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Hierarchy of Norms in Transitional Societies: Resolving the Tension between South Sudan's Transitional Constitution and the Revitalised Peace Agreement

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Abstract

Since gaining independence from Sudan in 2011, violent conflicts and differing intercommunal clashes have threatened the organised existence of South Sudan as a nation. Although, a constitutional document was drawn up (the Transitional Constitution) few days ahead of the country's independence in 2011, armed insurgencies and clashes between rival factions have led to conflicts and loss of civilian lives in the country. In 2018, a multiparty Peace Agreement was signed by diverse warring factions with a promise of restoring peace and stabilising the fragile nation. The Peace Agreement, framed as, the Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS) was adopted on 12th of September 2018 in Addis Ababa, Ethiopia. Although, the doctrine of constitutional sovereignty is an established aspect of constitutional law, the 2018 R-ARCSS simultaneously lays claim to supremacy in the event of any clash between the Peace Agreement and any other legal normative standard, including the 2011 Transitional Constitution. This paper assesses the legal validity of the supremacy claim by the Peace Agreement and finds that unlike 'traditional' Constitutions, in which the doctrine of Constitutional supremacy is generally settled and infrequently contested, Transitional Constitutions present a different variant. Drawing on the practice from other jurisdictions, the paper concludes that conflicts between Transitional Constitutions and Peace Agreements are often decided in favour of Peace Agreements, with the formulation of the so-called peace jurisprudence by certain courts.

Keywords: Peace Agreement, South Sudan, Supremacy of Constitutions, Transitional Constitution, Violent Conflict

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1.0 Introduction

South Sudan, the newest United Nations member State became an independent nation exactly ten years ago.[1] Since gaining independence from Sudan in 2011, the country's political and legal landscape has been fraught with many problems.[2] The political and the legal crisis are largely forged together with the former inducing varied constitutional issues in the country. The political crisis between President Kiir and his vice, Machar, fractured the country's military with soldiers fighting along ethnic lines.[3] The intra-military war further transformed into a full-blown conflict across the country, resulting in the killing of about 400,000 (Four Hundred thousand) civilians with millions more displaced.[4] Following years of protracted conflicts in South Sudan, the Revitalised-Agreement on the Resolution of the Conflict in South Sudan (R-ARCSS or the Agreement) was adopted in 2018 as a framework to facilitate the peace process in the country. Chapter VIII of the R-ARCSS asserts the supremacy of the agreement over other domestic legislation in South Sudan. This article assesses the legal validity of Chapter VIII R-ARCSS in light of Section 3 of the 2011 Transitional Constitution, which affirms the supremacy of the Constitution. It notes that, although in purely legal terms, constitutions, as the *Grundnorm* within a legal system possess authoritative legal force, and thus enjoy primacy, in transitional settings, courts are often inclined to adopt a 'peace jurisprudence' when assessing a potential conflict between the Constitution and Peace Agreements. Moreover, Transitional Constitutions seem to present a distinct scenario compared to 'traditional' Constitutions, as they are framed with the objective of achieving peace and serve as a bridge linking one constitutional order to another.[5] As this constitutional form provides a framework for negotiating the final constitution, they may generally not be construed as totally separate from the peace treaties that are negotiated.

To give proper context to the analysis on the Revitalised Peace Agreement and the 2011 Transitional Constitution, the paper begins by first highlighting the socio-political

[1] Sam Mednick, 'South Sudan celebrates 10 years of independence – but few rejoice' Aljazeera (8 July 2021) <https://www.aljazeera.com/news/2021/7/8/south-sudan-celebrates-10-years-of-independence-but-few-rejoice> accessed 29 July 2021

[2] Ibid

[3] Council on Foreign Relations, 'Civil War in South Sudan', <https://www.cfr.org/global-conflict-tracker/conflict/civil-war-south-sudan> accessed 24 July 2021

[4] Ibid

[5] Christine Bell and Kimana Zulueta-Fülscher, *Sequencing Peace Agreements and Constitutions in the Political Settlement Process*, (International Institute for Democracy and Electoral Assistance, Policy Paper No. 13, 2016) 27 <https://www.idea.int/sites/default/files/publications/sequencing-peace-agreements-and-constitutions-in-the-political-settlement-process.pdf> accessed 29 July 2021

context of South Sudan. It subsequently engages with the philosophical and legal basis for the doctrine of hierarchy of Constitutions before examining the question of norms conflict in South Sudan. This aspect demonstrates the possible legal validity of Chapter VIII of the R-ARCSS. The paper nevertheless recognises that questions of constitutional supremacy in transitional settings do not always lend themselves to easy solutions. The paucity of case law on conflict between Transitional Constitutions and Peace Agreements, including the manner in which courts employ purposive interpretations and proportionality principles to achieve justice are also noted. South Sudan is particularly studied in this paper given the protracted nature of the conflict, which has lasted for over six decades, pre and post-independence. The findings could be relevant not only for South Sudan but also for other post-conflict societies grappling with the balancing of Peace Agreements with the constitution, where both assert simultaneous claims to supremacy.

2.0 The Turbulent Socio-Political Context of South Sudan

South Sudan became a sovereign nation in July 2011 following independence from Sudan.[6] Prior to gaining independence, its relationship with Sudan was marked by violence and decades of brutal civil war.[7] Historically, the relationship between Sudan's predominantly Christian south and the largely Muslim north had been fraught with many problems.[8] From the outset, Sudan's independence from joint British and Egyptian rule in 1956 had suggested a turbulent future for the country's northern and southern regions; with leaders from the south accusing Khartoum of attempting to impose an Islamic Arab identity on the region while negating the spirits of true federalism.[9] In 1955, just before the 1956 independence, southern army officers mutinied, inducing a civil war between the southern and northern regions.[10] A Peace Agreement[11] brokered in Addis Ababa in 1972 effectively accorded the south a measure of autonomy. However, five years later, in 1983, the southern region's Sudan People's Liberation Movement (SPLM) including its armed organisation, the Sudan People's

[6] United States Institute of Peace, 'Independence of South Sudan', (United States Institute of Peace) <https://www.usip.org/programs/independence-south-sudan> accessed 25 July 2021

[7] DW, 'Can Sudan and South Sudan find friendship?' <https://www.dw.com/en/can-sudan-and-south-sudan-find-friendship/a-51255829> accessed 25 July 2021

[8] DW, 'Can Sudan and South Sudan find friendship?' https://www.dw.com/en/can-sudan-and-south-sudan-find-friendship/a-51255829 accessed 25 July 2021

[9] BBC, 'South Sudan profile – overview', (27 April 2016) < https://www.bbc.com/news/world-africa-14019208> accessed 25 July 2021

[10] Ibid

[11] The Addis Ababa Agreement, also known as the Addis Ababa Accord was brokered by Ethiopian Emperor Haile Selassie on February 27, 1972; see Marina Ottaway and Amr Hamzawy, 'The Comprehensive Peace Agreement' <https://carnegieendowment.org/2011/01/04/comprehensive-peace-agreement-pub-42223> accessed 28 July 2021. The agreement ended the nearly 20-year conflict with a promise of autonomy for the southern region; see Britannica, 'The Addis Ababa Agreement', <https://www.britannica.com/place/Sudan/The-Addis-Ababa-Agreement#ref48975> accessed 28 July 2021.

Liberation Army (SPLA), rebelled against the cancellation by the Sudanese government of the initial autonomy granted to the region.[12]

An estimated 1.5 million people were killed and more than 400,000 displaced between 1983 and 2005 during years of intense guerrilla warfare.[13] The 2005 Comprehensive Peace Agreement was finally adopted, which granted regional autonomy to the south including guaranteed representation in a national power-sharing government.[14] Following this, an independence referendum was conducted in 2011, in which 99% of southern Sudanese people voted to split from Sudan.[15] A Transitional Constitution was adopted the same year. In 2013, two years after becoming an independent nation, South Sudan recoiled into a deadly civil war with soldiers loyal to President Salva Kiir fighting against soldiers supporting Vice President, Riek Machar.[16]

Another peace deal was negotiated in August 2015, the Agreement on the Resolution of the Conflict in the Republic of South Sudan (ARCSS), which subsequently broke down given the outbreak of another civil war in 2016. In September 2018, the Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS) was finally adopted in Addis Ababa, Ethiopia, mainly to revive the terms and content of the 2015 ARCSS.[17]

3.0 The Nature of Transitional Constitutions

In most cases, constitutions are drawn up during the era of transition after political suppression.[18] They could also arise from subordinate agreements to enact internal rules to regulate individual transactions within a particular region.[19] Generally, a Constitution is a document having a special legal status which sets out the framework to create, select, define and regulate the powers and general responsibilities of government as well as the rights and duties of the governed.[20] Countries around the world change their

[12] BBC, 'South Sudan profile – overview', Op cit, n. 9
[13] Ibid; see also Council on Foreign Relations, 'Civil War in South Sudan', <https://www.cfr.org/global-conflict-tracker/conflict/civil-war-south-sudan> accessed 24 July 2021.
[14] BBC, 'South Sudan profile – overview', Op cit, n. 9
[15] Ibid
[16] DW, 'Can Sudan and South Sudan find friendship?' Op Cit, n. 7
[17] Clayton Hazvinei Vhumbunu, 'Reviving peace in South Sudan through the Revitalised Peace Agreement
Understanding the enablers and possible obstacles', *Accord* (Conflict Trends, 2018/4) <https://www.accord.org.za/conflict-trends/reviving-peace-in-south-sudan-through-the-revitalised-peace-agreement/> accessed 25 July 2021
[18] Gabor Halmai, 'Silence of Transitional Constitutions: The "Invisible Constitution" Concept of the Hungarian Constitutional Court' (2018) 16(3) *International Journal of Constitutional Law,* 970.
[19] Mark F. Grady, Michael T. McGuire, 'The Nature of Constitutions,' (1999) 1 *Journal of Bioeconomics*, 227 - 240
[20] Roger D. Congleton, 'The Nature of Constitution' Improving Democracy through Constitutional Reform, (Springer US, 2003) p. 11

constitutional arrangements whether from dictatorship or authoritarian to a more democratic structure and those already operating democracy debate on how to better structure the constitution.[21]

In a clearer form, a Transitional Constitution may be characterised as a provisional constitution or an interim constitution.[22] It refers to a constitution that is formed and intended to direct the dealings of people in a country till a viable permanent constitution is provided as an alternate.[23] In a functional and notional sense, interim constitutions are generally different from peace treaties or resolutions and traditional constitutions.[24] The Transitional Constitutional variants are established with the purpose of closing up a gap where there are in fact, no lawful and legitimate constitutional documents.[25] Thus, they stand as a bridge or a transitioning from an illegitimate regime to a legitimate one as well as providing a temporary legal framework for the governing of a society during the transition, with a bargaining framework to negotiate a new structure of government and governing system and all necessary requirements for the drafting of a final constitution.

Transitional Constitutions are really helpful and effective tools for deferral, because warring and conflicting parties can have an advantage of extra time, not only for negotiating, but to allow all tension from conflicts die down or subside.[26] These constitutions make room for parties to discuss and come to agreement on a mutual basis, so as to develop the seed trust among the parties involved. Not only this, they also ensure a legitimate transitional government and institutionalise the arrangements between parties to the transitional process.[27] In principle, a Transitional Constitution could demand a complete change or amendment of a pre-existing legal framework or interpretation of relevant constitutional power by a constitutional court, which automatically have primacy over preceding statutory documents.[28] This implies that a Transitional Constitution supersedes pre-existing normative standards within the legal order of a state.

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[21] International Institute for Democracy and Electoral Assistance (IDEA), 'Constitutional Transitions and Territorial Cleavages.' (2015) p. 5. <https://www.idea.int/sites/default/files/publications/constitutional-transitions-and-territorial-cleavages.pdf> accessed 12 July 2021

[22] Kailash Danrav, 'What is Interim Constitution' (12 September 2017) <https://www.topperlearning.com/answer/what-is-interim-constitution/w78mhxx> accessed 17 July 2021.

[23] Ibid

[24] International Institute for Democracy and Electoral Assistance (IDEA), 'Interim Constitutions in Post-Conflict Settings' (Discussion Report, 2014, 4-5 December) <https://www.idea.int/publications/catalogue/interim-constitutions-post-conflict-settings> accessed 18 July 2021.

[25] Ibid

[26] Harald Eberhard, Konrad Lashmayer and Gerhard Thallinger 'Approaching Transitional Constitutionalism' (2007, p. 13) <https://www.lachmayer.eu/wp-content/uploads/2014/05/2007_Facultas_Approaching-Transitional-Constitutionalism.pdf> accessed 17 July 2021

[27] Ibid, p. 13

[28] Ibid

In certain contexts, mid/post-conflict Transitional Constitutional documents are adopted to ensure that private and elite power is converted into public power for the overall welfare of the society.[29] The final constitution has to be a document where the hopes, aspirations, goals and even fears of the society is well-captured.[30] It is, however, worth acknowledging that Transitional Constitutionalism poses certain legal challenges in modern times, especially to constitutional law doctrine and theory.[31] Generally, a significantly large number of States have a more or less steady constitution and new constitutions are continuously emerging.

The trajectory of transitional processes form a very important part of constitutions of the modern world. Universally, Transitional Constitutionalism and transitions cannot be comprehensively discussed, except certain factors are put into consideration, such as history, culture, politics and the social life of that country or countries.[32] The former constitutional order in a way controls or influences the transitional process and the new constitution performs a significant role in legalising the new political structure. However, social, political and cultural aspects are the main encouraging factors for the transition process.

4.0 The Philosophical and Legal Basis for the Principle of Hierarchy of Constitutions

The idea of supremacy of the constitution indicates that the constitution assumes hierarchical primacy above all other sources of law in the land.[33] This implies that the constitution is above all traditions, culture, norms and any international and domestic laws or social act that is inconsistent with it. Supremacy of the constitution generally bothers on the sources of law and its hierarchy. Before engaging further with the principle of supremacy of the constitution, it is essential to note the three basic factors that symbolise the principle: a) The ability to differentiate between constitutional laws and other laws; b) subjecting the legislators to the constitutional law, by ensuring special procedures for amending constitutional law is followed; and c) providing an institution with the authority to adjudicate in the event of conflict so as to check the constitutionality of governmental legal acts.[34] The laws of most countries are a combination of written and unwritten codes often operating under a document called the 'constitution', which is viewed as the *grundnorm* for all other laws by most

[29] International Institute for Democracy and Electoral Assistance (IDEA), 'Interim Constitutions in Post-Conflict Settings' Op Cit, n. 8, p. 5
[30] Ibid
[31] Harald Eberhard, Konrad Lashmayer and Gerhard Thallinger, Op Cit, n. 10, p.9
[32] Ibid, p. 10.
[33] Graziella Romeo, 'The Conceptualization of Constitutional Supremacy: Global Discourse and Legal Tradition' (2020) 21 *German Law Journal*, 905
[34] Jutta Limbach, 'The Concept of the Supremacy of the Constitution' (2001) 64(1)1 *The Modern Law Review*, 3

democratic countries.[35] The Constitution serves as the authoritative legal standard for regulating the conduct of the legislature, executive, judiciary and everyone in the country. This is advanced, so as to prevent the overturning of the said document by the enemies of democracy or any powerful government official.[36]

As a general rule, hierarchy exists, such that a legislation or rule may not contradict a higher legal instrument. Universally, countries have a legal foundation consisting of a founding document, such as a constitution and the laws passed by the national legislature and other levels of law-making authority. These laws function in a hierarchical form, which establishes their status in authority and the scope of each level is derived from a legal instrument or constitution. This hierarchical structure depends on the form of government, which differs from country to country. However, for the most part, in many countries, the constitution forms the basis for determining the objective of different laws within the legal and regulatory framework; they also set out the limits for asserting power and stipulate the legality of those powers by organs of the state.[37]

As laws that govern the conduct of people in a particular place, constitutions can have a general rule that is binding on the entire community and also have specific laws governing a particular body. The specific laws could be laws of certain administrative bodies, associations, educational institutions, religious institution as they may be. For instance, in Nigeria the constitution[38] is the *grundnorm* from which other laws derive their validity. The laws of several bodies set up in Nigeria may not contravene the provisions of the constitution. Therefore, the doctrine of hierarchy of constitutions ensures that there is a check on the powers of individuals to make laws i.e., even if an individual has the right to make laws for the people in a society. If an individual makes any laws that are repugnant to natural justice, equity and good conscience, such laws may be subjected to a higher authority or legal measure that could serve as a check and balance measure over such powers. Undoubtedly, respect for the hierarchy of laws is fundamental to the rule of law, as it dictates how the different levels of law (executive, legislature and judiciary) will execute their responsibilities in practice.

More generally, the fundamental levels of hierarchy consist of: a constitution or founding document, statutes or legislation, regulations, and procedures.[39] In America, for instance, laws are passed, construed, and implemented at the federal, state, and local level, as stipulated by the US Constitution. Laws passed by a legislative body, and rules

[35] Graziella Romeo, Op Cit, n. 17 at p. 909
[36] Ibid, p. 4
[37] Micheal Clegg, Katherine Ellena, David Ennis and Chad Vickery, 'The Hierarchy of Laws: Understanding and Implementing the Legal Frameworks that Govern Elections' (22 September 2016) <https://www.ifes.org/publications/hierarchy-laws-understanding-and-implementing-legal-frameworks-govern-elections> accessed 17 July 2021.
[38] Constitution of the Federal Republic of Nigeria, Op cit, n. 35
[39] Micheal Clegg, Katherine Ellena, David Ennis and Chad Vickery, Op Cit, p. 3; Brooks, Tina M. and Steenken, Beau, 'Sources of American Law: An Introduction to Legal Research' Law Faculty Books, (4th Ed, CALI eLangdell Press 2019) 9-13.

promulgated by individual agencies are structured hierarchically as follows: U.S Constitution, Laws (statutes) enacted by Congress, Rules promulgated by federal agencies, State Constitution, Laws enacted by the state legislature, Rules promulgated by state agencies, City/county charters (the "constitution" for the city or county), Local laws and ordinances, as well as Rules promulgated by local agencies.[40]

Further, the constitutional framework of certain countries especially those operating the common law system such as the United States of America, Australia, Nigeria, India, Canada etc., regard customary and written existing laws as relevant sources before arriving at a documentary constitution which is generally authoritative; while Italy does not regard these sources in their constitutional practice and United Kingdom operates an uncodified or unwritten constitution.[41] Britain has accumulations of diverse statutes, conventions, political customs, judicial decisions (common laws), treaties, in some scattered documents which is collectively referred to as the British Constitution.[42] This is similar with Israel, New Zealand and several other countries.[43] Meanwhile, the concept of constitutional supremacy emanates from the United States.[44] Since the constitution of a state is a set of laid down rules of that state, which could either be documented or not, the hierarchy of such constitution is sacrosanct. Thus, other statutory norms must be framed in a way that is consistent and non-contradictory to the *grundnorm*.

In principle, the doctrine of constitutional hierarchy also manifests itself in transitional societies with Transitional Constitutions, since this constitutional form is the *grundnorm* within that particular context. The next section examines the key features of Peace Agreements while the succeeding section assesses the legal status of the 2018 Revitalised Peace Agreement, in particular, its claim to supremacy and the balancing with the 2011 Transitional Constitution.

5.0 The Normative Relevance of Peace Agreements

Although, documents that could be described as Peace Agreements are widespread, the meaning of the term remains largely unknown.[45] Nonetheless, the label Peace Agreement is often loosely ascribed to agreements between warring sides to a violent

[40] Mark Davies, 'An Introduction to the Structure and Sources of American Law', (2012) <http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal_ethics_laws_ny_state/introduction_to_american_law.pdf> accessed 19 July 2021

[41] Graziella Romeo, Op Cit, n. 33, p. 905

[42] Nwabueze, B. O., 'Nigeria's Presidential Constitution 1979-83: The Second Experiment in Constitutional Democracy.' (New York, Longman Inc. 1985)

[43] Ibid

[44] Graziella Romeo, Op Cit, n. 33, p. 906

[45] Ghassem Bohloulzadeh, 'The Nature of Peace Agreement in International Law' (2017) 10(2) *Journal of Politics and Law,* 208; Christine Bell, 'Peace Agreements: Their Nature and Legal Status', (2006) 100(2), *The American Journal of International Law* 374; Ahmed, Einas, 'The Comprehensive Peace Agreement and the Dynamics of Post-Conflict Political Partnership in Sudan, (2009) 44(3) In: *Africa Spectrum,* 133-147.

internal conflict to achieve a cease-fire and establish the political structure of a State.[46] Despite the ambiguities in definition, Peace Agreements often possess certain characteristic features and/or stages, including Pre-negotiation Agreements, Substantive Agreements, and Implementation/Renegotiation agreements.[47] These documents often seek to transform a conflict, so that contentions can be addressed in a more constructive manner.[48] Generally, divergent schools of thought exist regarding the role and importance ascribed to Peace Agreements during an internal conflict. For instance, the 'constitutive' approach, views Peace Agreement as occupying a crucial role in the overall process. This variant generally articulates the stringent criteria that the content of Peace Agreements should meet including: language precision, international legitimacy, technical feasibility, implementation timeline etc. In this regard, mediators are duty bound to ensure that relevant agreements accord with these high thresholds.[49] Peace Agreements adopted in El Salvador in January 1992[50] and Guatemala during December 1996[51] are clear examples of the constitutive approach.[52] The 2018 Revitalised Peace Agreement of South Sudan also arguably belongs to this spectrum. The 'instrumental' approach is another form, which unlike the 'constitutive' approach, does not accord the same centrality and clarity to the agreement.[53] Its negotiation follows multiple stages in a complex transition. Use of imprecise language and deficits in areas of feasibility and legitimacy are trade-off compromises often made to maintain the momentum of the overall transition. These gaps will over time be addressed via relevant amendments and refinement of the Peace Agreements. The Burundi Peace Agreement of 30 August 2000 is a classic example of this form.[54]

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[46] Christine Bell, 'Peace Agreements: Their Nature and Legal Status', (2006) 100(2) *The American Journal of International Law,* 374

[47] Ibid

[48] Nita Yawanarajah and Julian Ouellet, 'Peace Agreements' (September 2003) <https://www.beyondintractability.org/essay/structuring_peace_agree> accessed 25 July 2021

[49] Jean Arnault, 'Good Agreement? Bad Agreement? An Implementation Perspective', <https://peacemaker.un.org/sites/peacemaker.un.org/files/Good%20AgreementBad%20Agreement_Arnault.pdf> accessed 25 July 2021

[50] The Chapultepec Peace Accords of El Salvador was signed on 16 January 1992 under the auspices of the United Nations. The agreement was a culmination of twenty months of negotiations and a number of partial settlements between the rebel group Farabundo Martí National Liberation Front (FMLN) and the government of El Salvador. See Margarita S. Studemeister (ed) 'El Salvador Implementation of the Peace Accords', United States Institute of Peace, 2001) 5.

[51] The Accord for a Firm and Lasting Peace was signed by the Government of Guatemala and the Unidad Revolucionaria Nacional Guatemalteca (URNG), on 29 December 1996. The Agreement effectively ended a war that had ravaged the country for over three decades; see Council on Hemispheric Affairs, 'Guatemala's Crippled Peace Process: A Look Back on the 1996 Peace Accords', https://www.coha.org/guatemalas-crippled-peace-process-a-look-back-on-the-1996-peace-accords/ accessed 28 July 2021.

[52] Jean Arnault, 'Good Agreement? Bad Agreement? An Implementation Perspective', <https://peacemaker.un.org/sites/peacemaker.un.org/files/Good%20AgreementBad%20Agreement_Arnault.pdf> accessed 25 July 2021

[53] Ibid

[54] Ibid

Generally, even though Peace Agreements often appear to possess the character of legal agreements, it is often difficult to situate them in the realm of positive law, especially given the mix of state and non- state actors, and the absence of state legislators.[55] In transitional settings, parties to Peace Agreements, especially non-state actors often seek to establish the legality of such arrangements, by calling for legal reforms and constitutional amendments or by framing it as a Special Agreement under Article 3 common to all Geneva Conventions of 1949 to grant it international status which would be binding on the state.[56] Burundi legislators, for instance, adopted the Arusha Peace and Reconciliation Agreement as a national legislation. Generally, incorporating Peace Agreements with the constitution has the potential of shielding the document from situations which can undo the peace negotiation process. It could also discourage parties from dismissing the agreement as non-binding.[57]

6.0 The Legal Status of Chapter VIII of The Revitalised Peace Agreement in South Sudan Constitutional Order

As previously indicated, an important aspect of constitutional law is the supremacy of the constitution. The supremacy doctrine confers the highest authority in a legal system on the constitution and implies a lower ranking of any conflicting instrument or institution.[58] In South Sudan, this principle is affirmed by the Transitional Constitution,[59] which, *inter alia*, states that 'this Constitution derives its authority from the will of the people and shall be the supreme law of the land.'[60] Thus, in principle, the Transitional Constitution supersedes other conflicting laws or agreements within the South Sudan legal order. However, Peace Agreements may constitute an exception.

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[55] Christine Bell, Op Cit, n. 46, p. 349

[56] See Laurie Nathan, 'The Ties that Bind: Peace negotiations, credible commitment and constitutional reform' (Swiss Peace 2019) 16. Generally, Article 3 common to all four Geneva Conventions establishes fundamental rules which are non-derogable. See International Committee of the Red Cross, 'The Geneva Conventions of 1949 and their Additional Protocols' <https://www.icrc.org/en/doc/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm> accessed 28 July 2020.

[57] See Christine Bell, Op Cit, n. 46, p. 386; See also Asli Ozcelik, Tarik Olcay, '(Un)Constitutional Change Rooted in Peace Agreements' (2020) 18, *International Journal of Constitutional Law*, 31.

[58] Jutta Limbach, 'The Concept of the Supremacy of the Constitution', (2001) 64(1), *The Modern Law Review*, 1.

[59] See The Transitional Constitution, s. 3 of the 2011of South Sudan

[60] Although the provision is not worded to further assert that any conflicting law is null and void as may be found in the constitutions of several other jurisdictions, this may be assumed. The 2019 Constitutional Charter of South Sudan was for instance worded differently, it explicitly states that 'Provisions of any law that are inconsistent with the provisions of this Constitutional Charter shall be repealed or amended to the extent required to remove such inconsistency.'

Generally, since Transitional Constitutions are temporary arrangements that allow conflicting sides to continue negotiating fundamental disagreements, they technically differ from peacetime or traditional constitutions in both their objectives and character.[61] Therefore, Peace Agreements and Transitional Constitutions arguably belong to the same spectrum. In certain contexts, Peace Agreements take the form of Transitional Constitutions,[62] demonstrating their influence. For instance, the constitutions of Colombia and Bosnia-Herzegovina were both drafted as part of their peace processes.[63] The distinction between transitional and peacetime constitutions is therefore noteworthy. Generally, Transitional Constitutions are of a different stock. They are often attentive to past experiences while executing a transformative project.[64] In other words, they guide negotiation processes as opposed to codifying finalised outcomes.[65] Peace Agreements, on the other hand, are important documents which help to reconstruct societies in the wake of violent conflict.[66]

In South Sudan, Chapter VIII of the R-ARCSS explicitly calls for ratification of the agreement by the country's Transitional National Legislature and full incorporation into the Transitional Constitution.[67] It is noteworthy that the R-ARCSS, which was signed in September 2018, was ratified by the Transitional National Legislature in October 2018, in compliance with Chapter VIII of the agreement.[68] The R-ARCSS further states that in the event that the provisions of the 2011 Transitional Constitution (as amended) conflicts with the peace agreement, the terms of the agreement shall prevail. It is worth stating here that, the practice of inserting a supremacy clause into peace agreements is not uncommon. Like Chapter VIII of the R-ARCSS, the 1993 Arusha Peace Agreement of Rwanda[69] and the 2000 Arusha Peace and Reconciliation Agreement for Burundi,[70] contain supremacy clauses. However, cases of direct conflict between transitional constitutions and peace agreements (where both instruments lay claim to supremacy)

[61] Kimana Zulueta-Fülscher, *Interim Constitutions Peacekeeping and Democracy-Building Tools*, (International Institute for Democracy and Electoral Assistance 2015) 8-9.
[62] Ibid, p. 9
[63] Jenna Sapiano, 'Courting peace: Judicial review and peace jurisprudence', (2017) 6(1) *Global Constitutionalism,* 149.
[64] Asli Ozcelik, Tarik Olcay, Op Cit, n. 57, p. 22.
[65] Catherine Turner, 'Transitional Constitutionalism and the Case of the Arab Spring,' (2015) 64(2) *International and comparative law quarterly*, 270.
[66] Christine Bell, Op Cit, n. 57, p. 374.
[67] 2011, South Sudan Transitional Constitution
[68] Matthew Hauenstein, Madhav Joshi, Jason Michael Quinn, '*Report of the Peace Accords Matrix Project on the Implementation of the Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS)'* (University of Notre Dame 2019) 13.
[69] Article 3(2) states that 'in case of conflict between the other provisions of the Constitution and those of the Peace Agreement, the provisions of the Peace Agreement shall prevail.' The agreement went as far as replacing some aspects of the constitution, see Article 3(1).
[70] Article 15(2) of the Agreement inter alia states that, 'When there is any conflict between that Constitution and the Agreement, the provisions of the Agreement shall prevail.'

have been rarely litigated in courts.[71] Thus, the supra-constitutional status of peace agreements is not settled; and the legal jurisprudence in this area is not fully developed, an area for further research.[72]

Nevertheless, evidence from other jurisdictions show that courts often attach relative weight to peace agreements, even when they do not explicitly assert supremacy. In this regard, courts sometimes employ a combination of purposive interpretation and proportionality principles to gauge the intent of drafters, balance competing interests, and preserve fragile peace. In a publication, Joseph Raz noted that, 'the grounds for the authority of the law help to determine how it ought to be interpreted'.[73] A Northern Ireland case that came before the Judicial Committee of the House of Lords elucidates this reasoning. Here, the House of Lords was asked to determine whether there was a violation of the 1998 Northern Ireland Act (NIA), a post-conflict statute, which can be described as the *de jure* constitutional document for the devolved government. In deciding whether the voting of a First Minister and Deputy after a stipulated deadline had passed violated the NIA, the court had recourse to the Belfast Agreement, noting that the NIA 'should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody.'[74] Thus, while the constitution and the Peace Agreement were considered as mutually reinforcing, the court tacitly prioritised the Peace Agreement – a decision which facilitated the success of the peace process.[75]

Further, in Colombia, the constitution[76] recognises the role of the Constitutional Court in safeguarding the integrity and supremacy of the constitution; the court has formulated 'peace jurisprudence', noting that this approach is consistent with the preamble to the constitution.[77] In this regard, a negotiated agreement[78] between the government and rebel groups**,** which commuted offences committed by members of the armed groups was contested by human rights organisations as undermining constitutional provisions, including victims' rights.[79] In this case, the court affirmed the constitutionality of the agreement, as it was intended to achieve peace. It specifically identified peace as 'a complex legal entity, as a collective right, an essential purpose of the Colombian state and a constitutional value.'[80] It further noted that 'the State had the

[71] Asli Ozcelik, Tarik Olcay, Op. Cit, n. 57, 31.
[72] Ibid.
[73] Joseph Raz, *Between Authority and Interpretation* (OUP, Oxford, 2009) 322.
[74] *Robinson v Secretary of State for Northern Ireland & Ors* [2002] UKHL 32, Paras 10-11.
[75] Jenna Sapiano, Op. Cit, n 63, 152.
[76] The Constitution of Colombia, (1991) art. 124.
[77] T-406, 1992(2) G.C.C. at 198, cited in D Landau, 'Two Discourses in Colombian Jurisprudence' (2005) 37 *The George Washington International Law Review* 687, 727.
[78] Justice and Peace Law, 2005
[79] Gustavo Gallón Giraldo y otros v Colombia, Constitutional Court of Colombia Judgement, C-370/06, available at <http://english.corteconstitucional.gov.co/sentences/C-370-2006.pdf> accessed 29 October 2020.
[80] Ibid.

authority to provide reasonable transitional instruments, justified and proportionate, even limiting other constitutional guarantees, in order to achieve peace."[81] In this way, on the basis of proportionality principles, the court appeared to be re-asserting the constitution in the broader interests of peace.[82]

Despite the paucity of case law addressing norm conflicts in transitional settings, based on available evidence, the reasonable conclusion that could be drawn is that within the transitional context of South Sudan, the 2011 Transitional Constitution and the 2018 R-ARCSS belong to the same constitutional legal order. More so, the agreement has been codified by the country's legislature as forming part of the Transitional Constitution. The interest of peace is also an important factor to be taken into account, as opposed to legal technicalities which may undermine the peace process. This assessment would however be different in a non-transitional setting, where the primacy of the constitution should always be affirmed. Thus, a claim to supremacy by the South Sudan Peace Agreement is not altogether misplaced or far reaching in the context of a transitional system.

7.0 Conclusion

The supremacy of a Constitution in a legal order is a fundamental aspect of constitutional law. However, Transitional Constitutions, usually adopted in conflict and post-conflict societies may be contemplated to operate alongside Peace Agreements. To effectively address the question of norms conflict in South Sudan, this paper began by indicating the socio-political context of the country, which prompted the Transitional Constitution and the Revitalised Peace Agreement in the first instance. The paper also engaged with the general nature of Transitional Constitutions demonstrating their implicit divergence from the 'traditional' constitutional variants. Nonetheless, whether they are Transitional or the more 'traditional' forms, the doctrine of supremacy of the constitution is a cross-cutting principle common to both documents. In conflict and post-conflict societies, however, Peace Agreements formulated to end a war or affirm the terms agreed by parties to a peace process, sometimes assert their own supremacy over other potential laws including the constitution. As is the case in South Sudan, both the Transitional Constitution and Peace Agreement simultaneously lay claims to supremacy. This paper has highlighted that this approach is not without precedence. The Peace Agreements adopted in Burundi and Rwanda both contains similar supremacy clauses. Although judicial pronouncement on the hierarchy of norms between Transitional Constitutions and Peace Agreements is scarce, there is evidence that courts in other jurisdictions through purposive interpretations and proportionality considerations construe Peace Agreements as consistent and complementary with constitutions. Thus, given the transitional context in South Sudan, it is concluded that the R-ARCSS may

[81] Ibid.
[82] Jenna Sapiano, Op. Cit, n. 63, p. 149.

exceptionally be considered to possess hierarchical status, as the Transitional Constitution is not a final document but a framework for negotiating peace. Moreover, with the incorporation of the Peace Agreement with the Transitional Constitution, both instruments are complementary and technically legally equal, and may assert the supremacy of the Peace Agreement. Ultimately, it is left for the constitutional courts to decide on the hierarchical normative standard.