about without other humans. In other words, social relations are critical to the question of morality. This means that, to a large extent, and in support of Gyekye, personhood is achieved based on how one relates to members of one’s community.”³⁴

These concepts indicate that there is much in common among African traditional cultures that can be built upon in the development of culturally oriented principles of good governance, conflict prevention, and nation-building. Toward that objective, South Sudanese need to have a better appreciation of their own local cultures to engage in a constructive dialogue with other groups in the country to promote mutual understanding, accommodation, and cross-cultural process of give and take toward equitable integration. This process of dialogue between and among cultures can then be extended to more inclusive regional and international contexts.³⁵

What is being advocated here is relevant to what the Founding Fathers of African independence aspired to achieve. Although the current situation in Africa is largely one of disconnect between the prevailing Eurocentric governance systems and the indigenous African cultural values and institutions, the need for cultural orientation has been an unheeded call by the Founding Fathers. This was reflected in the normative visions they declared: Nkrumah’s Consciencism; Nyerere’s Ujamaa; Kaunda’s Humanism; Kenyatta’s Harambee; Senghor’s Negretude; and Mobutu’s Authenticite.’ These concepts centered around African socialism as a concept that was distinct from Western capitalism and European socialism. African socialism aimed at sharing resources and services in a traditional African way, as opposed to the European version of the concept. Writing on the African version, William Friedland and Carl Rosenberg noted, “Many African politicians of the 1950s and 1960s professed their support for African socialism, although definitions and interpretations of this term varied considerably. As many African countries gained independence during the 1960s, some of these newly formed governments rejected the ideas of capitalism in favor of a more afrocentric economic model. Leaders of this period professed that

³³ Ajume Wingo, ‘Akan Philosophy of the Person, *Stanford Encyclopedia of Philosophy*, Dec 27, 2006, p. 1.

³⁴ The Nexus between ‘Person,’ Personhood, and Community in Kwame Gyekye’s Philosophy H. M. Majeed, *UJAH Journal of Arts and Humanities*, Vol 18, No. 3, 2017. p. 30. For details, see Kwasi Wiredu ‘The Moral Foundation of an African’ in *Philosophy from Africa* and Kwame Gyekye, ‘Person and Community in African Thought’ in P.H. Goertze and A.P. J.Roux, (eds), *Philosophy from Africa: A Text with Readings*, 2nd ed New York, Oxford University Press, 2002.

³⁵ For details on the concept, see Rosilyn M. Borland, *Gacaca Tribunals and Rwanda After Genocide: Effective Restorative Community*

Justice or Further Abuse of Human Rights, <http://www.american.edu/sis/students/sword/Current-Issue/essay1.pdf>. See also

Francis Mading Deng, *Identity, Diversity, and Constitutionalism in Africa*, pp. 100-102.

they were practicing ‘African socialism.’³⁶ A common theme in the various approaches to African socialism was social development guided by building on the African identity and what it means to be African, and the avoidance of the development of social classes within society.³⁷

These normative concepts, though sincere, tended to be politically motivated and aimed at legitimizing otherwise authoritarian rule. The priority objectives of fostering national unity and accelerating socio-economic development were used to justify one party system, ‘African socialism’, leadership without term limits, and denial of human rights, fundamental freedoms, and civil liberties. And as the authors of the *Nation State* effectively argue, the challenge of building on African identity and cultural values goes beyond socio-economic development and relates comprehensively to state and nation-building for Africa.

8. South Sudanese Indigenous Cultures

Developing a culturally oriented system of governance and constitutionalism requires a close understanding of the indigenous cultures on which to build. This is not an easy feat, particularly where there are multiple cultures to consider. South Sudan has an estimated 64 ethnic groups, each of which demands and deserves equal consideration in building a culturally rooted nation. It must be noted that the cultures of South Sudan have been thoroughly studied by anthropologists, although we have not made effective use of those studies. In the famous Oxford University Institute of Anthropology, Evans-Pritchard on the Nuer and Godfrey Lienhardt on the Dinka were pioneers in the study of South Sudanese societies and placed them on the global map of the discipline. No student of anthropology around the world would not have heard of the Azande, or the Nuer and their fraternal conflicts with their kindred group, the Dinka.

John Gai Yoh wrote, “It is in this context that the British government sent Evans-Pritchard to study the Nuer and Azande political, economic and social ways of life. During his interaction with the Nuer, Evans-Pritchard was surprised by their openness and free interaction with different age groups within the society. He thought that they were communally cooperative. They shared everything, except their wives.”³⁸

“Evans-Pritchard observed that the Nuer did not have a centralized political system, rather, they were ruled through what he termed ‘ordered anarchy.’ This characterization of Nuer political system implies that they were organized, but not well structured...Two South Sudanese Nuer scholars tried to respond to Evans-Pritchard assertions. Dr. Michael Duany wrote his Ph.D. thesis entitled *Neither Palaces Nor Prisons: The Constitution of Order Among the Nuer*, in which he disapproved of Evans-Pritchard theory of ‘Ordered Anarchy.’ Duany argued that the Nuer Political system was institutionalized and governed by what he referred to as ‘The Constitution of Order’ and not by ‘ordered anarchy,’ as claimed by Evans-Pritchard.”³⁹

³⁶ Julius Nyerere of Tanzania, Modibo, Keita of Mali, Léopold Senghor of Senegal, Kwame Nkrumah of Ghana and Sékou

Touré of Guinea, were the main architects of African Socialism, William H. Friedland and Carl G. Rosberg Jr., (eds), *African*

Socialism, California, Stanford University Press, 1964, p. 3.

³⁷ Fenner Brockway, *African Socialism*, London, The Bodley Head, 1963, p. 3.

³⁸ Ibid.

³⁹ Michael Duany, Ph.D. thesis; *Neither Palaces Nor Prisons: The Constitution of Order Among the Nuer*. 1992.

Peter Lam in his book alludes to some of the major concepts that have been documented in the anthropological studies of South Sudanese societies. Among these are the characterization of our societies as acephalous political systems, stateless societies, tribes without rulers, segmentary lineage systems, balanced opposition, and ordered anarchy. These concepts, which some of our people consider objectionable as reflective of Western paternalism and condescension, were championed by the Oxford anthropologists and their colleagues in related institutions with implicit admiration.

One of the central issues that emerged in the grassroots and regional consultations of the South Sudan National Dialogue is the intense hostility among communities, focusing in particular on what is perceived as Dinka domination and the nationwide devastation caused by the conflict between the two major ethnic groups, the Dinka and the Nuer, who are seen as dominating the government, the army, and the security sector. The dominating role of these two Nilotic groups is often associated with cultural hegemony presented in some areas of the country as a conflict between Dinka cattle herders and Equatorian farmers. As one person from an Equatorian Consultation put it: “People who try to dominate others don’t know that all the tribes in South Sudan have their own cultures, and all these cultures are not the same. If I go with my own Kakwa culture to the Bari community and want to rule over them with our Kakwa culture, it will bring a very big conflict”. Another person, referring to the Dinka and the Nuer, said, “It is as though the country belongs to two big tribes.” Yet another said, “The Dinka claim that they are the majority; does it mean that we the minorities have no rights?”⁴⁰

The views of South Sudanese judges and the practicing lawyers whom I interviewed for my study for Customary Law in the Modern World, my second book after *Tradition and Modernization*,⁴¹ underscore the strongly-felt sentiments of the people about the crisis of national identity represented by the pluralistic legal system in Sudan’s war of identities.⁴² Customary law emerges in the interviews as the symbol of the culture and identity the South Sudanese had fought so hard and so long to defend until they achieved their independence. While acknowledging that certain aspects of customary law, especially those that discriminated against women and children, needed radical reform, South Sudanese lawyers and judges I interviewed saw it as the normative foundation of the legal system of an independent South Sudan that should guide legislation and governance in South Sudan. How this was to be accomplished was never made clear and remains an unfulfilled aspiration. Section 5 of the Transitional Constitution of South Sudan includes the

<https://paanluelwel.com/wp-content/uploads/2017/09/neither-palaces-nor-prisons-the-constitution-of-order-among-the-nuer-phd-dissertation-by-dr-wal-duany.pdf>

⁴⁰ *South Sudan National Dialogue, (Volumes 2 to 5)*, United Nations Development Programme (UNDP, 2021) -see p.m148.

⁴¹ Francis Mading Deng, *Tradition and Modernization: A Challenge for Law among the Dinka of the Sudan*, Yale University Press, 1971 —

See p. 24.

⁴² Francis Mading Deng, ‘Evans-Pritchard and The Paradox of Anthropology, in Andre’ Singer, (ed), *A Touch of Genius: The Life,*

Work, and Influence of Sir Edward Evans-Pritchard, Sean Kingston Publishing and Publishing Services, Herefordshire, United Kingdom, publication forthcoming).

customs and traditions of the people. Section 6. (1) provides that, ‘All indigenous languages of South Sudan are national languages and shall be respected, developed and promoted.’⁴³ As the views of minority groups demonstrate, these groups feel culturally discriminated against in the independent South Sudan.

In 2015, the Ministry of Justice, Local Government Board, and UNDP South Sudan jointly commissioned a series of studies for the Ascertainment of the Customary Laws of fourteen communities of South Sudan.⁴⁴ In the Foreword to the volume of the customary laws of a group that included the Acholi, Lokoya, and Madi communities, the Honorable Jeremiah Shaka Moses Wani, Under-Secretary of the Ministry of Justice, wrote, “Recognizing customary law is about recognizing our competence and recognizing the strength which comes from our culture, which is the core of our identity. In its day-to-day operation, the legal system takes cognizance of and applies our culture, our heritage, and our histories, and they are constructed in a way that is capable of providing justice for our people and communities.”⁴⁵ The Undersecretary went on to say, “Customary law is largely empowering in many indigenous communities because it is a form of social organization and justice that maintains and sustains traditions that go back millennia. A community is most likely to have a healthy sense of order when control comes from agreed norms from within. Over time, there is nothing more debilitating to a community than a lack of control, and an ongoing perception of ability among the people of that community to look after themselves.”⁴⁶

An aspect of the paradox of anthropological studies among the societies of South Sudan is that they documented the cultures of the people and by doing so also spotlighted ethnic differentiations, which becomes divisive, albeit inadvertently. The representation of the people by a foreign observer risks an inevitable degree of misrepresentation or distortion. This is true even of the highly acclaimed works of Evans-Pritchard. As I was preparing the Foreword to Andre Singer’s volume on E.E. Evans-Pritchard,¹ I decided to ask a few South Sudanese intellectuals from the communities which he had studied how, in their opinion, Evans-Pritchard is remembered in their communities. These included Azande, Nuer, Anuak, and Shilluk in the order in which he studied them, and by extension, the Dinka. What I received was a range of views, some quite objective, others rather critical, and most of them positive. Even those who were critical saw his studies as having prominently placed the people of South Sudan on the world map.

Jok Madut Jok, Professor of Anthropology at Syracuse University, offered an overall appraisal of the works of Evans-Pritchard and their relevancy to contemporary challenges of State and nation-

⁴³ The Transitional Constitution of the Republic of South Sudan, 2011, p. 3.

⁴⁴ Tumaini A. Minja, *Leveraging Customary Laws for Conflict Resolution and Building Societies*, Consultant, 2015.

⁴⁵ Customary Laws Project, Series 2, Volume 1, p. 1.

A similar Foreword is used in Volume 2 of Series 2 comprising the customary laws of the Bari and Kakwa Communities, p. 9. See also, *In Search of a Working System of Justice for a New Nation: The Ascertainment of the Customary*

Laws of the Toposa, Lokoto (Otuho) Lange and Lopit Communities of South Sudan, 2/15/2012 and The Ascertainment of the Customary

Laws of the Balanda Bviri, Bongo, Ndogo, and Mundari Communities of the Western Bahr el-Ghazal and Central Equatoria States of South Sudan. 2/15/2012.

⁴⁶ Ibid.

building in South Sudan: “As post-colonial societies grapple with their past and how to know it, E.P. (Evans-Pritchard) has rendered South Sudanese unable to say categorically whether British Social Anthropology sold them to empire or helped them record ways to remember aspects of their own past. He will always be remembered fondly, first for getting the descriptions of religion, marriage, livelihoods, and inter-ethnic relations correctly, and secondly, for his impact on the discipline in his *The Nuer: A Description of the Modes of Livelihood and Political Institutions of a Nilotic People*,⁴⁷ which remains a classic in anthropology, in the critique that this book has triggered the world over.”⁴⁷

Jok applies the dilemmas of anthropology to Africa generally; “By the same token, there are increasing voices within South Sudan, Africa or the Global South in general, that criticize anthropology as a particular way of knowing and knowledge production, that E.P.’s work may have generated a narrative about the Azande, the Nuer and the Anyuak (Anuak) of South Sudan, a narrative that is built on a foundation that misread the social structure of these communities, masking stories about women as free agents, not cognizant of issues of sexuality, gendered power relations and simply took what men reported and which has now come to constrain these communities in a straitjacket as if time and space had not touched their ways of life.”⁴⁸

Although it is virtually impossible to give due consideration and individual attention to every one of them, the inability to achieve the ideal should not inhibit doing what is practical and desirable, though short of the ideal; models that are representative of cultural clusters can be discerned. The objective is not to postulate the value system of any one ethnic group as the model for the national framework but as an example of what is required to be done with other models to collect the diverse cultures of South Sudan from which to conduct comparative analysis and develop a synthesis that can be viewed as a normative framework for the country.

9. Principles for Developing a Permanent Constitution

The Workshop on ‘The Constitution Making Process for the Republic of Southern Sudan,’ that was convened on 25-28 May 2021, with the theme: ‘Designing the Path to a Durable Constitution for South Sudan,’ agreed on the following fundamental principles:

- i. Reaffirm that the Permanent Constitution-Making process in the Republic of South Sudan shall be guided by the provisions of Chapter VI of the R-ARCSS (Revitalised Agreement for the Resolution of the Conflict in Southern Sudan) and based, among others, on the eight fundamental principles as outlined in Article 6.2 of the R-ARCS, namely:
- ii. Supremacy of the People of South Sudan.
- iii. Initiating a federal and democratic system of government that reflects the character of South Sudan in its various institutions taken together, guaranteeing good governance, constitutionalism, rule of law, human rights, gender equity and affirmative action.
- iv. Guaranteeing peace and stability, national unity and territorial integrity of the Republic of South Sudan.
- v. 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.

⁴⁷ Jok Madut Jok, op cit.

⁴⁸ Ibid.

- vi. Respecting ethnic and regional diversity and communal rights, including the right of communities to preserve their history, develop their language, promote their culture, and express their identities.
- vii. Ensuring the provision of the basic needs of the people through the establishment of a framework for fair and equitable economic growth and access to national resources and services.
- viii. Promoting and facilitating regional and international cooperation with South Sudan; and
- ix. Committing the people of South Sudan to peaceful resolution of national issues through dialogue, tolerance, accommodation, and respect of others' opinions.

These are of course broad principles that need to be elaborated and substantiated in the process of developing and drafting the constitution, which is the overriding objective of this paper. In particular, the role of culture should not be limited to the local level or to the communities but should inform national norms of good governance and constitutionalism.

The critical questions that should be addressed in conceptualizing and formulating a framework for culturally contextualizing constitutionalism would be: What are the key elements in the constitution that lend themselves to cultural orientation? These would probably include various forms of decentralization; balancing majority rule with the protection of minorities; protection of human rights and fundamental liberties; and respect for the rule of law in its varying forms. This is of course an illustrative and by no means exhaustive list; many more elements can and should be added to the list, as detailed below.

10. Parameters of Contextualized Constitutionalism

The foregoing sections of the paper have tried to address conceptual issues of identity, diversity, and the need for equitable management of diversity in the political, economic, social and cultural life of the country. Gross intolerable injustice generates conflicts that cause varying degrees of human suffering and death, escalating to mass atrocities that could become genocidal. The remaining sections of the paper focus on how these crises can be practically addressed in a culturally contextualized constitutionalism. This is indeed the most challenging part of constitution-making. The overriding goal of constitutionalism is ultimately to establish a constitutive process aimed at ensuring and sustaining peace, security, stability, and development in a country. While the requisite normative framework stipulates the exercise of power through popular democratic participation, democracy as a concept has generated a great deal of controversy not only in the African, context but worldwide, with cross-cultural nuances. The core of the problem in Africa is that constitutionalism and specifically liberal models of democracy have not been able to constructively address the challenges of unity and diversity.

Western notions of democracy have tended to focus on elections, based on the principle of one person one vote. But countries are not comprised of 'one person; they are also communities and groups defined by various identity factors. This poses a serious dilemma for ethnically diverse or pluralistic societies, where the value of every individual rests in being a vital member of the community and people tend to vote on the bases of their politicized ethnic or cultural identities. The core of the dilemma is that there is an inherent contradiction in the process. On the one hand, democracy requires that the will of the majority should prevail. On the other hand, the winner-

take-all outcome can become a dictatorship of numbers, where the majority imposes its will on the minority. In countries where wielding power means access to resources and vital social services, the stakes can be very high and the elections violently contentious. What is even more incongruous is that it disregards the fundamental normative principle of consensus-building in indigenous African decision-making process.

The alternative must be to marry the best of the Western system with the best of the African indigenous systems to retain those elements of the Western concept and practice of democracy that have universal validity while refashioning an African constitutive system by drawing on the indigenous values and institutions and fostering a sense of dignity and national pride based on an authentic vision of the state and nation-building.

There are also universal principles of human rights and humanitarian normative frameworks which states are obligated to protect and be internationally accountable. In South Sudan, there is also potentially the issue of citizenship as populations have been dispersed around the world by war induced forced displacement and refuge abroad. Many have acquired dual citizenship. Many were born in their countries of refuge. During the National Dialogue, controversy arose on whether dual citizens or spouses in mixed marriages should be allowed to hold constitutional posts. These factors, and other conventional considerations, raise questions about the determination of citizenship and the rights and duties of dual citizenship.

A way of resolving the conceptual and operational dilemmas of cultural contextualization of African constitutionalism, specifically bridging national and global perspectives, is to recast sovereignty as a responsibility to protect and assist citizens, and not to focus primarily on using it as a barricade against international scrutiny and involvement in internal affairs, which may be justified under certain compelling circumstances. This requires that the state shoulders the primary responsibility for its people, but seek, or at least accept, the assistance of the international community when needed. The agenda for discharging national responsibility in making the constitution and operationalizing it through the wider notion of constitutionalism should include, but not limited to, the following:

- i. Stating in the preamble the overriding importance of culture as a source of inspiration and guidance in the construction of state institutions and decision-making processes to consolidate independence, promote an endogenous state and generate a self-sustaining process of nation-building with confidence, dignity, and national pride.
- ii. Enshrining various forms of consensus-building approaches in decision making, including conflict prevention, management, and resolution, based on the famous African notion of sitting under a tree and discussing until an amicable decision is reached.
- iii. Upholding constructive management of diversity as a strategy aimed at inclusivity and equality of all ethnic groups in the shaping and sharing of power and national resources as a strategy for ensuring national unity, harmony, and stability.
- iv. Ensuring the democratic choice of the people for their leaders through a free, fair, and culturally oriented system of elections, conducted by a credibly independent national agent, with appropriate international assistance, and balancing majority rule with deferential recognition and accommodation of minorities in the government to promote inclusivity, unity, and harmony.

- v. Respecting the dignity of every individual and group by stipulating a Bill of Rights that respects individual human and collective people's rights, civil liberties, and fundamental freedoms, as core elements of the African values and normative principles that balance the rights and duties of the individual with those of the community, the core of the African Charter of human and people's rights;'
- vi. Stipulating the appropriate conditions for granting citizenship and recognizing the rights and responsibilities of dual citizenship, bearing in mind the unique circumstances of South Sudan and the prolonged wars that have resulted in massive displacement internally and externally.
- vii. Incorporating fundamental principles of African jurisprudence in the administration of justice, which would prioritize arbitration, mediation, compensation for wrongs, and reconciliation above punitive measures that are not essential to the maintenance of the rule of law and public order.
- viii. Adopting a federal system and an enhanced form of decentralization that devolves power to the local communities as a basis for ensuring self-administration as a form of internal self-determination to safeguard consensual unity in diversity.
- ix. Encouraging the return of internally displaced populations and refugees to their areas of origin in the countryside and providing them with essential services, employment opportunities, and socio-economic development in fulfilment of the liberation policy of taking power to the people.
- x. Spreading the services and amenities available in the cities and towns to the rural areas to be accessible to the people to discourage urban influx and promote even development in the country through self-reliance and resilience measures that approach development as self-enhancement from within instead of dependency on external support.
- xi. Ensuring effective exploration and exploitation of the natural resources and wealth of the country and diversifying the sources of production and distribution, with special emphasis on the development of agriculture and livestock and directing oil revenue toward supporting the diversification of the economy.
- xii. Recognizing and reinforcing the role of traditional authorities in the modern governance system and giving them the powers and resources to enhance their capacity to effective governance and maintain the rule of law, peace and security in their areas and with neighboring communities.
- xiii. Transforming the youth age-setting system in warrior societies from a means of recruiting fighters into a collective force for reconstruction and development and providing them with incentives to make their peace-building role more attractive than the lure of engaging in violence.
- xiv. Promoting gender equality by upholding respect and material for the role of women as homemakers and mothers while promoting the participation of women in economic and public life, to give them gender representation at par with men.
- xv. Transforming traditional reverence for nature as a sacred aspect of creation and promoting modern respect for the environment and supporting international programs for the protection of the environment.
- xvi. Developing self-reliance in development as a self-enhancement from within, in a process of 'transitional integration', that links national strategies with prudently planned complementarity with the wider global economies, rather than see development as an external commodity to be imported with dependency on external actors; and

- xvii. Incorporating culture in the educational system at all levels from schools to universities and other institutions of higher learning to ensure that the curriculum is indigenized by focusing it pragmatically on relevant epistemic concepts, cultural orientation, national history, normative frameworks, practical skills, and employment opportunities, the overriding goal being to make education responsive to the country's development framework and strategies, and the needs of the people.

These are only examples of what is needed in the cultural contextualization of constitutionalism in South Sudan as a model example of an African continent-wide strategy. They are of course subject to appropriate reformulation, redrafting, and categorization for incorporation in suitable chapters or sections of the constitution.

The overriding objective is to develop an authentic model of endogenous African constitution and the related concept of constitutionalism that is grounded in African cultural values and institutions and addresses the specific issues of the African political realities with due regard to universal structures and norms of constitutionalism. In his Foreword to *Identity, Diversity and Constitutionalism in Africa*, President of Nigeria, General Olusegun Obasanjo advocated "the view of an Africa that builds on its time-tested cultural ideals, and institutionalized." He added, "I might also note that these values have much to offer not only Africa but the world. Just as Western democracy enshrines certain universal values, so does the African worldview."⁴⁹

11. Conclusion

Professor Chaloka Beyani, the Zambian Constitutional lawyer who has contributed significantly to the drafting of constitution in a number of African countries and played a key role to the development of the 2009 African Union Convention for the Protection of Internally Displaced Persons in Africa (The Kampala Convention), recently wrote in a private communication, "Modern constitutions are made by the people for the people, and it is the people at grassroots level that matter and count the most as the people. In this sense, the cultural values of the people have to drive the basis of the constitution more generally as a characteristic of the sovereignty of the people, also under a chapter on national values, but if recognized and accepted by the people as an imperative, then it has to permeate the basis of the constitution in terms of its fundamental structure, governance, Bill of Rights, and dispute settlement, in addition to the traditional role of the judiciary. It is a challenge indeed, but it must be part of the will of the sovereignty of the people in articulating their vision of constitutionalism."⁵⁰

The starting point should be identifying and analyzing the various cultural systems to discern commonalities, differences, possible complementarities, and restating a shared national framework of cultural values that should be enshrined in a national constitution. These values should be favorably viewed as embodying indigenous principles of good governance, democracy, respect for human rights, and human dignity. If we observed and applied them, they could help shape an admirable model state that constructively balances unity with ethnic and cultural diversity. That was indeed what the colonial rulers did, albeit for their own administrative convenience, when

⁴⁹ Ibid, p. xii.

⁵⁰ Chaloka Beyani, *Constitution Making in Southern Sudan*, London, June 1, 2021.

they adopted the policy of indirect rule, which post-colonial administrations abandoned as part of colonial exploitation of culture as a tool of domination.

While our initial focus must of course be on developing an appropriate culturally contextualized constitutionalism for the country, the longer-term process of applying a similar process to the wider African context must be borne in mind. Ironically, South Sudan provides a fertile ground for this cultural experimentation as it is one of the least affected by modernizing and Westernizing transformation. South Sudan could indeed provide a model potentially adaptable to other African countries. Much is already being done by African constitutional experts in various institutions in Africa and elsewhere in the world from which the South Sudanese project could learn and benefit, with the wider African context in mind.

To recap the implications of what all this means for the appropriate guidelines in developing a culturally contextualized constitutionalism, flexibly interpreted, the core requirement should be devolving autonomous powers to the local level to enable communities to govern themselves on the bases of their indigenous values and institutions, using their own local resources with complementary support from the center. This should then extend to developing principles and institutions of constitutionalism at the national level that promote constructive management of diversity based on the principles of inclusivity and equitable participation in the shaping and sharing of all material and moral values as reflected in such African normative concepts and values from comparative South Sudanese ethnic communities. Such a normative framework could then offer guidance in Africa's participation on the global scale in formulating international frameworks for a shared world order.

I would like to end this paper with four specific recommendations. First, we need to revisit the normative principles enunciated by the Founding Fathers of our newly independent countries which turned out to be unfulfilled dreams. We need individual scholars conversant with these declared concepts to study them more thoroughly to develop the value systems they embodied.

Second, there is need to study more thoroughly and elaborate the normative principles enshrined in such concepts as *Ubuntu*, *Medemer*, Personhood, and similar concepts which should be postulated in preambular paragraphs of national constitutions as normative guidelines and used to develop a shared African cultural value system on which to build a regional policy framework.

Third, we should convene an inter-disciplinary team to discuss the documents emerging from these initiatives and consider their value in developing a culturally contextualized African system of governance and constitutionalism at both the national and regional frameworks and their potential application in international negotiations.

Fourth, to extract from the exercise major normative principles that offer guidance in developing an African position in international debates on the development or reforms of normative instruments and related institutional arrangements.

The conceptual and operational issues which this paper has tried to address are daunting, but so are the paradoxical stakes and opportunities of balancing localization and globalization in a world that is both unifying and fragmenting. Implicit in these paradoxes are the risks of conflicts on the

one hand and the potential of mutual understanding, cooperation, and cross-cultural enrichment on the other hand. That is at least the aspiration I have tried to pursue with relentless optimistic search for opportunities in crises and determined resistance to pessimism as a dead end that should be avoided.