

# CONTESTED CONSTITUTIONS

CONSTITUTIONAL DEVELOPMENT IN SUDAN 1953-2005

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## Abstrakt

Temaet for dette masterprosjektet er grunnlovsutvikling i Sudan, hovedsakelig fra 1956 til 2005. Oppgaven har et todelt fokus hvor den har sett på den generelle utviklingen til landets grunnlovsarbeid, samtidig som den har analysert utarbeidelsen og implementeringen av landets fire grunnlover fra 1956, 1973, 1998 og 2005.

For å kunne redegjøre tilstrekkelig for grunnlovsutvikling i Sudan, har oppgaven fokusert på politisk utvikling hvor forholdet mellom Nord- og Sør-Sudan står helt sentralt. I tillegg til den historiske konteksten, har oppgaven undersøkt hensikten med grunnlover i Sudan. Spesifikke kjennetegn hos de fire grunnlovene implementert i landet, samt gjennomgående stridsspørsmål i grunnlovsarbeidet og debatten knyttet til hver periode blir undersøkt. Oppgaven avslutter med en komparativ analyse av de fire grunnlovsdokumentene, hvor utvalgte artikler analyseres.

Analysen har vist at grunnlovsutvikling i Sudan har vært svært komplisert. Arbeidet har omhandlet nasjonsbygging, fredsmevling mellom Nord og Sør-Sudan, og opprettholdelse av politisk, økonomisk og sosial makt. Videre har analysen vist at grunnlovsutvikling i Sudan bærer preg av å springe ut av de umiddelbare omstendighetene i landet. Denne prosessen er nært knyttet til nasjonsbygging, hvor to motstridene nasjonsbyggingsstrategier har vanskeliggjort denne prosessen betraktelig. Grunnlovsutvikling har vært en eksklusiv prosess i Sudan, hvor kun den nordlige og sørlige politiske elite har deltatt. En bredere folkelig deltagelse har så å si vært fraværende i hele perioden. Implementering av grunnlover har kun vært oppnådd under de militære regimene, som viser til et spesielt engasjement for grunnlovsskriving i disse periodene. Spørsmålet om islamsk grunnlov og et desentralisert styre har stått frem som mest omstridt, og har dominert grunnlovsdiskursen siden 1956. Hensikten med grunnlover i Sudan har blitt sett i sammenheng med et teoretisk rammeverk som omhandler grunnlovsutvikling i autoritære regimer, sett både i en arabisk og en afrikansk kontekst. Fordi grunnlovsarbeid er ressurskrevende både tidsmessig, økonomisk og politisk, har det vært interessant å forstå hvorfor denne prosessen har vært så viktig, spesielt når grunnlovene i liten grad følges og har liten legitimitet blant folket.



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Sudan today.<sup>1</sup>

<sup>1</sup> Available at: <http://suffragio.org/2013/12/18/how-to-prevent-south-sudans-impending-civil-war/sudan-map/> [Last accessed 14.05.14]

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## Abbreviations

AAA	Addis Ababa Agreement
DUP	Democratic Unionist Part
INC	Interim National Constitution
ICF	Islamic Charter Front
ICJ	International Court of Justice
IGAD	Intergovernmental Authority in Development
NUP	National Unionist Party
NDA	National Democratic Alliance
NCP	National Congress Party
NIF	National Islamic Front
PCP	Popular Congress Party
PDP	People's Unionist Party
RCC	Revolutionary Command Council
RCC	Revolutionary Command Council
SANU	Sudan African National Union
SPLM/A	Sudan People's Liberation Movement/Army
SSLM	Southern Sudan Liberation Movement
SSU	Sudan Socialist Union
SACDNU	Sudan African Closed District National Union
SSU	Sudan Socialist Union
SCP	Sudan Communist Party
TMC	Transitional Military Council



# 1 Introduction

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In 2005, the Sudanese political elite wrote a new constitution, with an underlined call for national unity, written in a manner to preserve peace and dignity. This would be the last constitution written by a Sudanese government inside the country's original borders. When South Sudan gained Independence on the 9<sup>th</sup> July 2011, it marked the end of a united Sudan's constitutional history. However, its' beginning was set over five decades earlier, in 1956, when the country gained Independence and adopted the Self-Government Statute of 1953 as their Transitional Constitution. As Africa's first sovereign State, the Intelligentsia that inherited power after the Condominium had high hopes for themselves and their country. Strongly influenced by Western culture and political ideas, they had a vision of continuing the administration and political system built up under the Condominium, which also included providing the country with a Permanent constitution. This political goal was set in 1956, and constitutional development would therefore follow the political development from here on out.

Since Independence, the country has experienced political turbulence, marked by prolonged civil war. The country has had three short parliamentary periods, 1954-1958, 1964-1969, and 1985-1989, and a longer stretch of military regimes: 1958-1964, 1969-1985, 1989- to present day. This political instability has influenced the country's ability to write a permanent constitution, which has been an overarching goal since Independence. In the aftermath of 1956, the country experienced two civil wars, the first lasting from 1955 until 1972, followed by a second insurgency from 1983 until 2005. While the reasons behind the civil wars include a complex web of political, economic, ethnic and social factors, some issues have undoubtedly been more contested than others. These issues are linked to a political context, with roots stretching centuries back in time. Because of the country's geographical position, Sudan has become a gateway between the Middle East and the African continent. Historical relations to both regions have left a mark in Sudan, especially due to the unequal development between these regions. The country's political centre was in the North, and when the Condominium was concluded, political power was handed over to the Intelligentsia, which consisted of three Arab tribes, Ja'aliyyin, Shaygiyya and Dangala. They have dominated the country since 1956, through political participation and obtaining senior positions in the armed

forces.<sup>2</sup> South Sudan was underdeveloped when the country gained Independence. Fighting for equality and power-sharing, the region has been represented by a mix of educated southerners, tribal chiefs and military leaders, which has changed over the years. These regional differences developed into two different visions of state and nation building during the post-Independence era. Over the years, this have been disputed between the regions.

The search for a nationally acceptable permanent constitution started immediately after Independence. Between 1956 and 1958, a northern political consensus was achieved, stating that Sudan was to be guided by Islam, with Sharia as one of the main sources of law. This was immediately dismissed by the South who feared limited rights under Sharia. During the second civilian government (1964-1969) constitution-making unfolded itself differently. In an effort to include broader political participation, three individual drafts were produced, one introducing an Islamic state, one a semi-Islamic State, and one a secular state. The National committee endorsed the second option; however, the National Assembly did not manage to vote through the proposal before the army intervened. The third civilian government lasted from 1985-1989. Drafting a permanent constitution was set as top priority; however, little was achieved besides planning a constitutional conference, to be held with representatives from the government and the South.

Contrary to the civilian governments, the military regimes have been more successful in implementing constitutions. The first military regime under General Abboud (1958-1964) was least successful though, as no constitution was written. The second regime under Colonel Numayri (1969-1985) was able to negotiate a successful peace agreement between the North and the South in 1972, succeeded by the Permanent Constitution of 1973. The initial document was recognised as a success; however it was amended several times, finally losing national support in 1983. The third and final military regime produced two constitutions, one in 1998 and the second in 2005. The regime was led by Field Marshal Umar Hassan Ahmad al-Bashir, who came to power in 1989, and is still President today. The first document was an Islamic Constitution, whilst the second document was an Interim National Constitution, meant to constitutionalise the Comprehensive Peace Agreement (CPA).

As mentioned above, Sudan's constitutional history has been based around the goal of creating a permanent national constitution. The fact that the country has had four constitutions

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<sup>2</sup> Natsios, Andrew S. 2012. Sudan, South Sudan and Darfur: What Everyone Needs to Know. Oxford University Press. USA. P. 12

illustrates that the country has not struggled with *constitution-writing*. The problem has rather been to create a legitimate constitution for the whole nation, which can be accepted by all regions, races, and religions. Why they have been unsuccessful in this regard, can partly be explained by looking at the moment of creation and the involved actors. First, three of the four constitutions were written under military regimes, resulting in the documents being disputed initially. Second, two of the four constitutions were written after a peace agreement between the North and the South, which in reality meant that they were written in order to implement the peace agreement, and thus, the emphasis is on this relationship and not on the nation as a whole. Another characteristic of this process is exclusivity. Constitution-making has been highly political, only executed by an elite, regardless of the country is ruled by a civilian or a military government. Exclusivity together with Islamic elements, in the constitutions, has resulted in little or no public support. Instead of inviting the people to participate in constituting-making, the regimes have instead looked inwards for acceptance of the constitution, leaving the people with the impression of a government with a careless attitude, as the constitution “*is not something that concerns us, as we are not protected by it.*”<sup>3</sup>

## 1.1 Research Question

This master thesis concentrates on the constitutional development in the Sudan, with an overarching goal to convene and present this part of Sudanese history, which is neglected in research literature. The time frame is set from 1956 until 2005, yet relevant constitutional history prior to Independence will be accounted for, likewise regarding the post-2005 situation. Because of the historical context surrounding constitution-making in Sudan, the focus will be solely on North Sudan and South Sudan, as the tense relationship between these two regions has influenced the process considerably.

Extra emphasis will be on the development of the four constitutions that have been implemented; the constitutions of 1956, 1972, 1998 and 2005. The author’s main objective has been to shed light on Sudan’s constitutional history, and to investigate the relationship between these documents and the historical context they were created in. To carry out this objective, the following research question has been posed:

*In what way and to what extent has the historical context influenced constitution-making in the Sudan?*

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<sup>3</sup> Conversation with an informant in Khartoum in 2013.



Because the Sudan has implemented four constitutions since Independence, understanding the motives behind these constitutions, and trying to find answers to why they have been written, is a second aspect to this analysis. Four additional questions will therefore also be handled within the scope of this thesis:

- i) What has been the purpose of constitutions in Sudan?*
- ii) What has characterised each constitution?*
- iii) Which questions have been contested during the process of constitution-making in general?*
- iv) How have the constitutions attempted to come to grips with the contested issues?*

When approaching the source material, it was appropriate to first and foremost apply classical source criticism. The comparative method has been an essential part of the analysis, in order to understand constitutional development, and to highlight similarities and differences in the historical development, as well as thematic developments. Furthermore, a theoretical understanding of constitution-making in the Arab and African context has provided insight with regards to the case of Sudan.

## **1.2 Sources**

The main sources for this master thesis has been written documents. Most of the materials collected have been written in English, and in cases where they were originally written in Arabic, translated versions have been used. These sources have been available either in Bergen, Norway, or through online archives. Due to time limitations, the author was not able to visit the Sudan Special Collection in Durham, which would have provided additional source material not possible to order online.

Most of the sources for this work are archival. The Mahmoud Salih Collection at the Centre of Middle Eastern Studies at the University of Bergen has provided primary sources on constitutional development during the Condominium period, as well as documentation up until the 1970s. All of the source material from the Condominium period has been provided by the British Foreign Office, and consists mostly of yearly reports on political development in the Sudan. A challenge with the British sources is that the point of view is only given from their perspective, which means that secondary sources have been obtained to achieve an insight into alternative perspectives.

The University of Durham and the Sudan Archive have a vast online archive, and have provided relevant sources. This included documents concerning constitution-making from the 1960 and 1980s, and a mix of official documents and personal letters. All documents from Durham were written in English, and this includes comments on the different constitutions. The authors are mainly from the Sudanese opposition, which means that most of the material is critical. As the constitutions have been written by the regimes in power, and therefore reflect their views, the Durham material has been providing alternative perspectives, and has therefore been invaluable. It is possible that the Sudanese authors chose to write in English, in order to reach a wider audience. Durham also provided me with the Draft Constitution of 1968, written by the committee for the constitution and is a preliminary translation.

Through the Bergen Resource Centre, access was given to the monthly magazine of Sudanow that has equipped the author with contextual information about constitutional development from the 1970s up until the 1990s. This magazine was issued by the Ministry of Culture and Information, which could have influenced journalists, topics and presentations in the magazine. Sudanow was published from 1976 until 1996, and has withstood many government reshuffles. It appears that an editorial shift occurred in 1988, as all copies after 1988 have the Minister of Culture and Information as Editor-in-Chief. This could be explained by the regime's tightening of censorship. Furthermore, it is reason to believe that the magazine has been subject to increased censorship during the military regimes, which could affect topics and presentations of articles.

Furthermore, researcher Liv Tønnessen at the Chr. Michelsen Institute has kindly provided a set of documents covering many topics on the Sudan, including constitutional and political development from the 1980s onwards. Tønnessen also provided The Draft Constitution of the Republic of the Sudan from April 1998, which is an authenticated English Translation.

An extended Appendix that includes sources related to the opposition and the regime after 1989, has been provided by Peter Nyot Kok in *Governance and Conflict in the Sudan, 1985-1995*. Of particular relevance to this thesis, is the constitutional decrees implemented by the military regime of Umar Hassan Ahmad al-Bashir.

To show the development of the 2005 Interim National Constitution, the Comprehensive Peace Agreement signed between the Sudan People's Liberation Movement/Army and the Government of Sudan in January 2005 has been used. This has been available online, and as the international community has been deeply involved in creating this agreement, the English

version is deemed to be completely reliable.<sup>4</sup> In relation to the 2005 constitution, a document by Ali Mahmoud Hassanein “General Comments on Proposed Interim Constitution of Sudan,” dated 2006, has been available from an archive available at UIB/Centre for Middle Eastern Studies.

As this thesis is concerned with constitutional history, the constitutional documents have become the most central sources. Four constitutions have been implemented since 1956. The Transitional Constitution of Sudan from 1956 is available in the Mahmoud Salih Collection. This document is in English, and the translation is considered reliable as this was an adoption of the 1953 Self-Government Statute, written by the Anglo-Egyptian Condominium. Furthermore, The Permanent Constitution of the Sudan in 1973 was available in the same collection, and is an Authentic English Translation. An equal version including the 1975 Amendment is available online. As both texts are identical, it is likely that the amendment is an authentic translation as well.<sup>5</sup> The 1998 Constitution of Sudan has been downloaded from the International Labour Organisation.<sup>6</sup> No authentication is written on the document, however, it has been compared to references from Gabriel Warburg, who uses an official translated version, and they match.<sup>7</sup> It is therefore justified to assume that this document has a legitimate translation. The 2005 Interim National Constitution is available online and a copy from [www.refworld.org](http://www.refworld.org) has been used.<sup>8</sup> The international community has been deeply involved in creating this constitution, and therefore it is assumed that the English version is completely reliable.

The contexts in which the constitutions shall be analysed are from a political-strategic perspective, and from an ideological position. This means that the political context that created the constitutions, and the actors that are involved shall be looked at. A constitution is normative, which means that a constitution’s content tells the reader how the country *should* be governed, and thus, it tells us more about rules, regulations and norms, then it does about the actual reality. However, the constitutions are also a result of political debate, power relations and are a process of creation. The articles included in these document can therefore

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<sup>4</sup> The Comprehensive Peace Agreement 2005. Available at: <http://unmis.unmissions.org/Portals/UNMIS/Documents/General/cpa-en.pdf> [Last accessed 07.05.14]

<sup>5</sup> [righttononviolence.org](http://righttononviolence.org). Here the 1973 constitution and the 1975 amendment is available.

<sup>6</sup> [http://www.ilo.org/dyn/natlex/natlex\\_browse.details?p\\_lang=en&p\\_country=SDN&p\\_classification=01.01&p\\_origin=COUNTRY&p\\_sortby=SORTBY\\_COUNTRY](http://www.ilo.org/dyn/natlex/natlex_browse.details?p_lang=en&p_country=SDN&p_classification=01.01&p_origin=COUNTRY&p_sortby=SORTBY_COUNTRY)

<sup>7</sup> Warburg refers to the 1998 constitution text on page 214 in “Islam, Sectarianism and Politics”. In his footnote 38 he states that he uses an official translated version.

<sup>8</sup> The Interim National Constitution. Available at: <http://www.refworld.org/docid/4ba749762.html> [Last accessed 12.03.14 at 21:07]

tell us something about which issues were important at the time of writing. It is mostly this second approach that will dominate this thesis.

### **1.3 Literature**

No in-depth analysis has been written on constitutions in the Sudan, and so it is the culmination of sources and literature that provides the historical presentation of this thesis. However, a variety of scholars have written about this subject. Historians, social scientists and lawyers have all touched upon the constitutional history of the Sudan, yet no one has written extensively on this subject. This has posed challenges, as a large part of this project has involved locating, gathering and putting together a variety of book chapters, documents and articles, in order to present this historical development comprehensively.

For a general comprehension of the political development, the author has leaned on the well-known historians of Martin W. Daly's "*Imperial Sudan*", Peter Holt and Martin W. Daly's "*A History of the Sudan from the coming of Islam to the Present Day*", Robert O. Collins's "*A history of modern Sudan*", and Gabriel Warburg's "*Islam, sectarianism and politics in Sudan since the Mahdiyya*". An insight into the views from southern Sudan has been provided by Abel Alier's "*Southern Sudan, Too Many Agreements Dishonoured*".

#### **1.3.1 Historical Presentations**

Historian Gabriel Warburg's book "*Islam, Sectarianism and politics in Sudan since the Mahdiyya*" has been helpful to illustrate the process of constitution-making in Sudan, as he has a separate Chapter which discusses "Statehood and Constitution-making". He focuses his analysis mostly on the Islamic debate with regards to the constitutions, as well as the political landscape that is developing. In addition to his analysis, Warburg has provided an extensive overview of sources and literature, making it easier to find additional material.

Historian Yusuf Fadl Hasan's book "*Studies in Sudanese History*" has provided an extensive insight into General Abboud's constitutional contribution, as this was included in Chapter 9, as part of the Sudanese Revolution of October 1964. This is the only literature the author of this thesis has been able to find on constitution-making under General Abboud, as other literature normally does not mention this topic at all.

Abdel Salam Sidahmed, a Social and Political Scientist, discusses the 1964-1969 parliamentary period in his book "*Politics and Islam in Contemporary Sudan*". There, the focus is on the making of an Islamic Constitution, together with a discussion on political

parties, and their views on an Islamic Constitution. Sidahmed also gives a thorough presentation of constitution-making in the 1960s, discussing the different draft constitutions produced during this period.

### 1.3.2 Jurists and Social Scientists

The book “*Civil War in the Sudan*” is edited by Martin W. Daly and Ahmad Alawad Sikainga. The chapter written by Abdullahi Ahmed An-Na’im, (a professor of Law) “Constitutional Discourse and the Civil War in the Sudan” has provided an overview of the constitutional discourse in Sudan. An-Na’im gives a short overview of the constitutional discourse since Independence, up to the early 1990s, then he divides the political parties into two categories; proponents of an Islamic State, and those opposing that model in favour of a secular state. The same writer has written the book “*African Constitutionalism and the Role of Islam*”, which includes a comparative Chapter whereby Islam and constitutionalism in Sudan, Nigeria and Senegal are discussed. While there is some overlap between the topics he discusses in Daly and Sikainga, An-Na’im focuses on Constitutional Stalemate here. The time frame includes the first years of the twenty-first century, therefore including the 1998 constitution.

Constitutional lawyer Peter Nyot Kok has written the book “*Governance and conflict in the Sudan, 1985-1995*” where he writes extensively on constitution-making. Though his focus is mostly on the al-Bashir years up until 1996, he provides insights into constitutional development under a liberal and an authoritarian regime, with an emphasis on Abboud, Numayri and al-Bashir. Furthermore, he connects constitution-making with nation-building, providing his discussion with a secondary level of analysis.

Professor Ali Suleiman Fadlall, Member of the Faculty of Law, University of Khartoum, has written about the constitutions in Sudan. His article “*Constitution – Making in the Sudan: Past Experiences*”, gives a short overview of this development. The article focuses on constitution-making since Independence, yet it is not consistent with the type of information provided for each government or regime, leaving an impression that the article was written hurriedly. The same author has also written “*The Search for a Constitution*”, a Chapter included in the book “*Sudan since Independence*” from 1986. The Chapter discusses constitution-making from 1956-1973, with an emphasis on Presidential versus parliamentary systems and a secular versus a Muslim State.

Marti Alane Flacks from the Fletcher School of Law and Diplomacy and the Columbia Law School, has written the article “*Sudan’s Transitional Constitution: Potential Perils and Possibilities for Success*”. This article focuses mainly on constitution-making in a theoretical perspective, and the challenges with regards to wealth-sharing between North and South Sudan. It does however give an historical introduction of Sudan’s constitutional past, which has been helpful.

Professor Balghis Badri, Professor of Sociology, whom specialises in gender studies, has written an article on constitutional development called “*A critical Analysis of the Evolution of Constitutions in Sudan*”. This article comments on some theoretical aspects of constitution-making, before it discusses the evolution of the pre-2005 constitutions in Sudan. This article stands out, as Badri is the only one commenting on women’s rights in the constitutions.

Ismail bin Matt, Ph.D, from the Institute of Islamic Studies, at the University of Brunei, Darussalam, has written the article “*Toward an Islamic constitutional Government in Sudan*”. This article has a special emphasis on the Islamic discourse from the constitutional debates, as well as a focus on Islamic elements in the constitutions.

#### **1.4 Theoretical Framework**

An old soviet joke states that a man goes into a restaurant and surveys the menu. “I’ll have the chicken,” he says, only to be told by the waiter that the restaurant is out of chicken. He asks for the beef, only to be told the same thing. Working his way through the menu, he is repeatedly told that the restaurant is out of the selected dish, until he gets upset and says, “I thought this was a menu, not a constitution.”<sup>9</sup> Tom Ginsburg and Alberto Simpser use this joke to capture the usual perceptions of dictatorial constitutions as worthless pieces of paper, without any function besides giving an illusion of legitimacy to the regime. If this is true, why do such regimes invest in constitution-making? Sudan’s constitutional history included a development of constitutions, as well as the produced documents, that has been implemented over the years. It is therefore equally necessary to understand the function of the constitution, as it is interesting to understand why these authoritarian regimes have been so occupied in writing constitutions. Understanding what the purpose of constitutions is, and how constitutional development in the region has developed, will help place the case of Sudan in a wider context. Furthermore, introducing a theoretical framework, will shed light on the

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<sup>9</sup> Ginsburg, Tom – Simpser, Alberto (eds.) 2014. *Constitutions in authoritarian regimes*. Cambridge University Press. New York. P. 1

development that Sudan has gone through. Undoubtedly, constitutions have gained a lot more attention in recent years, especially after the Arab Spring in 2011, where now the whole region is occupied with constitution-making, either by amending or drafting new documents. On the African continent, three types of stages in constitutional development can be recognised; first, the constitutions drafted before or right after Independence which were used to signal sovereignty. Second; in the 1960s, new constitutions were created as many countries became one-party states and new legitimacy for these political forms was needed. Thirdly, a new trend entered Africa in the 1980s, whereby constitutions were modelled after Western principles, and a bigger emphasis was put on human rights.

#### 1.4.1 Constitution and Constitutionalism

As defined by Brown, constitutions represent the basic legal framework for governing. A constitution serves two main purposes: it divides and checks state power, and it defines and protects the rights of the people.<sup>10</sup>

According to Francis M. Deng, constitutionalism is a mechanism of governance by which people, individuals and groups, exercise power through institutions, with certain outcomes and effects on the system.<sup>11</sup> Furthermore, an important part of constitutionalism is the legal framework that it is surrounded by. Constitutionalism goes beyond the specific constitutional text. It works to operationalise the constitution which is the fundamental law containing rules, conventions and practices by which a society governs itself.<sup>12</sup> However, constitutionalism in this context is also meant to embrace the totality of how society and the state originates from the overriding goals and values of the society, for instance power, respect and well-being of the citizens.<sup>13</sup> The significance of the people is highlighted, whereby the process of making the constitution needs to be a collective effort.<sup>14</sup> Deng makes an interesting comparison between Western and African constitutionalism, stating that the West emphasises the individual as the principal subject that the constitution should ascribe rights to. Thus, the objective is the protection of individual rights. From an African perspective, he argues, the individual is seen in the context of a group, and that the individual gains largely within a

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<sup>10</sup> Brown J. Nathan 2002. *Constitutions in a nonconstitutional world. Arab Basic Laws and the Prospects for Accountable Government*. State University of New York Press, Albany. P. 8

<sup>11</sup> Deng, Francis M. 2008. *Identity, diversity and constitutionalism in Africa*. United States Institute of Peace Press. Washington, DC. P. 9

<sup>12</sup> Ibid: 10

<sup>13</sup> Ibid:10

<sup>14</sup> Ibid:11

social context that includes several relationships.<sup>15</sup> African constitutionalism must therefore aim at protecting both the individual and the society or community that a person is part of.<sup>16</sup> Constitutionalism in the Sudan must also be understood in relation to Islam. Abdullahi Ahmed An-Na'im discusses this relationship with a premise that it is problematic when Islam is taken to be synonymous with historical understanding of Sharia, because Sharia is fundamentally incompatible with the principles of constitutional governance.<sup>17</sup> The main challenge is the lack of institutionalised accountability for the government, and serious discrimination against women and non-Muslims. For example, women and non-Muslims are deemed by traditional formulations of Sharia to lack the capacity to hold certain types of public office.<sup>18</sup>

#### 1.4.2 Constitutions in an Authoritarian Regime

As mentioned briefly above, different theoretical concepts can explain why authoritarian regimes choose to write constitutions. Tom Ginsburg and Alberto Simpser investigate this topic based on a broad set of case studies.<sup>19</sup> Their main argument is that authoritarian constitutions cannot be dismissed, because they do matter. They have a purpose, even if it is not to protect citizens or for citizens to follow them. This is in line with Nathan Brown's argumentation as well, as he states that even though constitutions in the Middle East do not represent a political reality, they do serve a purpose and warrant investigation. With this attitude in mind, Ginsburg and Simpser present three overlapping questions: i) what do authoritarian constitutions do? ii) how do they work? iii) why are they adopted in the first place?

Co-editors Tom Ginsburg and Alberto Simpser provide four categories for the constitution's functions: *Operating manual, billboard, window dressing and blueprint*. Operating manual is meant to define government-structures. This will facilitate their operation and prevent continuous re-negotiations. A written constitution can therefore minimise conflict over basic institutions for any regime.<sup>20</sup> When a written constitution describes actual political practice, it is serving as an operating manual. The constitution is describing how government is to

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<sup>15</sup> Ibid:12

<sup>16</sup> Ibid:12

<sup>17</sup> An-Na'im, Abdullahi Ahmed 2006. *African Constitutionalism and the Role of Islam*. University of Pennsylvania Press. Philadelphia. P.154

<sup>18</sup> An-Na'im, Abdullahi Ahmed 2006. P. 154

<sup>19</sup> They use references from Asia, Europa, The Middle East and South America.

<sup>20</sup> Ginsberg – Simpser (eds.) 2014. P. 3



function and defines the relationship and interaction between institutions.<sup>21</sup> Serving as billboards is another function, and this means that constitutions serve as advertisement to their users or potential users. This can be both domestic and towards the international arena, as the audience can be the people that will be subject to it, or an international audience as they can signal a type of policy orientation.<sup>22</sup> The term “window dressing”, which is the third category, is used if the goal of the constitution is to keep those living inside the country from seeing out. The fourth and final point is called blueprint, which really is a characteristic of constitutions everywhere. Constitutions describe things not as they are, but as they might be.<sup>23</sup> They can serve as aspiring documents that can serve to motivate people to build a future society. For instance, constitutions from such regimes do include political, economic and social rights, though they may or may not be followed. Thus, they can be there to look good, they could be meant as aspiration of the way they want society to be, or they could be followed.

Concerning the second question, “how do the constitutions work?”, the authors provide three explanations. First, they can help oligarchic actors to co-operate and establish focal points, procedures and institutions, thereby addressing problems of coordination and problems of commitment.<sup>24</sup> For instance in Sudan during the civilian governments it was important that if the leader of the Umma Party was elected Prime Minister, the leader of the Democratic Unionist Party had to be part of the Supreme Council, in order to safeguard power-sharing. Second, constitutions have a normative aspect, which gives them a certain independent force, even in an authoritarian context. Just because the content is part of a constitution, its meaning enjoys special public visibility and status. Also, such status becomes extra important during moments of intra-elite conflict or during regime crisis.<sup>25</sup> Furthermore, in terms of the moment of creation, these rulers do have collaborator or an inside network, which means that the documents often reflect a process of collective choice among elites with divergent interests. Therefore, despite the fact that authoritarian rulers may have more discretion, it may be wrong to assume that authoritarian constitutions reflect optimising behaviour on the part of a single unitary ruler.<sup>26</sup> This is particularly true in the case of Sudan, as the military ruler may have needed backing by other political forces in order to create a constitution. Third, a variety of motivations exist, and in some cases the process of constitution-making may be valuable in

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<sup>21</sup> Ibid: 6

<sup>22</sup> Ibid: 6

<sup>23</sup> Ibid: P. 8

<sup>24</sup> Ibid: P. 2

<sup>25</sup> Ginsberg - Simpser (eds.) 2014. P. 2

<sup>26</sup> Ibid: 3

itself, independent of any short term or long-term consequences that specific constitutional provisions may have.<sup>27</sup>

Why write constitutions? The authors are referring to Negretto's study of constitution-making in Latin America, and he argues that the military there, have chosen to write constitutions to facilitate their long-term objectives of political, social and economic transformation and to enhance their influence over post-transitional democratic government. Another possibility is that the process of constitution-making is valuable in itself, as it allows the regime to be seen as engaged in an important project.<sup>28</sup> However, even though the people may know that such a process is ongoing, it is most often hidden from the public eye and is a discrete political project.<sup>29</sup> Again, this is related to Sudan, as constitutions have been used both to promote long-term objectives, as well as solve specific current issues such as civil war.

#### 1.4.3 The Purpose of Constitution-making in the Arab world

The aftermath of the Second World War left the Middle East with many young states, and many countries developed into authoritarian regimes. Several wars, particularly involving Israel and Palestine, contributed to the region being characterised as politically unstable, with little or no democracy, and a continuation of authoritarian regimes. As a result of this, the region has been perceived as hostile towards constitutionalist values.<sup>30</sup> It is noteworthy however, that this region joined the rest of Europe in their constitution-writing, as the Ottomans wrote their first constitution in 1876, followed by Egypt and Tunis, who also wrote constitutional documents.<sup>31</sup> However, in the twentieth century, constitutions have multiplied throughout the world, with only a handful of countries governing without this document.<sup>32</sup> According to Nathan Brown, what characterises the Middle East, is that these countries have not been able to successfully establish constitutionalism, and have not the institutional framework for regulating and limiting state power.<sup>33</sup> Generally, constitutions have been written to confine political authority, and liberal constitutionalism, whilst aims to limit political authority have been a secondary goal.<sup>34</sup> This has resulted in little or no accountability

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<sup>27</sup> Ibid: 3

<sup>28</sup> Ibid:13

<sup>29</sup> Ibid:13

<sup>30</sup> Brown 2002. P. xiii

<sup>31</sup> Brown 2002. P. 3

<sup>32</sup> Great Britain and Northern Ireland, Canada, New Zealand, San Marino and Israel, does not have a codified constitution, but have different types of laws or documents that serve the same principle.

<sup>33</sup> Brown 2002. P. 3. This situation has changed post-2011, as the "Arab Spring" created a new opportunity to construct or re-write constitutions, and many country have or shall begin this process.

<sup>34</sup> Brown 2002. P. xiii

for the regimes. The main topic of investigation by Brown is “why do authoritarian regimes create constitutions?” In order to answer this question, several theoretical options are presented. First and foremost Brown argues, constitutions have become so commonplace that they are considered a natural accoutrement of sovereignty. Furthermore, according to Karl Loewenstein, the written constitution has become the most common and universally accepted phenomenon of contemporary state organisation, which has led to modern autocracies feeling compelled to pay tribute to the democratic legitimacy inherent to the constitution.<sup>35</sup> Therefore, if constitutions are issued as an expression of national sovereignty, this should be reflected in their timing and their content. For instance, are they issued upon independence (or after a revolutionary change), and regardless of authorship, they should be presented as an expression of the national will.<sup>36</sup>

A second theoretical approach presented by Brown, is that constitutions can serve the purpose of proclaiming basic ideology. According to Brown, scholars have observed that constitution writers have become progressively more verbose.<sup>37</sup> This has become more visible, as the constitution has become a platform for describing the basic goals, ideology, or program of the State.<sup>38</sup> Such proclamations could be sincere when issued, however, because they are vaguely defined, they do not carry any legal weight and thus, they do not limit the government. The result is instead that they represent a political foundation, and serve as defining features of the State.<sup>39</sup> Brown points to a potential audience, as such proclamations could be internal to the society, or to the State, as senior political leadership might use a constitution to signal its orientation towards the bureaucracy, and therefore justify a new political order.<sup>40</sup> Most constitutions do have ideological elements, as it defines political culture and the identity of its members. However, Browns writes what makes an “ideological constitution” distinctive is that “*its ideological and programmatic nature overwhelms its substantive and procedural content*”.<sup>41</sup> Moreover, if constitutions fall into this category, it is expected that they contain long and elaborate introductions or ideological statements, and poorly developed provisions for the definition and operation of political authority.<sup>42</sup>

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<sup>35</sup> Loewenstein quoted in Brown 2002. P. 10

<sup>36</sup> Brown 2002. P. 10

<sup>37</sup> Brown 2002. P. 11

<sup>38</sup> Ibid:11

<sup>39</sup> Brown 2002. P. 11

<sup>40</sup> Ibid:11

<sup>41</sup> Ibid:11

<sup>42</sup> Ibid:11

The third and final point made by Brown, is that a constitution could serve the purpose of clarifying political authority, without restricting the action of the leaders. Even though some countries can rule without or above the law, a clear description of the basic structure and chain of command is necessary. Non-constitutional regimes may use the constitution simply to regulate relations amongst the elite group.<sup>43</sup>

#### 1.4.4 Constitution-making in an African Context

In post-colonial times, a widespread discussion concerning the legacy of the European powers has been contested, as many claimed that the continent would be better off without any Western systems of governance. However, as made visible in the Sudan, the invested time, struggle and resources that went into constitution-making indicates that this is a necessity. The question is why? According to Francis M. Deng, the way African countries have adopted Western constitution-making, is a result of a long period of consultation, preparation and negotiation between the Imperial powers and the African leaders (Intelligentsia).<sup>44</sup> Furthermore, the African leaders who participated in the draftings of the constitutions, were often educated in Europe, had been schooled in European political traditions and their legal and institutional norms.<sup>45</sup> This could mean that for them, there was no other options which could match the legitimacy of a constitution. However, as argued by Ghai, there is no evidence that the African leaders themselves wanted a constitution. They may not have been strongly against it either, and they could have realised that if this was the condition for Independence, then it was a price they were prepared to pay.<sup>46</sup> Either way, it became clear that constitution-making is important and plays a natural part in the governing of a country.

There has been however, a difference in approach to constitution-writing, and furthermore, how to design the process of constitution-making and its implementation. This difference is overwhelmingly visible if one compares Europe and Africa. Even though it is arguable to say that the new states in Africa are basing their constitutional process on the same principles that the West did two centuries ago, the African societies are qualitatively different compared to “old Europe”.

“We live in an era of constitution-making” says Vivian Hart. This statement is very appropriate in the Sudanese context, but they are certainly not alone. Of, close to 200 national

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<sup>43</sup> Ibid:11

<sup>44</sup> Deng, Francis M 2008. P. 19

<sup>45</sup> Deng, Francis M 2008. P. 18

<sup>46</sup> Ghai quoted in Deng, M. Francis 2008. P. 19

constitutions in existence today, more than half were written during the last quarter of the twentieth century.<sup>47</sup> Decolonisation left Africa with numerous young states, whereby many shared the common characteristics of deeply divided societies, along ethnic and religious lines. Conflict over identities and power has been present in many countries, and it has continued into the 21<sup>st</sup> century.<sup>48</sup>

Traditionally, constitution-making was negotiated and drafted by “appropriate” representatives, and their view on society and country were the views that were incorporated. New constitutionalism, according to Hart, is a conversation conducted by all concerned parties. It is open for new participants and new issues to be discussed, and it is seeking a workable formula that will be sustainable.<sup>49</sup> Typically, constitution-making today is not based on a foundation of stability for the future and internal harmony. Often it is based on the exact opposite, and that is why one must transform the way one create these documents.<sup>50</sup>

#### 1.4.5 Participatory Constitutionalism

One of the most important messages of Hart is that elite-made constitutions must be replaced by a constitution made through a democratic process. For a constitution to be perceived as legitimate, transparency and accountability is necessary, and the people need to feel a form of ownership towards the constitution.<sup>51</sup> Both Western and non-Western countries have tried this new form of Participatory Constitutionalism with great success, and as Hart explains, the essential concept is placing the constitutional responsibility within the hands of the citizens, and creating a constitutional conversation.<sup>52</sup> This new constitutionalism has received a lot of attention in the last decades, and the most successful effort can be seen in South Africa. The South Africa Constitution of 1996 is widely regarded as a model constitutional text.<sup>53</sup> There are many things that have made the constitution process so successful, and one important factor was public participation. In 1994, the South African Constitutional Assembly encouraged a nation of first-time voters to participate in the constitution-making process, with a special emphasis on voting.<sup>54</sup> Polls estimated that 73 per cent of South Africans were reached by the assembly’s campaign. Several things were done right in this case, and the

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<sup>47</sup> Hart, Vivian 2003. Special Report. “Democratic Constitution Making.” United States Institute of Peace. P. 3

<sup>48</sup> Ibid: 3

<sup>49</sup> Ibid.:3

<sup>50</sup> Ibid: 3

<sup>51</sup> Ibid: 4

<sup>52</sup> Ibid: 7. She mentions Canada, Nicaragua, Uganda, Brazil and South Africa.

<sup>53</sup> Ibid: 7

<sup>54</sup> Hart 2003. “P.7

process shows that a country can develop from the oppression of apartheid into a democratic society.<sup>55</sup>

The South African model was successful because of three factors. Firstly, the process was time consuming and no document was written hastily. Secondly, progress was phased, and it benefited from an interim constitution that allowed the dialogue of transition to continue. Thirdly, there was a huge and costly effort for educating the population, and this also meant a continuous flow of information.

## 1.5 Chapter Overview

The first Chapter in this master thesis provides the reader with an introduction of the chosen topic for this thesis. It introduces the research questions, along with the sources and literature which will help answer it. Furthermore, a theoretical framework is presented, which focuses on constitution-making in an Arab and African context. The second Chapter provides the necessary background information, with an emphasis on political development before the country gained independence in 1956; this is followed by an overview of state and nation-building efforts in Sudan post-1956. A special emphasis is put on the relationship between nation-building and constitutions, and the role marginalisation has played on the relationship between North and South Sudan. Chapters 3, 4 and 5 are empirical Chapters, this is where the research questions will be answered. Chapter 3 presents constitutional development from 1940 until 1985, which encompasses the last decade before Independence, the two first civilian governments, as well as the two first military regimes. This Chapter will have a special emphasis on the specific characterisations of constitution-making in each period, as well as identifying sensitive political issues during the constitutional discourse. Chapter 4 continues to introduce this same development from 1985 until 2005, including one civilian government followed by the third and final military regime. The same attention to each particular constitution-making process, as well as contested political issues, follows in this Chapter. The final empirical Chapter 5 contains a comparative analysis of the constitutional documents, and will specifically answer sub-question iv) *How have the constitutions attempted to come to grips with the contested issues?* The Chapter goes into a detailed analysis of a selection of constitutional articles. A special emphasis on the historical context is important to all three empirical Chapters. Finally, Chapter 6 will contain concluding remarks; where an epitome of the thesis will be presented, along with the main empirical findings.

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<sup>55</sup> Ibid:7

## 2 Historical Background and Nation-Building

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Constitution-making with Sudanese participation first took place during the Anglo-Egyptian Condominium (1898-1956). The emergence of an independent successor state signalled the end of foreign rule, and as the British government in the Sudan were preparing to leave, a group of educated northern Sudanese were ready to take their place.

The Sudanese spent a little over fifty years to attain democratic self-government. The constitutional work that would lead to independence began during the Condominium. By the time that the Anglo-Egyptian military took control of the Sudan, the country had experienced sixty years of Egyptian rule, and thirteen years of Mahdist rule.<sup>56</sup> The Condominium Agreement, signed in 1899, served as the country's first constitution. This dual agreement was as unusual as the foundation of the Condominium itself. However, it set the rules for governing in the Sudan, and up until the First World War, co-operation between the two countries was constructive. Paradoxically, the Condominium hindered political development and constitutional advance. Every aspect of political life was complicated by this status, and even simple local issues could sometimes turn into a national question, slowing down development.<sup>57</sup> These effects became stronger after the First World War. It became apparent that the Condominium partners wanted different things for the country's future. Egypt wanted unity in the Nile Valley, and claimed historical ownership over the Sudan. Great Britain on the other hand, advocated self-government.<sup>58</sup> As the real progress towards an independent Sudan began, three obstacles had to be overcome: firstly, there was no tradition in Sudan for constitutional experience or political institutions, secondly, two world wars had retarded development towards self-government, and thirdly, there was disagreement over the country's future, internally in the Anglo-Egyptian collaboration<sup>59</sup>.

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<sup>56</sup> Mayall, R.C. 1952. "Recent Constitutional Development in the Sudan." *International Affairs (Royal Institute of International Affairs 1944)*. Vol. 28, No. 3. P. 310. Available at: <http://www.jstor.org/stable/10.2307/2607416?Search=yes&resultItemClick=true&searchText=R.&searchText=C.&searchText=Mayall&searchUri=%2Faction%2FdoBasicSearch%3FQuery%3DR.%2BC.%2BMayall%26amp%3Bacc%3Don%26amp%3Bwc%3Don%26amp%3Bfc%3Doff> [Last accessed 04.05.14]

<sup>57</sup> Daly, M.W. 1991. *Imperial Sudan*. Cambridge University Press. Cambridge. P. 1

<sup>58</sup> Mayall, R.C. 1952. P. 310

<sup>59</sup> *Ibid*: 310

In 1953, the Self-Government Statute was written, and it safeguarded Sudanese right to govern themselves. Two years later, in 1955, the country was declared independent. There are three distinct periods in the evolution of this Self-Government Statute. The first period from 1899 to the early nineteen-twenties was governed by a policy, which in African history is called 'Direct Rule'. These first years were spent restoring law and order, and as Martin Daly writes, the Anglo-Egyptian administration had reached even the most remote backwaters for its rule to be unquestioned and secure.<sup>60</sup> Some educational steps were taken during this time, for instance in establishing the Gordon Memorial Collage in 1902.<sup>61</sup> On the other hand, R. C. Mayall argues that this was the beginning of British advocacy for Sudanese participation and democracy development.<sup>62</sup> Conversely, Daly sees this as misleading, as the British only wanted a small group of literate Sudanese to work as subordinate government employees.<sup>63</sup> However, what really characterises this period is the British encouragement of the Arab concept of sheikh's sitting in councils. According to Mayall, this was the beginning of the democratic organs of the constitutional government.<sup>64</sup>

The second period lasted between the early nineteen-twenties and the nineteen-forties. Government policy had changed from direct rule to indirect rule, or native administration. The motive behind this policy was financial. Tribal administration would be self-financial and therefore cheaper for the central government. It also hindered the further education of the Sudanese.<sup>65</sup> These native agents were carefully selected from the families of tribal leaders, which had held power during the Mahdia or pre-Mahdia days.<sup>66</sup> The loyalties between the Sudan government, and different religious leaders, would portray political development until 1956. This policy of indirect rule set out to prepare and train tribal leaders for participation in government institutions, such as the legislative assembly. Furthermore, with judicial and administrative experience, tribal leaders would be able to compete on equal terms with the better educated elite.<sup>67</sup> This policy was kept within the northern borders. Indirect rule was

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<sup>60</sup> Daly 1991. P. 1

<sup>61</sup> Holt, P.M, Daly, Martin W. 2011. *A History of the Sudan, from the Coming of Islam to the Present Day*. Pearson Educated Limited. United Kingdom. P. 89

<sup>62</sup> Mayall, R.C. 1952. P. 311

<sup>63</sup> Daly 1991. P. 4

<sup>64</sup> Mayall, R.C. 1952. P. 311

<sup>65</sup> Daly 1991. P. 6

<sup>66</sup> Mayall, R.C. 1952. P. 311

<sup>67</sup> Ibid: 311



paralleled by the Southern Policy, which hindered all types of development, resulting in institutionalised backwardness.<sup>68</sup>

Mayall began the third phase of constitutional development in 1944, and he argued that the Advisory Council was efficient and useful, and a considerable contribution.<sup>69</sup> The author disagrees with Mayall, as this council was established by the British, as a counterweight to the Graduate Congress established in 1938.<sup>70</sup> However, it can be agreed with Mayall that this third phase shows the most extensive political and constitutional development, and therefore justifies a more elaborate presentation of this period.

## 2.1 Sectarian Influence during the Condominium

Understanding the political landscape in the Sudan cannot be accomplished without knowledge of the sectarian forces that have influenced it so much. Sectarianism is an ambiguous term that has been given a special meaning in the Sudanese context. The classical Western understanding of the term “sect” is commonly a closed, inverted and dogmatic group, which distances itself from the political and ideological development of the majority society. This understanding is in many ways contradictory to the meaning of the term in the context of Sudanese politics, where sectarianism has become identified with the religious and political movements of Ansar and Khatmiyya, and the associated religious and political conflict that has been a constant factor in Sudanese politics.<sup>71</sup>

Islam has existed in Sudan for many centuries. Holy men, who taught the Quran and wished to bring social life into conformity with Sharia, largely undertook the Islamisation of the Sultanate. During the Turco-Egyptian period (1821-1885) this religious aspect remained largely the same, although there was some centralisation of the religious institutions in Khartoum, especially the Islamic legal system. However, Sudanese have always seemed to be more attracted to Sufism (popular Islam) as a religious affiliation. Sufism compared to orthodox Islam offered a more comprehensible understanding of religion, and it began to gain a real foothold in the fifteenth and eighteenth century.<sup>72</sup>

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<sup>68</sup> Daly 1991. P. 7

<sup>69</sup> Mayall, R.C. 1952. P. 311

<sup>70</sup> Daly 1991. P. 151

<sup>71</sup> Vambheim, Marit 2007. “Making Peace While Waging War.” Master Thesis, University of Bergen. P. 7 Available at: <https://bora.uib.no/handle/1956/2359> [Las accessed 04-05.14]

<sup>72</sup> Warburg, Gabriel 2003. *Islam, Sectarianism and Politics in Sudan since the Mahdiyya*. Hurst & Company. London. P. 1

In modern Sudanese history, two religious groups have played a significant role in the country's development. That is the Khatmiyya, which is a Sufi order, and the Ansar, who are the followers of the Mahdi. The Khatmiyya was founded by Muhammad Uthman al-Mirghani (1793-1852), and gained an early foothold in the Kordofan area. When the Turco-Egyptian rule was established, the Khatmiyya sect gained government support from the new regime, as they encouraged a more centralised and traditional Islam.<sup>73</sup> The Ansar, meaning followers of the Mahdi, are famously known for the Mahdi revolt, and the establishment of the Mahdi State from 1881 to 1898.<sup>74</sup> The self-proclaimed Mahdi was Muhammad Ahmad b. Abdallah, who succeeded in gathering and inspiring the Muslim population to resist against the Turco-Egyptian rulers.<sup>75</sup> This Islamic movement was created on the foundation of implementing a pure, incorrupt Islam. As the Mahdi gathered followers, they achieved victory in the battlefields. Their first decisive military triumph was in December 1881 followed by a second in May 1882.<sup>76</sup> During the two last decades of the eighteenth hundreds, British interest in Sudan had prevailed through their interest in Egypt. As the British were occupying Egypt at the time, they promised to help Egypt reclaim the Sudan. A famous British encounter with the Mahdi was in Khartoum where Charles Gordon, former Governor-General of the Sudan was killed, leaving the city under Mahdist occupation on the 25<sup>th</sup> January 1885.<sup>77</sup> The Mahdi died unexpectedly after this victory, and the appointed successor was Khalifa Abdullahi b. Muhammad.<sup>78</sup> The Mahdist state continued until the British-Egyptian invasion in 1898.

A year after the invasion, in 1899, Great Britain and Egypt signed a Condominium Agreement that signalled a new foreign rule in the Sudan. The British held the upper hand in this collaboration, and this meant that their policies dominated the Sudan.<sup>79</sup> The Sudan government was initially fearful of Mahdist revival, and official recognition was given to those groups and people that had withstood the Mahdist uprising, such as Sayyid Ali al-Mirghani, the leader of Khatmiyya.<sup>80</sup> The British also introduced, at least theoretically, a strong divide between state and religion. Gabriel Warburg mentions three principles applied

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<sup>73</sup> Ibid: 8

<sup>74</sup> Ibid: 22

<sup>75</sup> Ibid: 30

<sup>76</sup> Ibid: 39

<sup>77</sup> Ibid: 40

<sup>78</sup> Ibid: 43

<sup>79</sup> The condominium agreement reserved almost complete authority in the Governor-General, whom throughout this period was British. Supreme military and civil authority was vested in the Governor-General as he presided over "the Sudan government". For more details about the agreement, see Holt and Daly *A history of the Sudan*, Chapter 8.

<sup>80</sup> Daly 1991. P. 3

from the beginning: i) the separation of church and state, ii) the limit of Islam's role to only cope with purely religious matters and iii) the encouragement of tribal leadership.<sup>81</sup> Time would show however, that denying religious influence in political life was impossible, as almost every politician had a sectarian affiliation. Furthermore, the British would, at times, be dependent on good will from the two Sayyids Abd al-Rahman al-Mahdi and Ali al-Mirghani; thus, sectarianism and politics were tied together from an early start.

In an effort to control religious orders, the Sudan government participated in establishing an orthodox Muslim hierarchy, with the Board of Ulemas as an example.<sup>82</sup> Excluding all Sufi orders was impossible, and as briefly mentioned above, the Khatmiyya received special treatment, and was favoured by the government throughout the first decades. After first imprisoning Ansar's surviving notables, and repressing any sign of revival, the Sudan government reached a point where they had to acknowledge and co-operate with the Ansar.<sup>83</sup> The timing for this acknowledgement however, was anything but a coincidence. The First World War was raging throughout Europe, and when the Ottomans sided with Germany, Sir Reginald Wingate (Governor-General from 1899-1916) decided to recruit the service of Sayyid Abd al-Rahman al-Mahdi and the Ansar.<sup>84</sup> With the signing of the Sudan Book of Loyalty, Sudanese religious forces were back on track, and were now collaborating with the Anglo-Egyptian government.<sup>85</sup>

## 2.2 The First Educational Steps

After the Second World War, the Sudanese role within the civil service changed rapidly, and more influence and representation was trusted to the Sudanese. Decolonisation was occurring throughout Africa, and preparations for British withdrawal were initiated by Sudanisation. Sudanisation has two meanings in the Sudan: i) forcing some parts of the population to assimilate to another group, ii) it can describe a process of including the Sudanese into the political framework, replacing bureaucrats, police and military with Sudanese. The latter definition applies in this context.

As a result of a growing political service, more work capacity was needed. Importing British staff was too expensive, and so a decision was made to educate *some* Sudanese. James Currie,

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<sup>81</sup> Warburg 2003. P. 57

<sup>82</sup> Ibid: 60

<sup>83</sup> Daly 1991. P. 3

<sup>84</sup> Warburg 2003. P. 77. Son of the Mahdi

<sup>85</sup> Ibid: 77. Sudan book of loyalty was signed by Sayid Abd al-Rahman al-Mahdi together with some 500 religious leaders, shaykhs of Sufi orders and tribes.

the first Director of Education had a vision of teaching the masses the system of government. The masses however, were a small group of artisans that would perfect their skills, accompanied by a minor administrative class, who could work in the government service.<sup>86</sup> P.M Holt and M. W. Daly explains the system as “*highly selective, biased in favour of notable families, and reflected the needs of government departments and the prevailing administrative policy*”.<sup>87</sup> This educated group, which came from tribal and religious families, was called the Intelligentsia. Even though this educational program was a “secular” education, with an emphasis on government loyalty, the political reality turned out differently. Sectarian influence was propagated amongst the government workers, and later when these educated people established their first political parties, they were almost immediately associated with the two sects, as both Sayyids served as patrons for each political party, and thus, it became apparent that a secular Sudan would be hard to achieve.<sup>88</sup>

At the same time as when the Intelligentsia were being established as a group, the relationship between the Condominium partners was starting to deteriorate, as decisions over the country’s future was pressing. Egypt wanted a union with the Sudan whilst the British pushed for complete Independence. These contrasting views for the country’s future motioned a split internally amongst the Sudanese. Quickly, two sides were emerging along sectarian lines: with Khatmiyya opting for union, and the Ansar supporting full Independence with help from Great Britain. The sectarian leaders were now involved in national politics, and once they were given political and economic benefits together with power, neither of them wanted to give this up. As they participated in politics, their historical hostilities grew, and became threatening to the country’s future. This was neither a strong political position for the Sudanese, nor a good platform for future negotiations with the government.

### **2.3 The Graduate General Congress**

The Graduate’s General Congress was inaugurated in February 1938, and was the first Sudanese political organ. This congress had long traditions, with the first Graduate’s Club being established in 1918.<sup>89</sup> A British official supervised the club, and this was only open to graduates educated above primary level.<sup>90</sup>

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<sup>86</sup> Daly, Holt 2011. P. 88

<sup>87</sup> Ibid: 89

<sup>88</sup> More information on the political parties can be found on page 34.

<sup>89</sup> Daly 1991. P. 79

<sup>90</sup> Ibid: 79

This congress would not have been established if the British did not support it, and there were several reasons why they did. First, as an effort to stop sectarianism in the Sudan, they had approached tribal leaders in order to establish an Advisory Council. The British had experienced from other colonies, that collaborating with tribal forces was more successful than the Intelligentsia. However, this had failed in the Sudan, and they were back co-operating with the Intelligentsia. Second, the uncertainties of war in Europe made it necessary to have backing from the colonies. This turned out to be wise, as the British used colonial forces during the Second World War. Third, it became more apparent that the sectarian forces were influencing the Intelligentsia, and they therefore wished to create a non-sectarian organ where the latter could work with the government.<sup>91</sup> Lastly, two years prior, the new agreement between the Condominium, “the Anglo-Egyptian Treaty”, had led to huge reactions from the Sudanese Intelligentsia, and therefore they no longer believed that this group would remain silent in political affairs.<sup>92</sup>

According to Gabriel Warburg, it was naïve to think that the Congress could be an alternative to sectarian influenced politics.<sup>93</sup> Regardless of how highly educated they were, the Intelligentsia still had a sectarian affiliation. In some cases their loyalty was personal, which made secular politics in the Sudan virtually impossible to accomplish. As the 1940s were approaching, definite war clouds were gathering over Europe, and when war broke out, politics in Sudan was occupied with this. This was not without exceptions however, as domestic politics and visions of independence also started to gain a foothold.

## **2.4 The Emergence of Political Parties**

Even though the 1940s were characterised by war, important political steps were taken in the Sudan, represented by the creation of new political parties. In 1943, the Ashigga (renamed in the 1950s as The National Unionist Party) was created as the first genuine political party. This party was led by Ismail al-Azhari, and they favoured union with Egypt.<sup>94</sup> A year later the party gained the tactical support of Sayyid Ali al-Mirghani, whose sect had close ties with Egypt.<sup>95</sup> Two years later, moderate supporters of Sayyid Abd al-Rahman al-Mahdi followed, and created the Umma Party. This party was created under the patronage of the Sayyid, and

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<sup>91</sup> Warburg 2003. P. 110

<sup>92</sup> Ibid:110

<sup>93</sup> Warburg 2003. P. 111

<sup>94</sup> Holt, Daly 2011. P. 101

<sup>95</sup> Ibid: 101

they took the opposite stand and opted for Independence through the help of the British.<sup>96</sup> However, the congress's influence was soon replaced by the sectarian parties, and it ceased to play a role in Sudanese society after 1946. As a result, the Umma and the Ashigga became the dominant organisations in political life, with the two Sayyids pulling all the strings.<sup>97</sup> In 1946, the Communist Party, called the Sudanese Movement for National Liberation was founded. The Sudanese Muslim Brotherhood was founded at the end of the 1940s, as an independent student organisation at the University of Khartoum. It was initially called the Islamic Liberation Movement, before it was renamed the Muslim Brotherhood in 1954.<sup>98</sup> The Islamic Charter Front was established in October 1964, with Hassan al-Turabi as secretary general.<sup>99</sup> The Islamic Charter front was renamed National Islamic Front (NIF) in 1983.<sup>100</sup>

## 2.5 The Southern Dilemma

*“The Nile steamer’s slow journey up-river was like a time machine’s into a dark and silent past, and the region and its peoples seemed a visible reminder of the recent and precarious emergence of humanity from a morally and materially primitive state.”<sup>101</sup>*

This was a common description from the members of the central government, of the vast southern region, which in the 1920s was only seen as an unhappy result of imperial politics that added nothing of benefit to the country as a whole, but drained it of scarce resources.<sup>102</sup> The first two decades of British rule had been met with increasing local opposition, and the British tactics were therefore pacification, not administration. Ignorant of local languages and cultures, the natives only saw the British as intruders, who raided and taxed, who promised protection but never provided it. As enumerated by Martin Daly, there was no economic development, no real administration. Education was left to missionaries, and from a British perspective, the criterion for successful rule was simply order.<sup>103</sup> This was in strong opposition to the North, where Sudanisation and political awareness had emerged. From the beginning, a preference for the northern region and its residents had prevailed, sometimes explained by the close geographical proximity to Egypt, a more hospitable climate and a

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<sup>96</sup> Ibid: 101

<sup>97</sup> Warburg 2003. P. 124

<sup>98</sup> Tønnessen, Liv 2010. “Moderation in reverse? The Contradictory Political Experience of Islamism in Sudan (1989-2011).” Unpublished article. P. 6

<sup>99</sup> Ibid: P. 6

<sup>100</sup> Ibid: P. 8

<sup>101</sup> Daly, Martin W. 1986. *Empire on the Nile. The Anglo-Egyptian Sudan 1898-1934*. Cambridge University Press, Cambridge. P. 396

<sup>102</sup> Daly 1986. P. 396

<sup>103</sup> Ibid: 396-397

similarity in culture, religion and language. One major concern for the British was finding methods to control the spread of Islam in the South. In 1922, under the terms of The Passport and Permits Ordinance, the entire South, Darfur and parts of Kassala and the White Nile district were closed, indicating a security concern.<sup>104</sup> However, a renewed faith for the South came in the 1940s, when this region received more attention. In September 1942, the British government in Sudan contemplated new negotiations with the Egyptians, two issues became decisive; i) an incomplete political development, and ii) the cleavage between the Northern and Southern Sudan.<sup>105</sup> Southern administrators complained about neglect, though they were not listened to. It was not only the southerners who had expressed grievances of marginalisation, the Graduate's Congress had also complained, and in its 1942 memorandum, they had specific points, wishing for a closer relationship between the regions.<sup>106</sup> Real progress towards unification came in April 1947, when the British government decided to hold a southern administrative conference in Juba.<sup>107</sup> It convened on the 12<sup>th</sup> June 1947, and the goal of the Juba Conference was to discuss ways of integrating the South with "the rest of the world".<sup>108</sup> The Juba Conference was the first real forum where the southerners were able to express their views on political development.<sup>109</sup> The minutes from this conference have provided much information about these topics. Summarised, there were three main opinions expressed by the southerners.<sup>110</sup> Firstly, they saw the Sudan as one country. Secondly, they had not advanced to the levels of the northerners and they wanted an Advisory Council in the South to gain experience before joining the northern political life.<sup>111</sup> Thirdly, it was also expressed by one participant that the southerners should learn under the British Administration, because northerners could not understand the needs of Southerners.<sup>112</sup> Most of these arguments were resisted by the northern representatives, loudest by Mohamed Saleh Eff. Shingeiti.<sup>113</sup> The next day, the atmosphere was completely changed, as several participants from the southern side had fundamentally changed their minds when the meeting

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<sup>104</sup> Daly 1986. P. 405

<sup>105</sup> Daly 1991. P. 235

<sup>106</sup> Ibid: 235

<sup>107</sup> Ibid: 239

<sup>108</sup> Ibid: 239

<sup>109</sup> The agenda for the conference was to discuss the recommendations of the Sudan Administration Conference, southern participation in a proposed Legislative Assembly, safeguards for the South, an Advisory Council for the South, and political development in the Sudan.

<sup>110</sup> Also known as protocol or informal notes which are instantly written record of a meeting or hearing.

<sup>111</sup> Juba Conference 1947. Minutes if [sic] the preliminary meeting of the members referring [sic] to civil secretary's memorandum. P. 9. Available at:

<http://www.gurtong.net/LinkClick.aspx?fileticket=OBZ%2B7v1SXis%3D&tabid=124> [Last accessed 04.05.14]

<sup>112</sup> Juba Conference 1947. P. 7. Expressed by Chief Cir Rehan.

<sup>113</sup> Juba Conference 1947.

resumed the next day. Collins interprets this as a result of Shingeiti's strong efforts during the evening to intimidate and convince them of joining the North.<sup>114</sup> And indeed, as expressed by James Tembura, Judge Shingeiti had said that if they did not do so (participate in the Legislative Assembly in Khartoum) they would have no say in the future Government of the Sudan.<sup>115</sup>

The period of isolation ended after the Juba Conference; the borders were opened, religious freedom pronounced, and salaries were equalised for southerners and northerners doing the same job.<sup>116</sup> However, future political involvement would only bring dissatisfaction to the southern representatives in the North. In 1955, Southern members of parliament put forward a condition for supporting full independence, in exchange for consideration of their proposal for a federal system. The northern politicians decided to go along with the proposal, and the motion for independence was passed unanimously.

## **2.6 The End of the Condominium**

The last years of the Condominium included a more efficient Sudanisation-process, in order to prepare the country for Independence. The Legislative Assembly, opened in December 1948, and experienced intense political activity and debates concerning self-government. After the parliament opened in January 1954, the House of Representatives unanimously adopted a declaration of Sudanese independence on the 19<sup>th</sup> December 1955, concurred by the Senate on the 22<sup>nd</sup>. The fact that this motion was passed unanimously by northern and southern members, indicates the seriousness with which it was taken.<sup>117</sup> The British Governor General, who had been at home on Christmas vacation, was advised not to return, as actions to terminate the Condominium were undertaken. On the 31<sup>st</sup> December 1955, the house and the senate adopted the Self-Government Statute, and a ceremony was hurriedly organised for the next day.

In a private ceremony, British and Egyptian representatives delivered the documents, formally recognising the new state. The Condominium flags were lowered, simultaneously as the new Sudanese flag was raised.<sup>118</sup> As well as Sudanese politicians, the ceremony was

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<sup>114</sup> Collins 2003. *A history of modern Sudan*. Cambridge University Press. New York. P. 57

<sup>115</sup> Juba Conference 1947. P. 18

<sup>116</sup> Alier, Abel 1990. *Southern Sudan, Too many agreements dishonored*. Ithaca Press. Reading. P. 21. Northern officials working in the South at the time were receiving salaries and wages much higher than those received by the Southerners. This had become resented, and was an important topic at the Conference.

<sup>117</sup> Daly, 1991. P. 392

<sup>118</sup> *Ibid*: 393-394



witnessed by the sectarian leaders; “*The two sayyids were true to form: Sayyid Ali al-Mirghani watched silently from the Palace; Sayyid Abd al-Rahman al-Mahdi, embracing al-Azhari, burst into tears, then either fainted or suffered a mild heart attack and had to be removed to his Rolls Royce*”.<sup>119</sup>

## 2.7 The Road Ahead

When the Sudan government left, they left behind political institutions, central and local bureaucracies, and a liberal-democratic system of government, which was highly recognised by the Intelligentsia, and which they wished to continue. However, in the post-independence world, a new relationship between the state and its’ citizens prevailed, and the ways in which to operate this relationship produced less agreement.

A persistent attempt at state and nation-building has been visible in Sudans’s post-colonial development. State-building refers to the development of government institutions and the laws to govern them, whilst nation-building refers to the process of constructing a national identity, often to overcome differences and counteract alternative sources of identity and loyalties.<sup>120</sup> Searching for constructive ways to deal with the country’s diversities: multiple religions, ethnicities, different languages and cultures, have been especially important in the post-colonial Sudan. In an effort to overcome diversity, strong efforts to unite the disparate peoples and regions of the country around Islam have been pursued by all national governments since Independence.<sup>121</sup> This has produced a second theme in the nation-building process, which has been resistance to these policies. The peripheral regions in the North have commonly chosen to attach themselves to elements of the central elite and have given their votes or military assistance in return for political or commercial positions.<sup>122</sup> However, this strategy has not been successful throughout the Sudan, as South Sudan began their own state-building process based on a different identity, in opposition to Khartoum. This led to the outbreak of civil war already in 1955, which ultimately led to South Sudan’s Independence in 2011. The rebellion from the South was an example of the central state’s inability to dominate its territory. In order to keep control over the vast area, they have relied upon patron-client relationship and military power as a means of state-building. This has encouraged intense

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<sup>119</sup> Ibid: 394

<sup>120</sup> Gylver, Ragnhild 2012. *Nasjonsbygging i Sør-Sudan. Likehet, Mangfold og den Etniske Kabalen*. Master thesis. University of Tromsø.P. 6

<sup>121</sup> Sørbø, Gunnar – Ahmed, Abdel Ghaffar M. (eds.) 2013. *Sudan Divided. Continuing Conflict in a Contested State*. Palgrave Macmillan. New York. P. 3

<sup>122</sup> Ibid: P. 3

competition between rival groups in the Sudan, highlighting the heterogeneity in the Sudanese society.<sup>123</sup>

### 2.7.1 The Relationship between Constitutions and Nation-Building

The constitutional history of the independent Sudan has been characterised by the search for a permanent constitution. Constitutional lawyer Peter Nyot Kok (southerner) is discussing the relationship between constitutions and nation-building in the Sudan. He writes that the permanent constitution the country has been looking for is one that results from a national consensus on the fundamentals of state and nation-building.<sup>124</sup> The fundamentals, he argues, includes nature of the state, system of governance, human rights, supremacy of the rule of law, mechanisms and procedures of changing government and the constitution itself.<sup>125</sup> For the Sudanese, the unattainability of such a permanent constitution seems to lie in the irreconcilable nature of the social forces in the country, and according to Kok, constitution-making in the Sudan has been a clash rather than a synthesis of two main visions of state and nation-building: i) the conservative-hegemonic, and ii) the restructural-redistributive visions.<sup>126</sup>

The representatives of the social forces that benefitted from colonialism and inherited power from the colonialists hold the first vision.<sup>127</sup> This group is determined to keep this privileged position and they strive to build the state and the nation in their image. These representatives are organised in the Umma party, Democratic Unionist party, and the Muslim Brothers, which today is organised in the National Congress Party (NCP) and Popular Congress Party (PCP). This vision is also shared by a large number of army officers from the North and Central Sudan.<sup>128</sup> Through the process of constitution-making, this force has insisted on a centralised government with a minimum of decentralisation, as well as a foundation based upon an Islamic, Arabic culture. Continuing economic development and keeping the economic resources inside the northern region has been an addition goal.<sup>129</sup> These principles have shown themselves in the constitutional documents through Islam as national religion, Sharia as the main source of law, Arabic as official language and less power to the peripheral regions. These dominant policies have met opposition in Khartoum, especially by the

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<sup>123</sup> Ibid: P. 5

<sup>124</sup> Kok, Peter Nyot 1996. Governance and Conflict in the Sudan, 1985-1999. Analysis, Evaluation and Documentation. Deutsches Orient-Institut. Hamburg. P. 117

<sup>125</sup> Ibid: 117

<sup>126</sup> Ibid: 118

<sup>127</sup> Ibid: 118

<sup>128</sup> Ibid: 118

<sup>129</sup> Ibid: 118

Sudanese Communist Party. Other forms of opposition have been expressed through walk-outs, boycotting of constitutional committees and armed struggles. The struggle for political and economic power amongst the privileged groups in Sudan have led to alliances made despite disagreements, and political and personal modifications have been made in order to win support. The reality is therefore that the northern elite is not completely consolidated, however, they are consolidated enough to remain in power.

The restructural-redistributive vision of state and nation-building is in almost complete opposition to the first vision. The social forces that voiced this view are the ones who received the raw deal from the colonial and post-colonial regimes.<sup>130</sup> They can be found throughout the marginalised Sudan, and contrary to popular belief, they are also widely represented in the northern region. Many political parties and movements representing these areas have fronted a restructural-redistributive vision for many years. Various movements from the South have also called for separation on the grounds of oppression from several regimes. The Sudan People's Liberation Movement/Army (SPLM/A) have, since the 1980s, articulated this vision in terms of either a secular, federal or con-federal Sudan, where wealth can be fairly distributed throughout the country, with a special emphasis on development in the neglected areas.<sup>131</sup> The northern elite has accommodated some of these demands, however changes have only been implemented for short periods of time, as the elite always have returned to their conservative-hegemonic vision in order to stay in power. Kok concludes with *"the clash between the two main visions has been at the root of all these constitutional stalemates during the era of liberal democracy and the root of the armed conflict under authoritarian regimes"*.<sup>132</sup>

### 2.7.2 Inequality and Marginalisation in the Independent Sudan

In addition to the opposing visions of nation-building, two other elements have characterised the post-colonial development. Inequality and marginalisation of regions in the Sudan has become an element of dissatisfaction. However, this was visible in Sudan long before Independence. As a result of the Anglo-Egyptian strategy "growth pole", a centralisation of investments in favour of one region was initiated, in order to create centres of growth. This policy was implemented in the capital Khartoum and the immediate surrounding areas, which

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<sup>130</sup> Ibid: 119

<sup>131</sup> Kok, 1996. P. 119

<sup>132</sup> Ibid: 120

led to a centralisation of the political leadership there as well.<sup>133</sup> Economic, political, educational and social development has “flourished” around Khartoum, whilst other regions gained little development themselves, nor shared the benefits from the northern development. This unevenness has been a basic ingredient of the Sudanese conflict.<sup>134</sup>

Marginalisation was visible in the political arena as well, where the Umma Party and Democratic Unionist Party have dominated political power after independence, only to be side lined by the military regime of Jaafar Numayri (1969-1983) and the National Islamic Front, who together with General al-Bashir took power in 1989. One of the main features of Sudanese politics has been the powerful influence of religion. Politics has been dominated by factionalism, particularly well illustrated between the partisans of an Islamic order (in the North) and a secular order (in the South).<sup>135</sup>

Historically, South Sudan has been the most powerful oppositional group, stated when the region achieved independence in 2011 after almost sixty years in opposition. Secularism, equal rights, federalism and self-government are some of the issues they have been fighting for, and not only in a context of politics and national unity has this opposition been challenging, it has also been contested in the constitution-making processes. Regions like Nuba Mountains, Darfur, Blue Nile and eastern Sudan have shared their views and grievances, though they have not been able to establish a strong leadership like the one in the South.

Southern Sudan was not always as united as it was in 2011. The region is a patchwork of ethnic and religious affiliations, with ethnic tension, especially between the Dinka and the Equatorian tribes. Many Equatorians feared that the far more numerous Dinka would dominate any political and military arrangements in the South, and this has affected the regions ability to establish strong political and military organisations.<sup>136</sup> However, from 1956 until 2011, the South was able to unify over one matter: its abhorrence of successive Khartoum government’s policy of forced Arabisation and Islamisation.<sup>137</sup>

During the first civil war (the Anyanya) the South was unable to create a strong leadership because of tribal rivalries amongst the Anyanya commanders and politicians, and therefore

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<sup>133</sup> Warburg, Gabriel R. 1992. *Historical Discord in the Nile Valley*. Northwestern University Press. Evanston, Illinois. P. 130

<sup>134</sup> Sørbo – Ahmed (eds.) 2013. P. 4

<sup>135</sup> Ibid: 5

<sup>136</sup> Natsios 2012. P. 60

<sup>137</sup> Ibid:13

unable to form any unified military and political organisation.<sup>138</sup> By 1964, the South counted 5000 troops, and managed to cause some trouble and insecurity in the South, including harassment of northern administrators. However, they did not represent a real threat to the northern administrative control of the South.<sup>139</sup> Following Black Sunday in December 1964, peace negotiations were initiated between northern and southern political leaders, but no real results came out of them, partly because the southern representatives failed to agree internally.<sup>140</sup> The Anyanya revolt continued. The civil war took a new turn in 1967 when Joseph Lagu, an Equatorian, succeeded in unifying the military under his control, and eventually grew strong enough to side line the southern politicians, and thus eliminating Southern political disagreement. The last years before the signing of the Addis Ababa Agreement (AAA) in 1972, President Numayri had welcomed the southerner Abel Alier, a Dinka lawyer, into his government, and he participated actively in the peace negotiations. One of the results from the AAA was regional independence with a High Executive Council acting as the top policy making body in the new Southern Regional Government. As Abel Alier became the first President in this council, it sparked a rivalry between Lagu and Alier, who's competition for power weakened the South's semiautonomous status.<sup>141</sup>

The second civil war, which resurfaced in 1983, had a completely different southern leadership. It was led by the late John Garang de Mabior who was able to bridge the gap between the military and the political wings of the southern movement. On July 1983, Garang announced as their Commander-in-Chief the creation of the unified Sudan People's Liberation Army and Sudan People's Liberation Movement (SPLA/M).<sup>142</sup> He led the SPLM/A during the Second Civil War in the 1980s and briefly served as First Vice President in the Sudan after signing the Comprehensive Peace Agreement (CPA) in 2005. He was an important contributor to unity and national politics until his death in 2005.<sup>143</sup>

Alongside the development of the political and military opposition, southern demands and goals have changed over the years. Their focus started on distribution of economic surpluses and government positions, and then shifted to identity, territorial claims and self-

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<sup>138</sup> Ibid: 46

<sup>139</sup> Ibid: 44

<sup>140</sup> Black Sunday is the name of a riot which occurred in Khartoum in December 1964. A crowd of southerners living in Khartoum had gathered to welcome back Clement Mboro (first southerner appointed to a senior cabinet post). His flight was delayed and rumors spread that he had been assassinated, which led to southerners going rampage across the capital, killing Arabs.

<sup>141</sup> Natsios 2012. P. 57-58

<sup>142</sup> Ibid: 66

<sup>143</sup> He was killed in a helicopter crash three weeks after entering this position.

determination. The region ended up demanding political self-rule, option of autonomy and finally independence, which was achieved after a southern referendum in 2011.<sup>144</sup>

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<sup>144</sup> Sørbø – Ahmed (eds.) 2013. P. 13

### 3 Constitutional Development From 1956-1985

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The history of Sudan before Independence can be divided into two periods: pre- and post-Second World War. Before the Second World War, the Sudan were following the Condominium's policy without much Sudanese involvement. The British quickly came to dominate, whilst they focused upon calming down the religious forces in the North, considering the Ansar sect most dangerous. Essentially, the Sudan was governed by the British strategy of "divide and rule", whereby manipulating the religious forces in the country became an important strategy. Furthermore, sealing of the southern region to avoid Islamic preaching from reaching the South led to the "Closed District Ordinance", which was introduced in the 1920s. This created a separation between the two parts of the country, and the consequences of this policy followed the Sudan up to present day. The reason why the history of this "separation" is important is not only because it led to Africa's longest civil war, but also because it has created so many challenges concerning unity and a Constitutional agreement in Sudan.

#### 3.1 Towards an Independence Constitution

During the aftermath of the Second World War, anti-imperialistic ideology was flourishing in the West, and nationalistic movements were growing in the colonies. The colonies were demanding more representation, and gradually this wish for independence became more and more realistic. The rapid growth of Sudanese nationalism during the war followed this pattern. The co-dominion had provided education for some Sudanese; and this group, the Intelligentsia, fronted the nationalist movement. As mentioned in Chapter 2, Sudanisation was a policy implemented to include more Sudanese in central government, and thus preparing them for the ultimate task of governing themselves. As a part of this Sudanisation process, more Sudanese were needed in the central administration.<sup>145</sup> In 1946, a conference was held in Khartoum to discuss a closer collaboration between Sudanese and the Central Government.<sup>146</sup> The agenda for this conference involved finding methods for developing the present Advisory Council, along with integrating more Sudanese into other Central Government Boards, Councils and Committees.<sup>147</sup> The government and Sudanese were well represented at this

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<sup>145</sup> Sudan Administration Conference. 1946.

<sup>146</sup> Ibid.

<sup>147</sup> Ibid: 1

conference however no southerners were present. The committee recommended a transformation of the Advisory Council into a General Assembly with legislative, financial and administrative functions, thus giving it real political influence.<sup>148</sup> Remarks on southern development were still shy, as they argued that this province had to look to the North for developing itself both socially and economically. However, there was an idea that to achieve *one* Sudanese people, the southerners also had to be included.<sup>149</sup> These attitudes illustrate a northern desire to keep the country united, and a wish to create a platform where all Sudanese could meet. However, by not including the southerners in different political forums, such as this conference, the already existing distrust and neglect felt by the southerners was further reinforced.

The historical impact of the committee's work became evident over the following years. The British were reporting on the Sudanese's growing interest in domestic politics, and two years later, on the 23<sup>rd</sup> of December 1948, The Legislative Assembly was opened.<sup>150</sup> Furthermore, the old Governor-General's council (established in 1902) was transformed into an Executive Council with twelve members, whereby six of them were Sudanese. They held their opening meeting on the 22<sup>nd</sup> of December 1948.<sup>151</sup> To multiple members of the Intelligentsia, this was seen as a victory. Others however, held a different view. The political party Ashigga, and other unionists were sceptical about this progress, because the British had initiated these notions. In March 1948, the Graduate Congress, (which was dominated by unionists) announced their intentions of boycotting the Legislative Assembly.<sup>152</sup> This continued disagreement internally amongst the Sudanese political leadership resulted in uncertainty regarding the country's independence, as any political advancement was met with enthusiasm by the pro-independent wing, and with dissatisfaction by the pro-unity wing.<sup>153</sup> Despite internal struggle, the work towards a new constitution continued throughout the last years of the 1940s and into the 1950s. In 1951, the Legislative Assembly decided the formation of a new Constitution Amendment Commission, which was set up on 31<sup>st</sup> March.<sup>154</sup> This new commission had members from all of the political parties, except the Ashigga, who again refused to participate. This meant that the British attempt at representative participation was

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<sup>148</sup> Sudan Administration Conference. 1946. P. 3

<sup>149</sup> Ibid: 2

<sup>150</sup> Report on the Administration of the Sudan for the year 1948. 1951. Chapter 1, P. 1

<sup>151</sup> Ibid: 1

<sup>152</sup> Ibid: 1

<sup>153</sup> Documents concerning Constitutional Development in the Sudan (...). 1953. P. 3

<sup>154</sup> Report on the Administration of the Sudan for the year 1950-51. 1956. Chapter 1, p. 1



not successful, and the unionists had now boycotted two political institutions.<sup>155</sup> The British report from 1950-51 is vague about the achievements of the commission: «*The Commission achieved a great deal and made many important resolutions for a future constitution for the Sudan*».<sup>156</sup> However, when considering the unstable political climate at the time, a lack of progress is understandable. In October 1951, the commission was dissolved as a result of the abrogation by the Egyptian Government of the Condominium agreement, and the 1936 Treaty.<sup>157</sup> A new report from the British two years later (in 1953) elaborated on the further work of the commission, and stated that they had drafted a proposal for “*An order to provide full Self-Government in the Sudan*”.<sup>158</sup> What is not mentioned in the report however, was the southern point of view. A southern request for constitutional guarantees whether they opted for separation or unity was presented, but politely refused by the other members of the commission, resulting in the southern member resigning in protest.<sup>159</sup> This indicates a commission even less representative than described by the British Report. Furthermore, as the Legislative Assembly had approved this draft proposed by the commission in April 1952, followed by an agreement between the British and Egyptian governments on self-Government and Self-Determination for the Sudan in 1953, the northern and southern representatives was not in an agreement about the country’s future.<sup>160</sup> The Southern Liberal Party had won 22 out of 97 seats in the general elections in 1953, yet no northern party was willing to support the idea of federation, which was requested by nearly every southern Members of Parliament. Consequently, in October 1954, southerners held their own conference in Juba where they decided that the South could only remain united to the North under a federal government.<sup>161</sup>

Even though these events brought the Sudanese closer to Independence, it was still perceived as slow-paced, which led to some frustration and impatience amongst the Sudanese. There are however, two things that can explain this. First, the struggling relationship between the co-dominion partners was time consuming, and was further weakened after the UN Security Council refused to support the Egyptian claim for abrogating the 1936 Agreement.<sup>162</sup> Second,

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<sup>155</sup> Representative participation was defined as participation by the northern political parties. Taken the whole of Sudan in consideration, this definition is hardly representative.

<sup>156</sup> Report on the Administration of the Sudan for the year 1950-51. 1956. Chapter 1, P. 1

<sup>157</sup> Ibid: Chapter 1, P. 1

<sup>158</sup> Documents concerning the Constitutional Development in the Sudan (...). 1953. P. 7

<sup>159</sup> Warburg 2003. P.139. The composition of the southerners presented at the Juba Conference in 1954 is described as “Southerners of all shades of opinion”. No further description is given; however, it is reasonable to assume that Southern members of Parliament was represented there, as they agreed to vote for independence because the northern politician agreed to consider their proposal for federal status for the South.

<sup>160</sup> Self-Government Statute 1953.

<sup>161</sup> Warburg 2003. P. 139.

<sup>162</sup> Woodward, Peter 1979. *Condominium and Sudanese Nationalism*. Rex Collings Ltd. London. P. 75

it was the fact that the British did not believe they would leave the Sudan for many years to come. James Robertson, a civil-secretary from 1945-1953, expressed little faith in the Sudanese's ability to govern themselves, and according to him, without British help, the Sudanese would gradually relapse.<sup>163</sup> The Self-Government Statute did signal the beginning of foreign withdrawal; however most of the power was given to the Governor-General as he was the Supreme Constitutional Authority and the Commander-in-Chief of the Sudan Defence Force.<sup>164</sup> These factors indicate the uncertainties of the time, and that no one expected to leave just two years later. In fact, when the British were analysing the Sudanisation process, no one, including Robertson, expected a reduction in the British political staff until at least 1964.<sup>165</sup>

When the agreement on Self-Government and Self-Determination was signed, other political institutions had to be created in order to prepare for Independence. The Sudanese parliament opened in January 1954, and the National Unionist Party (NUP), led by Isma'il al-Azhari, had won the election in 1953. Isma'il al-Azhari therefore became the country's first Prime Minister.<sup>166</sup> In August 1955, the parliament passed a resolution demanding evacuation of British and Egyptian forces. Conversely, as steps towards Independence were taken in Khartoum, a revolt broke out on 18<sup>th</sup> August 1955 amongst the Equatorial corps at Torit, signifying the beginning of the Sudanese civil war. In order to overcome southern suspicion, Northern politicians promised to consider federalism after independence, which would include some type of autonomy for the region.<sup>167</sup> Perceived as a small victory, the southerner voted for a united and independent Sudan. On the 19<sup>th</sup> December, the lower house resolved unanimously to declare independence for the country, and the Senate adopted this motion on the 22<sup>nd</sup> December.<sup>168</sup> The English version announced the intent of the Sudan to become a sovereign state, whilst the Arabic version said it had already become one.<sup>169</sup> It appears that the Sudanese had taken a stand and were therefore ready to take control of their country. These events also show that once the northern political parties agreed on the country's future, steps towards implementing independence were quickly taken. The British began preparations for departure, and the Governor-General's office was closed at 2pm on 31. December 1955.<sup>170</sup>

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<sup>163</sup> Daly 1991. P. 247

<sup>164</sup> The Self-Government Statute. 1953. Chapter III, Article 12.-1. P. 17

<sup>165</sup> Daly 1991. P.252

<sup>166</sup> Holt, Daly 2011. P. 110

<sup>167</sup> Warburg 2003. P. 140

<sup>168</sup> Holt, Daly 2011. P. 112

<sup>169</sup> Daly 1991. P. 392

<sup>170</sup> Ibid: 393

On that day, the House and the Senate adopted the 1953 Self-Government Statute as a Transitional Constitution, under which the parliamentary regime would continue to govern. A five-man Supreme Commission replaced the powers of the Governor-General. They were elected by a parliament composed of an indirectly elected Senate and popularly elected House of Representatives. The Transitional Constitution allocated executive powers to the prime minister, who was nominated by the House of Representatives and confirmed in office by the Supreme Commission.<sup>171</sup> The Sudan became a sovereign state on the 1<sup>st</sup> January 1956.

### **3.2 The First Years of Independence (1956-1958)**

The implementation of the Transitional Constitution proclaimed the country as self-governing, stating the importance of political independence and territorial sovereignty. The new republic was recognised by foreign governments, and they became members of the Arab League and United Nations, and thus, this Constitution was a symbol of independence. Sudan achieved this because the country's political forces were able to join hands and agree on one goal for the country. Having said that, a unified political elite is of rare occurrence in Sudanese history. Soon after independence, the political landscape was infiltrated by personal ambitions, political and sectarian rivalry. Mohamed Ahmed Maghoub, former Prime Minister of the Sudan (1965, 1967-69), emphasised one issue as pivotal: *“having either worked for, or opposed, Independence, the parties found themselves without any particular aim once it was achieved”*.<sup>172</sup>

#### **3.2.1 The Politics of Independence**

The last events before the 1<sup>st</sup> January 1956 showed a rush towards independence, leaving many political questions unanswered. Although the country had adopted the 1953 Self-Government Statute as their transitional constitution, the political parties had not agreed on the form and content of a permanent constitution, only promising to draft and adopt a new document as soon as possible.<sup>173</sup>

In February 1956, a coalition government was created with al-Azhari as Prime Minister. However, by increasing his support for a secular government, he alienated the Khatmiyya, and in June 1956 some Khatmiyya members, who had defected from the National Unionist

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<sup>171</sup> Fadlalla, Dr. LL.M Mohamed H. 2004. *Short History of Sudan*. iUniverse, Inc. P. 38-39

<sup>172</sup> Mahgoub, Mohamed Ahmed 1974. *Democracy on Trial. Reflections on Arab and African Politics*. André Deutsch Limited. London. P. 175

<sup>173</sup> An-Na'im, Abdullahi Ahmed 1993. "Constitutional Discourse and the Civil War in the Sudan." In: Daly, Martin W- Sikainga, Ahmad Alawad (eds.) 1993. *Civil War in the Sudan*. British Academic Press. London. P.100

Party, established the People's Democratic Party (PDP) under Mirghani's leadership. This led the Umma and PDP to co-operate in parliament in order to remove al-Azhari and his government. They succeeded in their mission, and with the support of these two parties, backed by the Ansar and Khatmiyya sects, Abd Allah Khalil put together a coalition government on the 5<sup>th</sup> July 1956.<sup>174</sup> Khalil's government faced immediate problems, including unsuccessful discussions on reaching an agreement for a permanent constitution. The Umma-PDP coalition hindered political progress as they fundamentally disagreed on major political issues.<sup>175</sup> The Umma wanted the constitution to institute a presidential form of government. They wanted the Ansar leader Sayyid Abd al-Rahman al-Mahdi to be elected the first President.<sup>176</sup> The PDP on the other hand, wanted a closer relationship with Egypt, as Arab Nationalism and Gamal Abdul Nasser influenced their philosophy.<sup>177</sup>

In September 1956, a committee was set up to begin work on the constitution. The Umma Party, NUP and a number of other groups were represented in the Constituent Assembly, and even though it is not written explicitly, it is likely that representatives from these parties participated in the committee.<sup>178</sup> Immediately, the discussions started around the issue of an Islamic State.<sup>179</sup> The Muslim Brothers was a political group who strongly advocated an Islamic constitution, and they offered their support to any candidate or group who worked towards this goal.<sup>180</sup> Early in 1957, the constitutional committee had decided that Islam was going to be the official religion of the state, and Sharia was to act as *one* of its main sources of legislation.<sup>181</sup> In response to this statement, the sectarian leaders Sayyid Abd al-Rahman al-Mahdi and Sayyid Ali al-Mirghani, joined hands and demanded that the country was to be declared an Islamic Parliamentary Republic, with the Sharia as the main source of legislation.<sup>182</sup> Prime Minister, Ismail al-Azhari then declared that Sudan would be made an Islamic Republic from within Parliament.<sup>183</sup> This statement showed no consideration towards the marginalised South, who wanted a state constructed on federal principles, guaranteed

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<sup>174</sup> Fadlalla 2004. P. 39

<sup>175</sup> Besides disagreeing on the new constitution, they also struggled to agree on how to stabilize the south and encourage economic development.

<sup>176</sup> Fadlalla 2004. P. 40

<sup>177</sup> Ibid:40

<sup>178</sup> Kok 1996. P. 120

<sup>179</sup> Warburg 2003. P. 145

<sup>180</sup> «An Islamic Constitution» Sudanow, November 1979. P. 12

<sup>181</sup> Warburg 2003. P. 145

<sup>182</sup> «An Islamic Constitution» Sudanow, November 1979. P. 12

<sup>183</sup> Ibid: 12. Sudanow stated that Islamil al-Azhari was Prime Minister at the time, replacing Khalil. However, Holt and Daly 2011, and Collins 2008, states that an alliance between al-Azhari and PDP was only rumored at the time. Since the article "An Islamic Constitution" was an overview of the constitutional history of Sudan, it is possible that this was a mistake.

power-sharing, and their cultural and religious rights protected.<sup>184</sup> What this decision showed however, was an exclusive constitution-making process with little consideration for the country's diverse political opinions. An explanation for this decision can be found in the unstable political climate between the northern parties. Weak governments and changing political and sectarian alliances had led to some political stagnation. However, they had found mutual ground when discussing the constitution, as so, implementing an Islamic constitution could have been a measure to acquire *some* political stability. A period of five years was set for the State to be fully Islamised, and for its laws to comply with Sharia. However, there would be no discrimination of non-Muslims, who would enjoy all the rights granted under Muslim law.<sup>185</sup> Not surprisingly, this was unacceptable to the non-Muslims and non-Arab minority in the country, who feared limited rights under an Islamic Constitution and law. Conversely, the Islamist thinker Ahmad Safyy al-Din Awad, argued that Muslims' rights were threatened if the state did not adopt an Islamic Constitution. He stated that Muslims could not observe and abide by any legislation, unless under the rule of Islam. Accordingly, the issue of an Islamic Constitution for Muslims was part and parcel of their basic human rights.<sup>186</sup> Even though the views of Awad did not necessarily represent every northern politician, it shows the complexity of this topic.

The first parliamentary period introduced Islam into the constitutional debates. The South that prior to 1956 had focused mainly on attaining a federal solution for the region, now faced a second contested topic, a topic which would follow the constitutional development for years to come. The draft Constitution was presented to the Constituent Assembly in April 1958. However, due to other engagements, they failed to ratify it before the military coup of General Ibrahim Abboud.<sup>187</sup>

### **3.3 The First Military Regime- General Abboud (1958-1964)**

By mid-1958, a political and an economic crisis were brewing in the Sudan. During the 1958 Parliament elections, new alliances were founded, and as mentioned, the results brought the Umma Party and the People's Democratic Party (PDP) into a new coalition government.<sup>188</sup> This brought the two Sayyids together, but their lack of ability to co-operate soon

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<sup>184</sup> Warburg 2003. P. 145

<sup>185</sup> Ibid: 145

<sup>186</sup> Awad, Ahmad Safyy al-Din, "ma'alm al-dastur al-Islami." In: Sidahmed, Abdel Salam 1997. *Politics and Islam in Contemporary Sudan*. Curzon Press. Surrey. P. 65;

<sup>187</sup> Warburg 2003. P.145

<sup>188</sup> Ibid: 117. PDP was supported by Ali al-Mirghani

prevailed.<sup>189</sup> On 17 November 1958, in the early morning hours, the army took control over key institutions in the capital. The Commander-in-Chief, General Ibrahim Abboud, claimed that the army stepped in to save the country from a chaotic regime, which in itself was probably true.<sup>190</sup> However, following the coup, there was an announcement of a state of emergency, and an authoritarian regime grew forth. Ministers were arrested, political parties were dissolved, and all unions were abolished. Furthermore, the Transitional Constitution was suspended, and power was invested in a 13 member Supreme Council of the Armed forces.<sup>191</sup> All legislative, executive, and judicial powers were delegated to Abboud personally.<sup>192</sup>

### 3.3.1 Abboud's Constitutional Contribution

It is not the author's intention to elaborate on Abboud's rule. However, it is necessary to discuss his constructive attempts in re-instating some democratic institutions.<sup>193</sup> Though an authoritarian, it is often under-communicated in the literature that he made a constitutional contribution. On the 17<sup>th</sup> November 1959, President Abboud announced the formation of a committee, headed by Chief Justice Muhammad Ahmad Abu Rannat, with the mandate to reform the local government system. This was enacted in the Provincial Administration Act of 1960. It provided rural, municipal, and provincial councils with advisory powers on local matters. Advisory does not mean executive, but it opened up for participation. Council membership was partly nominated and partly elected. The retaining officer could reject nominations if he saw them unfit.<sup>194</sup> At the district level, the Inspector of Local Government had executive authority, and he could veto any decision from the Council. In the Provincial Council, the Chairman was the Military Governor, senior army officer and government representative, with the right to veto.<sup>195</sup> This system was flawed, and certainly did not implement democracy throughout the Sudan. However, it did show a willingness for change and opening up for public participation.

Another declaration by the President on 1<sup>st</sup> July 1961 appointed a second Constitutional Commission, again led by Abu Rannat. This commission were to submit proposals for introducing elections at the local level, in order to establish the Central Legislative Council.<sup>196</sup> The Central Council would compose of 72 members, 54 chosen by the Provincial Councils,

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<sup>189</sup> Ibid: 117

<sup>190</sup> Ibid: 117

<sup>191</sup> Daly – Sikainga (eds.) 1993. P.100

<sup>192</sup> Holt, Daly 2011. P. 117

<sup>193</sup> Hasan, Yusuf Fadl 2003. *Studies in Sudanese History*. SUDATeK Limited. Khartoum. P. 181

<sup>194</sup> Ibid: 181

<sup>195</sup> Ibid: 182

<sup>196</sup> Ibid: 182

and 18 by the President. The Speaker and the leader of the Council were appointed senior army officers. This reduced democratic effectiveness, and therefore was not accepted by the Sudanese or the unified opposition, also known as the National Front.<sup>197</sup> With no popular support, this constitutional structure could not survive. Furthermore, securing human rights was not part of this development, opposition in the South was growing and so were their demands. William Deng, Secretary General of The Sudan African Closed District National Union (SACDNU), protested against the President's effort to make a constitution by decree.<sup>198</sup> In a letter from March 1963, he stated that SACDNU represented the political interest of the South and that they wanted to secure self-determination for the region within a framework of Black African Unity.<sup>199</sup> It should be noted that self-determination could also mean independence. This indicated that the organisation wanted a close relationship with the Sub-Saharan countries. Especially as Deng wrote that unless the government withdrew the Central Council Acts of 1962, the organisation would, with the full mandate of the people of the South, intensify the fight for freedom.

Abboud's constitutional efforts were an attempt at decentralisation and distribution of power. This was not through democratic channels, and the institutions he wanted to create were only advisory at best. Even though this can be seen as an effort towards more democracy, the system that he implemented was not perceived as legitimate by the people of Sudan, and thus, Abboud's initiatives were unsuccessful. The situation reached a climax on the 21<sup>st</sup> October 1964 with a student protest at the University of Khartoum. This resulted in military confrontation, and ended with one student shot dead. With this supposed accidental action, the military had gone a step too far.<sup>200</sup> The October Revolution resulted in the overthrow of General Abboud's regime, which was achieved by gradually taking power from the President and his allies. This ended with a transitional government being established on the 30<sup>th</sup> October 1964.

Abboud's personal motives for initiating this process are still unknown, however, the government's failure to create an effective administration and being able to deal with situations effectively lead to greater opposition.<sup>201</sup> The constitutional work during Abboud's

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<sup>197</sup> Ibid: 182. National Front consisted of two fractions: the national front for professionals and the national front of political parties (Umma, DUP, Communist Party, Muslim Brothers).

<sup>198</sup> Deng, William 1963. "General Abboud prepares to make a new constitution by decree."

<sup>199</sup> Deng 1963. P. 3

<sup>200</sup> Hasan, Yusuf Fadl 2003. P. 185

<sup>201</sup> Hassan mentions two situations: resettlement of Nubians after flooding by the Aswan High Dam and the Abboud using military methods for suppressing Southern opposition. For details, see Hassan 2003.

period was directed towards the state structure, and the Islamic discourse that was visible in the previous period, was absent. Yet, President Abboud's policy of Arabisation and Islamisation throughout the country is widely recognised, which indicate that this policy probably would have been included in the constitution as well. Being faced with resistance and opposition in several parts of the country, his constitutional initiatives can be understood as an effort by him to keep power. However, as these institutions were neither representative, nor legitimate nor participatory, his dictatorship was beginning to crumble, leading to his removal.

### **3.4 Return to Democracy 1964-1969**

The second parliamentary period set out to write a permanent constitution. As President Abboud was side lined the 1956 Transitional Constitution, it was now brought back as a temporary solution (with some additional amendments) until a new document could be created.<sup>202</sup> This period witnessed a tremendous effort for creating a new constitution, and this process is characterised by its inclusiveness. Work began immediately.

The National Committee for the constitution was elected by the Constituent Assembly during the government of al-Sadiq al-Mahdi, who came into office in June 1966. The parliamentary period had begun in 1964, which meant that two years passed before any constitutional work was initiated. However, a lot of political attention was directed towards the Round Table Conference of March 1965, and the Twelve Man Committee of June 1965, which explain why some focus was taken away from constitution-making.<sup>203</sup>

The National committee had 44 members, and was composed of seven representatives each from Umma, NUP and PDP; five representatives from ICF and nine from the southern parties together with nine independents. Unfortunately the committee was boycotted by PDP, Sudan African National Union (SANU) and the Southern Front, which meant that the process lacked full participation.<sup>204</sup> Speaker of the Assembly, Mubarak Shadad, headed the committee, and the opening meeting was held on the 12<sup>th</sup> February 1967.<sup>205</sup> In addition, a Technical

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<sup>202</sup> As noted by Balghis Badri, the Transitional Constitution (amended 1964) gave women equal political rights to vote and run for political office, right to education, work and equal payment for equal work. It also preserved the Presidency Council as representing the highest authority of the State, but created the position Head of the Council, and deputy, to be elected by Parliament.

<sup>203</sup> For a detailed analysis on the Round Table Conference and the Twelve Man Committee, see Vambheim 2007.

<sup>204</sup> Sidahmed 1997. P. 234. Sidahmed does not provide an explanation as to why PDP boycotted the committee, however, it can be explained by the coalition government between Umma and NUP.

<sup>205</sup> Ibid: 101



Committee of constitutional studies was formed. Muhammad Ibrahim Khalil led this whilst Hassan al-Turabi served as secretary. This committee had its first meeting on the 22<sup>nd</sup> February 1967.<sup>206</sup> The culmination of these committees produced three draft constitutions, thus showing the efforts put into this work. Furthermore, the work represented a broad spectre of political participation; especially since the southern representatives wrote their own draft. It is very important to emphasise the inclusiveness and collaboration with regards to constitution-writing during this period, even though nothing was transformed into real politics.

The first draft was written by ICF, led by Hassan al-Turabi, and it was a full Islamic Constitution based upon Sharia.<sup>207</sup> The second option was written by the NUP, led by Ismail al-Azhari. The constitution had an Islamic orientation, but it was not strictly constructed on the principles of Islamic Sharia.<sup>208</sup> The third and final contribution came from the southerners in Khartoum. Not surprisingly, it had a secular foundation without a state religion, or any state interference with religious affairs.<sup>209</sup> The National Committee endorsed the second option presented by the NUP. The Draft Constitution was finalised in January 1968, and it included many Islamic elements. This came as no surprise, as the Umma, NUP and ICF had dominated both committees.<sup>210</sup> The document identified the State as founded on Islamic faith, and Islam was declared the official religion of the State. Arabic was identified as the official language.<sup>211</sup> In terms of legislation, the Islamic Sharia was the main source of law.<sup>212</sup> Abdel Salam Sidahmed argues that despite references to Islam, the constitution was secular in its nature, and it is not radical when compared to the previous one.<sup>213</sup> Although these are valid points, the constitution included discriminatory elements towards the broader population, as shown in article 14 under “Directive Principles”: “*The State shall strive to spread religious enlightenment among citizens, and shall eradicate atheism, all kinds of corruption and moral turpitude from society.*”<sup>214</sup> When Islam is implemented as state religion, this article opens up to the spreading of Islam, especially since it sets out to eradicate atheism. Including such an article in the constitution was especially insulting towards southerners, who had experienced

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<sup>206</sup> Ibid: 101

<sup>207</sup> Sidahmed 1997. P. 102

<sup>208</sup> Ibid: 102

<sup>209</sup> Ibid: 102

<sup>210</sup> Ibid: 102

<sup>211</sup> The National Committee for the Constitution. 1968. Translation of draft constitution of the republic of Sudan. Part 1. Article 1, 3, 5. P. 1

<sup>212</sup> The National Committee for the Constitution. 1968. Part 5. Article 113. P. 16

<sup>213</sup> Sidahmed 1997. P. 103

<sup>214</sup> The National Committee for the Constitution. 1968. Part 2. Article 14, P. 2

the Islamisation project initiated by Abboud. The decision to adapt this constitution, which reinforced the conservative-hegemonic policy, contradicted the efforts for national integration being achieved in the committee appointed by the Round-Table Conference (1965). Whilst the draft constitution was supporting a kind of ethnic nationalism based on one language, one culture and one religion, the committee had agreed on preservation of indigenous culture and languages.<sup>215</sup> Furthermore, as William Deng had commented on Abboud' constitutional work and emphasised self-determination as a significant issue for the South, this issue was not accommodated in the constitutional draft. There, a regional system was introduced, however, the majority of all power was controlled by the National Assembly.<sup>216</sup> The parties were not able to agree on the relationship between central and regional power, nor if the south would remain three separate provinces or constitute one large region, as southerners preferred. As a result, Southern members of parliament walked out of the constitutional committee and joined other secular and regional political forces, depriving the committee of its initial legitimacy.

There are some clear differences between this and the previous parliamentary period in terms of constitution-making. Measures to broaden political participation were implemented, which made the process more representative, and inclusive. The results however, were quite similar as the northern parties who dominated the committee agreed over a semi-Islamic constitution. The context both explains and questions this decision. Bitterness and disagreements between the political parties dominated these years, resulting in weak governments yet again. It is therefore interesting that the only thing they managed to agree on was an Islamic constitutional foundation, as it was probably an easier subject than economic development, foreign affairs and the civil war. The fact that the country was in the midst of a civil war is what makes this decision difficult to understand. Northern politicians must have recognised that a Constitution with Islamic element's would not be acceptable. Natali Alwak, a southern representative serving on the Technical Committee, argued that a government system based on religious ideology would jeopardise equality for all citizens, and that real religious freedom cannot be achieved unless the state has a neutral position.<sup>217</sup>

On the 23<sup>rd</sup> May 1969, all the political parties in the Constituent Assembly accepted the principles that Sudan should have an Islamic Presidential constitution, and general elections

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<sup>215</sup> Lesch, Ann Mosely 1998. *The Sudan-Contested National Identities*. Indiana University Press. United States of America. P. 42-43

<sup>216</sup> The National Committee for the Constitution. 1968. Article 176,177. P. 27

<sup>217</sup> Sidahmed 1997. P. 108

were scheduled from January 1970.<sup>218</sup> However, the army stepped in and assumed power once more, this time led by Colonel Jaafar Numayri.

### **3.5 The Jaafar Numayri Years 1969-1985**

Sudan's second constitution was created under the country's second military regime. Colonel Jaafar Numayri has attracted much academic research over the years. His personal shift from a secularist to an Islamist has been extensively written about, and the implementation of Sharia in September 1983, has withstood the test of time as a clear symbol of his time in power.<sup>219</sup> However, during the years prior to this, he was able to negotiate a peace agreement with South Sudan in 1972, which was accompanied by the Permanent Constitution of 1973.

#### **3.5.1 The May Revolution**

A Free Officer movement headed by Colonel Jaafar Numayri led the May Revolution. After securing power, the same exploitations experienced during the Abboud regime began to show again. The Temporary Constitution of 1964 was dissolved, along with the Supreme Council, the Constituent Assembly, the Public Service and the electoral commissions. Public meetings and newspapers were banned temporarily.<sup>220</sup> A Revolutionary Command Council (RCC) of ten was established with Numayri as President. Babikr Awadallah, ex-Chief Justice, was named Prime Minister.<sup>221</sup> Prime Minister Awadallah announced that the new government would be leftist, socialist, but would not be extremist or fanatic.<sup>222</sup> The regime broke with the traditional style of Sudanese politics, when they distanced themselves from sectarian loyalties.<sup>223</sup> The first years after the revolution experienced instability and internal conflicts.<sup>224</sup> The first coup attempt against Numayri came in June 1970, and even though Numayri was arrested, he quickly escaped and reclaimed power. Just a couple of months earlier, the relationship with the Ansar had deteriorated, and an air attack on Aba Island (the Ansar headquarters) ended in massive bloodshed. As Numayri distanced himself from the communist bloc and from sectarian influence, he eliminated political rivals, which resulted in Numayri personally consolidating power.

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<sup>218</sup> Warburg 2003P. 148

<sup>219</sup> The Sharia laws from September 1983 are often referred to as «the September laws», and I will use this description, when referring to Numayri's implementation of Sharia.

<sup>220</sup> Holt, Daly 2011. P. 130

<sup>221</sup> Ibid: 130

<sup>222</sup> Ibid: 130

<sup>223</sup> Ibid: 130

<sup>224</sup> Collins 2008.P. 98

After surviving the coup attempt, a new political strategy was in motion. As Numayri became more politically isolated, he realised that in order to sustain popular support, he needed to be elected President. The legitimacy of a nation's leader based on a military coup was questionable, and Numayri resolved this issue by organising an election.<sup>225</sup> On the 14<sup>th</sup> August 1971 Numayri announced that the RCC had nominated him for presidency, and the election was held on the 10<sup>th</sup> October. After two days of counting votes, the results showed that 98.9 per cent of the votes had gone to Numayri.<sup>226</sup> When summarising the election, the Ministry of Culture and Information wrote:

*“Constant flows of people were pushing their way with almost difficulty through the tremendous gatherings, to exercise [sic] their right of voting. This magnificent spectacular picture demonstrates manifestly the excessive love which these people bore in their hearts for their beloved [sic] leader”.*<sup>227</sup>

### 3.5.2 The Effort for Peace

While the overthrow of the second civilian government occupied most northerners, the civil war in the South was still ongoing. Compared to the previous civilian regime, Numayri had the advantage of being able to enter into peace negotiations as a neutral leader compared to the political parties and this was apparent based on the result he achieved. The Addis Ababa Agreement (AAA) was the result of a peace conference held in Ethiopia in February 1972. This negotiation had participants from both regions, the South being represented by the Southern Sudan Liberation Movement (SSLM).<sup>228</sup> The results of the negotiations in Addis Ababa turned out to be both a compromise, and an acknowledgement for the southerners. This agreement included many concessions from the northern leadership: it provided regional self-government in the southern province within a united Sudan. It also included a cease-fire agreement in the southern region, which was important security-wise.<sup>229</sup> Furthermore, temporary arrangements for the composition of the People's Armed Forces in the southern region were included.<sup>230</sup> After many years in combat, the South had both military personnel and weapons, which needed to be handled correctly, and a plan was to be set in motion to

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<sup>225</sup> Ibid: 102

<sup>226</sup> Ibid: 102.

<sup>227</sup> The Revolution's constitutional achievements. P 5

<sup>228</sup> The Addis Ababa Agreement on the Problem of South Sudan. 1972. P. 12-13 Available at: [http://peacemaker.un.org/sites/peacemaker.un.org/files/SD\\_720312\\_Addis%20Ababa%20Agreement%20on%20the%20Problem%20of%20South%20Sudan.pdf](http://peacemaker.un.org/sites/peacemaker.un.org/files/SD_720312_Addis%20Ababa%20Agreement%20on%20the%20Problem%20of%20South%20Sudan.pdf). [Last accessed 04.05.14] SSLM represented Josph Lagu, leader of the Anyanya. See Chapter 2 for more information.

<sup>229</sup> The Addis Ababa Agreement on the Problem of South Sudan. 1972. P. 8

<sup>230</sup> Ibid: 9

integrate the southern forces into the national army.<sup>231</sup> The challenge according to Abel Alier, leader of the Government delegation and Minister of Southern Affairs, was the implementation of the agreement.<sup>232</sup> There was a huge difference between the progress made at Addis Ababa and the constitutional committees in Khartoum. Fresh in memory of betrayal, killings and discrimination, the southerners were pessimistic towards the realisation of the peace agreement. Even though difficult topics had been covered, there were no guarantees of how the new constitution would look. The South still had people in exile and in refugee camps outside of the country; with an estimated over half a million southerners displaced inside the South or in northern Sudan.<sup>233</sup> With regards to this, the future would show that the new constitution fulfilled the demands of the South.

### 3.5.3 Constitution Writing

The work on a new constitution was in full swing by 1973, and it was implemented on the 8<sup>th</sup> May 1973. Writing a constitution quickly could be a result of legitimacy needs. The social forces that joined Numayri came from untraditional parts of society. Having sidelined the sectarian affiliated parties and the Sudan Communist Party, Numayri had no choice but to form alliances with the centrist forces. They were found in the military, the civil service, the new commercial bourgeoisie, the trade unions and the civil and military elite of southern Sudan.<sup>234</sup> The main objective of the People's Assembly was to prepare and pass a Draft Constitution in a period of six months.<sup>235</sup> However, instead of the Assembly writing this draft from scratch, the President had already given them a draft to work with, which marks the President's personal participation in the initial process. The general discussions of the Constitution continued from the 24<sup>th</sup> October until the 18<sup>th</sup> November 1972, with a purpose to define the constitution, classify and make a detailed study of the Draft.<sup>236</sup> After weeks of discussions, the Assembly was divided into ten committees, with the intention for each to discuss the constitution by itself, and then present a report with their viewpoints.<sup>237</sup> Simultaneously, a Coordination Committee was established to organise the viewpoints of the ten committees. The chairmen's of the ten committees initially formed this, but other

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<sup>231</sup> Ibid: 10

<sup>232</sup> Alier 1991. P. 124

<sup>233</sup> Ibid: 125

<sup>234</sup> Kok 1996. P.126. This elite had participated in the peace negotiations in 1972, and was therefore a natural alliance partner

<sup>235</sup> The Revolution's constitutional achievements. P. 26

<sup>236</sup> Ibid: 26

<sup>237</sup> Ibid: 26

members supplemented it in the second phase.<sup>238</sup> An additional group branched out of the coordination committee to write down articles agreed upon by the ten committees.

After three months of deliberating the Draft Constitution internally, as well as the coordinating committee producing another draft constitution including the viewpoints of all the Assembly members, they reunited on Saturday 10<sup>th</sup> March 1973, to discuss these deliberations together.<sup>239</sup> Then, from the 10<sup>th</sup> March until Saturday 7<sup>th</sup> April, the committees discussed this new draft over 23 meetings, going over the new articles.<sup>240</sup> After six months of constitution-writing, the Permanent Constitution of the Democratic Republic of the Sudan was passed and received by the President in a ceremony held on Saturday 15<sup>th</sup> of April 1973.<sup>241</sup>

While the constitution-making process during al-Sadiq al-Mahdi's civilian government in the mid-1960s took eleven months to complete, in 1973 the process was finished after six months. Theoretically, this means that both processes can be considered rushed, and thus, it loses some credibility. However, what is significant in both these cases is the level of wide political participation. As southern members of the National Assembly took part in the committees, it was given a broader consensus. Nevertheless, some differences can be pointed out. In the mid-1960s, the process of writing a constitution was inclusive. The document however, did not satisfy the southern politicians as it embraced the conservative-hegemonic vision. In 1973 however, both the process and the document was considered participatory, which resulted in the document being praised by politicians and the people alike. Neither of the constitutions was presented to the people for a national referendum, and it is important to remember that although southerners were participating, other marginalised areas was not given the same opportunity which illustrates that in Sudan, constitution-making was an exclusive project only including selected elites.

The draft constitution that was presented to the National Assembly in 1972, was based on the revised temporary constitution from 1968, as well as constitutions from India, Algeria,

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<sup>238</sup> The Revolution's constitutional achievements. P. 26. No names are specified in the source, but since the committees are chaired by the members of the People's Assembly, it is likely that there are representatives from here that are added.

<sup>239</sup> Ibid: 26

<sup>240</sup> Ibid: 26

<sup>241</sup> Ibid: 27. No date to which this document was written is included. However, it states that the Constitution was now awaiting authentication of the President. This indicates that the constitution was not implemented, as this happened in 8. May 1973.

Tunisia and Egypt.<sup>242</sup> Socialism had a strong foothold in Egypt, and as Tunis and Algeria was one-party states, they could have provided Numayri with regional influence. The debate concerning religion and state, displayed itself in this document whilst the draft declared Islamic Sharia as the *main* source of legislation.<sup>243</sup> This was hardly a new declaration, as the draft from 1967, and the Transitional Constitution had the same emphasis. What is interesting however is their argumentation for it. Explained by the late Dr. Jaafar Moamed Ali Bakheit, Assembly Leader and one of the architects of the constitution, Sharia had been accepted by the International Court of Justice (ICJ), and was therefore legitimate as national legislation.<sup>244</sup> He does not elaborate further on this decision, but it is possible that by referring to the ICJ, they wanted to show that Sharia was completely legitimate as source of legislation. The issue of the Islamic Penal code had not surfaced yet. It is also interesting that they are referring to an institution that is subject to the United Nations when they could have referred to other Arab countries. Again, the purpose could have been to ensure southerners that Sharia was legitimate and accepted by the UN, and thus, should be accepted in Sudan as well. No matter what reasons he had, he clearly saw the benefits of an international “approval”. When the permanent constitution was inaugurated in May 1973, the issue of Sharia was much more compromised. It was stated in article 9 that: “*The Islamic Law and Customs shall be main sources of legislation. Personal matters of non-muslims [sic] shall be governed by their personal law*”.<sup>245</sup> This article therefore created security for the religious minority, securing them the right to trials in their own courts.

Even though the constitution was not approved by a national consensus, it was made clear inside the National Assembly that a special concern towards the South had to be taken.<sup>246</sup> A few Islamists in the Assembly had suggested Islam as the official religion. This suggestion was met with resistance from southern members and other secularist, and in order to agree they ended up recognising all religions and spiritual beliefs.<sup>247</sup> Urging the Assembly to adopt this article, the late Omar al-Hajj Musa, then Leader of the House, advised members to pass the article in order to preserve national unity. He understood that there was no way the southerners would accept Islam as the state religion.<sup>248</sup> This rhetoric inside the National Assembly shows that it was a broad acceptance for the 1973 constitution. It is also apparent

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<sup>242</sup> Collins 2008. P. 116.

<sup>243</sup> “Islam, Blueprint for a new Century?” Sudanow. November 1979. P. 12

<sup>244</sup> Ibid: 12

<sup>245</sup> The Permanent Constitution of the Republic of Sudan. 1973. Part I, Article 9. P. 3

<sup>246</sup> Represented by the members mentioned above

<sup>247</sup> Kok 1996. P.126

<sup>248</sup> Ibid: 127

that the southerners had a stronger position now compared to 1956 and 1964, and that this is most likely due to the AAA. When the constitution was inaugurated on the 8<sup>th</sup> May 1973, a wave of celebration swept through the country. The southern Assembly members received recognitions for their work on behalf of their region, and several political commentators made the point that this was the first exercise of southern political weight in national politics.<sup>249</sup> President Numayri had gained face in the international arena as well. First of all, a successive peace agreement had been signed which ended seventeen years of civil war. The peace agreement brought a new political reality, and therefore the need to constitutionalise the agreement. The constitution recognised the Arab and African entities, side lined Islam and Christianity, and established Regional Self-Government for the South.<sup>250</sup> This historic accommodation was a clear sign of political will in keeping the Sudan united, and the 1973 constitution had managed to resolve the two most contested questions that had made constitution-making so difficult in the past: namely, the status of the South and the question of religion and politics.<sup>251</sup>

Not since independence had the Sudan experienced a secular regime, and its political approach made it much easier to cooperate with the minorities in the country, especially the South. Another challenge seen previously was the strained political relations amongst the northern political parties. Time and time again had shown that cooperation was difficult, and that the North was not able to let go of their conservative-hegemonic vision. President Numayri, who at least initially embraced a more inclusive vision, had the power to side line all opposing political activity which made this process easier. Besides being an inclusive constitution, it also reflected the kind of regime Numayri and his collaborators wanted. The Sudan Socialist Union (SSU) was declared as the only legally recognised political organisation, thus implementing a one-party state.<sup>252</sup> Ideological elements of socialism was reflected in the document, supporting Nathan Brown's theoretical argument that constitutions are sometimes created in order to establish a certain type of national ideology.

#### 3.5.4 Constitutional Weaknesses

During the years following the 1973 Constitution, several flaws and weaknesses in the constitutional text, and the interpretation of it would emerge. The process of creation had been

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<sup>249</sup> "Islam, Blueprint for a new Century?" Sudanow. November 1979 P. 13

<sup>250</sup> The Permanent Constitution of the Republic of Sudan. 1973. Part I, Article 1, 8, 9. Part II, Article 16 (a,b)

<sup>251</sup> Warburg 2003. P. 149

<sup>252</sup> Ibid: 149



participatory to the extent of southern involvement.<sup>253</sup> Its foundation however, was built upon a military regime, and this was reflected in the document. Dr. Jaafar Moamed Ali Bakheit along with Zaki Mustafa and Mansour Khalid, discussed the nature of the presidency, and wanted it to be strong as a counterbalance to the weak parliamentary system that had preceded them.<sup>254</sup> Numayri's ability to make decisions unchallenged was one of the factors that led him to reach an accord in Addis Ababa in 1972. However, as the constitutional writers intended, the People's National Assembly and the Sudan Socialist Union were put in place to check the President's power and make sure that he did not turn into a dictator.<sup>255</sup> The constitution is contradictory on this point. It explains the country's foundations as built on the Socialist Union's principles of democracy, socialism and national unity,<sup>256</sup> yet the President still had executive power, participation in law-making and was the Supreme Commander of the People's Armed Forces.<sup>257</sup> He also appointed and removed all official personnel, such as Officers, Ministers, Diplomats, Public Corporation's.<sup>258</sup> In theory, the People's National Assembly was a legitimate counter pole to the President, even though it was flawed. However, the constitution-writers being in alliance with the President probably saw no reason for restricting his powers further. However, this was to change in the future.

### 3.5.5 The 1975 Amendment

The Permanent Constitution of 1973 was not permanent. The document in its original form withstood two years, after which the once-agreed-upon constitution was amended in 1975, restricting basic human rights and freedom of movement.<sup>259</sup> The political landscape in Sudan changed rapidly, and President Numayri experienced several coup attempts during the 1970s, which ultimately became his reasons for amending the constitution and greatly enhancing his powers of Presidency.<sup>260</sup>

It is customary to amend a constitution as a society changes and develops, over time new laws are made. With regards to this, it is necessary to look at which articles were amended, and of course, what they were amended to. There are two amendments that specifically draw

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<sup>253</sup> Kok 1996, P.126

<sup>254</sup> Woodward 1990. *Sudan 1898-1989, the Unstable State*. Lynne Rienner Publisher Inc. London. P. 148

<sup>255</sup> Ibid: 148

<sup>256</sup> The Permanent Constitution of the Republic of Sudan. 1973. Part I article 4.

<sup>257</sup> Ibid: Part V, article 99.

<sup>258</sup> Ibid: Part V article 100.

<sup>259</sup> The Permanent Constitution of the Sudan (Amendment) 1975.

<sup>260</sup> Fadlall, Ali Suleiman 2011. "Constitution-Making in the Sudan: Past Experiences." P. 6. Available at: [http://unmis.unmissions.org/Portals/UNMIS/Constitution-making%20Symposium/110524\\_Ali%20Suleiman\\_paper\\_dft2.pdf](http://unmis.unmissions.org/Portals/UNMIS/Constitution-making%20Symposium/110524_Ali%20Suleiman_paper_dft2.pdf) [Last accessed 04.05.14]

attention, and this relates to the amendments made to presidential power. Article 81 and 82 of the 1973 constitution defines presidential responsibility, included responsibility over the constitution, protection of the country, the president being a representative of the people's will, and a preserver of freedom, justice and welfare of the people.<sup>261</sup> To both of these articles, the following text was added in 1975: [...]“*and to this effect he may take such action and make such decisions as he deems fit and his decision in this respect shall be binding and valid in accordance to their provisions*”.<sup>262</sup> These two amendments resulted in the President obtaining yet more power.

### 3.5.6 Numayri's Reconciliation Plan

The political isolation instigated by Numayri did not last for long, and over time he realised that he needed new alliances both abroad and at home. As a result, he now turned towards the sectarian leaders. The Reconciliation Plan, which was really Numayri's approach towards the sectarian and religious parties, brought back again the discussion of Islam in the Sudan. The countries intellectuals and reformist started to play a bigger role, and Hassan al-Turabi began participating in the Islamic development under Numayri.<sup>263</sup> This provided the conceptual framework and legal tools for implementing Sharia, and so al-Turabi most willingly entered into cooperation with Numayri, quickly gaining much power. He continued to play an important political part until he was side lined under the al-Beshir government.<sup>264</sup>

### 3.5.7 The Debate on Sharia and the Islamic state

The debates on Sharia and an Islamic state reached a new high during Numayri's year, and it continued to be the subject of much debate in the country. This is visible not only in the academic literature, but also through government records and newspapers that have covered this topic extensively. As part of the National Reconciliation with the Ansar, the discussion of Sharia blossomed. Constitutional reform was part of the reconciliation agreement, and a committee was established to consider the matter.<sup>265</sup> In line with reconciliation came Islamisation. There are disagreements as to why Numayri shifted from secularism to Islamisation. In hindsight, Numayri claimed that this shift happened as early as July 1971,

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<sup>261</sup> The Permanent Constitution of Sudan. 1973. Part 5. Article 81,82. P.15

<sup>262</sup> The Permanent Constitution of Sudan. (Amended) 1975. Article 81,82. P.2

<sup>263</sup> Layish, S. Aharon & Warburg, Gabriel R. 2002. Studies in Islamic Law and Society. The Reinstatement of Islamic law in Sudan under Numayri. Volum 16. Brill ; Leiden ; Boston ; Köln, 2002 Studies in Islamic Law and Society. P. xii

<sup>264</sup> Layish, Warburg 2002. P. xii

<sup>265</sup> Woodward 1990. P. 153

when his ex-colleagues, who staged the communist coup, imprisoned him.<sup>266</sup> After he regained power he performed the Hajj (the official Muslim pilgrimage to Mecca), and while there, he had a most constructive meeting with the Saudi King. Numayri and King Faysal discussed the Sudan and Islam's role in it. His reasons for this meeting might be personal, but there are indications that a financial motivation was present as well. According to Layish and Warburg, Numayri had promised the Saudi King an Islamic Constitution and he claimed to have the backing from the Muslim Brothers.<sup>267</sup> However, after discussion in the People's National Assembly, an Islamic constitution was dismissed.<sup>268</sup> Even though Numayri had talks with the Saudi's it is unlikely that he would have implemented an Islamic Constitution at this point, especially having the AAA signed the previous year.

Steps towards Islamisation of the State were taken four years after implementing the 1973 constitution. Two committees were created in 1977, the Technical Committee which was responsible for undertaking research on Sharia and Islamic jurists (in relation to the individual and his relationship to society), and the General Committee which was to report on legislative and legal changes in general.<sup>269</sup> The memberships in these committees included the Ansar and the Muslim Brothers, which was represented by Hassan al-Turabi.<sup>270</sup> As emphasised previously in this Chapter, the issue of religion and state had been contested during all the previous governments, but Numayri had solved this issue when he accommodated all religions on the basis of equality.<sup>271</sup> However, once this work began, it was met with resistance from the South who did not want to take part in the work of the committees.<sup>272</sup> In 1977, during an interview, Numayri said that "*I am convinced that Islam can be applied in a modern state and that it can be revived without impairing the religious autonomy of non-Moslems*"<sup>273</sup> Religious autonomy was a main issue for southerners, but as they had participated in national politics since Independence, the right to continue this was also of significance. However, the challenges with this were "explained" later that year when al-Turabi was forced to admit that a non-Muslim would never be able to become President.<sup>274</sup>

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<sup>266</sup> Layish, Warburg 2002. P. 30

<sup>267</sup> Ibid: 30

<sup>268</sup> See section 4.5.3 in this chapter for more information.

<sup>269</sup> "Islam, Blueprint for a new Century?" Sudanow. November 1979. P. 13

<sup>270</sup> Ibid: 13

<sup>271</sup> The Permanent Constitution of Sudan. 1973. Part 2. Article 16. P. 4

<sup>272</sup> "Islam, Blueprint for a new Century?" Sudanow. November 1979 P. 14. Sudanow writes that Dr. Francis Deng and Mr. Ambrose Riny agreed to serve on the committees, but rarely took part in the work. Both these men were employed by the Khartoum government.

<sup>273</sup> Interview by Falvio Grimaldi. Sudanow, November 1977 P. 12-13

<sup>274</sup> Viewpoint by Dr. Abdullahi Ahmed El Naiem. Sudanow, November 1977 P. 14

Again, the northern political forces were willing to jeopardise national unity in order to establish an Islamic State, and Numayri himself was willing to make these compromises with the sectarian forces and the Muslim Brothers in order to stay in power. Clearly, personal and religious ambitions triumphed everything else.

### 3.5.8 Implementing Sharia and the end of Numayri

The debate that occurs over this time span is two-fold, with religious- and political rights as the main issues. A conflict between the wish for Sudan to be a modern country, and the wish to bring the laws in conformity with traditional Sharia is quite clearly on the agenda and brings forth a lot of opinions.<sup>275</sup> Three years later, in 1980, a second step towards Islamisation was finished, and by now the process of unifying the Civil and Sharia courts had been completed. In September 1983, Numayri announced in a Presidential Order that Sharia was to be “*the sole guiding force behind the law of the Sudan.*”<sup>276</sup> Not only was the implementation of these laws a direct violation of the AAA, but it would also lead to discrimination of women and non-Muslims. These laws would deny them access to certain types of public office, and they would lack competence to testify in trials for capital offence.<sup>277</sup> Clearly this would bring forth an unfair adjustment of citizenship rights. A more long-term consequence of Numayri’s politics was the beginning of organised armed resistance in the South. This was not only rekindled by the abrogation of AAA, but also failed policies in the past. The first resistance, called Anyanya, was soon superseded by the far more powerful and sophisticated Sudan People’s Liberation Movement/Army (SPLM/A), established in the summer of 1983.<sup>278</sup> SPLM/A would play a significant role in the relationship between the regions from here on.

After the implementation of the September laws, most of the attention was concentrated on the Hudud laws. Public lashings and amputated limbs became clear illustrations of these laws in action, and they were met with despair both abroad and at home. The response from the public was that of surprise and the following quote serves as an interesting insight to the relationship between political and civil life in the Sudan, as politics are characterised as something strictly exclusive:

*”[...] people have tended to hear a lot about Islamisation while at the same time seeing very little in the way of actual results[...]. Consequently, the new laws have taken many people by*

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<sup>275</sup> For an insight to the debate, see “The State of Islam?” Sudanow. November 1979.

<sup>276</sup> Lesch 1998. P. 55

<sup>277</sup> An-Naim, Abdullahi Ahmed 2006. P. 154

<sup>278</sup> Daly, Holt. 2011. P. 134

*surprise simply because, however long these laws have been in the making, the public at large was unaware that any such process was afoot”.*<sup>279</sup>

Numayri’s remaining time was spent isolating himself. He dissolved the People’s Assembly after they hesitated to rubber-stamp drastic constitutional amendments. In January 1985, Mahmud Muhammad Taha, leader of Republican Brothers was executed for heresy, provoking discontent amongst large parts of the population.<sup>280</sup> The National Alliance for National Salvation was formed on 18<sup>th</sup> January 1985, immediately following Taha’s execution. It represented professionals and trade unions that sought to remove Numayri from power. Furthermore, it collaborated with political forces inside the country: SPLM/A, Umma Party, DUP and the Sudanese Communist Party (SCP). They called for a democratic system of government based on the Transitional Constitution from 1956. The charter was finalised as the uprisings against Numayri was under way, endorsed by Umma, DUP and SCP on 4<sup>th</sup> of April.<sup>281</sup> Public protests had begun on 26<sup>th</sup> march 1985, and during the night of 5-6 April, the armed forces seized power, relieving President Numayri of his post.<sup>282</sup>

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<sup>279</sup> “Return to roots.” Sudanow. November 1983. P. 9

<sup>280</sup> Mahmud Muhammad Taha was the leader of republican brothers, which viewed themselves as an Islamic movement, believing in an humane non-legalistic view of Islam and Statehood. For more information on Taha, see Gabriel Warburg 2003, P. 160-165.

<sup>281</sup> Lesch 1998. P. 61

<sup>282</sup> Ibid: 62

## 4 Constitutional Development From 1985-2005

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With the overthrow of President Numayri, the country entered into a new phase, which included a transitional military government, an elected civilian government and finally, the last military regime headed by Umar Hasan Ahmad al-Bashir. As the fall of President Numayri was celebrated in Sudan, many of his contested policies followed into this period which continued to make national politics strained. This last military regime, which toppled the civilian government in 1989 is still in power today, being the longest reigning regime in modern Sudanese history.

### 4.1 The Transitional Government and the Initial Constitutional Progress

The overthrow of President Numayri and the Sudanese Socialist Union on the 6<sup>th</sup> April 1985 was a result of a popular uprising that had been going on since March of the same year.<sup>283</sup> While the President was abroad, the army intervened in the morning hours, and announced over the radio the new political reality. Just like the previous military regimes, statements from the army headquarters followed each other in quick succession; which led to suspension of the constitution, declaration of a state of emergency, closing of the borders and airports, and relieving the President and his ministers of their tasks.<sup>284</sup> However, this military intervention evolved differently compared to the two previous ones. The army, which was led by General Abdel Rahman Sowar el Dahab, was quick to negotiate with the political parties and respond to their demands. The transitional period would last one year, and a 15-man Transitional Military Council (TMC) would be selected to rule during the interim.<sup>285</sup> The council had sovereign and legislative powers, but executive duties were to be performed by a civilian cabinet.<sup>286</sup> On the 25<sup>th</sup> April 1985, the Council of Ministers was installed. Members of the National Alliance gained eleven out of sixteen seats, while three seats were given to the southerners, one representing each region.<sup>287</sup> The TMC elected the Minister of Defence, whilst the Police chose the Interior Minister.<sup>288</sup> Some disappointments in the southern wing

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<sup>283</sup> "Current Events: One-party rule overthrown." Sudanow. April 1985. P. 9

<sup>284</sup> Ibid: 10

<sup>285</sup> Ibid: 11

<sup>286</sup> Ibid: 11

<sup>287</sup> The Alliance of National Forces for National Salvation (National Alliance) was a coalition of mass organisations including trade unions and political parties (Umma, DUP and SCP).

<sup>288</sup> Lesch 1998. P. 63

followed as they had hoped for more representation. However, the fact that the military installed a civilian council was seen as positive. The major problem that faced the current Sudanese government was the unwavering position of the SPLM/A. John Garang was unwilling to negotiate with the military council, demanding a return to civilian rule.<sup>289</sup> Furthermore, the question of southern self-government was still on the table, and the realisation that this was a national matter (because of the new outbreaks of civil war) made it a top priority alongside the controversial Sharia law.<sup>290</sup> Once power was given back to the civilian politicians, these issues became a first priority.

#### 4.1.1 Constitutional Work Begin

The most important legal issue for the new Transitional Government involved the constitution for this transitional period. As both northerners and southerners had participated in the uprisings that led to Numayri's removal, the question on everybody's mind was, "would the constitution be inclusive and allow for an emergent democracy?" or "would it enshrine the values of only one political opinion?"<sup>291</sup> The conservative-hegemonic- and the restructural-redistributive visions were showing itself in this debate.<sup>292</sup>

Work on revising the constitutions from 1956 (amended 1964) was in full motion in May 1985. Brigadier Ahmed Mahmoud led the legal committee, which was also in charge of preparing a draft Charter of National Action for the transitional period.<sup>293</sup> Four months later, on the 10<sup>th</sup> October 1985, the council of Ministers submitted a draft to the TMC, which specified that the Transitional Constitution of 1956 (amended 1964) would serve during the transitional period. Some changes were added to include self-rule for the South, as given to them in the Addis Ababa Agreement (AAA) from 1972, and the regionalisation of the North from 1980. Independence of the judiciary and a Bill of Rights were also added.<sup>294</sup>

As in the 1973 constitution, Sharia continued to be the basis for the legal system in this constitution. After former President Numayri installed the September Laws in 1983, this issue had participated in re-opening the civil war in the South. Furthermore, some other safeguards were removed from this Transitional Constitution. Constitutional lawyer, Peter Nyot Kok stated that in contrast to the 1973 document, there were no explicit reference to respecting

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<sup>289</sup> "Closing off, closing in." Sudanow. August 1985 P. 6

<sup>290</sup> Ibid: 6

<sup>291</sup> Lesch 1998. P. 64

<sup>292</sup> See chapter 3 for more information on these concepts.

<sup>293</sup> "Current Events: Early days yet." Sudanow. May 1985P. 12

<sup>294</sup> Lesch 1998. P. 64

indigenous African believes, and Sharia made it difficult to repeal the September Laws which were resisted by the southerners.<sup>295</sup> Members of the National Alliance and the South, were dissatisfied by the consequences of this constitutional content. Fighting alongside the military in the South, were other social forces, who advocated a more inclusive government policy and the removal of the September Laws. In 1984, the Christian Churches wrote a statement that presented their position on the enforcement of the Islamic Sharia declaring the Sudan as being an Islamic State.<sup>296</sup> Their overall message was unity in the country, and the need for co-operation and promotion of all citizens. Their protest was circled around Christians and other non-Muslims being a target of these laws “in order to demonstrate the power of Islam”.<sup>297</sup> Their final appeal to the legislators was: “*to re-affirm the present and permanent Constitution which takes into account the diversity of races, beliefs, religions and cultures in our country*”.<sup>298</sup> This is an example that the social forces in the South consisted of more than just the SPLM/A. Head of TMC, Suwar al-Dhahab, believed that the September Laws could be modified and amended. However, to remove them would be going against the peoples will, as the popular majority preferred to live under Islamic Law, in addition removing these laws would count as blasphemy.<sup>299</sup> Attitudes such as these were common amongst parts of the political elite in Khartoum, and it reflected reluctance for real negotiations with the South. This also represents the issue of religion and state that have continuously affected the constitution-making process negatively in respect of national legitimacy. In addition to the constitutional flaws mentioned above, positive dimensions in this constitution has been emphasised by Badri Balghis. Equality before the law for all Sudanese, respect for fundamental human rights and for democratic principles, and a Presidency Council of five as Head-of-State.<sup>300</sup> In terms of state apparatus, this constitution maintained a non-centralised system of government, with five regions in the North and self-rule for the South. Sensitive issues like identity and secularism were not agreed upon, and the discussion of the Sudan as an Arabised and Islamised nation versus a combined state of Arab and African culture remained unsolved.<sup>301</sup>

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<sup>295</sup> Ibid: 64

<sup>296</sup> The Sudan Church Association, July 1984. “The Position of the Christian Churches with regard to the enforcement of the Islamic Sharia and to the declaration of the Sudan being an Islamic State.”

<sup>297</sup> Ibid: 4

<sup>298</sup> Ibid: 5

<sup>299</sup> Lesch 1998. P. 64

<sup>300</sup> Badri, Balghis 2010. “A Critical Analysis of the Evolution of Constitutions in Sudan.” P. 7 Available at: <http://ahfadgender.com/pdf/BalghisCritical.pdf> [last accessed 04.05.14]

<sup>301</sup> Ibid: 7



#### 4.1.2 The 1986 Election and the New Civilian Government

The TMC did as promised and held elections a year later in 1986. The fact that the elections were held under calm circumstances, and that they were reasonably fair after so many years of oppression was a significant step. Ann Lesch commented on some of the challenges with the election, saying that since they were held so quickly, it gave the parties little time to organise themselves. This was of an advantage to NIF, Umma and DUP, who were already well-established parties. Other parties did not have the structure or funds to campaign efficiently given such short notice, thus putting them at a disadvantage. In addition, elections could not be held in most of the South due to intensive fighting in some areas and the SPLM's election boycott. In fact, fewer people registered to vote in the South than in greater Khartoum.<sup>302</sup> This again showed a hasty process, which lacked credibility and representativeness, two things the Sudanese society could not afford to lack.

The May 1986 election resulted in a coalition government between the Umma and DUP, with representation from four parties from southern Sudan, led by Umma Party leader, al-Sadiq al-Mahdi.<sup>303</sup> A five-man Supreme Council would again act as collective Head-of-State, under the presidency of Ahmed Uthman al-Mirghani.<sup>304</sup> This placed a descendant of the Mahdi as head of government, and the head of the Khatmiyya inside the Supreme Council. Political sectarianism was once again back in power.

#### 4.1.3 The New Governments Constitutional Work

The new Prime Minister addressed the Assembly early in July 1986, announcing his administration's policy for the next four years.<sup>305</sup> Amongst many initiatives, the government had created an executive Ministry, in order to work towards a peace settlement with the South and the proposed National Constitutional Conference. The Transitional Constitution (amended 1964) implemented by the Transitional Military Council were still in effect until a permanent constitution could be drafted. Three points were mentioned as top priorities: First, restoring basic rights. Second, domestic resources would be relied upon in the struggle for security. Third, abolish laws from the Numayri period and replace them with laws responding to the majority's values, while preserving the rights of ethnic and religious minorities.<sup>306</sup>

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<sup>302</sup> Lesch 1998. P. 70-71. Khartoum is the capital city.

<sup>303</sup> "Respos to prime minister" by El Hidai Ahmed. Sudanow. July 1986 P. 8. Daly & Holt writes that the elections were held in April 1986, Peter Woodward's writes March 1986

<sup>304</sup> Daly, Holt. 2011. P. 144

<sup>305</sup> "Sadig speaks by El Hidai Ahmed." Sudanow. July 1986 P. 9

<sup>306</sup> Ibid: 11

Things turned out much more complicated than perhaps first expected by the new Prime Minister. The debates concerning the September Laws continued on into this new parliamentary period, and the discussions surrounding a permanent constitution were set in a context of several peace initiatives between the government and the SPLM/A. Al-Sadiq al-Mahdi spoke out against the September Laws, and argued that Numayri had distorted Islam by imposing these laws. He had actually cited a number of Islamic jurists who all claimed the laws were inconsistent with Sharia.<sup>307</sup> In opposition, he had been jailed for his disapproval of the September Laws. As Prime Minister however, he was less decisive.<sup>308</sup> He's indecision appeared more threatening to the southerners, and the lack of initiative to remove these laws intensified the impression that the government was more interested in Islamisation than reconciliation.<sup>309</sup> However, positive steps were taken by the National Alliance and the SPLM in March 1986, forming a good platform for negotiations. An apparent breakthrough came in November 1988, when the SPLM and DUP reached an agreement on how to end the war. This agreement called for a constitutional convention to be held on the 31<sup>st</sup> December 1988 and the freezing of the September Laws.<sup>310</sup> While personally approving this agreement, al-Sadiq refused to adopt this as government policy. NIF's role must be emphasised when explaining the lack of initiative to remove the September laws. Right after independence, the Islamic right was less influential and less powerful compared to the 1980s. Now they were able to apply much more pressure on al-Sadiq.<sup>311</sup> As a reaction to this lack of political initiative, DUP withdrew from government and in February 1989, al-Sadiq announced a new coalition with NIF, making Hassan al-Turabi his deputy and foreign minister.<sup>312</sup>

#### 4.1.4 Social Forces Discrediting the September laws

The northern army was not pleased by the new collaboration between al-Sadiq al-Mahdi and Hassan al-Turabi, and insisted on broader government representation. In March 1989, a third government was put together, now excluding NIF. The government approved the agreement made between DUP and SPLM and sent a delegation to Ethiopia for talks.<sup>313</sup>

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<sup>307</sup> "Sadig speaks by El Hidai Ahmed." Sudanow. July 1986 P. 9

<sup>308</sup> Lobban-Fluehr, Carolyn 1990. *Islamization in Sudan: A critical Assessment*. Middle East Journal, Vol. 44, No. 4. P. 620. Available at: <http://www.jstor.org/discover/10.2307/4328193?uid=4795904&uid=3738744&uid=2&uid=3&uid=5909240&uid=21182&uid=67&uid=62&sid=21103730614821> [Last accessed 04.05.14]

<sup>309</sup> Holt, Daly 2011. P. 144

<sup>310</sup> Ibid: 145

<sup>311</sup> Lobban-Fluehr, 1990. P. 620

<sup>312</sup> Holt, Daly 2011. P. 145

<sup>313</sup> Ibid: 145

This parliamentary period had weak governments, indicated by the many governmental shifts that took place. The weakening of the North occurred in contrast to the political unification of the South, which gave them a stronger basis for negotiation. Furthermore, the South had successive victories on the battlefield, leading to deteriorating moral within the Northern troops. The long-term emergency of war had led to hundreds of thousands of casualties, toppled by famine and disease taking many lives.<sup>314</sup> The Sudan was under international surveillance, and seemingly failing to fix economic, social and warfare problems. No more initiatives were taken towards a new permanent constitution. The war and the fight for political survival mostly occupied the politicians in Khartoum. Holt and Daly write that towards the end of al-Sadiq's regime, Sudan started to resemble Numayri's government, especially due to the series of deals al-Sadiq had to make with DUP, NIF and the army to stay in power.<sup>315</sup> The search for a permanent constitution was not successful during this parliamentary period. The National Constitutional Conference never convened, as the political parties failed to agree on its agenda. As summarised by Gabriel Warburg:

*“The answer to the puzzle why Sudan, dominated by three Islamist parties, failed to agree on an Islamic Constitution until 1998 seems to lie in the nature of Sudanese Islam”.*<sup>316</sup>

## **4.2 The Third Military Regime – Umar Hassan Ahmad al-Bashir 1989-**

When the third military coup overthrew the civilian government in 1989, it appeared similar to those of 1958 and 1969. Public opinion believed that the new regime would not last long due to its' small base of popular support. However, they misjudged these new power holders completely, as the same regime is still in power today.<sup>317</sup> Umar Hassan Ahmad al-Bashir, who became self-proclaimed President in 1993 (he was elected President in the 1996 National Election, though supposedly rigged) has led the government for 25 years now, and is responsible for the creation of two constitutions in the Sudan.<sup>318</sup> The first document was implemented in 1998, whilst the second document followed seven years later in 2005.

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<sup>314</sup> Holt, Daly 2011. P. 146

<sup>315</sup> Ibid: 146

<sup>316</sup> Warburg 2001. P. 151

<sup>317</sup> Holt, Daly 2011. P. 148

<sup>318</sup> Ibid: 150

### 4.3 The Takeover

A group of army officers, led by Field Marshal Umar Hasan Ahmad al-Bashir, overthrew the third civilian government in June 1989. This military coup played out like the ones before it, bringing the political and civil life in the Sudan under strain. Immediately following the takeover, the first constitutional order was announced, which replaced the suspended the constitution and vested sovereignty, as well as legislative and executive powers, on the 15 member Revolutionary Command Council (RCC). The order also dissolved the Constituent Assembly, the five-member Supreme Council and the Council of Ministers.<sup>319</sup> A second constitutional order followed, which banned all political parties, disbanded trade unions, as well as banned all party and non-partisan newspapers. A state of emergency was also declared throughout the country.<sup>320</sup>

#### 4.3.1 New Political Realities and its' Opposition

With this new regime in power, it was uncertain in what way it would establish itself. In its' first months, no ideological orientation was revealed, partly because of the relative power within the regime of key individuals, but also because the relationship between the regime and NIF was not yet decided.<sup>321</sup> Initially, this collaboration was denied by al-Bashir, and he welcomed previous regime veterans, secularists and southerners into the new Cabinet. In their first statement and their political program, no mentioning of an Islamic Agenda occurred, but rather focused upon gaining and providing peace in the South, Darfur and Kordofan.<sup>322</sup> However, by the early 1990s, the regime's relationship with NIF began to show itself through army purges and mass recruitment of Muslim Brothers. Arrests were undertaken, staff from the University of Khartoum was suspended, and women were hounded in public life. In March 1991 the regime imposed the Sharia, in part excepting the South.<sup>323</sup> Today, it is widely recognised that they had the support of NIF, and this view has been confirmed by the former speaker of the constituent assembly, Mohamed Ibrahim Khalil.<sup>324</sup>

As the new regime controlled more and more parts of society, an opposition began to grow. As mentioned above, all political parties were banned. Both the RCC and NIF regarded the

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<sup>319</sup> Constitutional Decree No. 1. 30.06.1989. In Kok 1996. *Governance and Conflict in the Sudan, 1985-1995*. Appendix IV. P. 246

<sup>320</sup> Constitutional Decree No. 2. 30.06.1989. In Kok 1996. *Governance and Conflict in the Sudan, 1985-1995*. Appendix V. P. 247

<sup>321</sup> Holt, Daly 2011. P. 148

<sup>322</sup> "NSR First Statement." Sudanow. August 1989 P. 8-10

<sup>323</sup> Holt, Daly 2011. P. 148-149

<sup>324</sup> Lobban-Fluehr 1990. P. 621

sectarian politicians as useless, and were seen as a heritage from the Condominium period, that they strongly disapproved. Many of members from this “group” fled the country, and reinforcing themselves as an opposition. Eleven political parties, together with fifty-one trade unions and professional associations, adopted The Charter of the National Democratic Rally in Sudan, on the 21<sup>st</sup> October 1989, except NIF who did not want to participate. This was another indication of a collaboration between NIF and the regime.<sup>325</sup> A united opposition demanded a return to democracy, reinstating human rights and fundamental freedoms, and called for a peaceful solution to all conflicts dividing Sudanese society. Identifying the relationship between religion and state, and thus writing a new constitution was also advocated as one solution for the civil war.<sup>326</sup>

This charter and other documents presented to the regime were ignored however, and Bashir and his allies refused any compromises when dealing with the SPLM/A. They viewed Islam as the only solution to the crisis prevailing in the country, including the civil war.<sup>327</sup> Again, the conservative-hegemonic vision was implemented by the northern regime, at the expense of national unification. In fact, thoughts of a southern secession had already begun to surface inside NIF during the parliamentary period in the 1980s. Without the southern region, the country would be almost entirely Muslims, which would make implementation of Sharia, and thus, an Islamic State, much easier.<sup>328</sup> As this was their main political goal, the regime refused to abolish the September Laws, and instead implemented a new Islamic Penal Code in March 1991, reinforcing the Islamic agenda.<sup>329</sup>

Alongside establishing themselves as a new regime, a new state system had to be implemented. In President Bashir’s New Year’s speech of 1991, he mentioned the new federal system that he wanted to implement, in order to provide the South with some regional independence. This showed some willingness to carry out a more popular and broader policy. This federal system was meant to facilitate wide avenues for social justice and equal distribution of wealth.<sup>330</sup> Furthermore, a federal system was used as a solution to the issue of religion and state, because believers in other religions would be free to worship in accordance with teachings of their respective religions.<sup>331</sup> The South has been given different statuses

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<sup>325</sup> Warburg 2003. P. 208

<sup>326</sup> Ibid: 208

<sup>327</sup> Ibid: 208

<sup>328</sup> Daly, Holt. 2011. P. 145

<sup>329</sup> Warburg 2003. P. 209. The new penal code re-introduced the Hudud laws.

<sup>330</sup> Beshir, Omer Hassan Ahmed El. 1991. “In Occasion of the national independence”. P. 7

<sup>331</sup> Ibid: 7

over the years, but their stance for federacy was first made during the run-up to Independence and in the 1956-1958 parliaments, in which it was the main issue for southerners.<sup>332</sup> The northern position however, has been that federalism is disintegrative, unaffordable, and would only lead to southern separation.<sup>333</sup> NIF have opposed regional autonomy since Independence, only supporting administrative units where citizens can participate in everyday tasks. In 1984 they publicly supported the subdivision of the South.<sup>334</sup> Due to the history of this political party's attitudes towards federal solutions, their sincerity for this new proposal is questionable. Moreover, Peter Kok explains this "convenient support" as a motive for attaining power and as a bargaining tool, in order to gain support for an Islamic Constitution.<sup>335</sup>

#### 4.3.2 The Islamic Traits of the Regime

According to Robert O. Collins, the RCC took control over the media, and they used these channels to bring forward their commitment to orthodox Islam, Islamic law, and Islamic dress.<sup>336</sup> In October 1989, when the RCC established a government, they adopted the term "Islamist". This term was approved by al-Turabi, and was meant as a distinction from other political orientations, and as a counterbalance from the secular political parties.<sup>337</sup> As mentioned above, initially, the attitude towards Islamism was unclear, and the BBC reported that al-Bashir had spoken out about the controversial Sharia Laws, and said that if this issue was not resolved on the negotiation table (between the North and the South), it could be the subject of a general referendum.<sup>338</sup> The link between religion and state was politically confirmed by the seventh constitutional decree in 1993, which stipulates that "[Islam] is the law which inspires and guides the government's law, regulations and policies."<sup>339</sup> Both al-Turabi and al-Bashir publicly supported the Islamist agenda, and Turabi asserted that the Sudan had now come back to Islam, and Umar Hassan al-Bashir was the symbol of this.<sup>340</sup> NIF legitimised their coming to power through a military coup, as the only way to establish an Islamic State, and put a stop to sectarianism once and for all, and they insisted to be the only

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<sup>332</sup> Kok, 1996. P. 133

<sup>333</sup> Ibid: 133

<sup>334</sup> Ibid: 134. The Amendment broke the Addis Ababa Agreement, of a regional self-government which led to new civil war outbreaks.

<sup>335</sup> Ibid: P. 134

<sup>336</sup> Collins 2008. P.187

<sup>337</sup> Ibid: 187

<sup>338</sup> "Current Events: Army Assumes Power." Sudanow. August 1989 P. 7. This is also confirmed in NSR's first statement, printed in the same issue, P. 8-9.

<sup>339</sup> Constitutional Decree No.16.10.1993. In Kok 1996. *Governance and Conflict in the Sudan, 1985-1995*.

Appendix IX. P. 273

<sup>340</sup> Warburg 2003. P. 209-210

political group in the country who enjoyed genuine popular support.<sup>341</sup> The coup signalled a shift in the policies of NIF. The initial stage for achieving an Islamic State had been Islamisation from below. Once in power, the strategy became Islamisation from above, being able to implement wide reaching policies as free education for the rural population, and popular institutions like the Popular Defence Force, and Popular Police Force. According to Warburg, this was all intended as a counter pole to the Ansar and the Khatmiyya, which NIF sought to eliminate and replace.<sup>342</sup>

#### **4.4 The Islamist Constitution Of 1998**

NIF's political influence reached the constitutional committees in 1997, and it is widely recognised that NIF and Hassan al-Turabi, strongly influenced the process and the finished document. An interesting view on this constitutional process is that in the research literature, scholars have focused on the constitutional document and its implications, more than the design process, and this will be visible in this presentation as well.

##### **4.4.1 The Years Leading up to Constitution-Making**

When the transitional constitution from 1985 was suspended immediately after the coup, the new power holders promised to find some form of representative government.<sup>343</sup> However, it quickly became apparent that this regime differed greatly from its predecessors in political orientation and style. Contrary to the former governments, the work on a constitution was not immediately initiated, and so it did not look like this regime wanted to acquire legitimacy through “traditional” channels. In fact, they stated that they did not believe in Western-style liberal democracy, and that they considered it divisive and dysfunctional in a country like Sudan.<sup>344</sup> Al-Turabi had previously said that a multi-party system would not be democratic, because political parties or a government governed by the house of the Khatmiyya, or the House of the Mahdi, was a dynastic thing.<sup>345</sup> Instead, they advocated “Shura” as a more appropriate form of democracy via citizens, and as an interim measure, the RCC appointed several committees who specialised in areas such as economics, social issues and regional

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<sup>341</sup> Ibid: 210

<sup>342</sup> Ibid: 210. Popular Defense Force was most significant as its' final aim was to replace the army and thereby preserve Islamist rule. For a more detailed description, see Warburg 2003. P. 210.

<sup>343</sup> Daly – Sikainga (eds.) 1993. P.101

<sup>344</sup> Matt, Ismail bin 2006. “Towards an Islamic constitutional Government in Sudan.” P. 13. Available at: <https://www.yumpu.com/en/document/view/11458165/toward-an-islamic-constitutional-government-association-of-> [Last accessed 10.05.14]

<sup>345</sup> Warburg 2003. P. 210

administration.<sup>346</sup> This attitude can explain why constitution-making was not prioritised immediately. As constitutions can serve the purpose of proclaiming sovereignty or ideology, and can help legitimise an authoritarian regime, al-Bashir and NIF chose a different path. They sought legitimacy by advocating Islam and an Islamic State, for instance by reinforcing the Islamic Penal Code in 1991 and declaring Jihad in the South.<sup>347</sup> Furthermore, in contrast to 1973, there was no outside pressure put on this regime to make a constitution quickly, which gave them the opportunity to rule by decree in their first years.

Nine years passed without a new constitution being implemented and according to Peter Nyot Kok, when President al-Bashir was asked if he planned to give the country a permanent constitution, he replied that this was the responsibility of an elected parliament, and if they were to make it now, it would have to be amended several times, which would rob it of its' respect and importance.<sup>348</sup> Nonetheless, al-Bashir and his colleagues provided the country with a number of constitutional decrees in the meantime, which taken together acted as a constitution.

#### 4.4.2 The Making of the 1998 Constitution

In the 1996 election, al-Bashir was elected President, while NIF gained majority in the National Assembly and Hassan al-Turabi was elected Speaker. As al-Bashir had stated previously, an elected parliament was needed in order to write a constitution. This election provided them with the opportunity to write a constitution in a seemingly democratic manner, which serves as an explanation as to why they waited for so long.<sup>349</sup> When the work on the writing of a new constitution began, they followed the same pattern as in 1968. In 1997, a National Constitutional Committee was appointed, led by the chief justice and the deputy chief justice.<sup>350</sup> Originally, the task of this committee was to write and submit a draft constitution on behalf of the government, to the National Assembly, which would then vote on a final version before the document was sent to the electorate for referendum.<sup>351</sup> However, the committee never had a quorum and only submitted a “suggested draft” to President al-

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<sup>346</sup> Matt, Ismail bin 2006. P. 13. As the two Sudanese sects had many followers, NIF and al-Turabi was aware of their strong candidature in popular elections.

<sup>347</sup> Warburg 2003. P. 206

<sup>348</sup> Kok, 1996. P. 128. Which would be held in mid-1995.

<sup>349</sup> Warburg 2003. P. 213-214

<sup>350</sup> Fadlall 2011. P. 7

<sup>351</sup> Suleiman, Ghazi, Doeble, Curtis Francis 1998. “Human Rights in Sudan in the Wake of the New Constitution”. Human Rights Brief. Volume 6, Issue 1. P. 2 Available at: <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1558&context=hrbrief> [Last accessed 04.05.14]



Bashir. This draft had a solid collection of human rights provisions, which gave this draft a broader acceptance.<sup>352</sup> The president's office weakened some of the human rights provisions, yet what came as surprise to everyone was that the President's office also watered down its own newly proposed additional powers.<sup>353</sup> This led observers to believe that it was not the President, but others around him who made the changes, more specifically Hassan al-Turabi.

The draft constitution was passed by the National Assembly on 28<sup>th</sup> March 1998. This constitution-making process was criticised as the Assembly who voted over the constitution were elected from members of NIF, while other political forces boycotted the elections and government.<sup>354</sup> Nonetheless, the Draft Constitution was sent to the President on the 29<sup>th</sup> March 1998 for signing, and was then forwarded to the National Assembly and the General Election Board on the 1<sup>st</sup> April 1998, to be presented to the people of the Sudan for a referendum.<sup>355</sup> On the 8<sup>th</sup> May 1998, the Sudanese went to the polls to vote over the proposed constitution. The referendum showed an overwhelming 96 percent rating for the new constitution, which led to it being signed into law on the 30<sup>th</sup> June 1998.<sup>356</sup> To what degree the referendum reached the marginalised regions however, is uncertain. When considering the warfare in the South, it is reasonable to assume that no referendum was held there. This leads to some apprehension as to how representative and legitimate this referendum actually was. However, they introduced a national referendum into this process, providing the people of Sudan with the ability to participate in parts of the constitution-making, which according to Vivian Hart, is a necessity for obtaining legitimacy over a constitution.

#### 4.4.3 Contested Elements in the Constitution

The 1998 constitution were controversial from the beginning as it was negotiated during the civil war with the South, and without participation of the opposition. However, the constitution was a victory for Hassan al-Turabi and NIF who had advocated an Islamic Constitution and participated in constitution-making since the 1960s. Hassan al-Turabi had written and published extensively on the topic of an Islamic State, which not only gave the people an insight as to what elements could be part of the constitution, it also made it easier to recognise al-Turabi as a constitutional architect. In the article "The Islamic State", al-Turabi shared some of the characteristics of an Islamic State. He points out that there can be no

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<sup>352</sup> Suleiman, Doebble, 1998 P. 2

<sup>353</sup> Ibid: 2

<sup>354</sup> Badri 2010. P. 8

<sup>355</sup> Draft Constitution of the Republic of the Sudan, April 1998. P. 48

<sup>356</sup> Collins 2008. P. 224. This rating was questionable, as these number were provided by the government. See for instance Marti Alane Flacksn

separation of religion and state because Islam is a comprehensive, integrated way of life.<sup>357</sup> Furthermore, an Islamic State is not a nationalist State as allegiance is to God, and thereby to the community of all believers, the Umma.<sup>358</sup> An Islamic state is a government of the Sharia, yet it is a popular government as the Sharia represents the conviction of the people and therefore their direct will.<sup>359</sup> Finally, non-Muslims must be treated with trust, beneficence and equality. Yet there will a certain feeling of alienation as public law will be Islamic law. However, Islamic law is related to justice and to the general good, which can be appreciated by a non-Muslim as well.<sup>360</sup>

The 1998 Constitution featured many Islamic elements, and some of them are similar to the writing of Hassan al-Turabi. For instance Article 4, which stated that State supremacy is to God, the creator of human beings.<sup>361</sup> Al-Sadiq al-Mahdi, wrote that this concept was a product of theocracy because it allowed humans to speak on behalf of God and exercise that sovereignty, yet sovereignty is a political concept that should be vested in people.<sup>362</sup> Abel Alier, a long term southern politician, was also critical, saying that this constitution simply was a reflection of NIF's ideology and political program.<sup>363</sup> The constitution reinforced Islam as religion of the majority, and stated Arabic as official language.<sup>364</sup> Sharia remained unchallenged as source of legislation, the ultimate signal of an Islamic state:

*“Islamic law and the consensus of the nation, by referendum, Constitution and customs shall be the sources of legislation; and no legislation in contravention with these fundamentals shall be made.”*

In addition to the Islamic elements in the constitution, the new federal system was also disappointing to the southerners. As mentioned previously in this chapter, the President had promised a federal state system during his New Year's Speech in 1991. This constitution

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<sup>357</sup> Al-Turabi, Hassan 1983. “The Islamic State.” In: Esposito (ed.) 1983 *Voices of Resurgent Islam*. Oxford University Press. New York. P. 241

<sup>358</sup> Ibid: 242

<sup>359</sup> Ibid:242

<sup>360</sup> Ibid:250

<sup>361</sup> Constitution of Sudan 1998. Article 65. P. 1. For a more thorough discussion on religion in the 1998 constitution, see Chapter 6.

<sup>362</sup> Warburg 2003. P. 214

<sup>363</sup> Alier, Abel 1999 “Comments on some aspects of the 1998 constitution of the Republic of Sudan.” P. 1. This source is not dated, nor the context it was created in of is added to the document. However, there are indications that Alier's analysis was written before the referendum, as he only refer to the adoption by the National Assembly in March 1998. Furthermore, there are some inconsistencies with his article references. For instance he writes that article four define language. But in the draft and the constitution, this is mentioned in article 3. This could also indicate that this analysis was rushed.

<sup>364</sup> Constitution of Sudan 1998. Article 1, 3. P. 1

fulfilled this “promise”. The new federal system divided the country into twenty-six states; thereby abolishing the South as a separate political entity, as it had been under the Addis Ababa Agreement in 1972 and the 1973 Constitution.<sup>365</sup> Even though the states were given federal power, most power remained centralised.<sup>366</sup> Neither the Sharia nor the federal system was acceptable to the southerners. It only showed the country that the regime was willing to continue the conservative-hegemonic vision of nation-building, at the expense of national unity.

#### 4.4.4 The Political Association Bill

The years leading up to the new constitution cannot be considered democratic, as all political parties were banned. However, in March 1998, the government initiated an effort to install democracy, probably so the society and public life would reflect the constitution to come. The Political Association Bill was first approved by the National Congress, and in March 1998, the Parliament was called upon to discuss and ratify it. The discussions concerned whether the opposition would be allowed back into national politics, as they had been banned from 1989. Hassan al-Turabi, who had stated in an interview with *Frankfurter Allgemeine Zeitung* that he was not afraid of a multi-party system and that he was confident that the old feudal dynasties (The Umma and DUP) had lost their base of support for good. The proposed Bill was approved by Parliament and officially announced in October 1998, four months after the Constitution, yet Article 26 of the constitution stated freedom of association and organisation, guaranteeing the right for citizens to organise political associations.<sup>367</sup> In fact, President al-Bashir did not approve the Bill until the next year, becoming effective on the 1<sup>st</sup> January 1999.<sup>368</sup>

#### 4.4.5 The Debate on Sharia and Islam in relation to the 1998 Constitution

The unification of religion and State has been highly contested in Sudan. Abdullahi An-Na'im has commented on this relationship, and he writes that traditional interpretation of Sharia is fundamentally incompatible with constitutional governance.<sup>369</sup> He argues that in the case of Sudan, peace and national unity cannot be accomplished on the basis on an Islamic State, as this will hinder women and non-Muslim's right to self-determination. Self-determination, he argues, is a fundamental right, and is the guide and rational elsewhere in the world. If people's

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<sup>365</sup> Warburg 2003. P. 214-215.

<sup>366</sup> For a more thorough discussion on the federal system implemented in the 1998 constitution, see Chapter 5.

<sup>367</sup> Constitution of Sudan 1998. Part 2, Article 26. P. 3

<sup>368</sup> Warburg 2003. P. 215

<sup>369</sup> An-Naim, Abdullahi Ahmed 2006. P.154

right to self-determination cannot be achieved or maintained in an existing state, they should be entitled to secede and establish their own state.<sup>370</sup>

Religions have the power to categorise rights for different groups, but from a constitutionalism perspective, all persons must enjoy equal rights as citizens in their own country.<sup>371</sup> Moreover, different “solutions” for applying Sharia in Sudan have been suggested, but again, these meet challenges. If Sharia is implemented regionally (in the North), which has been suggested, this means that non-Muslims would not be able to live in the North without losing their basic rights, and what is national unity if some citizens cannot live in some parts of the country? Furthermore, if Sharia is implemented at a national level, non-Muslims will again have unequal rights, yet if Sharia is not applied at a national level, how can Sudan be an Islamic state?<sup>372</sup> Abdullahi An-Na'im show with his analysis the complexity of Islam in the Sudan, and how challenging national unity in the country has been.

One of the fundamental issues in the conflict between the North and South Sudan, is the opposing visions of nation-building. Whereas the northern political elite has decided that they must express their Islamic identity through the constitution and the legal system, southerners have demanded equal citizenship and an equal share in the development of their region as well as for non-Muslims in the country.<sup>373</sup> Abdullahi Ahmed An-Na'im argues that the political ambivalence amongst the northern Muslim leaders in reference to an Islamic state have contributed to constitutional stagnation during the parliamentary periods.<sup>374</sup> The two major political parties in the North, the Umma Party and the DUP, who are both backed by the two largest religious sects, The Ansar and the Khatmiyya, have been too vague about how an Islamic state could be implemented in practice. This is also the case for NIF, whose leader Hassan al-Turabi has written independently about his vision of an Islamic State, yet he has not been able to implement it during his years in power.<sup>375</sup> According to An-Na'im, NIF has never produced a definite statement, nor expressed in public the specific features of the model they hope to install in the Sudan.<sup>376</sup> It is possible that the 1998 constitution was the best expression of their visions of the Islamic state.

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<sup>370</sup> Ibid: 156

<sup>371</sup> Ibid: 156

<sup>372</sup> Ibid: 157

<sup>373</sup> Ibid: 135

<sup>374</sup> Ibid: 136

<sup>375</sup> Ibid: 136. See for instance Al-Turabi 1983, “The Islamic State”.

<sup>376</sup> Ibid: 137

In the last years of the 1990s, restructuring inside the regime and the Islamist movement occurred; with the most important event being the separation between President al-Bashir and Hassan al-Turabi. Al-Turabi had gained substantial power after the coup in 1989, holding the positions as leader of the National Assembly, and controlling the executive branch.<sup>377</sup> The event which ultimately led to the brake-up was the President's dissolution of the National Assembly after al-Turabi had introduced a law about decentralisation which provided more authority to regions like Darfur. In addition, complaints about al-Turabi acting without consultation were also a factor. Nonetheless, al-Turabi disappeared from the government and established a new political party, the Popular National Congress Party.<sup>378</sup>

#### **4.5 The Interim National Constitution Of 2005**

The second constitution written by President al-Bashir's regime, unfolded itself in a completely different context to that of the previous one. The 1998 constitution had been created by a small elite during a civil war, and had little popular support. The second effort for a permanent constitution however, was written under the scope of a united international audience, with full participation by the South, represented by SPLM/A, and perhaps with a sense of understanding that this may well be the last attempt at keeping Sudan united. Even though this constitution was written only a decade ago, the author has had access to very little source material. After contacting several Sudanese scholars, it was informed that not much had been written on this topic, and the material they had knowledge of, was written in Arabic. This means that the analysis below is mainly based on the information provided in the Comprehensive Peace Agreement (CPA), and supplemented by research literature. As was the case in 1998, it appears that scholars have been more interested in discussing the constitution after it was implemented, more so than the constitution-writing process.

As the purpose of the Interim National Constitution was to constitutionalise the CPA, it is necessary to understand the process that led to it, and the results of it.

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<sup>377</sup> Tønnessen 2010. P. 13

<sup>378</sup> Ibid:14

#### 4.5.1 The Prelude to the Comprehensive Peace Agreement

The road leading to the signing of the CPA was long, rough and included many setbacks. Nevertheless, the NCP and the SPLM/A committed themselves from an early stage to enter into negotiations, both parts seeing that it was in their best interest to engage in talks.<sup>379</sup>

In the years leading up to the CPA, the ruling regime experienced an internal and external legitimacy crisis. Pressure from the United States was mounting, and had been ongoing since the Clinton administration imposed sanctions because the country operated as a safe haven for Osama bin Laden. As a result of the government housing Al-Quida terrorists, the Bush Administration added yet more pressure, which had a drastic effect on Sudan's international image.<sup>380</sup> This led to the Sudanese government wanting to reposition itself on the international arena, as well as improving its relations with the US administration. Domestically, cracks were starting to appear, especially within the ruling National Congress Party (NCP).<sup>381</sup> When Hassan al-Turabi and President al-Bashir split, much credibility from the regime was lost, and the Islamic movement as a whole was called into question.<sup>382</sup> Finally, the dialogue between the SPLM/A and the northern political opposition called the National Democratic Alliance (NDA), led to political pressure, as they called for the establishment of a national government based on the pluralism of the Sudanese society, and the right to self-determination. Thus, both external and internal pressures led to the NCP agreeing to participate in peace negotiations, in order to rehabilitate its image and restore credibility.<sup>383</sup>

The situation for the southerners was also weakening as a result of lost support from its regional "sponsors", mainly Ethiopia and later Eritrea. Furthermore, SPLM/A were receiving mounting criticism for humanitarian violations, resembling those normally directed towards the North.<sup>384</sup> Internal divisions in the southern leadership, both within the military and the civilian parts were starting to appear. John Garang, leader of SPLM/A advocated "A New Sudan" within a united country, while others were starting to press for secession and were quickly gaining support.<sup>385</sup> At the regional level, relations between Ethiopia and Eritrea were

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<sup>379</sup> Ahmed Einas 2009. "The Comprehensive Peace Agreement and the Dynamics of Post-Conflict Partnership in Sudan." *African Spectrum*, 44,3. P. 136 Available at: <http://journals.sub.uni-hamburg.de/giga/files/journals/1/articles/195/public/195-195-1-PB.pdf> [Last accessed 04.05.14]

<sup>380</sup> Ibid: 136

<sup>381</sup> NCP was formerly the National Islamic Front.

<sup>382</sup> Ahmed 2009. P. 137

<sup>383</sup> Ibid: 137

<sup>384</sup> Ibid: 137

<sup>385</sup> Ibid: 137

improving, which encouraged NCP and SPLM/A to move towards negotiations themselves. Both these countries have given a significant contribution to the Sudanese peace process. Furthermore, at the international level, the Bush Administration had switched strategy, and wanted to position themselves as mediators. This was also a deciding factor, which pushed the two parties toward the negotiating table.<sup>386</sup>

In addition to the mentioned international pressure, another common factor brought the two parts together. The fact that NCP and SPLM/A both realised that neither had the military capacities to win the civil war, they opted instead to remain in power.<sup>387</sup> Furthermore, both parts agreed to regional Intergovernmental Authority in Development (IGAD) as its official mediation role. With the support of the US and others, IGAD's engagement led to the success of the following peace talks.<sup>388</sup>

Finally, personal ambitions and dedication to the cause were also contributing factors for the realisation of this peace process. John Garang and the then Vice President Ali O. Taha had invested interests in making this deal a success. As mentioned above, cracks were starting to show in the southern camp, and for Garang, it had become important to assess his authority vis-à-vis advisers in the SPLM/A, who the government had tried to opt for earlier. Vice President Taha had his own reasons for succeeding in these negotiations. After the split between the President and Hassan al-Turabi, political space had opened up for inter-personal competition, and Taha saw this as an opportunity to gain personal political currency. So, when peace talks were initiated again in early 2002, both parts adopted a pragmatic attitude towards each other, and they came prepared to make concessions.

#### **4.5.2 Negotiations and the finished Comprehensive Peace Agreement**

The CPA is a complex peace agreement, which included arrangements for power-sharing, wealth-sharing, security arrangements and special resolutions for the Abyei Conflict, Southern Kordofan and the Blue Nile. The difficult subject of national identity and religion and state are also included in this comprehensive document.

The Machakos Protocol endorses the South's right for self-determination. After an interim period of six years, the South would have the opportunity to choose between the unity of Sudan, or to vote for secession.<sup>389</sup> Both parts agreed however, to implement the Peace

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<sup>386</sup> Ibid: 138

<sup>387</sup> Ibid: 136

<sup>388</sup> Ibid: 138

<sup>389</sup> The Comprehensive Peace Agreement 2005. The Machakos Protocol 2002. Chapter 1.

Agreement in order to create unity in the Sudan as an attractive option, especially for Southern Sudan.<sup>390</sup> Religion was another challenge for the signatories. Islam, which has always been the basis for political legitimacy and hegemony in the North, was a difficult point to make concessions on, especially since the idea of establishing an Islamic State has been the ultimate aim of the NCP.<sup>391</sup> The South on the other hand, which had major advocates for secularism, would not succumb on this issue. The parties entered into a compromise, whereby the northern region would apply Islamic law, and “*popular consensus, the values and the customs of the people of Sudan*” would apply in the South.<sup>392</sup>

#### 4.5.3 The Making of the 2005 Interim National Constitution

Constitution-making took a new turn after the CPA, where not only a new national constitution had to be written, but also an independent constitution for South Sudan had to be created, as well as several state constitutions. It was apparent that constitutions now served as an important part of legitimising the “new Sudan”.

The 2005 constitution was created in order to constitutionalise the CPA. The CPA, which was the result of years of negotiations starting as early as 2002, was finally completed and signed on the 9<sup>th</sup> January 2005.<sup>393</sup> Included in the CPA were specific dates, which indicated the finalisation of a national constitutional commission, and a draft of the Interim National Constitution (INC) to be passed by parliament and to be formed in accordance with the said protocol.<sup>394</sup>

Included in the CPA were instructions on how to create an Interim Constitution for a united Sudan. The agreement stated that a representative National Constitutional Review Commission was to be established, and that this would prepare a Legal and Constitutional Framework (which would become the foundation for the constitutional text) within six weeks after the signing of the CPA.<sup>395</sup> This Constitutional Commission was to be comprised of the NCP, SPLM and representatives from other political forces and civil society as agreed upon by the parties.<sup>396</sup> For the first time in history, the Sudan prepared an interim constitution as a temporary document, which would help the country through a time of transition, for then to be replaced by a permanent constitution. The fact that they wrote an Interim Constitution is most

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<sup>390</sup> The Comprehensive Peace Agreement 2005. The Machakos Protocol 2002. Chapter 1. Article 1.5.5. P. 2

<sup>391</sup> Ahmed 2009. P. 141

<sup>392</sup> The Machakos Protocol 2002. Chapter 1. Article 3.2.3. P. 6. In: The Comprehensive Peace Agreement 2005

<sup>393</sup> Badri 2010. P. 8

<sup>394</sup> Ibid: 8

<sup>395</sup> The Comprehensive Peace Agreement 2005. Chapter 2. Article 2.12.4.2 P. 30

<sup>396</sup> Ibid.



likely related to the CPA. That agreement included a time-frame of six years for it to be fully implemented, followed by a Southern referendum. As the country's future was uncertain, it was impossible to write a permanent constitution in 2005. Furthermore, a democratic constitution cannot be written in haste. An interim constitution includes guarantees for a continuing, open and inclusive process for the longer term. It is a temporary solution, providing the country with a framework for governance, while it continues to work on a permanent constitution. There are however, two challenges with the instructions mentioned above. First, the commission is given six weeks to prepare the constitutional text. This is a short amount of time considering the size and the content of the INC. Second, how representative the commission were is questionable. NCP (President al-Bashir's party) and SPLM/A obviously participated, and other political and social forces were welcomed into the commission. However, it was not specified how many or from which parties or organisations they were to come from, and thus, it was up to the NCP and SPLM/A to make these decisions. The only additional information concerning this commission is that it has to be composed of 60 members.<sup>397</sup> Balghis Badri provides additional information on this development. She writes that the commission gave 52% representation to the NCP, 28% to SPLM, and 14% and 6% to other Northern and Southern political forces.<sup>398</sup> She also brings a second element into her analysis, as she includes the Cairo Agreement signed between the NCP and the National Democratic Alliance (NDA) in 2005. This resulted in the signatories of the CPA agreeing that the NDA should be represented by nine members in the constitutional commission, forming 15 per cent of the membership.<sup>399</sup> As President al-Bashir had experienced much opposition in Khartoum, this could have been an effort to co-operate with the opposition. However, this agreement was not honoured, because after the passing of the INC, the President reduced the number of members from nine to three.<sup>400</sup> Furthermore, the NDA consisted of the Democratic Unionist Party, the Communist Party and a few other leftist groups. Other political parties in the North, such as, The Umma Party, The National Peoples Party, the Eastern Front and the Darfur rebel movement were not included in the commission.<sup>401</sup> This illustrated some of the flaws included in the CPA, especially as it made it seem like writing and implementing the INC was more important than ensuring the entire process was a hundred percent legitimate, representative and inclusive.

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<sup>397</sup> The Comprehensive Peace Agreement 2005. Annexure II. Article 41. P. 161

<sup>398</sup> Badri 2010. P. 8

<sup>399</sup> Ibid: 9

<sup>400</sup> Badri 2010. P. 9

<sup>401</sup> Ibid: P. 9

As the commission began its work, the CPA provided it with some guidelines. The first task was to prepare the legal and constitutional framework, and this was to be based on the CPA, and the current 1998 Sudan Constitution.<sup>402</sup> Considering the Islamic character that the 1998 Constitution had, along with the fact that it was not accepted by the northern or southern opposition, it is surprising that this document served as a starting point. Once the text was finalised, it were to be presented to the National Assembly for adoption, and then presented to the SPLM National Liberation Council for adoption.<sup>403</sup> Moreover, it was stated that as a safeguard, in the event of a contradiction, the terms of the CPA shall prevail.<sup>404</sup>

#### 4.5.4 Islam and Sharia in the 2005 Constitution

As discussed throughout this thesis, the relationship between Islam and the State has followed the constitutional discourse since Independence. This has been one of the most contested issues between the North and the South, and because of the historical impact of Islamisation in the South, this was of importance in 2005. When the signatory partners of the CPA began deliberations, this issue was dealt with from an early stage. Resolutions were laid down in the Machakos Agreement in 2002 in Kenya.<sup>405</sup> Carolyn Fluehr-Lobban states that until the signing of the CPA, Sharia was a non-negotiable issue in the peace talks.<sup>406</sup> However, during the negotiations at Machakos Navaisha in Kenya from 2003-04, the North made concessions on this issue. The result of this was that southern states would not apply Sharia, nor would southerners living in the North be subject to provisions of Sharia.<sup>407</sup>

The constitutional commission was first formed in June 2005, after three months of delay.<sup>408</sup> It was then followed by five weeks of constitutional deliberations, after which the draft constitution was presented to the National Assembly for approval. This approval was final, as the National Assembly was composed of a majority of the signatories from the CPA, namely 52% NCP and 28% SPLM, and subsequently was signed by the President in July, becoming the new Sudan National Interim Constitution of 2005.<sup>409</sup>

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<sup>402</sup> The Comprehensive Peace Agreement 2005. Chapter 2. Article 2.15.5 P. 30

<sup>403</sup> Ibid: 30-31

<sup>404</sup> Ibid: 31

<sup>405</sup> Lobban-Fluehr 2012. *Sharia and Islamism in Sudan*. I.B. Tauris & Co Ltd. New York. P. 37

<sup>406</sup> Ibid: 38

<sup>407</sup> Lobban-Fluehr 2012. P. 38

<sup>408</sup> The interim constitution was originally set to be drafted by 8. March 2005, and then passed by 22<sup>nd</sup> March the same year. Badri writes that delays took place, though these are not specified in her article.

<sup>409</sup> Badri 2010. P. 9

#### 4.5.5 The Aftermath of 2005

Once the CPA was signed, a new era of collaboration presented itself, and commitments to the agreement would be put to test. Even though the agreement was signed by both parts, the situation was much more complex beneath the surface. The NCP was weary about the new power centre that was being established in the South, and had therefore little incentive to fast track the implementation of the CPA. It should be underlined that the context of the CPA signing has dramatically changed.<sup>410</sup> The two key figures and guarantors' of the agreement, Garang and Taha, were no longer involved. When Garang died in a helicopter crash in July 2005, only six months after the signing, it changed the political leadership internally in the SPLM, and with his passing, the unionist factions within SPLM crumbled and the separatist forces resurfaced.<sup>411</sup> The death of Garang also led to reshuffles inside the NCP. Members of the party's top leaders were dissatisfied with the concessions given to the South, and an opposition against Taha established itself. Eventually he was side lined politically, though kept his title as Vice President.<sup>412</sup> Another dimension that was left out in the CPA negotiations was the increasing pressure from the international community, with regards to the escalating Darfur crisis. In order to handle this, a shift internally in the NCP from a political domination of civilians, to military decision-makers created mutual interests, for them and the new leadership in SPLM, and as Einas Ahmed comments "*After all, the ultimate goal of the new SPLM leadership to establish a separate state is not incompatible with the ultimate aim of the NCP to rule in the North.*"<sup>413</sup>

It was not only the Interim National Constitution that was written in 2005. Southern Sudan also wrote their Regional Interim Constitution, which was meant to implement and serve alongside their own regional government. When South Sudan voted for secession and gained independence in July 2011, both countries were left with the challenge of writing a new permanent constitution. President al-Bashir spoke publicly and announced in December 2010, before the southern secession, if Juba would choose separation, the Sudan would adopt an Islamic Constitution.<sup>414</sup> This is perhaps an indication of the constitution to-come in the Northern part of Sudan. However, as of April 2014, no significant constitutional work has been done, despite the regime's persistent effort to provide the country with a participatory

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<sup>410</sup> Ahmed 2009. P. 143

<sup>411</sup> Ibid: 143

<sup>412</sup> Ibid: 143

<sup>413</sup> Ahmed 2009. P. 144

<sup>414</sup> Abdallah, M.N. 2011. "Bashir says Sudan will adopt entirely Islamic Constitution". Available at: <http://www.reuters.com/article/2011/10/13/ozatp-sudan-constitution-idAFJJOE79C00F20111013>[Last accessed 03.02.2014]

constitution-writing process. The opposition however, have stated that they do not wish to cooperate or write a new constitution with the current regime.<sup>415</sup> South Sudan has not been successful with constitution-making either. A Transitional Constitution was implemented in 2011, with the intention to make a permanent constitution later. A National Constitutional Review Commission was created in 2012, but little progress towards a permanent constitution has been made.<sup>416</sup> Today, South Sudan is in the middle of civil war, which unfortunately makes the prospects of a permanent constitution in the near future uncertain.

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<sup>415</sup>Sudan's DUP says work on new constitution suspended. Available at: <http://www.sudantribune.com/spip.php?article48595> [Last accessed 16.04.14.]

<sup>416</sup>Mabor, Beny Gideon 2013. South Sudan transition and constitution building. Available at: <http://www.sudantribune.com/spip.php?article48439> [Las accessed 10.05.14]

## 5 Sudan's Constitutional Documents: A Comparative Analysis

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This Chapter compares the four constitutional documents that have been discussed throughout this thesis. It is beyond the scope of this master thesis to conduct an exhaustive comparative analysis, so the articles that will be compared, are the ones that most often have been subject to debate in Sudan's constitutional development. These are: 1) the Nature of the State, 2) Political Rights, 3) Religion, 4) Decentralisation, and 5) Presidential Power. The goal of analysing these articles is to see how the different regimes in the Sudan have dealt with these contested issues. Furthermore, this analysis will also show if the constitutional documents reflect their immediate circumstances, or if the writing shows that they have been influenced by previous constitutions.

These five subjects have been chosen because of their significance in Sudan's constitutional history. It is common for constitutions to use the first article as an opportunity to define the country. Considering the Sudan's opposing visions of nation-building, this definition in the constitutional documents is particularly significant. Most often this definition is given in the first article, sometimes called "Nature of the State". Sovereignty has also been investigated within this category as this too reflects the Nature of the State. Two of the four constitutions have called this first article "Nature of the State", and so the same title has been used for this category. The next category is Political Rights. Here, this constitutes equality before the law, freedom of speech, and equality in public places. As a result of the on-going debates concerning an Islamic State and Constitution, the issue of political rights have been complicated and contested, as part of the population have fared limited rights if Sharia is implemented. The third category, Religion, has been widely discussed throughout this thesis, with an emphasis on the relationship between state and religion. However, the individual's right to choose and practice religion will also be discussed. Decentralisation is the fourth category, and has also been discussed in the previous chapters. This contested issue has involved the centralisation of power advocated by the North, versus decentralisation advocated by the South. The main topic of investigation is what types of systems that have been introduced. The fifth and final category is Presidential Power. It has not been the most debated topic in the constitutional history, however, investigating the access to this "top job", and the powers invested in the position are interesting, especially concerning changes of the constitution.

The preceding chapters have shown how the historical context has influenced constitution-making in general, and how the specific historical situations have shaped that particular constitution. Where in other countries, scholars are able to talk about one constitution’s development over many years, this type of analysis is impossible in the case of Sudan. In Sudan, the unstable political context, together with an on-going civil war, sectarian politics and incompatible views on how to run the country, has sometimes led to constitutional stagnation, and other times led to a narrow-based constitution-making process. However, despite a shifting political landscape, the constitutional discourse has been especially concerned with these five issues, with some topics more controversial and contested than others.

Each period’s constitutional work has resulted in the constitutional text in itself. Analysing specific articles that deal with the five issues presented above will provide an insight into how the constitutions have dealt with these contested issues, as well as contemporary policies and political goals for the future. The constitutional documents makes a good basis for this comparative analysis as they include many of the same topics, are written in the same style, and have a similar structure. Furthermore, by using the comparative method, it will be possible to see how these topics have been defined over time, and thus, be able to recognise what information that has been removed or added to the different articles. This can tell us something about political viewpoints, contemporary controversies, and regional or international influences at the time, which will all help in understanding, not only the development of them, but the constitutional documents themselves better.

**5.1 The Nature of the State**

1956	<b>Article 1:</b> This Instrument shall be known and cited as The Sudan Transitional Constitution. <b>Article 2:</b> (1)The Sudan shall be a Sovereign Democratic republic. (2) Its territory shall comprise all those territories which were included in the Anglo-Egyptian Sudan immediately before the commencement of this Constitution. <b>Article 3:</b> The provisions of this Constitution shall prevail over all other laws, existing and future, and such provisions thereof as may be inconsistent with the provisions of this Constitution, shall, to the extent of such inconsistency, be void.
1973	<b>Article 1:</b> The Democratic Republic of the Sudan is a unitary, democratic, socialist and sovereign republic, and is part of both the Arab and African entities.
1998	<b>Article 1:</b> The State of Sudan is an embracing homeland, wherein races and cultures coalesce and religions conciliate. Islam is the religion of the majority of the population. Christianity and customary creeds have considerable followers.
2005	<b>Article 1:</b> (1)The Republic of the Sudan is an independent, sovereign State. It is a democratic, decentralized, multi-cultural, multi-lingual, multi-racial, multi-ethnic, and multi-religious country where such diversities co-exist.(2)The State is committed to the respect and promotion of human dignity; and is founded on justice, equality and the advancement of human rights and fundamental freedoms and assures multi-partism (3)The Sudan is an all embracing [sic] homeland where religions and cultures are sources of strength, harmony and inspiration.

The 1956 Transitional Constitution was never meant to be permanent. It originated as the Self-determination Agreement between the Condominium powers, and was not written exclusively by the Sudanese. It did not include a “Nature of the State”, and the first article was placed under the headline “General”. What we see in the first three articles is an emphasis on sovereignty and territorial integrity, as well as supremacy of the constitution. This particular focus is in line with the development in other countries as well. Many African countries experienced de-colonisation and eventually independence at the same time as the Sudan, and the first constitutions written by these countries were much more focused on establishing themselves as independent states.

The 1956 Transitional Constitution survived the first civilian government, as no permanent constitution was produced during these years. When General Abboud (1958-1964) seized power via a military coup, the Transitional Constitution was side lined and he ruled through presidential decrees. Towards the end of his regime, he initiated a process, in order to create a constitution, and introduce democratic institutions in the country. However, a civilian revolt led to his demise, and the country’s second parliamentary period (1964-1969) was inaugurated. The Transitional Constitution was brought back as a temporary solution until a permanent constitution could be written. The civilian governments from this period did not manage to implement a draft constitution before the army again swept in and took power.<sup>417</sup> A new constitution was later implemented in 1973.

### 5.1.1 1973 Constitution

The next constitution for the Sudan had few similarities to the 1956 text, and as explained in Chapter 4, it was born out of a totally different context. The country had gone through its first civil war, which ended with the signing of the Addis Ababa Agreement (AAA) in 1972. Southern representatives participated in the writing process of this constitution, and they had a lot of weight in the National Assembly. It is necessary to keep this context in mind when analysing this text. The first article tells us a lot about the country and its political orientation. As mentioned in Chapter 4, this constitution received massive support from all sides of the Sudanese society, partly because of the inclusive definition of the state. By recognising both entities, it equalised the two regions, and by using the term “unitary” it stated an agreement that the country was to continue being united. The article also introduced an ideological element, namely socialism. As the new regime was inspired by socialist ideas, and genuinely

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<sup>417</sup> For more details on constitution-making under Abboud and the parliamentary period, see chapter 4.

wanted economic and social reform in Sudan, it is possible that one of the motives for writing this constitution was to show that socialism was now part of the program of the State.<sup>418</sup> Moreover, when the country was declared socialist, it gave people an insight into what kind of domestic policy that could be expected, as well as where the regime positions itself on the international arena. Finally, by including democracy in the definition, it exhibited an aspiration for a democratic state system. This is reinforced by Article 2 in the constitution, which says that sovereignty is vested in the people and shall be exercised by them through their popular and Constitutional institutions and organisations.<sup>419</sup>

This constitution was amended several times, which resulted in stripping it of much of its national legitimacy. In order to remain in power, President Numayri eventually allied himself with the traditional religious forces, which culminated with the implementation of the Sharia in 1983. A new outbreak of civil war and uprisings ultimately led to his fall, and the country entered its third parliamentary period, which lasted from 1985-1989. For the second time, the Transitional Constitution (Amended in 1964) was re-instated, until a permanent document could be written. However, a third military coup led by Umar Hassan Ahmad al-Bashir took place in 1989, which removed the Transitional Constitution. From 1989, nine years passed before a third Constitution was implemented. Once it finally arrived, it looked nothing like the 1973 Constitution.

### 5.1.2 1998 Constitution

The 1998 Constitution was the first document to use the headline “Nature of the State”. By this time, the deep-rooted issues of religion, identity, and decentralisation were established as a front between the northern and southern regions. At the time in which this constitution was written, the government in Khartoum was waging a war in the South. This political context questions the meaning of Article 1, as a country in war probably is not racially or culturally in harmony. Numayri had already introduced ideological elements, when he included socialism in Article 1. President Bashir on the other hand, included religion in this definition, stating religious tolerance, and defining religious adherents. This was new, as religion had been kept out of this article in the two previous documents. When this constitution was written, the relationship between the military and the political part NIF was well established. NIF’s leader Hassan al-Turabi had advocated an Islamic Constitution since the early 1960s, so when this constitution was made public, the Islamic elements in it came as no surprise. However, stating

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<sup>418</sup> Brown 2002. P. 11

<sup>419</sup> The Permanent Constitution of Sudan. 1973. Part 1, Article 2. P. 2



that Islam is the religion of the majority could be an effort to legitimise an Islamic Constitution. This is certainly in line with Abel Alier's interpretation. He points out that this classification was meant as a criterion for rule. The 1956 population consensus had shown 61% African and 39% Arabic origin, and according to him, NIF was concerned that the criterion for controlling state powers was to become race, and not religion which could potentially change the balance of power.<sup>420</sup> Conversely, this article can also be read through a normative perspective; where the government envisioned the country to *one day* have cultural and racial harmony and religious tolerance.

Another element that defines the Nature of the State, is sovereignty. In 1956 and 1973, sovereignty was vested in the people, which mean that the authority of the government is created and sustained by the consent of the people. In 1998 however, supremacy of the State belonged to God, and sovereignty was delegated to the people, to be practiced as worship to God.<sup>421</sup> This formulation amplifies the religious foundation of this constitution, and by placing ultimate allegiance in God; it excludes non-Muslims and secularists within the country. An important question to ask here is whom this constitution was written *for*. There are several normative elements within the constitution that expresses a wish for unity, and for the country to be a place for *all* Sudanese. However, when the regime decided to implement this constitution, they did it with the knowledge that it would not be accepted by the whole country. One explanation can be found in the international arena. From the early 1990s, the regime had moved towards Iran, whom many viewed as Sudan's Islamic regional mentor, and under a visit in 1993 by Hassan al-Turabi, it was reported that he stated that Islam ruled the Sudan, that Islamic values prevailed in society, and that Islamic injunctions were being implemented in all fields.<sup>422</sup> President Bashir had also on several occasions stated that he was in full agreement with the Islamist Agenda.<sup>423</sup> Wanting to affiliate themselves with Iran, and perhaps also because of such public statement, they felt the pressure of creating this type of constitution, despite knowing how unpopular it would be at home.

### 5.1.3 2005 Constitution

As a new political reality faced President Bashir at the beginning of the twenty-first century, it was clear that constitution-making would be completely different now. The comparison of the

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<sup>420</sup> Alier, Abel 1999. P. 3

<sup>421</sup> The Permanent Constitution of the Sudan. Part 1, Article 2. P. 2., Constitution of the Republic of Sudan 1998. Part 1, Article 4. P. 1.

<sup>422</sup> Quote Hassan al-Turabi in Theran 1<sup>st</sup> March 1993. In: Lesch 1998. P 130

<sup>423</sup> Warburg 2003. P. 209

1998 and the 2005 constitutions are especially interesting as they were created by the same regime, only seven years apart.

The historical context for the making of this constitution has been accounted for in Chapter 4. With the signing of the CPA, along with the international presence, it was expected that this constitution would be different compared to the previous ones. Reading through it, it is clear that this document exceeds the other constitutions in almost every respect. All issues that have been contested and debated in the previous periods are dealt with here, and it appears that solutions for every national problem have been found. This document too, included “Nature of the State” as a clause, which indicate that this definition probably was invented by the al-Bashir regime. Moreover, Article 1 is more comprehensive and informative in this constitution. The entire constitution has a discourse of unity, which is evident in this article too. As the constitution was an implementation of CPA, the writers had to be careful with the wording, whilst at the same time being precise, to avoid space for individual interpretations at a later time. Similar to the 1973 constitution, the article focuses on the country’s diversity, and sovereignty as vested in the people.<sup>424</sup> However, contrary to the 1998 constitution, any references to religion have been removed from this article, except to explicitly state that religions and cultures are sources of strength.

**5.1.4 Conclusion**

Looking at the different articles, it is evident that the writers of the constitutions have been inspired and influenced by different elements in their writing process. The articles have acted as both an introduction to the constitutions and as definitions of the State. In what way the authors have chosen to define these articles has changed over time, depending on who was in power, and if southern political views were taken into account.

**5.2 Political Rights**

1956	<b>Article 5:</b> (1) All persons in the Sudan are free and are equal before the law. (2) No disability shall attach to any Sudanese by reason of birth religion race or sex in regard to public or private employment or in the admission to or in the exercise of any occupation, trade, business or profession. (2) All persons shall have the right of free expression of opinion, and the right of free association and combination, subject to the law.
1973	<b>Article 38:</b> All persons in the Democratic Republic of the Sudan are equal before Courts of law. The Sudanese have equal rights and duties, irrespective of origin, race, locality, sex, language or religion <b>Article 41:</b> Freedom of movement and residence shall be guaranteed for all citizens, except for reasons of security and public health as prescribed by law, provided that the period and extent of any restriction thereon shall be fixed <b>Article 48:</b> Freedom of opinion is guaranteed. Every Sudanese shall have the right to express his opinion in writing or verbally or by other means of expression in accordance with the law.

<sup>424</sup> Interim Constitution of the Republic of Sudan 2005. Chapter 1. Article 2. P. 3

1998	<p><b>Article 21:</b> All people are equal before the courts of law. Sudanese are and duties as regards to functions of public life<sup>425</sup>; and there shall be no discrimination only by reason of race, sex or religious creed. They are equal in eligibility for public posts and offices not being discriminated on the basis of wealth.</p> <p><b>Article 22:</b> Every person born to a Sudanese mother or father shall have a non-alienable right to enjoy the country's nationality and its right and bear its obligations. Whoever is brought up or is resident; [sic] in the Sudan for several years shall have the right to nationality as regulated by law.</p> <p><b>Article 23:</b> Every citizen shall have the right of [sic] freedom of movement, residence in, exit from and entry into the country; and his freedom shall not be restricted save under safeguards of the law.</p> <p><b>Article 25:</b> There shall be guaranteed for citizens the freedom of pursuing any science or adopting any doctrine of opinion or thought without coercion by authority; and there shall be guaranteed the freedom of expression, reception of information publication and the press without prejudice security, order, safety and public morals, all as regulated by law.</p>
2005	<p><b>Article 7:</b> (1) Citizenship shall be the basis for equal rights and duties for all Sudanese.(2) Every person born to a Sudanese mother or father shall have an inalienable right to enjoy Sudanese nationality and citizenship.</p> <p><b>Article 31:</b> All persons are equal before the law and are entitled without discrimination, as to race, colour, sex, language, religious creed, political opinion, or ethnic origin, to the equal protection of the law.</p> <p><b>Article 39:</b> (1) Every citizen shall have an unrestricted right to the freedom of expression, reception and dissemination of information, publication, and access to the press without prejudice to order, safety or public morals as determined by law.</p> <p>Article 42:(1) Every citizen shall have the right to freedom of movement and the liberty to choose his/her residence except for reasons of public health and safety as shall be regulated by law.(2)Every citizen shall have the right to leave the country as shall be regulated by law and shall have the right to return.</p>

The rights included in this analysis are only a small selection, as the constitutions include a set of rights, sometimes referred to as “Bill of Rights.” The rights that are being discussed in this Chapter are considered “Political Rights”. As explained by Liv Tønnessen, in Sudan and in the Middle East in general, there is a difference between a person’s “public” rights, regulating for instance a person’s political life, and their “private” rights, regulating civil rights such as marriage, divorce or inheritance.<sup>426</sup> The analysis will show how rights have been described over the years, and this will be understood in reference to the specific context.

### 5.2.1 Equality before the Law

The rights that are being investigated within these four constitutions are very similar. The 1956 Transitional Constitution had a separate chapter called “Fundamental Rights”, and it provided all Sudanese with equality before the law, free expression of opinion, and the right of free association. This article also specified that no disability should be attached to any Sudanese in regards to public or private employment, or in different sides of working society.<sup>427</sup> The need to specify equal access to employment and working society could be a

<sup>425</sup> In another translated version of the 1998 Constitution, the formulation goes: “Sudanese are equal in the rights and duties of public life.” Available at: <http://www.sudanembassy.ca/Docs/THE%20CONSTITUTION%20OF%20THE%20REPUBLIC%20OF%20THE%20SUDAN%201998.pdf> [Last accessed 30.04.14 at 18:40]

<sup>426</sup> Tønnesen 2007. Competing Perceptions of Women’s Civil Rights in Sudan. CMI Brief. July 2007. Vol.6. No.4. P. 1. Available at: <http://www.cmi.no/publications/file/2703-competing-perceptions-of-womens-civil-rights-sudan.pdf> [Last accessed 25.04.14]

<sup>427</sup> Identity markers is a common “name” for race, sex, ethnicity, religion and so on.

result of pressures from southern Sudanese, who had experienced work discriminations, especially during the Sudanisation process in the 1940s and 1950s.<sup>428</sup> The 1973 Constitution also has a separate part concerning “Freedom, Rights and Duties”, which provided the citizens with equality before the courts of law. The constitution stated that the Islamic Law and customs was the main source of legislation, and personal matters of non-Muslims were to be governed by their personal laws.<sup>429</sup> Initially, this solution seemed to satisfy everyone, and it was not until Numayri reconciled with the religious parties in 1977 that the question of laws became a source of conflict. After 1977, a new phase with more emphasis on Islamic principles became apparent inside the Sudan. Balghis Badri notes that the amended constitution of 1979 was greatly Islamised, which ultimately led to the declaration of the Islamic Hudud laws, and the Islamisation of all other laws in 1983.<sup>430</sup> These actions were continuously opposed by the South who called for a total abrogation of the “September Laws.” This together with the division of the South into three separate states, led to the eruption of Sudan’s second civil war.

The country’s third constitution also provided all citizens with equality before the courts of law.<sup>431</sup> However, the same problem related to the Sharia followed into this third military regime, as al-Bashir and NIF did not intend to remove these laws. The supremacy of Islamic Law remained unchallenged as legislation, making non-Muslims second class citizens. As stated in Chapter 4, this regime saw Islam as the only solution to the “problem of the South”, proclaiming Jihad as a national duty.<sup>432</sup>

The al-Bashir regime had to let go of the conservative-hegemonic vision of state when the 2005 INC was being written. As all the constitutions before it, this too ensured equality before the law to all persons, without discrimination, to the protection of the law.<sup>433</sup> The topic of Sharia had been difficult to agree upon, as it initially had been a “deal breaker” for both parts. However, a compromise was reached. The northern states of the Sudan were to have Islamic Sharia as source for their legislation. Southern Sudan on the other hand, was to have the values and customs, traditions and religious beliefs as source for their legislation.<sup>434</sup> Initially, this seems like a good solution. However, as the country was writing this constitution as a

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<sup>428</sup> For more information on Sudanisation, see Chapter 2.

<sup>429</sup> The Permanent Constitution of Sudan. 1973 Part 1. Article. 9. P. 3

<sup>430</sup> Badri 2010. P. 6

<sup>431</sup> Constitution of the Republic of Sudan 1998. Part 2. Article 21. P. 3

<sup>432</sup> Constitution of the Republic of Sudan 1998. Part 1. Article 7. P. 1

<sup>433</sup> The Interim National Constitution 2005. Part 2. Article 31. P. 14

<sup>434</sup> Ibid: Part 1. Article 5. P. 4

measure to keep the Sudan united, it seems problematic to divide the country on grounds of religion. As stated by lawyer Ali Mahmoud Hassanein, Sharia was not applicable on personal basis, but it is enforceable on everyone living or present in the North regardless of his religious affiliation or belief.<sup>435</sup> This is also a dividing principle, as people could feel apprehensive to cross the regional borders, making unity even more difficult.

### 5.2.2 Citizenship

The 1998 Constitution is the first document to address citizenship. This was not mentioned in the Transitional Constitution, and in 1973 it only stated that nationality was to be regulated by law.<sup>436</sup> Prior to citizenship becoming a very important issue after the 2011 secession, citizenship also became a current issue during the civil war because of the refugees both inside and outside of the country. If not inherited, a national citizenship is normally hard to obtain. In 1998, two criteria's were stated: i) to have lived in the country during their youth, or ii) to have been a resident for several years. Both can be considered vague and opens up for many interpretations. For instance, does this give refugees or work migrant's right to citizenship? Furthermore, citizenship in a broader context is often related to gender rights. However this constitution states that citizenship is inherited from the mother and the father, which in an Islamic context are considered liberal as citizenship normally is inherited through the father. Furthermore, this interpretation is not what one would expect from an Islamic regime. In 2005, citizenship was the basis for equal rights and duties, and everyone born to a Sudanese mother or father, had the right to enjoy Sudanese nationality and citizenship.<sup>437</sup> The two criteria's instated by the regime in 1998 had now been removed. Citizenship was a difficult subject during this interim period due to the uncertainties regarding southern secession. After 2011, it had become a real problem, because many southerners living in northern areas were at risk of losing their citizenship.<sup>438</sup>

### 5.2.3 Freedom of Opinion and Movement

Freedom of speech and the ability to organise into political parties have been important in Sudan, especially since the military regimes have introduced censorship and banned political activity at times. Freedom of movement has also been a political topic as the South was sealed

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<sup>435</sup> Hassanein, Ali Mahmoud 2006. "General Comments on proposed interim constitution of Sudan." P. 10. From archive available on UIB/SMI at

<sup>436</sup> The Permanent Constitution of the Sudan 1973. Part 1. Article 11. P. 3

<sup>437</sup> The Interim Constitution of the Republic of Sudan. 2005. Part 1. Article 7 (1). P. 5

<sup>438</sup> For more information, see Sudan Report: Nationality and Citizenship Questions in Sudan after the Southern Sudan Referendum Vote.

off for many years during the condominium, and the ability to live in all parts of the country without losing civil or political rights, have been the essence of unity.

Freedom of opinion was secured in 1956, yet freedom of movement was not mentioned. Perhaps because the borders had been opened, and people had been working and living in both regions, it was not considered necessary to include. The 1973 constitution also provided freedom of opinion, and this was supplemented by Article 46, which gave all citizens the right to public participation, and nomination for public office.<sup>439</sup> Article 41 gave citizens freedom of movement and residence, except in situations where security or public health were threatened. Retrenchment of this right could be done by the President, as he had power to make such decisions on his own, for instance by instating State of Emergency. However, freedom of movement were curtailed in the 1975 Amendment, as people could *preventatively* be detained, receive a residence order, or get a restriction of movement, if he was presumed a security threat to the State, or a threat to public order, moral, or public health.<sup>440</sup> Furthermore, there were no guarantees for the defendant to receive a reason for his indictment because it was added “[...] *the manner in which he shall be heard, except in the cases in which such procedures could not be followed.*”<sup>441</sup> This amendment was the first of many amendments initiated by the President, and these would cause discontent in the population leading to revolts and the second civil war.

In the 1998 constitution, freedom of opinion and expression were provided, though they were subject to some restrictions; security, public order, safety, public moral, all as regulated by the law. These restrictions are vague and broad, which means that a number of circumstances could lead to this right being removed or restrained. Freedom of movement was also secured in the article, and did not include any of the restrictions seen in the 1975 Amendment. The INC also show freedom of opinion, and the restriction added to the article are similar to those in 1998, except for security, which is removed.<sup>442</sup> Lastly, freedom of movement is included in INC as well, but in contrast to the 1998 constitution, restrictions are included. People are free to choose where to live, except for reasons of public health and safety. It is likely that these

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<sup>439</sup> The Permanent Constitution of Sudan 1973. Part 3. Article. 46. P. 10

<sup>440</sup> The Permanent Constitution of Sudan (Amendment) 1975. Article 2. P. 1

<sup>441</sup> Ibid: Article 2. P. 1

<sup>442</sup> It is noteworthy that since 2005, peaceful demonstrations have been met with violence by the regime, and this is one of many examples of violations of the interim constitution post-2005. Latest is government violence used against a university protest: <http://www.sudantribune.com/spip.php?article50259> [Last accessed 12.03.14 at 19:47]

restrictions are referring to specific areas, for instance Abyei, which continued to be turbulent, and in 2005, had undecided futures.

#### 5.2.4 Conclusion

Political rights became associated with religion early on. The moment the northern elite announced their support of an Islamic Constitution, the people of the South objected, knowing that this would limit their rights in the country. Therefore, as a result of implementing Sharia, the question of equality before the law became a contested issue. This has led to further opposition and demands for Self-Government and eventually Independence. Fundamental political rights such as freedom of speech and freedom of movement become important as well, especially under the military regimes as these rights often were limited. Citizenship however, stood out particularly in 1998 as a liberal element in an otherwise Islamic Constitution.

### 5.3 Religion

1956	<b>Article 7:</b> (1) All persons shall enjoy freedom of conscience and the right freely to profess their religion, subject only to such conditions relating to morality, public order, or health as may be imposed by law.
1973	<b>Article 16:</b> (a) In the Democratic Republic of the Sudan Islam is the religion and the society shall be guided by Islam being the religion of the majority of its people and the State shall endeavor to express its values. (b) Christianity is the religion in the Democratic Republic of the Sudan, being professed by a large number of its citizens who are guided by Christianity and the State shall endeavor to express its values. (c) Heavenly religions and the noble aspect of spiritual beliefs shall not be insulted or held in contempt. (d) The State shall treat followers of religion and noble spiritual beliefs without discrimination as to the rights and freedoms guaranteed to them as citizens by this Constitution. The State shall not impose any restrictions on the citizens or communities on the grounds of religious faith. (e) The abuse of religions and noble spiritual beliefs for political exploitation is forbidden. Any act which is intended or is likely to promote feelings of hatred, enmity or discord among religious communities shall be contrary to this Constitution and punishable by law. <b>Article 47:</b> Freedom of belief, prayer and performance of religious practices, without infringement of public order or morals, is guaranteed.
1998	<b>Article 24:</b> Every human being shall have the right of freedom of conscience and religious creed and he shall have the right to declare his religion or creed, and manifest the same by way of worship, education, practice or performance of rites or ceremonies ; and no one shall be coerced to adopt such faith, as he does not believe in, nor to practice rites or services he does not voluntarily consent to ; and that is without prejudice to the right of choice of religion, injury to the feelings of others, or to public order, all as may be regulated by law <b>Article 27:</b> There shall be guaranteed for every community or group of citizens the right to preserve their particular culture, language or religion, and rear children freely within the framework of their particularity, and the same shall not by coercion be effaced. <b>Article 18:</b> Those in service in the State and public life shall envisage the dedication thereof for the worship of God, wherein muslims [sic] stick to the scripture and tradition, and all shall maintain religious motivation and give due regard to such spirit in plans, laws, policies and official business in the political economic, social and cultural fields in order to prompt public life towards its objectives, and adjust them towards justice and uprightness to be directed towards the grace of God in The Hereafter.
2005	<b>Article 6:</b> The State shall respect the religious rights to:- (a) worship or assemble in connection with any religion or belief and to establish and maintain places for these purposes, (b) establish and maintain appropriate charitable or humanitarian institutions, (c) acquire and possess movable and immovable property and make, acquire and use the necessary articles and materials related to the rites or customs of a religion or belief, (d) write, issue and disseminate religious publications, (e) teach religion or belief in places suitable for these purposes, (f) solicit and receive voluntarily financial and other contributions from individuals, private and public institutions, (g) train, appoint, elect or designate by succession appropriate religious leaders called for by

	<p>the requirements and standards of any religion or belief, (h) observe days of rest, celebrate holydays and ceremonies in accordance with the precepts of religious beliefs, (i) communicate with individuals and communities in matters of religion and belief at national and international levels.</p> <p><b>Article 38:</b> Every person shall have the right to the freedom of religious creed and worship, and to declare his/her religion or creed and manifest the same, by way of worship, education, practice or performance of rites or ceremonies, subject to requirements of law and public order; no person shall be coerced to adopt such faith, that he/she does not believe in, nor to practice rites or services to which he/she does not voluntarily consent.</p>
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Religion has dominated the constitutional debates, which makes it particularly interesting to see how this issue has been handled in the constitutions. This analysis will look at both personal religious freedom, and the relationship between state and religion.

### 5.3.1 Personal Religious Freedom

The Transitional Constitution emphasised personal religious freedom, while at the same time introduced some restrictions to control it publicly. Generally, the British had been little concerned with personal religious affiliation, although they “preferred” the heavenly religions above spiritual beliefs. As explained in Chapter 2, the British had initially tried to separate religion from the state apparatus, though this had become almost impossible due to the strong sectarianism in the North. When comparing the 1956 and 1973 articles, it is evident that religion has become a more important topic in 1973. Between these constitutions, the country had experienced its first authoritarian rule, and President Abboud had begun an Islamisation program in order to carry out the conservative-hegemonic vision, which he considered the solution to the country’s “lack” of a national identity. When a new constitution was being written after the 1972 peace agreement, Article 47 gave every citizen freedom to follow and express their personal religious beliefs.<sup>443</sup> Furthermore, the State was not to interfere with citizens or group’s religious affairs, and one could not discriminate upon these grounds.<sup>444</sup> Considering the policy experienced by many southerners prior to Numayri, safeguarding religious rights must have been important.

Likewise to the 1956 and 1973 agreements, personal religious freedom, together with the freedom to express and preform religious rituals were provided in the 1998 Constitution. However, for the first time, this right was to be exercised in a manner that did not harm public order or the feelings of others, and in accordance with the law.<sup>445</sup> As seen previously, this formulation gives room for different interpretations, and it is especially difficult to know what type of behaviour could harm the feelings of others, and furthermore, how are “others”

<sup>443</sup> The Permanent Constitution of Sudan. 1973 Part 3. Article. 47. P. 10

<sup>444</sup> Ibid: Part II. Article 16. P. 4

<sup>445</sup> Constitution of the Republic of Sudan 1998. Part 2, Article 24. P. 4-5



defined? However, the constitution does attempt to enable non-Muslims to practice their religious beliefs. To this government, the relationship between state and religion was much more important.

The 2005 Constitution also provides religious freedom, without any restrictions. Religious rights are presented under “the State and the Constitution” and Article 9 gives a detailed description of religious rights, with the overarching message that people are allowed to practice the religion of their choice. This means for instance: *worship or assemble in connection with any religion or belief and to establish and maintain places for these purposes.*<sup>446</sup> Furthermore, it provides the framework for teaching religion: *train, appoint, elect or designate by succession appropriate religious leaders called for by the requirements and standards of any religion or belief.*<sup>447</sup> A separate article is included to safeguard freedom of creed and worship, and Article 38 specifies the right to choose religion or creed, together with the right to worship, educate, practice or perform the rite or ceremonies.<sup>448</sup> Even though this article is much more detailed compared to the previous constitutions, the message is “unoriginal” in the sense that personal religious freedom have been accepted by all governments (except Abboud). The problem however, has been that one’s personal religious beliefs have led to limited rights and limited access to opportunities, which ultimately is linked to the relationship between religion and state.

### 5.3.2 Religion and State

Part of the relationship between religion and state, is the relations between different religions. Religion has been at the centre of the relationship between North and South Sudan, and is closely related to the conservative-hegemonic and the restructural-redistributive visions of nation-building. As the northern political elite have advocated Sharia since Independence, and implemented it fully in 1983, a religious hierarchy has formed. In 1956, no religion was mentioned by name, and therefore no distinctions were written either. In 1973 however, religions had been carefully defined in Article 16, most likely with the intention to provide equality between different religious beliefs. This article strives to equalise religions and spiritual beliefs, and the article is essentially trying to establish the relationship between the state and Islam, while at the same time placing all other religions on an equal basis. However, it is important to point out that they are not given equal status, as society is to be *guided* by

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<sup>446</sup> The Interim Constitution of the Republic of Sudan. 2005. Part 1. Article 6 (a). P. 4

<sup>447</sup> Ibid: Part 1. Article 6 (g). P. 5

<sup>448</sup> Ibid: Part 2, Article 38. P. 15

Islam, and the state shall *endeavour* to express Christianity. Furthermore, the same article is trying to clarify this relationship by stating that abusing religion for political exploitation is forbidden, and any act intended or meant to promote hatred, enmity or discord among religious communities is illegal. This could be meant to either illicit Islamisation of non-Muslims, or be a reference to political sectarianism. The last option seems most likely as Numayri had initially wanted to remove all aspects of sectarian life, especially in order to make peace with the South.<sup>449</sup> As this constitution had tried to openly promote secularism, the main source of legislation was Islamic Law and custom, which made this separation very difficult.<sup>450</sup>

The 1998 Constitution has a different level of commitment to Islam, with Sharia as the source of law, legitimised by a national referendum, which legalised the implementation of this constitution.<sup>451</sup> As it can be argued that the writers of the 1973 Constitution strived to equalise religions, Article 1 in the 1998 document defines the relationship between adherents of Islam, and adherents of Christianity and customary creeds.<sup>452</sup> As mentioned above, this could have been meant to legitimise the Islamic Constitution, as the majority of the people are Muslims. Article 18 of the 1998 constitution illustrates the relationship between religion and state. Those working for the government *should* worship God, and for Muslims this is through the Quran, for others, it is through the principles of religion. Taken into account all the different religious believes existing in the Sudan, it seems inconvenient that all these religious considerations should influence laws, policies, official business and so on. However, it does not specify any religious preference, and does not discriminate non-Muslims. However, it can be argued that the article is limiting as people are forced to use religion in their everyday jobs, which is clearly problematic for many southerners who advocates secularism. Abel Alier sees this article as reinforcing the Islamic State, and his interpretation is that all employees of state, irrespective of their religion, are directed to observe Islamic directives. For non-Muslims to avoid carrying out Islamic directives, the only option is to quit. Employment of non-Muslims will be conditional on his promotion and maintenance of the Islamisation program.<sup>453</sup> He finishes his argumentation by stating that a review of the central government institutions reveals that all civil secretaries of ministers, their deputies, assistance and heads of

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<sup>449</sup> Warburg 2003. P. 178

<sup>450</sup> The Permanent Constitution of Sudan. 1973 Part13. Article. 9. P. 3

<sup>451</sup> Constitution of the Republic of Sudan 1998. Part 4. Article 65. P. 9

<sup>452</sup> Ibid: Part 1. Article 1. P. 1

<sup>453</sup> Alier 1999. P. 5

departments, judges, senior police and military officers, are Muslims.<sup>454</sup> From his perspective, it is clear that this article contributes to the discrimination of non-Muslims and is part of the implementation of an Islamic State.

As mentioned previously in this Chapter and more thoroughly in Chapter 4, Hassan al-Turabi and the NIF participated in the constitution-making process of 1998, and many scholars note that al-Turabi participated actively in the writing process. In 2005 however, al-Turabi had been side lined, and a more representative committee was in charge. Arguably the biggest difference with the 2005 constitution is religion. First, no distinctions are made between Muslims, Christians or adherents to any spiritual believes, as all reference to religions are removed, probably as a measure to avoid controversy. Secondly, where the 1998 constitution did not mention diversity, except in religious affiliations, this constitution is overwhelmingly concerned with all kinds of diversities in the country. It is obvious that the writers of this constitution had tried to separate religion and state, and as the country does not have a State Religion, they have succeeded to a certain degree. However, since Sharia still is the source of national legislation in the Northern States, it is not possible to call Sudan a secular State.<sup>455</sup>

### 5.3.3 Conclusion

Sudan has always been a multi-religious country, yet as religious forces entered political life, the relationship between state and religion became strained, as some forces wanted an Islamic State, whilst others wanted secularism. This analysis show that the right to choose personal religious affiliation has been present in all the constitutions, however, the relationship between religions, and religions and state has changed, mainly as a result of the context and the constitution-writers. Using Islamic law as source for legislation have been part of the constitutions since 1973, however, the scale of which it has been practiced, have varied over the years.

## 5.4 Decentralised System of Governance

1956	
1973	<p><b>Article 6:</b> The Democratic Republic of the Sudan shall be administered in accordance with the system of decentralization as prescribed by law.</p> <p><b>Article 7:</b> For the purpose of realising people’s participation in government and the application of decentralization, the Democratic Republic of the Sudan shall be divided into administrative units, the numbers, boundaries d [sic] names of which shall be prescribed by law.<sup>456</sup></p> <p><b>Article 8:</b> Within the Unitary Sudan, there shall be established in the Southern Region a Regional Self-Government in accordance with the Southern Provinces Regional Self-Government Act, 1972, which shall be an</p>

<sup>454</sup> Ibid: 5

<sup>455</sup> Interim Constitution of the Republic of Sudan. 2005. Part 1. Article 5. P. 4

<sup>456</sup> Ibid: Part 1. Article 7. P. 2

	<p>organic law, and shall not be amended except in accordance with the provisions thereof.</p> <p><b>Article 182:</b> In order to realize democratic rule and widen the base for public participation therein and to abide by the principles of administrative decentralization and to satisfy their cultural distinction and to provide for stability and progress, the Executive shall by warrant establish, in each Province, a People's Executive Council having corporate personality. The law shall prescribe the powers if these Councils, their financial, legislative and executive powers, and their functions and procedure of formation, subject to the provisions of Article 8 of this Constitution.</p> <p><b>Article 183:</b> The Province People's Executive Council shall establish People's Local Council at all levels and shall delegate to them such powers as it may think fit.</p> <p><b>Article 184:</b> The People's Local Councils in the Provinces of the Southern Region shall be the basis for the organization of Regional Self-Government provided by the Constitution for these Provinces.</p>
1998	<p><b>Article 2:</b> The Sudan is a federal republic, the supreme authority thereof is based on the federal system drawn by the Constitution as a national centre and States, and administered at the base by local government in accordance with the law, to ensure popular participation, consultation and mobilization, and to provide justice in the distribution of power and wealth.</p>
2005	<p><b>Article 24:</b> The Sudan is a decentralized State, with the following levels of government;- (a) The national level of government, which shall exercise authority with a view to protecting the national sovereignty and territorial integrity of the Sudan and promoting the welfare of its people, (b) Southern Sudan level of government, which shall exercise authority in respect of the people and states in Southern Sudan, (c) The state level of government, which shall exercise authority at the state level throughout the Sudan and render public services through the level closest to the people, (d) Local level of government, which shall be throughout the Sudan.</p> <p><b>Article 177:</b> The Republic of the Sudan shall be decentralized and composed of State [...].</p> <p><b>Article 183 (2):</b> Abyei Area shall be accorded special administrative status under the Presidency, in which residents of Abyei Area shall be citizens of both Southern Kordofan and Bahr el Ghazal.</p>

Large geographical areas experienced marginalisation long before the country gained independence in 1956. During the last years of British rule, an effort towards unification and the inclusion of southern Sudan was initiated, but right after Independence, contrasting views on how to run the country led to civil war and further separation of the two regions. Although different strategies have been advocated over the years, all political governments since 1956 have pursued a political centralisation of power, resources and economic growth. Moreover, demands for new strategies have been voiced by the South, especially by the SPLM/A since the 1980s with regards to wealth-sharing and regional self-government. How has the constitutions dealt with these issues?

#### 5.4.1 1956 and 1973 Constitutions

In 1956, the importance of a decentralised system had not yet shown itself. As mentioned in Chapter 2, this had been discussed at the Juba Conference, but all parties had ended up agreeing to a united country, with Southern participation in national politics. Furthermore, as the political forces in the country unitedly agreed to independence, it is reasonable to assume that decentralisation was not a pressing matter. However, when approaching the 1973 constitution, the situation was different.

Regional Self-Government in the southern provinces was one of the most important achievements in the Addis Ababa Agreement. This grouped the three southern provinces of Bahr El Ghazal, Equatoria and the Upper Nile into a self-governing region, with their own Regional Assembly and High Executive Council.<sup>457</sup> In the 1973 constitution, this agreement was honoured in Article 8, and thus, a decentralised system of governance was implemented.<sup>458</sup> However, Regional Self-Government was only implemented in the South, showing the exclusivity of this constitution. What the document does provide is argumentations in favour of this system, and the achievements it hoped to bring: *“In order to realize democratic rule and widen the base for public participation therein and to abide by the principles of administrative decentralization and to satisfy their cultural distinction and to provide for stability and progress.”*<sup>459</sup>

#### 5.4.2 1998 and 2005 Constitution

The 1998 constitution provides for the adoption of the principle of decentralisation of rule, and the system of government is institutionalised in the constitution as a federal system. The favourable arguments for this system were to ensure popular participation, consultation and mobilisation, as well as fair distribution of power and wealth. The Permanent Constitution of 1973 did not have a dedicated section for introducing the system of governance, however, this was provided in Chapter 6 of the 1998 constitution. The Constitution divided the country into 26 states.<sup>460</sup> Article 111 defines state powers, which extends to planning, legislation and administration<sup>461</sup> The federal government however, controlled defence, the armed forces and security, foreign relations, elections on all levels, and federal lands and natural resources.<sup>462</sup> This, according to Abel Alier, is the regimes way of keeping tight control over the states functions and responsibilities. The President, who has the power to suspend or withdraw state functions, if he declares State of Emergency, further amplifies Alier’s argumentation.<sup>463</sup> Furthermore, Dr Akolda M. Tier, stated that, based on the division of power, the civilian population in the South will be southerners while the army, the police, the security forces and the legal profession will be northerners.<sup>464</sup> This could potentially be a source of conflict, especially since the southerners previously demanded southern participation in these jobs.

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<sup>457</sup> Addis Ababa Agreement on the problem of South Sudan. Chapter 1. Article 3-4. P. 1-2. The council was to be chaired by a Presidential Appointee.

<sup>458</sup> The Permanent Constitution of the Sudan 1973. Part 1. Article 8. P. 3.

<sup>459</sup> Ibid: Part 7. Article 182. P.32

<sup>460</sup> Constitution of the Republic of Sudan 1998. Part 6. Article 108. P. 14

<sup>461</sup> Ibid: Part 6. Article 111. P. 17

<sup>462</sup> Ibid: Part 6. Article 110. P. 17

<sup>463</sup> Alier1999. P. 2

<sup>464</sup> Tier 1999 “A Survey of the Sudan Constitution 1998. P. 8

Considering the fact that the country was in a civil war, to what degree this system was effective can be questioned. Furthermore, because of unequal power-sharing, it is likely that the system was not acceptable for the southerners.

The 2005 constitution introduces a much more complex system of decentralisation, compared to the previous constitutions. In part one of the INC, the decentralised system of governance is introduced, and the Sudan is defined as a decentralised state with three levels of government. At the national level, the government is to exercise authority to protect national sovereignty and territorial integrity. At the state level of government, authority is exercised to provide services through the level closest to the people. Finally, the Sudan is to have a local level of government throughout the country.<sup>465</sup> An important distinction between this and the previous constitution is that the federal state is removed and replaced by a decentralised system of governance. Comparisons are more fruitful in the 1973 document, as it too was written at least partly in order to constitutionalise the Addis Ababa Agreement and to introduce self-governance for the South.

As in 1973, Southern Sudan is the main point of interest in 2005. That region is awarded its own level of government, and is to exercise authority in respect to the people and states in southern Sudan. As mentioned before in this analysis, what is essential in 2005 is the precise and detailed wording in the articles, probably to avoid individual interpretations.

Part twelve of the Interim Constitution addresses the issue of states.<sup>466</sup> This section of the constitution is only concerned with states inside the northern region, as southern Sudan has a separate set of articles organising the establishment of a government for southern Sudan.<sup>467</sup> The northern states shall be composed of state organs, state executives and the state legislature. Three regions beside Southern Sudan are specified in the text; Southern Kordofan, Blue Nile States and the Abyei Area.<sup>468</sup> Southern Kordofan and Blue Nile States receive special attention because of the Agreement on the Resolution of the Conflict in Southern Kordofan and Blue Nile States.<sup>469</sup> The most contentious area is Abyei, because of the challenges with the northern boundaries, and how to delineate and demarcate the historical areas of the nine Dinka Ngok kingdoms which was transferred to Kordofan by the British

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<sup>465</sup> The Interim Constitution of the Republic of Sudan. 2005. Part 1. Chapter 4. Article 24. P. 10

<sup>466</sup> Interim Constitution of the Republic of Sudan 2005. P. 70

<sup>467</sup> Ibid: Part 11.

<sup>468</sup> Ibid: Part 12. P. 72-3

<sup>469</sup> Ibid: Part 12. P. 72-3

Administrators in 1905.<sup>470</sup> The case is further complicated as Abyei is very oil-rich, and the North and the South wanted to profit from this areas' revenues.<sup>471</sup> The constitution states that *“Abyei Area shall be accorded special administrative status under the Presidency, in which resident of Abyei Area shall be citizens of both Southern Kordofan and Bahr el Ghazal.”*<sup>472</sup> Simultaneously with the referendum in Southern Sudan, Abyei shall have a separate vote to establish if the area is to continue to have a special administrative status in the north, or be part of Bahr el Ghazal (South Sudan).<sup>473</sup>

### 5.4.3 Conclusion

A decentralised system of government has been an important cause for the South, who has actively advocated it since 1946. This demand has been part of the southern restructural-redistributive vision of nation-building, and over the years, it became the only solutions for keeping the country united. The constitutions have tried to meet this demand, yet in the long term they were unsuccessful. Either regional power was retracted as seen Under Numayri, or it was weakly implemented as seen in the 1998 Constitution. This demand was only met in 2005, when the region was given Regional Self-Government, a Regional President and a Regional Constitution. However, this was not enough to keep the country united, as the South voted for Independence in 2011.

## 5.5 Presidential Power

1956	<p><b>Article 10:</b> Parliament shall elect five persons who shall, together constitute the Supreme Commission.</p> <p><b>Article 11:</b> The Supreme Commission shall be the highest constitutional authority in the Sudan and in it shall vest the supreme command of the armed forces of Sudan.</p> <p><b>Article 23:</b> the Supreme Commission shall appoint as Prime Minister such person as may from time to time be elected for the purpose by the House of Representatives from amongst the existing members of Parliament.</p>
1973	<p><b>Article 80:</b> The president of the Republic is the Head of State. In him vests the executive powers and he participates in making laws. He acts on a direct mandate of the people through a plebiscite prescribed by law. The President shall be nominated by the Sudanese Socialist Union in accordance with its Basic Rules.</p> <p><b>Article 81:</b> The president is the symbol of sovereignty and national unity, and representative of the people's will. He shall be responsible for the protecting the victories of May Revolution, the achievements of the people, the consolidation of the working forces of the people, the preservation of freedom, justice and welfare of the people.</p> <p><b>Article 106:</b> If at any time when the People's Assembly is not in session or in cases of importance and urgency, the President of the Republic may issue Provisional Republican Orders having the force of law. Such provisional Orders shall be submitted to the People's Assembly within fifteen days from the date of issue if the People's Assembly is in existence, or at the first meeting in case of dissolution, or prorogation or end of session. If such Provisional Orders are not submitted as prescribed above or are submitted but not passed by the People's Assembly they shall cease to be law without retrospective effect.</p> <p><b>Article 111:</b> If the President of the Republic is satisfied that an imminent danger is threatening [...] he shall declare a State of Emergency and take the necessary measures to prevent the dangers which may include</p>

<sup>470</sup> Ahmed Einas 2009. P.140

<sup>471</sup> Sørbo – Ahmed (eds.) 2013. P. 17

<sup>472</sup> Interim Constitution of the Republic of Sudan 2005 Part 12. P. 73

<sup>473</sup> Ibid: Part 12. Article 183. P. 73

	suspension of all or any of the freedoms and rights guaranteed by this Constitution [...]
1998	<p><b>Article 36:</b> The Republic of Sudan shall have a President elected by the people.</p> <p><b>Article 43:</b> The President of the Republic shall represent government and the supreme sovereignty of the land. He shall stand as the supreme commander of the people's armed forces and other regular forces, have competence as to maintenance of the security of the country against dangers, preserving its integrity and mission and supervising the foreign relations thereof. He supervises the process of justice and public morals, cares for constitutional institutions and mobilize the enhancement of public life. He shall, in this respect, in accordance with provisions of the Constitution and the law, have the following functions and powers, to:-(a) appoint holders' of constitutional federal posts ; (b) preside over the Council of Ministers ; (c) declare war in accordance with the provisions of the Constitution and the law ; (d) declare the state of emergency in accordance with the provisions of the Constitution and the law (e) have the right to initiate draft constitutional amendments, legislations and sign the same ; (f) approve death sentences, and grant pardon, remit conviction or penalty ; (g) represent the State in its foreign relations with States and international organizations, appoint the ambassadors from the State, and accredit the ambassadors dispatched thereto ; (h) generally represent the authority of the State and the people's will before the public opinion and in public occasions ; (i) any other functions as may be prescribed by the Constitution or the law.</p>
2005	<p><b>Article 49:</b> The National Executive shall consist of the Presidency of the Republic and the National Council of Ministers.</p> <p><b>Article 51:</b> (1) The Presidency of the Republic shall consist of the President of the Republic and two Vice Presidents. (2) There shall be partnership and collegial decision-making within the Presidency in order to safeguard stability in the country and implement the Comprehensive Peace Agreement.</p> <p><b>Article 52:</b> there shall be a President for the Republic of the Sudan to be directly elected by the people in national elections according to the law and the regulations set by the National Election Commission.</p> <p><b>Article 58:</b> (1) the President of the republic is Head of State and Government and represents the will of the people and the authority of the State; he/she shall exercise the powers vested in him/her by this Constitution and the Comprehensive Peace Agreement and shall, without prejudice to the generality of the foregoing, perform the following functions [...].</p>

### 5.5.1 1956 Constitution

The Governor-General had served as executive authority during the Condominium. When the Transitional Constitution of 1956 was adopted, power was shared between the Supreme Commission and the Prime Minister. The supreme commission, a parliament elected five-man commission, was the highest constitutional authority and commander of the armed forces.<sup>474</sup> Alongside this commission, a Prime Minister was to be appointed by the Supreme Commission from the existing members of Parliament.<sup>475</sup> No presidency was discussed in this document, which can be explained by the fact that it was only meant to be temporary.

### 5.5.2 1973 Constitution

The 1973 constitution introduced a presidential system as Numayri had been elected President in October 1971, prior to the constitution. The access to this candidature however, was limited to members of the Sudanese Socialist Union.<sup>476</sup> The President was head of State with

<sup>474</sup> The Transitional Constitution of Sudan. 1955. Chapter 3. Article 10. P. 2-3

<sup>475</sup> Ibid: Chapter 4. Article 23. P. 5

<sup>476</sup> The Permanent Constitution of Sudan. 1973. Part 5. Article 80. P. 15. It was also the Socialist Union who nominated presidential candidates.



executive powers and participation in law-making.<sup>477</sup> The President was also the supreme constitutional authority and was responsible for the protection and independence of the country.<sup>478</sup> He was also the republic's symbol of sovereignty and national unity, probably as a result of his peace achievements in 1972.<sup>479</sup> Furthermore, he could give Provisional Republican orders, which would have the force of law, and he could declare State of Emergency, which included suspensions of all or any freedoms and rights guaranteed by the constitution.<sup>480</sup> Thus, this constitution concentrated great authority in the Head of State. Furthermore, Articles 81 and 82, which accounts for Presidential powers, were amended in 1975. The following sentences were added at the end of each article: "*and to this effect he may take such action and make such decisions as he deems fit and his decisions in this respect shall be binding and valid in accordance to their provisions*".<sup>481</sup> The amendment opened up for yet more presidential power, and as mentioned in Chapter 3, several coup d'états against Numayri in the 1970s created much uncertainty, which ultimately gave him a reason for attaining more power.

### 5.5.3 1998 Constitution

When the third military regime took over in 1989, they ruled by constitutional decrees for nine years. One of the biggest differences between the 1973 and 1998 constitution, was the presidential candidature. In 1973, the candidature was restricted to members of the Socialist Party, whilst in 1998 every voter had the right to nominate a candidate, and the President had to be elected by the people.<sup>482</sup> There are many similarities between the 1973 and 1998 constitution in terms of presidential power, as the President was named the supreme sovereignty of the land, and supreme commander of the armed forces, he represented the people's will, and could also declare war and a State of Emergency. One thing particularly interesting about this issue is that it sparked public debate. It would perhaps be reasonable to assume that the strong presidency received criticism; however another motion gained much more attention. The constitution stated that the President did not have to be a Muslim (nor male).<sup>483</sup> The question of a non-Muslim president provoked reactions, especially from the old guard of the Muslim Brotherhood, deeming it "un-Islamic" and claiming that it fundamentally

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<sup>477</sup> Ibid: Part 5. Article 80. P.15

<sup>478</sup> Ibid: Part 5. Article 81. P. 15

<sup>479</sup> Ibid: Part 5. Article 82. P. 15

<sup>480</sup> Ibid: Part 5. Article 106, 111. P.18-19

<sup>481</sup> The Permanent Constitution of the Sudan (Amendment) 1975. Article 81,82. P. 2

<sup>482</sup> Constitution of the Republic of Sudan 1998. Part 3. Chapter 1. Article 36. P. 7. Article 37 states that you have to be a Sudanese national, of sound mind and at least forty years of age.

<sup>483</sup> Tønnessen 2010. P. 10-11.

contradicted what they had originally stood for; Islam as a comprehensive way of life.<sup>484</sup> Hassan al-Turabi, who was one of the architects of this constitution, and leader of the Muslim Brotherhood, recalled in an interview with Liv Tønnessen in 2008:

*“The Muslim Brotherhood was sceptical about the fact that it was not explicit stated that the president should be a Muslim. Eventually they swallowed it. The argument that convinced them was a logical one; Muslims are in majority and it is very unlikely that a Muslim will vote for a non-Muslim President. In the U.S you have to be WASP to become a president. The only one who was a catholic, Kennedy, was shot.”*<sup>485</sup>

Even though it is not required for the president to be Muslim, the form of oath required by the president to “swear by Almighty God, to hold the Precedency of the republic in worship and obedience to God [...] to accept Shure and advice” could, according to Dr. Akolda M. Tier, be understood as an indirect preference for a Muslim President.<sup>486</sup> In short, the President is provided with considerable executive and legislative powers, and as Dr. Akolda M. Tier writes “*Lord Action’s dictum that power corrupts and absolute power corrupts absolutely has been lost of by the architects of the 1998 Constitution.*”<sup>487</sup>

#### 5.5.4 2005 Constitution

The 2005 constitution introduces a whole new set of rules to regulate presidential power and power sharing. The President’s scope of action has become tightened and where he previously had the opportunity to change the constitution, declare war or State of Emergency, was removed in 2005. The National Executive is discussed in part three of the constitution, and it includes the Presidency of the Republic, and the National Council of Ministers.<sup>488</sup> Power sharing is highlighted here, and it further states that the Precedency shall consist of the President and two Vice Presidents, and there is to be a partnership with collegial decision-making in order to safeguard stability and the implementation of the Comprehensive Peace Agreement.<sup>489</sup> These safeguards have not been implemented in the Sudan on any previous occasion. As in 1973 and 1998, the President is Head of State, and Government, and represents the will of the people and the authority of the State. Equal to the 1998 document,

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<sup>484</sup> Ibid: 11

<sup>485</sup> Ibid: 12. WASP is an informal term, meaning White Anglo-Saxon Protestant.

<sup>486</sup> Constitution of the Republic of Sudan 1998. Part 3.. Article 40 P. 5. Dr. Akolda M. Tier also comments on the presidency described in the 1998 Constitution p. 2-3.

<sup>487</sup> Tier 1999. “A Survey of the Sudan Constitution 1998.” P. 3

<sup>488</sup> The Interim Constitution of the Republic of Sudan. 2005. Part 3. Article 49. P. 19

<sup>489</sup> Ibid: Part 3. Article 51. P. 19

the President of the Sudan is to be directly elected by the people in national elections.<sup>490</sup> Furthermore, some of the presidential functions include preserving security and integrity in the country, summoning, adjourning or proroguing the National Legislature, initiating constitutional amendments and legislation and assent to laws, declaring war and State of Emergency.<sup>491</sup> However, declaring war and State of Emergency cannot be done without the consent of the First Vice President.<sup>492</sup> In order to work towards national unity and equal political representation, Article 62 asserts that if the President is from the North, the First Vice President shall be filled by the person who has been elected President of Government of southern Sudan.<sup>493</sup> These safeguards are a clear testament of the situation the country has been in for years.

What is noticeable concerning the presidency, is that the constitution includes named political parties, which according to Sudanese lawyer Ali Mahmoud Hassanein, is unprecedented in constitutions.<sup>494</sup> Article 65 states that the incumbent President is to continue as president and be the Commander-in-Chief of the armed forces, whilst the Chairman of SPLM/A, or his successor, shall be first Vice President and President of the Government of South Sudan.<sup>495</sup> Even though this is an interim constitution, it is a legal document, which should have a general operation and application.<sup>496</sup> Elements such as this show the exclusivity of this constitution as well, just as we saw with the 1973 constitution. Though they are more representative in terms of a broader set of participants compared to the 1998 constitution, they are only based on the North-South relationship, which unfortunately was only *one* of the ongoing conflicts inside the Sudan at that time. Furthermore, limiting the access of these positions to the signatories of the CPA is undemocratic and does not serve as a good starting point for a country with a history of weak democracy.

### 5.5.5 Conclusion

The Transitional Constitution had a Council of 5 instated with presidential power. This model was re-instated in every civilian government after 1956, probably in order to secure power-sharing amongst the elite. In the three other constitutions, strong presidencies were created, where the President for instance participated in law-making, declared war and could declare

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<sup>490</sup> Ibid: Part 3. Chapter 2. Article 52

<sup>491</sup> Ibid: Part 3. Chapter 2. Article 58 (1). P. 21

<sup>492</sup> Ibid: Part 3. Chapter 2. Article 58 (2). P. 22

<sup>493</sup> Ibid: Part 3. Chapter 2. Article 61 (1) P. 23

<sup>494</sup> Hassanein 2006. P. 12

<sup>495</sup> The Interim Constitution of the Republic of Sudan. 2005. Part 3. Article 65. P. 24-25

<sup>496</sup> Hassanein 2006. P. 12

State of Emergency. These were all situations which could side line the constitution and thus, remove constitutional rights. No Presidential election has been considered completely legitimate. However, in 1998, the constitution made the positions available to everyone who wished to run for President. The 2005 Constitution introduced a National Executive in order to safeguard power-sharing between the North and the South. Additionally, that constitution provided the South with a separate President of the Government of Southern Sudan.

## 6 Conclusion

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This thesis has accounted for the historical development of constitution-making in the Sudan, beginning with the inclusion of Sudanese participation in the 1940s, and ending with the creation of the Interim National Constitution in 2005. This thesis has also focused on the historical context in which these constitutions have been created in, while at the same time looking at the difficulties of creating such a document within the context of a divided society, civil war, and personal and political power-relations. Trying to understand the purpose of creating these constitutions has also been a central goal.

Constitution-making in Sudan has been a complex affair. It has concerned nation-building, resolving a civil war, and maintaining political, economic and social considerations. Participation in this process can only be described as exclusive, as it has been dominated by the northern political elite since Independence, and sometimes joined by southern representatives in Khartoum. As a result of Sudan's turbulent history, constitution-making has become part of a larger political context, consisting of one goal; staying in power. This is illustrated by weak civilian governments, and frequent military coups. Alliances have been made and broken, peace deals signed and also broken, often resulting in weak constitutions with little or no legitimacy. However, despite this complex web of challenges, constitution-making has been pursued by every government since Independence, whether civil or military, which shows the importance of such a process.

What has become obvious throughout this historical presentation is that two different constitutional histories have become visible. On the one hand, this thesis has shown a general historical progression marked by a consistency of constitution-writing. On the other hand, this thesis has shown the development and implementation of the country's four constitutions stretching from 1956 until 2005. While scholars had begun to consider constitutions in authoritarian regimes as unimportant because they did not represent a political reality, constitution-making in the Sudan has shown the exact opposite, as it is the political reality that has created these four constitutions. The following sections present the authors main findings.

**Constitutions have been situational in the Sudan.** This means that they are characterised by their immediate circumstances making them very easy to situate in both time and place. The

Transitional Constitution of 1956 was an independence constitution, marking the country's sovereignty. The 1973 Permanent Constitution was the result of the AAA, giving Southern Sudanese equal access to the constitution-making process. This is evident in the constitution, as it equalised the two regions, implemented regional self-government, and provided non-Muslims the right to govern themselves by their own laws. An Islamic Constitution was implemented in 1998, and was written solely by the NIF, without participation from the opposition. The INC of 2005 was implemented by the same Islamist regime, however in the meantime they signed the CPA together with the SPLM/A, which influenced the constitution considerably. Furthermore, an International delegation monitored the constitution-making process adding extra pressure on the writers.

**Constitution-making has been closely linked to nation-building.** Two visions of nation-building have developed in the Sudan. The northern political elite has advocated their conservative-hegemonic vision, which has consisted of a national identity based on Islamic and Arab culture, with a centralisation of power and economic resources. In contrast, southern Sudan, along with other marginalised areas within the country, have developed a restructural-redistributive vision, in opposition to the Khartoum policies. They have advocated a national identity based on Sudanese diversity, and power-sharing through a decentralised system of government. As the northern political elite have dominated constitution-making, their vision has been recognised in every constitution-making process, and implemented documents since 1956. The 1973 Permanent Constitution was initially a compromise of northern and southern political ideas and demands. By equalising the Arab and African entities, Numayri made an effort to create a mutual vision of state-building. However, this only lasted for a couple of years, as Numayri entered into collaboration with the traditional political parties in 1977, and reintroduced the conservative-hegemonic vision. The 1998 Constitution followed in its predecessors footsteps, and continued the same nation-building strategy, only seeing Islamisation as the solution to the "southern" problem. The al-Bashir regime was forced to give up this vision in 2005, in order to implement the CPA. A new nation-building strategy, based solely on the acceptance of the country's diversities was visible, however, Sharia remained as the main source of law in the Northern region.

**Constitution-making has been an exclusive affair.** Access to participation in constitution-making has been limited. It has single-handedly been a job for the Sudanese political elite. The northern elite have dominated this process throughout the years; however, as this thesis has shown, southern participation has been persistent, especially with the implemented

constitutions, making their role more important than initially anticipated. What we have seen is constitution-making that have included a northern and southern elite, both under civilian and military rule. However, as pointed out, outside participation only extends to the South, as no representatives from other marginalised areas have been invited to participate.

**Constitutional success has only been achieved by the military.** If constitutional success is measured in the number of implemented constitutions, then the military regimes in the Sudan clearly comes out as the winners. Excluding only the 1956 Transitional Constitution, every other constitution has been written and implemented by authoritarian regimes in Sudan. As shown throughout this thesis, even though the civilian political parties have agreed upon an Islamic constitution, how and in what way this shall be implemented, has been a challenge. This, together with the desire to stay in power, within the context of a continual civil war, has made implementation difficult. The military, on the other hand, was able to side line the political parties, which made decision-making much easier, including constitution-making.

**The constitutional development has contained a number of contested topics:** As should be clear through the argumentation, the question of religion and State has been the main topic of disagreement in Sudan's constitutional development. This question embraces more than the question of State Religion; it also affects people's social and political rights. This was discussed explicitly in relation to equality before the law in Chapter 5. Furthermore, the topic has been linked to nation-building and the consistent pursuit of a national Islamic identity by the northern political elite. As this thesis has demonstrated, personal religious freedom was stated in all four constitutions. The question of Sharia has been impossible to agree upon, and was demonstrated in 2005, when the country needed two separate legal systems. Another topic of disagreement has involved power-sharing and decentralisation. In 1956, no such system was implemented. In 1973 however, regional self-government was drawn up, with the South acting as one region. In 1998, a federal system was introduced, dividing the country into 26 states, thereby eliminating the South as a political entity, which it had been under the AAA. Furthermore, power continued to be centralised.

**Chapter 5 gives a comparative analysis of the constitutional documents.** It has highlighted some of the difficult issues within Sudan's constitutional development, these include: Nature of the State, Political Rights, Religion, Decentralised System of Governance and Presidency. This Chapter has contributed with a constitutional analysis that goes beyond the legal text, as it has carefully linked each constitution, and the topics of investigation, to the historical

context they are created in. Furthermore, this Chapter has been a confirmation of the main research question within this thesis: In what way and to what extent has the historical context influenced constitution-making in the Sudan? This is also in line with the topic of the two preceding Chapters, namely that these constitutions first and foremost represent the specific constitutional architects and their moment of creation. However, the constitutions share some similar characteristic and traits. The first articles have served as an introduction to the constitution, and have provided a definition of the State. Similar political rights are found in every constitution; however, because Sharia is the main source of legislation and they carry strong presidencies, the constitutions have been subject to limitations, especially in the 1973 and 1998 Constitution. In terms of religion, personal religious freedom has been provided in all of the constitutions, and Sharia has been a part of every constitution, complicating the relationship between State and religion. The 1973, 1998 and 2005 Constitutions have introduced a system of decentralisation; whilst at the same time have limited this power through continued centralisation of power. In contrast, the Transitional Constitution did not have a Presidency; however, the other three have made this political position strong, giving the president excessive power and influence.

**What has been the purpose of constitution-making in the Sudan?** As every government has initiated a constitution-making process since Independence, obtaining a constitution has clearly been of import. The question is why? First of all, as argued by Nathan Brown, constitutions are so common today, that even authoritarian regimes need to implement a constitution. Constitutions represent democratic legitimacy, which makes them very attractive to civilian and dictators alike. This clearly applies to the Sudanese context. As stated above, an important motive for creating constitutions has been to implement a specific vision of nation-building and constitutions has been an instrument for achieving this. In Sudan, civilian and military regimes have searched for a permanent constitution. The democratically-elected civilian regimes have struggled with constitution-making, as they have had weak civilian governments, making cooperation very difficult. However, the northern political elite agreed upon an Islamic Constitution early on, which helped them reinforce the conservative-hegemonic vision, which has been an overarching goal for the entire northern elite. The military, on the other hand, have been successful in implementing constitutions, and one pivotal reason indicates why: no consideration of sectarian views was needed and decision-making was therefore much easier. Another explanation is related to democracy and legitimacy. Unlike the civilian governments, the military regimes gained power through coup



d'états, and have therefore needed to gain popular support, in order to sustain their rule. As two of the constitutions followed peace agreements, the country was in a time of transition, whereby political institutions and practice needed to be re-established. This was achieved through constitution-making. The country has experienced three military regimes, whereby all of them claimed to take power, in order to stabilise and improve the development of the country. As they saw the civilian governments as incapable of governing, it became increasingly important to present themselves as something different, and thus, one way to achieve this was through writing a constitution. As seen in 1973 and 1998, the constitutions served the purpose of implementing different types of ideology, as this defines political culture and identity. This has been crucial in these times of transition. However, for constitutions to obtain legitimacy and national support, they needed to include public participation. As argued by Vivian Hart, the people need to feel ownership of the constitution, in order for it to be legitimate. This has not been successful in the Sudan, and is shown through the argumentation of this thesis. In conclusion, constitution-making has been an exclusive affair, *by* the elite, *for* the elite.

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