

Peace and the Constitution in the Sudan

Haydar Ibrahim Ali

Historical Background

Establishing and securing the foundations of a permanent constitution has long been the crux of political development in the Sudan. It is possible to interpret all the situations and conflicts that have confronted governance through the perspectives and crises related to deciding on the type of constitution that best suits this complex country.

The debate over the constitution began early in the mid-1940s, and centered on two key issues: The first concerned relations with Egypt, and the second stemmed from differences of opinion about the Islamic *versus* the secular or civil nature of the constitution. Some observers consider that the conflict between Secularism and Islamism began with the bilateral governance agreement of 1898. That agreement was forged after the fall of the Islamic Mahdiyya state, which had incorporated some constitutional principles into Sudanese governance. The bilateral agreement was amended through a number of ratifications, eventually arriving at the institution of self-governance on 12 February 1953.

Upon obtaining its independence in 1956, the Sudanese national government preserved the temporary constitution that enshrined previous developments and Salafi legislative precedents. Thereafter the regime that came to power after the popular rebellion that overthrew General Abboud's adopted the amended temporary constitution in October 1964. A constituent assembly was then elected. Its main concern was to formulate a permanent constitution. A constitutional committee submitted a draft constitution in 1968. This sparked conflicts and disagreements about the application of legislation, eventuating in the revolution of May 1969 and the complete suspension of Sudanese democratic life.

Paradoxically, the first permanent constitution after independence was put into place through the achievements of a totalitarian regime in 1973. Counselor Ja`afar Numeiri added Islamic Shari`a Law to the permanent constitution in September 1983. After Numeiri's military regime was deposed in 1985, the Sudanese people returned to the temporary constitution of 1956 and its subsequent amendments. On 30 June 1989, the army usurped power for the third time. The regime continued to work on constitutional designs until the approval of the 1998 constitution under the strong influence of Sheikh Hasan Turabi, president of the National Council at that time.

The Constitution is a Guarantor of Peace

Sudan witnessed instability and conflicts that led to a long civil war. Therefore, the current constitution is linked to the issue of peace, in that the constitution will be a lasting peace guarantee, incorporating that which supports permanent peace, and eliminating the possibilities of tension and conflicts in the future. Thus, the Inclusive Peace Agreement reached in Nairobi on 9 January 2005 focused on the importance of preparing and establishing a constitution as soon as possible. In relation to Article 2-4-12-2 of the constitution and all that it entails, the Inclusive Peace Agreement suggested the following:

* The establishment of a representative national commission to review the constitution and to oversee the preparation of a legal and constitutional framework known as "the Constitutional Text" in a period not to exceed six weeks from the date of the submission of the Agreement.

* Article 3-4-12-2: the national commission for review of the constitution includes representatives of the National Conference/Congress Party, the Popular Movement for the Liberation of the Sudan, and representatives of other political forces and civil society as agreed between the parties. This structure will be formalized in the Comprehensive Peace Agreement.

* Article 5-12-2 is the first item of business for the National Commission for Review of the Constitution in preparing the text of the legal and constitutional framework in an appropriate manner. The framework is to be based on the current peace agreement, which is to be presented before the parliament for its ratification. The same text is then

referred to the National Liberation Follow-Up Assembly of the Popular Movement for the Liberation of Sudan for its approval, and if it meets opposition, then the Peace Agreement will be judged as a draft as long as opposition persists.

Article 10-12-2 states that, without touching upon the rulings of the Peace Accord, the national commission for the review of the constitution is charged with organizing a complete constitutional review as a supplemental mission and during a transition period of six years. This process must be based upon public participation and political plurality.

The six special Nevasha protocols deal with the issues of the separation of religion and state, wealth distribution, power sharing, conflict management in the Abeyi region and the conflict in the south such as Ridfaan and the Blue Nile, as well as military and security arrangements during the pre-transition period. According to Al-Darderi Muhamad, the National Delegation's official spokesman: "The first and foremost concern is: How will the six protocols, in their constitutional form, succeed in governing the state during the transitional period? A small committee of negotiators put forward a first draft constitution and insisted on its conformance with the agreement and the relevant parts of the 1998 constitution, which have become a general structure for the draft since the peace agreement was not organized and categorized in constitutional form. A wide committee was formed including, in addition to the members of the government's delegation, a group of legal specialists and experts.

After careful study, the participants adopted a draft, which was taken to Nairobi for negotiation and then submitted to a "seven plus seven" committee (a grouping of the two sides' representatives: Government and Popular Movement), formed according to the Agreement's annex. The committee produced two texts, the first in Arabic and the second in English, and submitted them to various political forces as a common draft constitution of both the Popular Movement and the Sudanese Government.

The National Delegation for Constitution Review was formed by a republican decree according to the relative percentages that emerged in the Peace Accord as follows: 52% for the governing Congress Party, 28% for the Popular Movement for the Liberation of

Sudan, 14% for northern political parties, and six percent for the rest of the southern political forces. From the start, opposition parties boycotted the committee on the grounds that these percentages did not reflect the true weight of the parties, as manifested in the last free elections in 1986. The two traditional parties, *Al Umma* (The Nation) and *Al-Ittihad Al-dimocrati* (The Democratic Union), associated with the *Al-Khetmiyya* and *Al-Ansar* sects, still claim to be the majority according to the previous situation. Thus, it was natural that they would boycott the commission as a sign of protest, as did other parties that constitute *Al-tajammu' Al-watani Al-dimocrati* (the Democratic National Union), such as the communists, the baathists, the nasserists and the regional parties.

Realities of the Constitutional Debate

The commission began working on 3 March 2005 by convening a procedural session attended by 110 members. They adopted internal draft bills and divided the membership into four committees: Abil Alir and Abdullah Idriss were selected for the joint presidency, and Al-Darderi Muhamed and Yasser Araman were chosen as the commission's spokesmen. Participants in this session agreed on conditions of management, methodology, documents to be distributed, and a constitutional proposal comprised of 16 topics. The time limit was set for six weeks at the latest, i.e., before July 9, 2005, the date fixed for the appointment of John Garang as the first vice president of the republic and the beginning of a transitional government. The commission proceeded unhesitatingly despite the opposition because both parties were facing deadlines and demands that could not be postponed according to the comprehensive Peace Agreement and pressures from the international community. Committees formed to discuss some constitution clauses and to submit their reports to the head technical committee, which composed the final draft after incorporating necessary amendments. Lastly, the technical committee submits these reports to the higher committee for validation.

Despite time limitations, the appointment of members, and the absence of influential political elements, the discussion was lively. Two points of views emerged from the beginning. Some participants differed concerning the "bismillah" (In the Name of God the Merciful and the Compassionate) as the introduction of the constitution, but they compromised on the formulation: "In the name of God and the Nation." Also, a dispute

erupted within the first and second special committees on the role of principles and on human rights, particularly Article 40, clause three, which defines political action, and Article 218, which deals with elections. This latter article prohibits anyone who does not assent to the constitution and/or the peace accords from engaging/participating in politics. The opposition termed this “political deprivation”. It is important to note however that the commission was amenable to inserting a document of rights into the constitution, including all details common to international human rights conventions and declarations. Moreover, a human rights delegation was established, which means that the state is empowered to play a supervisory and observatory role, alongside civil organizations connected with human rights.

The constitutional committee denied accusations of rash or lazy performance and undue reliance on the Comprehensive Peace Agreement’s texts. The committee replied that it had been able to validate issues 15 and 16 of the oversight committee’s report, particularly those related to exceptional and transitional matters, after entering more than twenty amendments related to national civil service, independent institutions and commissions, national security, state of emergency, and statistics. The general committee adopted Article 216, which determines the conducting of elections at all levels of government at a date not to exceed four years, i.e., by July 2009.

The referendum on the south’s self-determination was set to take place before the end of transitional period in six months i.e., before the end of 2010. The commission made a minor amendment to the controversial Article 218 stating that: “Each person standing as a candidate for election should respect the Peace Agreement and abide by it.” The committee adopted article 217, which gives the president of the republic the right to conduct referenda among citizens concerning any issue, and which renders their outcome a binding decision in consideration that this manifestation of a consensus is one of the sources of legislation.

Some observers consider that the constitution project is tantamount to the establishment of a new governmental order, as it has created four levels of governance: the national, the South Sudanese, the States level and the local level.

Each of these levels are granted specializations and financial resources to enable them to discharge their duties and play their roles towards citizens in the zone of in which each level's activity take place. It is notable that, for the first time since independence, this constitution has initiated a system of two councils: that of the National Assembly (Parliament) and that of States' Councils comprised of two representatives from each state.

The final step of the constitution draft's validation was the National Assembly's ratification and the presidential signature. Thus the constitution came into force during the transitional period. However, the government and the popular movement were striving to defend the national character of the new constitution, i.e. its representative nature and inclusiveness of all the major Sudanese political forces.

Considerable efforts were exerted to bring new elements on board. Official sources stated that 27 parties in addition to the Popular Movement and the parties that form the National Agenda –as officially named - represented by The Nation's Party (*hizb al-umma*), the Reform and Renovation party (*Al-islah wal-tajdid*), and the Democratic Union, participated from the beginning. The government succeeded in convincing the opposition National Democratic Grouping (*al-tajammu' al-watani al-dimocrati*) to join the constitutional process in its last week. After the Cairo Agreement on 18 June 2005, the National Democratic Grouping agreed to participate in the constitutional commission with 27 members: 9 permanent members and 18 surrogate members. The Grouping participated in the last sessions beginning on 22 July 2005. Representatives of the National Grouping (*tajammu'*), nominated by Mr. Muhamad Uthman Al-Mirgheni, head of *al-tajammu'*, received a valid copy of the draft constitution to study and to comment upon. For its part, the assembly confirmed that its representatives have a comprehensive vision of the constitution. During the commission's meetings, representatives of the *tajammu'* submitted some amendments concerning the draft constitution such as increasing the number of vice presidents of the Republic to seven in order to represent all regions of east, central, and west Sudan. But their proposal was rejected and they settled on nominating only two vice presidents of the Republic as specified by the

comprehensive Peace Agreement. It was agreed that the empowerment of different parts of the country could be achieved through strengthening the decentralized system.

Repercussions of Constitution Validation

Representatives of *Al-tajammu'* had reservations against some issues, such as the date of the elections. They demanded that elections be held on an earlier date, but the committee of twelve affirmed the necessity of complying with the required conditions of the Comprehensive Peace Agreement and its annexes as affirmed by the Cairo Agreement, i.e., holding the elections after four years. *Al-tajammu'* representatives debated the right of the president of the republic to enforce the state of emergency according to his constitutionally mandated prerogatives. They demanded sufficient guarantees that the president would not exceed or exploit this right; rather the president should be obliged to consult with diverse parties before taking such decisions. *Al-tajammu'* also requested that both the National Assembly and States Council be in session during states of emergency, and that the constitutional court should be in activity. Last but not least was the demand that the government not limit the freedom to form political parties. However, the Article concerning the declaration of a state of emergency (211-A) allowed the suspension of part of the rights document. The suspension did not extend to some very specific rights but did include – despite the demands of the Assembly for an exception – the free formation of parties and trade unions, and the principle of fair trial. *Al-tajammu'* representatives submitted observations concerning the independence of the judiciary, affirming the importance of independent courts as well as the independence of both legislative and the executive powers, as well as demanding the formation of a court comprised of nine respected, credible and experienced judges, known for their integrity, objectivity and fairness. Article 119 concerning the establishment of the constitutional court was amended and improved. The important contribution of *al-tajammu'* to the constitution is its insistence on ensuring a sound democratic transformation during the transitional period. When the commission completed its work on 25 June 2005, the draft had already witnessed amendments that were designed to give the constitution a national scope. In spite of this, and due to

cultural and political diversity in Sudan, it was hard to attain a consensus or semi-consensus about the primary national issues, no matter how important.

During the past few years, Sudan has witnessed explicit and intense foreign pressure and interference. Thus all Sudanese parties speak of the internationalization of the Sudanese issue, and exchange accusations. The truth is that the Sudanese issue is no longer an entirely local matter. It was therefore only natural that discussions would revolve around foreign influence in laying out the draft constitution. In the same context, there were speculations within political circles concerning the commission's adoption of a draft constitution prepared by the Max Planck German Institute, especially since some of the Institute's texts appeared to be literally copied in the draft constitution. A spokesman for the commission, Yasser Araman, declared that the commission had shown its ability to draw on the universal constitutional heritage in the early phase of its work, especially the experiments of other nations, such as South Africa and Nigeria which witnessed similar circumstances, but that this did not mean that external forces could impose whatever they wished on the Sudanese people.

Yet one cannot ignore the impact of this foreign intervention. The presence of the United States and Scandinavian states, especially Norway, in the constitutional endeavor was palpable and continuous. Even though these states interfered in solving disputes and placing equal pressures on both parties, neighboring African countries, particularly those in Eastern Africa, supported the foreign role. As for Egypt and Libya, they avoided any involvement in the constitutional and peace processes, since negotiations would require recognizing Southern Sudan's demand for self-determination, which Egypt and Libya interpreted as a step towards future separation. Foreign involvement assumed an international form that provided legitimacy, as manifested by the United Nations Mission In Sudan (UNMIS), a body that differs from the usual United Nations offices. UNMIS's commissioner plays a direct role in Sudanese politics during the transitional stage, so much so that some critics have compared his role to that of the Sudanese General Governor during pre-independence days.

Perspectives about the Constitution

Eventually, discussions about the constitution's duplicity lessened, while criticism now focuses on the constitution's content and its role in accelerating the transitional period's arrangements, especially those related to democratic transformation. The Southern politician Buna Malwaal – who is independent from the Popular Movement – opined that “The Constitution is simple and is part of the Comprehensive Peace Agreement forged between the Government and the Popular Movement. But in view of the Islamic clauses included in the existing constitution, as well as the Comprehensive Peace Agreement's Articles concerning the inapplicability of these clauses in the South, it is necessary to find an executive mechanism for the constitution in the South. I do not believe that there are any insurmountable differences about the constitution, as it is a law for regulating the state's performance. As for the post-transitional period, it requires a new constitution as we do not yet know what will be the situation in the South following the consecration of the actual constitution. Will people vote for unification or separation? If they vote for unification, they will be casting their ballots according to new bases that are not provided for in the present constitution. Therefore, I don't view the current debate to be justifiable. We should hasten to ratify the constitution, especially since the Government and the Popular Movement have agreed upon constitutional amendments required to enter the constitution into force. In my opinion, it is a very simple issue.” The majority of political forces adopted such flexible stances, since they view the constitution as transitional and temporary only, leading to a coming stage and not instituting another new one. That is why the communist party representative, Youssef Hussein, supported the widening of freedoms based on the principles of human rights and stressed the role of the constitution as the expression of national consensus.

Other opponents expressed their positions on the constitution with sharper clarity. Ali As-Sayyed, a leader of the Democratic Union Party, and spokesman the internal assembly's secretariat, confirmed that the transitional constitution will serve to transcend the totalitarian nature of the system and move towards democracy and plurality. He considers it a way of embedding the Comprehensive Peace Agreement in constitutional provisions. He also opined that the National Assembly had succeeded in inserting

freedom and rights-related Articles into the constitution, even though laws enacted subsequently may limit or violate these rights and freedoms.

Therefore, *al-tajammu'* insisted on fixing a text in Article 27 entailing that all rights and duties enshrined in international agreements, treaties, and conventions are a constituent and integral part of the constitution, in addition to the insertion of a text guaranteeing a fair trial any time someone violates or obscures these freedoms and rights. The most important issue – according to As-Sayyed -- is the existence of a text in the constitution forbidding the issuing of any law that violates existing constitutional freedoms and rights, emphasizing that these texts are sufficient and strong guarantees to prevent a law taking with the left hand what the constitution gives with the right hand.

The *umma* Party, led by Al-Sadek Al-Mahdi (differing with his traditional ally Al-Mirghani), and the Popular Congress party, dominated by Hassan Al-Turabi, have firmly opposed the constitutional process, and have launched a continuous political battle against the constitution and the two new participants: The Popular Movement and the government. The *umma* party emphasized the lack of national participation in laying down the constitution, referring to all Sudanese political forces, especially those that represent the majority according to him. As for the Popular Congress Party, it criticized the constitution for consecrating the hegemony of the National Congress and the Popular Movement. The constitution grants the president of the republic the authority to designate members of all institutions and to thereafter grant to the executive power the upper hand over all the mechanisms and organs of the legislative and judicial branches. The Congress Party leader, Hassan Al-Turabi, criticized what he termed the absence of Islamism and democracy in the constitution by saying that “The constitution is merely the quieting of Islam’s path and language, especially in that it does not require that non-Muslims comply with the Shari`a, which guarantees sufficient freedoms for all and does not harm non-Muslims. Turabi also rejected the aforementioned legislative sources by saying: “Legislative sources should comprise Muslim Shari’a and the religious principles that Muslims believe in.” According to Turabi, considering religion and custom as sources of national legislation will stir up unending conflicts. In spite of opposition fervor, the

consensus on democratic transformation is the most salient position of all Sudanese political forces, whether openly or implicitly. The democratic choice is no longer a subject of discord, and the constitution remains an enduring democratic tool. Thus, what appear to be differences and disagreements are actually an effort towards shaping a better constitution, which is a positive matter.

Ratification of the Constitution

The work of the constitutional commission lasted from 29 April 2005 until 25 June 2005, the debates and technical aspects were completed, and the committee grouped the entire work in a draft of 266 articles in 17 chapters/sections. The draft was submitted to the president of the Republic on 26 June 2005. He then presented it to the National Council (the Northern Sudan Parliament) and the Liberation Council (the Southern Sudanese Parliament) in order to validate the draft within maximum eight days. The president of the National Council, Ahmad Ibrahim Al-Taher, and the president of the Popular Movement's delegation, Niyal Daynek agreed to validate the draft within a period not exceeding eight days, i.e., by 6 July 2005. In fact, the National Assembly worked in the form of committees: the coordination and formation committee, the wealth distribution committee, a committee concerned with rights and obligations and issues concerning the state, and one on constitutional bodies. This division simplified the work, and some amendments were introduced after coordination with the Popular Movement. There was common consent that some texts need to be more accurate, well formulated, and properly translated. This is what happened before the committees submitted the constitution in its final form to the president of the republic, who signed it during an official ceremony on Saturday 9 July 2005. He then took oath as president of the Republic for a period of four years. In the same ceremony, John Garang took an oath as first vice president of the Republic, as well as president of the southern Sudan district government. Ali Uthman Muhammad Taha was nominated as the second vice president of the Republic.

The Constitution ratification process was intertwined with the implementation of the Comprehensive Peace Agreement, both of which signal a new period of Sudanese

history, which some hail as a Second Independence, especially since real independence and its obligations had yet to be realized in terms of national unity and development, not to mention the damage wrought by Sudan's civil war, the longest in the region's history.

This may be the last chance for the Sudanese people to transform the present constitution into real democratic practice that can lead to Sudan's unity and development. Although the constitution is not perfect, and despite some gaps and deficiencies, it is the reasonable and rightly guided political forces on the ground that can rectify what is lacking in the constitution. For constitutions can be merely a piece of paper if political forces do not possess a clear vision, an action program and reason, in addition to nationalist and democratic methods. It is notable that religious/Islamist forces, particularly those led by Sheikh Al-Turabi, accepted the call for reform and democratic change even if only in theory.

This is the Sudanese crossroads: Will the constitution be the means of realizing all of the above? Or will it remain a new field on which political powers struggle and fight? Sudanese parties are weak, and the splits and divisions among political actors and organizations are the expected results of the repressive and tyrannical regime Sudan has endured during 16 years of dictatorship. In addition, civil society is quickly affected by Sudanese political infirmities, such as paralysis, elitism, and a deficit of internal democracy. The fact that narrow educational instruction focuses primarily on religion and conservative values and structures is another hindrance to realizing the constitution's potential. All these matters increase the challenge and require different opposition and obligations in order to transcend the past.

Conclusions:

Sudan is facing decisive challenges, chief among them are:

1. The capacity of political parties and forces to transform the constitution from written texts into a practical source of legislation and governance responsive to the actual realities now confronting the Sudanese. On the other hand, these

powers and parties have experienced fierce repression since the summer of 1989, i.e., since the inception of the religious dictatorship. Therefore, self-renovation and reform are obligatory through special programs and a new democratic leadership suited to the challenges of this period.

2. Enhancing and improving the role of civil society, which is negatively affected by the current form of political life, since community organizations tend towards ostentation, paralysis and undemocratic systems of management.
3. The need to introduce changes into the educational system and formulate a well thought cultural strategy.
4. The possibility of making unity an attractive option in the referendum that will take place at the end of the six-year transitional period of coexistence between northerners and southerners.