



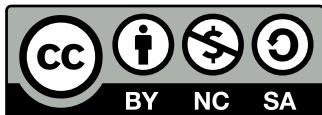
REFLECTIONS ON SUDAN'S CONSTITUTIONAL TRAJECTORY, 1953–2023

70 Years Lacking Legitimacy, Democratic Governance
and Ownership



© 2023 International Institute for Democracy and Electoral Assistance

International IDEA publications are independent of specific national or political interests. Views expressed in this publication do not necessarily represent the views of International IDEA, its Board or its Council members.



With the exception of any third-party images and photos, the electronic version of this publication is available under a Creative Commons Attribution-NonCommercial-ShareAlike 3.0 (CC BY-NC-SA 3.0) licence. You are free to copy, distribute and transmit the publication as well as to remix and adapt it, provided it is only for non-commercial purposes, that you appropriately attribute the publication, and that you distribute it under an identical licence. For more information visit the Creative Commons website: <<http://creativecommons.org/licenses/by-nc-sa/3.0/>>.

International IDEA
Strömsborg
SE-103 34 Stockholm
SWEDEN
Tel: +46 8 698 37 00
Email: info@idea.int
Website: <<https://www.idea.int>>

Cover illustration: International IDEA
Design and layout: International IDEA
Copyeditor: Andrew Mash

DOI: <<https://doi.org/10.31752/idea.2023.53>>

ISBN: 978-91-7671-663-2 (PDF)

REFLECTIONS ON SUDAN'S CONSTITUTIONAL TRAJECTORY, 1953–2023

70 Years Lacking Legitimacy, Democratic Governance
and Ownership

Mohammed Abdelsalam Babiker and Atta H. el-Battahani



International IDEA
Strömsborg
SE-103 34 Stockholm
SWEDEN
+46 8 698 37 00
info@idea.int
www.idea.int

Contents

Acronyms and abbreviations	5
Introduction.....	6
Chapter 1	
Colonial rule 1898–1956 and Self-Government Statute, 1953.....	9
Chapter 2	
Constitutional developments after the colonial period (1956 to 1998)	13
2.1. Transitional Constitution of 1956	13
2.2. Transitional Constitution of 1964	14
2.3. Constitutional draft of 1968.....	14
2.4. Permanent Constitution of 1973	16
2.5. Transitional Constitution of Sudan 1985	17
2.6. 1998 Tawali Constitution	18
Chapter 3	
2005 and 2019: The duality of constitution-making and peace agreements	20
3.1. Interim National Constitution 2005	21
3.2. The Constitutional Document 2019: A flawed foundation.....	22
3.3. Constitutional Document 2019 and Juba Peace Agreement, 2020: Conflicting designs	23
3.4. The Juba Agreement: Binding on non-signatories	27
3.5. The constitutional effects of the 2021 military coup	29
Chapter 4	
Concluding remarks	32
References	35
About the authors.....	37
About International IDEA	39

Acronyms and abbreviations

CPA	Comprehensive Peace Agreement
DPA	Darfur Peace Agreement, 2006
ESPA	East Sudan Peace Agreement, 2006
DDPD	Doha Document for Peace in Darfur, 2011
FCC	Forces of Freedom and Change
INC	Interim Constitution of 2005
NCP	National Congress Party
SPLM/A	Sudan People's Liberation Movement/Army
SRF	Sudanese Revolutionary Front
TLC	Transitional Legislative Council
TMC	Transitional Military Council

INTRODUCTION

Methods and outcomes of constitution-making in Sudan have been the product of self-interested, elite processes, rather than being based on inclusive, participatory and transparent efforts to reflect the aspirations and diversity of the Sudanese populace.

The purpose of this paper is to improve the knowledge base for those seeking to understand Sudan's constitutional trajectory—present and future—by reflecting on its past, including Sudan's previous experiences with transitional constitutions. It examines the history of constitution-making in Sudan, charting developments from the time of the colonial condominium (the Self-Government Statute of 1953) to the various short-lived constitutions (those of 1956, 1964, 1973, 1985, 1998, 2005 and 2019). This historical inquiry is followed by an examination of current constitutional developments, including the Constitutional Document of 2019, with a view to drawing lessons on how to move forward to overcome Sudan's chronic constitutional stalemate. The paper concludes that all previous constitutional designs in Sudan are not suitable to provide answers to Sudan's current constitutional crisis. This is due to a simple fact: methods and outcomes of constitution-making in Sudan have been the product of self-interested, elite processes, rather than being based on inclusive, participatory and transparent efforts to reflect the aspirations and diversity of the Sudanese populace.

An overview of constitutions in Sudan from the post-colonial era to after the 2018 revolution indicates that interim constitutional designs variously reflected common law norms in the post-colonial era, secularism and socialism, Islamism and 'liberal peace' constitutions. In each case post-colonial Sudanese constitutions and laws have been used as an instrument for ideological or partisan purposes and as means of discipline and repression (Fadlalla and Babiker 2019: 254; see also Babiker and Ahmed 2020), rather than to allow Sudan a pluralistic politics. The 1973 permanent Constitution

represented ‘socialist ideology’; the September laws of 1983 and the 1998 Constitution reflected an Islamic ideology with its ‘Islamic civilizational mission’. This latter ‘civilization project’ was initiated with the Islamization of laws in Sudan in September 1983, when Shari’a law became the ‘new common law’ of Sudan, requiring the constitution and other laws to comply with it or to be regarded as null and void (Fadlalla and Babiker 2019). Since the Comprehensive Peace Agreement (CPA) and Interim Constitution of 2005 (INC 2005), liberal peace models of wealth and power sharing between authoritarian military regimes and armed groups have all lacked democratic legitimacy and accountability.

The Report describes how Sudan’s constitutional designs were all interim, short-lived and dominated by military regimes with concentration of power in the hands of the military, and thus represented top-down, elitist approaches (Fadlalla 2011; Badri 2008). The Self-Government Statute 1953 as well as the 1964 and 1998 constitutions represent constitutional designs that are suitable to a relatively peaceful Sudan (with the exception of the Addis Ababa Agreement which dealt with amnesty provisions). The thematic issues and provisions dealt with in these constitutions cannot be evoked and applied in post-conflict Sudan, and hence are an inappropriate basis for tackling contentious constitutional issues in future. Afflicted by protracted armed conflicts, Sudan is currently in an era where constitutional design is based on peace agreements. This fundamental reality is reflected in what this Report calls the ‘liberal model’ and specifically the Interim National Constitution of 2005 (based on the CPA and other peace agreements).

The same liberal model continued after the secession of South Sudan (9 July 2011), with short-lived peace agreements—the Darfur Peace Agreement (DPA, 2006), the East Sudan Peace Agreement (ESPA, 2006), and the Doha Document for Peace in Darfur (DDPD, 2011)—all providing the foundation for transitional constitutional frameworks and institutions of governance. Similarly, the Constitutional Document (2019) was overruled by the Juba Agreement in October 2020. Yet all these peace agreements represent a flawed foundation for constitution-making in Sudan. They became incorporated into Sudan’s constitutional frameworks primarily based on a power- and wealth-sharing model (Young 2012) which lacks transparency,

Sudan’s constitutional designs were all interim, short-lived and dominated by military regimes.

public participation and ownership. Most of the Sudanese people have participated neither in the peacemaking nor in the constitution-making processes.

Sudan has embarked on 'constitution writing' rather than proper constitution-building.

In practice, Sudan has embarked on 'constitution writing' rather than proper constitution-building. Such processes have been continually manipulated by military and civilian governments and supported by narrow elites. A brief historical survey reveals this unfortunate reality—which has continued even after the peaceful 2018 revolution.

Chapter 1

COLONIAL RULE 1898–1956 AND SELF-GOVERNMENT STATUTE, 1953

The Condominium Agreement of 1899 made Sudan a British colony and the country was ruled by a British Governor-General who had all the powers of government in his hands—legislative, executive and judicial—with direct control over the armed forces as well as civil administration (Fadlalla 2011: 72–79). The constitutional development that took place followed the pattern adopted by the British in their other African ‘possessions’, namely: ‘wholly autocratic one man rule by a colony Governor’, which then ‘passed on to oligarchic rule with the help of a legislative council which ... evolved in natural stages to a parliamentary assembly ... the Governor executive council, to being with largely a yes group, developed in parallel into a British-type cabinet’ (Fadlalla 2011: 3). From 1898 up to 1910 the Governor-General was the sole centre of power all over the country, except Darfur (joined in 1916). In 1910 a Governor-General Council was created, but the Governor-General still retained veto powers on legislative, executive and judicial matters (Fadlalla 2011; Salih 2022; Bechtold 1976: 24).

The 1920s and 1930s saw the emergence of rival socio-political forces: religious-tribal leaders on one hand, and educated cohorts on the other hand busy attending to building their support base. Cultural activities by the educated boomed, while religious sects invested in economic and commercial sectors. By the time a Graduates’ General Congress was formed in 1938, religious and tribal aristocracies were a power to be reckoned with—especially in rural areas. During the 1940s these basic positions hardened, leading to a pro-British chieftains’ coalition versus a Graduates’ General Congress calling for wider Sudanese participation in the formulation of public policy. This

The constitutional development that took place followed the pattern adopted by the British in their other African ‘possessions’, namely: ‘wholly autocratic one-man rule by a colony Governor’.

demand, ignored by the British, was expressed in a memorandum calling for formation of a representative body to approve the budget and ordinances, and for the Sudanese to be given an opportunity to share effectively in the running of the country (see Bechtold 1976: 28–32).

By 1943 a Consultative Council for the North was created, largely through the pressure of educated nationalists who, through the Graduates' General Congress, started to agitate for self-determination. In March 1947 the British administration began preparations for a single elected legislative assembly for the whole of Sudan and emphasized that 'Sudan should remain one' but with provisions and safeguards to ensure South Sudan could 'stand up for themselves in the future socially, economically as equal partners of the Northern Sudan and the Sudan of the future' (Collins 2008: 55–57). The Juba Conference was held in June 1947 with 17 southerners and three northerners. Instead of South Sudan going its own way or seeking some sort of affiliation with other East African countries, the conference opted for South Sudan to remain with North Sudan. According to Collins, the conference decision for South to remain with the North in a united Sudan was all but stage-managed acts by the British (Collins 2008). By 1948, the British administration created a Legislative Assembly and Executive Council for the whole country, which was wholly appointed.

In March 1951, a constitutional amendment commission was convened under the chairship of Mr Justice Stanley-Baker. Its membership was composed of some 13 members of the Legislative Assembly; four others were brought into the discussions when the electoral rules were considered. But when Egypt suddenly and unilaterally abrogated its treaty with Britain in 1952, 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. Eventually, those members resigned, but the Chairperson of the commission managed to make a summary of the various recommendations and submitted his report to the Governor-General.

An interesting feature of this commission is that its chairperson consulted a British academic, Professor Vincent Harlow, the

Beit Professor of the History of the British Empire at Oxford University. Harlow made elaborate comments on the commission's work, including the suggestion that the amended constitution should include, as part of the Chapter on Fundamental Rights, a comprehensive provision on the 'Rule of Law'. Albeit not fully implemented, this recommendation found its way into the final outcome (the Self-Government Statute of 1953)—insofar as article 8 contained a marginal note 'The Rule of Law' stating that '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' (Collins 2008). By the standards of late British imperial constitution-making, this was a significant innovation which attempted to encapsulate the ethos and values of the English common law.

This provision did not find fertile ground; it was not observed in post-independence Sudan, where the demands of a nascent nation-state and Indigenous development in a post-colonial context strained the concept of the rule of law. It is unimaginable that a provision such as article 8 would be observed in a context lacking independent courts of justice, rule of law institutions and established parliamentary norms. All of these had been formally established in Sudan, but not had time to consolidate themselves before a precipitous independence spurred by the Egyptian revolution brought the Free Officers to power (Fadlalla and Babiker 2019).

However, a combination of internal and external dynamics shaped Sudan's journey to political independence in early 1950s, during which time British constitutional discourse still had the upper hand. The late colonial regime post-1952 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 (Fadlalla 2011).

The Self-Government Statute of 1953 reflected the common law ethos and values (Fadlalla and Babiker 2019). One of the positive aspects of the Statute is that the sources of legislation were not stated. The silence on this issue was intended to please the Southern

A combination of internal and external dynamics shaped Sudan's journey to political independence in early 1950s, during which time British constitutional discourse still had the upper hand.

One of the negative aspects of the Statute is its failure to include aspects of federalism, or the right of the South for self-determination.

Sudanese and guarantee that a civil nation would be developed wherein all Sudanese of various religions could coexist peacefully under equal rights, irrespective of religion. This was needed to guarantee that the Southerners would side with the declaration of a united, independent Sudan. However, one of the negative aspects of the Statute is its failure to include aspects of federalism, or the right of the South for self-determination which was later debated in the Transitional Legislative Council of 1955. This silence led to both suspicion and resentment among the South's leaders (Badri 2008).

Chapter 2

CONSTITUTIONAL DEVELOPMENTS AFTER THE COLONIAL PERIOD (1956 TO 1998)

2.1. TRANSITIONAL CONSTITUTION OF 1956

When Sudan became independent in 1956, the existing Self-Government Statute was hurriedly amended and 'approved by parliament' as Sudan's Transitional Constitution of 1956 (Fadlalla 2011: 72–79). As noted above, it provided for a Westminster model with a cabinet government subject to the control of a bicameral parliament, and an independent judiciary. The Constitution also includes fundamental rights provisions that had first appeared in the Self-Government Statute, such as the right not to be arbitrarily arrested or deprived of the use of property; protections on freedom of religion, opinion and association; the right to constitutional remedy; independence of the judiciary; and the rule of law (Sudan 1956, Bill of Rights articles 5–10).

In 1957, the first Constituent Assembly was elected and a national commission was appointed to draft a constitution for the country, composed of 46 members who were drawn from a wide circle of academics, lawyers, politicians and representatives of workers and farmers—but no women were included. The Southern members of the Assembly had withdrawn from the national commission when it failed to endorse their claim for federalism. The commission opted for a parliamentary system. Following the 1958 election, the Constituent Assembly set up a national committee to draft the constitution. It spent its time debating the merits of the British and American systems of government and whether the state should be

When Sudan became independent in 1956, the existing Self-Government Statute was hurriedly amended and 'approved by parliament' as Sudan's Transitional Constitution of 1956.

secular or Muslim in its future orientation. No agreement had been reached when the army, under its commander-in-chief Major General Abboud, took power in 1958. Abboud's reign lasted for six years until his downfall at the hands of a popular movement, the October revolution of 1964 (see Ibrahim et al. 2015). His regime had no vision for nation-building, nor any need to develop a constitution, hence the period 1958–1964 witnessed government by executive decree with no constitution or progress towards one (Collins 2008: 72–73).

2.2. TRANSITIONAL CONSTITUTION OF 1964

The National Uprising of October 1964 overthrew Abboud's military regime and led to yet another Interim Constitution. The 1964 document amended that of 1956. Both Constitutions included Bills of Rights and equality before the law. The other major positive dimensions in this Constitution are that it gave women equal political rights (of voting and running for political office) as well as other rights to education, work and equal payment for equal work (Badri 2008).

2.3. CONSTITUTIONAL DRAFT OF 1968

The Transitional Constitution of 1964 was adopted as an interim document to govern the country while Sudan searched again for a permanent constitution. Eventually a draft was completed in January 1968 and presented to the Constituent Assembly for discussion. This time, a national commission was appointed, supported by a technical committee composed of legal experts and politicians. The technical committee conducted its business through a series of papers prepared by its members, detailing the various options. The national commission agreed on a draft that came to be known as the 'Islamic Constitution' of 1968. This draft opted for a presidential rather than parliamentary system of government. It vested executive powers in the President, assisted by a Prime Minister and a Council of Ministers, to be directly elected by the people for a period of five years but who could not hold office for more than two consecutive periods (articles 43 and 59).

One of the contentious issues which had emerged during debates on the draft was the issue of secularism, religion and the state. Should Sudan be declared a Muslim state or would it be better to leave it as a secular state? The draft adopted a slightly modified version of the first option. The state was to be a 'democratic, socialist republic based on the guidance of Islam', which was declared the 'official religion' (articles 1 and 3). In this way Islam enjoyed the status of an established religion. But the Constitution went further, enjoining the state to 'strive to spread religious enlightenment among citizens, and eradicate atheism, all kinds of corruption and moral turpitude' (article 14). Many non-Muslims were alarmed. Southern politicians in particular had called for a secular constitution that would depoliticize the issue of religion and thus would be more conducive to national unity. For their part, supporters of the draft argued that this would be tantamount to subjecting the Muslim majority to the views of the minority.

Besides, the draft Islamic Constitution did not abandon the religious interests of minorities. Rather, it provided them with the right to establish their educational institutions, to enjoy freedom of religion, opinion and conscience and to profess their religious beliefs subject to such reasonable limitations in the interest of the majority, health or public order as may be imposed by law (articles 19 and 32). The 1968 text also contained a chapter on fundamental rights and freedoms which, apart from making unlawful the propagation of communism or atheist ideas, sought to protect most of the usual civil and political rights of citizens subject to 'reasonable limitation' imposed by law (articles 8–24). It advocated for a regional system of government, in an effort to resolve the conflict in south Sudan (articles 163–79).

One of post-October 1964 legacies was an unprecedented political polarization between: (a) conservative political coalition of forces; and (b) leftist and secular forces who were gaining more support and favour. Feeling the threat of the latter, and led by the Muslim Brothers, the pro-establishment coalition moved to rid parliament of communist MPs and outlaw the Communist Party; a move seen by many to instigate the May 1969 military takeover by Arab nationalist and communist army officers. When Lt. Col. Nimeiry took power on 25 May 1969, all this serious debate on the constitution and the nature of the state came to an end.

One of the contentious issues which had emerged during debates on the draft was the issue of secularism, religion and the state.

Sudan's 1973 Permanent Constitution was adopted without any transparent constitution-making process in place—there was no popular participation or referendum.

2.4. PERMANENT CONSTITUTION OF 1973

The Nimeiry regime (1969–1985) attempted to build a constitution based on a one-party system. Nimeiry moved quickly to support the Addis Ababa Peace Agreement (signed 1972) which ended Sudan's first civil war in Southern Sudan. However, the Addis Ababa Agreement was not incorporated into the 1973 Permanent Constitution and hence it was easy to disregard what was agreed upon. The Agreement ended the armed conflict between the government and Anyanya—the main rebel groups fighting the government. While it gave the southern states some measure of self-rule, including the establishment of a Southern Regional Government (subsequently retained under the 1973 new Constitution), it also left the autocratic state in the North intact and led to growing discontent in the North itself. The final demise of the Addis Ababa Agreement came in 1983, when Nimeiry imposed Islamic law on the southern states (the 'September laws'). This led to renewed civil war, began by the Sudan People's Liberation Movement/Army (SPLM/A) in 1983.

Having secured a support base in North and South Sudan, Nimeiry's regime moved to build a permanent constitution for the country (see Niblock 1987: 248–56; Collins 2008: 95–102). Accordingly, a People's Assembly was appointed in 1972 to adopt a constitution prepared by the government. The Assembly was divided into 10 committees, each of which was to give its own report on all aspects of the draft. Substantial changes were made, many of which the regime accepted, including a whole chapter on procedural aspects of the rule of law (Khalid 1978). Sudan's 1973 Permanent Constitution was adopted without any transparent constitution-making process in place—there was no popular participation or referendum. All executive and legislative powers were vested in the hands of the President, as well as the power of appointing all the judges, on advice from the High Council of the Judiciary. The constitutional system was a presidential one, leaning more to centralization of power (Khalid 1993: 563–67).¹

In 1977, the Nimeiry regime became reconciled to some of the Islamist elements. This ushered in a new phase with more emphasis

¹ Nimeiry's amendments of the 1973 Constitution made him a 'Governor-General'. It is interesting to see how this phenomenon repeats itself with al-Bashir (2011–2018) and recently with General al-Burhan (2021–2022).

on Islamic principles, influencing mainly the principles of law-making (justice, equity and good consciousness; judicial interpretation to be carried out in the light of the basic rules of Islamic jurisprudence). The legal system was greatly Islamicized, a development which paved the way for declaring the Islamic 'Hudood' Personal Laws, and Islamicization of all other laws, in 1983 (Badri 2008). These moves and subsequent breaching of the Addis Ababa Peace Agreement prompted the eruption of the country's second civil war in the South, which raged until 2005.

2.5. TRANSITIONAL CONSTITUTION OF SUDAN 1985

The Nimeiry regime (1969–1985) ended with another popular uprising (Berridge 2015). A transitional military government, assisted by a civilian council of ministers, shared power under the 1985 Transitional Constitution of Sudan, which was based on the initial Transitional Constitution of 1956 and its later amendments, as well as the 1973 Constitution. The 1985 Transitional Constitution was developed after the popular uprising and it had two main positive dimensions (a) equality before the law (article 17) for all Sudanese; and (b) respect for fundamental human rights and democratic principles. An elected Constituent Assembly and a civilian cabinet assumed power in April 1986 (Woodward 2011).

The elected government under the 1985 Transitional Constitution spent much time negotiating constitutional law reform and peace in the South. The main concern was dealing with Islamic Shari'a law introduced by the previous regime and to eliminate the source of law clauses based on Islamic law in order to prepare or pave the way for law reform, particularly Islamic penal laws. Though such penal laws were practically frozen in terms of application of 'Hudood' crimes, no actual law reform was undertaken. However, the democratic period again was brief and did not complete a full cycle of re-election or achieve the formation of a permanent constitution. Instead, this short democratic transition was ended by the so-called National Salvation military regime on 30 June 1989. It will by now be apparent that popular uprisings leading to changes of regime—but without addressing the underlying constitutional issues—have been a recurring theme in Sudan's recent past.

The 1985 Transitional Constitution was developed after the popular uprising and it had two main positive dimensions (a) equality before the law for all Sudanese; and (b) respect for fundamental human rights and democratic principles.

2.6. 1998 TAWALI CONSTITUTION

On 30 June 1989 the National Islamic Front achieved a long-awaited takeover of power and put its 'civilization project' into effect. Another military coup occurred. Following the usual pattern of previous coups, the Constitution was frozen and political parties and all democratic institutions, including the parliament, were dissolved. Omar al-Bashir's military government did not quickly develop a constitution and the country was ruled for almost 10 years through presidential decrees. This use of arbitrary unconstitutional powers lacked any form of legitimacy or rule of law principles.

In 1998 the military regime decided to adopt a constitution. A national commission was appointed, assisted by a technical committee. The final report of this body was 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 had been sent to the President, and was much reduced in length. The language used was also different, carrying the hallmark of Dr Turabi's style of writing.² A controversial provision on *tawali*, translated as freedom of association, was a particular cause for concern—with some observers seeing it as an attempt at perpetual rule of the governing party. The theocratic character of the document was also emphasized through a provision declaring sovereignty to God alone (Fadlalla 2011).

The 1998 Constitution was prepared and approved in a haste, enabling the vision of a small but well-placed group to dominate others.

A committee of 10 persons drafted the 1998 Constitution, and that draft was read in its first version in parliament; the next day, a second alternative draft was substituted and read in parliament; the second draft was then passed by parliament and signed by the Head of the State. This incident shows the haste with which the 1998 Constitution was prepared and approved, enabling the vision of a small but well-placed group to dominate others. Such a method of constitution-building (or rather, constitution writing) is unlikely to lead to nation-building, but rather tends to perpetuate the cleavages and instability that have characterized the political life in Sudan since independence. The 1998 Constitution was formulated in such a way to fundamentally establish an 'Islamic' state. Though the Constitution

² Dr Turabi was a Sudanese Islamist politician and ideological leader who was considered 'the true architect' of the 1989 coup that brought Omar al-Bashir to power.

contained articles referring to rights, all these articles were limited by the phrase 'according to the legal regulations' that rendered these rights non-constitutional, that is, inferior to other laws.

Chapter 3

2005 AND 2019: THE DUALITY OF CONSTITUTION-MAKING AND PEACE AGREEMENTS

From 1956 to 1998 Sudan's constitutions represent structures or designs that are suitable—at best—to a relatively peaceful Sudan.

It will be obvious from the previous section that Sudan's constitutional designs were all interim, short-lived and dominated by regimes with concentration of powers in the hands of the military, and took a top-down, elitist approach (Fadlalla 2011; Badri 2008). From 1956 to 1998 Sudan's constitutions represent structures or designs that are suitable—at best—to a relatively peaceful Sudan (with the exception of the Addis Ababa Agreement which dealt with amnesty provisions). The thematic issues and provisions dealt with in these constitutions cannot be evoked and applied in post-conflict Sudan, and hence are an inappropriate basis for tackling contentious constitutional issues in future. This is because Sudan has been afflicted by protracted armed conflicts ever since 1983; it is an era when constitutional design is based on peace agreements and substantive parts of these post-conflict constitutions are fundamentally required to deal with this reality. This has been reflected in the Interim National Constitution of 2005 and the CPA, and other peace agreements including the Abuja Agreement (2006) and the Doha Document for Peace in Darfur (DDPD, 2011). Similarly, the Constitutional Document 2019, overruled by the Juba Agreement in October 2020, also reflects the very flawed foundation of constitution-making in the Sudan. This recent era of post-conflict, interim constitutional arrangements in Sudan will critically be analysed below.

3.1. INTERIM NATIONAL CONSTITUTION 2005

As noted in its article 2.2.5, the Interim National Constitution of 2005 (INC 2005) is based on the Comprehensive Peace Agreement (CPA), negotiated over many years and signed by the government of Sudan at the time and the Sudan People's Liberation Movement/Army (SPLM/A). The details of the Constitution are to be found in the various protocols relating to the distribution of power and wealth. Its final wording was prepared by the National Commission for the Review of the Constitution and endorsed by an appointed National Assembly in which the government and the SPLM had 80 per cent of the seats. The CPA's provisions, even if not specifically included, were part of the Interim National Constitution (Fadlalla 2011). Despite these limitations the Interim Constitution, at least on paper, included many impressive provisions such as (a) the Bill of Rights; (b) measures adopted to curtail presidential powers, particularly in relation to provisional orders and declarations of emergency; and (c) 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 (Babiker 2014). Some of the institutions mentioned above, despite the enactment of statutes supporting them, were never created during the lifetime of the INC (i.e. the Land Commission), while others have been co-opted and were not able to achieve or realize their intended mandate.

The INC 2005 dealt with peace- and constitution-making as intertwined processes. Both processes lacked genuine and popular participation, being based on 'a liberal model' of wealth and power sharing. In other words, the INC 2005, though credited with the inclusion of an extensive bill of rights and despite allowing a considerable margin for public debate, was derived from a model which lacked inclusivity or representation of the majority of the Sudanese populace (Fadlalla and Babiker 2019). The constitutional process at the time reflected the interests of the National Congress Party (NCP) and the SPLM and was controlled by these two actors until South Sudan seceded in 2011. The CPA-INC 2005 constitutional framework also did not address the fundamental issues related to democratic transformation. Rather, governments in place

The INC 2005 dealt with peace- and constitution-making as intertwined processes. Both processes lacked genuine and popular participation, being based on 'a liberal model' of wealth and power sharing.

manipulated constitution-making, committed more repression and ended up dividing the country through secession/independence. The CPA-INC model thus also reflects the power structures of the key players aspiring to govern the country at the time (i.e. NCP and SPLA/M).

The same liberal model continued after the secession of South Sudan (9 July 2011), with short-lived peace agreements—the Darfur Peace Agreement (DPA, 2006), the East Sudan Peace Agreement (ESPA, 2006), Doha Document for Peace in Darfur (DDPD, 2011) and the Juba Peace Agreement (2020)—all providing the foundation for transitional constitutional frameworks and institutions of governance. These peace agreements became incorporated into Sudan's constitutional frameworks primarily based on a power- and wealth-sharing model (Young 2012). This model is flawed, as it lacks transparency, public participation and ownership. Most of the Sudanese people have participated neither in the peacemaking nor in the constitution-making processes.

Constitution-Building processes have been continually manipulated by military and civilian governments and supported by narrow elites.

In practice, Sudan has embarked on 'constitution writing' rather than proper constitution-building. Such processes have been continually manipulated by military and civilian governments and supported by narrow elites.

3.2. THE CONSTITUTIONAL DOCUMENT 2019: A FLAWED FOUNDATION

The Forces of Freedom and Change (FFC), a coalition of 'revolutionary forces', glossed over this reality and agreed to negotiate power-sharing with the Transitional Military Council (TMC), established after Omar al-Bashir's overthrow in April 2019 and led by General Abdel Fattah al-Burhan. This led to political agreement between the parties in July and signature of the Constitutional Document in August of the same year. Chief among its provisions were those providing for a joint military–civilian government, comprising a 'Sovereign Council' intended to function as a quasi-head of state with nominal powers, and a Council of Ministers which would exercise executive functions (articles 11–12 and 15–16; see also

article 24.3 providing for the formation of a Transitional Legislative Council).

Once again, a constitutional framework based on military–civilian partnership of wealth and power sharing allowed for the country to be dominated by the military—facilitated by a weak civilian government without a democratic, electoral mandate—and unable to achieve the slogans of the revolution: ‘freedom, peace and justice’. Aside from its flawed civil–military power-sharing structure, the Constitutional Document 2019 had several debilitating gaps: (a) monopoly by the military over the security sector and law enforcement agencies, which hindered any endeavour to dismantle the power structure of the NCP regime and to reform existing institutions; (b) appointment of the Chief Justice and Attorney General by the Sovereign Council; and (c) the establishment of four key commissions by the Sovereign Council including the Constitution-Making and Constitution Conference Commission, Peace Commission, Election Commission and Boundaries Commission (Babiker 2019).

The latter two commissions were established during the transitional period without an act of parliament, and their heads were appointed by the military. Under section 12 of the 2019 Constitutional Document, the establishment of independent commissions and the election of their members should be carried out by the Council of Ministers. It is important to note here that all these commissions are to be established as independent, politically neutral and impartial bodies, in terms of their respective constitutive acts and nominations of their members by the Legislative Council (as yet not established), otherwise the Sovereign Council would be able to manipulate these commissions.

Once again, a constitutional framework based on military–civilian partnership of wealth and power sharing allowed for the country to be dominated by the military and unable to achieve the slogans of the revolution: ‘freedom, peace and justice’.

3.3. CONSTITUTIONAL DOCUMENT 2019 AND JUBA PEACE AGREEMENT, 2020: CONFLICTING DESIGNS

On 3 October 2020, Sudan’s Transitional Government and representatives of several armed groups signed the Juba Agreement for Peace in Sudan (hereinafter ‘Juba Agreement’). The Juba Agreement contains six bilateral agreements between

the Transitional Government of Sudan³ and different rebel groups, including the Armed Struggle Movements-Darfur Path,⁴ Sudan Liberation Movement-North-SRF⁵, *Masar al-Sharq* (Eastern Path)⁶, *Masar al-Shamal* (Northern Path)⁷, *Masar al-Wasat* (Central Path), and *Al-Jabaha al-Thalitha-Tamazaj*.⁸ These bilateral agreements (chapters to the Juba Peace Agreement) cover a wide range of national issues, including power sharing, revenue sharing, transitional justice, and transitional security arrangements.

The Constitutional Document was dramatically changed, in contradiction of settled constitutional principles and of its own amendment procedure. These amendments were hence unconstitutional.

One of the flaws of the constitutional design is that in bringing other groups—under the umbrella of the Sudanese Revolutionary Front (SRF)—into the government and power-sharing arrangement, the Juba Agreement superseded, and thereby amended, the 2019 Constitutional Document. The Ministry of Justice prepared a draft for the amendments to the Constitutional Document which was later approved in a joint session of the Sovereign Council and the Council of Ministers. The Darfur Agreement provides that the signatories agreed to ‘include the signed peace agreements [sic] in the Constitutional Document and *in the event of a contradiction, the contradiction shall lead to an amendment of the Constitutional Document*’ (emphases added). However, the Constitutional Document itself provides that it can only be amended through an agreement by two thirds of the Transitional Legislative Council. What this means is that the Constitutional Document was dramatically changed, in contradiction of settled constitutional principles and of its own amendment procedure. These amendments were hence unconstitutional, but unfortunately cannot be challenged due to

3 The Transitional Government of Sudan formed pursuant to the 2019 Constitutional Charter and includes elements from the Forces of Freedom and Change and from the Sudan Armed Forces.

4 This coalition of the main armed movements in the Darfur region mainly includes: the Justice and Equality Movement, the Sudan Liberation Movement (Minni Minawi), the Sudan Liberation Movement-Transitional Council, the Sudanese Alliance Movement, the Sudan Liberation Forces Alliance, and the Sudan Liberation Movement.

5 This group was connected to the South Sudanese SPLM until South Sudan seceded in 2011, and it remained active in Sudan after South Sudan’s secession. In 2017, the movement split into two main factions: the Malik Agar faction which signed the Juba Agreement and the Abdelaziz Al-Hilou faction which has still not signed it. Both factions control territories in South Kordofan and Blue Nile.

6 Headed by Osama Saeed, the leader of the Beja Congress, which is a political group comprising several ethnic groups. The group has splintered, which contributed to a lack of consensus within Masar al-Sharq on the Juba Agreement. Osama Saeed signed the Eastern Sudan Track on behalf of two Beja Congress splinter groups (United People’s Front for Liberation and Justice, and the Beja Congress in opposition).

7 Consists of the Kush Liberation Movement and the North Entity. The Masar’s objectives include development.

8 Third Front. Faction/wing of the Sudan People’s Liberation Movement (SPLM).

the absence of a Constitutional Court (on the constitutionality of incorporating the provisions of the peace agreement into the Constitutional Charter, see Babiker 2021: 237–38).

It is worth noting here the disregard for constitutionalism and the rule of law—which made it much easier, too, for the coup regime to break with these on 25 October 2021. A well-known constitutional doctrine is that the constitution is the supreme law of the land and shall not be contradicted by other laws or peace agreements. However, against all settled constitutional norms the Juba Agreement stipulates that it will supersede any provisions in the Constitutional Document that may contradict it (see articles 79 and 80 of the 2018 Constitutional Document, amendments 2020). This is a serious flaw as the Constitutional Document serves as the interim constitution of Sudan (despite its doubted legitimacy after the coup), and it therefore must prevail over any other statutes and regulations, including the Juba Peace Agreement. Before the 2021 coup many scholars and civil society groups called upon the government at the time to finalize the transitional governmental institutions—including the parliament, the Constitutional Court and specialized independent commissions—to prevent the country from slipping into a legal and constitutional crisis should the constitutional integrity be undermined. The coup having taken place, constitutionalism in Sudan was indeed further undermined by all—whether military or civilians (Babiker 2021). This grim reality of illegality, lack of constitutionalism, weak transitional government, flawed Juba Peace Agreement, military coup and suppression of the voices of the Sudanese masses, paved the way for the abortion of the 2018 Sudanese revolution and plunged the country into a destructive war and power struggle between corrupt army generals and militia leaders who tremendously benefited from the transitional period and made every effort to abort the revolution and allegedly committed international crimes.

Furthermore, the Juba Peace Agreement is highly complex, mainly because of the way in which the different chapters relate to each other (Al-Ali 2021). On the constitutional process, for example, relevant provisions are spread throughout the document rather than being concentrated in a single section. Not only that, but the signatories may discover that some of the arrangements are not compatible with each other. Virtually all of the agreements make

It is worth noting here the disregard for constitutionalism and the rule of law—which made it much easier, too, for the coup regime to break with these on 25 October 2021.

reference to the 2019 Constitutional Document, for instance, and many reconfirm the relevant signatories' commitment to its section on rights and freedoms. At the same time, some of the individual chapters go further and purport to substantially amend the Constitutional Document's contents. In particular, the Blue Nile and Kordofan Agreement provides (article 112) that its provisions are part of the 2019 Constitutional Document, stating that: 'this agreement is an inseverable part of the Constitutional Charter and in the event of a contradiction the provisions of this agreement prevail'.

The above legal conundrum is not unique in post-conflict societies and in the context of peacemaking and constitution-making processes (see Brandt et al. 2011; Berghof Foundation and UN 2020). However, it seems that political forces in Sudan and international actors have repeated the same mistakes by adopting conflicting constitutional arrangements. The basic problem here is that the prior document in time should be the superior document in authority; by violating that order, in ways that were not envisaged and permitted by the prior document, legal uncertainty has been introduced and the authority of both the 2019 Charter and the Juba Agreement diminished. In summary, the constitutional framework in post-conflict Sudan, in both 2005 and 2019, was primarily based on peace agreements between the regime in power and non-state armed actors. These protagonists reached agreements which reflected power relations and the balance of interests between them, rather than observing the ethos of constitutionalism, the rule of law and other recognized principles of legality. The general public interest, the interests of ordinary citizens, have not been paramount.

Rather than involving wide sectors of the Sudanese populace in the peace- and constitution-making, the processes after the 2018 December revolution remained in the hands of the military components of the Sovereign Council.

It is unfortunate that the piecemeal and 'liberal peacemaking' approach continued after the 2018 December revolution. Rather than involving wide sectors of the Sudanese populace in the peace- and constitution-making, these processes remained in the hands of the military components of the Sovereign Council—despite the peace process (according to the Constitutional Document) supposedly being led by the Cabinet of Ministers. The Juba peace negotiations were controlled by the military actors and non-state armed groups without allowing wide sectors of Sudanese society to be part of the constitution-making design and agenda.

3.4. THE JUBA AGREEMENT: BINDING ON NON-SIGNATORIES

One of challenges is that non-signatories to the Juba Peace Agreement will not agree in any forthcoming negotiations to be bound by the legal framework it sets out. For example, the Sudan People's Liberation Movement–North (led by Abdelaziz Adam Al-Hilu) can be expected to insist on changing the existing constitutional framework. Conversely, the signatories would not allow for the Agreement and recent constitutional amendments to be subject to any review or amendments. This vicious circle will, no doubt, hinder any future constitutional arrangements during Sudan's transition. Various stakeholders have different conceptions of and little agreement on the constitutional modalities—particularly rebel groups who are not yet part of any peace agreement. The dilemma is that signatories of the Juba Agreement made a number of determinations on the future system of government, including that Sudan will be a federation, and hence managed to control the parameters of any future constitutional arrangements. Article 8 of Chapter 8, for example, allows for the possibility that new parties can sign the Juba Agreement on the condition that the 'concerned sides' agree. Article 9 provides that in the event a new party signs, it will be bound by all the responsibilities that the original parties were bound by.

Another complication of the Juba Peace Agreement is that it refers to equal and several responsibility or liability of the parties. Article 4 of Chapter 8 (Final provisions) provides that regardless of which agreement they have signed, all parties are bound by the Agreement's preamble and the final provisions on national issues. It also provides that the parties are 'equally responsible' for upholding this Agreement. At the same time, article 7 of Chapter 8 suggests that individual parties are only bound by the individual chapters that they negotiated and signed. However, given that many of these bilateral agreements have national implications, individual parties will inevitably be impacted by arrangements beyond those they have expressly negotiated and agreed to. Therefore, it is expected that the above provisions will cause serious obstacles in any future negotiations with non-signatory parties.⁹

Given that many of the bilateral agreements have national implications, individual parties will inevitably be impacted by arrangements beyond those they have expressly negotiated and agreed to.

⁹ It is pertinent to note here the Darfur Peace Agreement 2006, signed by Minni Minawi, the Sudan Liberation Movement, excludes other armed groups who were not able to join it, other than parties that made the declaration of commitment to the agreement (DOCs parties).

On 28 March 2021 the SPLM-North signed a Declaration of Principles with the Head of the Sovereign Council. Among these, that in order to reach any agreement, the current constitutional design has to be fundamentally amended or revoked and replaced by a new framework agreement to be negotiated in the future.¹⁰ The SPLM-North agreed to engage in peace negotiations based on consent to 'supreme constitutional principles' including Sudan's constitutional and governance structures to be based on secularism as a precondition for conclusion of any peace¹¹, which caused the negotiations to stall. The other Sudan Liberation Movement (led by Abdel Wahed Mohamed Nour) does not recognize the previous transitional government as legitimate due to the partnership with the military, and therefore did not participate in the negotiations. Therefore, any expected peace negotiations with non-signatory armed groups may be resisted by the signatories of the Juba Agreement given (a) their previous animosities as splinter groups, with conflicting visions and aspirations; and (b) current signatories' affiliations with the 25 October 2021 military coup.

It is clear that non-state military actors as well as the de facto military government have sought to resolve major governance issues without any democratic input from the general population.

From the above, it is clear that non-state military actors as well as the de facto military government have sought to resolve major governance issues without any democratic input from the general population, whether direct or indirect. This has caused consternation in many circles, particularly civil society and new forces of change associated with the 2018 December revolution such as the resistance committees. Therefore, a concerted effort to bridge the democratic deficit in order to ensure that the final constitutional arrangement enjoys broader societal support is urgently needed. Any feasible and sustainable peace- and constitution-making process must take into consideration the UN Guiding Principles governing constitution-making processes, including those of national ownership, public participation and transparency (UN 2020).

10 Draft Framework Agreement to Stop the War and Realization of Peace between the Government of Sudan and the SPLA/M North, May 2021.

11 Sudan People Liberation Movement/Army (SPLM-North), *The Supreme Constitutional Principles: The Correct Path for a Unified Sudanese State*, SPLM-North publication series, No. 4, by Mutwakil Salamat, Idris Shalou, not dated.

3.5. THE CONSTITUTIONAL EFFECTS OF THE 2021 MILITARY COUP

General al-Burhan's military coup on 25 October 2021 put an end to power sharing under the 2019 Constitutional Document. The return of the defunct Islamist regime to power left the country in a historic juncture, heightening a confrontation between two coalitions: one for meaningful, democratic change relying on the power of street politics and the other for preserving the status-quo through repression and co-option. Neither was ready or willing to engage in conventional electoral politics through the framework of a neutral, procedural, democratic constitution.

The December revolution managed to court the support of a broad-based coalition of forces yearning for liberty and a civil, democratic state—as captured in its slogans of *Huriya, Salam wa Adala* (freedom, peace and justice) and *Madaniyya, Madaniyya* (Civil State, Civil State). These are values and principles of a liberal revolution demanding transition from authoritarianism to constitutionalism. However, the thorny question remains whether conditions on the ground (state, society and economy, see Ghai 2005; 2011) provide the foundations on which to build democratic and accountable governance, basic civil rights and the rule of law.

The legal effect of al-Burhan's October 2021 coup repealing specific provisions of the Constitutional Charter is baseless (see e.g. Saeed 2021). Al-Burhan, even in his capacity as the head of the Sovereign Council, lacked the constitutional authority to unilaterally amend or repeal the Constitutional Document 2019, under its own terms. Its article 78 provides that '[t]his Charter cannot be amended or repealed other than through a two thirds majority of the members of the Transitional Legislative Council' (TLC). In the absence of the TLC, its constitutional powers are—by article 25(3)—'invested in the members of the Sovereign Council and the [Council of Ministers], who exercise them in a joint meeting, and who take decisions by consensus or by a two-thirds majority of members.'

Furthermore, the powers to amend the Constitutional Document can only be exercised by the TLC. Close reading of the Charter confirms that, in the absence of the TLC, members of the Sovereign Council

Al-Burhan, even in his capacity as the head of the Sovereign Council, lacked the constitutional authority to unilaterally amend or repeal the Constitutional Document 2019, under its own terms.

It is unfortunate that no review body or structure of governance—such as the TLC or Constitutional Court—able to review the constitutionality and legitimacy of government decisions was in place.

and the Council of Ministers cannot introduce any constitutional amendments in a joint meeting. Rather they have only the power to 'legislate' temporarily, pending the formation of the TLC; a power which actually elapsed 90 days after the Constitutional Document came into force. Strict interpretation of the latter indicates that the transitional government exercised illegitimate de facto powers from this point. The effect of 25 October 2021 is an extension of such illegitimate powers. It is unfortunate that no review body or structure of governance—such as the TLC or Constitutional Court—able to review the constitutionality and legitimacy of government decisions was in place, either before or after the coup.

Under such circumstances, the Constitutional Document 2019 does not contemplate the exercise of legislative powers by a single figure, even the head of the Sovereign Council. Similarly, it sets out clearly the conditions for the declaration of a state of emergency (article 40) and appointment of government ministers (article 15). None of those conditions were met in the period immediately following the coup. Furthermore, the declaration of a state of emergency is a prerogative power vested in the prime minister rather than the head of the Sovereign Council and is to be exercised with the approval of the TLC within a specific duration.

As a matter of law, therefore, al-Burhan's actions since 25 October 2021—and particularly the suspension of portions of the Constitutional Document, declaration of a state of emergency, and subsequent appointment of caretaker government ministers—were unconstitutional and of no legal effect.

There has been much recent debate on the motives and timing of the coup. Many observers attribute it to an imminent handover of power to the civilian leaders of the Sovereign Council, which by some accounts was due to take place in November 2021.¹² The expected date for the handover was clearly stipulated in the 2019 Constitutional Document, but with the signing of the Juba Agreement and subsequent (unconstitutional) amendments, this clarity was lost. With the tacit agreement of the military–civilian government,

¹² The date for the handover of the Sovereign Council to civilian leadership, originally set for 17 May 2021, was cast into doubt after the signing of the Juba Peace Agreement. Some argued that the date was November 2021. Others argued for July 2022.

the revised charter became vague and was deliberately silent on the issue of the handover of power. Such handover would have shifted the power balance and constituted a threat to the political and economic interests of the military. This would also have been viewed as reinvigorating calls for legal and political accountability for past human rights violations, including the 3 June 2019 massacres in which the military was allegedly implicated (see Fricke 2020).

Chapter 4

CONCLUDING REMARKS

The historical pattern has been that successive Sudanese constitutions have been used as ideological instruments and tools of social control to 'indoctrinate the nation' with the vision or ideology of the regime in power at the time (Fadlalla and Babiker 2019: 254). The Self-Government Statute of 1953 during the colonial time reflected the common law ethos and values, while later constitutions (i.e. the 1973 Permanent Constitution, the 1998 Constitution, the INC 2005) represented the ideologies of socialism, Islamism and a liberal peace model of power and wealth sharing, respectively. As Fadlalla and Babiker (2019) point out, it is unfortunate but unsurprising that these constitutions, which bear the marks of certain constitutional ideologies, have failed to build a national consensus.

Sudan has had a number of constitutions but has experienced neither democratic processes of constitution-making nor respect for constitutions in force.

As these authors go on to observe, Sudan has had a number of constitutions but has experienced neither democratic processes of constitution-making nor respect for constitutions in force. This lack of respect for successive constitutions in Sudan reflects a broader disregard for fundamental constitutional principles and the rule of law. It is imperative for Sudan in the years to come to agree on modalities for choosing an appropriate constitution-making process and to reach a consensus on the 'substantive' norms of a new constitution. There is 'a need for Sudan to break away from the "evil cycles" of adopting short-lived interim constitutions and to condemn the path of "traditional constitution writing processes" which lacks ownership, effective participation and ultimately has failed to attract true allegiance of the Sudanese populace' (Fadlalla and Babiker 2019).

The historical developments of governance and constitutions in Sudan show that the dominant political class (or more accurately coalition of forces) failed to accomplish the structural change in state, economy and society that could have laid the foundations for democratic governance, basic rights and the rule of law. Imbalance and disjuncture (mismatch) between structural foundations (state, economy and society) and constitutional architecture leads to 'disparity between theory and practice' (Fadlalla and Babiker 2019); the values and norms of constitutionalism stressing basic civil rights, accountable government and rule of law are not realized on the ground but systematically breached.

The December 2018 revolution provided the Sudanese people, 'a nation in search of its soul', with an opportunity to take hold of their destiny. However, such a stand is stubbornly resisted by the same pro-establishment coalition of forces who are responsible for past political setbacks and constitutional debacles. A political stalemate indefinitely prolonged and guaranteed by a perpetual balance of power is sure to lead the contending forces and classes to their common and ultimate ruin (Meszaros 1971). We believe this applies to the current state of affairs in Sudan. The pro-December revolution forces lacked the political agency to see it through to state power, and on the other hand, the military–security nexus bowed to people's interest in overthrowing President al-Bashir while keeping his state security apparatus intact.

In a context of post-April 2019, a context shaped by a multiplicity of conflicting, intermingling and mutually exclusive political agendas (political compromise proved difficult to arrive at), the precarious status quo was bound to be broken for certain. However, the current post-2019 full reality is still in the making and it is difficult to ascertain how political-constitutional contestation can be resolved. The transitional period was marred by an ineffective transitional government lacking vision and leadership, weakened and manipulated by the military and remnants of the old Bashir regime. The transitional period also lacked a governance structure to pave the way towards democratic governance, legitimacy and elections. Still, events after 2019 testify to shaky power-sharing relations between civilians and the military, with frequent disagreements ending in the military taking over in October 2021. The military coup of 2021 by the

The December 2018 revolution provided the Sudanese people with an opportunity to take hold of their destiny. However, such a stand is stubbornly resisted by the same pro-establishment coalition of forces who are responsible for past political setbacks and constitutional debacles.

The Sudanese must emerge from this conundrum with new constitutional visions on how the country should be governed after the war and on what will be the best interim constitutional arrangements in the current circumstances.

Sudanese Armed Forces and the Rapid Support Forces is part and parcel of constant conspiracies to abort the Sudanese revolution.

While lack of unanimity and harmony among civilian forces is commonplace and in most cases resolved peacefully by means of agreements, this is not the case with military and armed groups, in particular if leaders have political ambition. With the temperature rising, soon exchange of words changed to firearms signalling the end of the deadlock which had to be broken one way or another. Since 15 April 2023, Sudan has moved from autocratic rule and dictatorship and slipped into a brutal war led by generals and militia leaders who are not capable of being in partnership with the civilians during the transitional period and cannot be trusted to lead the country towards democracy. The constitutional design of the 2019 Declaration which enshrined a model military–civilian partnership is flawed and lacked effective governance structures including a parliament, a constitutional court and constitutional commissions. Other documents, including the Juba Peace Agreement of October 2020 as well as the Framework Agreement signed on December 2022, a few months before the war and supported by the international community, also reflect the flawed approaches of peacemaking and constitution-making. These are important lessons learned. While the war is still raging, constitutional arrangements have to wait for current efforts underway seeking a political settlement. However, the Sudanese must emerge from this conundrum with new constitutional visions on how the country should be governed after the war and on what will be the best interim constitutional arrangements in the current circumstances to pave the way for a democratic Sudan where the constitution, constitutionalism and the rule of law are respected after 70 years lacking legitimacy and democratic governance.

References

- Al-Ali, Z., *The Juba Agreement for Peace in Sudan: Summary and Analysis* (Stockholm: International IDEA, 2021), <<https://www.idea.int/sites/default/files/publications/the-juba-agreement-for-peace-in-sudan-en.pdf>>, accessed 1 June 2023
- Babiker, M., 'Why constitutional bills of rights fail to protect civil and political rights in Sudan: Substantive gaps, conflicting rights, and "arrested" reception of international human rights law', in *Constitutional Protection of Human Rights in Sudan: Challenges and Future Perspectives* (Khartoum: University of Khartoum and Redress, 2014), <<http://www.redress.org/downloads/publications/140127final-sudan-uok-report.pdf>>, accessed 1 June 2023
- , 'Constitutional bills of rights in Sudan: Critiques?', in L. Oette and M. Babiker (eds), *Constitution-Making and Human Rights in the Sudans* (Abingdon: Routledge, 2019)
- , 'Covid-19 and Sudan: The impact on economic and social rights in the context of a fragile democratic transition and suspended constitutionalism', *Journal of African Law*, 65 (2021), pp. 311–31, <<https://doi.org/10.1017/S0021855321000383>>
- Babiker, M. A. and Ahmed, E., 'Soudan' [Sudan] in E. Canal-Forgues (ed.), *Constitutions et Lois Fondamentales des Pays Arabes* [Constitutions and Fundamental Laws in Arab Countries] (Paris: Pedone, 2020)
- Badri, B., 'Contesting the Interim National Constitution of Sudan: After the Comprehensive Peace Agreement of 2005', Ahfad University for Women, August 2008
- Bechtold, P., *Politics in Sudan: Parliamentary and Military Rule in an Emerging African Nation* (London: Praeger, 1976)
- Berghof Foundation and United Nations Department of Political and Peacebuilding Affairs, *Constitutions and Peace Processes: A Primer* (Berlin: Berghof Foundation, 2020), <<https://berghof-foundation.org/library/constitutions-and-peace-processes-a-primer>>, accessed 1 June 2023
- Berridge, W. J., *Civil Uprisings in Modern Sudan: The 'Khartoum Springs' of 1964 and 1985* (London: Bloomsbury, 2015)
- Brandt, M., Cottrell, J., Ghai, Y. and Regan, A., *Constitution-making and Reform: Options for the Process* (Geneva: Interpeace, 2011) [English, Arabic], <<https://www.interpeace.org/resource/constitution-making-and-reform-options-for-the-process-2>>, accessed 1 June 2023
- Collins, R., *A History of Modern Sudan* (Cambridge: Cambridge University Press, 2008)
- Fadlalla, A. S., 'Constitution-Making in the Sudan: Past Experiences', Paper presented at 'Constitution-making Forum: A Government of Sudan Consultation', Advisory Council for Human Rights, Khartoum, 24–25 May 2011, <https://unmis.unmissions.org/sites/default/files/110524_ali_suleiman_paper_dft2.pdf>, accessed 8 August 2023
- Fadlalla, A. S. and Babiker, M. A., 'In search of constitution and constitutionalism in Sudan: The quest for legitimacy and the protection of rights', in L. Oette and M. A. Babiker (eds),

- Constitution-Making and Human Rights in the Sudans* (Abingdon: Routledge, 2019), <<https://doi.org/10.4324/9781315624075>>
- Fricke, J. D., ‘“Chaos and Fire”: An Analysis of Sudan’s June 3, 2019 Khartoum Massacre’, Physicians for Human Rights, 5 March 2020, <<https://phr.org/our-work/resources/chaos-and-fire-an-analysis-of-sudans-june-3-2019-khartoum-massacre>>, accessed 1 June 2023
- Ghai, Y., ‘A journey around constitutions: Reflections on contemporary constitutions’, *South African Law Journal* (2005), pp. 804–31, <<https://hub.hku.hk/bitstream/10722/222191/1/content.pdf>>, accessed 1 June 2023
- , ‘Chimera of constitutionalism: State, economy, and society in Africa’, Lecture delivered at the University of Pretoria, 2011, <https://www.up.ac.za/media/shared/Legacy/sitefiles/file/47/15338/chimera_of_constitutionalism_yg1.pdf>, accessed 1 June 2023
- Ibrahim, H. et al. (eds), *50 Years since the Sudanese October Revolution (1964–2014): Sudan’s Early Uprising* (Sudanese Studies Center, 2005) [Arabic]
- Khalid, M., *The False Dawn: Nimeiry and the Tampering with Sharia* (Dar-El Hilal, 1978) [Arabic]
- , *Sudanese Elites’ Addiction to Failure* (Dar Al-Ameen for Printing and Publishing, 1993)
- Meszaros, I., *The Necessity of Social Control* (London: The Merlin Press, 1971), p. 11
- Niblock, T., *Class and Power in Sudan: The Dynamics of Sudanese Politics, 1898–1985* (Albany: State University of New York Press, 1987)
- Saeed, S. A., ‘Sudan’s Constitutional Crisis: Dissecting the Coup Declaration’, Just Security, 3 November 2021, <<https://www.justsecurity.org/78848/sudans-constitutional-crisis-dissecting-the-coup-declaration>>, accessed 1 June 2023
- Salih, M. M., veteran journalist and politician, interview with the author, Khartoum, 20 November 2022
- United Nations, ‘Guidance Note of the Secretary-General on United Nations Constitutional Assistance’, September 2020, <<https://peacemaker.un.org/guidance-note-UN-constitutional-assistance-doc>>, accessed 1 June 2023
- Woodward, P., ‘Sudan’s fragile state, 1956–1989’, in J. Ryle, J. Willis, S. Baldo and J. M. Jok (eds), *The Sudan Handbook* (Woodbridge: James Currey, 2011), <<https://www.refworld.org/pdfid/51d3d28c4.pdf>>, accessed 9 August 2023
- Young, J., *The Fate of Sudan: The Origins and Consequences of a Flawed Peace Process* (London: Zed Books, 2012)

About the authors

Atta H. el-Battahani, Ph.D., is a Professor in Political Science, Political Economy, educated at Khartoum University (Sudan) and Sussex University (UK). During 2003–2006 he was Head of the Department of Political Science, Faculty of Economics, University of Khartoum. He is a founding member of Amnesty International Khartoum Group (1987–1989), and also a founding and leading member of Sudanese Civil Society Network for Poverty Alleviation (SCSNPA) 2002–2005. He served as Manager and Senior Advisor for International IDEA in Sudan from 2006 to 2011.

El-Battahani did a number of consultancies for UNDP, ECA, IDRC, IGAD, OXFAM, IFAD and World Bank on governance, resource-based conflict, early warning, urban poverty and gender and development, respectively. He is an Associate of Partners in Development Services (PID) and Gender Centre for Research and Training (GCRT) and Rift Valley Institute (RVI). He served as Editor-in-Chief of the *Sudan Journal of Economic and Social Studies* during 2010–2020.

He has over 25 years experience as a researcher and has published widely on issues of governance and conflict in Sudan. His areas of research include development impact of ethnic and religious conflicts in African societies; governance and state institutional reform in Africa and the Middle East; conflict and cooperation in the Nile Valley; gender politics; peripheral capitalism and political Islam in sub-Saharan Africa; and elections and political transitions. El-Battahani has conducted research and published on federalism and economic development in Sudan, economic liberalization and institutional reform in irrigated agriculture, Indigenous conflict resolution mechanisms, the politics of HIV/AIDS in Sudan, and economic transformation and political Islam, and democracy deficit in the Arab World.

Mohammed Abdelsalam Babiker, Ph.D., is Associate Professor of International Law, former Dean of the School of Law, University of Khartoum, and founding Director of its Human Rights Centre. He is the author of *Application of International Humanitarian Law and Human Rights Law to the Armed Conflicts of the Sudan: Complementary or Mutually Exclusive Regimes* (Intersentia, Antwerp: Oxford, 2007). He has also co-edited a number of books including: *Constitution-Making and Human Rights in the Sudans* (Routledge, UK, 2019); *Anthropology of Law in Muslim Sudan* (Brill, 2018); and *Child Soldiers and Protection of Children's Rights in Conflict and Post Conflict Environments in Central and Eastern Africa* (L'Armatan, France, 2013). Dr Babiker has published extensively in the areas of human rights, international criminal law, international humanitarian law and migration law, and contributed chapters in books and journal articles.

In September 2020, Babiker was appointed by the UN Human Rights Council as Special Rapporteur for the situation of human rights in Eritrea. In December 2017 and 2018, Babiker was also appointed by the UN Secretary-General as humanitarian expert with the Somalia and Eritrea Monitoring Group (SEMG), Security Council Resolution 2385 (2017) and the Panel of Experts (POE) on Somalia, Security Council Resolution 2444 (2018). He was also nominated by the Consultative Committee of the UN Human Rights Council for the position of Special Rapporteur for the Islamic Republic of Iran, Human Rights Council, 33rd session, September 2016.

Babiker has also worked as a Legal Advisor and a Human Rights Officer with UN and African Union peacekeeping operations and as a consultant with a number of UN agencies and international organizations.

About International IDEA

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization with 34 Member States founded in 1995, with an exclusive mandate to support and advance democracy worldwide.

WHAT WE DO?

We produce comparative, policy-friendly knowledge and provide technical assistance on issues relating to elections, parliaments, constitutions, money in politics and political representation, all under the umbrella of the UN Sustainable Development Goals. We assess the performance of democracies around the world through our unique Global State of Democracy Indices and reports. Our work is expanding to address issues related to climate change and democracy.

We use our knowledge to provide technical assistance and expert advice to governments and civil society around the world. We publish books, databases, and primers annually in several languages on topics ranging from voter turnout to Indigenous Peoples' rights in constitution-building. Gender equality and inclusion are mainstreamed in all our work.

We engage in conversations and convene agenda-setting dialogues and partner with like-minded organizations, including the African Union, the European Union and the United Nations, to achieve greater impact.

WHERE WE WORK?

Our headquarters is in Stockholm, and we have regional and country offices in Africa, Asia and the Pacific, Europe, and Latin America and the Caribbean. International IDEA is a Permanent Observer to the United Nations and is accredited to European Union institutions.

<https://www.idea.int>

International IDEA
Strömsborg
SE-103 34 Stockholm
SWEDEN
+46 8 698 37 00
info@idea.int
www.idea.int



Constitution-building processes in Sudan have been continually manipulated by military and civilian governments and supported by narrow elites. A brief historical survey reveals this unfortunate reality—which has continued even after the peaceful 2018 revolution.

The purpose of this Report is to improve the knowledge base for those seeking to understand Sudan’s constitutional trajectory—present and future—by reflecting on its past, including Sudan’s previous experiences with transitional constitutions. It examines the history of constitution-making in Sudan, charting developments from the time of the colonial condominium (the Self-Government Statute of 1953) to the various short-lived constitutions (those of 1956, 1964, 1973, 1985, 1998, 2005 and 2019). This historical inquiry is followed by an examination of current constitutional developments, including the Constitutional Document of 2019, with a view to drawing lessons on how to move forward to overcome Sudan’s chronic constitutional stalemate.

The Report concludes that all previous constitutional designs in Sudan are not suitable to provide answers to Sudan’s current constitutional crisis.

ISBN: 978-91-7671-663-2 (PDF)