SUDAN ELECTIONS PROJECT
BRIEFING PAPER 5
JULY 2021

Understanding Sudan's electoral system: Law and law enforcement

This briefing is part of RVI's Sudan Elections Project, a short-term study on the history of elections in the country. The project examines the different factors that have shaped the course and consequences of elections in Sudan, while drawing out lessons to inform the programming and advocacy work of those hoping to ensure a successful transition in Sudan. Research is based on analyses of election-related documents and interviews with polling and electoral commission staff, candidates, political party members, civil society organizations, and journalists.

Sudan's current legal framework for elections was devised during the CPA period (2005 – 2011), and subsequently amended. Alongside the specific electoral laws there are a number of other relevant laws and a significant body of rules that regulate the holding of elections. This briefing argues that this body of law and rules needs to be considered as a whole in order to ensure a credible electoral environment. It also suggests enforcement and oversight of these laws matters as much as what they actually say. The briefing is structured around three questions:

1. What is the current framework?
2. In what ways has it been problematic?
3. How could it be improved?

What is the current electoral framework?

The core legislation that, at present, governs elections in Sudan is the National Elections Act (NEA) of 2008, as amended in 2014 and 2019. The drafting of this during the CPA period involved some international input, and the law is not dissimilar in principle to much electoral law internationally. A number of key amendments have been made subsequently. These have related to the direct election of governors (which was ended); the relative number of proportional representation seats; and the length of the voting period. Like most such laws, the NEA has an enabling clause that allows the NEC to issue rules and regulations relating to the conduct of elections which have the status of laws. A significant number of such rules appear to have been issued, but we have been unable to find a collated and definitive set of these.

A further piece of legislation directly relevant to elections is the Political Parties Act (PPA) of 2007. Prior to the PPA, there was the Registrar for Political Organizations, which operated between 1999 and 2007. The PPA created a regulatory body—the Political Parties Council (PPAC)—with which all parties must be registered, and which has the power to deregister them. That Council has nine members, appointed by the president, with the appointment approved by the National Assembly. Section 30 of the Act gives it potentially very extensive powers to issue rules, provide state financial support to parties and set penalties. It can also deregister parties and refer them for prosecution if it feels they have failed to comply with the terms of the act.

The PPAC was part of the Presidency but in 2019 the Constitutional Declaration, following the ousting of Omar al-Bashir, made the PPAC part of the Cabinet, under the Prime Minister. The core responsibility of the PPAC is to register political parties, dealing with conflicts that ensue as a result of internal party problems. The PPAC has two key secretariats: registration and training. The PPA has some similarities to legislation in some other countries. Among other things, it is intended to prevent ethnic or religious hate-speech and to require forms of internal democracy and accountability in parties.

There is a considerable body of wider legislation and/or administrative practice that has affected the conduct of elections, and which in 2010 and 2015 effectively undermined some of the rights that were ensured under the NEA. Security and public order legislation, and both legal and extra-legal constraints on the media, were used to systematically favour the National Congress Party and its candidates and to harass the opposition.

In what ways has the existing electoral framework been problematic?

The existing legal framework was produced through discussion and consultation: it is not inherently bad and was not designed to allow malpractice. But it has been problematic in two ways: in what it actually says, and in how it has been applied (or more often, not applied).

Several problems, or potential problems, arise from what the laws currently say. A number of issues raised in previous briefings—notably the question of geographical and proportional representation seats; and the appointment and size of the NEC—are enshrined in the NEA, and it would require amending in order to change these. There are also some flaws in drafting in the NEA: the campaign period is defined slightly differently in two different sections; there is some potential confusion over which court deals with which kind of appeal; and the law provides no guidance on tallying, declaration and publication of results beyond the polling centre, leaving this entirely to rules. Some problems have already been addressed by previous amendments. For example, the requirement to complete polls within one day, which was completely impossible to meet when all levels of poll were held at the same time, was removed in 2019.

The PPA is potentially more problematic. Political parties do need to have some sort of legal status and there has to be a mechanism for registering them and maintaining accurate records. Legislation intended to make political parties more institutionally robust has been introduced in other countries—sometimes specifically because of concerns that party structures are too weak to sustain electoral democracy (internal weakness is one of the main tenets of political parties in Sudan). The PPA combines both these aims—registration and party-strengthening—in a way that potentially gives the PPAC significant power. The PPA does not seem to have succeeded in its core aim of ensuring that parties are institutionally robust and internally democratic, but it has enabled what looks like partisan enforcement, as when the PPAC banned a party—the Republican Party—in what seems to have been an entirely arbitrary act of repression.

The problems arising from the non-application, or selective application of the law, have been very significant. The NEA forbids the use of state resources in election campaigns, asserts the right of parties and candidates to freedom of expression and explicitly guarantees equal coverage in 'public media' (that, is state-owned media). It empowers the NEC to set campaign spending limits and requires parties and candidates to submit reports on spending within thirty days of the end of elections. There has been no effective mechanism to guarantee these rights or enforce the restrictions, and other laws (and extra-legal measures) have been used to limit the rights nominally provide by the NEA. Opposition parties and candidates in 2010 and 2015 complained of restrictions on their freedom to organize. Media coverage of opposition candidates, especially in privately-owned media, was limited by the press law, by economic pressure (notably, the withholding of government advertising) and by intimidation—it should be noted that the law does not explain what 'equal' coverage in public media actually means, raising questions about coverage for minor parties and individual candidates.

An inter-party group created to manage public media access for the 2010 elections collapsed because other parties felt that the NCP were dominating. In both 2010 and 2015 the distinction between the NCP and the state was often hazy and evidently NCP candidates at every level were very much better resourced than any others. There was no monitoring or enforcement of campaign finance limits.

While the NEC was clearly unable to enforce the law, it also seems to have repeatedly failed to obey it too—for example, with respect to finalizing and making available the voters' register and publishing lists of polling stations. Where rules have been broken by staff working for the NEC, there has been little recourse. The Commissioners themselves are protected from prosecution by a very broadly worded immunity. More generally, complaints procedures are limited (so, for example, a voter can complain if they are omitted from the register, but there is no way to complain that the register has not been made available). In 2010 a number of prosecutors were trained on

election laws, but they were only allowed to initiate cases with the approval of State High Election Committees (SHECs). This meant, in effect, that neither the NEC nor the SHECs could be prosecuted for violations of the NEA. Candidates and parties were however permitted to make appeals against declared results, which were heard by two special Supreme Court panels. The great majority of these were summarily dismissed.

The NEC's power to issue rules has been exercised, but this has not always been done in a timely way. Registration, polling and tallying staff—for whom the rules are most relevant—have not had sufficient notice of these (it is not clear how far the rules have been followed). The rules around tallying votes in 2010 were particularly problematic: they were released very late, and then effectively over-ridden halfway through the process by a further instruction.

The failure to apply the law was also apparent with respect to corrupt practices. Around one-tenth of the NEA is devoted to defining various forms of malpractice, all of which are criminal offences. These include a number of practices that have allegedly been quite common in recent elections: notably the distribution of money to voters, bribing or intimidating candidates to withdraw, false registration and impersonation. There have been prosecutions in some cases, but it seems likely that enforcement has been selective. Corrupt practices may be cited in appeals against results, but such appeals will only be upheld if the court feels the practices affected the outcome. The NEC itself has the power—somewhat unusually—to invalidate election results for malpractice without any court decision, but has not used this.

These multiple failures have contributed substantially to widespread popular scepticism about elections and electoral integrity. Almost without exception, Sudanese whom we interviewed felt that the laws around elections are either bad in themselves or have been enforced in ways that are deliberately intended to advantage the former ruling party. This widespread lack of confidence, as well as the record of problems, means that that there must be significant and evident reforms of the legal framework if new elections are to have any credibility.

How could the current electoral framework be improved?

Actions of two kinds should be considered. Some amendments to existing laws are certainly necessary. More important, however, there should be changes in practice and enforcement to make it easier to follow the laws and more costly to break them. The form of any changes will involve a further decision: should the NEC itself be made more clearly the guarantor of the process? Or should the role of the judicial system in overseeing elections be clarified and strengthened? Making the NEC central to the process would likely offer quicker resolution to some problems. However, public credibility is key—laws have to be followed, but people also have to believe that they are being followed. If the impartiality of the NEC were in doubt, external judicial overview might be a more effective way to gain public confidence. The Constitutional Court (absent since January 2020) could be the institution that oversee and guarantee the process.

Amendments

First, other laws that do not relate solely to elections should be amended or annulled. Most significant in this respect are the National Security Service Act and the Press and Publications Act.

The NEA will require amendment unless every aspect of the existing election system is to be maintained. In making amendments, the opportunity should be taken to ensure that the NEA is internally consistent. That process should embrace a review of rules issued, with a view to ensuring that these are clear and consistent and that they are available and known to elections staff in a manner that allows proper training. The amendment process might consider whether to provide more clarity over which courts should handle which kinds of appeal and dispute (registrations, nominations, results).

Amendments might also specify requirements for tallying and publication of results. The polling period might also be reconsidered: the 2019 amendment removed the single-day requirement, but this creates problems of its own (most obviously with security of the ballot, but also for polling staff). Single-day polls would be viable if elections at all levels—presidential, national assembly, state assembly—were not held at the same time. The NEA as it stands does not actually require simultaneous polls.

Consideration should be given to amending the PPA to focus on registration of parties, rather than party-strengthening. Experience elsewhere suggests that legislation alone will not create robust parties; the law can impose requirements on existing organisations but cannot magic organizations into being. The current presidentially appointed PPAC has potentially significant powers to punish and reward. It is also possible that a different system of appointment of commissioners would create more confidence, or that the functions of the PPAC could be brought under the NEC, removing the need for a separate Council.

Practice and enforcement

The single most important change to practice is simple to state but harder to realise: make it easier for election staff not to break the law. The repeated failure of NEC staff to meet statutory requirements, on everything from displaying voters lists to not completing polls in a single day, was almost inevitable because of delays in planning. A system that places legal responsibilities on people and then makes these impossible to meet is pernicious and normalizes rule-breaking.

The problem of rule-breaking by NEC staff might be addressed by creating a more clearly defined way for any complaints to be made to the NEC and a legal responsibility and timeline for addressing them: this would require additional resource within the NEC but would allow the NEC itself to identify and respond to problems quickly. Alternatively, creating clear mechanisms for reporting suspected failures to follow the law and placing investigation and prosecution in the hands of police and courts, and clearly outside the remit of the NEC, would offer a way to enforce the law and at the same time improve public confidence. This might well be slower and might lead to a significant number of frivolous allegations. It would, however, have the advantage of making the legal responsibilities of election officials very clear.

As well as making the NEC staff and its staff more clearly subject to the law, there is a need to provide better mechanisms for ensuring that candidates, parties and voters follow the law. This could be done by strengthening capacity within the NEC—so that, for example, it is possible to follow up on campaign financing. Again, the alternative would be to more clearly define, and resource, the role of the police and judiciary in enforcing election laws and establish a responsibility for NEC staff to report suspected violations.

There needs to be a clearer mechanism to assert, and handle complaints around, the rights to organize and campaign and the media access nominally provided by the law. Parties or candidates who feel that they have not been given access to public media, or who believe that their right to campaign has been infringed, must have a way to raise complaints, and there must be a mechanism to resolve these. It should be noted that such complaints might well pit a political party that wishes to hold a rally against a police force which wishes to ban that rally for security reasons: resolving them may not be easy. Again, the NEC might be enabled to investigate and resolve such complaints, or a specific judicial channel created for them.

Credits

This briefing is a product of RVI's Sudan Elections Project, funded by UKaid from the UK government. The views expressed do not necessarily reflect the UK government's official policies.

The Rift Valley Institute works in eastern and central Africa to bring local knowledge to bear on social, political and economic development.