

Federalism as a peacemaking device in Sudan's Interim National Constitution

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By



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DECLARATION

I, Steve Odera Ouma, declare that this work is original. It has never been presented to any other University or institution. In the instances where the works of other writers have been used, references have been duly given. In this respect, I declare this work to be authentically mine. I hereby present this dissertation in partial fulfilment of the requirements for the award of the Master of Laws Degree in Human Rights and Democratisation in Africa.

Signed.....

Date.....

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Signature.....

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Date.....

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“The essence of federalism lies not in the institutional or constitutional structure but in the society itself. Federal government is a device by which the federal qualities of a society are articulated and protected”.

Daniel Elazar; Elazar, D (1984) *Federalism and political integration*



LIST OF ABBREVIATIONS

GOSS	Government of Southern Sudan
HEC	High Executive Council
US	United States
UN	United Nations
CPA	Comprehensive Peace Agreement
SPLA/M	Sudanese Peoples Liberation Movement
GOS	Government of Sudan
UK	United Kingdom
SPRSA	Southern Provinces Regional Self-Government Act
NCP	National Congress Party
PCP	Popular Congress Party



CHRONOLOGY OF THE KEY POLITICAL AND CONSTITUTIONAL EVENTS IN SUDAN'S CONTEMPORARY HISTORY

- 1899 The Anglo-Egyptian agreement establishes the Condominium in Sudan.
-
- 1930 The “Southern Policy” is introduced with the effect of isolating the South from the North.
-
- 1947 The Juba Conference comprising of both Northern and Southern representatives confirms the abandonment by the government of the “Southern Policy” limiting contact between the two regions.
-
- 1955 A revolution in the Equatoria region in Southern Sudan is characterised by widespread killing of Northerners living in the South.
-
- 1956 Sudan gains independence on 1 January under a transitional constitution. Led by Ismail al-Azhri, Sudan’s parliament begins deliberations on a permanent constitution. Northern politicians dismiss calls for federalism.
-
- 1958 A military coup led by General Ibrahim Abboud overthrows the government and suspends the constitution. General Abboud comes to power with a policy of Arabising and Islamising the South.
-
- 1962 Guerrilla civil war breaks out in the South led by a rebel movement called the Anya Nya.
-
- 1964 A revolution leads to the overthrow of General Abboud’s regime and a national government is established under Sir al-Khatim al-Khalifa.
-
- 1965 A round table conference is convened on the issue of Southern Sudan but fails to reach a solution to the civil war in the South.
-
- 1969 Army officers led by colonel Gaafar Al-Nimeiri overthrows the government through a coup.
-

- 1972 After months of negotiation, the Addis Ababa Peace Agreement between the Sudan government and the Southern rebel movement (Anyanya) is announced. The Agreement grants some measure of autonomy to the South.
-
- 1973 Sudan's first permanent constitution is proclaimed.
-
- 1983 President Al-Nimeiri abrogates the Addis Ababa Agreement and imposes Sharia law throughout the country. Civil war re-emerges with the creation of the Sudanese People's Liberation Army/Movement (SPLA/M).
-
- 1985 Following widespread demonstrations senior army officers who form the transitional military council under Siwar al-Dahab depose Al-Nimeiri.
-
- 1986 Following general elections a coalition government is formed under Sadiq al-Mahdi.
-
- 1987 The National Islamic Front party support the call by SPLA/M for federalism.
-
- 1989 The National Islamic Front led by Omar Al-Bashir orchestrates a coup, overthrows the government, suspends constitution and proceeds to create an Islamic state.
-
- 1991 Sudan for the second time employs federalism through the Fourth Constitutional Decree of 1991 creating nine states.
-
- 1994 The Tenth Constitutional Decree of 1994 redivides Sudan into twenty-six states, the states into fifty-seven provinces and provinces into 220 councils.
-
- 1997 The Fourteenth Constitutional Decree grants a greater measure of self-rule to the Southern states.
-
- 1998 A permanent constitution is adopted entrenching the federal arrangements created by the fourth, tenth and fourteenth constitutional decrees.
-
- 1999 Al Bashir imposes a state of emergency and dissolves the National Assembly as part of an ongoing power struggle with Hassan Al-Turabi hitherto the Speaker of the Assembly and Secretary General of the ruling party National Congress Party (NGP).

2000 Al Bashir under pressure organises election where he is elected president with opposition groups boycotting the elections.

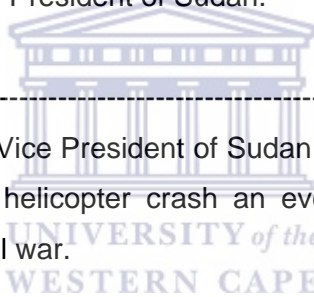
2002 Machakos protocol is signed between the GOS and the SPLA/M providing for the right to self-determination for the South after a six-year transitional period during which the South is exempt fro Sharia Laws.

2004 The Machakos Peace talks culminate in the signing of one Comprehensive Peace Agreement comprising an agreement on issues of power sharing, wealth sharing, and a cease-fire agreement. The CPA further provides for the enactment of Interim National Constitution which will be premised on it and which will operate during the six-year interim period.

9 July 2005 The Interim National Constitution is adopted and the interim six-year period is set in motion. At the same ceremony SPLA/M leader John Garang is appointed First Vice President of Sudan.

30 July 2005 John Garang, First Vice President of Sudan and President of Southern Sudan passes away in a helicopter crash an event which analysts foresee as a recipe for a new civil war.

11 August 2005 Salva Kiir the new SPLA/M leader is sworn in as the new First Vice President of Sudan and President of Southern Sudan dispelling previous premonition of chaos.



CHAPTER ONE

INTRODUCTION

1.1 Background to the study

The process of democratisation and the quest for peace in Africa has been marred by the proliferation of internal conflicts. Most of these conflicts have centred on the role, structure, and policies of the state.¹ The failure of African leadership to accommodate ethnic² differences has produced a variety of identity conflicts such as Rwanda's ghastly genocide,³ Somalia's collapse,⁴ Liberia's implosion,⁵ and Sudan's civil war that has already claimed millions of lives and displaced cosmic portions of the population.⁶

Sudan has been selected for purposes of this study because of its recent stride towards securing peace through a comprehensive political reorganisation, which for the most part employs the notion of federalism.⁷ Incidentally, the Interim National Constitution of Sudan adopted on the 9 July 2005 (Interim Constitution), provides for a decentralised system of

¹ N Haysom "Constitution making and nation building" in *Federalism in a changing world: Learning from each other* (2002).

² In this study, the term "ethnic" and "ethnicity" are used as broad concepts covering a variety of factors which distinguish one group of people from another group. Important descriptions in this regard include language, race, colour and religion.

³ In 1994, between half a million and one million people were massacred in Rwanda in three and a half months. The overwhelming majority of the victims of the Rwandan genocide belong to the Tutsi minority ethnic group that comprised approximately 14 percent of the population. The vast majority of the perpetrators are members of the Hutu group, which comprised 85 percent of the population.

⁴ The Somali civil war commenced in 1991 when the then military leader Siad Barre was overthrown. Prior to his deposition he had relied heavily on the manipulation of clan identity to stay in power. This has led to the perennial inter-clan conflict that is seen in Somalia today.

⁵ The cycle of violence that characterised Liberia up until 2004 erupted when the native Liberian Samuel Doe ousted Americo-Liberian president William Tolbert Jr. Up until then, the native Liberians had been subjects of oppression. Unequal distribution of resources and political marginalisation between the two groups featured as some of the key themes during the conflict.

⁶ Sudan has experienced civil war intermittently since 1956. Central to the Sudanese conflict has been the two conflicting identities that are prevalent in the country namely Arab/Islamic and African/Christian.

⁷ Federalism in this study refers to a form of political organisation, which unites separate political entities within an overarching political system such that they maintain their political integrity. See in this regard D Elazar "Federalism v. decentralisation: The drift from authenticity" (1976) *Publius: The Journal of Federalism* 12.

governance.⁸ The Interim Constitution grants Southern Sudan autonomy⁹ to extend over a six-year period, which will culminate in a referendum in the South on whether it should remain part of Sudan or secede to form another state.¹⁰

The decentralised system of governance that now forms the integral part of the present Sudanese constitutional order, can be traced to the Machakos Peace Talks between the Southern rebel group Sudanese Peoples Liberation Movement/Army (*SPLA/M*) and the Government of Sudan (*GOS*) which commenced in Machakos, Kenya in 2002. On 20 July 2002, the two parties signed the Machakos Protocol in which they reached an agreement on an extensive agenda setting forth principles of governance, a transitional process and structures of government as well as on the controversial issue of the right to self-determination for the people of Southern Sudan. In addition, the two parties agreed to carry on with talks on issues of power sharing, wealth sharing and a cease-fire agreement.

The peace process was fortified in 2003 and 2004 with the signing of a series of framework protocols on the aforementioned issues in Naivasha, Kenya. On 31 December 2004, the parties signed two supplementary protocols, one on the implementation modalities of the earlier agreements and the other on a permanent ceasefire marking the end of the talks. The whole process culminated on 9 January 2005 during an official ceremony where then First Vice-President Ali Osman Taha and the late and former SPLM/A chairman John Garang signed a Comprehensive Peace Agreement (*CPA*) comprising all previously signed documents including the two 31 December protocols. The CPA would form the basis of the Interim Constitution which was to be drafted within the following six months. On 22 April 2005, the GOS formed a drafting committee to draw up the Constitution. Having completed the draft text on the 14 March 2005 and submitted the same to a Pan-Sudanese Constitution Committee, the National Assembly, the SPLM/A Council and finally the President for ratification, the Interim Constitution was adopted on 9 July 2005. During the same ceremony and in accordance with the new constitution, the late SPLA/M leader John Garang was sworn in as the First Vice President of the country. On 30 July 2005 John Garang regrettably passed away in a helicopter crash while returning from an official

⁸ Article 24 of the Interim National Constitution.

⁹ Article 25 (a) of the Interim National Constitution.

¹⁰ Article 222 (1) and (2) of the Interim National Constitution.

visit to Uganda. Incumbent President Omar El Bashir has since appointed the Vice President of Southern Sudan and new SPLA/M leader Salva Kiir as First Vice President of the country.¹¹

1.2 Statement of the research problem

International and national response to Sudan's civil war has ranged from efforts at electoral democracy¹² to resort to the grant of autonomy to Southern Sudan. Of these responses, the most prolific means for conflict management in Sudan's history seems to be the latter. Discernibly, the longest period of peace that Sudan has witnessed (11 years) in its over 40 years of civil war, came about when then President Al Nimeiri granted a measure of autonomy to Southern Sudan. This has guided conflict resolution practitioners, negotiators, mediators and scholars in deducing that in the grant of autonomy, is present the solution to Africa's longest civil war.

On the other hand, because of this attractiveness autonomy has proved controversial. At one time it has offered a way out of conflict or has served to transform it positively.¹³ Other times it has failed to solve problems for example in Eritrea where the grant of autonomy was followed by a full annexation, a long bloody war and formation of a new state in 1993.¹⁴ Sudan, likewise exemplifies this point. The grant of autonomy to Southern Sudan in 1972 with the signing of the Addis Ababa Peace Agreement facilitated some reprieve from war beginning 1975 to mid 1983. The conflict resumed in late 1983 when the autonomy granted to the South was cancelled by the Northern government. Rufus Davis has opined of the nature of federalism:

The truth of the matter is and experience has been the teacher that some 'federal' systems fail, some do not...some inhibit economic growth, some do not...some promote a great measure of civil liberty, some do not; some are highly adaptive, some are not...whatever their condition at any one

¹¹ BBC News "Kiir sworn in as new Sudanese VP" Thursday 11 August 2005 at <http://news.bbc.co.uk/1/hi/world/africa/4140520.stm>

¹² In this study, electoral democracy refers to the election of a government through free and fair elections as opposed to the forcible inception of the same through military rule or a *coup d' etat*.

¹³ For example the informal establishment of an autonomous regime in Northern Iraq following the declaration of a no-fly zone over the region by the United Nations (UN) Security Council has facilitated relative peace up until now.

¹⁴ See R Lapidoth *Autonomy: Flexible solutions to ethnic conflicts* (2000) 4. The author in this text also gives the example of the former Soviet Union where ethnic conflict has intensified and has led to armed hostilities.

time...it is rarely clear... that it is so because of their federalness, or the particular character of their federal institutions, or the special way they practice federalism, or in spite of their federalness.¹⁵

Against this backdrop, taking into account the ability for federalism to work for or against peace and democratisation, how effective is the federal principle as an institutional framework for managing the Sudanese civil war? What are potential perils and/or possibilities for success of the federal principle as employed in Sudan's recently enacted Interim Constitution?

1.3 Focus and objective of the study

The focus of this study is on the Interim Constitution adopted on 9 July 2005. The significance of the federal principle both as a peacemaking device and a tool of democratisation will be considered. The objective of the study is to provide an informed and well-researched estimation of the potential perils and possibilities for success of Sudan's contemporary constitutional arrangement.

1.4 Significance of the study

The relevance of this study derives from the signing of a CPA and the subsequent adoption of the Interim Constitution, a process that has seen the reintroduction of autonomy to Sudan's political administration. Because of its importance in the Sudanese peace process, the application of the federal principle in Sudan deserves a close examination and analysis. It is hoped that this study will positively inform and influence the unfolding Sudanese peace process. In addition, it is hoped that this piece will positively add to the scholarly literature on Sudan. Conflict resolution practitioners in different parts of the world engaged in negotiation, mediation or conciliation should likewise benefit from this study's analysis of federalism and its role as a tool for political integration in a heterogeneous society.

¹⁵ D Rufus *The federal principle* (1978) 211-212. For similar views see A Gaili "Federalism and the tyranny of the religious majorities: Challenges to federalism in Sudan" (2004) *Harvard International Law Journal* 517; B Omar "Federalism and problems of minorities" in *Federalism in the Sudan* (1995) 215; H Illy "Decentralisation of political systems: A worldwide trend?" in *Federalism in the Sudan* (1995) 8-9.

1.5 Hypotheses

The federal principle has served as a tool of political integration in heterogeneous societies. Federalism has provided protection against domination by the majority, an opportunity for self-fulfilment and self-development for the minority through institutions that it controls while maintaining the ability of both groups to pursue common goals.¹⁶ However, the federal principle can perpetuate and intensify the very conflicts it is designed to manage. In this regard, only a careful and concerted application of the federal principle, taking into account the peculiar circumstances of the case is capable of offering a viable solution to a conflict.

1.6 Literature review

The subject of federalism has attracted lots of literature. Rufus Davis¹⁷ has explored the meaning of the term federalism thereby offering a consequential piece for a theoretical understanding of the concept. Elazar¹⁸ has analysed the theoretical foundation of the federal principle and its application as a tool of political integration¹⁹. However, he has discussed federalism as tool of political integration generally and has not made any particular case study. This study is unique not only because it focuses on Sudan but on the contemporary Sudanese federal arrangement. In a book edited by Adar, Yoh and Maloka²⁰ in 2003 prior to the adoption of the Interim Constitution, an analysis of the peace process comprising of the signed Protocols has been conducted. This study has however been conducted based on the 2002 Machakos Protocols. In this regard, it falls short of analysing the amendments that have been reflected in the more recent CPA and the Interim Constitution. It also fails to analyse the deficiencies of the Protocols against the backdrop of Sudan's federal history as done by this study. For these reasons this study is unique and should be the first of its kind more because of the currency of the subject.

¹⁶ G Gagnon and J Tully *Multinational democracies* (2001) 338.

¹⁷ Rufus, as note 15 above.

¹⁸ D Elazar *Federalism and political integration* (1979).

¹⁹ D Elazar (Ed) *Federalism as grand design: Political philosophers and the federal principle* (1987).

²⁰ K Adar, J Yoh and E Maloka *Sudan peace process: Challenges and future prospects* (2004).

1.7 Research methodology

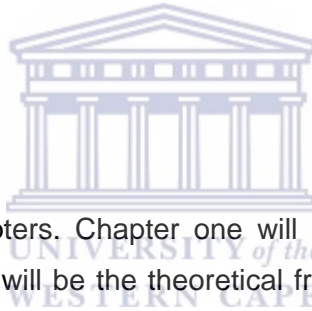
The research is library based on documented facts. Extensive use has also been made of Internet based resources. As the subject under consideration is of particular relevance to the events currently unfolding in Sudan and to Africa as a whole, this study is not only of academic interest.

1.8 Limitations of the study

Indeed, any endeavour at writing on Sudan is characterised by volumes of historical accounts of the country's experience. Each of these works is useful and contains detailed accounts of events as they unfolded. The greatest task for a researcher in this regard is to decipher the portions relevant to his or her area of focus. This necessarily entails going through bountiful volumes. Secondly, the political precariousness of Sudan serves to render a researcher perpetually on alert. Events unfolding in the country could serve to either adversely or favourably alter the course of study.

1.9 Overview of chapters

This study will consist of five chapters. Chapter one will principally set out the content and objective of the study. Chapter two will be the theoretical framework comprising an analysis of the concept of federalism from which the notion of autonomy is derived. The significance of the federal principle in meeting the challenges of multiculturalism will also form part of the discussion. Chapter three will outline the history of the federalism in Sudan and attempts at its use as a tool for political integration. This chapter will comprise an analysis of the content of autonomy under the Addis Ababa Agreement of 1972. Chapter four will consist of an analysis of the federal principle as embodied in the Interim National Constitution of Sudan. In so doing, it is expected that its potential perils and possibilities of success will be brought to the fore. Chapter five will comprise conclusions drawn here from.



CHAPTER TWO

THEORETICAL FRAMEWORK OF ANALYSIS

2.1 Preface

In the quest for a stable and peaceful world, humanity today finds itself confronted with a plethora of political problems many of which are seemingly intransigent and whose sources lie in conflicting national, ethnic, linguistic and racial claims.²¹ The just resolution of these problems is essential if regional and world peace is to be attained. The federal principle or federalism as referred to in ordinary parlance, has served as a resource for resolving these problems.²² Many writers tend to limit the use of the term federalism to the application of the federal principle in the establishment of a federal system in the conventional sense of a contemporary federal state. Some scholars have identified and drawn a conceptual distinction between “federalism” as a normative term, “federal political systems” as a descriptive term referring to a broad genus of federal arrangements and a “federation or federal system” as a particular species within that genus.²³

This chapter prescribes the meaning of the term federalism as employed in the research and discusses the application of the federal principle in three selected instances. The importance of the federal principle in dealing with the challenges of multiculturalism is considered. Further, the role of the constitution in dealing with the challenges of multiculturalism also forms part of the discussion.

2.2 Defining federalism

Any scholar of federalism would acknowledge the complexity in defining federalism in view of the various ways in which it has been employed.²⁴ Indeed, one researcher has identified 267

²¹ Elazar, as note 18 above at 2.

²² Elazar, as note 18 above at 2. See also R Watts “Federalism, federal political systems and federations” in (1998) 1 *Annual Review of Political Science* 117.

²³ Watts, as above.

²⁴ J Anton *American federalism and public policy* (1989) 3.

different conceptions of the term.²⁵ Nevertheless, federalism or the federal principle in this thesis refers to the philosophical or ideological idea that a political organisation should seek to achieve both political integration and political freedom by combining shared rule on some matters and self-rule in various forms on others.²⁶ Federalism is a normative and philosophical concept based on the notion that the greatest human fulfilment is to be found through participation in a wider community that at the same time favours diversity and protects individuality.²⁷ The practice of federalism links individuals or groups within various political entities, forming part of a broader single entity, in a lasting but limited union in such a way as to provide for the pursuit of common ends, while maintaining their respective integrities usually through permitting some level of discretion in policy making on their part.²⁸

2.3 Federal political systems or federal arrangements

Federal political systems are instances of application of the federal principle. Unlike federalism, “federal political systems” is a descriptive term referring to a genus of political organisation that is marked by the combination of shared rule and self-rule.²⁹ This genus encompasses a variety of species such as those Elazar has categorised: unions, constitutionally decentralised unions, federations, confederations, federacies, associated states, condominiums, leagues, and joint functional authorities³⁰. To this list, Lapidoth has added decentralised and autonomous arrangements.³¹ These constitute the many ways in which the federal principle may be applied. More often than not, such application includes hybrids of two or more arrangements because statesmen are seldom more interested in theoretical purity but in pragmatic political solutions.³²

²⁵ See W Stewart *Concepts of federalism* (1984).

²⁶ J Madison, A Hamilton, and J Jay *The federalist* (1987) 515 opine that as a normative concept federalism entails both elements of self-rule and shared rule. See also D Elazar *Exploring federalism* (1987).

²⁷ On this definition of federalism see B De Villiers “Federalism in South Africa: Implications for individual and minority protection” (1993) *South African Journal of Human Rights* 375. For the same definition see P King *Federalism and federation* (1982) 159.

²⁸ D Elazar *Exploring federalism* (1987) 5; A Gaili “Federalism and the tyranny of the religious majorities: Challenges to federalism in Sudan” (2004) *Harvard International Law Journal* 513; R Lapidoth *Autonomy: Flexible solutions to ethnic conflicts* (2000) 50; D Elazar “Federalism v. decentralisation: The drift from authenticity” (1976) 6 *Publius: The Journal of Federalism* 12.

²⁹ See Watts, as note 22 above.

³⁰ Elazar, as note 28 above.

³¹ Lapidoth, as note 14 above.

³² R Watts *Comparing federal systems in the 1990s* (1996) 126.

In order to satisfactorily appreciate the significance and application of the federal principle in Sudan, it is helpful to highlight the features of some of the federal arrangements already mentioned above. However, for the want of space and focus of this study, only federations, decentralised and autonomous arrangements will be discussed.

2.3.1 Federations

A federation is a system of government in which power is constitutionally divided between a central authority and constituent political units.³³ It is noteworthy that the central feature of a federation is that it is established by a constitution. Federalism in contrast, refers to the broader concept behind a federation. In a federation, a state is comprised of a number of self-governing regions (*often referred to as "states" or "provinces"*) united by a central (*federal*) government. The self-governing status of the constituent regions is constitutionally entrenched and may not be altered by a unilateral decision of the central government.³⁴ Further, the constituent entities are regarded as sovereign in so far as certain powers are reserved to them that may not be exercised by the central government. However, they do not enjoy an independent status under international law and accordingly powers of foreign policy and national defence are normally exercised by the central government.³⁵

As earlier stipulated, the diffusion of power in a federation is typically outlined in the Constitution of the country. Nonetheless, these entities possess their own Constitutions in most cases which they may amend as they see fit although in the event of conflict between these Constitutions and the federal Constitution, the latter as a rule takes precedence. Generally, federations typically incorporate one or more mechanisms for protecting the interests of constituent entities. Commonly employed is the direct representation of constituent entities' governments' in federal political institutions such as the executive, legislature and the judiciary. The form and manner of representation may vary from one country to another. For example, where a federation has a bicameral legislature, consisting of two or more chambers or houses, the upper house is often used to represent the constituent entities while the lower house represents the people of the nation as a whole. This system of representation has served to safeguard the self-governing status of the constituent states.

³³ See Elazar, as note 28 above.

³⁴ See Elazar, as above.

³⁵ Lapidoth, as note 14 above.

In addition, most federations have a special tribunal for settling disputes among the various regions or between a region and the federal government.³⁶ Other than these common features, the precise division of power in a federation varies from one nation to another.

2.3.2 Devolved or decentralised arrangements

Devolution is the transfer of power from the central government to subordinate regional institutions.³⁷ Devolution differs from a federation in that although their territorial jurisdiction may be similar, devolved bodies have no share in sovereignty. Their responsibilities and powers are derived from and are conferred by the centre. Furthermore, devolved administrations are not of necessity a constitutional creation and by and large exist in statute law. For this reason, devolved arrangements can have their powers broadened, narrowed or abolished in the same manner. In contrast, regional administrations in federations are created and granted their powers by the Constitution of the country and can only be abolished or altered constitutionally through consultation with the constituent units. A devolved government is one that is decentralised, either wholly or partially, from state level to a more local level. The degree of devolution may vary depending on the scope of the delegated powers, extent of participation of locally elected officials and the degree of supervision exercised over the decentralised units by the centre.³⁸

Examples of such arrangements are the Provincial Administration system in Kenya³⁹ and that in the United Kingdom (UK). In UK certain powers have been devolved over time from the UK government in London to the UK's constituent nations.⁴⁰

³⁶ See Lapidoth, as note 14 above.

³⁷ A Heywood *Politics* (2002) 167. See also R Lapidoth, as note 14 above at 51.

³⁸ Lapidoth, as note 14 above at 51.

³⁹ The Provincial Administration system in Kenya divides the country into 8 provinces each headed by a Provincial Commissioner. The provinces bear no measure of autonomy and they basically implement policies already decided by the central government. They are thought to be an avenue through which efficiency may be achieved.

⁴⁰ Scotland was formerly governed by the Scottish Office in London, but now has the Scottish Executive Government and the Scottish Parliament. Likewise Wales used to be governed by the Welsh Office in London, but now has the National Assembly of Wales. Northern Ireland has undergone a similar process.

2.3.3 Autonomous arrangements

Autonomy is often used to describe the quality of having the right to decide or act at one's own discretion in certain matters. As a federalism derivative, different scholars have defined the term in a number of ways. George Jellinek⁴¹ has described an autonomous entity as one based solely on its own laws and with all the material and functional attributes of statehood: the authority to govern, to administer and to judge. According to Paul Laband⁴² autonomy includes the power of legislation of the autonomous entity but differs from sovereignty in that it can only be exercised within limits established by the sovereign. To Carre de Malberg⁴³ an entity may be regarded as autonomous only when it has its own derivative original powers of legislation, administration and adjudication.

In this study, autonomy refers to an arrangement aimed at granting to a group that differs from the majority of the population in the state but that constitutes the majority in a specific region, a means by which it can express its distinct identity.⁴⁴ Similar to federations, matters relating to foreign relations and external security are reserved for the central government though in certain instances the autonomous body has limited powers with the consent of the central government. In some, cases the autonomous body has limited powers with the consent of the central government to enter into international agreements and to become a member of a particular international organisation.⁴⁵ Moreover, the powers of the autonomous entity may include the power to legislate, adjudicate and administer in the sphere of responsibility transferred to it. In these cases the legislative Acts of the autonomous area may require confirmation by the central government before having the force of law. Nevertheless the Acts of the autonomous entity in the areas for which it has jurisdiction are normally not subject to any control by the central authorities. Unlike a federation that can only be constitutionally created, an autonomous regime can be established by either an international treaty or by a constitution.

⁴¹ G Jellinek *The general theory of the state* (1960) 493.

⁴² Cited in Lapidoth, as note 14 above.

⁴³ Lapidoth, as note 14 above.

⁴⁴ See Lapidoth, as note 14 above at 33.

⁴⁵ Lapidoth, as note 14 above.

Owing to the fact that actual cases of autonomy are rather diverse they may differ in various aspects from those described above.

2.4 Why federalism?

Federalism can strengthen democracy by allowing for a more accountable government that is nearer its citizens.⁴⁶ While it is true that a federal order is not an indispensable condition of democracy, it arguably comes closer to achieving the democratic ideal than a unitarian order. It is arguable that federalism could overemphasise centrifugal forces at the expense of centripetal ones.⁴⁷ In order to address this, strong institutions, effective delivery of policies and unifying symbols need to be set in place, together with an independent and impartial judicial system that enforces minority protection rights, the rule of law and the secularity of the state. Owing to the ability of federalism to advance democracy it has provided an institutional mechanism through which multicultural societies have maintained unity and coherence.⁴⁸ Federalism has been considered as tool for political integration in pluralistic societies and a counterforce to tyranny of the majority. As opposed to centralisation of power characterised by the emphasis on one national identity, federalism emphasises the positive assertion of ethnic identity. Federalism allows a minority to be a majority within its constituent federal state. It offers a unique opportunity for self-fulfilment and self-development for the minority through institutions it controls while maintaining the ability of the two groups to pursue common goals.⁴⁹ It has been argued in this regard that by offering greater opportunity for power sharing to various groups, federalism plays a critical role in facilitating political participation thereby reducing prospect of conflict. The end result is that political integration is preserved through a delicate balance between unity and diversity.⁵⁰

⁴⁶ B Serap, H Mia, J Miodrag and E Christian "Federalism, decentralisation and conflict management in multi-cultural societies" 4 available at www.fca-caf.gc.ca/bulletins/speeches/federalism_e.shtml - 87k - 30

⁴⁷ See Watts, as note 32 above at 131. See also Serap, Mia, Miodrag and Christian, as above.

⁴⁸ Heywood, as note 37 above at 164.

⁴⁹ See Haysom, as note 1 above.

⁵⁰ See Elazar, as note 28 above at 28.

2.5 The role of the constitution in management of cultural diversity

In this study, the Constitution is a contract between the citizens of a country in regard to the manner in which they will jointly shape their collective destiny, manage their affairs and make their rules.⁵¹ Being the supreme law of the land, a constitution is vital in employing the federal principle in a bid to politically integrate a pluralistic society. A constitution ought to be construed as more than just rules of government. It ought to assemble the nation's aspirations and codify its common values. Constitutions in multi-cultural countries are invited to deal with this feature. A constitution can put minority guarantees and protections beyond the reach of parliamentary majorities.⁵²

Where it is firmly founded, a constitution is capable of generating a sense of security amongst the minorities. Constitutional approaches to multiculturalism have ideally fallen between two opposing paradigms. The first of these is drawn from the classical liberal democratic model.⁵³ It places emphasis on the existence of enforceable human rights in the constitution including the rights to individually practice one's religious, cultural or linguistic preference. The second paradigm employs the federal principle and constitutionally recognises cultural or community difference thereby allocating a measure of self-government, group autonomy or group protection. Since this thesis will be concerned with the latter, it is worth briefly discussing first constitutional approach to dealing with multiculturalism.

2.6 Conclusion

Contrary to the customary conception of federalism in the conventional sense of a federation, federalism in this study refers to a normative concept capable of varied application. When employed in this fashion federal political systems such as federations, autonomous arrangements and decentralised or devolved arrangements come to be. Federalism is critical as tool of political integration in pluralistic societies and can serve to act as a counterforce to the tyranny of the majority. It can be a tool of democratisation and advance democracy and participation of all factions of a society in the government of the country. However, federalism can also be the antithesis of political integration and yield secession. In discharging this function

⁵¹ Heywood, as note 37 above.

⁵² See Gaili, as note 15 above (2004) *Harvard International Law Journal* 517.

⁵³ Haysom, as note 1 above at 222.

of integration, the constitution has proved to be a vital tool. The success or failure of the federal principle in addressing the challenges of multiculturalism is dependent on the nature of the society where it is employed.



CHAPTER THREE

FEDERALISM IN SUDAN: A HISTORICAL PERSPECTIVE

3.1 Preface

This chapter examines Sudan's experience with federalism from a historical perspective. On the whole, this chapter will trace the debate on federalism, which has featured all through Sudan's quest for peace and unity. The manner and content of federalism as has been employed, in particular, the 1972 Addis Ababa Peace Agreement⁵⁴ (the Addis Agreement) and the Constitution of 1998 (the 1998 Constitution) will be considered. This chapter lays the foundation for a discussion of the present Sudanese constitutional order, which is for the most part inspired by the Addis Agreement, thereby re-introducing the notion of autonomy to Southern Sudan. In the essence, this chapter will serve to bring the recent political and constitutional developments in Sudan into perspective. In doing this, it will also provide historical insight into the character of the conflict, highlighting the key issues that have been at the heart of the civil war. This chapter seeks to give the reader an essential grasp of the historical facts behind the present day events in Sudan so as to be able to appreciate the ensuing analysis of the Interim National Constitution.

3.2 Background

Many scholars have often referred to Sudan as the microcosm of Africa in the sense that it is at one and the same time both Arab and African.⁵⁵ Whereas the internal cultural composition of Sudan may render it the microcosm of Africa physically, culturally and ethnically, this uniqueness confronts it with multiple political marginalisations rendering it neither distinctly African nor Arab, Muslim nor Christian. Internally, this puts it in an awkward position where the dominant elite mostly from the North desire the country to be Arab and Muslim and its Southern elite desire it to be African and "de-Arabised".⁵⁶ These two contradictory and exclusivist desires have been at the heart of the Sudanese conflict. Since it erupted in 1983, the internal conflict

⁵⁴ The Addis Ababa Agreement on the Problem of South Sudan, Appendix B in M Beshir *The Southern Sudan: From conflict to peace* (1975) 158.

⁵⁵ Abd Al Rahim "Arabism, africanism and self-determination in the Sudan" in Y Hassan *Sudan in Africa* 1985 228.

⁵⁶ A Mazrui "The multiple marginality of the Sudan" in Y Hassan *Sudan in Africa* (1985) 228; See also M Deng *War of visions* (1998) 35 and 69. According to the author the policy of the North towards the South was that of assimilation whereas the attitude of the South was resistance towards the same.

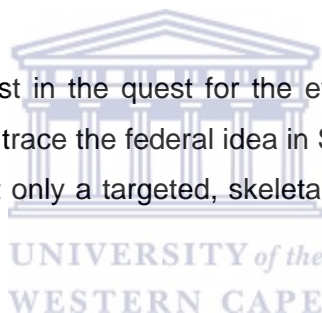
between the North and the South has been reproducing itself time and again in unprecedented patterns of violence. There has been an array of efforts both at the domestic and international stage aimed at resolving this conflict. Of significance to this study, is the use of the federal principle in the quest for political integration and democratisation in Sudan.

3.3 The federal question in pre-independent Sudan

Indeed if one wishes to come to terms with a political concept such as federalism, one must first come to terms with its history in a given context albeit the risk of reconstructing it imperfectly. Rufus Davis has said of this task:

“Those who travel the precarious journey into the past must not expect to find a beginning, nor one simple coherent thing, nor a single path, human institutions are not like that... Neither must they expect to find all the scattered shreds that need only the potter's skill to bring them back to their original form... And worse for the explorer, there is no register of birth for political ideas, no birth names, no book of dates.”⁵⁷

Perilous as the journey into the past in the quest for the evolution of a concept may be, this study will proceed as best as can be to trace the federal idea in Sudan's political history. Sudan has a long history of state formation but only a targeted, skeletal history of the same is in order for purposes of this study.



Historically, there existed five kingdoms in the area presently known as Sudan namely the Nubia, Maqarra, Alawa, Funj kingdoms and the Fur Sultanate.⁵⁸ The Nubia, Maqarra and Alawa kingdoms were Christian kingdoms situate in the South while the Fur Sultanate and Funj kingdom were Islamic and situate in the North.⁵⁹ The precursor of contemporary Sudan is said to date back at the establishment of a semi-centralised Islamic kingdom by the Funj kingdom following its defeat of the Nubia and Alawa kingdoms in 1754.⁶⁰ By this conquest, the latter were

⁵⁷ See Rufus, as note 15 above at 2.

⁵⁸ See H Sharif “Recycling the past in the Sudan: An overview of political decay” in H Sharif and T Tvedt (Eds) *Shortcut to decay: The case of Sudan* (1994) 22; S Fahey and J Spaulding *Kingdoms of the Sudan* (1973) 54; H Idris *Sudan's civil war: Slavery, race and formational identities* (2001) 33; P Woodward *Sudan 1898-1989: The unstable state* (1990) 23; P Holt *A modern history of the Sudan* (1961) 17; P Holt and M Daly *A history of the Sudan: From the coming of Islam to the present day* (2000) 1.

⁵⁹ Sharif, as above; Fahey and Spaulding as above at 55; Idris as above at 33 specifies that the Funj kingdom included the Gezira, the North-eastern parts of Sudan and the riverain region north of Khartoum which is the present day capital city of Sudan.

⁶⁰ Sharif, as note 58 above; Woodward, as note 58 above; Holt, as note 58 above at 22.

brought under the central administration of the former. During this period, the cultural process of Islamism/Arabism was a mark of cultural superiority hence it would bestow upon an individual an esteemed status in society.⁶¹ For example, in the Fur Sultanate cultural and racial supremacy was asserted through proof of Arabic descent.⁶²

3.3.1 The Turko-Egyptian rule (1821-1885)

The Turko-Egyptian conquest of the Funj and Fur Sultanate in 1821 and 1873 respectively, can be considered the earliest event that brought about a comprehensive centralised system of governance for the area presently known as Sudan. Naturally, as a colonial power extending its domains through military conquest, the Turko-Egyptian rule obliterated the boundaries between indigenous kingdoms and imposed central or unitary rule from Khartoum.⁶³ Some scholars have opined that this is the period that created the base for the strong centralisation tendencies that have been the hallmark of the Sudanese state up until 1998 when federalism was first constitutionally entrenched.⁶⁴

The Turko-Egyptian rule has been described as the most brutal and exacting period of colonial rule that has dominated Sudan.⁶⁵ Reforms introduced during this period included the centralisation of government, imposition of forced labour and service to the army, imposed taxation and monopolisation of the exiting trade in ivory.⁶⁶ There was a policy of forced conversion to Islam and compulsory change of language from indigenous dialects to Arabic.⁶⁷ The two most significant developments contributing to the North-South divide then, were the impoverishment of certain areas of the North through the forms of taxation already mentioned

⁶¹ See Deng, as note 56 above at 31; Sharif, as note 58 above.

⁶² See Sharif, as note 58 at 23 where he gives the example of the Fur Sultanate phenomenon “of wise stranger” whereby almost all claimed that their ancestor was a learned man of Arabic origin who was accepted by the original ruler of the groups and given him his daughters hand in marriage. The emphasis here was that of a claim of Arabic descent through patrilineal descent system but an African indigenous affinity through marriage.

⁶³ Sharif, as at note 58 above 23.

⁶⁴ Sharif, as note 58 above at 30; Holt, as note 58 above at 35; Woodward, as note 58 above at 23.

⁶⁵ Sharif, as note 58 above at 23-24; Holt and Daly, as note 58 above at 41.

⁶⁶ See in this regard, H Hannum *Autonomy, sovereignty, and self-determination: The accommodation of conflicting rights* (1996) 309.

⁶⁷ Hannum, as above; Sharif, as note 58 above at 30; Holt and Daly, as note 58 above at 32.

and land ownership, an act which contributed to the dramatic expansion of slave-raiding and slave-owning.⁶⁸ Slave raiding was chiefly carried out from the South and while not all Southerners were negatively affected by it, some benefited from collaboration with the merchant companies or the government.⁶⁹ Owing to the fact that the slave population in the North during this period was largely drawn from the South, in the popular mind, slaves and blacks were synonymous.⁷⁰ The effect of this was that even the Southern Sudanese who converted to Islam or exercised some power in the colonial society, as those in the army did, were stigmatised by their slave status or their slave origins.⁷¹ Therefore, the incorporation of the whole of the South as the Sudan's exploitable hinterland, the intensification of racial stratification and the widespread identification of people from the South with low status can rightly be viewed as consequences of the economic and political system of Turko-Egyptian colonialism.⁷²

Around 1881 an Islamic religious movement which came to be known as the Mahdist movement led by Mohammed Ahmed al-Mahdi, emerged in the North bringing to an end the Turko-Egyptian regime. Although some non-Muslims supported this movement, the revolt is widely thought to have been the brainchild of the Islamic community.⁷³

3.3.2 Anglo-Egyptian rule

In 1898, the British colonialists joined forces with Egypt to conquer Sudan thereby overthrowing the Mahdist state. During the Anglo-Egyptian rule, the North and South were administered as two separate entities.⁷⁴ In response to frequent rebellions from the South mostly over unequal treatment, the British prohibited most contact between the two regions. For example, from 1922,

⁶⁸ Hannum, as note 66 above.

⁶⁹ J Douglas *The root causes of Sudan's civil wars* (2003) 6; See also Woodward, as note 58 above; F McLoughlin "Economic development and the heritage of slavery in the Sudan" in (1979) 32 *Africa* 361.

⁷⁰ Douglas, as above; Deng, as note 56 above at 35.

⁷¹ Douglas, as note 69 above.

⁷² Douglas, note 69 above.

⁷³ Hannum, as note 66 above at 312.

⁷⁴ M Deng *Preventive diplomacy: The case of Sudan* (1997) 2; See also M Wai *The African-Arab conflict in the Sudan* (1981) 35. According to the author, the colonial administration adopted the southern policy, which was based on the premise that the black Africans were racially distinct from the Northern Arab Sudanese and would to this extent be administered separately.

Southerners could not travel to the North without a special permit and vice-versa.⁷⁵ In addition, Islam and the use of the Arabic language were banned in the South while the activities of Christian missionaries were encouraged there.⁷⁶ Little was done during Anglo-Egyptian rule to develop the South hence the existence of great economic disparity between the two regions at independence. Indeed, owing to multi-cultural and economic disparity factors, on the road to independence, the British considered the option of granting independence separately to the South or attaching it to either Kenya or Uganda.⁷⁷ However Egyptian and Northern Sudanese pressures succeeded in keeping the two regions together as a united country⁷⁸

3.4 The federal question in the run-up to Sudan's independence

Southern demand for a federation dates back to the run-up to independence in 1950 when Southern politicians raised the issue of structuring future relations between the North and South on a federal basis.⁷⁹ In November 1955, a month before independence, they declared that they were going to endorse the proclamation of independence for Sudan, only if the South were going to be granted considerable autonomy within a federal state.⁸⁰

The calls for federalism were principally driven by the Southerners' fear of Northern domination that had already begun manifesting itself in the numerical disparity between the South and the North in the legislative assembly.⁸¹ In the run up to the grant of independence, a twelve man commission was appointed to *inter alia* recommend the way to advance towards self government in Sudan. The Commission produced a draft Constitution which provided for certain safeguards for the South including the appointment of a minister for Southern affairs who was to be responsible for promoting in the Council and introducing in Parliament, measures for the

⁷⁵ Wai, as above at 36.

⁷⁶ A Alier "The Southern Sudan question" in M Wai (Ed) *The Southern Sudan* (1973) 3.

⁷⁷ M Bona *People and power in Sudan: The struggle for national stability* (1981) 24-28.

⁷⁸ Bona, as above.

⁷⁹ See M Khalid *The government they deserve: The role of the elite in Sudan's political evolution* (1990) 98; M Wai, as note 84 above at 69.

⁸⁰ Alier, as note 76 above at 19; See also *Sudan Weekly Digest of Proceedings of the Senate* 22 December 1955 304.

⁸¹ There were only 13 Southern members in the legislative assembly as against 75 from the North; see Niblock T *Class and power in Sudan: The dynamics of Sudanese politics* (1898-1985) 65.

economic and social betterment of the peoples of Sudan⁸² But these recommendations were rejected by the majority Northern representatives during the ensuing debate in the legislative assembly in January 1952. Later in the same year, Southerners were excluded from crucial constitutional talks that took place in Cairo between the Northern political parties and the Condominium powers.⁸³

These events increased Southern apprehension about the Northerners' intentions towards the South. To most Southern Sudanese, this was clear proof that the Northerners wanted to include the Southerners in the new constitution and the new Sudan on their own terms and not on the terms that the Southern Sudanese wanted.⁸⁴ This increasingly tense situation was further aggravated by the policy of "Sudanisation" through which the working force in the country was to be transformed to a Sudanese one as opposed to a foreign one.⁸⁵

Of the 1222 jobs, which were to be Sudanised, 1069 of which were held by Britons and 153 by Egyptians, only 4 were given to Southerners.⁸⁶ This more than anything else at the time, demonstrated to the Southerners that the Northerners were just but new colonisers.⁸⁷ In the heat of the moment, though federalism continued to be their main demand, some of the more radical Southerners of the time began to call for the complete separation of the South from the North. Others called for a referendum under the auspices of the United Nations (UN) to determine the future of the South.⁸⁸ It was against this backdrop of political disenchantment that a revolt broke out in the Southern region of Torit on 18 August 1955.

In the aftermath of the mutiny, Southern politicians raised the federal question once again in December 1955 during a debate on the motion for self-determination for Southern Sudan. After

⁸² See the "Report on the Work of the Constitution Amendment Commission" 8 December 1951 South 1/16/48 National Records Office.

⁸³ Alier, as note 86 above.

⁸⁴ A Loiria Political awakening in Southern Sudan 1946-1955: Decolonisation and the problem of national integration PhD Thesis University of California Los Angeles (1969) 235-235.

⁸⁵ Wai, as note 84 above at 56.

⁸⁶ Wai, as above.

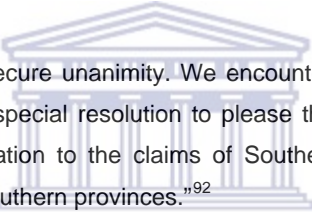
⁸⁷ *Sudan Report of the Commission of Inquiry Southern Disturbances*, August 1955 Khartoum: McCorquodale Company Limited 114.

⁸⁸ E Balance *The secret war in Sudan* (1977) 45; See also Wai, as note 74 above at 69.

a passionate appeal by the Southerners in both houses, the Northern members eventually agreed reluctantly to the insertion of a provision into the bill which stipulated that the Southern demand for a federal system of government would be considered after independence.⁸⁹ In response, Southern politicians deferred the question to after independence in exchange for posts in the government to be formed.⁹⁰

3.5 The federal question after Sudan's independence

No sooner had independence been declared, than the term federalism became a taboo, tantamount to subversion, in the political language of the Northern elite who on the eve of independence were assuring their Southern brothers that they sympathised with their cause.⁹¹ In 1957, a parliamentary committee set up to look into the federal question rejected the idea on the ground that it was unsuitable for the Sudan. It then came to the fore that the clause had been inserted as a political manoeuvre rather than as a genuine promise on the part of the North. The then leader of the opposition Mohammed Ahmed Mahgoub explained this as follows:


"We canvassed all the parties to secure unanimity. We encountered some difficulty in convincing the Southerners so we inserted a special resolution to please them pledging that the constituent Assembly would give full consideration to the claims of Southern Members of Parliament for a federal Government for the three Southern provinces."⁹²

In November 1958, the Sudanese government was overthrown in a military coup led by General Ibrahim Abboud and the new military regime set on to deal forcefully with dissent in the South. It became official government policy that the South introduces Islam and Arabic throughout the country with all speed in order to unite the Southern people and Sudan in general with the hope that this would discard calls for federalism. African traditional religions practiced mainly in the South were discouraged and in February 1962, all foreign Christian missionaries in the South were expelled.⁹³ As unrest in the South mounted, Northern forces attacked Southern villages

⁸⁹ Wai, as note 74 above at 69.

⁹⁰ Sharif, as note 58 above at 40.

⁹¹ Sharif, as above.

⁹² M Mahgoub *Democracy on trial* (1974) 57.

⁹³ Wai, as note 74 above at 89.

with as many as half a million Southerners fleeing into exile.⁹⁴ The government of Abboud declared a state of emergency and warned that any talks of federalism would be considered as treason.

By this time a Southern rebel guerrilla force known as Anya-Nya had been established to resist Northern dominance. The political wing of the Anya-Nya, Sudan African National Union (SANU) repeated the pre-independence calls for federalism through the grant of autonomy to the South. In October 1964, massive general strikes broke out in the North, leading to the fall of the military government. A transitional government replaced the military government and arranged what came to be known as the roundtable conference in March 1965 to discuss the Southern question with a view to reaching an agreement that was to satisfy the regional interests as well as the national interests of Sudan.⁹⁵

3.6 The 1965 round table conference

Among the significant aspects of this conference were the divisions amongst Southerners as to whether the South should remain a single political unit and if so whether its independence was viable option. Three factions namely SANU (I), SANU (O) and Southern Front (SF) represented the South. The Northern parties consisted of the Umma Party, the National Union Party (NUP), the Peoples Democratic Party (PDP), the Islamic Charter Front (ICF) and the Communist Party.

The Northern politicians were prepared to concede only a limited regional autonomy to the South in areas such as primary education, health and roads, leaving control over economic planning, financial policy, state security, armed forces, foreign affairs and other areas of national policy to the central government.⁹⁶

The Southerners on the other hand, insisted that a federation was necessary to ensure that they would exert control over their own affairs and resources. However whereas there was general agreement amongst the Southerners on their right to self-determination, there was a divergence of views amongst them on how it was to be asserted. SANU (I) insisted that federation was

⁹⁴ Wai, as above.

⁹⁵ *Documents on the Roundtable Conference* in M Beshir *Southern Sudan: Background to the conflict* (1968) 120 (Appendix) (Hereinafter Documents on the Roundtable Conference).

⁹⁶ *Documents on the Roundtable Conference* 12.

necessary to ensure that the South would exert control over their affairs and resources.⁹⁷ The SF for their part wanted the Southern people to express their opinion by way of referendum. It was their position that in all previous attempts to solve the Southern problem, the wishes and aspirations of the people of Southern Sudan were not ascertained. To find out what they wanted, the SF adopted the position that the Southerners should be allowed to exercise their right to self-determination in an internationally supervised referendum at which they would chose between separation, confederation, federation, local autonomy or the existing unitary system.⁹⁸ SANU (O) called for outright secession and the formation of an independent state in the South.⁹⁹

With such divergent views it came as no surprise that the conference ended in a deadlock. Ultimately, the conference appointed a twelve-person committee to draw up a working paper on the North-South relations. The Committee, made up of an equal number of Southern and Northern members, deliberated for a year before submitting a report. Although the Committee finally agreed that the South should be separate from the North, it was still unable to agree on several key issues particularly the most vital question on whether the South should be one region as most Northerners wanted or three regions as advocated by the Southerners.¹⁰⁰ There were also fundamental differences over what relationship would exist between Southern and Northern troops and on the fiscal aspects of the proposed federal arrangement.

By the time the Committee's report was submitted, the civil war in the South had degenerated. The then President Ibrahim Abboud resigned as head of state and a transitional Government was appointed to serve under a provisional Constitution of 1956. The Coalition government that came to power after April 1965 reneged on the question of reconvening the conference to discuss the federal question. The coalition was in turn ousted out of power by the military on 25 May 1969 led by Colonel Jaáfar Nimeiri.

⁹⁷ *Documents on the Roundtable Conference* 112.

⁹⁸ *Documents on the Roundtable Conference* 162; See also B Malwal *People and power in Sudan: The struggle for national stability* (1981) 107.

⁹⁹ *Documents on the Roundtable Conference*, 76.

¹⁰⁰ R Collins *The Southern Sudan in historical perspective* (1975) 83. See also Alier, as note 76 above at 23.

3.7 The Addis Ababa Peace Agreement

Nimeiri immediately embarked on the federal question and took steps towards recognising the rights of the Southern people to regional autonomy within a united Sudan. Over the next two years he made a positive step in appointing Southerners to administrative positions in the South.¹⁰¹ During a visit to Ethiopia in 1971, his government made arrangements for a peace conference to be held in Addis Ababa. The conference called for the grant of autonomy to Southern Sudan and resulted in the Addis Agreement. The Addis Agreement created a federal structure in Sudan and was later incorporated into Southern Provinces Regional Self-Government Act of 1972 (SPRSA) and the permanent Constitution of 1973.

For the first time, the South had its own Regional Assembly, High Executive Council (HEC), Regional Civil Service, Regional Development Corporation, a regional principal language (English) in addition to the national official language (Arabic).¹⁰² At the centre, the South was represented by Southern quotas in the government, national assembly and the army. The country's Second Vice-President was a Southerner and headed the HEC. The Addis Agreement stipulated that the SPRSA could only be altered upon a vote of three quarters of the National Assembly and approval by a referendum in the South.¹⁰³ Despite the fact there appeared to be legal safeguards in to the regional autonomy that the South was granted, within the space of little more than a decade the agreement collapsed and brought down with it the "federal experiment" in Sudan.

The following section will investigate the content of federalism as employed in the Addis Agreement in a bid to evaluate its strengths and weaknesses in consolidating peace and democracy.

3.8 The content of autonomy under the Addis Ababa Peace Agreement

As alluded to earlier, the 1972 Addis Agreement was given legal status through enactment of the SPRSA of 1972 as an organic law of the Sudan. It was later incorporated into the 1973 Constitution.

¹⁰¹ Hannum, as note 66 above.

¹⁰² Hannum, as note 66 above.

¹⁰³ Article 2 of the Addis Agreement.

3.8.1 Legislative power under the Addis Agreement

Chapter V of the Addis Agreement vested regional legislative authority in a People's Regional Assembly elected by Southern Sudanese citizens resident in the Southern region.¹⁰⁴ The Assembly could legislate over the preservation of public order, internal security efficient administration and the development of the Southern region in the cultural, economic and social fields.¹⁰⁵ This legislative competence was subject to the reserved powers of the central government which included national defence, external affairs, currency and coinage, air and inter-regional river transportation, communications and telecommunications, customs and foreign trade (*over certain commodities which the regional government could identify with the approval of the central government*), nationality and immigration, planning and public audit.¹⁰⁶ The People's Regional Assembly was expected on request to provide the Peoples National Assembly with facts and information concerning the administration of the South.¹⁰⁷ Further, the People's Regional Assembly could by a two-thirds majority request that a national law it deemed detrimental to Southern welfare be postponed from entering into force. However, the National President had the discretion to grant or deny such request.¹⁰⁸

To safeguard the interests of the Southern region, the People's Regional Assembly could by a majority of its members, request the withdrawal of any Bill presented to the National People's Assembly, which in its view would adversely affect the welfare rights of the citizens in the Southern region.¹⁰⁹ Again in this instance, withdrawal of such Bill was a matter within the president's discretion.¹¹⁰ The President could veto any Bill of the People's Regional Assembly that he deemed contrary to the National Constitution. Nevertheless, the National People's Assembly could reintroduce such a Bill and according to article 107 of the 1973 Constitution, a two-thirds majority of the National Assembly could override a presidential veto.¹¹¹

¹⁰⁴ Article 8 of the Addis Agreement.

¹⁰⁵ Article 11 of the Addis Agreement.

¹⁰⁶ Article 7 of the Addis Agreement.

¹⁰⁷ Article 12 of the Addis Agreement.

¹⁰⁸ Article 14 of the Addis Agreement.

¹⁰⁹ Article 15 (i) of the Addis Agreement.

¹¹⁰ Article 15 as above.

¹¹¹ Article 107 of the Constitution of Sudan 1973.

3.8.2 Executive power under the agreement

The regional executive authority was vested in a HEC headed by a President with a mandate to act in the South on behalf of the National President. According to article 18, the HEC was charged with specifying the duties of the various government departments in the Southern region. The National President appointed the President of the HEC on the recommendation of the Peoples' Regional Assembly.¹¹² The HEC President in turn proposed its members to the National President for appointment the process being the same for removing appointees from office.

As a Chief Executive, the President of the HEC had the constitutional mandate to promulgate administrative regulations enforcement of which was the responsibility of Council Members.¹¹³ The Addis Agreement remained vague on the question of the relationship between the Council and the various ministries of the central government. All the same the ultimate authority for defining the relationship rested in the hands of the National President.¹¹⁴ Provisions dealing with the relationship between the HEC President and the National President were unclear. For example, article 16 stipulated that the Council acted on behalf of the national administration but article 20 made the Council responsible to the People's Regional Assembly and the President. The National President's constitutional power to regulate the relationship between the Southern administration and the central ministries also was problematic. The Addis Agreement was not clear on how the regional departments should relate to the central ministries and the role of Provincial Commissioners exacerbated this confusion. Provincial Commissioners were nominated by the HEC President and appointed by the National President. Although their work directly concerned matters assigned by the Act to the regional government, these Commissioners reported the central government authorities in Khartoum.

3.9 The fall of the Addis Ababa Agreement

The Addis Agreement of 1972 forever remains a landmark in the political history of Sudan for having brought about and maintained peace for 11 years. It collapsed when President Nimeiri failed to abide by its commitments. Owing to the fact that the Southern government was entitled

¹¹² Article 19 of the Addis Agreement.

¹¹³ Article 24 of the Addis Agreement.

¹¹⁴ Article 22 of the Addis Agreement.

to revenues received from natural resources in the South under the Addis Agreement, they were enthusiastic in wooing oil companies to explore the region. United States (US) oil company Chevron Incorporated agreed to explore Southern Sudan in 1974 and in 1978 discovered significant oil reserves. In 1983, Nimeiri's government through the National Assembly attempted to redraw the boundary between the North and South in such a way as to shift Bentiu and other areas of the South, rich in agriculture and minerals to the North. In addition, in September 1983, under the influence of Hassan Al Turabi the then leader of the National Islamic Front¹¹⁵, Nimeiri cancelled the grant of autonomy to the South and introduced Sharia rule throughout the country. All these steps led to strong reactions in the South and eventually to the outbreak of another civil war in the same year.

3.10 Political developments in Sudan from 1985 to date

In April 1985 after 16 years in power, the military Government of Colonel Nimeiri was overthrown in a military coup organised by army officers and Transitional Military Council was put in place under the leadership of General Abed Rahman Siwar Al-Dahab. Elections were organized in 1986 that saw the Sadiq Al-Mahdi become Prime Minister. Al-Mahdi's Government lasted less than four years. However, during this period it had started taking some important measures but was faced serious challenges including the continuing war in the South as well as drought and desertification. In June 1989 the current president of Sudan General Omar Hassan El-Bashir assumed power following a military *coup d'état*.¹¹⁶

3.11 Federal structure under the 1998 Constitution of Sudan

The 1998 Constitution is the first one to have formally introduced the federal principle in Sudan's political administration. It came into force on 1 July 1998 and elections of which were boycotted by all major political parties in the country were held. Incumbent President El-Bashir was elected for a further five-year term with his National Congress Party (NCP) assuming 340 of the 360 parliamentary seats. Al Turabi was appointed the Speaker of Parliament. The NCP party members were awarded key positions and possessed strong control influence over the Government, army, security forces, judiciary, academic institutions and the media.¹¹⁷

¹¹⁵ The National Islamic Front is an offshoot of another movement based in Egypt called the Muslim Brotherhood who advocated for a theocratic state.

¹¹⁶ A Lesch *Sudan: Contested national identities* (1998) 113.

¹¹⁷ Lesch, as above at 114.

Although it created a federal structure in Sudan and provided for certain fundamental rights and freedoms, the 1998 Constitution reflected a strict Islamic ideology. The relationship between the federal government and the states was such that the former had more authority over the latter.¹¹⁸

In 1999, an internal power struggle within the NCP resulted in President El-Bashir declaring a state of emergency, dissolving the Parliament, and suspending important provisions of the Constitution including those related to the structures of the local government in the various states.¹¹⁹ In May 2000 Al Turabi led a split from the ruling NCP thereby establishing a new party called the Popular Congress Party (PCP). Many officials linked to Al Turabi were dismissed from Government and in May 2001 Al Turabi himself was placed under house arrest and was later accused of organizing a *coup d'état*. At least 70 key members of the PCP were detained without charge or trial, and a number fled in to exile.¹²⁰

3.12 Conclusion

This chapter has illustrated that the historical process that has separated the Arab/Islamic North and the African/South has its roots in the attempts at Arabisation and Islamisation by the North of the South and in the resistance to these forces in the South. Undeniably, every Sudanese government since independence has been dominated by Northern Arab Muslims. This chapter underscores the significance of ethnic diversity in the Sudanese society. The federal principle has been very instrumental in Sudan's quest for peace and democracy but for has long remained an elusive concept. The Addis Agreement facilitated a period of peace for eleven years but collapsed when it was repudiated by then President Al-Nimeiri. The federal experiment in Sudan in 1972 provides useful indicators on the style of a workable federal arrangement for the country. Also pertinent to the conflict has been the allocation of natural resources in particular oil. This has emphasised the need to provide for a concise fiscal plan in a prospective federal arrangement for Sudan. Lastly, the inability of the North and South to reach a consensus on the style of political administration from the pre-independence era raises the debate on a right to self-determination with a possibility of secession.

¹¹⁸ K Adar, J Yoh and E Maloka, as note 20 above at 104.

¹¹⁹ *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General* 19 available at www.un.org/News/dh/sudan/com_inq_darfur.pdf.

¹²⁰ *Report of the International Commission* as above.

CHAPTER FOUR

FEDERALISM IN CONTEMPORARY SUDAN: SUDAN'S TRANSITIONAL INTERIM NATIONAL CONSTITUTION

4.1 Preface

Sudan's constitutional past and devotion to the rule of law is bleak. Sudan has had three transitional constitutions, two permanent constitutions and a series of constitutional decrees regarding constitutional issues in its 48-year history as an independent state.¹²¹ This chapter provides insight into the content and significance of the federal principle as employed in the Interim Constitution that was drafted on the basis of the CPA. The conceptual framework of analysis under chapter two and the federal history of Sudan under chapter three will inspire this analysis. It is hoped that this endeavour will expose the potential perils and possibilities for success of the present constitutional order in Sudan.

4.2 The legal status of the Comprehensive Peace Agreement in the Interim National Constitution

It is important to clarify the legal status of the CPA in the Sudanese constitutional order. Article 225 of the Interim Constitution provides that the CPA is deemed to have been duly incorporated into the Constitution and that any of its provisions which are not expressly incorporated are considered to part of the Constitution.¹²² The legal effect of this provision is to render it an integral part of the Interim Constitution and therefore part of the supreme law of the country. Therefore, in this study where reference is made to the CPA and the various agreements comprising it, cognisance should be taken of the fact that such references bear constitutional fortitude.

¹²¹ See M Hoebink *Constitutional perspectives on Sudan* (1999) 6-7.

¹²² Article 225 of the Interim National Constitution.

4.3 The Interim National Constitution of Sudan

The Interim Constitution is comprised of 151 articles, 17 parts and 7 schedules. Whereas it is clear that the Interim Constitution does create a federation as qualified by Elazar¹²³ earlier in the study, another clearly evident element of the federal principle employed in the Constitution is autonomy.¹²⁴ The federal structure is created under Part I, Chapter IV, article 177 (1) which stipulates that the Republic of Sudan shall be decentralised with four levels of Government:

- a) The national level of government exercising authority with a view to protecting the national sovereignty and territorial integrity of the Sudan
- b) Southern Sudan level of government exercising authority in respect of the people and states in Southern Sudan
- c) The state level of government exercising authority at the state level throughout the country
- d) The local level of government existing throughout the Sudan.¹²⁵

As for the grant of autonomy section 25 of the Interim Constitution recognises the autonomy of the Government of Southern Sudan and the states of Southern Sudan. This chapter will discuss the significance of federalism in the Interim Constitution under the following headings:

- The content of Southern Sudanese autonomy.
- The impact of federalism on the relationship between the state and religion.
- Fiscal federalism in the Interim Constitution.
- The right to self-determination of the South.

4.4 The content of autonomy under the Interim National Constitution

In response to the cultural diversity and the attendant North South civil war that lasted over 40 years between the North and the South, the Interim Constitution employs the federal principle and creates an autonomous arrangement in Sudan.¹²⁶ Article 159 of the Interim Constitution provides for the establishment in Southern Sudan of a government known as the Government of

¹²³ Elazar, as note 28 above.

¹²⁴ Lapidoth, as note 14 above.

¹²⁵ Article 24 of the Interim National Constitution.

¹²⁶ See Lapidoth, as note 14 above.

Southern Sudan (GOSS) with legislative, executive and judicial organs.¹²⁷ Article 25 recognises the autonomy of the GOSS. It is noteworthy that inasmuch as other states are created by this constitutional dispensation, Southern Sudan is accorded a special status in the political administration of the country.¹²⁸ Lapidoth¹²⁹ refers to such an arrangement as a territorial political autonomy because it is primarily aimed at granting the Southern Sudanese who differ from the majority of the population, a means through which they can express their distinct identity.

The GOSS operates in accordance with an Interim Constitution of Southern Sudan and has the following primary responsibilities; promotion of good governance, development and justice, exercise of authority in respect of Southern Sudan and the states of Southern Sudan, acting as a link between the National Government and the states of Southern Sudan and to ensure the protection of rights and interests of the people of Southern Sudan.¹³⁰

4.4.1 Executive power of the Government of Southern Sudan

Executive power in the GOSS is vested in President of Southern Sudan directly elected by the people of Southern Sudan according to the Interim Constitution of Southern Sudan, a Vice President and the Southern Sudan Council of Ministers appointed by the President of the GOSS.¹³¹ The tenure of the President of the GOSS is five years and commences from the date of his assumption of office and he/she is subject to re-election for one term only.¹³² In the event of the post of the President of GOSS falling vacant, pending elections within sixty days and the swearing in of the President elect, his functions are assumed by Vice President of the GOSS.¹³³

¹²⁷ Article 152 of the Interim National Constitution.

¹²⁸ The federal principle as employed by the Interim Constitution is therefore an asymmetrical federal arrangement with the Southern Sudan enjoying a special status as compared to other states.

¹²⁹ Lapidoth, as note 14 above.

¹³⁰ Article 162 of the Interim National Constitution.

¹³¹ Article 163 (1) of the Interim National Constitution.

¹³² Article 163 (2) of the Interim National Constitution.

¹³³ Article 163 (3) of the Interim National Constitution.

This arrangement positively differs from that of 1972 discussed in chapter three whereby in place of the GOSS was a High Executive Council (HEC) and in place of a President of the GOSS was a President. In the previous arrangement, whereas the National President appointed the President of the HEC, the present arrangement under the Interim Constitution is more steadfast and democratic and requires the President of the GOSS to be elected by the people of Southern Sudan.¹³⁴ In addition the contemporary arrangement is more elaborate on the relationship between the President of the GOSS and the National president than existed between the National President and the President of the HEC under the SPRSA.

Under the SPRSA the HEC acted on behalf of the National President whereas another provision made the HEC responsible to the Regional Assembly. This ambiguity made it unclear whether the President was more responsible to the National President or the Peoples' Regional Assembly. The Interim Constitution is for its part very clear and stipulates that the President of the GOSS is to be the First Vice President of the country. In this regard he is a direct assistant to the National President in the running of the country as a whole and is also directly in charge of running Southern Sudan.¹³⁵

Unlike the SPRSA where the National President's power to regulate the relationship between the Southern administration and the central ministries was problematic¹³⁶ the Interim Constitution makes the National President and Southern President partners. In this regard, the most crucial decisions affecting the country require the consent of the President of the GOSS. No provision in the Interim Constitution directly mandates the National President to act unilaterally over affairs falling within the mandate of the GOSS. All actions affecting the country including a declaration of war and states of emergency which may entail suspension of parts of the Bill of Rights¹³⁷, and dissolution of or suspension of any of the state organs¹³⁸ with attendant consequences on the South, are to be taken with the consent of the First Vice President who is also the President of the GOSS.

¹³⁴ See Article 163 (1) of the Interim National Constitution as compared to Article 19 of the Addis Agreement.

¹³⁵ See Articles 65 (b) and Article 163 (1).

¹³⁶ N Kasfir "Southern Sudanese politics since the Addis Ababa Agreement" 76 (1977) *African Affairs* 143.

¹³⁷ Article 211 of the Interim National Constitution.

¹³⁸ Article 211 of the Interim National Constitution.

Drawing from the above the Interim Constitution ought to be viewed as having stronger legal safeguards than the 1972 federal arrangement that fell apart after bringing 10 years of peace to Sudan.

4.4.2 Legislative power of the Government of Southern Sudanese

Article 169 of the Interim Constitution provides for the establishment of the Southern Sudan Legislative Assembly. The Protocol on Power Sharing¹³⁹ and the Protocol on Wealth Sharing¹⁴⁰ that form part of the CPA envisage some of the functions of the Southern Sudan Legislature. Its powers shall include *inter alia* competence to approve plans, programmes and policies relating to state and society and approve the Annual Southern Sudan Budget of revenues and expenditures. The Constitution of Southern Sudan has not at the time of this study been enacted. However, there is in place a Draft Constitution of Southern Sudan (Draft Constitution) premised on the CPA awaiting adoption. Notable in the draft is the independence granted to the Southern Sudanese Assembly. Unlike the Regional Assembly under the Addis Agreement, the National President cannot veto a Bill of the Southern Sudanese Parliament. In addition, unlike the Addis Agreement whereby the Regional Assembly was subject to scrutiny by the National Assembly,¹⁴¹ the Draft Constitution provides for the complete independence of the Southern Sudanese Assembly. In this manner there are stronger safeguards in the present arrangement to guard against abuse of the CPA.¹⁴²

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4.5 Federalism and the relationship between state and religion

The relationship between state and religion has featured as the most divisive issue in the history of Sudan.¹⁴³ This relationship was very instrumental when drafting the Interim Constitution. Indeed Article 1 of the Constitution provides that:

¹³⁹ Protocol on Power Sharing articles 2.2.14, 2.2.6 1.5.5.4 (c) and (d) and 2.11.4.6 (i) in Part II of the Comprehensive Peace Agreement.

¹⁴⁰ Protocol on Wealth Sharing article 15.4 in Part II of the Comprehensive Peace Agreement.

¹⁴¹ Article 12 of the Addis Agreement.

¹⁴² Article 99 of the Draft Constitution of Southern Sudan

¹⁴³ K Adar, J Yoh and E Maloka, as note 20 above at 104. See also A Sidahmed and A Sidahmed *Sudan: The contemporary middle-east* (2005) 116; N Wakoson "The dilemmas of South-North conflict" in F Deng and P Gifford *The search for peace and unity in the Sudan* 90; A El-Affendi *Turabi's revolution: Islam and power in Sudan* 23. See in particular Lesch, as note 125 above at 1 who emphasises that the identity crisis in Sudan has centred on state and religion more than on any other factor.

The Republic of Sudan is an independent, sovereign state. It is democratic, decentralised, multicultural, multi-lingual, multi-racial, multi-ethnic, multi-religious country where such diversities exist.¹⁴⁴

The Interim Constitution in recognising this diversity provides for a secular and democratic Sudanese state whereby freedom of religion and belief is guaranteed equally to all.¹⁴⁵ Different from previous constitutions with the exception of the 1973 Constitution that was premised on the Addis Ababa Peace Agreement of 1972, the Interim Constitution recognises the diversity of the Sudanese state and thereby provides for a secular and democratic state.¹⁴⁶

In a positive budge, article 5 of the Interim Constitution permits the applicability of other sources of law in Sudan other than Sharia thereby accommodating other traditions and beliefs. Nationally enacted legislation is divided into two categories namely that applicable to Northern Sudan and the other applicable to Southern Sudan. Nationally enacted legislation having effect only in Northern Sudan has as its source of legislation Islamic Sharia and the consensus of the people¹⁴⁷ while that applicable to Southern Sudan has as its sources popular consensus, the values and customs of the people of the Sudan including their traditions and religious beliefs having regard to Sudan's diversity.¹⁴⁸ This provision largely addresses the state religion question that has for long hampered peace efforts between the North and South.

Also creditable is article 5 (3) (a) which stipulates that where national legislation is currently in operation or is to be enacted and the source of such legislation is religion or custom, residents of Southern Sudan who do not practice such religion or custom may either introduce legislation to allow practices or establish institutions in the state consistent with their own religion or customs.¹⁴⁹ In the same vein, Southern Sudanese residents may also refer the law to the

¹⁴⁴ Article 1 of the Interim National Constitution.

¹⁴⁵ See Article 38 of the Interim National Constitution on the freedom of creed and worship.

¹⁴⁶ The 1998 Constitution of Sudan provided for a federal structure but based on Islam. Inasmuch as article 1 of the constitution provided the Sudan was a country of religious tolerance, Article 7 provided declared that jihad, an Islamic notion was duty of every Sudanese. This constitutional quagmire served as the foundation for the manipulation of the Southern Sudanese.

¹⁴⁷ Article 5 (1) of the Interim National Constitution.

¹⁴⁸ Article 5 (2) of the Interim National Constitution.

¹⁴⁹ Article 5 (3) (a) of the Interim National Constitution.

Council of States¹⁵⁰ to be approved by a two-thirds majority of all the representatives or they may initiate national legislation which will provide for necessary alternative institutions as may be appropriate.¹⁵¹

Moreover, article 6 mandates the state to respect religious rights to worship or assemble, establish and maintain appropriate charitable or humanitarian institutions, acquire and possess movable and immovable property, write, issue and disseminate religious publications, teach religion or belief in places suitable for these purposes, solicit and receive voluntary financial and other contributions from individuals, private and public institutions, train appoint, elect or designate by succession appropriate religious leaders called for by the requirements and standards of any religion or belief, observe days of rest, celebrate holidays and ceremonies in accordance with the precepts of religious beliefs and communicate with individuals and communities in matters of religion and belief at national and international levels.¹⁵²

The downside of article 5 is that it fails to address the sources of legislation for states that do not fall in the North or South. During negotiation of the CPA, this was a very prominent issue. In effect the Machakos Protocol of July 20 2002 had included a provision to the effect that nationally enacted legislation having effect only in respect of states outside Southern Sudan was to have as its source of legislation Sharia and consensus of the people. The contentious issue was that as crafted, this provision was a recipe for chaos.

Some of the plausible arguments raised were that Northerners and Southerners were not neatly divided societies who lived in their respective regions. Presumably it was thought wise in the Interim Constitution not to prescribe Sharia as a source of law for any of the non-Southern states but to leave it ambiguous as it currently is. This article as presently crafted still poses the potential to destabilise the relative peace in the country and create further discontent in the regions in the West Darfur and the East.¹⁵³ There seems to be a conception that Sudan is neatly divided into two, the South and the North. The reality on the ground is far more complex than

¹⁵⁰ Article 85 of the Interim National Constitution provides that the Council of States is composed of two representatives from each state each elected by the state legislature.

¹⁵¹ Article 5 (3) (b) of the Interim National Constitution.

¹⁵² Article 6 of the Interim National Constitution.

¹⁵³ Not often highlighted in the news is the existence of a rebel group in the eastern part of Sudan Beja area. Earlier this year a rebel group abducted military officers and demanded to be recognised in the political dispensation that was being arranged then between the Northern government and the South.

this. The same constitution provides for freedom of movement and permits all Sudanese to live wherever they wish in the country. Article 42 (1) provides:

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.

Many Southern Sudanese have permanently settled in the North and vice versa. Khartoum is the capital city where most jobs and opportunities are situated and is also in the North. It is imperative that many Southern Sudanese would be subject to Sharia law while in the North. Therefore, this constitutional arrangement in the Interim Constitution raises the question of whether the autonomy granted to Southern Sudan includes personal autonomy¹⁵⁴ for the Southerners. Lapidoth when discussing the role of autonomy in consolidating a multicultural society, opines that personal autonomy is an integral part of territorial autonomy because it serves to it serves to preserve and promote the religious linguistic and cultural character of a minority.¹⁵⁵ A provision guaranteeing other ethnic groupings personal autonomy within their respective regions to be free from the application Sharia laws is required so as to avoid any injustice that may be occasioned to them.

However, Lapidoth's concept of personal autonomy does not seem to have been entirely overlooked. Part X of the Interim Constitution does provide for a special kind of administration in the capital city Khartoum that is in the North but forms the main centre of activity. This effectively means that Southerners and other Sudanese from the various regions are bound to conduct their every day activities there. Article 154 emphasises that human rights and fundamental freedoms specified in the Constitution including respect for all religions, beliefs and customs should be guaranteed and enforced in the National capital. Article 156 sets forth five principles that are to guide judges and law enforcement agencies in dispensing justice and enforcing law in the national capital. These are:

- a) Tolerance shall be the on the basis of peaceful coexistence between the Sudanese people of different cultures, religions and traditions,

¹⁵⁴ See Lapidoth, as note 14 above at 37-38. Lapidoth defines personal autonomy as the right of members of a certain group within the state normally ethnic, cultural, religious or linguistic, within a state regardless of their residence to preserve and promote their identity through institutions established by the minorities themselves

¹⁵⁵ Lapidoth, as note 14 above at 38.

- b) Behaviour based on cultural practices and traditions which does not disturb public order is not disdainful of other traditions and not in violation of law shall be deemed in the eyes of the law as an exercise of personal freedoms,
- c) Personal privacy is inviolable and evidence obtained in violation of such privacy shall not be admissible in a court of law,
- d) The judicial discretion of courts to impose penalties on non-Muslims shall observe the long established Sharia principle that non-Muslims are not subject to prescribed penalties and therefore remitted penalties apply according to law.,
- e) Leniency and granting the accused the benefit of the doubt are legal principles of universal application and required by the circumstances of the Sudan.¹⁵⁶

Consideration is made of the fact that Khartoum being the capital city is likely to be cosmopolitan and by virtue of this fact southerners and persons from other regions other than the North ought not to be subjected to Sharia law. Whereas as this provision does not completely exempt non-Northerners from the application of Sharia law it in the very least provides for a mechanism through which some leniency may be exercised in dealing with them.

4.6 Fiscal federalism under the Interim Constitution

Fiscal federalism refers to federalism as an allocative device. This would entail the sharing of wealth and distribution of resources in a federal arrangement.¹⁵⁷ With regard to Sudan this refers to constitutional provisions on control over oil income and related resources, which have played a major role in the Sudan conflict since the discovery of oil in 1982.

The Interim Constitution provides for distribution of resources for the development of the country without discrimination, stating the principle that the sharing and allocation of wealth emanating from the resources of the Sudan shall ensure that the quality of life, dignity and living conditions of all the citizens are promoted without discrimination on grounds of gender, race, religion, political affiliation, ethnicity, language or region.¹⁵⁸ The sharing and allocation of this wealth shall

¹⁵⁶ Article 156 of the Interim National Constitution.

¹⁵⁷ See Haysom, as note 1 above.

¹⁵⁸ Article 185 (1) of the Interim National Constitution.

be based on the premise that all parts of Sudan are entitled to development.¹⁵⁹The Interim Constitution also obligates the parties to consult and share the benefits of oil development with individuals who enjoy rights in land.

During negotiation of the Interim Constitution, experts recommended the creation of a trust fund of oil wealth, which could be used to fund reconstruction and rehabilitation of the South to compensate residents of the oil fields for the massive destruction and loss of life that occurred during the war and to help redevelopment of oil-producing areas. The Interim Constitution in this regard provides for the establishment of a “Future Generation Fund” once national oil production reaches two million barrels per day.¹⁶⁰

Although the Interim Constitution commits the parties to ensure that all funds and accounts created by that agreement are “on-budget” and that all revenues and expenditures are made public,¹⁶¹ there are no effective oversight mechanisms contained in the CPA to ensure that this takes place. It creates two institutions with control over parts of the oil sector but neither of them possesses the capacity to independently ensure that oil revenues are managed correctly. The function of the National Petroleum Commission (NPC)¹⁶² is to assist the government in formulating policies and guidelines with respect to the petroleum sector and to monitor and assess the impact of those policies, as well as to negotiate and ensure all oil contracts are consistent with these policies.¹⁶³ Its purpose is to ensure that oil-producing communities and the Southern government have a voice in the decision-making process. While the goals of the NPC may be laudable, its powers do not allow it to independently monitor the way oil revenues are dispersed or ensure that money is actually spent in accordance with the law.

The Fiscal and Financial Allocation and Monitoring Commission (FFAMC) is created to ensure transparency and fairness regard to the allocation of nationally collected funds.¹⁶⁴ Composed of three representatives of the National Government, three representatives of the GOSS, and the

¹⁵⁹ Article 185 (2) of the Interim National Constitution.

¹⁶⁰ See Article 192 (7).

¹⁶¹ See Article 192 (8).

¹⁶² Established under Article 191 of the Interim National Constitution.

¹⁶³ See Article 191(3) of the Interim National Constitution.

¹⁶⁴ See Article 198 of the Interim National Constitution.

Ministers of Finance of each state in Sudan, it is empowered to “monitor and ensure that equalisation grants from the National Revenue Fund are promptly transferred to respective levels of government ensure appropriate utilisation and sharing of financial resources; to ensure that resources allocated to war affected areas are transferred in accordance with agreed upon formulae and to ensure transparency and fairness in the allocation of funds to the Government of South Sudan and states/regions according to established ratio and percentages.”¹⁶⁵

Neither the FFAMC nor the NPC are functionally independent of the government, in fact both are composed almost entirely of high-level government officials. Unlike most oversight commissions in other jurisdictions, neither body is empowered to investigate complaints of mismanagement, much less take action to remedy those actions. Finally, there are no guarantees of access to information possessed by either government or private entities that either body requires to perform even its listed functions.

The CPA emphasises that revenue sharing should reflect a commitment to devolution of power and decentralisation of decision-making in regard to development, service delivery and governance.¹⁶⁶ It further provides that at least 2% of oil revenue shall be allocated to the oil producing states/regions in proportion to output produced in such states/regions.¹⁶⁷ Of the remaining oil revenues from the South, a portion will be allocated to an Oil Revenue Stabilisation Account¹⁶⁸ and the remainder to be divided evenly between the government of Southern Sudan and the national government. 50% of any non-oil revenues collected in Southern Sudan is also to be allocated to the Government of Southern Sudan.¹⁶⁹ This arrangement may pose problems given the fact that the bulk of oil reserves are in the South (though there is still some disagreement over where the border is and on which side some oil fields are located¹⁷⁰) and the great population disparity between North and South. This means that even above and beyond the 2% automatically returned to the South, Southerners will probably receive a much higher portion of revenue per capita than Northerners.

¹⁶⁵ Article 198 (2) of the Interim National Constitution.

¹⁶⁶ See the Wealth Sharing Agreement, at Article 1.8. in Part II of the Comprehensive Peace Agreement

¹⁶⁷ Article 192 (5) of the Interim National Constitution.

¹⁶⁸ To be established according article 192 (4) of the Interim National Constitution.

¹⁶⁹ See Article 192 (6) of the interim National Constitution of Sudan.

¹⁷⁰ See the International Crisis Group Report, “New Sudan Action Plan,” 4.

The South has significantly greater development needs than the North.¹⁷¹ The Wealth Sharing Agreement is vague about the specifics about the flow of oil revenue. It is also unclear whether the 50% of revenues from Southern oil will first flow through the central government or not. Though this would seem logical, the CPA specifies only that “All revenues collected nationally for or by the National Government shall be pooled in a National Revenue Fund (NRF) administered by the National Treasury,” without specifying what those revenues will be.¹⁷² Thus it is possible for oil and other revenues to accrue directly to the Southern government or state governments without having to flow through the nominally transparent National Revenue Fund. The system of decentralisation may also complicate the process of accounting for revenue distributions and spending within regions. Though the Agreement requires that “all levels of government comply with generally accepted accounting standards and procedures and that there shall be institutions at the state/regions, GOSS and national levels to ensure that funds are distributed according to the agreed government budget, neither of the institutions it creates has authority to supervise government entities other than the National Government.

If states are to receive oil revenues directly, there are no requirements of transparency or accountability in the Wealth Sharing Agreement that covers those funds. This is especially problematic given the Southern government's wide independent powers to tax revenues, borrow money, and receive foreign aid directly. Though certain Southern government funds, such as the Southern Sudan Reconstruction and Development Fund (SSRDF), must be transparently administered and are subject to an oversight committee, the income garnered from oil revenues, taxes, loans, or aid is not subject to this oversight unless it is channelled into the SSRDF. Thus an independent body is needed to oversee oil revenues flowing both to the central government as well as state or regional governments with the power to investigate violations and enforce the Agreement. Such a body need not focus exclusively on oil revenue monitoring, but may be empowered to monitor and enforce other aspects of the peace agreement as well. Many countries in Eastern Europe, for example, created Ombudsman's offices to monitor the transition from communism to democracy in the early 1990s.¹⁷³

¹⁷¹ *IRIN News*, “Sudan: School attendance low in south, mainly among girls,” April 19, 2005; *IRIN News*, “Sudan: Inadequate food, health and education for returnees to the south,” April 18, 2005; International Crisis Group.

¹⁷² Wealth Sharing Agreement Article 7.1.

¹⁷³ “The Bill of Rights and the Emerging Democracies” in (2002) 65 *Law and Contemporary Social Problems* 272; R Williams “Earned sovereignty: Bridging the gap between sovereignty and self-determination” (2004) 40 *Stanford Journal of International Law* 118. The Rambouillet Accords, which ended the conflict in Kosovo, provided for the creation of an Ombudsman office, both to prevent further violence against Kosovars and to discourage individual retribution against Serbs.

The peace agreement creates a host of nominally independent institutions to oversee various aspects of the agreement, including National and Southern Sudan Land Commissions to arbitrate land claims and recommend land policies to the various levels of government, an Electoral Commission to oversee legislative elections, and a Human Rights Commission, whose functions are not spelled out. It is crucial that these institutions be given the independent oversight authority and the power to enforce the constitution and law in the areas of their purview.

At the same time, the growth of civil society and the development of better education, health, and economic systems in all parts of Sudan will enable citizens to play a more active role in monitoring the activities of the national and regional governments.

4.7 The right of self-determination under the Interim Constitution

As illustrated in chapter three, the most prolific element of the Sudanese conflict has been the debate on the right to self-determination of the South. Article 219 provides that the people of Southern Sudan have the right to self-determination. Accordingly this right is to be enumerated under a Southern Sudan Referendum Act to be promulgated by the National Legislature at the beginning of the third year of the interim period.¹⁷⁴ As soon as the Southern Sudan Referendum Act is established a Southern Sudan Referendum Commission is also to be established. Another Commission titled the Assessment and Evaluation Commission is also to be set up by the President under Article 221 to monitor the implementation of the CPA. The Commission is to conduct a mid-term evaluation of the unity arrangements established under the CPA and in so doing recommend ways of improving institutions and arrangements created there under. Six months before the end of the six-year interim period there shall be an internationally monitored referendum organised the Referendum Commission already mentioned above in cooperation with the National Government and Government of Southern Sudan. The people of Southern Sudan shall here after have the right to confirm unity off the Sudan by voting to sustain the system of government established under the Interim constitution and the CPA or vote for secession.¹⁷⁵ In the essence the Interim Constitution creates an option of secession for the Southern Sudanese in accordance with their right to self-determination.

¹⁷⁴ Article 220 (1) of the Interim National Constitution.

¹⁷⁵ Article 221(2) (a) of the Interim National Constitution.

The right to self-determination of peoples has long been recognised and accepted as legal principle under international law.¹⁷⁶ The riddle remains as to how effective the right to self-determination is in managing the civil conflict in a multicultural society such as Sudan. The following section will be dedicated to examining the merits or demerits of secession as tool for realising peace and democracy. Borrowing from Russell and McCall¹⁷⁷, the following considerations come into play when making an examination on whether secession is justified in a given instance: (i) questions of democracy and democratic rights (ii) racial and ethnic quality (iii) viability of the post-secessionist states. This study will take up each of this at a time applying them to Sudan with a view of reaching an informed opinion on the viability of the impending secession of Southern Sudan.

4.7.1 Democracy

This study proceeds from the premise that if a large proportion of a population of a state is denied the opportunity both to participate in the decision to form the state and to establish its mode of government, as well as the opportunity to participate effectively in that government after state formation, then this would constitute a very strong argument for secession.¹⁷⁸

But it is noteworthy that the democracy test is a double-edged sword. It should be applied not only to the state as a whole but also to the secessionist movement itself. For if within the population which secessionists claim to represent there are significant segments which have not manifested a will to attach themselves to the movement and are deliberately excluded from its leadership, this would seriously undermine the justice of the secessionist cause.¹⁷⁹ Relevant questions that ought to be posed to assist this quest concern the circumstances that surrounded state formation of the Sudanese nation-state as discussed under chapter three. From pre-independent Sudan through the Turko-Egyptian and Anglo-Egyptian rule to the present day Sudan, has anything approximating a social contract taken place? Have the Southerners participated fully in the process of state formation and where the state was formed in the running

¹⁷⁶ I Brownlie *Principles of public international law* (1998) 595. Article 19 of the African Charter on Human and Peoples' Rights unequivocally declares that nothing shall justify the domination of a people by another. Further article 20 mandates a right of self-determination.

¹⁷⁷ P Russell and S McCall "Can secession be justified? The case of southern Sudan" in D Wai *The Southern Sudan: The problem of national integration* (1973) 95.

¹⁷⁸ Russell and McCall, as above.

¹⁷⁹ Russell and McCall as note 38 above at 95.

of the same? Can one objectively say that the birth of the Republic of Sudan had the Southerners' consent and support? The answers to these questions are of paramount importance in assessing the potential perils or success of a decision of Southern Sudan to secede at the end of the interim period.

Without regurgitating the federal history of Sudan in chapter three, right from pre-independent Sudan, the predominantly Christian/animist Southern kingdoms of Nubia, Maqarra and Alawa were conquered and subjugated to the Islamic and Northern Funj kingdom. The Maqarra and Alawa were brought under the central administration of the Funj.¹⁸⁰ The Turko-Egyptian rule that followed was no different and has been famed for being brutal and characterised by *inter alia* forced conversion to Islam and a compulsory change of language from indigenous dialects to Arabic. These policies were mostly aimed at Southerners who were mostly animist or Christian.

The Anglo-Egyptian and Condominium rule was no better with the first attempt to consult the South about its future coming in with the convening of the Juba conference. The next pertinent steps on the path to creation of a Republic of Sudan were the visits to Cairo Egypt by representatives of Northern political parties resulting in the Anglo-Egyptian Agreement of 1953. The South was excluded from these crucial talks that were to lead up to the creation of a Constitution for the new state. By the time independence came forth, Southern Members of Parliament had been bought into accepting to put the federal question to rest. This effectively meant shelving the future and participation of the South. All in all, through the critical moments of state formation the South were constantly isolated. The effect of this is such that by the time of creation of a Republic of Sudan, the North and South are still so far apart that a single democratic system of majority decision making is unworkable.

However, this point by itself would not necessarily justify the break up of state. Opinion in America on the eve of the civil war was probably divided in this way yet one would scarcely regard this as justifying the secession of Southern Sudan.

4.7.2 Racial and ethnic equality

¹⁸⁰ See chapter three page 16.

The argument here is to the effect that if some racially or ethnically distinct section of a state's population were given reasonable legal rights to participate in its government, if the members of this group were consistently regarded as inferior and are treated as inferiors in the day to day social intercourse of the nation, the value of any democratic right they may enjoy would be gravely diminished. If they were regarded as inferior and denied any democratic rights this would constitute an even stronger argument against submitting to the government of those who claimed to be their natural superiors. The question that would be poised here with Sudan is what the situation is as far as racial equality goes.¹⁸¹ The danger with this test is that racial attitudes are notoriously difficult to assess and one would have to look elsewhere for more concrete means of determining the relationship between the two groups

4.7.3 Viability of the post-secession state

Indeed the justification of important political acts like secession cannot be entirely confined to deontological considerations of justice. Certainly one of the strongest arguments used against secessionist movements in the past has been that they would divide the state into two fragments one or both of which would be severely crippled economically and scarcely able to survive as a viable nation.¹⁸²

In addressing the question what the odds and evens are for secession in Sudan the economic effect of such secessionist movement is of critical importance.¹⁸³ It is submitted that whereas upon the inception of the Interim Constitution and the appointment of a National Coalition Government, many countries had made pledges to support Southern Sudan so as to recover from the effects of war, the recovery that would have been achieved within a span of six years will not suffice to sustain a successful secession. As eloquently put forth by Collier and Hoeffler:

“Secession is by definition spatial. That is, the exiting group must inhabit contiguous territories that can form a unity distinct from the existing political entity. In the normal case in which the richer part of the national population is geographically dispersed – for example, living in the better suburbs of each city – secession is not the appropriate political response no matter how high the tax rate. At the most, rich people will simply emigrate, possibly to a common location. Hence, if economic advantage drives secession, it can only do so where economic advantage is spatially concentrated:

¹⁸¹ Russell and McCall, as note 38 above.

¹⁸² Russell and McCall, as above.

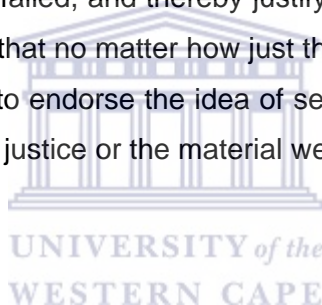
¹⁸³ See in this regard P Collier and A Hoeffler *The political economy of secession* (2002).

locality X must be significantly better off than locality Y. Once this is the case then the inhabitants of locality X may come to identify themselves politically as 'X's, with a political agenda of separation."¹⁸⁴

Southern Sudan is devastated by the war and there is a complete lack of basic human needs food water clean sanitation let alone any institutional infrastructure.¹⁸⁵ Most of the economic activity and infrastructural institutions to manage any wealth exists in the North. Secession of Southern Sudan would effectively be like farmer with a grade cow who is no longer able to feed it and puts it up for sale. It would be extremely difficult for Southern Sudan to sustain itself.

4.7.4 Is Southern Sudanese secession therefore justifiable?

This study finds it difficult to give a definitive and unqualified answer to this question. It is however a matter of weighing the rights of Southern secession against the probable consequences. One may conclude that other methods or attempts at resolving the conflict including the federal principle have failed, and thereby justify the secession of Southern Sudan. On the other hand one may believe that no matter how just the cause may be the consequences of separation would be too harmful to endorse the idea of secession. In the end it boils down to whether one attaches more value to justice or the material well-being.



4.8 Conclusion

Against the backdrop of Sudan's practice of the federal principle discussed in chapter three one can deduce that the Interim Constitution is a carefully thought out and well drafted document. It takes into account most of the inadequacies of the Addis Agreement and provides legal safeguards to watch against it abuse. Further, it provides for a more steadfast relationship between the National President and the Southern President unlike the Addis Agreement. The Interim Constitution does not contain a claw-back clause permitting the National President to withdraw Southern autonomy or meddle in the affairs of the Southern Government. Instead, it adopts a "cooperation approach" requiring National President to consult the President of the GOSS in all decisions affecting the country. Fiscal federalism under the Interim Constitution has its flaws and will in due time require amendment as the exigencies demand.

¹⁸⁴ See Collier and Hoeffler, as above.

¹⁸⁵ Interview with Professor Julia Sloth Nielsen of the University of Western Cap following her recent visit there with a UNICEF group.

The controversial issue of the relationship between state and religion is sufficiently dealt with. The Interim Constitution makes Sudan a secular state and allows for other sources of law other than Sharia in the South. Whereas it fails to do the same for other states not in the North and not forming part of the South, it does establish a mechanism to protect non-Northerners from application of Sharia law while in the Northern capital city of Khartoum. The most attractive feature of the Interim Constitution is its inclusion of a right to self-determination of the South with an option of secession. The viability of secession of Southern Sudan is debatable and will depend on the advancements made by the region during the interim period.



CHAPTER FIVE

CONCLUSION

Sudan has been afflicted by a civil war mainly between the Arab-North and the African–Animist Christian South for nearly four decades punctuated by an 11-year pause that brought some relief and left useful lessons and indicators of what is required to bring about peace and democracy in the troubled country. One of the options that has been resorted to in the quest for peace and democracy has been political integration along lines of assimilation and coexistence within a framework that accommodates diversity within unity. In essence this has meant resort to the federal principle.

Contrary to the customary conception of federalism in the conventional sense of a federation, federalism in this study has been used to refer to a normative concept capable of varied application. This renders federal political systems such as federations, autonomous arrangements and decentralised or devolved arrangements just but varied applications of the federal principle. Indeed, the federal principle has proved critical as tool of political integration in pluralistic societies. It has served as a tool of democratisation. In discharging this function of integration, the constitution has proved to be a vital avenue through which it has found expression. The incorporation of the federal principle in the constitutional framework has created federal arrangements that have managed to deal with the challenges of multiculturalism. However this has not been the case in all societies. The success or failure of the federal principle in addressing the challenges of multiculturalism has been dependent on the nature of the society where it is employed.

In Sudan, the historical process that separated the Arab/Islamic North and the African/South had its roots in attempts at Arabisation and Islamisation of the South and in the resistance to these forces in the South. In effect, every Sudanese government since independence has been dominated by Northern Arab Muslims. Critical to the Sudanese conflict has been ethnic diversity. Despite calls for a federation in Sudan, actual resort to the federal principle to meet the challenges of diversity was only achieved in 1972 with the promulgation of the Addis Agreement.

The grant of autonomy to the South while successful to the extent of having provided 11 years of peace collapsed when it was repudiated by the then President Al Nimeiri. The 11-year period thus left a lot of lessons to learn about the federal experiment in Sudan. Of these is the importance of taking into account ethnic diversity in any arrangement meant to politically integrate the Sudanese society. Secondly the Addis Agreement underscored the need to establish a well-crafted model of a federal arrangement in terms of content. The design of

autonomy as embodied in the Addis Agreement had with its own flaws, which can be said to have contributed to its eventual collapse. This lesson is a pointer as to the precise manner and content of federalism required to sustain peace and advance the democratisation process in Sudan. Thirdly, the demise Addis Agreement and the period 1972-1983 emphasises the need for a concise fiscal plan in any prospective federal arrangement. The distribution of oil is central to any scheme aimed at integrating the Sudanese society. The demise of the Addis Agreement ought to inform the contemporary constitutional order in Sudan that reintroduces the issue of Southern autonomy.

This study unconventionally steers away from the afro-pessimism that characterises most literature on governance in Africa. Viewed from the lens of the historical application of the federal principle in Sudan, the Interim Constitution is a well thought out and well drafted. The inadequacies of the Addis Agreement in failing to provide an unequivocal provision preventing the National President from meddling in the affairs of the South have been addressed. On the relationship between the National President and the president of the HEC or Southern P President, is the shift from a “control” approach under the Addis Agreement to “cooperation” under the Interim Constitution. Unlike the President of the HEC under the Addis Agreement who was but a stooge answerable to the National President, the President of the GOSS is to be consulted by the National President on virtually every decision affecting the country as a whole. As regards Southern Sudan he is the Chief Executive.

The fiscal plan under the Interim Constitution is flawed and will need to be amended as and when becomes necessary to enhance its functionality. On the controversial issue of state and religion the Interim Constitution makes commendable strides in making Sudan a secular state. Even more unequivocal than the Addis Agreement, it provides for different sources of law to apply in the South. While it fails to clearly stipulate that eastern and western states may have as sources of law traditions and customs, it goes a long way to provide for freedom of creed and worship.

The most appealing feature of the Interim Constitution is its inclusion of a right to self-determination of the South with an option of secession. By so doing it joins the Ethiopian Constitution as being the only two Constitutions with a right to secession. Whether this provision is a good or bad thing is open to debate as has been alluded to in chapter four and will be dependent on whether ones allegiance is with justice or economic realities.

(Word Count 17, 994)

Bibliography

Books and Articles

Abbas, M (1952) *The Sudan question*, London: Faber and Faber.

Abd Al-Rahim, M (1969) *Imperialism and nationalism in the Sudan: A study in constitutional and political development 199-1956*, Oxford: Clarendon Press.

Abd-al-Rahim, M "Arabism, africanism and self-identification in the Sudan" in Wai, D (Ed), (1973) *The Southern Sudan: The problem of national intergration*, London: Frank Cass.

Abd-al-Rahim, M (1969) *Imperialism and Nationalism in the Sudan*, Oxford: Oxford University Press.

Adar, K Yoh, J & Maloka, E (2004) *Sudan peace process: Challenges and future prospects*, Pretoria: Africa Institute of South Africa.

Ahanotu, A (1992) *Religion state and society in contemporary: Nigeria, Sudan, South, Zaire and Mozambique*, New York: Peter Lang Publishing Inc.

Albino, O (1970) *The Sudan: A Southern viewpoint*, London: Oxford University Press.

Alier, A "The Southern Sudan question" in Wai, D (1973) *The Southern Sudan: The problem of national integration*, London: Frank Cass.

Assegais, H (1987) *Mediation of civil wars: Approaches and strategies - The Sudan conflict*, Colorado: Westview Press.

Beshir, M (1984) *Southern Sudan: Regionalism & religion: Selected essays*, London: Biddles Ltd Guildford and King's Lynn.

Bleuchot, H, Delmet, C & Hopwood, D (Eds) (1991) *Sudan: History, identity, ideology*, Reading: Ithaca Press.

Blindenbacher, R and Koller, A (Eds) (2002) *Federalism in a changing world: Learning from each other: Scientific background, proceedings and plenary speeches of the International Conference on Federalism 2002*, Montreal: Mc Gill-Queens University Press.

Brownlie, I (1998) *Principles of public international law*, Oxford: Clarendon Express.

Daly, M (1991) *Imperial Sudan: The Anglo-Egyptian Condominium 1934-1956*, Cambridge: Cambridge University Press.

Daly, M (2003) *The Anglo-Egyptian Sudan, 1898-1934*, Cambridge: Cambridge University Press.

De Villiers, B "Federalism in South Africa: Implications for individual and minority protection" (1993) *South African Journal of Human Rights* 375.

Deng, M (2001) *Preventive diplomacy*, Durban: ACCORD.

Deng, F & Gifford, P (1987) *The search for peace and unity in the Sudan*, Washington DC: The Wilson Centre Press.

Deng, F (1995) *War of visions: Conflict of identities in the Sudan*, Washington DC: The Brookings Institution.

Diamond, L and Plattner, M (1994) *Nationalism, ethnic conflict and democracy*, Baltimore: The John Hopkins University Press and National Endowment for Democracy.

Earle, V (1968) *Federalism: Infinite variety in theory and practice*, Illinois: Peacock Publishers.

El-Affendi, A (1991) *Turabi's revolution: Islam and power in Sudan*, London: Gray Seal Books.

Elazar, D "Federalism v. decentralisation: The drift from authenticity" (1976) *Publius: The Journal of Federalism* 12.

Elazar, D (1984) *Federalism and political intergration*, Tel Aviv: Turtledove Press.

Elazar, D (1987) *Exploring federalism*, Tuscaloosa: University of Alabama Press.

Elazar, D (1995) *Federalism: An overview*, Pretoria: Human Sciences Research Council Publishers.

Elazar, D (Ed) (1987) *Federalism as a grand design: Political philosophers and the federal principle*, Lanham: University Press of America Inc.

Franck, T (Ed) (1968) *Why federations fail: An inquiry into the successful requisites for successful federalism* New York: New York University Press.

Gagnon, A & Tully, J (2001) *Multinational democracies*, Cambridge: Cambridge University Press.

Galli, A "Federalism and the tyranny of the religious majorities: Challenges to federalism in Sudan" (2004) *Harvard International Law Journal* 517;

Ghai, Y (Ed) (2001) *Autonomy and ethnicity: Negotiating competing claims in multi-ethnic states*, Cambridge: Cambridge University Press.

Heywood, A (2002) *Politics (2nd Edition)*, Hampshire: Palgrave Foundations.

Holt, P & Daly, M (2000) *A history of the Sudan: From the coming of Islam to the present day*, Essex: Pearson Education Limited.

Hunwick, J (Ed) (1992) *Religion and national integration in Africa: Islam, christianity and politics in the Sudan and Nigeria*, Illinois: Northwestern University Press.

Johnson, W (1997) *Religion, federalism and the struggle for public life: Cases from Germany, India and America*, New York: Oxford University Press.

Khalid, M (1985) *Nimeiri and the revolution of Dis-May*, London: KPI Limited.

Khalid, M (1987) *John Garang speaks*, London: KPI Limited.

Knop, K, Ostry, S, Simeon, R and Swinton, K (Eds) (1995) *Rethinking federalism: Citizens, markets and governments in a changing world*, Vancouver: University of British Columbia Press.

Lapidoth, R (1996) *Autonomy: Flexible solutions to ethnic conflicts*, Washington DC: USIP Press.

Lesch, M (1998) *Sudan: Contested national identities*, Indiana: Oxford University Press.

Mahgoub, M (1974) *Democracy on trial*, London: Andre Deutsch.

Mahmoud, F (1988) *Calamity in Sudan: Civilian vs. military rule*, London: Institute for African Alternatives.

Malwal, B (1981) *People and power in Sudan: The struggle for national stability*, London: Ithaca Press.

Malwal, B (1985) *The Sudan: A second challenge to nationhood*, New York: Thornton Books.

Niblock, T (1898-1985) *The dynamics of Sudanese politics: Class and power in Sudan*, New York: State University of New York Press.

Rolandsen, O (2005) *Guerilla Government: Political changes in the Southern Sudan during the 1990s*, Uppsala: The Nordic Africa Institute.

Rufus, D (1978) *The federal principle: A journey through time in quest of a meaning*, London: University of California Press.

Sharif, H and Tvedt, T (1994) *The case of Sudan: Shortcut to decay*, Stockholm: Nordic African Institute.

Voll, O and Voll, S (1985) *The Sudan: Unity and diversity in a multicultural state*, Colorado: Westview Press.

Voll, J (Ed) (1991) *Sudan: State and society in crisis*, Washington DC: Middle East Institute.

Wai, D (1981) *The African-Arab conflict in the Sudan*, London: Africana Publishing Company.

Watts, R "Federalism, federal political systems and federations" in 1 (1998) *Annual Review of Political Science* 117.

Woodward, P (1981) *Sudan after Nimeiri*, London: Biddles Limited.

Treaties and Legislation

The Constitution of Sudan, July 1998.

The Interim National Constitution of Sudan, July 2005.

The Addis Ababa Agreement on the Problem of Southern Sudan 1972.

The Comprehensive Peace Agreement Between the Government of the Republic Of the Sudan and the Sudan People's Liberation Movement / Sudan People's Liberation Army
Nairobi, 9 January 2005.

Report of the International Commission of Inquiry to the United Nations Secretary General on
Darfur.

