

# CONSTITUTIONAL CHALLENGES OF THE TRANSITION\*

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## Overview

Sudan began its independence by amending the Self Autonomy Act of 1953, to be the 1956 Transitional Constitution. During the 43 years of independence, the country has seen three Transitional Constitutions, two Permanent Constitutions and several constitutional or republican orders. The debate on the constitutional problems of Sudan has usually focused on the failure to achieve a permanent constitution despite decades of independence. President Jaafar Nimeiri believed he had solved the problem by branding his 1973 Constitution as ‘permanent’. The current government has done the same thing with its 1998 Constitution. They seem to have learned nothing from Nimeiri’s experience: an insistence on the term ‘permanent’ is rather strange in a country like Sudan where the dominant culture dictates that nothing permanent but God. The search for a permanent, unchanging constitution is in fact illusory. The constitutional development of any country might pass important thresholds but it never stops developing and changing. The most important issue is not a ‘permanent constitution’ as such, but broad agreement on the foundations that can guarantee *stable constitutional development* for Sudan. The Steering Committee is hoping to stimulate discussion on human rights and the constitution not just to reach a well-defined text on the subject but to embark on a strategy that makes the culture of human rights part of the constitutional culture of Sudan. This is one of the most important issues for a constitutional consensus in Sudan.

Independent Sudan can be called ‘a state of emergencies.’ For this entire period, Southern Sudan has either been ruled under a State of Emergency, or there have been such substantial exceptional powers on the statute books that de facto emergency rule has been in place. In Northern Sudan, during more than half of the 43 years, there has been a State of Emergency in place. For more than fourteen of the remaining years, there has been such substantial emergency powers permitted that the government has had little need to invoke a State of Emergency. For a mere three years since Sudan gained independence has the government not had use to any emergency powers or special security measures. And the last such occasion was a few months in 1973, between the adoption of the ‘Permanent Constitution’ and the amendment of the National Security Act in response to disturbances



at the University of Khartoum. This brief period was twenty-five years ago, and was a period in which security measures were rapidly eroding the limited constitutional freedoms enjoyed by Sudanese citizens.

Emergency rule has been employed by both military and civilian governments. The use of emergency or exceptional powers by elected governments blurs the line between constitutional democracy and military rule, and lends legitimacy to military coups. The doctrine of 'exceptionalism' has been used to try to justify serious deviations from constitutionalism and has become a charter for the abuse of basic human rights.

Under these circumstances, it makes sense to regard exceptional powers as Sudan's de facto constitution. Consequently the first part of this paper will be concerned with emergency or exceptional powers: how they should be introduced and removed; what their scope should be; what guarantees for human rights should exist within them, and what is the constitutional role of the armed forces.

Only then, do we move on to address the other major constitutional issues facing Sudan, including the kind of the constitution, the right of self-determination, the place of human rights guarantees, the penal code, the electoral system, and the process whereby a constitution is formulated and adopted. The paper does not address in detail the question of a transitional constitution that should be in place while a permanent constitution is negotiated, developed and adopted. But it is essential human rights guarantees are built into any interim constitution.

The central theme throughout is that guarantees on human rights should be central to Sudan's future constitution. While human rights are universal and idealistic, the mechanisms for establishing and enforcing those guarantees must be realistic and appropriate to the situation of Sudan today. Fortunately, many of the main constitutional issues have been resolved in principle by the Asmara Declaration and the IGAD Declaration of Principles. Following on from these landmark agreements, there is a consensus, shared by the Steering Committee for Human Rights in the Transition, that citizenship should be the basis for all rights guaranteed by the constitution without discrimination on the basis of religion, race, gender or culture, and that Sudan should have a secular constitution. However, because there is still much controversy about the position of religion in politics, and because the concept of 'secularism' is sometimes confused with atheism, these issues are discussed in this paper.

## **Sudan: A Constitutional History of Exceptionalism**

In November 1958, Sudan's first experience of democratic government came to an end when the Prime Minister handed over power to the army. The path of the handover was earlier prepared when the leadership of Umma Party met with the army's high command. Although the party leadership changed its mind about the coup, this meeting provided



important momentum to the army, and in the days after the handover, both leaders of the two main sects publicly supported the coup. These actions prevented public opinion mobilising against the coup as a crime against the constitution. Concerning the May 1969 coup (without entering the debate about the physical participation of the Communist Party), it is proven that it enjoyed the support of the Communists and other leftist. The Communists continued to support the regime until political differences developed, and their method of reforming the coup was by an attempted coup of their own in 1971. The conservative parties also gave their support to the May regime in 1977. The point of revisiting this history is not to incriminate the political parties, but simply to demonstrate that in Sudan's history civilian parties have not ruled out the military coup as a legitimate means of gaining power. Rather, the actual position was to make a distinction between a 'bad coup' and a 'good' one.. Even in the case of the June 1989 coup, despite the moral weight of the charter to protect democracy, many civilian politicians tried to look into the identity of the perpetrators before passing judgement against the act itself. It was for that reason that the June junta tried to give the impression that their coup was carried out by the army High Command, in continuity from the army memorandum of February 1989.

The idea of special or exceptional circumstances as an excuse for dictatorship is a dominant doctrine in the Sudanese political school of thought. The roots of this lie in colonial rule. Though introduced by a liberal, quasi-democratic government (Britain), the colonial system as applied in Sudan was dictatorial and military. It was the beginning of the jurisprudence of the exception. Irrespective of the circumstances, colonial rule was itself a violation of human rights, and entailed many violations.

This section will examine the idea of 'exceptionalism' with a brief historical analysis of its evolution in Sudan. For one hundred years, governments have sought excuses to justify their exceptional powers to escape from the rules of constitutional government. In all cases, exceptional powers led to human rights abuses, and did not succeed in their stated aims. While military governments have generally been worse in their use of emergency powers, elected and transitional governments have also been ready to resort to arbitrary measures.

### The Colonial Period, 1898-1953

Article 3 of the Anglo-Egyptian Condominium Agreement of 1899, vested supreme military, civil and judicial authority in the Governor General, who was invariably British. The Governor General enjoyed absolute power. The laws of Sudan, including all administrative orders and bylaws, were the Governor General's decrees. Despite the parliamentary system in Britain, there was no pretence at democracy in colonial Sudan. The creation of the Governor General's Council in 1909 made very little difference: it was merely a consultative and advisory body for the British autocrat. The later development of the Consultative Council for Northern Sudan also did not affect the absolute power of the Governor General: its role was also purely advisory. The 1948 Legislative Assembly for



the first time introduced elected members alongside appointees, and had the right to consider the laws referred to it by the Executive Council, which consisted of the Governor General and twelve other members, half of them Sudanese. The Governor had to approve any legislation for it to have the force of law, retained the right of veto, and could still make law without regard for the wishes of the Council. Meanwhile, matters concerning the relation between Britain and Egypt, foreign relations, defence, currency and the status of ethnic and religious minorities, were out of the jurisdiction of the Assembly.

#### The First Military Regime 1958-1964

In November 1958, the military high command took power through a coup on the request of the Prime Minister. Constitutional Order Number One made the Supreme Military Council the ultimate executive, legislative and judicial power. The Council delegated its power to General Ibrahim Abboud. Under Section 2 of the Sudan Defence Act, a State of Emergency was declared on the first day of the coup and it continued until the regime was toppled in October 1964. The new regime enacted its 1958 Sudan Defence Act and the Sudan Defence Bylaw. The Act imposed punishments, including capital punishment, for forming political parties, calling for strikes, spreading hatred against the government, or attempting to topple it. The bylaw gave the Minister of Interior far-reaching powers of search, confiscating of any publication, forcing people to give any information required, and provisional detention. Those powers were widely used. Many political opponents were detained either without charge or trial or after being sentenced by military courts. Five army officers were executed by hanging for an alleged coup attempt in 1959.

#### The Second Democracy 1964-1969: The Tyrant Parliament

In response to the Charter of the October Revolution, the State of Emergency imposed by the military regime was lifted in the North, though it remained in the South. The Transitional Constitution of 1956 was applied, amended. The main changes included the abolition of the Upper House, while the October Charter became part of the constitution and the sections which allowed amendment were deleted. A Constituent Assembly was elected in 1965, and it started its work by amending the section to allow a permanent President for the Supreme Council.

The attitude of the elected government towards the constitution and fundamental human rights was highlighted by the banning of the Communist Party and the expulsion from parliament of its MPs. Although more than three decades old, this incident is important for understanding the capacity of an elected government for unconstitutional action. In 1965, having proposed banning the Communists, the Constituent Assembly discovered this needed a constitutional amendment. Section 5 was duly amended to include 'no person should be allowed to disseminate or attempt to disseminate communism, whether local or international or disseminate or attempt to disseminate atheism or disbelief in religion or act or attempt to change the regime by force or terrorism or any other unlawful means.' Section 46 was also amended to prohibit members of communist organisations



from being MPs. In December 1965, a new act for the dissolution of the Communist Party was enacted and eight communist MPs expelled. The Communist MPs filed a constitutional suit against the amendment. On 22 December 1966 the High Court decided that the amendment was unconstitutional and abolished it and all its consequences. The Constituent Assembly decided on the following day to appeal to the Supreme Court of Appeal, and decided not to allow the Communist MPs back to the assembly. The Supreme Council issued a statement on April 1967, describing the High Court decision as legally wrong, also accusing it of bias. The Chief Justice resigned in protest, the Supreme Council accepted the resignation. Some of the government's supporters tried to justify the government's position by saying that the court decision was merely indicative and not enforceable.

This incident was a landmark attack on the independence of judiciary and principle of the separation of powers in Sudan. A particular irony is that it was done by a democratically elected parliament and its government, shortly after the October Revolution called for the independence of the judiciary and enshrined this principle in the constitution.

#### The May Regime 1969-1985: Many Ideological Faces and Consistent Oppression

The May regime started its role as left wing 'revolution.' Justifying them as measures against counter-revolution, it immediately enacted steps against basic freedoms. Over the succeeding years the regime changed its political colour several times, ending up as a right-wing government enacting a very harsh interpretation of Islamic Law. The only thing that did not change was the oppressive nature of the regime.

On 1 May 1970, Republican Order No 5 was issued, listing a set of crimes including crimes against the foundation the state. Acts like forming an association, disseminating false news or rumours, exploitation of sectarianism or religious feelings, any act that may undermine the socialist objectives of the revolution, and strikes were all considered crimes under the order. The order gave a wide range of powers to the police and security organs and the crimes were heavily punishable, including the death sentence. From the first days of the May regime, there were many cases of detention without charge or trial, abuses of due process, confiscation of property and extra-judicial killings against opponents of various kinds.

In 1973, the regime issued a Permanent Constitution. The basic freedoms were well defined, but everything was framed in terms of a one-party system. Within months, exceptional measures were introduced in the name of safeguarding national security. In 1975, following the coup attempt of Lt-Col. Hassan Hussein, the Constitution was amended and the few existing restrictions on the state apparatus to violate the basic freedoms were lifted. The National Security Act was introduced and amended, to allow the government to bring civilians before special courts, with special procedures far from due process of law. The country had become a police state.



In the early 1980s, President Nimeiri went further. In September 1983 he introduced a version of Shari'a Law. The Penal Code of 1974, and Criminal Procedures Act were amended to include a full range of supposedly Islamic measures including hudud crimes and penalties, and the principle of ijithad. In April 1984, Nimeiri declared a State of Emergency to 'protect faith and the country from the enemies and the devil.' Emergency and 'prompt justice' courts were established to expedite the application of these laws. In these special courts, some of the judges were from outside the judiciary and were untrained. These courts were set up with summary procedures and with virtually no guarantees for the accused. People were charged arbitrarily with violating Islamic laws. Punishments of flogging in public for drinking and other public order 'offences', amputation of arms for theft, cross amputation of arm and legs for robbery and death for adultery and murder. It became obvious that the regime was using Islam to intimidate any form of political opposition. This was confirmed in January 1985, when Nimeiri ordered the execution of Ustaz Mahmoud Mohammed Taha, on a charge of apostasy, a crime not even on the statute books at the time. When the State of Emergency was lifted, the same courts remained in place beside the ordinary courts.

### The Third Transition: New Legitimacy

The transitional government that took power in April 1985 and its elected successor also used arbitrary and exceptional powers, justifying them by the supposed exceptional situation facing the country. Liquidating the legacy of the May regime, the security challenges of the civil war, and natural disaster were all used as justifications for emergency powers.

The Supreme Transitional Military Council and Transitional Cabinet of Ministers governed Sudan for one year from the April intifada. Section 32/2 of the 1985 Transitional Constitution removed the constitutional right to the protection of the Supreme Court from any person accused of corrupting the economic, political, or social life of Sudan or violating or toppling the Transitional Constitution of 1964 (i.e. high ranking members of the former regime). Highly publicised trials were held for the perpetrators of the May coup, officials accused of corruption and those accused of transporting the Falasha (Ethiopian Jews). In one case, a witness in the trial of the director of the State Corporation for Oil was detained without charge or trial because the prosecution council felt that he was withholding information important to convict the accused.

The parliamentary government of 1986-9 introduced and extended exceptional powers. On 25 July 1987, Prime Minister Sadiq al Mahdi introduced the Emergency Powers Act. This specified Emergency Zones, including areas where military operations and armed looting were taking place, areas where illicit economic activities were occurring, and (after the floods of August 1988), areas affected by flooding or other natural disasters. The whole of South was a Military Zone from 1987, and Darfur, southern Kordofan, and parts of the Blue Nile were subsequently included. Within these areas the military enjoyed extremely wide powers, including provisional arrest and indefinite detention of anyone sus-



pected of contravening the Emergency Regulations. The interpretation of who might be deemed to be contravening the Regulations was also very wide, including not only those who incite insurrection or sedition, but those who provide any moral or material support to people accused of these offences. The penalty for these offences included death or life imprisonment. Khartoum was declared an Emergency Economic Zone in 1987, a Natural Disaster Emergency Zone in August 1988, and a Defence Emergency Zone in December 1988, following the discovery of alleged coup plot.

The Emergency Regulations were renewed every six month until the fall the Sadiq government. In January 1989 the Sudanese Bar Association campaigned against the emergency powers, especially the provision for indefinite detention without trial. The Constituent Assembly subsequently objected to this provision and demanded that the military to be held accountable in the war zones and adjacent areas.

In Khartoum and the provinces there were many cases of arbitrary detention and, especially in the war-affected areas, torture and extra-judicial execution. Even one MP, Haroun Kafi (from South Kordofan) was arrested in violation of his parliamentary immunity.

### The Current Regime

The current regime took power in a military coup and immediately enacted far-reaching emergency powers. A State of Emergency was declared in the first day of the coup by the virtue of Constitutional Order No 2. According to the State of Emergency, the Head of State or any person delegated by him has the power to detain any individual, to force him or her to serve any security or military service, and has the right to confiscate any property. These powers have been widely exercised in a most abusive manner. The National Security Acts of 1992 and 1995 have given security officers the power of provisional detention. The few restrictions detailed, such as the right of the person to be informed of the reasons for his detention, the maximum period of detention and the right of the detained to claim judicial review were never implemented. Detained persons were never awarded even this minimum level of respect for their rights. This State of Emergency was lifted only in April 1998. But all the exceptional powers arrogated by the government on the night of the coup are still practised.

The many human rights violations and crimes of the current government have been amply documented by human rights organisations and need not detain us here. Even as the current Government of Sudan has ostensibly moved towards political pluralism, it has retained far-reaching exceptional powers. It is precisely in reaction against these outrages that the current opposition has mobilised and adopted a programme for democracy and human rights.

### The Draft Constitution of the NDA

The Draft Constitution of the NDA is important to consider because it lays out the think-



ing behind the democratic leadership of Sudan and the likely trajectory of a future government in which the NDA has a dominant position. Several sections of the Draft Constitution indicate that not all of the pitfalls of earlier transitional or democratic governments in Sudan have been recognised or avoided.

Section 62 of the Draft Constitution of the NDA refers to those guilty of crimes under the now-current military regime. It states that, ‘In spite of any other section in this constitution, persons falling under laws issued according to Section 80 of this constitution, would not enjoy the decrees of this chapter (basic freedoms).’ Section 63 further explains:

‘Whenever a competent court decides that there is a prima facie case against any person related to the wreckage of the democratic system on June 30, 1989, or by abetting, plotting in the dismantling, or participation in or assistance to the continuity of the military regime established by NIF, or to the political economic or administrative corruption or to the humiliation or the undermining of any citizen’s dignity or to an unlawful enrichment or abetting or covering to any of the above, such a person has no right enjoy any of the freedoms or rights enlisted in the chapter and has no right to appeal against any law or judicial or administrative decree denying him those freedoms, until his innocence from the charge against him is proved.’

Section 80 allows the enactment of laws to incriminate the above-mentioned acts. The need to investigate, prosecute and punish those responsible for crimes and human rights abuses under the now-incumbent regime is not in doubt. But the suspension of rights envisioned is a clear violation of the rule of law and a deviation from the presumption of innocence. Issue Paper A-1, on transitional justice, shows that accountability does not need those exceptional measures.

Emergency legislation is provided for in Section 60 which states that ‘the freedoms and rights mentioned in this constitution should not be restricted except for the restrictions provided in the laws whenever such restriction is necessary for the protection of national security, public order, public health, public morality or the freedoms or the rights of others. Such restrictions should not be imposed without a judicial decree issued from a competent court.’ The specification of a ‘competent court’ is an improvement on much past emergency legislation, but in other respects the phrasing of the draft suffers from the same shortcomings as Sudan’s earlier emergency legislation. This section needs to be amended in several ways, as outlined below.

### **Emergency Powers and Civilian-Military Relations**

The relationship between the military and civilians is one of the most fundamental human rights questions. In Sudan during a future transition it will be both fundamental and very complicated.



Sudan does not enjoy the conditions under which civilian control of the military will be achieved easily. As mentioned above, there is a long history of military engagement in politics with several successful and many unsuccessful coups. The country is highly militarised, with many armed fractions with political agendas. Since the time of Abdel Nasser, many military commanders have felt that force is a legitimate political tool: many will continue to do so. In the process of disarmament and demobilisation that must follow any peace deal, there is bound to be discontent among some of the demobilised combatants, leading to incidents of disobeying orders, desertion and mutiny. The temptation for renewing insurgency will be great; the temptation for the government to crack down hard on any sign of possible insurgency will equally be great. In short, it will take very careful planning and considerable political skill for Sudan to make the transition from a militarised society to one in which the military plays its proper role as the non political agent of national defence.

This section will examine several relevant issues.

### 1. Emergency Powers: When?

It is legitimate for governments to invoke emergency powers when national survival is endangered. However, for too many governments in Africa and the Middle East, occasional use has turned into regular use. Sudan is no exception. Executives have become addicted to emergency measures. In fact, States of Emergency have themselves become a major threat to constitutionality as well as to human rights. The 1984 State of Emergency, enacted on the grounds of a threat to public morality, became itself the gravest threat to public morality.

A future constitution for a democratic Sudan must have very clear preconditions for the imposition of a State of Emergency. There must be a genuine and substantial threat to national security. Natural disasters and threats to public health and public morality are insufficient grounds. The need for public mobilisation because of a natural disaster does not warrant a State of Emergency.

A State of Emergency does not suspend the constitution; it gives the executive exceptional powers to act within the constitution. Any legislation concerning State of Emergency should provide for (i) enactment by the appropriate court (for a national State of Emergency, the High Court acting as a Constitutional Court) and (ii) regular judicial review by the appropriate court, which should be empowered to decide (in camera if necessary) whether the executive has met the conditions required by law. A period of six months between each judicial review should be considered a maximum. If the Constitutional Court decides that a State of Emergency, or any particular exceptional powers, are unlawful, the executive should comply. For such an event to occur would be an important indication of the constitutional maturity of Sudan and the entrenchment of democratic values and practice.

There is a particular temptation to invoke a State of Emergency if there is no permanent



constitution yet adopted. That would be a mistake. It is precisely at times of transition and uncertainty that the greatest safeguards on abuse of power are needed. Any interim constitution must have extremely robust restrictions on emergency powers included.

## 2. Emergency Powers: What?

In a State of Emergency, some civil and political liberties may be suspended. During the emergency, for example, there may be certain restrictions on freedom of expression, freedom of movement or even habeus corpus. But when a State of Emergency is introduced, there are certain inviolable rights and principles that remain. International humanitarian law (IHL) has been developed to deal with war, and is applicable by extension in situations where normal human rights guarantees no longer run.

In determining what is and what is not permissible during a State of Emergency, the Sudanese Constitution should take note of the fundamental conventions of IHL, including:

- The Genocide Convention of 1948;
- The Four Geneva Conventions of 1949;
- The Additional Protocols to the Geneva Conventions of 1977.

These Conventions provide for basic human rights guarantees, including the right to a trial. The development of IHL to its current state, in which an International Criminal Court is being set up, indicates that a State of Emergency or a state of armed conflict can no longer be considered a charter of impunity. Agents of the state cannot act outside the law. After each episode in which a State of Emergency is invoked, there must be some examination and reckoning.

## 3. Nature of the National Army

Sudan should, in time, develop a true non-political national army. This will be an essential precondition for the respect of human rights. But creating a new army will take time, for the reasons mentioned above. The sensitivity of military and security concerns means that the future Sudanese constitution will need to examine, probably in great detail, the composition and role of the Armed Forces. Among the issues that will demand examination are the following:

- i. Ethnic, regional and religious composition of the Armed Forces. Many from the marginalised people will feel that they have been under-represented in the officer corps. Quotas or positive discrimination may be in order.
- i. A unified national army or a national army with special units representing different regions. This issue will arise particularly in Southern Sudan, where the people will probably demand that only Southern army units are stationed, at least during the transitional period. History has shown that this is a very sensitive issue.
- i. Military representation in politics. In reaction against the high political profile of certain military officers it is tempting for democrats to argue that the military should be debarred from any political role whatsoever. But is this realistic? Might



it set up a dangerous tension if there is no direct institutional representation of the army's interest in national politics? One possible avenue to explore is this: the Minister of Defence should be a civilian, but the army should nominate or elect a certain number of representatives to the upper chamber of parliament.

- i. Involvement of the military in economic and commercial activities. Since the creation of the Military Economic Corporation in the early 1980s, the Sudanese armed forces have developed strong links with certain commercial sectors. Although the Military Economic Corporation was disbanded in 1985, the military-commercial co-operation remains. This leads to potentially dangerous conflicts of interest. The constitution drafters will need to examine this issue carefully.
- i. Proliferation of security services. One of the features of many governments in Africa and the Middle East, including Sudan, is a tendency to multiply security agencies. This occurs because either the President does not trust the existing security services and wants to spy on them and have a more loyal alternative, because different figures in the government develop their own security fiefdoms, or because the executive is frustrated by legislative or judicial scrutiny of the existing security services, and wants to set up new and more secretive ones. These are dangerous developments which should be contained. The most common justification for security services is that they are needed to protect national security and democracy, but the strongest protection is provided by the robustness of democratic institutions themselves.

#### 4. The Illegality of Military Coups

A military coup d'état is a blatant illegality. This is so obvious that it should not even need to be stated in law. However, as detailed above, such has been the readiness of many civilian politicians to accept military coups (or even initiate them), that this fact should be stated in the constitution. Coups need to be rendered illegitimate by the force of universal moral opprobrium, inside Sudan, in Africa and the Middle East, and around the world.

Given that any permanent constitution in Sudan will have been developed and adopted in the context of international and regional engagement in the Sudanese peace process, the outlawing of coups d'état will also have the effect of internationalising the responsibility for maintaining constitutional rule in the country. In other words, if there is a coup that overthrows a constitutional government, this cannot simply be regarded as an internal Sudanese matter: it is a matter of legitimate concern to Sudan's neighbours and to the international community.

The ultimate test of the maturity of Sudan's constitutionality, the supremacy of the rule of law and the rootedness of democracy would occur if the military attempted a coup, but the Constitutional Court declared it illegal, and, commanding the support of the Sudanese people and the international community, reversed it.



## Constitutional Issues

In a future peaceful and democratic Sudan, emergency powers should be used rarely or not at all. There should be a possibility for an extended period of constitutional rule. The following issues will arise:

### 1. How Far Should the Constitution Go?

Some countries (e.g. Britain) have no written constitution at all and rely on custom alone. Others have simple, robust constitutions, and exceedingly slow and difficult procedures for enacting amendments, e.g. the United States. Others have much more detailed constitutions that lay out at considerable length the powers and duties of the state, its organs and its citizens. Such constitutions were common in socialist states, and many newer countries have adopted similar elaborate constitutions, e.g. Eritrea.

i. Following the ‘customary’ approach, as in Britain, is not an option in the case of Sudan. There is not sufficient consensus or continuity in Sudan’s central political institutions to allow such a constitution to be operable. However, it is worth remarking on how smoothly and quickly old provisional constitutional provisions, with modest revisions, have been enacted in previous transitional regimes (1964, 1985), and how effectively elections were organised and governments formed on the basis of parliamentary majorities. This implies that, in Northern Sudan at least, there is some sense of continuity and legitimacy bestowed upon the ‘Westminster style’ transitional constitution (originally enacted as the self-government act of 1953, amended 1956, 1964 and 1985). I.e., though the ‘customary’ approach in itself cannot work, there are Sudanese customary constitutional principles that can help form the basis of an acceptable and workable constitution.

i. The ‘minimal’ approach has advantages. If the constitution is a set of elementary, basic laws, then it can more easily stand apart from the other legislation adopted by the assembly. It can gain greater sanctity. It can be simple to read, understand and impart. Minimal constitutions are also likely to be flexible, because there is much left unsaid and left to the legislators of the day.

i. The ‘maximal’ approach also has advantages. In a country lacking political or institutional stability, and with fundamental conflicts of identities and values within its borders, a far-reaching constitution can help to stabilise politics. It can enshrine a well-worked out agreement on a wide range of issues between different parties including former adversaries, and thereby sanctify an historic compromise. But it can also become a straightjacket. The hierarchy of ‘sacred’ constitutional provisions versus more contingent legislative enactments may be lost. Some provisions may have to be altered, and once the legislature has started down the road of altering the constitution, it may feel it is able to change it entirely.

i. The incorporation of international human rights conventions into the constitution is a simple and legitimate way of making the Sudanese Constitution compatible with fundamental human rights. These conventions ought to be justiciable, i.e. the courts should be able to use international human rights law as the basis on which to reach decisions.



The decision about which kind of constitution to adopt is a fundamental one that the Sudanese political parties and their constituencies will have to decide. In general, the more there is consensus and agreement on core values, the shorter the constitutional document can be. The more there is a need for different constituencies and political forces to safeguard themselves from others whom they do not trust, the more complex the constitution will have to be.

## 2. The Challenge of Unity

The principle of self-determination has been accepted by all major political forces in Sudan. At the same time, the Asmara Declaration and the IGAD Declaration of Principles, along with the manifestos of all major parties including the SPLM, call for unity as the preferred option. But it is commonly known that there is a substantial Southern constituency that demands independence. It follows that one of the major challenges for those drafting a national constitution is to come with a formula that makes it attractive for the South to vote for unity in the referendum on self-determination. In the preparation for the Southerners' exercise of that right, it is the responsibility of the North to make a persuasive case for unity. It is the Southerners' right to evaluate that case and make their decision accordingly.

Unity in Sudan will be gained by citizens making a free choice. However, one element in the NDA Draft Constitution appears to contradict this possibility, by criminalising the call for the separation. Section 67 reads, 'Every Citizen should support the sovereignty of Sudan, its unity and the safety of its territories.' The Steering Committee has no objection to the emphasis of the NDA Draft Constitution and other literature on making the unity a priority option. However, to put it as a duty of citizenship is another matter. This outlaws any individual or party campaigning for separation in the referendum by making them guilty of treachery, and so makes the practice of self-determination purely cosmetic. The draft also bans the formation of any political party on a racial basis. In Sudanese history there is a long record of describing anyone who campaigns for the rights of oppressed ethnicities as 'racist', and some interpretations of this section could outlaw organisations like the Beja Congress, the Union of Sudan African Parties or the General Union of the Nuba Mountains.

The case for unity will not be won on the basis of vague appeals to national sentiment, nor to accusations of treachery levelled at separatists. The case for unity will be won if Northern Sudanese political leaders make a united Sudan an attractive enough place for each and every ethnicity to want to stay. They have hard work to do.

The issues facing a constitution relevant to the demands of Southern Sudan are analysed in Issue Paper B-2 and will not be discussed in detail in this paper.

## 3. Self-Determination: An Enduring Right

The Asmara Declaration and the Draft Constitution of the NDA acknowledge the right of self-determination. Section 64 of the Draft Constitution refers to self-determination as a



‘basic human and democratic right, provided that it should be practised in an atmosphere of democracy and legitimacy, under international and regional supervision, according to the procedures determined by law.’ Yet both documents confine the right for self-determination to the people of Southern Sudan. (The citizens of Abyei are given the option of joining the South or Southern Kordofan.) No explanation is given to why this ‘basic human and democratic right’ is confined to the people of the Southern Sudan. It is only consistent with principle and justice that this right should be applied to each of the peoples of Sudan. The right of self-determination should be extended to include the Nuba of Southern Kordofan, the South Blue Nile people, the Beja, the people of Darfur, the Nubians of Northern Sudan and arguably also the Baggara. Some might argue that most of these groups have not asked for self determination. However, each has expressed a demand for more democratic government and the right to preserve their cultures and societies.

It is worth noting that if the South is awarded self-determination and votes to remain in a united Sudan under a federal or confederal arrangement, then the relationship between North and South should become symmetrical. I.e. not only will the Northern and Southern States have their own assemblies under a Federal Assembly or Senate, but the Northern State will also of necessity enjoy the same right of self-determination as the Southern State.

It must be stressed that self-determination does not mean secession. Many advocates of unity have confused people (including themselves) and done the cause of unity a disservice by implying that self-determination inevitably leads to separation. It does not. For example, if we look at the current Ethiopian constitution, each one of fourteen Ethiopian nationalities enjoys the right of self-determination. This includes the right to regional self-administration, the right to choose which language will be used for administration and education, and many other rights including, in extremis, the right to decide whether to remain part of the Ethiopian federation. But, precisely because the nationalities are enjoying their historically unprecedented autonomy, they are not contemplating leaving Ethiopia. For most it is literally unthinkable. And the Ethiopian constitution specifies precisely under what circumstances a nationality may choose to leave. In essence, the right of self-determination is a guarantee on equal treatment within a united Ethiopia. Self-determination should be envisaged precisely as the Draft Constitution has defined it, as a basic human and democratic right.

Once this principle is followed, it has profound consequences for the future constitutional shape of Sudan. Historically, the boundaries of Sudan were carved out by conquest and many of the people incorporated through subjugation. This is not appropriate for a country that espouses human rights as it enters the next century. Instead, Sudan should be a free association of equal peoples. Granting the right of self-determination will help to make it so.

Self-determination is a right possessed by peoples. It is not a one-off act of decision in a referendum. Therefore, once the right of self-determination has been recognised,



as in the Asmara Declaration, the peoples of Sudan will enjoy that right in perpetuity. They may choose not to exercise it and may even come to consider it irrelevant. But it will not go away. This holds for the Southerners and others such as the Nuba and people of South Blue Nile who are claiming the same right.

#### 4. Local Democracy

There has always been a general understanding that Sudan, due to its unique circumstance (being a very large country, very varied and underdeveloped) needs a combination of centralisation and decentralisation. In earlier decades, Sudan enjoyed a civil service famed for its excellence, rooted in the administration of rural areas. In the 1960s and '70s there were sincere attempts to democratise local government. But unfortunately the issue of local democracy has now been reduced to mere administrative procedures, with the main objective of facilitating the control of the central government and reducing costs.

The Draft Constitution of the NDA in Section 11 states that the Republic of Sudan shall be divided to six territories, regions, or states and the Commission of the National Capital Khartoum. It defines the six units as the Southern, the Central, Darfur, Kordofan, the Eastern and the Northern unit. This implies that the issue of a federal or decentralised Sudan is left unresolved.

The draft however refers to a proposed Local Government Act which will clearly have a determining influence on the status of local democracy, when it is approved by the NDA. Some of the NDA's thinking is evident on the issue of Native Administration. Concerning this, the draft states that the government shall 'seek the assistance of Native Administration whenever possible after making sure of the public wishes through democratic means.' The issue of the native administration is controversial. The 'traditional' rural leadership of nazirs, omdas and sheikhs (and their variants) has both advantages and disadvantages. Supporters of the system argue that it is (a) simple to understand and acceptable to the people (who often elected their old sheikhs and omdas to 'modern' elected posts), (b) truly local and accessible to the people, unlike salaried administrators who rarely stay in the rural areas for long, (c) therefore an effective way of ensuring social acceptance of the law and voluntary compliance with it, and (d) very cheap. The disadvantages are that (a) it is undemocratic, (b) there is a concentration of executive and judicial power in the same individual at the village level and (c) it is fundamentally conservative.

Sudan is a very varied country and there are some localities where the advantages of native administration are more obvious, and it is likely to be more popular, and others where the disadvantages are very severe, and it is likely to be less popular. A future government should bear in mind that different systems of local government can co-exist in the country. It is the opinion of the Steering Committee that the form of local democracy should be determined according to the wishes of the local people. Wherever the people opt for the native administration they should be granted that system. However there are some basic safeguards that should also be built into the system, including election for office and separation of powers wherever possible. In the areas currently controlled by opposi-



tion forces, a consultation can be carried out with the people to determine which type of system is preferred. Almost everywhere, people will certainly opt for a system including election to all significant offices.

### 5. Ethnicity and Cultural Rights

The subjects of ethnicity and cultural rights have been thoroughly discussed in the papers concerned with race relations and freedom of expression. There are also some concerns relating to their constitutional aspects which have been raised by the Draft Constitution of the NDA.

Concerning language policy, it is unfortunate that while the NIF Constitution mentions local Sudanese languages, the NDA draft merely states ‘Arabic is the official language and the English language can be used.’ The importance of extending official recognition to indigenous Sudanese languages is clear and does not need further explanation.

Concerning the issue of education the draft states that ‘The state shall determine the policies and learning and educational curriculum in all educational institutes and shall supervise and direct it to enhance the love of country and the planting of morality, good manners and the sense of responsibility.’ The NDA has incorporated international human rights instruments into the Draft Constitution so it would also be consistent to include the teaching of human rights in the national curriculum.

The teaching of religion within the national curriculum is a long tradition in Sudan and it is likely that this will continue. The teaching of Islam has always gained an upper hand, even before the current government seized power. There is a need to give space in the educational curriculum to both Christianity and noble spiritual beliefs. It is important that Sudanese children should be taught that there are elements that Christianity and Islam have in common, that Islam, Christianity and noble spiritual beliefs are ways of interpreting and dealing with existence, and that they can coexist peacefully. This will be essential to ensure equal rights to different believers and to create a tolerant society.

### 6. Secularism

The issue of the public role of religion in Sudan is extremely complex and controversial. Today, this refers primarily to the NIF project for an Islamic state and the wider support for Shari’a Law. There is a possibility of a highly politicised Christianity, even to the extent of Southern Sudan being declared a ‘Christian State’ (as President Chiluba has done in Zambia for example), but this is very unlikely in the foreseeable future. A discussion of secularism in Sudan is essentially about the implications of an Islamic state. It is important to emphasise that ‘secularism’ is not atheism. A secular state respects the religions of all its citizens, in the case of Sudan including Islam, Christianity and noble spiritual beliefs. The basic values of society, reflected in the constitution and in many aspects of the legal and administrative system, can be informed by religious principles. But citizenship without discrimination is the sole basis for constitutional rights.



Islam has always had a prominent public role in Sudan. Even the British imperial rulers were very sensitive to the role of Islam in Northern Sudan and kept the Shari'a as the foundation of personal law in the North. The dominant political role of religious-political leaders whose followings are based on religious sects has meant that political Islam has never been far away from power in the country. The removal of Islam from public life in Sudan is not an option.

But in a country which has a substantial minority of non-Moslems, and in which many Moslems regard international human rights conventions (which are by definition secular) as binding, a constitutional order based on Islam alone cannot be acceptable.

In conclusion, the Committee agrees that the resolution of the Asmara Declaration, which states that citizenship is the only basis for constitutional rights without any discrimination based on religion, race, gender or culture, is the only sound basis for protecting human rights. The Committee also wholeheartedly supports the IGAD Declaration of Principles that calls for a secular state to be established in Sudan.

#### 7.The Penal Code

Many scholars and constitutional experts have addressed many of the issues surrounding a state based on Islamic law. Abdullahi an-Naim is prominent among them. Some of the arguments he and others make include the following:

i. A state founded on Islamic law is incompatible with freedom of religion and other essential freedoms such as freedom of expression and freedom of association. Throughout most of its history, and especially at the time of the Prophet Mohamed, Islam was more progressive and tolerant of other religions than Judaism or Christianity. However in modern times, the nature of Islamic law, and notably the prohibition of apostasy, mean that a strict and categorical interpretation of Islamic law is incompatible with these fundamental freedoms. While other, more pluralist and tolerant interpretations are possible, there are no powerful political forces pressing for these in Sudan today. A Sudanese Islamic state in 1999 means a state dominated by the NIF.

i. An Islamic state applying the Shari'a law rules out the possibility of self-determination. It precludes the possibility of equal treatment for non-Moslems and for women (Moslem and non-Moslem). In addition, the provisions for apostasy in the Penal Code make opposition to an Islamic state a crime equivalent to treason, punishable by death. While milder versions of the Shari'a can be envisioned that do not include the categorical prohibition on apostasy, they all are inherently discriminatory, and all include at least the possibility of sliding into a more categorical and jihadist form.

i. Applying Shari'a in just some parts of the country will be a fundamental violation on the rights of citizens. This is especially so for non-Moslems. While they may be subject to secular laws while 'at home', what is the meaning of common citizenship if one can only enjoy full rights while resident in one part of the country?

i. If Shari'a is to be just the law of a region or local state, then the issue of the law at federal level remains to be resolved. Equal citizenship is only compatible with secular



law drawn from universal conventions of human rights. Once those are a basic constitutional provision, it is questionable whether the state could be called truly 'Islamic'. It will also open up the possibility of a constitutional challenge to the legality of Shari'a in any region on the grounds that it may be incompatible with the nation's commitments to fundamental human rights. (This issue may arise for example in Ethiopia, should one of the regions choose to implement Shari'a law, and be challenged by the Federal Government or its human rights commission.)

i. The current penal code, based on an interpretation of Islamic Law, is incompatible with human rights in numerous respects. In particular, we may mention the discrimination against women and non-Moslems, the cruel, unusual and degrading punishments, the loose definition of a number of crimes, the existence of a crime of apostasy, and the principle of *ijtihad* which gives much leeway to judges.

In a future transition, Sudan will need a new penal code. This is an established controversy which will be revisited in the coming years. For the four years after the 1985 *intifada*, the penal code was the subject of endless debate. The Transitional Military Council refused to abolish the 1983 Penal Code (the 'September Laws'), giving as a reason the veto of the DUP leader. After the 1986 elections, Prime Minister Sadiq el Mahdi, who had once described the September Laws as not worth the ink with which they were written, consistently failed to abolish them. His government instead submitted the 1988 draft Penal Code, largely the work of Dr Hassan al Turabi. A vigorous campaign by Sudanese civil society prevented the parliament from issuing this code. The question of an alternative penal code was referred to the Palace Committee, which was set to look into four different drafts. The matter was closed by the 1989 coup. In 1991 the NIF government promulgated the current Penal Code, which is almost identical to the 1988 draft Penal Code.

The Asmara Declaration and the Draft Constitution affirm the NDA commitment to international human rights covenants. This implies that many of the measures in the 1991 Penal Code, such as the *hudud* punishments, cannot be part of any future penal code. The Steering Committee is concerned however that the NDA has not yet proposed any draft penal code for consideration. This concern reflects the bitter experience of 1985-9, and the comparison with other areas in which the NDA has issued detailed drafts.

The Steering Committee proposes the following as an alternative:

i. The 1974 Penal Code be re-instated with some amendments. The 1974 Penal Code is an amended version of the 1925 Penal Code and Criminal Procedure Act, derived from British common law as practised in India. Most scholars argue that these criminal laws, over the years, have become Sudanese laws through the valuable contributions of Sudanese judges in their application and implementation. Among the specifically Sudanese variations was the possibility of allowing *diya* in homicide cases in Southern Sudan. The courts have been sensitive also to the diversity of cultures in Sudan, for example in interpreting what constitutes provocation. Most Sudanese judges and lawyers are familiar with the Code. The 1994 SPLM Penal Code is very largely based on the 1974 Penal Code, and the switch to the 1974 Code could be made with little difficulty.



i. There is a need to revise some aspects of the 1974 Penal Code to remove some elements that are contrary to basic freedoms. One of the ways in which this could be done is to enable international human rights conventions to be justiciable in Sudan's domestic courts. I.e. the courts could hand down rulings based on international human rights law. The Steering Committee argues that all the human rights instruments that Sudan has acceded to should be incorporated into domestic law. Where there is an incompatibility between domestic law and international human rights law, the latter should prevail.

#### 8. Independence of the Judiciary and the Constitutional Court.

In modern Sudanese history, the custodian of the constitution has been the Supreme Court, acting as a Constitutional Court. This is a positive tradition and should be maintained. The alternative, of turning the legislature (or one of its chambers) into a constitutional court is problematic, in that it undermines the separation between judiciary and legislature and opens possibilities for abuse of power. Several points need to be made:

i. During previous parliamentary regimes in Sudan, the rule of law was compromised by the excuse of national emergencies and calls for the accountability of those holding high office in previous regimes. The exceptional powers justified by those two factors were over-used and their objectives were never achieved. This point has been thoroughly discussed above.

i. The role of the Bar in defending human rights and basic freedoms has always been significant. Even during the current regime, Sudanese advocates have succeeded in keeping the issues of the rule of law and basic freedoms at the heart of the political struggle. The NDA Draft Constitution has recognised this in Section 73, which reads: 'Advocacy is an independent profession. Advocates are obliged to work for the enhancement and respect of the freedoms and rights guaranteed by this constitution and to defend it and to abide by the ethics of the profession.'

i. The first Transitional Constitution of 1956 made the Supreme Court the custodian of the constitution. This tradition has continued in all the constitutions that followed. This arrangement has proved to be a workable one in the Sudan, and is followed in the Draft Constitution of the NDA. It is fair to say Sections 179 to 195 which deal with the judiciary are well-drafted in relation to the independence of the judiciary. Section 188 which specifies a special court to try the perpetrators of the June coup and those responsible for human rights abuses and crimes against humanity will need special attention. While convening a special court is a normal and acceptable procedure in such cases, special care needs to be given to ensure that any special court operates according to due process of law and in accordance with basic human rights guarantees.

i. One of the most important issues in the subject of judiciary is the judicial reform and the rebuilding of the judiciary (see Issue Paper A-3).

Turning to the Constitutional Court itself, the main issues that arise include the following:

i. The source of authority. Under the current constitution, Islamic Law including the principle of *ijtihad* ('interpretation') is the fundamental source of law. This is despite the fact that Sudan has acceded to international human rights conventions from the Universal Declaration of Human Rights onwards. The Steering Committee accepts as a fundamental tenet that international human rights conventions should be an ultimate



source of constitutional authority, and that the constitutional court should interpret the constitution accordingly.

i. Its composition. Who should sit there, and how they should be appointed and dismissed? Ten years of rule by the National Islamic Front has left the Sudanese judiciary in a parlous state: many of the judges loyal to the present government cannot be considered as true and impartial advocates of human rights and cannot be trusted to make judgements accordingly. The independence of the judiciary is a fundamental principle for human rights.

#### 9. The Independence of Certain National Institutions

In order for a free society to function, certain key institutions should be independent of the control of the executive. The institutions in question are: the civil service, the national media, higher education institutions such as universities, the public auditing chamber and the electoral commission.

The NDA Draft Constitution has dealt with the independence of all these institutions in a positive way. However, to move from independence on paper to real independence is more challenging. In Sudan as in many countries, both developing and developed, there are subtle links of patronage between government and the higher echelons of civil society (and in the case of the civil service and media, often not-so-subtle connections). It is ambitious to expect Sudan to achieve what is a challenge to, say, the United States. But the ideal should be enshrined at the least.

#### 10. The Electoral System

One of the remarkable facts about Sudan--especially Northern Sudan--is its long and proud history of electoral politics. Sudan is one of the very few countries in Africa or the Middle East where one can virtually guarantee that an election can be organised rapidly in the months after the fall of a dictatorship, and that the election will be very largely free of fraud and manipulation. In both 1965 and 1986, free and fair elections were held within months of the restoration of democracy, and the results--including a number of surprises--were respected. A few cases of fraud did not invalidate the overall result. However, justifiable pride in the way in which electoral democracy is deep-rooted should not lead us to automatically accept the restoration of the status quo in terms of electoral law.

The following discussion refers primarily to Northern Sudan. Southern Sudan has a somewhat different history of electoral politics, and the options for electoral law in Southern Sudan (some similar, some different) have been discussed in the Issue Paper on constitutional options for the South.

Sudanese elections have historically been to a single-chamber assembly, using a dual system whereby most MPs are elected in single member districts (SMDs) in accordance with the 'Westminster style', while a minority are elected in special 'graduate seats.' The system is a 'winner takes all' system in which the party or parties that gain a plurality of seats form the government and monopolise executive power.



There are many options for electoral systems that should be studied carefully. Some of the questions that need to be asked include the following:

i. Should Sudan have a unicameral or a bicameral system? Sudan has experience of both. In the first parliamentary period there were upper and lower chambers. In 1965 the Upper Chamber, which had both elected and appointed members, was abolished after a summary debate. There are no good reasons for restoring it. However, there are powerful arguments in favour of a bicameral system. The regional and ethnic divides in Sudan, especially North versus South, call for some form of Federation. Federation or devolution of power normally entails a bicameral system, with a Senate representing the different units (states, regions, nationalities or whatever) and a National Assembly elected on a common electoral roll. Given that Southern Sudan will probably demand federal status as a minimum, this implies a Southern Assembly alongside a Northern Assembly and national or federal one. But there are many variations on this theme.

i. The future of the 'graduate seats'. Specially-reserved 'graduate seats' are an anomaly of the Sudanese electoral system. The NDA Draft Constitution, Section 83, implicitly calls for some form of reserved seats to be retained by stating that the general election shall ensure the representation of federations, unions and women. These groups are normally called the 'modern forces' and have historically argued in favour of special representation. There are arguments for and against the graduate seats. In favour, we note that educated people are disproportionately powerful in all societies, so there is a case that the electoral system should reflect this reality and give them extra influence, and 'graduate seats' are one possible answer to this challenge. In Sudan, the 'modern forces' have played the pivotal role in the struggle for independence and democracy, and providing them with special representation is therefore a guarantee for democracy and stability. If this argument is accepted, there is a case for amending the electoral system in graduate seats, for example by introducing PR (to minimise the risk of manipulation of electoral rolls, as the NIF practised in 1986) or widening the constituency. The strongest argument against special seats is that they violate the principle of 'one person one vote' and hence are undemocratic. It is difficult, the argument runs, to have MPs in one assembly elected on very different principles. The strongest case is for putting the 'graduate seats' into an upper chamber.

i. There is also a related argument for extra-territorial seats, to represent expatriates and refugees who should not be ignored. Sudanese are scattered across the world and all should have a chance to participate in their country's future. (In the Eritrean independence referendum, the Eritrean diaspora voted on equal terms with those remaining at home.) Extra-territorial seats do not imply an extra chamber or a different representative principle, but only the extension of the electoral roll to expatriates.

i. Should there be single member districts (SMD), proportional representation (PR) or a combination of the two? Most African countries prefer the SMD system because it is the simplest, because of the strong link that is thereby established between MP and



constituents, and because in rural societies people tend to vote along geographical lines, so that distortions that occur in some western systems (e.g. Britain) are unlikely. But SMDs also have their drawbacks, for example when constituencies become the fiefdoms of sitting MPs who may be almost impossible to remove. Some African countries (South Africa, Namibia) have chosen PR-based systems, and other options are also possible. Sudan has a very high level of urbanisation by African standards, and so has a 'segmented' electorate: rural and urban, with potentially different voting patterns. It follows that there may be an argument for using a version of PR in urban constituencies or perhaps the national capital. One possibility would be to retain SMDs in the capital but also to have a few 'top up' seats awarded on a PR basis, perhaps to the 'best losers'. There is a strong argument that extra-territorial seats or graduate seats (if they remain) should be awarded on the basis of PR.

i. Parliamentary decision-making rules can be simple (e.g. majority alone) or complex, requiring super-majorities or votes from various regions for certain critical measures to be allowed to pass. Constitutional amendments could for example require a two-thirds majority.

i. There can be constitutional requirements for power-sharing. In a Westminster-style democracy, it is 'winner takes all' and the opposition wields no real power at all, merely hoping that it can gain power in the next election. But there are very few African or Middle Eastern countries in which there has been any genuine party alternation in government, which leads to the situation in a single party or party-coalition dominates for extended periods, with others in perpetual opposition. This can be deeply problematic if there are minorities and voting is along ethnic lines: substantial minorities can be permanently excluded from power. (In Britain, the Labour Party consistently won a plurality of the votes in Scotland in the 1980s and 1990s, but the Conservatives were in government. Conservative insensitivity to Scottish needs fuelled the demands for devolution and independence.) One possible response to this likelihood is a special constitutional provision for broad-based coalition government, whereby any party gaining above a certain percentage of the votes is guaranteed a ministerial position. For example this is the case in another ethnically-divided country, South Africa.

i. The role of the electoral commission or other independent agencies for arbitration over electoral disputes can be very important. The history of fairness in Sudanese elections should not be taken for granted: there will be a need for some independent election monitor. Under SMD systems, constituency boundaries are important and should be set by an independent agency so far as possible. Disputes over elections should also be investigated and arbitrated by an independent agency as a first level, with the judiciary playing a role as a second level.



## **The Process of Constitution-Building**

The process of constitution-building is in some ways just as important as the substance of the constitution itself. The new Sudanese Constitution must have legitimacy among the Sudanese people. It must be seen as reflecting their aspirations and demands for rights. They must feel that they 'own' the constitution. Even the most finely crafted constitution, springing complete from the study of the most eminent constitutional lawyer, will not be good enough. It is essential that the Sudanese people participate in a process of constitutional consultation.

Assuming progress towards peace and pluralism in Sudan, we can anticipate the following processes that will contribute towards constitution-building in the coming years:

- i. The process for a settlement to the war, under the auspices of IGAD or a comparable international mediator, involving protracted negotiations between the parties to the conflict. The nature of these negotiations will play a fundamental role in determining the future constitution. First, if the IGAD Declaration of Principles is adopted as a basis for negotiation, as it should, then the constitution should be (a) secular and (b) designed to give the best possible chance for unity.
- i. The process of political discussion and negotiation among the political parties, within the NDA and collectively or separately with the current Sudan Government.
- i. The process leading up to the exercise of self-determination in the South and the settlement in other war-affected areas. The very process of peacemaking at a national and local level and the establishment of an interim administration, education of the Southern electorate in advance of the referendum, and political campaigning by the various parties and points of view, will be an unprecedented process of political awakening in the whole of Sudan. Southerners will be the direct beneficiaries of this process but Northerners cannot be immune from this major enterprise in installing democracy.
- i. Any formal process of national consultation on the constitution that is adopted. Many new countries have undergone processes of consultation prior to adopting a constitution. In the case of Eritrea this involved holding extensive discussions with citizens in all parts of the country, listening to their views and receiving their responses to preliminary proposals. This exercise was conducted by a specially constituted Constitutional Commission. Alternatives involve a Constitutional Committee of parliament, or a Constitutional Conference, attended either by nominees of existing political parties or specially elected for the purpose.
- i. The favoured approach in Sudan is the National Constitutional Conference. It is important for such a Conference not to be confined to political parties and other members of the social and political elite. Public participation from a wide range of constituencies should be ensured through various forms of consultation both before and during the Conference. By these means the Conference can be a true national exercise.



It would be naive to assume that the politics of self-interest and expediency will play no role in constitution building. In fact it is necessary that they do so. For a country to emerge from a very bloody and divisive war it will be necessary for compromises to be struck between the belligerents. The armed forces and the liberation movements will want to protect their interests, and no constitution that fails to provide their minimum demands can be expected to survive. So it is inevitable that political negotiations, perhaps conducted in a secretive or undemocratic manner, will establish some constitutional provisions. But it is important that a much wider participation is encouraged: the constitution must not be the prisoner of the past, but the charter for the future. It must be able to transcend the historical compromises that allowed it to be born, and become a permanent manifestation of the character and aspirations of the Sudanese people, along with a fundamental protection of their rights.

### **Conclusion**

The Steering Committee has not sought to draft a constitution for Sudan. That is well beyond its capacity and its mandate. Instead it has tried to focus on the main issues that will confront Sudanese democrats in trying to fashion a constitution that can form the basis for a peaceful, democratic country with respect for the human rights of all its citizens. The NDA has gone a long way down this road. But ultimately it is the responsibility of Sudanese citizens and civil society to ensure that a future constitution truly represents the interests and aspirations, and properly safeguards the human rights of all Sudanese citizens without exception.

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