

Identities and citizenship in Sudan: Governing constitutional principles

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Summary

In several states across the globe, the relationship between the state and its cultural, religious, ethnic, and tribal components is still an issue of fierce constitutional and political debate, both at formal and informal levels. A nation's inability to properly deal with this sensitive question, through adherence to certain constitutional principles, makes it susceptible to instability and insecurity, and probably dichotomy and fragmentation. This article argues that the general recognition of diversity in a specific state is not, by itself, enough to guarantee peace and stability for that state. An impartial state which treats its diverse components equally is a conditio sine qua non for the stability and peace of heterogeneous societies. The idea that modern states are not nation states reflects the need to draw a clear line of distinction between identities and the state as an institution which should occupy itself with the interest of all its components, rather than the interests of one or some of its components only, and promote the peaceful co-existence of its diverse groups and elements, on the one hand, and lay down the rules that are essential to its advancement, on the other. The post-colonial history of Sudan unequivocally demonstrates that the country's successive national governments have failed to do so. If the post-9 July 2011 Sudan is to avoid wars, conflicts and further fragmentation, then it is necessary for the state to treat Sudan's different ethnic and religious groups equally and to reflect such equal treatment in its policies.

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1 Introduction

Plurality and diversity have, since humans emerged in Africa two million years ago,¹ been two of the main characteristics of human societies and groups. The more societies develop and more individuals emigrate from one place to another, the more diverse they become. Societies display different types of diversity, including cultural diversity, ethnic diversity, religious diversity, gender diversity and political diversity. From the United States to Japan, it is rare to find states or societies that are a hundred per cent homogeneous. The same is true of nations such as China and Korea.² The United States is known as the melting pot of the world, comprised of an infinitesimal number of ethnicities and cultures.

The right to enjoy one's culture is considered a fundamental human right, enshrined in several international human rights instruments, including the United Nations Educational, Scientific and Cultural Organisation (UNESCO)'s Universal Declaration on Cultural Diversity³ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁴

Although there is no accurate and reliable information on the demography of Sudan,⁵ the country, even after the secession of South Sudan, is an excellent example of a state that enjoys all types of diversity. Religiously, it consists of Muslims, Christians, and followers of local religions and belief systems. The Sudanese speak more than a hundred indigenous languages.⁶ Thus, there is no one society in Sudan, nor is there one culture, or one system of morals or belief that can or should govern the whole of Sudan.

1 This is the prevailing view among mainstream anthropologists. For further information, see http://anthropology.si.edu/humanorigins/faq/encarta/genus_homo.htm#origin (accessed 11 June 2011).

2 To read about ethnic diversity in Japan and China, see <http://people.cohums.ohio-state.edu/bender4/eall131/EAHReadings/module01/module01ethnicdiversity.html> (accessed 21 June 2012).

3 United Nations Educational, Scientific and Cultural Organisation (UNESCO) Universal Declaration on Cultural Diversity, 2 November 2001. The full electronic text of the Declaration is available at <http://www.unhcr.org/refworld/docid/435cbcd64.html> (accessed 28 July 2012). Adopted by the 31st session of the General Conference of UNESCO in Paris, 2 November 2001. Another example is the International Covenant on Economic, Social and Cultural Rights.

4 International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations Treaty Series Vol 993 3. The electronic version of the Treaty is available at <http://www.unhcr.org/refworld/docid/3ae6b36c0.html> (accessed 29 November 2012).

5 For government-provided information on this, see the website of the Sudan Bureau of Statistics, <http://www.cbs.gov.sd/en/node/6> (accessed 21 June 2012). One should note that the government of Sudan refused any inclusion of a question about tribe and ethnicity in the 5th census that was conducted in 2008 in the aftermath of the Comprehensive Peace Agreement. The figures that came out in that census are disputable.

6 J Ryle 'Peoples and cultures of two Sudans' in J Ryle *et al* (eds) *The Sudan handbook* (2011) 70, http://www.sudanarchive.net/resources/file/RVI_Sudan_Handbook_Digital_Edition_2012.pdf (accessed 21 June 2012).

However, the history of the country, as shown in this article, demonstrates that diversity has not been recognised and properly managed by its successive governments since independence. It is because of this non-recognition that the issue is particularly significant, as government bodies and civil society organisations and groups are engaged in discussions over drafting a 'permanent' constitution in a country where constitutions are continuously changed without properly addressing the fundamental issue of identities and their connection to the state as an institution. The problem of having transient constitutions is, in fact, dialectically related to a failure to properly deal with the issue of diversity.

Issues related to the identity of a state or a community or an individual ('who are we/am I') are not new or particular to Sudan. For different reasons, it is an issue which almost arises in all societies and countries.

In developed and developing societies alike, people commonly ask themselves the question 'Who are we/am I?'. Anti-multi-culturalists and anti-diversity groups often raise this question. In my view, there are two reasons why they consistently raise the 'Who are we/am I?' question: first, their inability to appreciate the value, significance, and beauty of difference and diversity; and second, their belief that people in the communities where they live should all be the same and that cultures, religions, ethnicities and other components of identities are or should be static. They assume that their own communities are homogeneous or that they should be so. The so-called Just Peace Forum⁷ in Sudan, which claims to be the voice of 'the silent majority', is an obvious example of a group that insists on raising an unnecessary question in one of the most diverse countries in Africa. The group does not only raise that question, but also answers it incorrectly. It, along with other groups, falsely assumes that Sudan, after the secession of the predominantly Christian South Sudan, is an

7 The so-called 'Just Peace Forum' is a racist Sudanese political organisation whose members are mostly previous and current members of the National Congress Party. It was established in April 2004 before the final conclusion of the Comprehensive Peace Agreement (CPA) in Nairobi, Kenya. The group was established on the idea that the secession of South Sudan was the only solution to Sudan's political and economic problems. It also strongly opposed the CPA on the ground that it gave South Sudan too much, but welcomed it because it gave them the right to self-determination. It wanted the same self-determination right to be given to Northern Sudanese so that they could also vote. The group believed the agreement was not just, and this is where its name came from. They see themselves as defenders of what they call Sudan's Arabic and Islamic identity. Unaware of or unwilling to recognise North Sudan's diversity, the leaders and members of the group thought the secession of South Sudan would simply mean that Sudan is a homogeneous Arab-Islamic state. The group is well known of making racist and derogatory statements, particularly against Southern Sudanese and the Sudan People's Liberation Movement leaders, even after the birth of the Republic of South Sudan. They also target the rebel movements that fight the Sudanese government in Darfur, Blue Nile, and the Nuba Mountains.

Arab-Islamic nation,⁸ despite the existence of a diverse and heterogeneous the post-9 July 2011 Republic of Sudan. The Nuba in the Nuba Mountains (partially non-Arab Christians and followers of African indigenous religions), the Nubians in North Sudan (non-Arab Muslims), and the Coptics (non-Arab Christians), for instance, would not be able to see themselves in a Sudan that exists in the imagination of the so-called Just Peace Forum, leaders of the National Congress Party, and like-minded Sudanese from other organisations and parties.

The problem here is much clearer with regard to the definition of the word 'identity'. While the Just Peace Forum focuses on the identity of Sudan, others, who are Sudanese, too, raise the same issue, but for a quite different reason – they are striving for recognition as equal citizens, not only in the Constitution and the laws of the country, but also in their everyday lives. In stable, peaceful or democratic societies where the values of equality, justice, human rights and democracy prevail, individuals or groups rarely ask themselves about their ethnic or national identities.⁹ But when a nation goes through a difficult moment in its history, the question of national identity becomes unavoidable. However, the question of identity in this kind of situation is raised temporarily, that is, it persists only during the difficult moment or crisis that gave rise to its appearance in the first place.¹⁰ Wars, disenfranchisement, attacks and economic, social or political marginalisation are some of the reasons that cause individuals, groups and nations to ask themselves about their identities. The larger the crisis is, the stronger and more urgent the 'Who are we/am I?' question becomes. Similarly, the more diverse the nation is, the faster this question arises. Thus, in communities where equally ethnically-diverse groups embrace different religious or belief systems, the question about one's identity arises faster and stronger than, say, in communities where people are ethnically different but follow one religion. It should be noted that identity claims and questions are not uncommon in liberal democracies. The cases of Spain and Belgium illustrate this.

Since independence, in Sudan there has been an increasing awareness of regional and ethnic identities in the peripheries, mainly due to the exclusionary policies by the governments since the

8 After the secession of the South, the President of Sudan announced twice that Sudan would be an entirely Islamic state and that Arabic would be the official language of the country. For more information, see <http://sudanradio.org/al-bashir-reiterates-plan-make-sudan-and-entirely-islamic-state> (accessed 23 June 2012).

9 Eg, the right-wing political organisations across Europe, which claim to be defending the identity of Europe, which is defined without taking into consideration the demographical developments that Europe has witnessed as a result of migrations from all over the world.

10 In the case of extremist groups, the question is always raised - it is permanent. For extremists, defining the national identity of the nation is a matter of life or death, as it reflects ideological convictions.

departure of the British.¹¹ In addition, the relatively huge disparities in development between the periphery and the central parts of the country are partially responsible for this awareness. Many groups in Sudan have found themselves in crisis as the state has wittingly and, sometimes unwittingly, adopted a single national identity that does not reflect the social, ethnic, religious and cultural realities of the country. This has been expressed in the different internal and foreign policies of successive governments of Sudan and resulted in the secession of South Sudan and might lead to other secessions in the decades to come, if Sudan does not acknowledge and celebrate diversity. Groups threatened by the domination of an identity considered by the state to be the national identity are struggling to make the government respect their languages, religions and cultures and recognise their right to genuine participation in the administration of the public affairs of their country. If this state of exclusion continues, Sudan will face one of two probabilities: a continuation of the current situation of insecurity and instability; or the fragmentation of the remaining Sudanese nation. The process of drafting a new constitution for the country in the aftermath of South Sudan's historic independence is a good opportunity for the Sudanese people to rethink the way the country has been actually administered since 1956 to avoid the repeated mistakes of the past and craft a new path towards the future.

2 Demise of the nation state

Political scientists find it particularly attractive to describe the modern state as a nation state. The idea of a nation state originated in nineteenth century Europe and suggests cultural and ethnic homogeneity in a specific geographical area or territory. The modern state does not meet the elements of the nation state (and *vice versa*), as it does not suggest such homogeneity. In point of fact, cultural and ethnic heterogeneity is one of its main characteristics and people are connected or are eligible to be connected to it because they satisfy certain legal requirements.

Nation states were based on the assumption that there were nations that existed and had to exercise sovereignty on a certain territory, or that there was a state whose main purpose was to build, as a matter of policy, a nation to unify and modernise an already-existing state. In either case, the state is not an impartial entity as far as diversity is concerned. It exists either because there is an ethnically and culturally homogeneous population (a nation), or it exists to

¹¹ Eg, many regional political organisations were established in the 1960s. Examples are the Darfur Development Front and the General Union of the Nuba Mountains (GUN), which were established in 1964. In South Sudan, a military and political organisation, Anya-nya, was born in 1955, one year before the formal independence of the country.

create that homogeneous population or nation. It is, therefore, inappropriate to describe modern states as nation states, since the former are diverse, while the latter are not. In this context, establishing a nation state is an illusory idea. It is a recipe for instability, as it always leads to conflicts and fragmentation as a direct result of marginalisation and exclusionary policies and practices. In nation states, an individual's enjoyment of rights depends on the extent to which they share the characteristics of that nation. It is their proximity to these characteristics that determines their rights. Post-colonial Africa is a clear example of the failure of nation states. Africa's wars and conflicts can only be understood if one considers the attempts by Africa's post-colonial ruling groups and organisations to unite their nations through the creation of the so-called nation states.

Modern states that accommodate differences and diversities are based on citizenship. The way in which a country is governed in terms of accommodating differences among its components determines whether their leaders would build or dismantle their nations. The Republic of Côte d'Ivoire is a good example. Immediately after independence, President Felix Houphouët-Boigny (1905-1993) adopted and followed an accommodative approach that included large numbers of immigrants who moved from neighbouring countries, especially Burkina Faso, for security, humanitarian or other reasons. In the aftermath of his death in December 1993, his opponents adopted different, exclusionary approaches and policies that made Côte d'Ivoire one of the most religiously, culturally and ethnically fragmented African nations.¹²

With the increasing spread of the idea of international human rights and multi-culturalism and the recognition of ethnic, religious and linguistic diversity, demise is the inevitable fate of nation states. The world is now moving away from nation states toward Habermas's idea of constitutional states, republicanism and citizenship, to establish nations that transcend cultural identities.¹³

3 Coerced nation building in Sudan

Discussions over the identity of the Sudanese nation are not new. For a variety of reasons, they started extensively in the early years of independence. The most well-known of such discussions in the political and social history of the country are the dialogues of Ali Abdullateef and Suleiman Kisha. Two groups reflecting political and intellectual immaturity emerged as a direct result of those discussions and dialogues: one that argued that Sudan is an Arab state and

12 R Joseph 'Nation state trajectories in Africa' (2003) 4 *Georgetown Journal of International Affairs* 16.

13 See J Habermas 'The European nation state - Its achievements and its limits' in G Balakrishnan *Mapping the nation* (1996) 281-294, cited in Joseph (n 12 above) 17.

another that argued that Sudan is an 'African' state. Later on, a school of 'compromisers' or realists, known as the 'forest and desert' school, argued that Sudan is an Afro-Arab state. However, in the wake of Sudan's independence, the apparatus of the state was dominated by Sudanese politicians who were tenacious defenders of the first school that argued for an Arab state, such as Mohamed Ahmed Almahgoub and Ismail Alazhri, both of whom played a crucial role in the national movement for independence. Their victory, however, was not a victory for the Sudanese as a nation, as it led to the establishment of a distorted, exclusionary state. The political crisis of the Sudanese nation is caused by those who led the state in the aftermath of its independence.

Several attempts have been made to find a solution. One that remains appealing to many Sudanese and relevant to the situation of Sudan, even after the secession of South Sudan, is the idea put forward by a Southern Sudanese revolutionary thinker, the founder of the Sudan People's Liberation Movement (SPLM), the late Dr John Garang de Mabior, whose vision is called 'New Sudan vision'. The objective of this vision, according to its architect, was to holistically address the central problem of Sudan, the classification of the state as an Arab-Islamic/Islamic-Arab state.¹⁴ He based the New Sudan vision on what he termed the 'historical diversity and contemporary plurality' notion which demonstrates that Sudan has throughout history been religiously, ethnically and culturally diverse. By contemporary plurality, he means the current ethnic, religious, cultural, political and other pluralisms that the present-day Sudan enjoys. With regard to historical diversity, Garang went back to the history of Sudan and Ancient Egypt (which is interconnected with Sudan) to find an anchor in history, because the past of a nation also plays a role in determining its future. In this context, he refers to the various 'peoples and kingdoms that thrived and disappeared in the geographical area that constitutes the present-day Sudan ...'¹⁵ In this sense, the vision has strong historical and contemporary foundations. The New Sudan vision aims at establishing a state on both the

14 A speech delivered by Dr John Garang de Mabior in Washington DC in the United States in 2004. The full speech is available at <http://www.youtube.com/watch?v=Tb1Esm5KK4k&feature=related> (accessed 25 October 2012).

15 He explains this as follows: 'Peoples and kingdoms have lived, thrived, and disappeared in the present day Sudan. Yet, and despite this wealth of historical evidence, the present and past rulers in Khartoum present a false picture of our country as if the Sudan started with them, and as if the history and reality of the Sudan consists only of specific parameters: Arabism and Islamism. We are much bigger than that ... the Sudan belongs to all the peoples that now inhabit the country, and its history, its diversity and richness are the common heritage of all the Sudanese people. It is important to establish this firm anchor in history and affirm that the Sudan and we, the Sudanese people, are indeed a historical people. So let nobody push you off the rails of history. If they want to push you out of history, you hold on and say no; I am here to stay and have rights like anybody else. I have called this 'historical diversity'.

historical diversity and the contemporary plurality of Sudan.¹⁶ In other words, it opposes the idea that the Sudanese are or should be of one identity. Nobody expresses this better than the designer of the vision:¹⁷

In His infinite wisdom, it is the same God that made the Arabs, that made the Nuba, that made the Fur, that made the Dinka, that made the Nubians, that made the Beja, that made the Shilluk, that made all the five hundred different ethnic groups in the Sudan ... and who is this to amend God's creation. The one who makes this amendment, I would say, is against God. If this case of mine is brought before God, I'll win it.

In his documented speeches both before and after the conclusion of the Comprehensive Peace Agreement in 2005, he repeatedly stated that, unless the Sudanese recognise that their nation has historically been plural and diverse, no solution for the problems of Sudan would ever be possible. In this regard, he discusses five possible state models: an 'African' state, which would exclude the Arabic component of the Sudanese nation; an Arab state, which would exclude the 'African' component of the Sudanese nation; an Islamic state, which would exclude the non-Islamic components of the nation; a Christian state, which would, like model three, exclude the non-Christian components of the Sudanese nation; and a new model, which is the New Sudan model, in which all Sudanese, regardless of their religion or origin, would be equal citizens.¹⁸ This last model which is, in fact, the embodiment of the New Sudan vision, is to a wide extent closer to the 'forest and desert' school that I referred to earlier: They both speak about 'Sudanism' as the only uniting bond. Each of the other four models is a recipe for conflicts and wars, as they are inherently exclusionary in a diverse society. Like the New Sudan vision and the 'forest and desert' school, constitutions of states should enshrine principles and contain provisions that unite the different religious, cultural and ethnic components of society. The engagement of intellectuals and lawmakers in the never-ending debate of 'Who are we/am I,' despite its intellectual legitimacy, would only lead to crises and distraction from focusing on the real problems of those components whose real interest is in establishing a state that accommodates them all. For this reason, this article does not speak to the issue of an identity crisis in Sudan. In fact, it is exactly this issue that the article tries to avoid, as it argues for a practical approach to deal with the question of identities and their relationship to the state.

Although the term 'identity' is often used in political, anthropological and legal circles and contexts, it remains ambiguous, and overlaps with the term 'citizenship'. Therefore, it is necessary to

16 As above. Also see 'The problem of the Sudan in its historical context', SPLM document defining the problem of Sudan, <http://www.splmtoday.com/index.php/about/historical-background> (accessed 25 October 2012).

17 De Mabior (n 14 above).

18 For further details and an explanation on this, see R Giba *John Garang and the vision of New Sudan* (2008).

analyse them both to ensure a clear idea about their meaning and how they differ from each other. Of course, when we speak about identity, we have to take into account that there are several types of identities. For example, one might speak about social identity or gender identity.

Identity and citizenship, although sometimes interrelated, are different concepts. The word 'identity' is derived from the Latin *identitas* and *idem*, which means 'the same'. Despite the fact that it is widely used, there is no clear or simple definition of the word 'identity'. Academics and politicians use the word without trying to define it. Writers on political science, anthropology and international relations have different definitions of 'identity', some of which will be mentioned briefly here.

Identity could refer to the way people define themselves or are defined by other individuals or groups. This is reflected by some authors who define the word as follows: Identity is 'people's concepts of who they are, of what sort of people they are, and how they relate to others';¹⁹ or 'identity is used ... to describe the way individuals and groups define themselves and are defined by others on the basis of race, ethnicity, religion, language, and culture';²⁰ or identity 'refers to the ways in which individuals and collectivities are distinguished in their relations with other individuals and collectivities'.²¹

However, national identity is different. National identity, as Blooms puts it, 'describes that condition in which a mass of people have made the same identification with national symbols'.²²

A broader definition, which is very similar to Bloom's concept of identity, is provided by Wendt, who speaks about identities in general, not just national identity. According to him, '[i]dentities are relatively stable, role-specific understandings and expectations about self'.²³

Wendt and some other authors provide definitions of social identity. According to Wendt,²⁴

[s]ocial identities are sets of meanings that an actor attributes to itself while taking the perspective of others, that is, as a social object ... [Social identities are] at once cognitive schemas that enable an actor to determine 'who I am/we are' in a situation and positions in a social role structure of shared understandings and expectations.

19 M Hogg & D Abrams *Social identifications: A social psychology of intergroup relations and group processes* (1988) 2.

20 FM Deng *War of visions: Conflict of identities in the Sudan* (1995) 1.

21 R Jenkins *Social identity* (1996) 18.

22 W Bloom *Personal identity, national identity and international relations* (1990) 52.

23 A Wendt 'Collective identity formation and the international state' (1994) 88 *American Political Science Review* 384.

24 Wendt (n 23 above) 385.

Another definition of social identity is offered by Herrigel. He states that²⁵

[b]y social identity, I mean the desire for group distinction, dignity and place within historically specific discourses (or frames of understanding) about the character, structure and boundaries of the polity and the economy.

Identity, according to yet other authors, is constructed and evolved in a shared manner by those who define and those who are defined. In this regard, '[t]he term [identity] (by convention) references mutually-constructed and evolving images of self and other'.²⁶

On the other hand, identities could be about political actors and their relations, *inter se*, as indicated by the definition which explains that '[i]dentities are ... prescriptive representations of political actors themselves and of their relationships to each other'.²⁷

An individual's identity determines, according to some authors, their values, obligations and positions. In Taylor's words:²⁸

My identity is defined by the commitments and identifications which provide the frame or horizon within which I can try to determine from case to case what is good, or valuable, or what ought to be done, or what I endorse or oppose.

Thinking differently, Clifford defines identity as a nexus of relations and transactions. As he wonders: 'Yet what if identity is conceived not as a boundary to be maintained but as a nexus of relations and transactions actively engaging a subject?'²⁹

Two other definitions that differ slightly from the above-mentioned are put forward by White and Berger and Luckmann, who define it as follows: '[I]dentity is any source of action not explicable from biophysical regularities, and to which observers can attribute meaning.'³⁰ 'Indeed, identity is objectively defined as location in a certain world and can be subjectively appropriated only along with that world. ... [A] coherent identity incorporates within itself all the various internalised roles and attitudes.'³¹

Finally, identity comes into existence over a long period of time. It is dynamic; it changes from time to time. In this context, Hall indicates that³²

25 G Herrigel 'Identity and institutions: The social construction of trade unions in the United States and Germany in the 19th century' (1993) *Studies in American Political Development* 371.

26 P Katzenstein (ed) *The culture of national security: Norms and identity in world politics* (1996) 59.

27 P Kowert & J Legro 'Norms, identity, and their limits' in Katzenstein (n 26 above) 451.

28 C Taylor *The sources of the self: The making of the modern identity* (1989) 27.

29 J Clifford *The predicament of culture* (1988) 344.

30 HC White *Identity and control: A structural theory of social action* (1992) 6.

31 PL Berger & T Luckmann *The social construction of reality* (1966) 132.

32 S Hall 'Ethnicity: Identity and difference' (1989) 23 *Radical America* 9.

[i]dentity emerges as a kind of unsettled space or an unresolved question in that space, between a number of intersecting discourses. ... [Until recently, we have incorrectly thought that identity is] a kind of fixed point of thought and being, a ground of action ... the logic of something like a 'true self' ... Identity is a process, identity is split. Identity is not a fixed point but an ambivalent point. Identity is also the relationship of the other to oneself.

There are, of course, many other definitions. The reason why there are so many is very obvious: The definition of any word, term or expression reflects the background or the purpose of the person who uses it. As Carroll puts it, '[w]hen I use a word, it means just what I choose it to mean, neither more nor less'.³³

Identity is used in academic and social circles with a sense that is different from the one used in the dictionaries. In this sense, the present concept of identity is relatively new. The *Oxford English dictionary*, for example, defines it as 'the sameness of a person or thing at all times or in all circumstances; the condition or fact that a person or thing is itself and not something else; individuality, personality'. This definition has shortcomings: It does not easily capture what we seem to mean when, for instance, speaking about 'national identity' or 'ethnic identity'. National identity does not necessarily mean the sameness of a nation in all times and places, nor does it mean that a nation is different from another nation or other nations. The present sense of 'identity' is derived from Erikson's concept of 'identity crisis', a concept which for its novelty made it into dictionaries with the following definition:³⁴

the condition of being uncertain of one's feelings about oneself, especially with regard to character, goals, and origins, occurring especially in adolescence as a result of growing up under disruptive, fast-changing conditions.

This definition implicitly defines the concept of identity as we use it today and it includes the concept of national, ethnic or tribal identity.

This article does not adopt any of the different definitions of the word 'identity'. Its aim is to establish that the apparatus of the state should be and should always remain impartial when it comes identities, regardless of their definitions.

Citizenship, unlike identity, is a legal and constitutional relationship between individuals and the state based on protection and loyalty. It defines and determines who belongs, and who does not. Through citizenship, which is alternatively referred to as nationality, people are able to interact with their states and define their social and cultural identities.³⁵ Its roots could be traced back to the days of Aristotle. In *Politics III*, Aristotle states that '[t]he politician and lawgiver is wholly

33 L Carroll *Through the looking glass* (1872) 205.

34 *Webster's new world dictionary* (1979) 696, cited in JD Fearson *What is identity (as we now use the word)?* (1999) 9.

35 SK Pokharel *Citizenship and identity in Nepal's transition to federalism* (2012) 1.

occupied with the city state, and the constitution is a certain way of organising those who inhabit the city state'.³⁶ He defines a citizen who is different from other inhabitants, such as aliens, children and minors, as a person who has the right to participate in deliberative or judicial office.³⁷ Thus, citizenship since Aristotle's era confers on its holders certain rights, and of course obligations, that non-citizens or aliens do not enjoy, nor are subject to. In addition, Aristotle does not relate citizenship to ethnicity, culture, religion or language.

Identity, be it social, cultural or national, should always be clearly distinguished from the concept of citizenship.³⁸ The former has to do with culture and the latter has to do with law. In McCrone and Kiely's words:³⁹

Nationality [identity] and citizenship actually belong to different spheres of meaning and activity. The former is in essence a cultural concept which binds people on the basis of shared identity – in Benedict Anderson's apt phrase as an 'imagined community' – while citizenship is a political concept deriving from people's relationship to the state. In other words, nation-ness and state-ness need not be, and increasingly are not, aligned.

McCrone and Kiely's definition of identity, derived from Anderson's 1991 book *Imagined communities: Reflections on the origin and spread of nationalism*, is one of the best for the purpose of precisely defining national identity.

States have different rules for acquiring citizenship. However, in the vast majority of their laws, citizenship or nationality is obtained by birth, marriage, adoption or legitimisation, naturalisation, or as a result of transfer of territory from one state to another.⁴⁰ Constitutions of states may contain provisions that constitutionalise citizenship and at the same time adopt a single identity. They may also constitutionally base citizenship on ethnicity. In either case, as we will see the following section of this article, the state only becomes a citizenship state in theory. In practice, it is an exclusionary state that divides its diverse components.

4 Past and current policies and the way forward

It is often mistakenly said that constitutions have a variety of objectives, the most prominent of which is to determine the identity of the nation. That is why we find that the inclusion of an article determining the national identity of a state is not something

36 See III 1274b36-38, cited in the *Stanford encyclopedia of philosophy, origins of citizenship*.

37 See 1275b18-21, cited in the *Stanford encyclopedia of philosophy, origins of citizenship*.

38 J Thomassen *European citizenship and identity* (2006) 469.

39 D McCrone & R Kiely *Nationalism and citizenship* (2000), cited in Thomassen (n 38 above) 469.

40 P Malanczuk *Akehurst's modern introduction to international law* (1997) 263.

uncommon in the constitutions of states, especially those of post-conflict states.⁴¹ Strongly related to determining the identity of the state is to provide for a national language in a country with multiple languages or to provide for an official or national religion in a country that has more than one religion. In addition, the sources of legislation in a constitution contribute to determining the identity of the state. Such provisions might be problematic in societies where there are minorities or majorities that speak other languages, embrace other religions, or embrace no religion or belief system at all.

In the modern political and constitutional history of Sudan, a number of constitutions clearly provided for an official language or a religious identity for Sudan, although the Self-Government Statute of 1953 and the 1956 and 1964 Constitutions did not contain any provisions that determined or indicated the identity of Sudan. The first constitution that clearly determined a national identity for the state was the 1968 Draft Constitution of Sudan, which provided for Arabic as the official language and Islam as the official religion of the state.⁴² Moreover, article 1 of the 1968 Draft Constitution also declared Sudan a 'democratic, socialist republic based on the guidance of Islam'. Under that Draft Constitution, Islam was the official religion of the state.⁴³ That Constitution, furthermore, provided that Shari'a was the main source of the laws of the country and that all laws that would be passed in contravention of Shari'a were null and void.⁴⁴

The 1973 Constitution also provided for Islam as the religion of the state and Christianity as a religion of a substantial number of citizens. The state was obligated under that Constitution to reflect the values of these two religions.⁴⁵ The 1985 Constitution provided that Shari'a, in addition to custom, was the main source of legislation and that family issues of non-Muslims were to be governed by their special laws.⁴⁶ Back in 1957 and 1968, Southern Sudanese members of the two Constitution Commissions that were tasked with the drafting of the Constitution objected to the provisions that determined Shari'a as the main source of legislation.⁴⁷ However, the two Draft Constitutions were never passed due to military *coups d'état*.

41 Eg, the Preamble of the Algerian Constitution provides that the state is 'an Arab land'. The Preamble of the Lebanese Constitution provides that Lebanon is 'Arab in its identity'. Art 1 of the Saudi Arabian Constitution provides that the state is a 'sovereign Arab Islamic state'. See also the Constitutions of Egypt, Libya and Syria which all describe their people as part of the Arab nation. See P William *et al Post-conflict constitution drafter's handbook* (2007) 9.

42 Art 2 Sudan Constitution 1968.

43 AS Fadlallah *Constitution making in the Sudan: Past experiences* (2011) 5, workshop paper, http://unmis.unmissions.org/Portals/UNMIS/Constitution-making%20Symposium/110524_Ali%20Suleiman_paper_dft2.pdf (accessed 22 June 2012).

44 See arts 113, 114 and 115 of the draft Constitution of 1968.

45 Art 16 1973 Constitution.

46 Art 4 1985 Constitution.

47 MI Khalil 'Religion and the state in the Sudanese Constitution' in MM Salih (ed) *Studies on the Constitution* (2012) 40.

The 1998 Constitution (repealed) continued in the footsteps of the 1968 Constitutions with regard to religion and language, but provided for the duty of the state to allow the development of other local and international languages.⁴⁸ The 1998 Constitution, in addition to determining an identity for the state, provided that 'supremacy in the Republic of Sudan is for God, the Creator of man'.⁴⁹ This is in contrast with the 2005 Constitution which provides that the supreme law of the country is the Constitution itself.⁵⁰ These two Constitutions, however, agree on one issue: that Shari'a is the source of legislation as far as North Sudan is concerned. Popular consensus and values and customs of the Sudanese people, which are the sources of legislation in South Sudan, are not sources of legislation in Northern Sudan.⁵¹ Depending on the logic of the 2005 Constitution, it is unclear why it does not exempt regions such as the Nuba Mountains and Blue Nile, where there are substantial followers of Christianity and African traditional religions, from the application of Islamic laws.

As discussions continue across the country over the content of the 'permanent' Constitution of Sudan, an old, outdated question comes up: What is the identity of Sudan? Another related question is: Should the upcoming Constitution provide for the identity of the state? Islamic extremist groups request that the identity of the country in the Constitution be Islamic, arguing that after the secession of South Sudan, the majority of the populations in Sudan are Muslims.⁵² Arab nationalists request that the identity of the country be Arabic, despite the fact that even after the secession of South Sudan, those who are classified as or consider themselves non-Arab are still a substantial part of Sudan's population, if not the majority.

All these questions, and indeed their answers, have little to do with the idea upon which modern constitutions are premised. The fundamental notion that the whole idea of modern constitutions is based on is citizenship, not identity. It seems that the drafters of the Constitution of the nascent Republic of South Sudan have well grasped this fundamental notion, as they do not declare in the current transitional Constitution that South Sudan has a specific identity.⁵³ In an article that I wrote and published in May 2011, I commented on

48 Art 3, which reads: 'Arabic is the official language in the Republic of the Sudan; and the state shall allow the development of other local and international languages.'

49 Art 4.

50 Art 3.

51 Arts 5(1) & (2).

52 Eg, on 28 February, an Islamist group (the Islamic Constitution Front) warned that it would unseat the President of Sudan if the government fails to adopt an Islamic constitution based on Shari'a law: <http://www.sudantribune.com/spip.php?article41745> (accessed 22 June 2012).

53 The Transitional Constitution of the Republic of South Sudan, 2011 (South Sudan), 9 July 2011, <http://www.unhcr.org/refworld/docid/4e269a3e2.html> (accessed 5 November 2012).

some articles relating to the draft of the Transitional Constitution of South Sudan with regard to this issue, where I stated:⁵⁴

Unlike some previous constitutions of Sudan, the draft of the Constitution [of South Sudan] does not make any mention of the identity of the new nation, and rightly so. The fundamental idea on which constitutions are based nowadays is citizenship, not ethnic, cultural or religious identities. Wisdom therefore dictates that nations, states and governments concentrate directly on how different identities could peacefully live together, and establish a strong nation, rather than sparking unnecessary debates over the identity of the state.

Indeed, citizenship could be provided for in a constitution side by side with a single identity for a specific state. In fact, a number of previous Sudanese Constitutions, such as the 2005 interim Constitution of Sudan, provided for citizenship and a single identity for the state. However, such constitutionalisation of both citizenship and a single identity does not solve the problem of having an impartial state. It is a contradiction to say that the state is based on citizenship and yet have provisions that adopt or reflect one identity in a country with different identities. From Sudan's experience, citizenship becomes meaningless when the state sides with a single identity, rather than recognising all identities and treating them equally. It is because of this contradiction that many Sudanese, whose identities are not practically recognised by the state, feel that the state does not represent them. This is true not only of those who live on the peripheries in marginalised areas, but also of those who live in Khartoum but do not identify with the dominant 'official' identity. In interviews conducted in Khartoum in 2012 with individuals who identified themselves as non-Arab, it was obvious that when the state adopts a single identity, citizenship does not guarantee people their fundamental rights - it is their identity that does so. In one of those interviews, a man from Darfur interviewed in Khartoum on 30 June 2012 said:⁵⁵

I am a university graduate in economic and political science. But we feel no value for education because of the ethnic and racial problems in our country Sudan, as well as the lack of equality in political power.

Another man from South Kordofan interviewed on 17 June 2012 expressed how citizenship becomes useless when a single identity is favored by the state even if they are both constitutionalised: 'I am a Sudanese citizen and have my identity card. But I don't feel I have the same rights as others.'⁵⁶

Besides this fundamental idea, there is another reason why it is imperative for constitutions of diverse nations (and all of them are

54 N Abdulbari 'South Sudan needs to recognise citizenship' *The Start Newspaper* 9 May 2011 and the *Sudan Tribune* 13 May 2011, <http://www.sudantribune.com/South-Sudan-needs-to-recognise,38884>, (accessed 22 June 2012).

55 See 'The disappearance of Sudan? Life in Khartoum for citizens without rights' International Refugee Rights Initiative (IRRI), *Citizenship and Displacement in the Great Lakes Region Working Paper 9*, May 2013 8.

56 n 55 above, 11.

diverse today) not to provide for a single national identity. Adoption of a single national identity could make a state susceptible to economic and political exploitation. Each and every identity has a centre. If the centre of an identity is an exploitative one or led by an opportunistic government, then states that are on the periphery of that identity could be used for the achievement of economic and political objectives that have nothing to do with the real interests of the populations. Identities can, therefore, distract states from upholding external policies that prioritise the higher economic and political interests of their nations. Sudan has suffered a lot from the insistence of its leaders on imagining that it is a nation that has a specific national identity. The upcoming Constitution should be a salvific document that should, once and for all, liberate them from this illusion.

In addition, the adoption of a specific national identity might be an instrument to strengthen or increase the influence of the group or groups whose identity is adopted by the state. Adoption of a national identity in such a case creates divisions within the population of the state. In Sudan, for instance, the call for an Islamic constitution and establishing an Islamic state has not been out of religious piety. The objective behind such a call is to affirm the alleged Arabic identity of the state, which would in turn increase the influence and power of certain ethnic and political groups in Sudan. This connection between these two identities explains the unusual coalition between the Islamic groups and Arab nationalists in Sudan. In countries such as Libya, Egypt, Syria and Iraq, for instance, the relationship between the two groups has always been tense, and sometimes violent.⁵⁷

It should be noted here that having a constitution without a religious identity in a diverse society is not without a foundation in the political history of Islam. In 622 CE, Prophet Mohammed called the document that governed relations between Muslims, Christians, Jews and pagans in Medina 'the Medina Charter', not the Islamic Charter or the Islamic Constitution.⁵⁸

A flimsy argument is often made that the state should reflect the aspirations and identities of the majority. This argument has two problems: It does not address situations where there is more than one group that could be considered as a majority, and it ignores the fact that the state is not for the majority – the state is for the majority and the minority. In open and tolerant societies, every single citizen counts and minorities are as important as majorities. The essence of

57 Oral conversation with Dr Musa Adam Abdul-Jaleel, Head of the Anthropology Department, University of Khartoum, Faculty of Economics, Khartoum, Sudan. The conversation was on 11 August 2012.

58 The Medina Charter was an agreement between the tribes and groups of Medina. The full electronic version of the document is available at http://www.constitution.org/cons/medina/con_medina.htm (accessed 25 October 2012).

democracy is to rule the state by the majority without ignoring the aspirations and concerns of the minority.

Governing one of the, if not the most, diverse nations on earth, the Constitution of the United States of America does not provide for an identity for the United States. Nor does it provide for an official language, although English is the *de facto* national and official language, as it is spoken by 82,1 per cent of US citizens.⁵⁹ Each state in the United States is entitled to adopt its official language or languages. The state of Hawaii, for example, according to its 1978 Constitution, has two official languages: English and Hawaiian.⁶⁰ Because of Sudan's diversity, it is certainly important not to adopt a national or a single official language for the state in the future Constitution. States should be entitled to do the same. In this regard, the provisions of the 2005 interim Constitution of Sudan on multi-culturalism and languages should be reflected in the new Constitution of Sudan. All religious rights that are enshrined therein should also be guaranteed for all religious groups.⁶¹ The 2005 Constitution assures multi-culturalism and recognises the indigenous languages of the country as equally national. They must be respected, developed and promoted by the state.⁶² It contains an article that should be repeated *verbatim* in the new Constitution. That article, *inter alia*, states:⁶³

The Republic of the Sudan is an independent, sovereign state. It is a democratic, decentralised, multi-cultural, multi-lingual, multi-racial, multi-ethnic, and multi-religious country where such diversities co-exist.

Furthermore, Sudan's future Constitution should adopt no national identity or give preference to a single language as a national language. There is no plausible reason why the Constitution should not adopt all the major Sudanese languages as official languages. It should with respect to languages at least provide for the provisions of the interim Constitution, which state that 'Arabic is a widely-spoken

59 CIA *World fact book* (2009) <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> (accessed 22 June 2012).

60 See sec 4 of the Constitution of the State of Hawaii, <http://hawaii.gov/lrb/con/conart15.html> (accessed 30 August 2012).

61 The interim Constitution details religious rights in art 6, which provides: 'The state shall respect the religious rights to (a) worship or assemble in connection with any religion or belief and to establish and maintain places for these purposes; (b) establish and maintain appropriate charitable or humanitarian institutions; (c) acquire and possess movable and immovable property and make, acquire and use the necessary articles and materials related to the rites or customs of a religion or belief; (d) write, issue and disseminate religious publications; (e) teach religion or belief in places suitable for these purposes; (f) solicit and receive voluntary financial and other contributions from individuals, private and public institutions; (g) train, appoint, elect or designate by succession appropriate religious leaders called for by the requirements and standards of any religion or belief; (h) observe days of rest, celebrate holidays and ceremonies in accordance with the precepts of religious beliefs; (i) communicate with individuals and communities in matters of religion and belief at national and international levels.'

62 Art 8(1) interim National Constitution.

63 Art 1.

national language in the Sudan' and that 'Arabic, as a major language at the national level *and* English shall be the official working languages of the national government and the languages of instruction for higher education'.⁶⁴ There are many laws that were supposed to be amended so that they could be consistent with the provisions of this article. An example is section 12(h) of the Higher Education and Scientific Research Institutions Regulation Act 1990 (amended 1995), which clearly indicates that one of the main objectives of higher education institutions is to ensure that Arabic is *the* language of instruction in all academic fields. It, in addition, provides that expanding teaching Arabic is one of the responsibilities of those institutions.

There are two obvious reasons why the future Constitution of Sudan should adopt or maintain English, as well as Arabic, as the official working language of the national government and the language of instruction for higher education: One is the recognition of the right of individuals and groups that would prefer to use English for learning and communicating with others; the other is that English would help the Sudanese better communicate with the outside world, including the Arab world which is increasingly concentrating on English in education and official governmental transactions. In addition, English would contribute positively to the quality of education that the Sudanese students and researchers would have access to. In turn, this would increase the opportunities of Sudanese university graduates to, for example, further enhance their career paths through further study or working abroad. In the past, Sudanese were able to compete in the job market of the Gulf countries, in large part due to a mastery of English and indeed Arabic. Sudanese applicants were often the first choice in careers located in oil-rich Arab countries. However, at present, because of the continuous deterioration in English language skills in younger generations of Sudanese university graduates, as a direct result of the Arabisation policies in higher education, Sudanese are no longer the top candidates. It is probably worth noting that anti-English language policies have ironically led to a deterioration in the level of Arabic language proficiency of the Sudanese, as well. Learning new languages makes individuals compare them to their mother tongues or native or previously-learned languages, and therefore they more deeply understand the latter.

With regard to indigenous and other languages, guidance could be found in the South African Constitution, which recognises 11 languages as official languages of South Africa.⁶⁵ In recognition of the historically-diminished use and status of the indigenous South African

64 Arts 2 & 3 (my emphasis).

65 See the South African Constitution of 1996, art 6(1), which reads: 'The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.'

languages, the South African Constitution obliges the state to take practical steps and positive measures to elevate the status and advance the use of those official languages.⁶⁶ The Constitution, in addition, puts an obligation on the state to promote and ensure respect for all languages commonly used by communities in South Africa, such as German, Greek, Hindi, Tamil, Portuguese, Arabic, Hebrew and Urdu.⁶⁷

Language is not, as many people mistakenly argue, simply a means of communication and so is its adoption. In point of fact, the adoption of a language or several languages as official languages reflects the recognition of the adopting state of the ethnic groups that speak those languages. It practically expresses the support of the state of such languages and at the same time guarantees their passing on, together with their associated traditions and conventions, to the next generations. The adoption of a single official language that is the mother tongue of a group is apparently inconsistent with the state's necessary impartiality in diverse societies. Of course, the state could adopt a culturally-neutral language, as is the case in many African nations. The adoption of several languages in linguistically-diverse communities is, therefore, particularly necessitated by the fact that in some societies the option of a culturally-neutral language might not be available.⁶⁸ In some parts of the world, the declaration of a single official language fuelled civil wars. One example can be found in the war that broke out in 1956 in Sri Lanka between the Tamil minority and the Sinhalese majority as a result of passing a law (the Official Language Act) that made Sinhalese the official language of the state.⁶⁹ That civil war proves the destructive consequences of having a state that is biased towards a specific language, culture or ethnic group.

Experiences of many countries that enjoy linguistic diversity demonstrate that recognising vernacular schools at the elementary level contributes to both maintaining indigenous languages and improving education, as children always understand better in their mother tongues or native languages. In addition, vernacular schools give schools a chance to introduce children to languages that they could use at secondary and university levels. In fact, the recognition by the state of vernaculars as a medium of instruction at the elementary level reflects its respect for them and shows its commitment to elevating their status, advancing their use, and promoting cultural diversity. Since the beginning of the 1980s, successive Sudanese governments have been implementing strict policies that aim at diminishing the role of the indigenous Sudanese languages in public spheres. Before then, public servants were paid an

66 Art 6(2) South African Constitution.

67 Art 6(5) South African Constitution.

68 YT Fessha *Ethnic diversity and federalism: Constitution making in South Africa and Ethiopia* (2010) 18.

69 Fessha (n 68 above) 19.

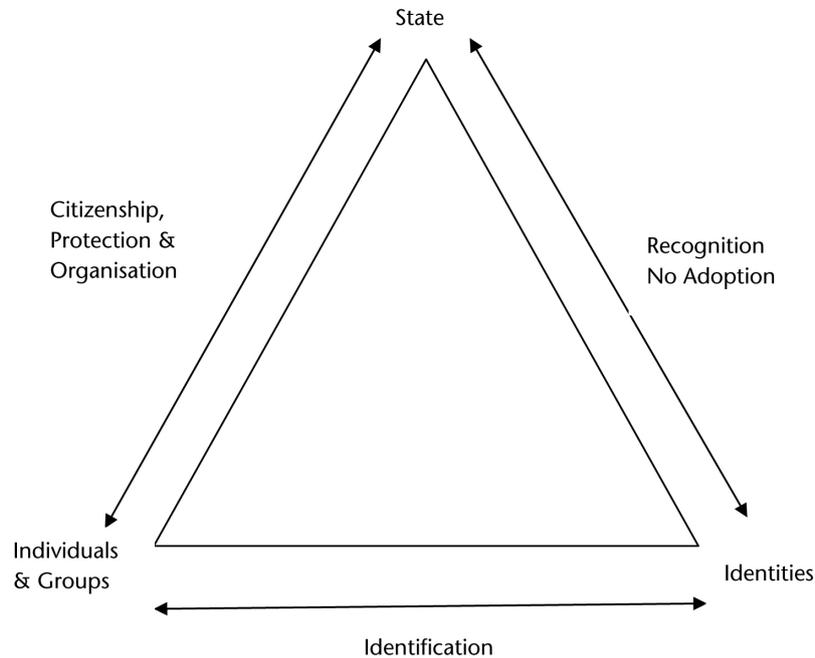
allowance for learning an indigenous language. Malaysia's experience in this context is fascinating. Nobody is prohibited or prevented from using, teaching or learning non-Malay languages. The country, which fastidiously weaved a rich cultural mosaic, has vernacular schools that are strongly supported by the non-Malay ethnic groups in the Western part of the Malaysian peninsula. Features indicate that 94 per cent of Chinese attend vernacular schools. Approximately 75 per cent of Indians attend a Tamil vernacular school.⁷⁰ English is used as a medium of instruction, in addition to Malay, Mandarin and Tamil at the national level for primary, secondary and tertiary education. Private schools use Arabic in addition to the aforesaid languages.⁷¹

In short, the future Constitution of Sudan should unambiguously recognise all the identities and cultures of the Sudanese peoples and enhance their promotion and protection. Its relationship with individuals must be based on international principles of citizenship or nationality, as they will be mentioned in detail in a following part of this article. Regarding its cultural, ethnic, religious and political groups, its role should focus on organising and protecting them. This position of the state with regard to ethnic, religious and cultural identities should under no circumstance prevent individuals or groups from identifying themselves with these identities, provided that they do not harm any individual or group. In other words, the right of individuals and groups to identify themselves with identities should end where other individuals' or groups' rights begin. In fact, allowing them to do so is part and parcel of maintaining the impartiality of the state and accenting its organisational, promotional and protectional role. It would also be a reflection of its respect for one of the underlying constitutional principles, which are necessary for the stability of the state; that is, the international principles of human rights, as detailed in the various international human rights conventions.

These relationships could be illustrated by this triangle that I would like to call the 'state, individual and groups, and identities triangle':

70 CS Farugi *Nation building in a divided society: The experience of Malaysia* (unpublished) (2012) 9. See also art 152(a) of the Malaysian Constitution, which reads: 'No person shall be prohibited or prevented from using (other than for official purposes), or from teaching or learning, any other language.' "Official purposes" here means any purpose of the government, whether federal or state, and includes any purpose of a public authority.'

71 A Puteh 'The language medium policy in Malaysia: A plural society model?' (2010) 2 *Review of European Studies* 192.



State, Individuals & Groups, and Identities Triangle

In addition to the impartiality of the new Constitution and, as far as the issue of national identity is concerned, the Constitution should contain and enshrine the following principles to organise and govern identity, diversity and plurality issues:

4.1 Human rights

It goes without saying that international human rights are one of the main instruments of achieving justice and equality among and between the diverse components of any society. All citizens should have the right to equally enjoy internationally-recognised human rights and freedoms, regardless of their ethnic, religious, political, cultural or geographic background.⁷² The protection of group and individual cultural, social, religious and linguistic rights is one of the central functions of national and international human rights systems. It is because of this significant role of human rights that philosopher

⁷² See eg art 2(1) of the International Covenant on Civil and Political Rights, which reads: 'Each state party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

Immanuel Kant eloquently argues that it is the 'principles of human rights that allow states to protect each other against external aggression, while at the same time refraining from interfering with each other's internal disagreements'.⁷³ The same is so true of relations between individuals and groups within one state.

One of the revolutionary aspects of the 2005 interim National Constitution is that it directly incorporates universal human rights into the domestic law of Sudan.⁷⁴ However, two problems should be dealt with in the upcoming Constitution of Sudan as far as human rights are concerned. The first is the lack of political commitment to human rights, which is demonstrated by the unwillingness of the government to amend laws that are inconsistent with the 2005 Constitution. Although Sudan is not a party to many significant international human rights conventions, the provisions of the conventions to which Sudan is a party, if respected and implemented, can change the human rights record of the country. However, the new Constitution should oblige the state to join the other international human rights treaties if individuals and groups are to fully benefit from those treaties and conventions according to that direct incorporation. The second problem relates to the establishment and functioning of the institutions and bodies that promote and protect the rights and freedom enshrined in the Constitution. Many bodies and commissions that should have been established under the interim Constitution have not been established and those that have been established remain inactive. The upcoming Constitution of Sudan should, therefore, concentrate not only on the theoretical, constitutional framework of fundamental rights and freedoms, but also on the mechanisms for implementing and protecting them through domestic and international mechanisms.

One of the striking characteristics of the 2005 Constitution is that it provides in its first article that Sudan is a diverse or multi-cultural state.⁷⁵ This recognition of diversity should be reflected in the institutions and policies of the state. Such recognition and reflection are significant constitutional and human rights principles that should clearly be included in Sudan's 'permanent' Constitution.

4.2 Prohibition of discrimination

The prohibition of discrimination is a global human rights norm that the new Constitution should clearly provide for. Discrimination is a

73 G Cavallar 'Kantian perspective on democratic peace: Alternatives to Doyle' (2001) 27 *Review of International Studies* 229-48, cited in SO Akoth *Challenges of nationhood: Identities, citizenship, and belonging under Kenya's new Constitution* (2011) 17, Constitution Working Paper Series 10.

74 Art 27(3) interim National Constitution.

75 See art 1(1), which provides: 'The Republic of the Sudan is an independent, sovereign state. It is a democratic, decentralised, multi-cultural, multilingual, multi-racial, multi-ethnic, and multi-religious country where such diversities co-exist.'

chronic problem of modern societies, because of their ethnic, cultural and religious diversity. It is a problem that is prevalent across the globe. Constitutions in many countries contain provisions to deal with it and equally protect individuals and groups. The 2005 interim Constitution dedicates article 31 to equality before the law and equal protection of the law. It provides that '[a]ll persons are equal before the law and are entitled without discrimination, as to race, color, sex, language, religious creed, political opinion or ethnic origin, to the equal protection of the law'. General UN human rights conventions also prohibit discrimination. Examples are articles 1 and 2 of the Universal Declaration of Human Rights (Universal Declaration);⁷⁶ articles 2, 3 and 26 of the International Covenant on Civil and Political Rights (ICCPR);⁷⁷ and article 2 of ICESCR.⁷⁸ In addition, the UN adopted a number of issue-specific conventions which aim at combating discrimination on the basis of race, gender, disability and religion. The adoption of these issue-specific conventions indicates the particular significance of protecting the human rights of all individuals, but in particular of certain groups, regardless of their racial, gender or religious background.⁷⁹ The future Constitution of Sudan should pay particular attention to protecting and ensuring the well-being of the groups for whose rights these issue-specific conventions were adopted by the UN, such as women, ethnic and cultural groups and people with disabilities.

At the regional level, the African Charter on Human and Peoples' Rights (African Charter),⁸⁰ which was drafted taking into consideration the immense diversity of Africa, prohibits discrimination

76 Art 1 reads: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.' Art 2 is more detailed on the issue: 'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.'

77 Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with art 49. The full text of the Convention is accessible at <http://www2.ohchr.org/english/law/ccpr.htm> (accessed 28 June 2012).

78 Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with art 27, <http://www2.ohchr.org/english/law/cescr.htm> (accessed 28 June 2012).

79 Examples are the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD, 1965); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1979); and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981).

80 African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc CAB/LEG/67/3 Rev 5, entered into force 21 October 1986, reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2010) 29.

in articles 2 and 3. These two articles provide that '[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status' and that '[e]very individual shall be equal before the law'; and adds that '[e]very individual shall be entitled to equal protection of the law'.

In the Constitution of the United States of America, the prohibition of discrimination is an underlying principle. It was introduced in 1868 (Fourteenth Amendment) which states that '[n]o state shall ... deny to any person within its jurisdiction the equal protection of the law'. In fact, the Fourteen Amendment does nothing more than repeating and accentuating an already-existing principle. The American Declaration of Independence contains that principle of equality in, to my mind, one of the best-crafted sentences in the history of the English language:⁸¹

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among those are Life, Liberty, and the pursuit of Happiness.

The only internationally, constitutionally-acceptable exception to the principle of non-discrimination is affirmative action, which is sometimes alternatively inappropriately known or referred to as 'positive discrimination'. Affirmative action is justified on the basis that it aims at addressing historical discrimination and inequalities. In this context, affirmative action is implemented to eradicate substantive inequalities. It therefore aims at achieving substantive equality. Unlike formal equality, which means identical treatment regardless of the concrete circumstances, substantive equality acknowledges the need for formally differential treatment to obtain substantively equal treatment.⁸² Conventional anti-discrimination policies aim at achieving formal equality, not substantive equality. In this sense, affirmative action is explicitly provided for in the interim Constitution of Sudan to promote women's rights.⁸³ The future Constitution should contain affirmative action provisions to deal with the various types of substantive inequalities that are prevalent across Sudan.

4.3 Right to citizenship

Since the Constitution and the state are based on citizenship, the most significant right becomes the right to obtain citizenship or nationality according to internationally-recognised principles. States might adopt different rules for obtaining citizenship, despite the fact

81 See the American Declaration of Independence, <http://www.ushistory.org/declaration/document/> (accessed 21 August 2012).

82 K Henrard *Equality of individuals* (2011) 1.

83 Art 32(2) interim National Constitution, which provides: 'The state shall promote women's rights through affirmative action.'

that these laws have some common features, as I have mentioned earlier in this article. International law and constitutional law have developed principles that are now international, thanks to customary law and conventions adopted by states.

Article 7 of the interim Constitution contains a number of well-established principles that protect the right to a nationality, although it does not provide for the *jus soli* (right of soil) principles, one of the common ways of acquiring citizenship today. The 2010 Constitution of the Republic of Kenya properly addresses this issue by conspicuously providing for almost all the principles of the acquisition of citizenship. It is my view that the new Constitution of Sudan should contain them as well. Modelled on the 2010 Kenya Constitution, the article or articles that deal with citizenship or nationality should be drafted and included in the new constitution of Sudan as follows:

- Citizenship shall be the basis for equal rights and duties for all Sudanese.⁸⁴
- A person is a citizen by birth if on the day of the person's birth, whether or not the person is born in Sudan, either the mother or father of the person is a citizen.⁸⁵
- A person who has been married to a Sudanese citizen for a period of at least five years is entitled on application to be a Sudanese citizen.⁸⁶
- A person born outside Sudan is a citizen, provided that either the father or the mother of the person is or was a citizen (although this can be limited by law to prevent citizenship from passing from generation to generation through people who have no active connection with Sudan).⁸⁷
- A citizen who becomes or has become a citizen of another country is entitled to be a citizen of Sudan.⁸⁸
- A child adopted by a non-Muslim Sudanese is entitled on application to become a Sudanese citizen.⁸⁹
- A person first found as a deserted infant shall, until the contrary is proven, be deemed to be Sudanese by birth.⁹⁰

Constitutional provisions that provide for dual citizenship would in the long run end the dominant notion that being a Sudanese national necessarily means being a member of a specific tribe or ethnic group. By doing so, the upcoming Constitution will adhere to the fundamental idea that Sudan is a citizenship state, not a state that

84 Art 7(1) Sudan interim National Constitution.

85 Art 14(1) Kenyan Constitution.

86 Art 15(1) Kenyan Constitution.

87 Art 7(2) Sudan interim National Constitution.

88 Arts 14(5), 15(4) & 16.

89 The Kenya Constitution gives this right to all Kenyans. In Sudan, this right could be restricted to non-Muslims, as Islam strictly prohibits adoption as practised today in the world in a clear-cut Quranic verse. In fact, the 1974 Sudan Nationality Act was amended, among other reasons, to remove provisions that gave this right to Sudanese citizens. As Sudan has Christian and non-religious populations, it is consistent with human rights and constitutional practices in many countries to provide for such a provision in the new Constitution.

90 Art 14(4) of the Kenya Constitution in this regard is less generous. It provides that 'a child who is in Kenya and who seems to be less than 8 years old, but whose parents are unknown, will be assumed to be Kenyan'.

assumes homogeneity or adopts and implements policies to create a homogeneous nation. This adherence will in turn greatly contribute to building a modern state. In Kenya, the above-mentioned constitutional provisions on citizenship helped the Republic of Kenya deal with what once was a strong aboriginal movement.⁹¹

4.4 Recognition of differences

Recognition and protection of human rights of individuals and groups pave the way towards establishing a political community, a pluralistic community that accommodates differences and diversities. In this context, differences or pluralisms could be classified into two distinct types or groups: horizontal pluralisms and vertical pluralisms. Horizontal pluralism refers to a situation in which people are different by choice or primordially. Examples include religious beliefs and, as a function of innate differences in skin pigmentation, language or culture, respectively. Differences that arise as an implication of social distinctions in access to socially valuable or even livelihood material resources are classified as vertical pluralisms.⁹²

The recognition by the new Constitution of Sudan of pluralisms should lend weight towards the aim of protecting or eliminating them, depending on the type of pluralism. Horizontal differences should be recognised so that through the Constitution and implementation mechanisms, the state is able to protect them. On the other hand, vertical pluralisms should be recognised first, so that the state has the opportunity to eliminate or reverse them. The economic and political inequalities throughout Sudan demonstrate the existence of vertical differences. The conflicts and wars that Sudan has been witnessing are a direct result of those vertical differences that have not been addressed properly and sometimes not recognised by successive governments of Sudan.

It is worth noting that the 1998 Constitution was the first in the constitutional history of Sudan to directly recognise diversity. The interim Constitution of 2005 unambiguously recognises the horizontal differences of the country, but no clear reference is made to vertical differences, although the provisions of the Constitution of 2005 have been drafted to deal with them. They were mentioned and recognised in the 2005 Comprehensive Peace Agreement which was part and parcel of the Constitution. Here again it is important that the Constitution focuses on the necessary mechanisms of effectuating its provisions. Direct and unambiguous recognition of vertical differences in the Constitution will certainly create a better atmosphere for their reversal and elimination.

The recognition of horizontal differences as detailed above inherently springs from the existence of several distinct groups in

91 Akoth (n 73 above) 21.

92 MG Smith 'Institutional and political constitutions of pluralism' in L Kuper & MG Smith (eds) *Pluralism in Africa* (1969), cited in Akoth (n 73 above).

Sudan. Unlike the policy of assimilation, recognition here aims at acknowledging the plurality of the state. It puts an obligation on it to recognise the right of ethnic groups with regard to maintaining their distinctions and managing their affairs.⁹³

The liberal non-recognition-of-ethnic-groups approach is untenable in societies where ethnic groups are regionally or geographically centred. In such societies, individual civil and political rights would not help states and governments deal with a variety of problems and questions that arise in relation to ethnic and national groups. An example in this regard is the question of which language should be recognised in parliament. As Fessha puts it, '[i]f the state is going to effectively address these questions and thus accommodate cultural diversity, it needs to supplement individual rights with institutional measures that represent an acknowledgment of its multi-ethnic reality'.⁹⁴

4.5 Federalism

Federalism is accepted in many countries in the world as one of the most effective forms of governance for vast and diverse nations. It is an effective means when it comes to organising relationships between identities. As defined by Watts, federalism is 'a normative term [that] refers to the advocacy of multi-tiered government combining elements of shared rule and regional self-rule. It is based on the presumed value and validity of combining unity and diversity and of accommodating, preserving and promoting distinct identities within larger political union.'⁹⁵ The future constitution of Sudan should, therefore, adopt federalism as a tool for dealing with the country's diversity and vastness, as federalism is the only option that the Sudanese have to deal with their diversity, if they are to keep the country in security and peace, and in the long run create a strong state. In other words, the incentives for creating a federal state, in Sudan's particular situation, are centrifugal in the short run and centripetal in the long run.

As federations greatly differ, depending on the particular circumstances and history of every state, the details of the exact federal system that the future Constitution of Sudan should adopt must be worked out by the technical body that should draft the Constitution in light of the discussions and deliberations that should be organised throughout the country. That body should, in particular, consider an asymmetric federalist system which is recommended by the 2004 United Nations Development Programme (UNDP) report for

93 Fessha (n 68 above) 19.

94 Fessha (n 68 above) 14-19.

95 R Watts *Comparing federal systems* (1999) 9, cited in F Boucher 'Deep diversity and multinational federalism in Canada' 5, IFF Summer University Paper for Week 2.

certain multi-cultural states.⁹⁶ Nevertheless, whatever type of federation the Sudanese choose, it must be an authentic, democratic one. To do so would require a foundation of a strong rule of law paradigm. This leads to a greater likelihood of success due to the constitutional divisions of power and respect for minority rights within such federations. Historically, most failed federations were not in fact authentic democratic ones – rather they were sham or pseudo-federations.⁹⁷

In this context, federalism should be distinguished from constitutionally-decentralised unions. Federalism is based on an agreement between the units of the federal state, while constitutionally-decentralised units are created by the will of the central government. In other words, in constitutionally-decentralised unions, the states or the regions derive their powers and authority from the central government, which means that these powers could be unilaterally retaken by the central government if it so decides. This fundamental difference between federal states and constitutionally-decentralised units reflects one of the fundamentals of federalism, that is, keeping the balance between self-rule and shared-rule or having unity in diversity.

Neither decentralisation nor federalism is new to Sudan's political history. The roots of decentralisation in Sudan date back to the era of the Nubian Christian kingdoms in Northern Sudan, the Fung State in Central Sudan, and the Fur Sultanate in Darfur in Western Sudan, where tribal chiefs were in full charge of ruling the regions of their tribes. Aware of regional diversity and the necessity of accommodating such diversity coupled with a willingness to respect the right of all to participate in administering their affairs, the leaders of the old Sudanese kingdoms were wise enough to rule in a way that today is called decentralisation or federalism.

With regard to centralisation, one should refer to the Turko-Egyptian rule (1821-1885), which divided Sudan into three provinces whose rulers were directly responsible to the Turko-Egyptian administration in Cairo. In the aftermath of the collapse of the Turko-Egyptian rule in Sudan and the triumph of the Mahdist revolution, Sudan witnessed a centralised system of government from 1885 until 1898. The military nature of the Mahdist movement and revolution dictated the establishment of a highly-centralised state.

The British rule of Sudan (1898-1955) very early on adopted a centralised system of government, where British officers ruled the British-created provinces under the administration of the Governor-General. In 1921, the British started to apply an indirect rule system. Milner, a British expert who wrote a report on the government system

96 Human Development Report, United Nations Development Programme, (2004) <http://www.hdr.undp.org/2004/> (accessed 27 July 2012).

97 J McGarry 'Can federalism help to manage ethnic and national diversity' (2005) 5 *Forum of Federations* 15.

in Sudan, recommended that an indirect rule system be applied. With the increase of the political movements that called for independence, the British authority issued several laws that increased and sometimes decreased centralisation of powers. In fact, this has been the case during the periods that followed the British era, beginning in 1956 with Sudan's independence.

Discussions over the significance of federalism started before independence and continued thereafter. In the 1947 famous Juba Conference, the 1953 Southern Sudanese Political Parties Conference and the 1956 Roundtable Conference, Southern Sudanese demanded a federal form of government. Decentralisation was formally adopted in 1989 and implemented in two stages: The first was through the 1991 Fourth Constitutional Decree, which was issued to put into practice one of the recommendations of the National Conference for Dialogue on Peace Issues; and the second through the 1998 Constitution.

The 2005 interim Constitution, based on the Comprehensive Peace Agreement and the 1998 Constitution, declares in article 1 that Sudan is a decentralised state. In chapter 4, article 24, the Constitution adopts a decentralised system of governance with four levels of government: national, Southern Sudan, state and local. However, it does not mention the word 'federal' or 'federalism'.⁹⁸

The experience of the past years indicates that neither decentralisation nor federalism has been properly applied in Sudan, basically due to a lack of commitment. The states consistently report the intervention by central authorities in some affairs that do not fall within their constitutionally-determined powers. In addition, federalism of powers is never accompanied with fiscal federalism. For instance, state governments complain that they are given powers or, to be more precise, responsibilities without the necessary resources to meet them. All significant revenue resources are made national by the central or federal government, while revenue resources that put the states in a direct confrontation with citizens are left to the states. Financial transfers to the states are not made on time or are not made through the legally-determined channels.⁹⁹ As a rule, federal states' fiscal decentralisation is generally measured by the difference between

98 Art 24, titled 'Decentralised system of governance', provides: 'The Sudan is a decentralised state, with the following levels of government: (a) the national level of government, which shall exercise authority with a view to protecting the national sovereignty and territorial integrity of the Sudan and promoting the welfare of its people; (b) the Southern Sudan level of government, which shall exercise authority in respect of the people and states in Southern Sudan; (c) the state level of government, which shall exercise authority at the state level throughout the Sudan and render public services through the level closest to the people; (d) local level of government, which shall be throughout the Sudan.'

99 Eg, a previous governor of South Darfur, Abdulhameed Musa Kasha, resigned from his position because of channelling money by the Sudan Ministry of Finance directly to the Commissioner of Riheed Ekbirdi. The money should have been channelled to the Commissioner through the legally-designated South Darfur

the revenues and expenditure of the central government and those of the state governments.¹⁰⁰ Applying this rule, there has been no proper application of fiscal decentralisation or federalism in Sudan. Therefore, the future Constitution of Sudan should contain detailed provisions on the application of fiscal federalism and responsibilities. Moreover, in this context, it should deal with all the problems that accompanied the previous attempts of their application.

Additionally, the ruling elites in Khartoum have, because of their political myopia, been unjustifiably concerned that federalism would eventually lead to the fragmentation of Sudan. Ignorant of history, some governmental circles strongly argue today for further centralisation after the secession of South Sudan. They wrongly believe that the more centralised the government is, the more united the state becomes. In fact, the history of Sudan tells that this fear is deeply rooted. Prior to independence, Benjamin Luki, from Yei in South Sudan, speaking on behalf of Southern Sudanese parliamentary representatives, demanded on 12 December 1955 that a congress of all political parties be formed to ensure that the Declaration of Independence contains a statement that Sudan would be a federal state that would bring the North and the South together under a united state, but his suggestion was rejected by both the then ruling and opposition parties. Those political parties agreed that a paragraph be added to the Declaration that South Sudan's demand of federalism be taken into consideration in the new Constitution of Sudan. However, this promise – which was accepted by Southern Sudanese – for the sake of securing Sudan's independence – was later broken by the political parties.¹⁰¹ Later, calling for federalism became a crime: Stansalous Biasama, a parliament member from South Sudan, was deprived of parliamentary immunity and tried, and Satirino Ohuru, also from South Sudan, was assassinated by Sudanese security forces on the Sudan-Uganda border.¹⁰²

In 1957, for example, one of the suggestions made by the Constitution Commission established by the Constituent Assembly was that federalism be the system of governance in Sudan. The same suggestion was made in 1968 by the Southern Sudanese members of the Constituent Assembly. None of the two draft constitutions contained a single article on federalism. Instead, article 2 of the 1968 Draft Constitution provided that Sudan was a united state.

Finally, there is an argument made against federalism that it is a costly system of governance and that it is inappropriate for states with limited budgets. This argument is indeed correct, but if we weigh it

State authorities. Another example is the resignation of Gadarif state governor, Karamallah Abbas, for not receiving financial transfers from the federal government.

100 M Mushtaq 'Managing ethnic diversity and federalism in Pakistan' (2009) 33 *European Journal of Scientific Research* 288.

101 M Khalid *Takathur Az-za'azi wa Tanagas Alawtad* (2010) 10.

102 Khalid (n 101 above) 20.

against the deleterious repercussions of centralisation in diverse and vast countries, we would certainly opt for federalism. Sudan, for instance, had spent billions of dollars to deal with the war that continued for decades in South Sudan because of centralisation, and it is today doing the same to contain wars and conflicts in Darfur, Blue Nile, and the Nuba Mountains. These financial costs of war are, of course, in addition to the loss of lives and the lack of development caused by instability or insecurity.

In short, to deal with Sudan's vastness and diversity, the future Constitution of Sudan must, first of all, clearly recognise and adopt federalism as a system of governance and, secondly, avoid the theoretical and practical shortcomings of the country's previous experiences with federalism, particularly as far as fiscal federalism is concerned.

5 Concluding remarks

States are fundamentally created and structured to promote and protect the interests of their populations; *all* their populations. They are broader and larger institutions that are able to comprehensively and accurately reflect the interests of their components. It is indisputable that nations today are so diverse that they could only be stable if the state is impartial and unbiased towards various and different groups. Constitutional principles such as human rights, citizenship, the prohibition of discrimination, and recognition of differences or diversities, in addition to federalism, are effective instruments that help nations achieve peace, stability and unity.

While it is legitimate to speak about the identities of people or identify oneself with them, the question of ethnic, cultural, and national identities have nothing to do with the basic principles of modern constitutions that are based on the concept of citizenship. Constitutions should concentrate on organising, promoting and protecting these identities but should not adopt any to the exclusion of the other identities.

Political power might be used by a group of individuals, at a certain historical moment, to impose their own identity on others, but that has always been a recipe for conflict and instability. This is why principles that secure recognition of diversity must be included in the future Constitution of Sudan, as our own history tells us about the deleterious consequences of exclusionary policies that have led us to wars, destruction and fragmentation.

Sudan's beauty is in its diversity. Efforts should therefore be exerted to constitutionally strengthen, promote and protect pluralism and diversity. In this context, the new Constitution of Sudan should particularly concentrate on the implementation of the constitutional principles that aim at recognising the different types of differences and pluralisms. This, of course, needs something more than having

strong implementation mechanisms and institutions. That is, it requires a strong commitment to constitutionalism.

In essence, the state as an institution should remain impartial and indifferent. It should in practice equally treat its populations and citizens, recognise their differences and occupy itself with their higher, common interests. It should, in other words, be an accommodating state. It is this characteristic of accommodation that will secure permanent peace, stability and unity for Sudan and make it a tolerant, modern and inclusive state.