

Constitution – Making in the Sudan: Past Experiences

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A paper presented at the

Constitution-making Forum: A Government of Sudan Consultation

24-25 May 2011

Khartoum, Sudan



Advisory Council for Human Rights

With support from



Introduction:

In 1978, upon my return to Sudan from Nigeria, I found that one of my predecessors at the Faculty of Law, University of Khartoum, had set up a question in constitutional law for the first year students asking them to comment on the following statement:

“Since the time of the *Mahdi*, the history of the Sudan has been a history of a country in search for a constitution.”

In 1986, I contributed a chapter on constitutional development in the Sudan to a book of essays on the politics of the country, published under the title of *Sudan Since Independence*. The editors, and myself chose for my easy the heading of “The Search for a Constitution”. Now, a quarter of a century later, and more than fifty years since the country became independent, it seems that that perennial search for a constitution has not, yet, been successful concluded.

In this brief essay, I intend to look at past endeavors in constitution making in this country. It is just possible that previous constitutional making processes may have been so flawed, that the structure that they thought to build could not withstand the test of time. Hence; they always came crumbling down. In some cases, some of these structures were not even finished.

Constitution-Making:

Constitutions can be created through different methods and devices. They can be the work of a clandestine of group of experts through a legislative enactment or through the deliberations of a constituent assembly, especially elected for such a task. They may be also the result of a special constitutional convention that seeks to find solution to all the political ills of the country. And, in the past as in most recent times constitutions can be created through popular initiatives, in which the public directly play a role in expressing its views on all aspects of a constitution. This popular initiative can at times be limited to putting up the constitution for approval through a public referendum or plebiscite, however, as *Nwabueze* pointed out:

“a referendum or a plebiscite lacks a genuine constituent and legitimating effect unless it is preceded, at the drafting stage or after, by series discussions on as popular a platform as possible, of the constitutional proposal.”

Indeed, it could be argued that the process of constitutional making might just be as important as the component parts of the constitution itself. Where the process does not reflect sound and transparent participatory mechanisms, it is unlikely that the institutions created as a result of such an exercise will last for long. And even if they did, they are unlikely to capture the imagination of the people or win their support. In what follows, I intend to offer a quick historical account of constitutional making in the Sudan, beginning with its ‘colonial experience’

‘Colonial’ Legacy:

As everyone knows the Sudan was a Condominium, the co-domini being Egypt and Britain. But the Condominium Agreement of 1899, in reality, made the Sudan a British colony in every respect except designation. The country was ruled by a British

Governor-General who had all the powers of government in his hands: legislative, executive and judicial. The constitutional development that took place followed the pattern adopted by the British in their other African "possessions". This standard form was described by the late Professor Allott as follows:

"Wholly autocratic one man rule by a colony Governor passed on all to oligarchic rule with the help of a legislative council which gradually become democratized and evolved in natural stages to a parliamentary assembly; at the executive level, the Governor executive council, to being with largely a yes group, developed in parallel into a British-type cabinet."

However, the case of the Sudan, and may be in some parts of the British colony, constitutional change during the colony days was usually the result of some pressure

"whether from within or without", and could not perhaps be said to have "evolved in natural stages". This is particular so if we take in consideration the "unnatural" divide that was built between the North and the South in those days that was only removed some sixteen years before the country became self-governing.

Still, the general pattern was not much dissimilar to that described above. In 1910, a Governor Council was created, but the Governor General still retained veto powers. By 1943, a consultative council for the North was created, largely through the pressure of educated nationalist who, through the Graduates Congress, started to agitate for self-determination. By 1948, the British Administration created a Legislative Assembly and Executive Council for the whole country; the Southern had accepted to participate as a result of the recommendation of Juba Conference in 1947. But the pro-Egypt nationalists refused to participate in the working of these bodies.

In March 1951, a constitution amendment commission was convened under the chairmanship of Mr. Justice Stanley-Baker. Its membership was composed of some 13 members of the Legislative Assembly, 4 others were brought into the discussions when the electoral rules were considered. But, when Egypt suddenly and unilaterally abrogated its treaty with Britain, and extended its rule over the Sudan, some members of the commission wanted the Sudan to be placed under an international commission to resolve the issues of contested sovereignty over the Sudan. Eventually, they resigned.

But, the Chairman of the commission managed to make a summary of the various recommendations made and submitted his report to the Governor-General.

An interesting feature of the work of this commission was that its chairman submitted his report to a British academic Professor Vincent Harlow, the Beit Professor of the History of the British Empire at Oxford University, who made elaborate comments on the commission work. I shall make a reference to just one very useful result that came out of Professor Harlow's comments. The Professor had suggested that the amended constitution should include, as part of the Chapter on Fundamental Rights, a comprehensive provision on the "Rule of Law". Though his recommendation might not have been fully implemented, the final outcome the self-government statute 1952, that resulted from the constitution amendment commission contained an important Article, Article 8 with the marginal note "The Rule of Law":

“All persons and associations of persons, official or otherwise, are subject to the law as administered by the Court of Justice, saving only the established privileges of parliament.”

Perhaps the makers of the coming Sudan constitution should, I think it is imperative that they do, reflect on such a provision and its significance in good governance in the country.

They were other factors that affected the making of self-government statute, most important of which were the changes in the political system in Egypt that brought the free officers to power. The new regime accepted self-determination for the Sudanese. It also secured an all Sudanese parties agreement on issues pertaining to the Statute. This led to amendments in the powers of the Governor-General, particularly in relation to the South, and that he should exercise those powers on the advice of a five man Governor-General Commission. The electoral commission was also headed by an independent outsider, an Indian Electoral Officer.

Independence and After:

As is well known, the Anglo-Egyptian Agreement of 1953, the self-determination agreement, had paved the way for self-government in the Sudan through the holding of free general election for bi-cameral parliament. The election resulted in the winning of a majority by the National Unionist Party, a body composed of many pro-Egyptian political groups. The government that was formed helped to conclude the *Sudanisation* process, albeit in mechanical and unimaginative fashion, and carried out the evacuation of foreign troops, Egyptian and British from the country. This period was supposed to be followed by constituent assembly that would decide the future of the country to be either in some form of union with Egypt or opt for independence. Instead, independence was declared from within the parliament itself and the country became independent in the first of January 1956. The Self-government Statute was hurriedly amended and “approved by parliament” as the Sudan Transitional Constitution 1956.

But, all of this could not have been achieved without the promise that was made to the Southern members of the parliament that their claim for a federal system of government will be given “due consideration” when deciding on the “permanent constitution” of the country. The first constituent assembly was elected in 1957. Under it, a national commission was appointed to draft a constitution for the country, composed of 46 members, all men. They, however, were widely drawn from academics, lawyers, politicians, representatives of workers and farmers. This commission opted for a parliamentary system of government; the Sudan was declared a unitary state and a democratic parliamentary republic. Attempt to insert “Islamic” after parliamentary were not conceded by the national commission, despite consistent efforts by some of its members. However, Islam was to be the “official religion of the State” and “Arabic” its official language”.

The Southern members of the assembly had withdrawn from the national commission when it failed to endorse their claim for federalism. At the constituent assembly they also insisted that they cannot accept to discuss any draft that did embody any plans for federal structure for the Sudan. They did accept the argument that was presented to them by some members of the parliament that the draft would be presented to a

committee on the constitution, adopted by a constituent assembly, to examine that draft including the issue of federal government.

All that came to an end when military, under *Abboud*, assumed powers on 18 November 1958. Two other successful military coups were to take place in May 1968 and June 1989. However, the hands of civilians, and their connivance were clearly present in instigating the military coups: the incumbent prime minister, in 1958, when he learned that his own party, the *Umma* Party, was opting for a coalition government with the National Unionist instead of the People Democratic Party with the Unionist Leader as the coming prime minister; the communist party, in 1969, in an effort to thwart an attempt for writing a constitution that sought to make a ban on communism part of the new permanent constitution; and finally the national Islamic front, in 1989, when it could not accept the idea of a “national government” dictated by armed forces leadership with a “national program”.

Despite ideological differences between the military governments that ruled over the Sudan, their system of government is not much dissimilar from each other. They all start with a decree that suspends the existing constitution, order the dissolution of the government and the national assembly and curtail political freedom. Slowly they seek to shed away their *Khaki* and assume civilian garb and institutions. *Abboud's* reign was the shortest among the military regimes that assumed power in the Sudan (1958-1964). Its efforts to create a new system of government in the Sudan resulted in the creation of basic democracies of *Ayub Khan* in Pakistan. Elections were held for local councils from which members were elected for provincial councils that sent representatives to a central (legislative) council. The “revolutionary” armed command stayed at the apex of the executive power, sharing legislative powers with the central council.

At the province level, the military ruler was the chairman of the provincial assembly; the former administrative head of the province, the governor, a civil servant, became the secretary general of the provincial administration. The *Nemeir* “May revolution” (1969-1985) put an end to the second democratic regime that was elected after the popular uprising, “October revolution 1964), the constituent assembly that was elected in 1965 again worked on the making of a permanent constitution for the country. This time, a national commission was appointed helped by a technical committee, composed of legal experts and politicians conversed with constitutional matters.

The technical committee conducted its business through a series of papers, singly or jointly, prepared by members of the committee, detailing the various options available to the members of the committee. Once agreed to, the members were selected to present the options on any particular topic before the national commission. Eventually, the national commission settled for the draft that came to be known as “Islamic constitution”.

Under this draft constitution, the Sudan was declared a “democratic, socialist republic based on the guidance of Islam”, and Islam was made the “official religion of the State”. As for the system of government, the draft constitution of 1968 opted for presidential rather than parliamentary system; this was seen as more likely to safeguard the executive from the frequent upheavals that was subjected to during the first years of independence when the national unionist government faced a vote of censure

immediately before and after the declaration of independence. It survived the first but lost power at the second attempt, and just as it were about to return to govern in coalition with *Umma* Party, *Abboud* military, as already explained above assumed power.

I have elsewhere, in the Chapter referred to above; given more details about 1968 draft constitution. Despite some blemishes, I felt it could have presented with some basis for building democratic constitution, but *Nemeri* and his followers thought otherwise. He had initially depended on the support of communists and leftists. But, when he finally fell out with the communists, in the aftermath of a coup attempt against his regime in 1971, he tried to reach out for a wider base of support through the building of one party structure, the socialist union, based on the Egyptian model. However, the national charter, the program of action for the party, still read like a communist manifesto.

As part of this opening up, *Nemeri* put himself up for election as President, thereafter dissolving the revolutionary command, a People Assembly was appointed, in 1972, to adopt a constitution prepared by the government. The assembly was divided into ten committees, each of which was to give its own report on all aspects of draft constitution. Substantial changes were made to the draft which the regime accepted, including a whole chapter on procedural aspects of the rule of law. However, a proposal that was made by at least two committees, setting a limit of two terms on the presidency, was resisted and not adopted, despite the assurances that some of the members made of their support for *Nemer*, whom they were willing to accept a life president.

Nevertheless, and despite its limitations and the fact that was operating within a one party structure, it is possible to argue that a modicum of constitutionalism was created by the permanent constitution of Sudan, 1973. Indeed, in the first constitutional case decided under this constitution, the Sol Nasr case, the Supreme Court ruled that the trial of civilians before military tribunals, using a penal law that had retroactive effect, offended against the “the letter and spirit” of that constitution.

But then, just that court was about to deliver another decision, this time on the unconstitutional of preventive detention, an attempted a military coup against the regime was successfully resisted. The regime then used the incident as a pretext for far reaching amendments to the constitution, which sought, *inter alia*, to greatly enhance the powers of the president, ensure the constitutionality of preventive detention and special criminal courts. The constitutional amendments were made with retrospective effect. From then on the constitution became what the president thought it should be. In 1983, *Nemeir* used his enhanced power to amend the 1972 Addis Ababa Agreement that created the regional government for the South. By a presidential decree, the south was divided into three regions, despite the clear wording of the agreement, endorsed by the constitution that any such changes should be brought through about by national legislation that should be endorsed by a public referendum in the region. In 1983, also saw the imposition of Islamic criminal punishments and other fundamental changes in the legal system. An attempt was even made, and abandoned, to create an Islamic *Khalifate*.

Another popular revolution, in April 1985, put an end to May regime. A transitional military administration, assisted by a civilian council of ministers, shared power under

the transitional constitution of Sudan 1985, based on the initial transitional constitution of 1956 and its later amendments, as well as 1973 constitution. An elected constituent assembly and a civilian cabinet assumed power in April 1986. A permanent constitution was to be prepared by this new administration. But until the demise of this regime by the forces of the national salvation regime, at the end of June 1989, the constituent assembly and the government failed even to set up any institution to support the process of constitutional making.

After years of ruling through presidential decrees, the salvation regime finally, in 1998, decided to adopt a constitution for the country. To this end, the pattern adopted in 1968 was followed. A national commission was appointed, assisted by a technical committee. The final report of this body was finished and submitted to the president, it was soon discovered that the version that was passed to the national assembly for approval was fundamentally different from the initial document that was sent to the president.

In fact, the constitution that was submitted to the assembly was a leaner version than the one adopted by the national commission. The language used in the drafting was also different, carrying the hallmark of Dr. *Turabi's* style of writing. A controversial provision on *tawali*, translated as freedom of association was a particular cause for concern, with some observers seeing it as an attempt for perpetual rule of the governing party. The Islamic character of the constitution was also emphasized through a provision declaring sovereignty to God alone. Yet, these provisions and other that were not specifically included in 2005 Interim National Constitution has since lapsed.

The Interim National Constitution as everyone is aware is based on comprehensive peace agreement, negotiated over many years by the government of Sudan and SPLM. The details of the constitution are to be found in the various accords relating to the distribution of the power and wealth agreed to in *Nivasha*. Its final wording was prepared by the constitutional review commission and endorsed by an appointed national assembly, in which the government and the SPLM had 80% of the seats. The CPA provisions, even if not specifically included, are still part of the Interim National Constitution.

But despite these limitations, the interim constitution, at least on paper included many impressive provisions such as the Bill of Rights, the measures adopted to curtail the presidential powers, particularly in relation to provisional orders, the newly created commissions, such as the commission on the treatment of non-Muslims in the Capital, the Human Rights Commission, the Land Commission, etc. Yet, the disparity between the constitution on paper and the constitution in action is clear. Some of these institutions mentioned above, despite the enactment of the statutes supporting them, are not created. The two parties it seems are quite happy to work out arrangement that consider appropriate for the part of the country under their control.