

## ABHANDLUNGEN / ARTICLES

### International Law and Constitution Making Process: The Right to Public Participation in the Constitution Making Process in Post Referendum Sudan

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**Abstract:** *This article addresses the design of the constitution-making process in Sudan with a focus on the right to public participation and civic education in this process. It arises from a series of forums that were organized jointly by UNDP Sudan and the Sudanese Ministry of Justice at the national and the state levels. In particular, the article reviews the design of the current constitution-making process in Sudan, which is preceded by the secession of the South Sudan. The article briefly discusses the international norms pertaining to the constitution-making process, elements of its design, the history of the process in Sudan, and some features of the design of the current process. The article concludes that there is openness on the part of the Government of Sudan when it comes to making the process more participatory. This is illustrated by the fact that an attempt was made by Sudan to educate the public on constitution-related issues.*

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#### A. Introduction

The Comprehensive Peace Agreement of 2005 (CPA), that ended the Sudanese North-South conflict provided for the enactment of an Interim National Constitution (INC) to govern Sudan during the interim period (2005-2011). The INC also provided for the right to self-determination for Southern Sudan at the end of the interim period in 2011. Southern Sudan was allowed to decide whether to stay in a united Sudan, or secede and form an independent State.<sup>1</sup> The Government of Sudan (GoS) kept its promise and conducted the referendum on the self-determination of Southern Sudan in a timely manner. The Southern Sudan Referendum for self-determination, held in January 2011, clearly indicated that the absolute majority of those who participated in the referendum favoured separation from Sudan. This constituted

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1 See: The Comprehensive peace agreement between the Government of the republic of the Sudan and The Sudan's People Liberation Movement/ Sudan's People Liberation Army, (2005). Available at: <http://www.sd.undp.org/doc/CPA.pdf> (Last accessed February 2012).

a milestone in the history of Sudan, resulting in the establishment of a new independent state, the Republic of Southern Sudan. The GoS accepted and formally recognised this result.

The INC made it clear that its provisions, subject to changes that will be necessitated by the decision favouring the secession of the Southern Sudan, shall stay in force until they are replaced by a new constitution.<sup>2</sup> While it is true that the INC states that its provisions, subject to changes necessitated by secession, shall continue being in force; nonetheless, the GoS indicates the need for a new constitution.

Now Sudan is searching for a new constitution. In this respect, the INC did not stipulate any principles and norms that are to be embodied in the construction of a new constitution, should the Southern Sudan secede. Unlike, for example, the South African Interim Constitution that articulated 34 principles to which the final Constitution had to adhere to. As to the design of the constitution making process, at present, Sudan is contemplating the establishment of a constitution commission, or, the formulation of a commission to solicit the views of all the people of Sudan on the future constitution, or, the involvement of the public directly in ratifying the new constitution in a referendum.<sup>3</sup>

However, the majority of the Sudanese people see that it is crucial to raise the awareness of the public on the constitution making process. Accordingly, initiation of a broad-based public awareness that aims to restore trust in the possibility of building a democratic state, rule of law and good governance will become one of the basic conditions for constitution making. The political process and creation of democratic constitution in the country will not succeed unless concerted efforts are made to sensitise the public on questions like: what is a constitution? What are the constitutional institutions and what is the role of the people in activating and protecting them? What is the system of government and what are the general principles of the state, as well as the civil, political, economic, social and cultural rights of citizens?<sup>4</sup>

This article addresses the design of the constitution-making process in Sudan with a focus on the right to public participation and civic education in this process. It arises from of a series of forums on 'The Right to Public Participation in Constitution Making Process' that were organized jointly by UNDP Sudan and the Sudanese Ministry of Justice (MoJ) at the national and the state levels. The aim of this article is to explore comparative experiences in constitution making processes, with a focus on the right to public participation. In particular, the article reviews the design of the current constitution-making process in Sudan, which is preceded by the secession of the South Sudan. It also looks at role of the state and non-state actors in the

- 2 Article 224(10) of the INC states that "if the outcome of the referendum on self-determination favours secession, the parts, chapters, articles, sub-articles and schedules of this Constitution that provide for southern Sudan institutions, representation, rights and obligations shall be deemed to have been duly repealed".
- 3 Interview with Legal Expert on Sudanese Constitutional Law, Khartoum, Sudan (2012). Record of interview is available with the author.
- 4 Alahdath Newspaper 04 March 2012, available at <http://www.alahdath.sd/> (in Arabic) (Last accessed in March 2012).

process of examining whether the design of the Sudan constitution-making process is participatory, transparent and inclusive, as these elements are deemed to be critical to the acceptance, legitimacy and longevity of the constitution.

The article briefly discusses the international norms pertaining to the constitution-making process, elements of its design, the history of the process in Sudan, and some features of the design of the current process (especially the role of the state and non-state actors in making the process more participatory). The article concludes that there is openness on the part of the GoS when it comes to making the process more participatory compared to the other Sudanese experiences with constitution-making since the independence (which were closed to public participation). This is illustrated by the fact that an attempt was made by Sudan to educate the public on constitution-related issues.

While civic education, led by the Ministry of Justice, was limited because it did not reach the grassroots level, it did provide an opportunity for dialogue between the people and government institutions. However, the process of civic education is negatively impacted by the high level of violence in some parts of the country, and by the fact that the design of the constitution-making process is not clear yet.

## **B. Norms of International Law Relating to the Constitution Making Process**

### *I. The Right to Participation in International Law*

Participatory rights are crucial, as they constitute a means through which the public makes its views known and felt in the formulation of national policy. Scholars argue that public participation in the decision-making processes confers legitimacy on actions of the government.<sup>5</sup> Therefore, “the decisive test of a democracy [is] its capacity to encourage its population to play an active role in its government.”<sup>6</sup> The participatory rights appeared in multilateral instruments in the aftermath of the Second World War, especially in the various human rights treaties. These instruments guarantee the right to political participation and oblige the state parties to hold fair elections at regular intervals.<sup>7</sup> For example, article 25 of the International Covenant on Civil and Political Rights (ICCPR) guarantees the right to “take part in the conduct of public affairs directly or through freely chosen representatives.”<sup>8</sup> The United Na-

5 *A. M. Banks*, *Expanding Participation in Constitution Making: Challenges and Opportunities*, *William and Mary Law Review* 49 (2008) 4, p. 1046.

6 *Ibid.*

7 *G. H. Fox / B.R. Roth*, *The Right to Political Participation in international Law, Democratic Governance and International Law*, Chapman University, California 2000, p. 53.

8 Article 25 of the ICCPR provides that “every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) to have access, on general terms of equality, to public service in his country”.

tions Human Rights Committee's General Comment No. 25 encourages States to "adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects."

A number of international instruments contain provisions relating to the right to participation, such as the right to freely determine political status, the right of all elements of society to participate actively in defining and achieving developmental goals, and the right of all people to participate in the political life of their country.<sup>9</sup>

Such instruments include, for instance, article 21 of the UN Declaration of Human Rights, article 5(c) of the Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on the Elimination of All Forms of Discrimination against Women.<sup>10</sup> Regional instruments such as articles 31 and 25 of the African Charter on Human and Peoples' Rights, article 5.2 of the Asian Charter of Rights, article 3 of the European Convention on Human Rights, article 25 of the American Convention on Human Rights and the inter-American Democratic Charter, refer, in general terms, to meaningful participation in any aspect of public and political affairs in the country. It is important to note that article 25 of the African Charter on the obligation of the State to promote and ensure, through teaching, education and publication, respect of the rights and freedoms contained in the Charter is more specific than the ICCPR in spelling out the obligation of the state parties to ensure that people are well-informed of their political rights.

## II. Constitution Making Under International Law

International law does not contain specific provisions as to the way in which a state constitution is to be negotiated or drafted. However, the general trend in the recent constitution-making processes all over the world is towards a participatory constitution-making process, with the aim of providing the public with an opportunity to influence the outcome of the process.<sup>11</sup> In general, the process of making a new constitution is legitimate when the process is broadly accepted and owned by the public.<sup>12</sup> The emerging trend of public participation in the constitution-making process is supported by international law, especially the ICCPR that provides for minimum obligations for the right to participation in public affairs. This is the case because article 25 of the ICCPR requires that "every citizen shall have the right and the

9 S. P. Marks, *The Process of Creating a New Constitution in Cambodia*, in: Laurel E. Miller (ed.), *Framing the State in Times of Transition*, Washington, D.C. 2010, p. 183.

10 Guarantees the right for women to participate in the formation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government.

11 P. Dann / M. Riegner / J. Vogel / M. Wortmann, *Lessons Learned From Constitution Making: Processes with Broad Based Public Participation*, Democracy Reporting International 2011-20, available at: <http://www.democracy-reporting.org> (Last accessed February 2012).

12 W. Wahiu, *A Practical Guide to Constitution Building: An Introduction*, International Institute for Democracy and Electoral Assistance, Stockholm, 2012. Available at: <http://www.idea.int> (Last accessed May 2012).

opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives...”

In addition, the United Nations Committee on Human Rights, in a General Comment (25), interpreted the “conduct of public affairs”, as contained in article 25 of the ICCPR, as encompassing the right to public participation in the constitution-making process. The Committee indicated that: “by virtue of the rights covered by article 1(1) of the ICCPR, peoples have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government.”<sup>13</sup> Furthermore, the Committee stated that citizens participate directly in the conduct of public affairs “when they choose or change their constitution or decide public issues through a referendum or other electoral process conducted in accordance with paragraph (b)”.

In the case of *Marshall v. Canada*,<sup>14</sup> the UN Human Rights Committee concluded that constitutional conferences constituted the ‘conduct of public affairs’ in the spirit of article 25 (a) of the ICCPR. This was confirmed in the concluding observations to the 2005 state report on Bosnia and Herzegovina, where the UN Human Rights Committee recommended that Bosnia “should reopen talks on the constitutional reform in a transparent process and on a wide participatory basis”.<sup>15</sup> As to the modalities for participation in constitution-making, the United Nations Committee ruled that “it is for the legal and constitutional system of the state party to provide for the modalities of such participation”.<sup>16</sup> Also, the right to public participation in constitution-making may be, according to the UN Human Rights Committee, subject to conditions, namely whether citizens participate directly or through representative, but such conditions shall not be made in a discriminatory manner.

In view of the preceding, it is clear that the norms of international law pertaining to the governance of the states (such as ICCPR) do not explicitly provide rules to govern the process of constitution-making, nonetheless, these norms may be extended to the constitution-making process through purposive interpretation of the object and purpose of the international law provisions related to governance to which the state is a party to, or, by reference to the customary international law if the state is not a party to an international law treaty.<sup>17</sup>

13 CCPR Office of the High Commissioner for Human Rights, General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25): 07/12/1996. CCPR/21/Rev. 1/Add.7, General Comment No. 25 (1996).

14 Human Rights Committee, CCPR/C/43/D/205/1986, 3 December 1991.

15 CCPR/C/BIH/CO/1, Consideration of reports submitted by states parties under article 40 of the covenant, 2006, paragraph 8.

16 Human Rights Committee, 43 Session, Communication No. 205/1986: Canada. 12/03/1991. CCPR/C/43/D/205/1986.

17 *T. M. Franck / A. K. Thiruvengadam*, Norms of International Law Relating to the Constitution-Making Process, in: Laurel E. Miller (ed.), note 9, p. 4.

As a consequence, the international law requires that the states respect the right to public participation in the constitution-making process.<sup>18</sup> The obligation to respect the right to public participation requires the state to take positive action, such as to facilitate the provision of public meetings and the solicitation of submissions during the constitution-making process. Furthermore, it requires that all obstacles to individual participation in the affairs of the State are removed, such as restrictive legislation that hinders the practice of the right to assembly, freedom of information and press, etc.

### III. *The Design of the Constitution-Making Process*

#### 1. The Key Components of the Constitution-Making Process

This section is concerned with the issues that need to be considered in the design of constitution-making processes. The process of constitution-making refers to the drafting of a new constitution, or reviews and reforms of an existing constitution. Generally, transitions from authoritarian regimes or from conflict to peace have usually involved the birth of new constitutional orders.<sup>19</sup> An ideal design of a constitution and the process of its development can play an important role in peaceful political transitions and post-conflict peace consolidation through shaping the governance institutions that may regulate access to power and resources and put in place mechanisms for peaceful conflict resolution.<sup>20</sup> Therefore, the constitution-making process is as important as the contents of the constitution.<sup>21</sup>

The design of the process has a number of components, ranging from high-level negotiation between key actors to agree on how the constitution-making process is to proceed, to the final adoption procedures of the constitution.<sup>22</sup> This includes, for instance, the method through which the constitution is made and enacted, the key actors and forms of representation.<sup>23</sup> According to the Guidance Note of the Secretary-General: United Nations Assistance to Constitution-making Processes, the constitution-making process usually includes the following elements:

- 18 *V. Hart*, Constitution Making and the Right to Take Part in a Public Affair, in: Laurel E. Miller (ed.), note 9, pp.26-27.
- 19 *M. Rosenfeld*, 'Constitution-Making Building, and Peaceful Transition to Democracy: Theoretical Reflections Inspired by the Spanish Example, *Cardozo Law Review* 19 (1998) 6, p. 1891.
- 20 *K. Samuels*, Post Conflict Peace Building and Constitution Making, *Chicago Journal of International Law*, 6 (2006) 2, p. 1-2.
- 21 *V. Hart*, Democratic Constitution Making, United States Institute of Peace, Special Report, May 2010, available at: [www.usip.org](http://www.usip.org) (Last accessed in January 2012).
- 22 Guidance Note of the Secretary-General: United Nations Assistance to Constitution-Making Processes, April 2009, p. 5. Available at [http://www.unrol.org/files/Guidance\\_Note\\_United\\_Nations\\_Assistance\\_to\\_Constitution-making\\_Processes\\_FINAL.pdf](http://www.unrol.org/files/Guidance_Note_United_Nations_Assistance_to_Constitution-making_Processes_FINAL.pdf) (Last accessed March 2012).
- 23 *Y. Ghai et al*, Constitution-making and Reform: Options for the process, Switzerland 2011.

- Assessment of the need for a constitution-making process;
- High-level negotiation between key constituencies leading to an agreement on how constitution-making is to proceed (establishing a structure and blueprint for the process, including who will be involved in preparing a draft, how they will be selected, how consensus will be built, how the constitution will be adopted, what the timeline will be, and how disputes will be resolved);
- Establishment of a representative body (i.e. constitutional commission) to prepare a draft of the constitution;
- A public information and civic education campaign on the constitution-making process, and the role and implications of the draft constitution;
- A public consultation process led by the drafting body to gather views and ensure input of the public on the draft constitution;
- Submission of the draft constitution to a representative forum (i.e. constituent assembly, constitutional convention, parliament) to debate it and make any amendments;
- Final adoption procedures (e.g., qualified majority in the representative forum, referendum);
- Post constitution-making education on the newly adopted constitution and development of a strategy for its implementation.<sup>24</sup>

In essence, the methods through which a constitution can be created range from a mainly expert-based drafting process or drafting by elected representatives (constitution commission, constituent assembly, legislative enactment), to a high degree of direct public participation by ordinary citizens at all different stages in the constitution-making process.<sup>25</sup> Such direct public participation, in which people are able to express their views on all aspects of a constitution, can, at times, be limited to putting the constitution up for approval through a public referendum to manifest the sovereign will by voting to endorse a new constitution.<sup>26</sup> In Kenya, the referendum was used despite the lack of precedent in the country.

The design of the constitution-making process is important in that: it identifies the key actors in the process, it informs the public about their role in it and provides guidance with regard to the procedures, the objectives and principles determining the content of the constitution. The design also provides for the sequencing of the different stages of the process, the resources and those responsible for the management of the process, the timeline for the activities and decisions leading to the adoption of the constitution.<sup>27</sup> It has implications for a number of factors such as the degree of the public participation in the process, how the views regarding participation are collected and analysed, plus it shows the importance attributed to

24 Guidance Note of the Secretary-General: United Nations Assistance to Constitution-Making Processes, April 2009, p. 5. Available at [http://www.unrol.org/files/Guidance\\_Note\\_United\\_Nations\\_Assistance\\_to\\_Constitution-making\\_Processes\\_FINAL.pdf](http://www.unrol.org/files/Guidance_Note_United_Nations_Assistance_to_Constitution-making_Processes_FINAL.pdf) (Last accessed March 2012).

25 See: P. Dann *et al.*, note 11.

26 A. Suliman, Sudan: Past Experiences in Constitution Making 1956-2005. A paper presented in a Constitution Making Conference organized by UNDP Sudan, May 2011. Available with the author.

27 See: Y. Ghai *et al.*, note 23.

the public's views – whether their views are included in or excluded from the text of the constitution.<sup>28</sup> That said, in addition, the design of a constitution-making process needs to take into consideration the prevailing circumstances in the country; in particular the political, economic and social circumstances. This is the case because the prevailing situation in the country influences the design of the constitution-making process.<sup>29</sup> Furthermore, other critical processes, during this process, may also need to be considered such as the scope of change; the use of interim and transitional devices; transitional justice issues; democratic representation during the process; popular participation; and the role of external actors.<sup>30</sup> As concerns the scope of change, for instance, constitutional drafters may opt for constitutional change by drafting a new constitution to replace a previous one.<sup>31</sup>

In order for the design of a constitution and its constitution-making process to play an important role in the governance system of the country, it needs to be responsive to the aspirations of the ordinary people. And, for the process of constitution-making to be legitimate, it is necessary to include all stakeholders in the process with the aim of representing the entire country in the constitution. In this respect, this article will focus on some of the elements of the design of the constitution-making process, in particular public participation and civic education, in the following section.

## 2. Public Participation in Constitution-Making Process

Some of the elements that should be found in a sound process of making a new constitution include: a commitment to set up a broad dialogue in the process of formulation; a commitment to consensus-building through consultation before or after the adoption; and drawing from available expertise when needed.<sup>32</sup>

The modern trend in the constitution-making process is toward active popular participation in the process before, during, and after the text is finalised.<sup>33</sup> Where there is broad public participation, there is a greater likelihood that all stakeholders will have the opportunity to express their views on constitutional issues.<sup>34</sup> The options that will expand democratic constitution building are institutional and procedural, as well. Examples of involving the public

28 *Y. Ghai / G. Galli*, Constitution Building Processes and Democratization, a paper prepared for IDEA, available at [http://www.federalism.ch/files/documents/YGhai\\_ConstBuildingProc%26Democr.pdf](http://www.federalism.ch/files/documents/YGhai_ConstBuildingProc%26Democr.pdf) (Last accessed in March 2012).

29 *L. E. Miller*, Designing Constitution-Making Processes: Lessons from the Past, Questions for the Future, in: *Laurel E. Miller* (ed.), note 9, p. 604.

30 *W. Waihu*, note 12, p. 10.

31 *Ibid.*

32 Conference Book, Papers and Proceeding of a National Conference on Constitution Making Process, UNDP Sudan Publications, October 2012.

33 *V. Hart*, Democratic Constitution Making, Special Report United States Institute of Peace, 2003, p. 2, Available at [www.usip.org](http://www.usip.org) (Last accessed January 2012).

34 Max Planck Manual on Constitution Building, p. 12. Available at [http://www.mpil.de/shared/data/pdf/mpil\\_constitutionalism\\_manual\\_2009\\_2.pdf](http://www.mpil.de/shared/data/pdf/mpil_constitutionalism_manual_2009_2.pdf) (Last accessed May 2012).

in the process of constitution-making may include prior agreement on broad principles as a first phase of the process, an interim constitution to prepare for a longer term constitution, civic education and media campaigns, elections for constitution-making by constituent assembly and approval of the constitution by various combinations (representative legislature, courts and referendum).<sup>35</sup>

An example that illustrates the widespread adoption of a participatory constitution-making process is Uganda in 1988. This process involved submission of public suggestions before, as well as comments after, the drafting process. In the South African constitution-making process, the constituent assembly encouraged the public to participate in the process.<sup>36</sup> A participatory constitution-making process can constitute a means to find solutions for contested issues.<sup>37</sup> For instance, a participatory process in Kenya resulted in the inclusion of provisions such as social- economic justice.<sup>38</sup>

### 3. Forms of Public Participation in the Constitution-Making Process

Popular participation in the constitution-making can take on several forms: the election of a constituent assembly, constitutional conventions, referendums on draft constitutions, civic education, public consultation, media campaigns, etc.<sup>39</sup> The most commonly utilized procedure of involving the public is through the election of representatives to draft and deliberate on the content of a constitution. The use of referendums as a direct means of involvement in the constitution making process is another way, though it is a limited form of participation. Public participation can take place during different stages of the constitution making process: during the period before the constitutional assembly convenes; during the drafting process itself; and during the phase between the presentation of a draft constitution and the final decision.<sup>40</sup>

In essence, the forms of public participation could be formal or informal. The formal modes of public participation, usually legislative-based, can vary in terms of type or degree, including, for instance, workshops, public hearings and conferences, or the evaluation of submissions and petitions.<sup>41</sup> This is the case, for example, in Kenya and Uganda where the independent constitution commission was tasked to promote public participation and to allow public recommendations in drafting the constitution.<sup>42</sup> On the other hand, informal means of public participation consist of debates through the media and the work of the local and foreign

35 Ibid.

36 Ibid.

37 *K. Samuels*, *Constitution building Processes and Democratization: A Discussion of Twelve Case Studies*, International IDEA, p.23.

38 Ibid.

39 *V. Hart*, note 18 p. 32.

40 *P. Dann et al*, note 11.

41 Ibid.

42 *Y. Ghai et al*, note 23.

civil society organizations on constitution-related issues, the mobilisation of social movements and lobbying vis-à-vis decision-makers.<sup>43</sup>

In general, the means of public participation vary and there is no single authoritative set of standards, in the form of law, to guide the creation of participatory processes or monitor them as far as the constitution-making process is concerned. Earlier attempts to codify standards for the process of public participation were made by the Commonwealth Human Rights Initiative. The code called for “good management, responsiveness, accessibility, a respect for dissent, inclusiveness, mediation, and continuous review, evaluation and feedback”.<sup>44</sup> Public participation should include all segments of the society and it requires civil society, civic education, good communication, availability of resources and time to facilitate the process to ensure inclusiveness.<sup>45</sup> In Kenya, for example, the public participation process branched out to all segments of society, including the marginalized communities, forest people, pastoralists, the disabled and ethnic minorities.

#### 4. The Impact of Public Participation on the Constitution

There are benefits to public participation, such as the opening of the constitutional debate to groups formerly excluded from the political process, thereby assisting in building social consensus. In addition, the widespread public education on fundamental rights during the constitution-making process produces increased citizen awareness of those rights, which, in turn, can enable the public to demand the enforcement of their constitutional rights.<sup>46</sup> In post-conflict countries, public participation may contribute to the strengthening of national unity and political stability, enhance the democratic governance and respect for the rule of law.<sup>47</sup> Also, public participation endows the constitution with legitimacy and ownership of the process by the people.<sup>48</sup> As such, constitution-making process that provides opportunity for all to participate is more likely to strengthen democracy, through the provision for specific institutional design and processes for the protection of human rights, for example.<sup>49</sup>

While it is a widely held belief that public participation in constitution-making engenders inclusiveness, legitimacy and ownership of the final document,<sup>50</sup> public participation raises difficult questions. There are concerns as to how to ensure the genuineness of participation

43 *P. Dann et al*, note 11.

44 *L. E. Miller*, note 29, p. 604.

45 *V. Hart*, note 21.

46 *L.E. Miller*, note 29, p. 633.

47 *P. Dann et al*, note 11.

48 *Y. Ghai et al*, note 23.

49 *W. Wahi*, note 12,, p.8.

50 *H. Ebrahim / L. E. Miller*, *Creating the Birth Certificate of a New South Africa: Constitution Making after Apartheid*, in: Laurel E. Miller (ed.) note 9, p.138.

mechanisms and measure their effects,<sup>51</sup> how participation is structured, and how public view influences the result of the constitution making process.<sup>52</sup> In many processes there is no guarantee that the views of the people will be taken seriously by the constitution-makers. On the other hand, some groups will have an advantage over others because, for example, they have more funding or are better organised.<sup>53</sup>

Supporters of public participation in the constitution-making process contend that “participation is necessary to legitimate the new constitutional order, promote awareness, acceptance and assertion of human rights and promote democratic governance”.<sup>54</sup> Critics of broad consultation note that public participation may delay the process of constitution-making and may undermine its legitimacy, as some groups may not be able to participate in the process.<sup>55</sup> They say that some constitutions, such as the US constitution, were made without public participation, and yet these constitutions have acquired legitimacy and observance from politicians.<sup>56</sup>

While the impact of public participation is difficult to measure, it may be examined by reference to various factors, including the content of the constitution, the broadening of the political reform agenda, the legitimacy of the constitution, the resolution or creation of conflict, people’s empowerment and their willingness to participate in public affairs, promotion and understanding of constitutionalism.<sup>57</sup> Successful participation depends on a number of factors. These include endorsement by all political actors, active support by the authorities, including the constituent assembly, a reasonable timetable and a well-planned, transparent and rule-based process.<sup>58</sup> In South Africa, for example, the process of constitution-making is regarded as a positive example of a broad public participation. This is the case because the process involved direct interaction that took place between the members of the constitution assembly and the people. In addition, the constituent assembly radio programme reached out to over 10 million. Furthermore, citizens were invited to submit their views on the draft constitution.<sup>59</sup>

#### *IV. The History of the Sudanese Constitution-Making Process (1956-2005)*

Post-independence Sudan has made numerous constitution-making attempts, which were largely controlled by the ruling party. The failure to include all social groups in constitutional

51 *L. E. Miller*, note 29, p. 602.

52 *Idem*, p. 630.

53 *Y. Ghai / G. Galli*, note 28.

54 *V. Hart*, note 18, p.40.

55 *P. Dann et al*, note 11.

56 *V. Hart*, note 18, p.40.

57 *Y. Ghai et al*, note 23.

58 *P. Dann et al*, note 11.

59 *Ibid*.

decision-making, justified negotiating newer ones. The government controlled the body that was entrusted with writing the constitution, which has historically been a constituent assembly, parliamentary committee, technical committee, or a committee of legal experts. In general, regardless of the modality of the constitution-making body, the process of constitution making ensured there was little or no public debate prior to or during the drafting process. Although there was a referendum to adopt the 1998 constitution, the entire process was manipulated by the government.

Shortly after the independence of Sudan in 1956, the first constituent assembly was elected in 1957. Under it, a national commission, composed of 46 members, was appointed to draft a constitution for the country. This commission consisted of academics, lawyers, politicians, representatives of workers and farmers. It opted for a parliamentary system of government, and on the basis of the Self-Government Statute of 1953, a Transitional Constitution was drafted.<sup>60</sup> An attempt to make a permanent constitution through a constituent assembly was abandoned when General Aboud seized power in the 1960s.<sup>61</sup>

The Abboud regime was overthrown in the October Revolution of 1964. A constituent assembly was elected to make a new permanent constitution for the country in 1965, and a national commission was appointed and helped by a technical committee, composed of legal experts and politicians. The national commission drafted an “Islamic Constitution”, and Islam was made the official religion of the state. As for the system of government, the draft constitution of 1968 opted for presidential.<sup>62</sup> Abboud initiated a constitution-making process, but it was interrupted by the popular uprising that later brought his regime to an end. In 1968, a new National Constitutional Committee was formed to pursue the drafting of a permanent constitution aided by a technical committee. The constitution-making process in 1965-1968 resulted in a draft constitution. By 1968, a draft Islamic constitution was prepared by a constitutional committee, but the Southerners walked out in protest for ignoring the demands of Southern Sudan. However, another coup d'état led by Nimeiri prevented the draft constitution of 1968 from being enacted.

In 1972, during Nimeri regime, a People Assembly was appointed to adopt a constitution prepared by the government. The assembly was divided into ten committees, each of which was to give its own report on all aspects of the draft constitution. In 1973, a permanent constitution was adopted which bore the features of a socialist State.<sup>63</sup> The 1973 Constitution, like the INC of 2005, incorporated the Addis Ababa Agreement of 1972 which ended the Sudanese North-South conflict for ten years. The Nimeiri regime was overthrown in 1985, and in April 1986 an elected constituent assembly and a civilian cabinet assumed power. This new administration was to prepare a permanent constitution.

60 *I. Bantekas et al*, Reconciliation of Islamic Law with Constitutionalism, *African Journal of International and Comparative Law* 12(2000) 3, p.535.

61 *Idem*, p.4.

62 *A. Suliman*, note 26.

63 *Ibid.*

The 1985 Constitution was drafted by the major political parties and the trade unions, and provided for the establishment of a constituent assembly that would be responsible for the drafting of a permanent constitution. Thereafter, the major political parties negotiated and ratified a charter (the Charter for the Defense of Democracy), in which the principles of multiparty and rule of law were enshrined. But until the demise of this regime by the forces of the National Salvation regime, at the end of June 1989, the constituent assembly and the government failed even to set up any institution to support the process of constitutional making.<sup>64</sup>

In 1998, a national commission was appointed and the constitution was submitted to the assembly for approval. The public was invited to approve the constitution in a referendum.<sup>65</sup> However, the 1998 referendum to ratify the constitution of 1998 was under tight government control. The 1998 constitution was drafted largely by the National Congress Party (the current ruling party) with the opposition parties boycotting the constitution-making process. INC was made through the establishment of a national constitutional review commission and passed by the national assembly.

The CPA provided for the establishment of a National Constitutional Review, whose main task was to draft the legal and constitutional framework to govern the interim period.<sup>66</sup> The INC constitution-making process was not opened to the public. It involved both parties to the CPA, which retained enough power to remain relevant players in post-CPA. The drafting process of the INC was highly contentious given experiences of prolonged Sudan North-South conflict and embedded social divisions. In effect, the ensuing constitutional change processes became tied to concerns for security and stability as a priority. As a result, the constitution-making process failed to achieve a genuine popular consensus. This is so because the substantive options for the constitution were made by the parties to the CPA at the initial stage of the CPA negotiations. Clearly, during previous Sudanese constitution-making experiences there was little open debate. It was generally characterized by much politicking, a boycott by opposition groups, and key final determinations always reflected the power of one party.

#### *V. The Design of the Current Constitution-Making Process in Sudan*

The objectives and methods for constitution-making depend on its context. That is, the contexts immediately preceding constitutional reform usually justify the need for a new constitution,<sup>67</sup> for example, Sudan North-South conflict has promoted the INC – the CPA between governmental actors, and armed rebels have required constitutional changes. Some constitutions are reviewed in order to ensure that the constitution is in line with social, economic and technological changes in the country. Sometimes a constitution is used to transform the po-

64 *A. Suliman*, note 26.

65 The Republic of Sudan, the Ministry of Justice, Republic of the Sudan Gazette. Special Supplement No. 1. Constitution of the Republic of Sudan.

66 Section 3.1.2. Machakos Protocol of the CPA.

67 *W. Wahiu*, note 12, p. 4.

litical and economic system (after revolution), imposing a system and values on the people, with little need for negotiations or concessions.<sup>68</sup>

As to the current constitution-making process in Sudan, the secession of Southern Sudan necessitated the need for a new constitution. When it comes to the design of the process, it is unclear which one Sudan will adopt. Earlier attempts by GoS involved the establishment of a Constitutional Review Committee under the auspices of the Higher Council for Decentralization; a constitutional review committee at the Council of the Ministers to study recommendations on constitutional review which were produced by the Higher Council for Decentralization. The initiative of the Council of the States aimed to organise a consultation, ensuring public participation through the organisation of workshops at the state level.<sup>69</sup>

In addition, Women Parliamentarians for Constitution Campaign, organized by the National Commission of Sudanese Women Parliamentarians under the auspices of the National Assembly Speaker, launched a campaign called “let us all contribute to its making”. The aim of the campaign was to produce a document that preserved the rights of the Sudanese. It particularly stressed the need for dialogue to preserve women’s rights in the coming constitution and to the need to focus on local governance. In general the campaign emphasised the importance of the citizens’ participation in the referendum on the new constitution.

Recently, the GoS announced through the various media outlets that the new constitution will be an inclusive national constitutional review process which should involve comprehensive dialogue with all political forces and sectors of Sudanese society, including those in the peripheral areas.<sup>70</sup> Furthermore, the GoS plans to constitute a commission to draft the constitution. However, it appears that there is willingness on the part of the relevant state bodies to actively support broad public participation initiatives, especially civic education, before the first main steps in the process begin. Currently, there are apparel initiatives on civic education on the constitution making process that are being spearheaded by the Ministry of Justice and the local and foreign civil society originations.

### 1. Civic Education in Constitution Making Process of the Ministry of Justice

The constitution-making process has to be preceded or accompanied by civic education, to increase people’s familiarity with constitutional issues and to enable them to engage actively in the process.<sup>71</sup> As the constitution-making process requires various forms of consensus-building before the formal process of constitution-drafting can commence. For this to happen, it is critical to ensure that the public has accurate information about the constitution making

68 *Y. Ghai*, *The Constitution Reform Process: Comparative Perspectives* 2004, available at: <http://www.idea.int/news/upload/Nepal%20-%20workshop%20paper%20-%20Yash%20Ghai.pdf> (Last accessed March 2012).

69 Interview with the officials of the Ministry of Justice, 2011, Khartoum. In file with the author.

70 UNDP Sudan Booklet on “State Level Recommendations on Sudanese Constitution Making Process”, May 2012 (forthcoming).

71 *Y. Ghai*, note 69.

process exercise and their role in the process through a programme of constitutional awareness raising and civic education.<sup>72</sup> Civic education is widely recognized as an important part of constitution-making processes. Civic education in a constitution-making process helps prepare the public to participate, both before and after the constitution is prepared and adopted. In particular, in post conflict countries where the public has been excluded from governance for prolonged periods, there is a need for civic education. Civic education may also be perceived as stronger where civic education is undertaken by an independent body rather than by partisan actors in the constitutional process, including the government.<sup>73</sup>

There seems to be willingness on the part of the relevant state bodies to actively support and endorse a process of broad public participation through outreach programmes and civic education. In this respect, the Sudanese Ministry of Justice has entered into a partnership with UNDP to organize a series of forums on public participation in the constitution-making process in all the states of Sudan to facilitate civic education, in order to stimulate public discussion and raise awareness of constitutional issues. The civic education programme organised by the Ministry of Justice and UNDP reached all the states in Sudan. These forums targeted representatives from the various interest groups that were previously excluded from the constitution making process: political parties, women, religious groups, ethnic communities, professionals, business organizations, trade unions, the disabled, students, and parts of the international community, minorities, the poor and the marginalized.

Civic education undertaken by state actors focuses on informing people about the process, including alerting people to the opportunities for public participation and the manner in which they may be able to participate in the process. The content of the civic education included what a constitution is, the constitution history of Sudan and democratic principles, institutions and practices to promote more democratic behaviours and attitudes, and key constitutional issues so that the public can provide thoughtful input during any public consultation. Civic education at this stage may inform the public about issues concerning the nature of a constitution and the kinds of choices that can be made when deciding a new constitution. In Rwanda, for example, a two-year of civic education programme preceded the final adoption of the constitution and intensive efforts were made to reach marginalised groups to inform them about the content of the constitution so as to help them to vote for the draft.<sup>74</sup> While in Uganda, for example an independent commission educated the public and collated views.<sup>75</sup> Successful examples of civic education programmes were conducted in South Africa and Eritrea to educate the population on the role of the constitution and their role in the process of making a constitution.<sup>76</sup>

72 Ibid.

73 *W. Wahiu*, note 12, p. 17.

74 *Y. Ghai et al.*, note 23.

75 *W. Wahiu*, note 12, p. 17.

76 Max Planck Manual, note 34.

The debate during the forums on constitution-making, triggered questions and comments about effective forms of public participation, such as the appointment of a constitutional commission, constituent assembly and direct public participation in the form of a referendum. Those who organised the forums undertook special efforts to ensure that groups that had traditionally remained outside the consultative process were invited in order to take their views with regard to the preparation of constitutional draft into consideration. Participants recommend that once the constitution is finally adopted, it should be subjected to the referendum process to obtain the approval of the people. Some recommend that the constitution-making body is to be required to return to public scrutiny during its proceedings, or required to subject the draft constitution to judicial review before promulgating the constitution. Participants in the different forums remarked that such forums had been an education in constitutional rights.<sup>77</sup>

On its part, the Ministry of Justice assured the participants that their inputs would inform the constitution writers of the main trends in citizen interest in the substance of the constitution. However, whether and to what extent public input would actually influence the final text of the constitution is more difficult to discern. A careful channelling of the results of public input during the forums on constitutional education is critical to maximizing the programme's potential benefits, and to instil a sense of public ownership in the final outcome.

There are still numerous challenges facing public participation in Sudan, particularly inexperience, illiteracy, impoverishment, insecurity, prejudice, and lack of resource, and lack of accessible channels of communication, especially in rural areas. In addition, the insecure circumstances, which are characterized by recurrent civil unrest, make it difficult to create a bottom-up process of public participation. However, the forums organized by the Ministry of Justice made clear that the public still needed education about the nature and the function of a constitution as well as information about constitution-making process.

For participants, the forums were the first occasion on which they could voice their views on constitutional matters. Discussions in the forums were lively, ideas original, and the participants appreciated the exchange of views. Participants emphasised the need to draw from the previous Sudan constitutions and they think that the forums on civic education will promote democratic values in citizens and educate them in the operation of democratic processes as well as the contents of the constitution. This initiative by the Government should not just be a matter of holding an isolated event or workshop, but it should be an on-going process of creating a culture of public participation in democratic events. On the other hand, some questions were raised regarding the genuineness of the process. Critics generally viewed these forums as purely decorative character, but other observers found that the discussions in the forums generally lively.

Participants were clearly sceptical about the seriousness of the Ministry of Justice in calling for their involvement and the treatment their submissions would receive. In particular, some fear that the Government of Sudan may take advantage of UNDP initiative and haste to

77 UNDP Sudan Booklet, note 71.

conclude these forums constituted public consultations, as the forums did not engage the majority of the population and were limited to a two-day forum per state. However, even a limited participation process is preferable for the future prospects of a new constitution. The plan is to organise similar forums at the local level to reach communities in rural and disadvantaged communities, which have limited access.

While constitution making is a sovereign exercise, constitution drafters can make meaningful use of the support offered by external actors. External assistance with constitution-making can take the form of offering advice, providing equipment, civic education and effective study tours; specialists on particular issues (who are invited to advise on specific options), designing participation mechanisms, and collecting and providing the constitution-making body with information about comparative options and methods.<sup>78</sup> The UN forms of assistance to constitution-making may include political and strategic assistance, legal and human rights, capacity-building and institution development, and financial, logistic and administrative support. The involvement of external actors in the constitution-making process is usually promoted by the desire to ensure compliance with international norms and standards as well as the benefit from international best practices in constitution making.<sup>79</sup> Critics of external involvement in the constitution-making process think that such involvement may influence the drafting process of the constitution. On the other hand, many observe that external involvement in constitution-making positively influences the final outcome of the drafting process.<sup>80</sup> Despite the severe criticism of the foreign involvement in the constitution-making process, in general the role of the international community should be facilitative, including the provision of logistics and assisting with the experience of other countries which have faced similar problems.<sup>81</sup>

Prior to the above-mentioned forums, a national conference on constitution making was held in May 2011, organised jointly by the Ministry of Justice and UNDP, and international experts were invited from Asia and Africa to present papers in their field of expertise. Access to the experience of comparative constitution-making exercises is particularly useful during the constitution-making process as it provides an array of practical ideas, good practices and lessons learnt.<sup>82</sup>

78 *L. E. Miller*, note 29, p. 641.

79 *Z. Al-Ali*, *Constitutional Drafting and External Influence*, in: Tom Ginsburg (ed.), *Comparative Constitutional Law*, Cheltenham, UK, Northampton, MA 2010, p. 77.

80 *Ibid.*

81 *Y. Ghai / G. Galli*, note 28.

82 *M. Ndulo*, *Zimbabwe's Unfulfilled Struggle for a Legitimate Constitution Order*, in: Laurel E. Miller (ed.) note 9, p.190.

## 2. Recommendations of the Forums on Constitution-Making at the National and the State Levels

The UNDP's efforts aim to promote inclusive, participatory and transparent constitution-making processes and to provide comparative experiences. Participants wanted the new constitution to include rights for those groups that had not previously gained political protection or recognition, and to include provisions addressing issues of social and economic justice, corruption and the failure of elites to act responsibly. These forums generate multiple questions concerning participation, rights, discrimination, protection, governance, cultural particularities, and multiple sources of law. These examples will prove helpful as a means from which the constitution designers may select what to be included in the new constitution.<sup>83</sup>

Although the presented topics were on the constitution-making process, the interventions from the audience focused on the content: equal rights for men and women, the nationality issue, the role of the Constitutional Court in reviewing the acts of the executive layer, establishment of anti-corruption and Human Rights Commissions, and recognition of religious and racial diversity in Sudan. Sudan's past experienced with constitution-making had to be taken in consideration while drafting the new constitution. Some recommendations were made:

- "Some of the INC provisions need to be kept intact in the new constitution, especially, the Bill of Rights, the electoral system and the national service commission;
- The main source of legislation should be Sharia Law;
- Equality in power and wealth sharing between the central and the state administration, with emphasis on the principle of separation of powers;
- Some say that entrusting the deliberation and adoption of the draft constitution to the regular legislature would undermine the legitimacy of the process. As such, the choice of a constituent assembly reform model, with popular ratification of the adopted text via referendum, is the best option.
- Participants were unclear to what extent their inputs will seriously be taken by the designers of the constitution".<sup>84</sup>

## 3. The Role of the Civil Society Organizations in Civic Education

While the influence of the ruling groups in constitution building is a political fact, more widespread participation in the constitution making process will depend to some extent on the degree to which the political and legal framework provides meaningful opportunities for outsider groups, such as civil society organisations, to shape any resulting constitutional settlement.<sup>85</sup>

National and foreign civil society organisations run a sort of parallel process, such as civic education and mobilisation of marginalised communities. The work of civil society focuses

83 UNDP Sudan Booklet, note 71.

84 Ibid.

85 *W. Wahiu*, note 12, p. 17.

on the design of the constitution-making process and the fundamental principles that must determine the substance of a constitution, while some academic institutions such as the University of Khartoum and Ahfad University focus on the substance of the constitution. Civil society may influence the process of the constitution-making in many ways, including promoting or organizing for constitutional change, informing the people about issues related to elections, providing civic education, supporting or conducting public consultations, preparing submissions, researching, lobbying, and monitoring the process.<sup>86</sup> In Kenya, civil society created a group of fifty-two religious and secular organisations that set up an unofficial commission to travel the country and collect the views of the people. In Sudan, some civil society organisations conducted constitutional discussions on their own initiative, and are playing a key role by taking the initiative to begin the constitutional dialogue and to inform and educate the people. These civil society organisations organised a number of events on constitution making at the local and the State levels in collaboration with youths and women to raise awareness on the process of making the constitution.<sup>87</sup>

Furthermore, a consortium of civil society organisations work on law reform process as a whole through the organisation of awareness-raising events, in collaboration with foreign civil society organizations, on the law reform with all those involved in the process of law reform, be it the legislature, the judiciary, or law enforcement agencies. This initiative also focuses on the impact of the implementation of the law on the people.<sup>88</sup> The activities of these civil society organisations focus on the State and local levels. The problem is that these steps were taken on an ad hoc basis, while media coverage is rather general.

Mutawinat Civil Society Organization,<sup>89</sup> for instance, is involved in the constitution-making process and focuses its constitutional awareness activities on citizens with little education, illiterate people and people living in geographically marginalized parts in Sudan, such as IDP camps. This civil society organisation works closely with community-based organisations for information and outreach activities.<sup>90</sup> The United Nations for Women also held a similar forum addressing the gender issue in the new constitution of Sudan, such eradication of harmful practices (such as female genital mutilation), establishment of the Gender Commission, equality between men and women. In addition, a number of civil society organisations, especially Women Civil Society Organisations are active in organizing forums and workshops on issues pertaining to constitution-making, with a special focus on women issues, the role of women in decision and policy making, representation of women in the national parliament.

In addition, a group of civil society organisations joined forces to form what is called the “Sudan Initiative on Constitution Making” to work exclusively on issues related to constitu-

86 *Y. Ghai et al.*, note 23.

87 Interview with Neswa Organization, February, 2012, Khartoum. In file with the author.

88 *Ibid.*

89 Interview with Mutawinat Civil Society Organization, February, 2012, Khartoum. *Idem.*

90 *Ibid.*

tional reform. The Initiative organised several activities on the process of constitution making, with a focus on international best practices, principles of constitution making (such as inclusiveness, participation and transparency) and Sudanese experiences on constitution making. The target groups of these activities were the political parties, youth, women, and civil society organisations. The focus of the activities was at the local and the State levels. This civil society employed a number of mechanisms to facilitate awareness-raising on constitution related issues, including education materials (such as manuals, a declaration on the principles of constitution making, and a road map for the constitution making process), a radio program and a weekly column in the newspapers.<sup>91</sup>

While civil society organisations are actively involved in the constitution making process and content, the civil society organisations lack certain elements that prevent them from contributing substantively to the constitution making process. These elements include: forms for the civil society to present/dialogue on the constitution making. That is to say, there are no policies or rules that regulate how civil societies are to be consulted in the constitution making process. In addition, civil societies do not have the human and financial capacities, negotiation capacity, technical and research capacity to raise substantive issues during the constitution making process. More importantly, civil society organisations inputs have a hard time reaching the decision makers, for example, the Ministry of Justice, parliament, etc.

## Conclusion

Sudan has a fluctuated history of democracy and is an ethnically and religiously divided nation emerging from decades of civil war, which resulted in the secession of South Sudan, in July 2011. Even today a high level of violence still persists in other parts of the country, and the democracy is very fragile and weak, as exemplified by the lack of the rule of law. Despite the progress made since the independence, as far as public participation in constitution-making is concerned, most of the decisions and powers are still limited to the exclusionary elite. The INC constitutes an exemplary constitution with the inclusion of a comprehensive bill of rights (comparable to the previous constitutions of Sudan), nonetheless, since its adoption in 2005, the INC has faced on-going attempts by the parties to the CPA to undermine it.

It seems that the participatory aspect in the form of public education was somewhat limited, as the exercise of awareness raising focused only on urban areas, without reaching out to grassroots levels. Some also call for the involvement of civil societies in drafting the constitution, and emphasize the importance of the role of the media in the process of constitution-making, as it plays a critical role in civic education campaign.<sup>92</sup> Sudan continues to be in a state of armed conflict despite the constitution-making process, especially on the border between Sudan and Southern Sudan. This will impact negatively on achieving broader consensus

91 Interview with Sudan Initiative on Constitution Making, February, 2012. Idem.

92 A two-day Workshop held at the University of Khartoum and the Institute for Peace and Development on the “Gender issue in forthcoming Constitution of the Republic of Sudan”, October, 2011, Khartoum, Sudan.

and participation on the constitution making process, as the recent conflict resulted in the displacement of the population and affected the livelihoods of many. Such issues may need to be considered in the process of making the new constitution.