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Constitutional Reform as a Means of Democratic Transformation in Sudan

Dissertation

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List of Abbreviations:

AU: African Union
 CAT: International Covenant Against Torture
 CC: Constitutional Court
 CCA: Constitutional Court Act
 CoM: Council of Ministers
 CPA: Comprehensive Peace Agreement
 DDR: Demobilization, Disarmament and Reintegration
 DOP: Declaration of Principles
 DUP: Democratic Unionist Party
 HCD: Higher Council
 FCCA: German Federal Constitutional Court Act
 FFAMC: Fiscal and Financial Allocation and Monitoring Commission
 GoNU: Government of National Unity
 GoS: Government of Sudan
 GoSS: Government of Southern Sudan
 ICC: International Criminal Court
 ICCPR: International Convention on Civil and Political Rights
 ICESCR: International Covenant on Economic Social and Cultural Rights
 ICSS: Interim Constitution for Southern Sudan
 IDEA: International Institute for Democracy and Electoral Assistance
 IDP: Internally Displaced People
 IGADD: Intergovernmental Authority on Drought and Development
 INC: Interim National Constitution
 JIU: Joint Integrated Unit
 LAD: Legal Aid Department of the National Ministry of Justice
 LRC: Law Reform Committee
 MDTF: Multi-Trust Fund
 MoJ: Ministry of Justice
 NCP: National Congress Party
 NCRC: National Constitutional Review Commission
 NDA: National Democratic Alliance
 NIF: National Islamic Front
 NJSC: National Judicial Service Commission
 NPC: National Petroleum Commission
 NRDF: National Reconstruction and Development Fund
 PDF: Popular Defense Forces
 PPS: Protocol of Power Sharing
 RoL: Rule of Law
 SAF: Sudan Armed Forces

SPLM/A: Sudan People's Movement Army

UDHR: Universal Declaration of Human Rights

UN: United Nations

UNDP: United Nations Development Programme

UNMID: United Nations African Union Mission in Darfur

UNMIS: United Nations Mission in Sudan

UNISFA: UN Interim Security Force in Abyei

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Summary of the Study

Introduction

Sudan is the third largest country on the African continent with a total area of 1,882,000 sq km. Before the secession of South Sudan in 2011, Sudan was the largest country in Africa, covering 1 million square miles. Sudan is unique and complex in its climate, politics, environment, languages, cultures, religion and ethnicities. Demographically, Africans are the majority (52%), with Arab and *Beja* tribes constituting 38% and 6% of the population, respectively. Over 597 tribes live in Sudan that speak more than 400 dialects and practice different religions. Muslims make up 70% of the total population of Sudan, followers of indigenous beliefs comprise 25% and Christians constitute 5% of the population. The complex mixture of the Sudanese social fabric renders it neither distinctly African nor Arab country. The Sudanese, however, have long disagreed about Sudan's identity. For some, Sudan should be Arab and Muslim. Other believe that the country should respect and accommodate all the cultures, religions and minorities within its territory. Most of Sudan constitutions, however, stated that Islam and Arabic language should define the national identity.

Sudan, with its present boundaries, is a fairly recent State. Sudan only came into being, in 1916. Prior to that period, the country was divided into a number of Kingdoms and Sultanates, which were unified at various periods of history. The present boundaries of Sudan were drawn in 1820 during the *Turkiyya* era. The *Turkiyya* first unified the Sudanese territories on the basis of a centralised administration, which established territories in the Nile valley, Blue Nile and Kordofan, but it did not include the present southern parts of Sudan. The *Turkiyya* was overthrown by the *Mahdiyya*, in 1883.

Politically, since the independence, Sudan has experienced a fluctuation between military rule and democratic rule. In fact, Sudan spent thirty years under the military rule, and only twelve years under democratically elected governments. The successive governments have frequently made use of emergency legislation to broaden the executive powers. These legislative measures have contributed to conflict and facilitated a range of human rights violations. In addition to the political instability, Sudan has the distinction in Africa in enduring a devastating civil war: that is: Sudan's north-south civil war. The conflict started just a year before the independence of

Sudan, in 1956. The cumulative impact of that conflict has been massive. The conflict has caused horrendous loss of life in any interstate war, and has produced the largest internally displaced population (IDP) in the world.

Sudan north-south conflict has long been perceived as ethnic or even religious conflict between the north and the south. Ethnicity has been used generously in the description of that conflict. Yet, a closer look at the history of the conflict reveals that the root-causes of that conflict are highly complex. But, this is by no means to say that conflict has had no ethnic, racial and religious overtones. The eruption of the north-south conflict was the result of a combination of factors. One could trace the root-causes of the conflict to the invasion of the south from the north by *Turkiyya* that expanded southwards, and the simultaneous development of slave trade. Thereafter, the British rule contributed in different ways to the crystallizing of the north-south dichotomy.

After the independence of Sudan, successive governments, were unsuccessful in handling the growing southern problem, ranging from neglect to attempts to reverse the British isolation by enforced *Arabisation* and *Islamization* of the southern Sudan. The north-south conflict ended, in 1972, when Addis Ababa Agreement was signed by then President *Nimeiry*. But, the conflict broke out again, in 1983, when the Addis Ababa Agreement was abrogated by the then President *Nimeiry*. After a series of peace talks (which witnessed ‘start and stop’), a Comprehensive Peace Agreement (CPA) was concluded, on 9 January 2005, between the Government of Sudan (GoS) and the Southern Sudan People’s Liberation Movement (SPLM/SPLA) to end the conflict.

The CPA provides for a temporary solution for the conflict through, *inter alia*, the distribution of the power between the north and the south of Sudan by establishing a federal system of government with a significant devolution of powers within which the Southern Sudan is to enjoy a regional autonomy and share half of the resources with north Sudan for a period of six years. Furthermore, the CPA creates joint institutions, such as, the Government of the National Unity (GoNU) in which the Southern Sudan participate and share ministerial posts. The CPA also provides for the establishment of a number of commissions for implementing and

monitoring the CPA, for instance, the Evaluation and Monitoring Commission, the National Human Rights Commission, etc. At the end of the interim period, a referendum on the self-determination is to be held, in 2011, in which the people of the Southern Sudan will decide whether to remain within a united Sudan or to secede and form an independent State.

The Aim of the Study

The significance of this study derives from the conclusion of the CPA and the adoption of the Interim National Constitution (INC) that called for democratic transformation so as to bring an end to Sudan north-south conflict. While the CPA ended Sudan's north-south conflict, a lasting peace and a democratic transformation, in Sudan, may prove elusive unless the CPA provisions are translated into reality, especially the implementation of constitutional, legislative and institutional reforms, including human rights protection and respect for the rule of law.

The study aims to answer whether the CPA and INC can fulfil their roles in securing peace and establishing a framework in which the constitutional protection of human rights are recognised and effectively implemented through the availability of the various mechanisms. In this respect, the CPA provided for the adoption of a new constitution (INC), with a view to embedding constitutionalism, rule of law promotion, and protection of human rights. It is, therefore, this study is meant to analyze the constitutional, legislative and institutional reforms of the INC with a view to examining whether such constitutional reforms may be conducive for a lasting peace, in Sudan, that is based on human rights protection, constitutionalism and the rule of law.

The CPA stipulated the need for institutional and legislative changes to reduce the risk of recurrence of human rights violations. To this end, the CPA mandated the adoption of a bill of right (for the promotion and protection of human rights) and provided for re-restructuring of the courts system. Such institutional reforms are aimed at embedding constitutionalism. That is to say: establishing a system in which the constitution provides an agreed upon framework for the exercise of powers and the protection of human rights. In this respect, the study examines whether the outcome of the constitutional reforms process (to recognise, implement, and protect human rights as provided for in the INC) have been reflected in institutional and legislative

reforms to protect and prevent human rights violations and address past violations in practice. To that end, the human right jurisprudence of the constitutional court will be examined.

The Organization of the Study

a) The Structure of the Political/Governance System in Sudan under the INC

With the devolution of the powers and resources to the Southern Sudan level and other States, the governance system, under the INC, is structured with four levels of government: the national level at the apex, the Government of South Sudan level, the State level (25 States), the local level. Now, the government responsibilities are decentralized and the national government allocates a significant proportion of revenues to the States. It is, therefore, that the first question that this study poses is: What is the impact of the current governance system, under the INC, in giving greater equity of representation and participation decision-making processes to communities across Sudan so as to facilitate conflict management to achieve a lasting peace in Sudan?

In Sudan, previously appropriate design of institutions to ensure political accommodations for all social groups has not been established in a way that would give them the chance to function properly. Now, the INC restructures the prevailing governance system by establishing a decentralized system of government that bears the characteristics of asymmetrical/symmetrical federalism, with the level of South Sudan having more powers and resources than other States across Sudan.

Establishment of a federal structure may constitute a mechanism for preventing a relapse into conflict through the devolution of the powers to the State level. For a federal to work effectively, it requires a functional court system to decide on the jurisdictional limits of the different levels of government, as well as on the distribution of resources. Nevertheless, the relevance of the court system in resolving the intractably political contentions in federal countries, especially in transition situations, is uncertain. Noticeably missing from the literature is the study and analysis of the impact of the role of court system in post conflict countries.

That said, the role of the court system in preserving democracy has grown in importance with the increase recognition of the judicial review of the constitutionality of the acts of the government organs and the recognition and the protection of human rights provisions. It is, therefore, that the involvement of the courts is necessary to ensure the successful operation of the federalism and thus the failure or the success of federalism is contingent on the implementation of the federal system by the courts. According to some scholars, ‘federalism means legalism – the predominance of the judiciary in the constitution- the prevalence of a spirit of legality among the people’. As ‘[the] courts ...are actually telling a government how far it can go with its assigned constitutional rights’.

This leads to the second question that this study addresses which relates to the analysis of the constitutional reform as provided for in the INC, in general, but with a special focus on the role of the court system, through the application of judicial review and protection of human rights, to resolve not only disputes in litigations between private parties, but also to prevent the arbitrary exercise of the government power.

b) The Structure of the Legal System (Court System) in Sudan under the INC

The available literature presents different views as to the role of the court system in new democracies. On one hand, one view assumes that the courts have a fairly wide discretion to decide the outcome of the controversial cases to the needs of the political moment. The other view, on the other hand, takes the position that political actors do not exert any kind of influence at all on the way judges make their decisions. A third source, and with which I agree, argues that legal rules do put constraints over the exercise of the judicial discretion in controversial cases. A fourth view argues that in new fragile democracies constitutional courts/supreme courts should not be involved in judicial review, especially on adjudicating issues related to social and economic rights, which may profoundly affect the allocations of resources and violate the doctrine of separation of powers.

In this respect, the study considers whether the court system, as restructured in the INC, and other constitutional guarantees introduced to the legal system as a whole, offer good prospects for constitutionalism that may control the power of the government so as not act arbitrarily. The role of court system in resolving disputes is highly contingent on the substantive law and the

institutional structure within which the courts apply laws. Thus, this study examines to what extent the current structure of the legal system under the INC and the protection of human rights through the application of the Bill of Rights by the courts may signal the State's commitment to constitutionalism and respect to the rule of law. It is, therefore, that the role of the court system (in contributing to democratic transformation in Sudan) should be evaluated against the legal framework: that is the INC, with a focus on the independence of the judiciary, the application of the Bill of Rights and the rules governing the judicial review.

c) The Legislative and Institutional Reforms under the INC

The functions of the courts, in developing countries, have experienced increasingly transformative role as institutions that can hold the government organs accountable. The study aims to examine the practice of constitutionalism: that is, the implementation of the INC constitutional, institutional and legislative reforms, especially the compliance with the provisions of the INC, in particular the role of the constitutional court as “a positive legislator”.

In this regard, the Sudanese Constitutional Court may play an important role in the law reform process given its power to annul laws found unconstitutional. This entails the non-applicability of such laws and, as a result, would compel the government institution/organ concerned to adopt new legislation that is in conformity with the INC. Thus far, the Sudanese constitutional court, under the INC, has received a number of human rights cases that involved issues related to violations of human rights or related to the constitutionality of key legislation, such as counter-terrorism laws, immunities for officials and statutes of limitation for torture.

So what role the constitutional court has played in the law reform process under the INC? For the court system to play a role in the democratic reform, a comprehensive law reform process is seen as a prerequisite to bring the existing laws in line with the provisions of the INC and enacting new laws. Therefore, this study identifies what legislative and institutional reforms that have been undertaken by the parties to the CPA during the interim period to address human rights violations, root-causes of the conflict; inequality; marginalization, rule of law vacuum and weak democratic structures. Furthermore, this study offers empirical evidence for the judicial behavior of the Sudanese constitutional court through a systematic examination of

selected human rights jurisprudence of the constitutional court to gauge its role in the law reform process in Sudan since the adoption of the INC.

Overview of the Study and the Main Findings:

Introductory Chapter: Overview of the Study

The Introductory Chapter provides an overview of the study, including, the key features of the State of Sudan, the aim of the study, the main objectives of the study, and a general overview of the study.

Chapter One: A Historical Background of Sudan's North-South Conflict

Chapter One gives a rich and deep account of Sudan north-south conflict. It looks at the root-causes of the conflict by elaborating on different factors that directly and indirectly contributed in making that conflict protracted. *Chapter one* moves on to consider the end of the first Sudan's north-south conflict which was ended when Addis Ababa Agreement was signed in 1972. *Chapter one* further elaborates on Sudan's second north-south conflict which broke out in 1983. Finally, *Chapter one* touches on the various peace initiatives that ended by the conclusion of the CPA. *Chapter One* concludes by analysing the CPA. ***In the final analysis/main finding***, the CPA made significant changes the prevailing governance and legal systems in Sudan by establishing a federal system, introduced a dual legal system and a bill of rights, provided for the right to self-determination for the south Sudan, established institutions for the protection of human rights by establishing mechanisms such as National Human rights Commission, and distributed the wealth between the north and the south. However, the CPA failed to include the Sudanese people in the talks leading to the conclusion of the CPA, as the CPA was bilateral reflecting the views of the north and the south.

Chapter Two: The Structure of the Governance System under the INC

The INC describes Sudan as a decentralized State with different levels of government: the national level, the Southern Sudan level, the State level and the local level. It further grants the Southern Sudan autonomy status. A careful analysis of the current governance arrangements reveals that the INC provides for asymmetric/symmetrical federalism system of governance.

Chapter Two discusses the allocation of legislative powers between the national government, the Southern Sudan and the rest of the country and the nature of the constitutional design of the

INC to manage diversity of Sudan (ethnic, linguistic, religious and cultural diversity). At the outset of *Chapter Three* provides an overview the fundamental principles of federalism and provides a brief historical background of federalism in Sudan and how federalism arrangements can play a role as a tool for peace-building. *In the final analysis/main finding*, in contrast with old constitutions of Sudan, the INC establishes a federal system, with four levels of government; national, south Sudan, State and local levels. The INC federal system guarantees the special characteristics of all ethnic and religious groups in Sudan through the creation of the Council of the States. However, all the States in Sudan are not treated equally, because (1) two States have special status (South Kordofan and Blue Nile States), and (2) between the ten States in the South and the national level, the Government of South Sudan (GoSS) is inserted to exercise authority in respect of the ten States at South Sudan level. This means the INC creates asymmetrical/symmetrical federalism, as the South Sudan level enjoys significant autonomy and exclusive authority over ten States in South Sudan.

The INC Schedules (A – C) distribute the exclusive legislative powers to the national level (Schedule A), the GoSS level (Schedule B), and the state level (Schedule C). Schedule (D) lists the concurrent powers and Schedule (E) allocates the residual powers as per its nature. Schedule (F) is a provision to resolve conflict that might arise under Schedule (D). It should be noted that not all issues listed in the INC schedules are allocated to one level of government only. For example, several substantive issues are granted to the national level as an exclusive competence, to the South Sudan level as an exclusive competence and at the same time to all levels of government as a concurrent power, such as telecommunication. With regard to the legislative powers allocated to the tens states at the South level, the GoSS according to Schedule (B) has the competence to enact a kind of framework with regard to issues that fall under the exclusive South Sudan State competence, thereby limiting the legislative powers of the ten States in South Sudan.

Finally, the INC has reinforced existing power relations and failed to provide structural changes for democratic transformation, as the INC asymmetrical federalism accommodates the demands of the South Sudan only. As the INC does not accommodate the demands of the different ethnic

and cultural groups in the different regions of Sudan as demonstrated by the conclusion of Darfur Peace Agreement and East Sudan Agreement.

Chapter Three: The Structure of the Legal System under the INC

The INC altered the Sudanese legal system with a view to accommodating the competing views: *Sharia* law and secularism. For a proper understanding of the present Sudanese legal system and an assessment of the role of the court system in contributing to democratic governance, a glance at the Sudanese legal history is necessary. Firstly, *Chapter Three* reviews the constitutional developments in Sudan since the independence to the present day. Secondly, *Chapter Three* provides overview of the structure of the court system in a decentralized system and focuses on the contribution of the court system to democratic transformation through limiting the acts of the government. *Chapter Three* further discusses issues that may impact of the role of the court system in contributing to democratic transformation.

Yet, the role of the court system in promoting democratic transformation is contingent on the constitution, the substantive law, etc. For instance, instituting the principles of constitutionalism is contingent on the independence of the judiciary, as an independent judiciary is required for the protection of constitutional rights and to restrain the actions of the government. Thus, it is important to understand under what conditions the court system develops such accountability functions: that is, what conditions favor the ability of the court system to exercise an effective accountability functions.

It is, therefore, *Chapter Three* examines (a) how the INC re-structures the court system in the north and the south of Sudan so as to give effect to the principles of the federalism and legal pluralism; (b) the rules regulating the judicial review, and (c) the protection of human rights through the implementation of the bill of rights by the court, all of which signal the commitment of the State to establish democratic governance.

Finally, *Chapter Three* attempts to evaluate the independence of the judiciary and the rules that govern the judicial review before and after the adoption of the INC with a view to assessing the fidelity of the government to the principles of constitutionalism, and whether the limitations observed in the actual conduct of the government. *In the final analysis/main finding*, the INC

constitution making process was bilateral reflecting the views of the parties to the CPA and lacked inclusiveness, but provides for a pluralism legal system by providing for a constitution for south Sudan and 25 State constitutions. The INC introduces State judiciary and South Sudan judiciary and opted for an integrated the court system. That is: the State courts apply the State laws, the national laws and the South Sudan laws. In the North, the State courts are still organized by the national level, although the NC provides for the establishment of the State judiciary. At the South Sudan level, all State courts are organized and financed at the level. Towards the South Sudan, the National Supreme Court is the final court of on matters arising under national laws

The INC emphasizes the importance of protecting; respecting and promoting human rights through the inclusion a bill of right and incorporation via Art. 27(3) of the INC all human rights treaties that Sudan has ratified, thereby the human rights contained in the INC directly applicable before the Sudanese courts. Also, the implementation of some human rights requires revision of the existing statutory laws. To date there has been limited legislative reforms to address human rights violations. A few laws have been reformed but fall short of Sudan international obligations, such as Criminal Act, Security Laws, Immunity Laws, etc.

The INC differentiates between the north and the south regarding the sources of legislation. Art. 5 of the INC lists Sharia as one of the sources of legislation along with the consensus of the people at the national level. Art. 5(2) of the INC names popular consensus and the values and the customs of the people of Sudan as the sources of legislation in South Sudan. The INC contains special rules for national legislation if its source is religion or custom. In that case, a state where the majority of residents do not practice such religion or customs may introduce different legislation allows practices or establishes institutions in that State that are consistent with its own religion or customs. The INC establishes human rights commission for the implementation of the bill of rights as well as a commission for the protection of non-Muslims in the Capital.

The INC has chosen a concentrated system of judicial review and a hybrid system of judicial review with respect to the South Sudan as the Supreme Court of South Sudan acts as a

constitutional court and a high court of Appeal with respect to South Sudan. The newly enacted Judicial and Administrative of 2005 does not provide for concrete judicial review of law and bars the court from question the constitutionality of law by way of making referral to the constitutional court, thereby renders the judiciary unable to deal with crucial constitutional issues.

Chapter Four: Institutional and Legislative Reform: Practice of Constitutionalism

In order to understand whether the adoption of the INC has brought any changes may enhance the role of the court system in contributing to democratic transformation; *Chapter Four* scrutinizes the compliance of the statutory law with the provisions of the INC, the law reform process in Sudan and the implementation of law in practice. *Chapter Four* further presents an analysis of more pertinent provisions of civil and political rights in the light of the laws and practices prevailing in the country to assess the extent to which the principles laid down in the INC are complied with. It further assesses the involvement of the Sudan constitutional court in the law reform process by reviewing a selected human rights jurisprudence of the constitutional court. Finally, *Chapter Four* makes a reference to the jurisprudence of other constitutional courts (the German constitutional court, the Indian Supreme Court and the South African constitutional court) by way of comparison.

In the final analysis/main finding, the INC does not set out procedure for concrete review and access to the court is not free. The constitutional court has a broad power to consider and adjudge and annul any law in contravention with the constitution and reconstitute the right to the aggrieved person and compensate for the harm. The court may also order interim measures to avoid any harm. As such, the constitutional court can abolish laws and compel the government to enact new law. The constitutional court has reviewed a number of cases that alleged the violation of human rights. The constitutional court has demonstrated reluctance to declare legislation unconstitutional. Interpretation of the bill of rights and reference to international human rights lacked consistency and the court has taken deference to the executive. The constitutional, legislative and institutional changes did not acknowledge past human rights violations through mechanisms that would question the way of governance and persisting inequalities and injustices. The constitutional court has institutional weaknesses and its

jurisprudence has largely upheld existing laws such as immunities laws and the constitutional court made limited reference to international human rights law. The constitutional, legal and institutional reforms failed to generate the sense of constitutionalism and the fundamental change that were to remove the causes for human rights violations and provide effective remedies. A number of laws contravening the human rights are still in force, such as, Public Order Act, Immunity of police, security and army officers, inadequate laws for the protection of women's rights; and finally, the implementation of CPA/the INC as a means of democratic transformation left an unreformed government virtually intact

Chapter Five: Post- Referendum Sudan

Chapter Five looks at the constitutional developments after the secession of South Sudan, with a focus on constitution making process in Sudan.

The Southern Sudan Referendum for self-determination, held in July 2011, clearly indicated that the absolute majority of those who participated in the referendum for the Southern Sudan favour separation of the Southern Sudan from Sudan. The secession of the South Sudan on July 9, 2011, as a result of the referendum on self-determination provided by the CPA has created a new reality in Sudan with far reaching economic, political and social implications. Economic and financial losses related to the secession are substantial and have affected all sectors of the economy. Sudan has lost three-quarters of its largest source of foreign exchange (oil), half of its fiscal revenues and about two-thirds of its international payment capacity. *In the final analysis/main finding*, the secession of South Sudan resulted in a 36.5% structural decrease in overall government revenues. The unresolved issue of Abyei constitutes a trigger for potential violent tension in the future between Sudan and South Sudan. Abyei status is yet to be decided, as both Sudan and South Sudan claiming it as part of its territory. Its final status will be decided by a Referendum for which implementation mechanisms have not yet been agreed upon by the two countries.

The end of the CPA necessitated a constitutional review process to decide on the new constitution to replace the INC. However, for a constitution to be able to win the affections of the citizens of the State, it will be necessary to involve those citizens in the constitution-making

process that establishes such a constitution, so as to ensure that the process is inclusive and reflects the aspirations of the Sudanese people at large.

In the final analysis/main finding, currently, public debate over the new constitution is proceeding, although the Government has not yet announced a timeframe for the constitution making process, amid a polarization of views on diverse issues such as the decentralization of power and wealth sharing between the different regions of Sudan. Since 2011, the Government of Sudan, in collaboration with the UNDP and other UN agencies, initiated the forum on public participation in constitution making to facilitate open and public dialogue. This approach has been based on the need to pursue the constitutional process/review inclusively, transparently and participatory to ensure all sectors of society including civil society organizations and opposition political groups participate fully in the process.

Introductory Chapter: Overview of the Study

1. Introduction

I. Key Features of the State of Sudan

Sudan is the third largest country on the African continent with a total area of 1,882,000 sq km.¹ Before the secession of South Sudan in 2011; Sudan was the largest country in Africa, covering 1 million square miles. Sudan is unique and complex in its climate, politics, environment, languages, cultures, religion and ethnicities. Demographically, Africans are the majority (52%), with Arab and *Beja* tribes constituting 38% and 6% of the population, respectively.² Over 597 tribes live in Sudan that speak more than 400 dialects and practice different religions. Muslims make up 70% of the total population of Sudan, followers of indigenous beliefs comprise 25% and Christians constitute 5% of the population. The complex mixture of the Sudanese social fabric renders it neither distinctly African nor Arab country. The Sudanese, however, have long disagreed about Sudan's identity. For some, Sudan should be Arab and Muslim.³ Other believe that the country should respect and accommodate all the cultures, religions and minorities within its territory.⁴ Most of Sudan constitutions stated that Islam and Arabic language should define the national identity.⁵

Sudan, with its present boundaries, is a fairly recent State. Sudan only came into being, in 1916. Prior to that period, the country was divided into a number of Kingdoms and Sultanates, which were unified at various periods of history.⁶ The present boundaries of Sudan were drawn in 1820 during the *Turkiyya* era. The *Turkiyya* first unified the Sudanese territories on the basis of a centralised administration, which established territories in the Nile valley, Blue Nile and

¹ Sudan has international borders with 7 states: Egypt, Eritrea, Ethiopia, South Sudan, Central African Republic, Chad and Libya. See: <http://www.sd.undp.org/content/sudan/en/home/countryinfo/>

² Gerard Prunier et al, the Sudan: A Successful Failed State, in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, World Peace Foundation, Cambridge MA, 2003, p. 110.

³ See generally Ann Mosel Lesch, *the Sudan – Contested National Identities*, Indian University Press, Oxford, 1998.

⁴ Ibid.

⁵ When the current government seized power in 1989, a project of “Civilization” based on *Arabisation* and *Islamisation*, has been pursued with a view to forcing the peoples of the South, Darfur, Nuba Mountains, Blue Nile and the East (Beja) to adopt this common identify. See International Crisis Group, *Divisions in Sudan's Ruling Party and the Threat to the Country's Future Stability*, Africa Report, No. 174, May 2011, p. 3.

⁶ Zaki Mustafa, *The Common Law in the Sudan: An Account of the 'Justice, Equity, and Good Conscience' Provision*, Clarendon Press, Oxford, 1971, p. 33.

Kordofan, but it did not include the present southern parts of Sudan. The *Turkiyya* was overthrown by the *Mahdiyya*, in 1883.

The *Mahdiyya* State lasted until 1899 when it was ousted by the British and Egyptian Administration, in 1899. Thereafter, the status of Sudan was one of a condominium (Anglo-Egyptian Rule). The Anglo-Egyptian Administration drew the present boundaries of Sudan in early 20th century. Towards the Western region of Sudan, Darfur Sultanate, which was an independent entity, was conquered by the British-Egyptian Administration and incorporated into Sudan, in 1916. Sudan gained its independence from Britain, in 1956.

Politically, since the independence, Sudan has experienced a fluctuation between military rule and democratic rule. In fact, Sudan spent thirty years under the military rule,⁷ and only twelve years under democratically elected governments.⁸ The successive governments have frequently made use of emergency legislation to broaden the executive powers. These legislative measures have contributed to conflict and facilitated a range of human rights violations.⁹ In addition to the political instability, Sudan has the distinction in Africa in enduring a devastating civil war: that is: Sudan's north-south civil war. The conflict started just a year before the independence of Sudan, in 1956. The cumulative impact of that conflict has been massive. The conflict has caused horrendous loss of life in any interstate war, and has produced the largest internally displaced population (IDP) in the world.¹⁰

Sudan north-south conflict has long been perceived as ethnic or even religious conflict between the north and the south. Ethnicity has been used generously in the description of that conflict. Yet, a closer look at the history of the conflict reveals that the root-causes of that conflict are highly complex. But, this is by no means to say that conflict has had no ethnic, racial and religious overtones. The eruption of the north-south conflict was the result of a combination of

⁷ There have been three military regimes, which ruled Sudan from 1958 until 1964 (Abboud Government), 1969 until 1985 (Nimeri Government), and 1989 to the present-day (El-Bashir Government).

⁸ The three democratically elected governments were established in 1956, 1964 and 1985.

⁹ *Abdelsalam Hassan and Amin Medani*, Criminal Law Reform and Human Rights in African and Muslim Countries with Particular Reference to Sudan, p. 35, in *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan*, L. Oette (eds.), Ashgate Publisher, 2011.

¹⁰ *Robert I. Rotberg*, Failed States, Collapsed States, Weak States: Causes and Indicators, in *State Failure and State Weakness in a Time of Terror*, Robert I. Rotberg (ed), Brookings Institution Press, Washington D. C., 2003, p. 13.

factors. One could trace the root-causes of the conflict to the invasion of the south from the north by *Turkiyya* that expanded southwards, and the simultaneous development of slave trade. Thereafter, the British rule contributed in different ways to the crystallizing of the north-south dichotomy. After the independence of Sudan, successive governments, were unsuccessful in handling the growing southern problem, ranging from neglect to attempts to reverse the British isolation by enforced *Arabisation* and *Islamization* of the southern Sudan.¹¹ The north-south conflict ended, in 1972, when Addis Ababa Agreement was signed by then President *Nimeiry*. But, the conflict broke out again, in 1983, when the Addis Ababa Agreement was abrogated by the then President *Nimeiry*. After a series of peace talks (which witnessed ‘start and stop’), a Comprehensive Peace Agreement (CPA) was concluded, in 9 January 2005, between the Government of Sudan (GoS) and the Southern Sudan People’s Liberation Movement (SPLM/SPLA) to end the conflict.

The CPA provides for a temporary solution for the conflict through, *inter alia*, the distribution of the power between the north and the south of Sudan by establishing a decentralised system of government with a significant devolution of powers within which the Southern Sudan is to enjoy a regional autonomy and share half of the resources with north Sudan for a period of six years. Furthermore, the CPA creates joint institutions, such as, the Government of the National Unity (GoNU) in which the Southern Sudan participate and share ministerial posts.¹² The CPA also provides for the establishment of a number of commissions for implementing and monitoring the CPA, for instance, the Evaluation and Monitoring Commission, the National Human Rights Commission, etc. At the end of the interim period, a referendum on the self-determination is to be held, in 2011, in which the people of the Southern Sudan will decide whether to remain within a united Sudan or to secede and form an independent State.¹³

¹¹ *Peter Woodward*, *Conflict and Federalism in Sudan*, Peter Woodward and Murray Forsyth (ed), Dartmouth Publishing Company Limited, 1994, p. 88.

¹² Chapter II, Art. 2.5, ‘Power-Sharing Protocol’ of the Comprehensive Peace Agreement. The agreement is not a single agreement but a number of Protocols signed on different dates. These Protocols include, *inter alia*, the Power-Sharing Protocol, the Wealth-Sharing Protocol, the Machakos Protocol, etc. The full text of the Comprehensive Peace Agreement is available at: http://www.mpil.de/shared/data/pdf/cpa_complete.pdf.

¹³ Chapter I Part B “*Machakos Protocol*” of the CPA states that: “a referendum for the people of Southern Sudan at the end of the interim period, either to confirm the unity of Sudan or to vote for secession”.

II. The Aim of the Study

The significance of this study derives from the conclusion of the CPA and the adoption of the Interim National Constitution (INC) that called for democratic transformation so as to bring an end to Sudan north-south conflict. While the CPA ended Sudan's north-south conflict, a lasting peace and a democratic transformation, in Sudan, may prove elusive unless the CPA provisions are translated into reality, especially the implementation of constitutional, legislative and institutional reforms, including human rights protection and respect for the rule of law.¹⁴

Thus, this study aims to answer whether the CPA and INC can fulfil their roles in securing peace and democratic transformation through establishing a framework in which the constitutional protection of human rights are recognised and effectively implemented through the availability of the various mechanisms. In this respect, the CPA provided for the adoption of a new constitution (INC), with a view to embedding constitutionalism,¹⁵ rule of law promotion,¹⁶ and protection of human rights. It is, therefore, this study is meant to analyze the constitutional, legislative and institutional reforms of the CPA and INC with a view to examining whether such constitutional and institutional reforms may be conducive for a lasting peace, in Sudan, that is based on human rights protection, constitutionalism and the rule of law.

The CPA stipulated the need for institutional and legislative changes to reduce the risk of recurrence of human rights violations. To this end, the CPA mandated the adoption of a bill of right (for the promotion and protection of human rights) and provided for re-structuring of the

¹⁴ The CPA Chapeau, articles 1 & 4 of the INC and the Bill of Rights.

¹⁵ The notion of constitutionalism can be summarized as follows: (a) an independent judiciary that enforces the legal rights and limits the acts of government in accordance with the constitution; (b) separation of the powers to ensure that public policy is based on clearly defined laws; (c) protection of the individual rights and freedoms against government interference. See *Okon Akiba*, Constitutional Government and the Future of Constitutionalism in Africa, in: *Constitutionalism and Society in Africa*, Okon Akiba (eds), Ohio University, London, 2004, pp3-6; See *Carla M. Zoethout et al*, Defining Constitutionalism and Democracy: An Introduction, in: *Constitutionalism in Africa: A quest for autochthonous principles*, Carla M. Zoethout et al (ed), Sander Institute, Gouda Quint Publisher, Rotterdam, 1996, p.4.

¹⁶ The rule of law, as defined in the Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies, refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency. See the Secretary-General on *the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, 3, August 2004. para. 6, S/2004/616.

courts system. Such institutional reforms are aimed at embedding constitutionalism. That is to say: establishing a system in which the constitution provides an agreed upon framework for the exercise of powers and the protection and promotion of human rights.¹⁷ In this respect, the study examines whether the outcome of the constitutional guarantees (to recognise, promote and protect human rights as provided for in the INC) have been reflected in practice in institutional and legislative reforms to protect and prevent human rights violations and address past violations and the factors that have contributed to violations. To that end, the human right jurisprudence of the constitutional court will be examined.

III. Main Objectives of the Study

In the view of what precedes the study attempts to answer certain questions.

1) The Structure of the Political/Governance System in Sudan under the INC

With the devolution of the powers and resources to the Southern Sudan level and other States, the governance system, under the INC, is structured with four levels of government: the national level at the apex, the Government of South Sudan level, the State level (25 States),¹⁸ the local level.¹⁹ Now, the government responsibilities are decentralized and the national government allocates legislative powers and resources to the States. It is, therefore, that the first question that this study poses is: What is the impact of the current governance system in giving fair opportunities for political representation and participation decision-making process for different social groups across Sudan with a view to facilitating conflict management to achieve a lasting peace in Sudan?

In Sudan, previously appropriate design of institutions to ensure political accommodations for all social groups has not been established in a way that would give them the chance to function

¹⁷ See *Thomas Cottier and Maya Hertig*, 'The Prospects of 21st Century Constitutionalism', in *A. von Bogdandy and R. Wolfrum* (eds.), *Max Planck Yearbook of United Nations Law*, Volume 7, 2003, pp.261-328, at pp.275-282; *Ruti G. Teitel*, *Transitional Justice*, OUP, 2000, pp. 191-201; *Christine Bell*, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria*, OUP, 2008, pp.202, 203.

¹⁸ 11 of the those States belong to the national level, 10 States belong to the Government of the Southern Sudan and two States: that is: South Kordofan and Blue Nile States which are technically in the Northern Sudan but identify more closely with the Southern Sudan and are under special arrangements, as per the Protocol on the Resolution of Conflict in Southern Kordofan and Blue Nile States. Abyei Area is granted a special status under the institution of the Presidency, as per the Protocol on the Resolution of Conflict in Abyei.. See Articles 182 and 183 of the INC.

¹⁹ There are three level of government in the Northern Sudan (National, State and Local levels), and four levels of government in the Southern Sudan (National, the Southern Sudan, State and Local levels). See Article 171(1) of the INC.

properly. Now, the INC restructures the prevailing governance system in Sudan by establishing a decentralized system of government that bears the characteristics of asymmetrical/symmetrical federalism - asymmetrical in the structure and responsibilities of subunits, with the level of South Sudan having more powers and resources than other States across Sudan.

Establishment of a federal structure may constitute a mechanism for preventing a relapse into conflict through the devolution of the powers and resources to the State level so as to bring the government closer to the people and further enhance the delivery of public and social services. For a federal to work effectively, it requires a functional court system to decide on the jurisdictional limits of the different levels of government. Nevertheless, the relevance of the court system in resolving the intractably political contentions in federal countries, especially in transition situations, is uncertain. Noticeably missing from the literature is the study and analysis of the impact of the role of court system in post conflict countries.

That said, the role of the court system in preserving democracy has grown in importance with the increase recognition of the judicial review of the constitutionality of the acts of the government organs and the recognition and the protection of human rights provisions.²⁰ It is, therefore, that the involvement of the courts is necessary to ensure the successful operation of the federalism and thus the failure or the success of federalism is contingent on the implementation of the federal system by the courts.²¹ According to some scholars, 'federalism means legalism – the predominance of the judiciary in the constitution- the prevalence of a spirit of legality among the people'²² As '[the] courts ...are actually telling a government how far it can go with its assigned constitutional rights'.²³

This leads to the second question that this study addresses which relates to the analysis of the constitutional reform as provided for in the INC, in general, but with a special focus on the role

²⁰ See *Aharon Barak*, A Judge on Judging: The Role of a Supreme Court in a Democracy, 116 *Harvard Law Review*, Nov. 2002, Vol. 16.

²¹ *Yash Ghai*, Ethnicity and Autonomy: A Framework for Analysis, in *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States*, Yash Ghai (ed) p. 16. Cambridge University Press, 2000

²² *A. V. Dicey*, an Introduction to the Study of the Law of the Constitution. 8th ed., p. 175. Quoted in: *Thomas Hueglin et al*, *Comparative Federalism: Systematic Inquiry*, Broadview Press, 2006, p. 275.

²³ *Thomas Hueglin et al*, *Comparative Federalism: Systematic Inquiry*, Broadview Press, 2006, p. 278.

of the court system, through the application of judicial review and protection of human rights, to resolve not only disputes in litigations between private parties, but also to prevent the arbitrary exercise of the government power as play a role in the law reform process.

2) The Structure of the Legal System in Sudan under the INC

The available literature presents different views as to the role of the court system in contributing to democratic transformation new democracies. On one hand, one view assumes that the courts have a fairly wide discretion to decide the outcome of the controversial cases to the needs of the political moment. The other view, on the other hand, takes the position that political actors do not exert any kind of influence at all on the way judges make their decisions. A third source, and with which I agree, argues that legal rules do put constraints over the exercise of the judicial discretion in controversial cases.²⁴ A fourth view argues that in new fragile democracies constitutional courts/supreme courts should not be involved in judicial review, especially on adjudicating issues related to social and economic rights, which may profoundly affect the allocations of resources and violate the doctrine of separation of powers.²⁵

In this respect, the study considers whether the court system, as restructured in the INC, and other constitutional guarantees introduced to the legal system as a whole, offer good prospects for constitutionalism that may control the power of the government so as not act arbitrarily and hence contribute to democratic transformation. The role of court system in resolving disputes and limiting the acts of the government actions is highly contingent on the substantive law and the institutional structure within which the courts apply laws. in this respect, some observers, for example, *Massoud*, have argued that “enforcing and creating constitutions is central to much of democratic governance ... and that law and legal institutions perform a variety of functions ... such as building legitimacy ..”.²⁶ Thus, this study examines to what extent the current structure of the legal system under the INC and the protection of human rights through the application of the Bill of Rights by the courts may signal the State’s commitment to

²⁴ See generally *Theunis Roux*, Legitimizing Transformation: Political Resources Allocation in the South African Constitutional Court, in: *Siri Gloppen et al (ed), Democratization and the Judiciary: the Accountability Function of Courts in New Democracies*, Frank Cass, London, 2004.

²⁵ See generally *Javier A. Couso*, The Politics of Judicial Review in Chile in the Era of Democratic Transition, 1990-2002, in: *Democratization and the Judiciary: the Accountability Function of Courts in New Democracies*, *Siri Gloppen et al (eds.)*, Frank Cass Publisher, London, 2004.

²⁶ *Mark Massoud*, *Law’s Fragile State, Colonial Authoritarian, and Humanitarian Legacies in Sudan*, Cambridge University Press, 2013, p. 26-27

constitutionalism and respect to the rule of law. It is, therefore, that the role of the court system (in contributing to democratic transformation in Sudan) should be evaluated against the legal framework: that is the INC, with a focus on the constitutional structure of the independence of the judiciary, the application of the Bill of Rights and the rules governing the judicial review.

3) Legislative and Institutional Reforms and Practice of Constitutionalism under the INC

The functions of the courts, in developing countries, have experienced increasingly transformative role as institutions that can hold the government organs accountable.²⁷ The study aims to examine the practice of constitutionalism: that is, the implementation of the INC constitutional, institutional and legislative reforms, especially the compliance with the provisions of the INC and the CPA, in respect the study will consider the role of the constitutional court as “a positive legislator”.

The Sudanese Constitutional Court may play an important role in the law reform process given its power to annul laws found unconstitutional.²⁸ When the constitutional courts annuls a statute this entails the non-applicability of such laws²⁹ and, as a result, would compel the legislature to adopt new legislation that is in conformity with the INC. Thus far, the Sudanese constitutional court, under the INC, has received a number of human rights cases that involved violations of human rights or issues related to the constitutionality of key legislation, such as counter-terrorism laws, immunities for officials and statutes of limitation for torture.

So what role the constitutional court has played in the law reform process under the INC? For the court system to play a role in the democratic reform, a comprehensive law reform process is seen as a prerequisite to bring the existing laws in line with the provisions of the INC and enacting new laws. Therefore, this study identifies what legislative and institutional reforms that have been undertaken by the parties to the CPA during the interim period to address human rights violations, root-causes of the north-south Sudan conflict; inequality; and weak democratic structures. Furthermore, this study offers empirical evidence for the judicial behavior of the

²⁷ Siri Gloppen, Bruce M. Wilson, Robert Gargarella, Elin Skaar, morten Kinander, *Courts and Power in Latin America and Africa*, Palgrave Macmillan Publisher, 2010, New York, p. 1.

²⁸ Art. 16 (1) (a), the Sudan Constitutional Court Act, 2005.

²⁹ Art. 24 (2), the Sudan Constitutional Court Act, 2005.

Sudanese constitutional court through a systematic examination of selected human rights jurisprudence of the constitutional court to gauge its role in the law reform process in Sudan since the adoption of the INC.

2. Overview of the Study

To address the primary research questions, the study proceeds as follows:

I. Introductory Chapter: Overview of the Study

The Introductory Chapter provides an overview of the study, including, the key features of the State of Sudan, the aim of the study, the main objectives of the study, and a general overview of the study.

II. Chapter One: A Historical Background of Sudan's North-South Conflict

Chapter One gives a rich and deep account of Sudan north-south conflict. It looks at the root-causes of the conflict by elaborating on different factors that directly and indirectly contributed in making that conflict protracted. *Chapter one* moves on to consider the end of the first Sudan's north-south conflict which was ended when Addis Ababa Agreement was signed in 1972. *Chapter one* further elaborates on Sudan's second north-south conflict which broke out in 1983. Finally, *Chapter one* touches on the various peace initiatives that ended by the conclusion of the CPA. *Chapter One* concludes by analysing the CPA.

III. Chapter Two: The Structure of the Governance System under the INC

The INC describes Sudan as a decentralized State with different levels of government: the national level, the Southern Sudan level, the State level and the local level. It further grants the Southern Sudan autonomy status. A careful analysis of the current governance arrangements reveals that the INC provides for asymmetric/symmetrical federalism system of governance.

Chapter Two discusses the allocation of legislative powers between the national government, the Southern Sudan and the rest of the country. In this respect, the study provides analysis of how the nature of the constitutional design of the INC to manage diversity of Sudan (ethnic, linguistic, religious and cultural diversity and allocation of resources to alleviate economic disparity). At the outset of *Chapter Three* provides an overview the fundamental principles of

federalism and provides a brief historical background of federalism in Sudan and how federalism arrangements can play a role as a tool for peace-building in Sudan.

IV. Chapter Three: The Structure of the Legal System under the INC

The INC altered the Sudanese legal system with a view to accommodating the competing views: *Sharia* law and secularism. For a proper understanding of the present Sudanese legal system and an assessment of the role of the court system in contributing to democratic governance, a glance at the Sudanese legal history is necessary. Firstly, *Chapter Three* reviews the constitutional developments in Sudan since the independence to the present day. Secondly, *Chapter Three* provides overview of the structure of the court system in a decentralized system and focuses on the contribution of the court system to democratic transformation through limiting the acts of the government. *Chapter Three* further discusses issues that may impact of the role of the court system in contributing to democratic transformation.

Yet, the role of the court system in promoting democratic transformation is contingent on the constitution, the substantive law, etc. For instance, instituting the principles of constitutionalism is contingent on the independence of the judiciary,³⁰ as an independent judiciary is required for the protection of constitutional rights and to restrain the actions of the government. Thus, it is important to understand under what conditions the court system develops such accountability functions: that is, what conditions favor the ability of the court system to exercise an effective accountability functions.

It is, therefore, *Chapter Three* examines (a) how the INC re-structures the court system in the north and the south of Sudan so as to give effect to the principles of the federalism and legal pluralism; (b) the rules regulating the judicial review, and (c) the protection of human rights through the implementation of the bill of rights by the court, all of which signal the commitment of the State to establish democratic governance.

³⁰ C. Larkins, Judicial Independence and Democratizations, p.605 (606), Comparative Politics, Vol. 30, No. 4 (July 1998), 423-442.

Finally, *Chapter Three* attempts to evaluate the constitutional structuring of the independence of the judiciary and the rules that govern the judicial review before and after the adoption of the INC with a view to assessing the fidelity of the government to the principles of constitutionalism, and whether the limitations observed in the actual conduct of the government.

V. Chapter Four: Legislative and Institutional Reform: Practice of Constitutionalism

In order to understand whether the adoption of the INC has brought any changes may enhance the role of the court system in contributing to democratic transformation; *Chapter Four* scrutinizes the compliance of the statutory law with the provisions of the INC, the law reform process in Sudan and the implementation of law in practice. *Chapter Four* further presents an analysis of more pertinent provisions of civil and political rights in the light of the laws and practices prevailing in the country to assess the extent to which the principles laid down in the INC are complied with. It further assesses the involvement of the Sudan constitutional court in the law reform process by reviewing a selected human rights jurisprudence of the constitutional court. Finally, *Chapter Four* makes a reference to the jurisprudence of other constitutional courts (the German constitutional court, the Indian Supreme Court and the South African constitutional court) by way of comparison.

VI. Chapter Five: Post- Referendum Sudan

Chapter Five looks at the constitutional developments after the secession of South Sudan, with a focus on constitution making process in Sudan.

Chapter One: A Historical Background of Sudan's North-South Conflict

Part I: The Root Causes of Sudan's North-South Conflict

The history of Sudan's north-south conflict comprises a necessary background to any discussion about the sustainability of peace in Sudan. Many in the media had for so long simplistically depicted Sudan's north-south conflict as a war being fought between Muslim northerners and Christian southerners. Yet, viewing Sudan's north-south conflict exclusively through an ethnic/religious lens fails to capture many of the important nuances of the history of the conflict. Indeed, ethnicity is a critical element of that conflict which has certainly been used as a tool for mobilization, but other factors have also been important to fuel the conflict.

1. The Anglo-Egyptian Rule of Sudan

The Anglo-Egyptian conquest of Sudan began in 1898. The British administration considered the Southern Sudan region as a different unit from the rest of Sudan.³¹ Thus, the southern Sudan was administered separately, albeit as a part of the Sudanese territory for over four decades.³² The British administration severed the existing economic and political ties between the north and the south by adopting the so-called '*the Southern Policy*'/*Segregation Policy*, in 1930.³³

It was a common view, at the time, that the '*Southern Policy*' was intended to preserve the south from the influence of Islam and Arabic language coming from the north Sudan.³⁴ For instance, the southerners were discouraged from emulating the northerners' customs.³⁵ Christian missionary education was introduced in the south. Additionally, a series of legislation were passed to legalize the segregation policy and make it formal - the most notable pieces of legislation were the 1922 '*Passport and Permits Ordinance*'³⁶, the 1920 '*Closed District*

³¹ Yehudit Ronen, Religion and Conflict in Sudan: A Non-Muslim Minority a Muslim State, in: Minorities and State in the Arab World, Ofra Bengio and Gabriel Ben-Dor (eds), Lynner Rienner Publisher, London, 1999, p. 75; See Douglas Johnson, The Root Causes of Sudan's Civil War, International African Institute with James Currey, Oxford/Indiana University Press, Bloomington, 2003, p.26.

³² Dunstan Wai, The African-Arab Conflict in the Sudan, African Publishing Company, London and New York, 1973, p. 85; See Douglas Johnson, The Root Causes of Sudan's Civil War; See generally Peter Woodward, Condominium and Sudanese Nationalism, Billing & Sons Ltd, London, 1979.

³³ Dunstan Wai, The African-Arab Conflict in the Sudan, African Publishing Co., London, 1973, p.35.

³⁴ See Douglas Johnson, The Root Causes of Sudan's Civil Wars, pp.11-15; Francis Deng, Negotiating a Hidden Agenda: Sudan's Conflict of Identities', in William I. Zartman (ed.), Elusive Peace: Negotiating an End to Civil Wars, The Brookings Institution, Washington DC, 1995, p. 80.

³⁵ Dunstan Wai, The African-Arab Conflict in the Sudan, African Publishing Co., London, 1973, p.35.

³⁶ '*Passport and Permits Ordinance*' (was enacted on the pretext to prevent the frequent rebellion in the south) allowed the British administration to control the free movement of people between the north and the south. As such, any form of contacts (social, cultural and commercial) between the north and the south was prevented. In

*Ordinance*³⁷, *Permits to Trade Order*' of 1925.³⁸ While the British administration adopted the policy of the segregation on the pretext that the south Sudan should be developed along the lines of African culture, nevertheless, very little was implemented in terms of education and economic development in the south.³⁹ On the other hand, considerable investment and development were made in the north Sudan.⁴⁰

The Southern Policy, as introduced by the British administration, has resulted in the development of a very narrow and parochial nationalism on both sides of Sudan: One was Arabic- or semi Arabic-oriented with Muslim influence in the north Sudan. The other, which took firm roots in the south Sudan, was a semi-Christian culture with a great deal of animist traditional religion. The '*South Policy*' eventually ended in a conference convened in Juba, in 1947, in which the British administration abolished the policy of segregation and incorporated the south into Sudan. At that conference, the British administration invited the southerners to decide on their own destiny, nevertheless, when the southerners demanded a federal system they were simply ignored, and the British administration insisted on a unitary system in Sudan.

Yet one would be cautious as not to cast the blame solely on the British administration by pointing out to segregation policy as a trigger of Sudan north-south conflict. It is of a particular importance to note that the historical processes that separated the north from the south had already begun before the arrival of the Anglo-Egyptian to Sudan. Partly, this has roots in early enslavement of the southerners by the northerners.⁴¹ The Turck-Egyptian rule in Sudan (1820-1881) had forced the northerners to participate in exploiting the material resources in the south

fact, this Act barred virtually all northern Sudanese from entering or working in the south. Southerners could not travel to the north without a special permit, and vice versa.

³⁷ '*Closed District Ordinance*', which sealed off the southern region and greatly constrained its economic and other ties with the rest of the country, made the south closed to northern Sudanese. See *Johnson*, the Root Causes of Sudan's Civil War, pp. 12,17; *Abel Alier*, the Southern Sudan Question, in the Southern Sudan: The Problem of National Integration, Dunstan Wai (ed), Frank Cass, London, 1973, p.17.

³⁸ '*Permit to Trade Order*' stated that only natives of the south were allowed to carry on trade in the south without a permit. See. *K. Prah*, Constitutionalism, the National Question and the Sudanese Civil War, in *The Quest for Constitutionalism in Africa*, Asmelash Beyene and Gelase Muthaba (eds), Berlin, New York etc,1994,p.15.

³⁹ *Johnson*, The Root Causes of Sudan's Civil War, p. 15.

⁴⁰ *Francis Deng*, Self-Determination and National Identity Crisis: The Case of Sudan, in the *Self-Determination of Peoples: Community, Nation and State in an Interdependent World*, edited by Wolfgang F. Danspeckgruber, Lynne Rienner Publishers, 2005, p. 255

⁴¹ See *Francis Deng*, Dynamics of Identification: a Basis for National Integration in the Sudan, 1973, Sudan, Khartoum

for the benefit of the *Khedive* of Egypt, especially slave raiding and ivory trade.⁴² As a result, the northerners were seen as ‘colonial collaborators and oppressors’⁴³ and that they ‘had been part of the coercive apparatus of the colonial administration’.⁴⁴ The tendency of the colonial power to treat certain groups and regions preferentially in the development of political and economic policies led to considerable disparities among ethnic groups in the sharing of power, national wealth, social services, and development opportunities and effectively sowed the seeds for future conflict.⁴⁵

In 1947, the British Governor-General of Sudan convened ‘the Sudan Administration Conference’,⁴⁶ which resulted in the formation of a legislative assembly in which the south was granted a representation.⁴⁷ Consequently, the legislative assembly brought the northerners and the southerners together and culminated in the conclusion of a Self-Government Statute, in 1953, which laid down the process by which Sudan would elect its first self-governing legislature and the conditions for self-determination.⁴⁸

Thereafter, the elections for the first self-governing parliament were held and Ismal el-Azhari became the first Sudanese Prime Minister.⁴⁹ When the first Sudanese Parliament was convened, Ismal el-Azhari began the process of bringing to an end the Anglo-Egyptian administration in Sudan.⁵⁰ For this, el-Azhari’s government established a *Sudanization* Committee to nationalize

⁴² *Sara Basha*, Sudanese Civil Wars: Multiple Causes, Multiple Parties – One ‘Comprehensive Agreement?’ In: *Peace in Balance: the Crisis in Sudan*, Brian Raftopoulos and Karin Alexander (eds.), Institute of Justice and Reconciliation, South Africa, 2006, p8.

⁴³ See *Johnson*, the Root Causes of Sudan’s Civil War, p. 28.

⁴⁴ *Ibid*, p. 28.

⁴⁵ *Francis M. Deng*, Identity, Diversity and Constitutionalism in Africa, United State Institute of Peace Press, Washington DC, 2008, pp4-5.

⁴⁶ *Muddathir Abd al-Rahim*, Imperialism and Nationalism in the Sudan: A study in Constitutional and Political Development (1899-1959), Oxford: Clarendon Press, 1969, P.160

⁴⁷ The assembly had limited powers of self-government, both legislative and executive. See *James Robertson*, *Transition in Africa: From Direct Rule to Independence*, London, Hurst & Co, 1974, pp. 108/9.

⁴⁸ See *Johnson*, the Root Causes of Sudan’s Civil War, p. 25-27.

⁴⁹ *Ibid*, p. 25-27.

⁵⁰ *Muddathir Abd al-Rahim*, Imperialism and Nationalism in the Sudan: A study in Constitutional and Political Development 1899-1956, Oxford, Clarendon Press, 1969, p. 219.

all governmental institutions.⁵¹ When running up to the election, el-Azhari promised the southerners full representation at all levels of the civil service in the *Sudanisation* process.

Despite these promises, the southerners did not get senior positions. The *Sudanization* process resulted in the appointment of the northerners in most senior positions throughout the country.⁵² Instead of the forty senior civil service posts believed to have been promised to the south, the southerners Sudanese were appointed to six such positions. This generated frustration and a sense of marginalisation and alienation amongst the southerners.⁵³

2. The Failure to Address Questions of the Political System in Sudan

Another main concern upon which the north-south conflict has centered has been on the system of governance, which the post-independence Sudanese governments have failed to establish in such a way which would have been sufficiently inclusive to all existing peoples in Sudan. For example, in the general elections preceding the formation of self-government under then Prime Minister Ismal el-Azhari, the political parties in the north made promises to the south (in order to win their support) that south would be granted regional autonomous.⁵⁴ But, when the elected parliament convened, in 1955, to endorse a motion for independence, the southerners agreed to support the national efforts to gain the independence, but only on the condition that Sudan's diversity be recognised through introducing a federal system in Sudan.⁵⁵

Soon after the declaration of independence, the northerner political parties launched an intensive campaign against federalism describing it as a colonial plot, and argued vigorously that federalism was first step towards separation.⁵⁶ Although the independence motion included a provision for a federal system in 1955, the north ignored it later. In December 1956, a committee of 43 members was set up to prepare a draft constitution and there was a dilemma as

⁵¹ Annex III to the Anglo-Egyptian Agreement of 12 Feb. 1953. As quoted in *Muddathir Abd al-Rahim*, *Imperialism and Nationalism in the Sudan: A study in Constitutional and Political Development 1899-1956*, Oxford, Clarendon Press, 1969, p. 219.

⁵² *Dunstan Wai*, *The African-Arab Conflict in the Sudan*, African Publishing Co., London, 1973, pp. 55-77.

⁵³ *Ibid*, pp. 55-77.

⁵⁴ *Ibid*, p. 56.

⁵⁵ *Abel Alier*, *The Southern Sudan Question*, in: *Dunstan Wai* (ed.), *The Southern Sudan: The Problem of National Integration*, London: Frank Cass, 1973, pp. 19, 23.

⁵⁶ See *Johnson*, *The Root Causes of Sudan's Civil War*, p. 30.

to whether the constitution should be a federal or an Islamic constitution.⁵⁷ The southerners argued that constitution should reflect the character, the needs, and the aspirations of all the Sudanese people, and the only way to achieve that was through a federal system.⁵⁸

But, some members of the committee declared that what was agreed upon in December 1955 was not an agreement to form a federal state but merely to *consider* the demand of the south for federalism, and that the federal issue was not feasible. On the other hand, the northerner members of the Constitutional Committee recommended to the Parliament that: ‘(1) Sudan should become a unitary Parliamentary Democratic Republic (Art. 1); (2) Islam should become the official state religion of Sudan (Art. 5); and (3) that Arabic should become the official and national language (Art. 4)’.⁵⁹ Subsequently, the Constitutional Committee drafted a unitary constitution for Arab Islamic state.⁶⁰ However, the southerners were keen on a federal constitution with a view to averting subordination to a northern-dominated central government.⁶¹

After the independence, political participation, in Sudan, was dominated by sectarian parties: the Democratic Unionist Party, *Umma* Party, and Muslim Brothers. Successive governments have been concerned with keeping Sudan united, but the policies that they have often pursued (regarding matters of sharing power, development and allocation of economic resources) tended to ignore the demands of the rest of Sudan, thereby widening further the disparities between the centre and the periphery. Thus, one of the root-causes of the north-south conflict rested with the failures of the successive governments to address the demands of the different groups in Sudan. The demands for federalism or a reasonable degree of devolution of power to preserve some degree of local self-governance at the State level were disparaged. This has resulted in violent ethnic confrontation and polarization between the center and the periphery.

⁵⁷ See *Johnson*, *The Root Causes of Sudan's Civil War*, p. 30.

⁵⁸ *Dunstan Wai*, *The African-Arab Conflict in the Sudan*, African Publishing Co., London, 1981, p. 70.

⁵⁹ *Ibid*, p. 70.

⁶⁰ *Abel Alier*, *The Southern Sudan Question*, in: *Dunstan Wai* (ed.), *the Southern Sudan: The Problem of National Integration*, London: Frank Cass, 1973, p. 23.

⁶¹ *Johnson*, *The Root Causes of Sudan's Civil War*, p 28.

3. Economic Marginalization in Sudan

The exploitative policies by the centre were one of the main causes of the conflict between the north and the south as well as between Sudan's centre and other parts of the country, as discrepancies in development and service delivery are remarkable.⁶² Peripheries often complain about the expropriation of their wealth, especially through taxes as well as exploitation of land and resources (oil, minerals and water), without a legitimate share of the national budget being redistributed to their regions.⁶³ During the British era, a combination of neglect and exploitive practices rendered south Sudan least developed in comparison with north Sudan. Developing of the economies and other interests of the southerners continued to be of little concern to the British administration.⁶⁴ For instance, revenues collected from ivory sales and exports (generated from the south) went mainly to the development and construction projects in the centre, rather than sharing the wealth between the different regions in Sudan.⁶⁵ The consequence of this is to further widen the existing gap in living conditions arising from the disparity in income and wealth between the various classes in the society.

Furthermore, the policies of the successive governments emulated the policy of the British era. For example, Sudan's developmental strategy has been geographically concentrated in the agricultural belt of central Sudan. Education facilities improved and the infrastructure and economy were developed, while the rest of the country remained underdeveloped, especially areas in the extreme north, east and west of Sudan.⁶⁶ President Numeiri, promoted the *Gezira* scheme (which was branded as 'Breadbasket of Arab World') and *Kennan* Sugar refinery in the north, while similar schemes were not attempted in the south Sudan, thereby, creating economic disparity between the south and the north. As *Basha* has rightly pointed out that the north-south

⁶² International Crisis Group, Sudan's Spreading Conflict (II): War in Blue Nile Africa Report N°204, 18 June 2013, p. 1.

⁶³ Ibid, p. 1.

⁶⁴ *Abel Alier*, Southern Sudan: Too Many Agreements Dishonored, Ithaca Press, Exeter, 1990, p. 13.

⁶⁵ *Johnson*, The Root Causes of Sudan's Civil War, p. 16.

⁶⁶ *Sara Basha*, Sudanese Civil Wars: Multiple Causes, Multiple Parties – One 'Comprehensive Agreement'? In: Peace in Balance: the Crisis in Sudan, Brian Raftopoulos and Karin Alexander (eds.), Institute of Justice and Reconciliation, South Africa, 2006, p.9

conflict was a result of long-term economic and political injustice and not a religious war as it has long been perceived by outside observers.⁶⁷

Furthermore, since the late 1970s, economic crises have affected a growing number of people in Sudan. Neither structural adjustment programs nor economic strategies of the successive governments have succeeded in reversing the economic decline.⁶⁸ Furthermore, conflicts over natural resources, such as oil, land, water, augmented due to desertification and severe drought that hit Sudan, especially Darfur region, in late 1980s. A further economic factor with conflict-boosting impact has been the proliferation of small arms in the region in the Cold War context which contributed to 'markets of violence'.⁶⁹ Economic marginalization had gradually, and consistently, changed the nature of the conflict from a classic ethno-religious conflict to one mainly over natural resources.⁷⁰

4. The Relation between the Religion and the State in Sudan

Under all successive governments, religion has played a central role in Sudanese history in that religious identity and political identity are interrelated in the country.⁷¹ At the time of independence the Arab Muslim elites defined the Sudanese identity as Islamic and Arab as manifested in the policies of political parties and as proclaimed by the two largest ones (the National *Umma* Party backed by the *Anṣār* sect and the Unionist Democratic Party backed by the *Khatmīyah* sect) that came to dominate the political scene in the country.⁷²

The policies that revolved around *Islamization* and *Arabization* of the State bred antagonism amongst the Sudanese communities, especially amongst those of South Sudan that identified

⁶⁷ Sara Basha, Sudanese Civil Wars: Multiple Causes, Multiple Parties – One 'Comprehensive Agreement'? In: Peace in Balance: the Crisis in Sudan, Brian Raftopoulos and Karin Alexander (eds.), Institute of Justice and Reconciliation, South Africa, 2006, pp7-8.

⁶⁸ Atta El-Battahani, The Social and Political Impact of Economic Liberalization and Social Welfare in Sudan, University of Helsinki, Institute of Development Studies: Working Paper 6, 1996.

⁶⁹ Francis Wairagu, The Proliferation of Small Arms and their Role in the Escalating Conflicts in East Africa, in: Nhema, Alfred (ed.): The Quest for Peace in Africa, Utrecht, 2004, pp. 107-122.

⁷⁰ Monica Kathina Juma, The Sudan, in: Dealing with Conflict in Africa: the United Nations and Regional Organizations, Jane Boulden (ed), Palgrave Macmillan Publisher, USA, 2003, p. 188.

⁷¹ Li Tonnessen and Anne Sofie Roald, 'Discrimination in the Name of Religious Freedom: The Rights of Women and Non-Muslims after the Comprehensive Peace Agreement in Sudan' (Chr. Michelsen Institute Report, 2007) <<http://www.cmi.no/publications/file/2704-discrimination-in-the-name-of-religious-freedom.pdf>> (accessed 08 November 2013) p. 5.

⁷² *Ibid.*

themselves as Africans. This has been increasingly the case during the current regime as conflict was portrayed as a *jihād* war against infidels in South Sudan. The cultural, racial and religious diversity of Sudan renders it difficult to simplistically attribute the causes of the north-south conflict to religious differences; nonetheless, this conflict has long been perceived as a religious conflict between Christians, mostly in South Sudan and Muslims, mostly in the rest of Sudan. The question as to whether Sudan should adopt an Islamic constitution has frequently been debated, and the post-independence constitutions of Sudan provide a mixed picture as concerns the relationship between religion and State.⁷³

In 1967, the trend that favored the adoption of an Islamic constitution emerged once again when the National Draft Constitution Committee proposed to draft an Islamic constitution for Sudan. The southern representatives walked out the Constitution Committee, as they did not ‘wish to be party to a document that emphasized Islamic religion and Arab culture to the exclusion of other existing religions and cultures [in Sudan]’.⁷⁴ However, the Draft Constitution did not see the light, as *Numeiri* seized the power, in 1969, in a military coup.

Under *Numeiri* rule, the 1973 constitution departed significantly from older constitutions in prescribing, as a directive principle, an active role by the State with regard to two religions: Islam and Christianity.⁷⁵ This Directive Principle of 1973 constitution, according to *Tier*, ‘an intermediary position on the question of the relation between religion and the state [that] seems to be unique, reflecting the social complexity of the Sudan’.⁷⁶ However, the legal pluralism of Sudan was changed in late 1970’s and 1980s, when then President *Numeiri* announced that Sudan would be an Islamic State and began issuing a series of laws subsequently known as the “September Law of 1983”. *Numeiri* justified Sudan’s implementation of Islamic law as a means

⁷³ Akolda Tier, ‘Freedom of Religion Under the Sudan Constitution and Laws’ (1982) 26 Journal of African Law, pp. 133, 145.

⁷⁴ Abel Alier, ‘The Southern Sudan Question’, in: Dunstan Wai (eds.), *The Southern Sudan: The Problem of National Integration*, 1973, pp.23-25.

⁷⁵ Art. 16 of the 1973 Sudan constitution provided that ‘(a) in the Democratic Republic of the Sudan Islam is the religion and the society shall be guided by Islam being the religion of the majority of its people and the State shall endeavour to express its values; (b) Christianity is the religion in the Democratic Republic of the Sudan, being professed by a large number of its citizens who are guided by Christianity and the State shall endeavour to express its values.’

⁷⁶ Akolda Tier, *Freedom of Religion Under the Sudan Constitution and Laws*, 26(182), Journal of African Law, pp. 133(147).

of conforming with ‘the country’s roots and ridding the State’s legal system of the last vestiges of colonial influence’.⁷⁷

Consequently, the south was forced to abide by the principles of *Sharia’a* law. The Southern Sudan continued to demand the immediate repeal of the *Sharia’a* law. The sharp dissent over the implementation of *Sharia’a* laws soon became the driving force of conflict between the north and the south. In addition, the government formed a law reform committee to revise the laws of the Sudan so as to bring the laws in line with *Sharia’a* rules and principles. September Laws introduced the whole set of Sharia crimes to Sudan through the addition of the Islamic punishments of *huddud* and *qisa* into the Criminal Panel Code.⁷⁸ Application of September laws was widespread and ruthless.⁷⁹ In this respect, special courts called “Prompt Justice Courts” were established under the state of emergency. The September Laws were not abrogated when *Nimeiri* was overthrown. Instead, the National Islamic Front, which seized power by a military coup in 1989, began to expand and entrench the wholesale application of *Sharia’a* law. These factors contributed their share to the aggravation of the north-south rift.

Part II: The First Sudan’s North-South Conflict: 1955-1972

1. The First Sudan’s North-South Conflict: 1955-1972

The outcome of the nationalization process of civil service resulted in increasing the number of northerners into government structures, in the southern Sudan, fuelled fears amongst the southerners that the Southern Sudan would be dominated by the northerners.⁸⁰ In August 1955, even before independence of Sudan, a mutiny broke out in the southern Sudan, when northerners soldiers replaced the British officers in the south Sudan, as the southerners officers feared that they would be disarmed and transferred to the north Sudan. The southern resistance first took the form of a mutiny that was spread throughout the south and developed into a full-

⁷⁷ Address by then President *Nimeiri* given in Khartoum at the opening session of the International Conference on the Implementation of Shari’a in Sudan, September 22, 1984. As quoted in *Carey Gordon*, *The Islamic Legal Revolution: The Case of Sudan*, 19(1985) *International Lawyer*, pp. 793(798).

⁷⁸ *Huddud and qisas* punishments include: amputation of a hand for theft, cross amputation or death for robbery, stoning to death for adultery if the person is married or 100 lashes, 100 lashes and possible imprisonment of up to five years for sodomy, and the penalty or life imprisonment in the case of a third conviction.

⁷⁹ *Layish and Warburg*, *Sharia in Sudan’s Criminal Law in 1983, 2002*, in *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century*, Rudolph Peters (eds.) Cambridge University Press, 2006, p54-60.

⁸⁰ *Johnson*, *The Root Cause of Sudan’s Civil War*, p.27.

scale civil war. At the beginning, the south armed struggle took the form of a political call for a constitutional settlement based on a federal arrangement within Sudan.⁸¹

The immediate effect of the mutiny was to accelerate the independence of Sudan by the British Administration, and Sudan was granted independence on 1st of January, 1956 with a temporary constitution that remained silent on two issues: the relationship between the state and religion and the governance structure of Sudan (whether federal or unitary state).⁸² The post-independence political leaders continued to hold a vision of establishing an Islamic and Arabic State and the question of the south Sudan has always been a major issue in the Sudanese political. In 1958, a military coup brought General *Abboud* to power. Towards the south Sudan, *Abboud* attempted to spread Islam and Arabic in south Sudan. To this end, a series of measures were put in place such as the policy of *Islamization* and substitution of Arabic language for English language in the south.⁸³ In 1962, the Missionary Societies Act was passed to discourage the expansion of Christianity in the south.⁸⁴

Consequently, the Christian Missionaries were expelled from the country.⁸⁵ The oppressive regime of *Abboud* drove many southerners into exile. The Southerners in the exile formed both the political movement known as Sudan African Nationalist Union and a guerrilla army known as *Anyanya* in protest of *Islamization* and *Arabization* policy in the south Sudan. The guerrilla movement (*Anyanya*) later evolved to form the Southern Sudan Liberation Movement (SSLM).⁸⁶

Abboud was overthrown. In 1965, a Round-Table Conference was held in Khartoum, with the participation of the southerners to discuss the 'Southern Problem'. However, the government precluded any discussion regarding self-determination or federalism for the southern Sudan. The northern political parties rejected the federalism option, and proposed the establishment of

⁸¹ *Yehudit*, Religion and Conflict in Sudan: a Non-Muslim Minority in a Muslim State, in: Minorities and the State in the Arab World, Ofer Bengio and Gabriel Ben-Dor (eds), London, 1999, p.77.

⁸² *Johnson*, the Root Cause of Sudan's Civil War, p. 30

⁸³ *Emeric Rogier*, *No More Hills Ahead?* The Sudan's Tortuous Ascent to Heights of Peace, Netherlands Institute of International Relations, Clingendael, 2005, p. 10.

⁸⁴ *Johnson*, The Roots Causes of Sudan's Civil War, pp.30-31.

⁸⁵ *Ibid*, p. 35.

⁸⁶ *Abel Alier* The Southern Sudan Question., p. 20

a regional government for the southern Sudan to which the central government would devolve matters of education, public health, commerce, agricultural policy and internal security to a southern regional executive council.⁸⁷ The Round-Table Conference did not reach an agreement on the constitutional status of the south vis-à-vis the north. Accordingly, a twelve-man committee was appointed to consider plans for constitutional reform.⁸⁸ The victory of the sectarian parties, which found themselves under the pressure from the Muslim Brotherhood, promulgated an Islamic constitution.⁸⁹

In 1969, *Nimeiri* came to power in a military coup. *Nimeiri* took concrete steps towards recognizing 'the rights of the southern people to regional autonomy within a united Sudan'.⁹⁰ Consequently, *Nimeiri* declared, in 1969, the regional autonomy for the Southern Sudan as a notional policy. This declaration became the basis of what came to be known as Addis Ababa Agreement.⁹¹ Negotiations between the north and the south culminated in the conclusion of the Addis Ababa Agreement,⁹² in 1972.⁹³

⁸⁷ Holt, P.M. & Daly M.W, A History of the Sudan From The Coming of Islam To The Present Day, 4th edition, Longman, London and New York, 1988, pp 185-186.

⁸⁸ Johnson, The Root Causes of Sudan's Civil War, p. 34.

⁸⁹ Francis Deng, Negotiating a Hidden Agenda, Sudan Conflict of Identities, in: Elusive Peace: Negotiating an End to Civil Wars I. William Zartman (ed), Brookings Institution Press, 1995, pp. 86-88.

⁹⁰ Statement cited in Perspective on the South: An Analysis of Trends and events leading to the Final Decree of Regionalization for the Former Southern Region of the Sudan (Khartoum: Ministry of Guidance and National Information, 1983). Cited in Abel Alier, Too Many Agreements Dishonored, pp.25-26. Ithaca Press, Exeter, 1990

⁹¹ Elias Nyamlell Wakoson, the Politics of Southern Self-Government 1972-83, in Civil War in the Sudan, M. W. Daly and Ahmed Alawad Sikainga (eds), British Academic Press, London, 1993, p. 30.

⁹² The 1972 Addis Ababa Agreement was comprised of three main components: (1) the organic law (which defined power of self-government in the Southern Provinces and regulated relations between the central government and the region); (2) the Cease-Fire Agreement; and (3) the Protocols on Interim Arrangements, comprised four subjects: (a) the Interim Administrative Arrangements; (b) Temporary Arrangements for the Composition of the Units of the People's Armed Forces in the Southern Region; Amnesty and Judicial Arrangements and Repatriation, Relief and Rehabilitation and Resettlement Commission; The Addis Ababa Agreement of the Problem of South Sudan, Appendix B in *Dustan Wai* (eds), The Southern Sudan: The Problem of National Integration, Frank Cass and Company Publisher, London, 1973, p. 225 et seq; See. Abel Alier, South Sudan: Too Many Agreements Dishonored, Ithaca Press, Exeter, 1990, p. 125.

⁹³ Many other mediators helped to guide the negotiations, among others, All Africa Council of Churches, the World Council of Churches and the Ethiopian Emperor Haile Selassie. Numeiri negotiated the Addis Ababa Agreement in an attempt to achieve a delicate balance between competing claims to self-determination of the south and the preservation of the unity of Sudan.

2. End of Sudan's First North-South Conflict: The Addis Ababa Agreement, 1972

The Addis Agreement consisted of three parts: (a) the organic law to regulate the relation between the national level and the Southern Sudan level, (b) a cease-fire agreement and (c) protocols on interim arrangements relating to administration, military affairs, judicial affairs and resettlement and rehabilitation. The Agreement also provided for a number of fundamental rights and freedoms;⁹⁴ plans for the development and reconstruction of the southern Sudan; transitional arrangements for repatriation of refugees and amnesty for the southern rebels movement.⁹⁵

The constitutional arrangements of Addis Ababa Agreement were embodied in the 1972 Southern Sudan Regional Self-Government Act that regulated the relation between the central level and the south Sudan level. The Act established a Southern Regional Government with its legislative and executive organs that were created in the form of the Southern People's Regional Assembly and the High Executive Council.⁹⁶ This Act was later incorporated in the 1973 Permanent Constitution of Sudan, thereby granted the south regional autonomy within the framework of a unitary state.

The Southern People's Regional Assembly was empowered to deal directly with its citizens in the exercise of the legislative powers, and to be elected by the southern residents through direct and secret ballot.⁹⁷ It was empowered with legislative powers on issues related to: promotion and utilization of regional financial resources for the development and administration of the southern region; local government; traditional law and native customs (within the framework of national law);⁹⁸ the prison and the police administration; regional administration of public

⁹⁴ See generally Appendix (A) to the Addis Ababa Agreement: "Fundamental Rights and Freedoms" which provided for personal liberty, freedom of religion and conscience, protection of labour etc. The Addis Ababa Agreement reprinted in *The Southern Sudan: The Problem of National Integration*, Dustan Wai (eds), Frank Cass and Company Publisher, London, 1973.

⁹⁵ Chapter III, Arts. 2-3 of Addis Ababa Agreement granted full amnesty to persons on account of any act or matter done inside or outside the Sudan as from 18 August 1955, if such act or matter was done in connection with mutiny, rebellion or sedition in the Southern Region,

⁹⁶ *Hassan El-Talib*, Sudan Government and the Peace Process in: *Sudan Peace Process Challenges & Future Prospects*, Adar, Nyuot Yoh, Maloka (eds), Africa Institute of South Africa, 2004, p. 25. The southern Sudan was empowered to elect its assembly and to choose its own President, who should, at the same time, be the first Vice-President of Sudan.

⁹⁷ Chapter IV articles 7, 8 and 9 of Regional Self-Government Act, 1972.

⁹⁸ Art. 10 (iii) of the 1972 the Regional Self-Government Act, 1972

schools, health care; cultural activities; land use; and other matters authorized by the national president.⁹⁹ The regional government had an independent budget, the revenue of which was to come from local taxes, fees, natural resources and special allocations and grant-in-aid from the central government.

On the other hand, the central government had exclusive power over: national defense;¹⁰⁰ external affairs; currency and coinage;¹⁰¹ air and inter-regional river transportation;¹⁰² communication and telecommunication;¹⁰³ customs and foreign trade;¹⁰⁴ nationality and immigration;¹⁰⁵ planning for economic development;¹⁰⁶ educational planning;¹⁰⁷ and public audit.¹⁰⁸ As to the participation of the Southern Regional Assembly in national policymaking, such as law-making, the Southern Regional Assembly was empowered, by a two-thirds majority, to *request* that a national law that it deemed incompatible with the southern welfare to be postponed from entering into force, but the national president ‘may, if he thinks fit, accede to such request’.¹⁰⁹

Furthermore, the national president had the power to veto any bill emanating from the Southern Regional Assembly that deemed in contravention with the 1973 Permanent Constitution. While the Southern Regional Assembly could then reintroduce such a bill, nevertheless, the 1972 Regional Self-Government Act did not clarify the situation whether the bill could become law after its reintroduction by the Southern Regional Assembly, regardless of the presidential veto.¹¹⁰ Therefore, the Southern Regional Assembly was clearly subordinated to the central

⁹⁹ Art. 10 of the 1972 the Regional Self-Government Act, 1972

¹⁰⁰ Art. 7(i) of the 1972 the Regional Self-Government Act, 1972

¹⁰¹ Art. 7(iii) of the 1972 the Regional Self-Government Act, 1972

¹⁰² Art. 7(iv) of the 1972 the Regional Self-Government Act, 1972

¹⁰³ Art. 7(v) of the 1972 the Regional Self-Government Act

¹⁰⁴ Art. 7(vi) of the 1972 the Regional Self-Government Act. Except for border trade and certain commodities which the southern regional government could identify, albeit with the approval of the central government.

¹⁰⁵ Art. 7(vii) of the Regional Self-Government Act, 1972

¹⁰⁶ Art. 7(viii) of the Regional Self-Government Act, 1972

¹⁰⁷ Art. 7(xi) of the Regional Self-Government Act, 1972

¹⁰⁸ Art. 7(x) of the 1972 the Regional Self-Government Act, 1972

¹⁰⁹ Art. (14) of the Regional Self-Government Act, 1972

¹¹⁰ As to the national legislation level, Art. (107) of the 1973 Permanent Constitution of Sudan clarified this matter in that it stated a two-thirds majority of the National Assembly could override a presidential veto. For example, Art. Art. 5 of the 1973 Permanent Constitution of Sudan contained a special clause exempting oil revenue and negotiations with oil companies from any control by the Southern High Executive Council. The constitution also

government, as the power to veto bills emanating from the Southern Regional assembly was vested in the national president.

Towards the executive branch, the High Executive Council (HEC), headed by a President who entrusted to act in the south on ‘behalf’ of the national President.¹¹¹ The Southern Regional Assembly was empowered to elect and remove the President of the High Executive Council, albeit subject to the confirmation of the national president.¹¹² The President of the High Executive Council, who was also the vice-president of Sudan, and his cabinet were allowed to participate in the deliberations of the National Legislature, but without the right to vote. At the same time, the national president was authorized to appoint and remove the members of the southern HEC upon the recommendations of the president of the HEC.¹¹³ Both the president of the HEC and his cabinet were collectively and individually responsible to the national president.

All in all, despite its flaws, the Addis Ababa Agreement contained constitutional arrangements that provided the Southern Sudan with self-rule that had succeeded in providing both sides with a political and constitutional model for settlement that lasted for ten years after which the second Sudan conflict erupted.

Part III: The Second Sudan’s North-South Conflict: 1983-2005

1. The Second Sudan’s North-South Conflict: 1983-2005

In the 1980’s, president *Numeiri* implemented measures to annex the oil-rich areas in the south into the north.¹¹⁴ The Southern Region was abolished and three smaller regions were established and endowed with much less power. In 1983, Sharia laws (Sharia’s law) were introduced by *Nimeiri*. *Nimeiri* broadened the operational scope of Sharia’s law to cover criminal matters and expanded its jurisdiction to the south. This ignited the second Sudan’s north-south conflict which started with a mutiny of soldiers from 105th battalion located in the Southern Sudan.

gave and took at the same time the right to the south to legislate on mining but ‘without prejudice to the right of the central government in the event of discovery of natural gas and minerals.

¹¹¹ Art. (17) of the 1972 of Regional Self-Government Act of South Sudan. See chapter VI of the 1972 of Southern Regional Self-Government Act.

¹¹² Chapter V and Chapter VI “Addis Ababa Agreement” (Art. 13 & 19)

¹¹³ Art. (22) of the 1972 Regional Self-Government Act, 1972

¹¹⁴ *Johnson*, The Root Causes of Sudan’s Civil Wars, p. 46.

Troops from the Sudan Army were sent by Khartoum to quell the mutiny in the south, but a government army officer *John Garang* led the rebellion against Khartoum. The first resistance to *Nimeiri* measures to impose *Sharia*'s law, undertaken by a group known as "Ananya Two", which was soon over taken by Sudan Peoples' Liberation Movement (SPLM/SPLA), which was established, in 1983, under the leadership of *John Garang*. SPLM/SPLA was not secessionist but stood instead for a 'new Sudan' in which there could be federalism.¹¹⁵ *Nimeiri's* regime was overthrown in 1985 and replaced by *Abd al-Rahman Suwar al-Dahab*, who led the Transitional Military Council until elections were held, in 1986. As a result of the elections, the National Democratic Alliance (a collation of political parties) took over.

In 1986, a conference of the National Democratic Alliance and SPLM/A was convened and called for the reinstatement of the 1956 Transitional Constitution of Sudan and repeal of the 'September Laws'.¹¹⁶ Subsequently, *Umma* Party together with the Democratic Unionist Party commenced negotiation with the SPLM/A to end the conflict. However, Elbashir overthrew the democratically-elected government, in 1989, after it had agreed with the SPLA/M to negotiate a new constitution that would respect the rights of all citizens and accept the country's diversity of cultures and religions. The Islamists did not want to abolish recently implemented *Sharia* (Islamic law) and thwart their attempts to create an Islamic state.¹¹⁷

2. End of Sudan's Second North-South Conflict: Various Peace Initiatives

The National Islamic Front's military coup of June 1989 declared the "*Jihad*" (Islamic war) against the Christians in the south Sudan, and the conflict took the religious factor, as a new dimension. From the perspective of the new government, a solution to the north-south conflict could be achieved through the implementation of a vigorous program of *Islamization* and *Arabicization* in the south Sudan.¹¹⁸ Whereas the SPLM/A brought a new dimension to the conflict- that is: the creation of the "New Sudan" where the Sudan would remain in a unity framework and failing to achieve this, secession could be required as a solution to the conflict.

¹¹⁵ *Peter Woodward*, *Conflict and Federalism in Sudan*, Peter Woodward et al (eds.), Dartmouth, 1994, p. 90

¹¹⁶ *Holt and Daly*, a history of the Sudan From the Coming of Islam to the Present Day, 4th edition, London, 1988, pp. 223-224.

¹¹⁷ International Crisis Group, *Divisions in Sudan's Ruling Party and the Threat to the Country's Future Stability*. Africa Report No. 174, May 2011, p. 1.

¹¹⁸ *Ahmad AlAwad Sikainga*, "Northern Sudanese Political Parties and the Civil War", in *Civil War in the Sudan*, M.W Daly & Ahmed AlAwad Sikainga (eds), British Academic Press, London 1993, p. 87.

The first phase that marked the beginning of peace efforts between the SPLM/A and the al-Bashir government when the 1997 Khartoum Peace Agreement was signed by some southern movements and the central government so as to arm the southern factions against the SPLM/A.¹¹⁹ The execution of the 1997 Khartoum Agreement witnessed intense conflict between the government in Khartoum and the signatories that eventually led to its collapse.

The north-south conflict has seen abundance of negotiations for peace, in 1986, after the overthrow of *Numeri*'s regime, talks began between the north and the south resulted in the so-called 'Koka Dam Declaration',¹²⁰ during the period of General *Swar-al-Dahab*'s Transitional Military Council. Trade union, opposition and civil society groups invited the SPLM/SPA, *Umma* party to a conference in Koka Dam, Ethiopia.¹²¹ They called for a new interim government of national unity, including all political forces.¹²² In Koka Dam all agreed to hold a national constitutional conference with a view to establishing a new Sudan, based on a multi-party democratic system in Sudan.¹²³

But, Koka Dam peace initiative failed because the National Islamic Front (NIF) rejected the call for a new interim government of national unity and to hold the elections on schedule.¹²⁴ Later on, the Democratic Unionist Party (DUP) initiated another phase of the peace talks which began when the Democratic Unionist Party (DUP)-SPLA/M signed an agreement in Addis Ababa, in November 1988, which was built on the groundwork, which was established by the Koka Dam Declaration,¹²⁵ and made clear that ' . . . genuine peace in Sudan cannot be attained in the context of the so-called "Southern Problem" but on the appreciation that the problem is national

¹¹⁹ *Mansour Khilaid*, Janoub AlSudan fil Makhila Al'Arabiyya AlSura AlZaifa wal Gam' Al-Tarikhi, Turath, 2000, p. 137.

¹²⁰ *Koka Dam Declaration*, (1986). Available at: <http://www.caabu.org/press/documents/koka-dam.html>.

¹²¹ This conference paved the way for the formulation of an alliance between a number of northerner political parties and the SPLM/SPA and the born of what is known as the National Democratic Alliance (NDA).

¹²² Divisions in Sudan's Ruling Party and the Threat to the Country's Future Stability, Crisis Group Africa Report N°174, 4 May 2011, p. 6.

¹²³ *Barnaba Marial Benjamin*, The Sudan People's Liberation Movement/Army (SPLM/A) and the Peace Process, in: Sudan Peace Process: Challenges and Future Prospects, Korwa G. Adar et al eds, Africa Institute of South Africa Publisher, 2004, p. 49

¹²⁴ Divisions in Sudan's Ruling Party and the Threat to the Country's Future Stability, Crisis Group Africa Report N°174, 4 May 2011, p. 6.

¹²⁵ *Barnaba Marial Benjamin*, The Sudan People's Liberation Movement/Army (SPLM/A) and the Peace Process, in: Sudan Peace Process: Challenges and Future Prospects, Korwa G. Adar et al eds, Africa Institute of South Africa Publisher, 2004, p.50

in nature ...”¹²⁶ Thereafter, in 1989, *Sadiq al-Mahdi* was under populace and military pressure to end the war. Subsequently, he agreed to the DUP/SPLM Sudan Peace Agreement. It was to be endorsed by the cabinet on 30 June 1989 and on September, a National Constitutional Conference was proposed to be held, but the junta of 1989 coup seized the power.¹²⁷

In 1992, the peace initiatives (Abuja talks) were revived by the former Nigerian President *Ibrahim Babangida*, but the main bones of contentions were the right to self-determination for the south Sudan and the relation between the religion and the state. A second series of talks ‘Abuja II’ were held a year later, in Nigeria. The SPLM/A reiterated its program for transforming Sudan into a secular and democratic confederation, but Khartoum proposed instead power-sharing and balanced development within a federal framework. The talks collapsed because differences over the separation of state and religion, the political system, socioeconomic policies, and security arrangements during the interim period.¹²⁸ Abuja talks paved the way for future negotiations on issues pertaining to ceasefire, relation between the state and the religion, definition of the relationship between the central government and the different regions, etc.¹²⁹

In 1994, the Intergovernmental Authority on Drought and Development Authority (IGAD) Authority initiated a dialogue between Khartoum and the SPLM/A,¹³⁰ and presented a Declaration of Principles (DOP),¹³¹ which called for Sudan to develop a secular state and provided for the option for secession if desired.¹³² The DOP placed emphasis on the unity of

¹²⁶ The Sudanese Peace Initiative, 16 November, 1988. Available at: <http://www.fou.uib.no/fd/1996/f/712001/annex9.htm>. Last visited on: 22 July 2006.

¹²⁷ *Barnaba Benjamin*, The Sudan People’s Liberation Movement/Army (SPLM/A) and the Peace Process, in: Sudan Peace Process: Challenges and Future Prospects, Korwa G. Adar et al (eds), Africa Institute of South Africa Publisher, 2004, p. 50.

¹²⁸ *Ann Lesch*, the Sudan: Contested National Identities, Indian University Press, Oxford, 1998, pp. 172-79.

¹²⁹ See generally *Sara Bash*, Sudanese Civil Wars: Multiple Causes, Multiple Parties – One ‘Comprehensive Agreements? in Peace in balance: the Crisis in Sudan.

¹³⁰ See The Sudan-IGAD Peace Process: Signposts for the Way forward, African Security Program, Occasional Paper 86, March 2004. Available at: <http://www.issafrica.org/pubs/papers/86/papers86.htm>.

¹³¹ *Francis Deng* et al, Sudan’s Civil War: The Peace Process Before and Since Machakos 6-13(2004), Africa Institute of South Africa Publisher; *Barnaba Marial Benjamin*, The Sudan People’s Liberation Movement/Army (SPLM/A) and the Peace Process, in: Korwa G. Adar et al., Sudan Peace Process: Challenges and Future Prospects, Africa Institute of South Africa Publisher, 2004, pp. 51-52.

¹³² *Ann M. Fitz-Gerald*, South Sudan, Responding to Conflict in Africa: The United Nations and Regional Organizations, edited by Jane Boulden, Palgrave Macmillan, 2013, p. 311. DoP It was based on three fundamental principles: (a) The right to self-determination for the people of the southern Sudan; (b) Separation of state and

Sudan and provided that certain principles pertaining to the political, legal and economic systems were put in place with a view to achieving full recognition of Sudan's pluralistic society.¹³³ However, the central government vehemently opposed the idea of separating the religion from the State together with the concept of self-determination for the people of the Southern Sudan.

In 1999, the so-called Egypt-Libya Initiative was initiated. The Egyptian-Libyan Initiative excluded all reference to self-determination for the south Sudan and secularism, and envisaged, *inter alia*, recognizing Sudan's diversity through establishing a decentralized system of government. The Egypt-Libya Initiative was not well-received by the SPLM/A, as it did not touch upon substantive issues, such as, the right to self-determination for the people of the Southern Sudan and the separation of religion from the state.¹³⁴ Egypt, throughout Sudan's peace talks, rejected any solution that proposed the secession of south Sudan. Egypt feared that instability in the South would pose a threat to its supply of Nile water.¹³⁵ In fact, Egypt opposed IGAD process and advocated for making Sudan unity as a priority.¹³⁶ Egypt's primary strategic concern was then, and remains, its access to Nile water.¹³⁷ More importantly, Egypt perceived the secession could lead to instability in both North and South Sudan, opening the door again for extremist elements that could destabilize the region.¹³⁸

International pressure on Sudan to end the north-south revived the IGDA peace process. This was coupled with the increase of oil production in Sudan and its potential to contribute to the international oil industry. Subsequently, the international interest was drawn on Sudan's north-south conflict and eventually led to revitalization of the IGAD process. Several 'stop and start' peace talks between the warring parties culminated in a number of joint communiqués and preliminary

religion; (c) A referendum in the south for the determination of the question of session as an option for the south; (d) Sharing of resources and interim system of governance; and (e) security arrangements.

¹³³ Declaration of Principles, IGAD (D), Peace Initiative, 20 July 1994, Nairobi, Kenya, http://www.sudansupport.no/sudan_konflikt/peacepros/igad_dop.html.

¹³⁴ International Crisis Group, *God, Oil and Country: Changing the Logic of War in Sudan*, 2005. Available: <http://www.crisisgroup.org>.

¹³⁵ International Crisis Group, *Sudan: Regional Perspective on the Prospect of Southern Independence*. African Report, No. 159-6 May 2012. P. 9. Available at <http://www.crisisgroup.org>.

¹³⁶ Ibid, P. 9.

¹³⁷ Ibid, p 9.

¹³⁸ Ibid, p. 11

memorandums of understanding. As a result, Khartoum and the SPLM/A signed the Comprehensive Peace Agreement (CPA) containing the above-mentioned protocols was signed, in 9 January 2005.

Part IV. The Comprehensive Peace Agreement 2005 (CPA)

1. The Comprehensive Peace Agreement of 2005 (CPA)

The various protocols that make-up the CPA, include: the Machakos Protocol (Chapter I), the Power-Sharing Protocol (Chapter II), the Wealth Sharing Protocol (Chapter III), the Resolution of the Abyei Conflict (Chapter IV), the Resolution of the Conflict in the Two States of Southern Kordofan and Blue Nile (Chapter V), the Security Arrangements (Chapter VI) and two annexes. These annexes are concerned with Permanent Ceasefire and Security Arrangements. Implementation Modalities and Appendices (Annex 1) and the Implementation Matrix and Appendices (Annex 2). The UN Security Council supported the CPA through the deployment of the United Nations Mission in Sudan (UNMIS) mandated under Chapter VI of the UN Charter only to ‘monitor and verify’ the ceasefire and to support the timely implementation of the CPA.¹³⁹

The CPA is premised on the right of self-determination referendum for the South after a six-year interim period in exchange for the implementation of Sharia in the North.¹⁴⁰ The CPA contains elements aimed at democratic transformation, for instance: (a) sharing of powers between the north and the south of Sudan;¹⁴¹ (b) granting an autonomous status to the southern Sudan; (c) full recognition of cultural, religious and linguistic diversity of Sudan (enactment of a Bill of Rights;¹⁴² (d) re-establishment of a dual legal system by exempting the south from the application of *Sharia* law;¹⁴³ (e) the enactment of new constitutions (Interim National Constitution, Interim Constitution for the Southern Sudan and some 25 Interim State

¹³⁹ The United Nations Security Council Resolution 1590 of 24 March 2005, available at: <http://www.unmis.org/english/documents/resolutions/res1590.pdf>.

¹⁴⁰ The Khartoum-SPLM Agreement, Sudan’s Uncertain Peace, Africa Report N°96 – 25 July 2005, International Crisis Group,

¹⁴¹ Chapter II ‘Power-Sharing Protocol’ Art. 2.3.11.1.

¹⁴² Chapter II ‘Power-Sharing Protocol’ Art. 1.6.

¹⁴³ Chapter I ‘Machakos Protocol’ Art. 3.2.2 est eq.

Constitutions);¹⁴⁴ (f) sharing of wealth (division of oil revenues equally between the north and the south). Furthermore, the CPA provides for the establishment of a number of commissions to oversee its implementation, such as, the Evaluation and Assessment Commission, etc.

a. The Power Sharing Protocol

The Power Sharing Protocol creates asymmetrical federal system with four levels of government: the national level, the Southern Sudan level,¹⁴⁵ the State level and the local level. The power sharing arrangements provided for fixed representation (between the north and the south) in national institutions, including parliament. The Power-Sharing formula divides the power mainly between the Southern Sudan (SPLM/A) and the Northern Sudan (the current ruling party - the National Congress Party (NCP) by allocating 52% to the ruling party, 28% to the SPLM/A, 14% for the other northern political parties and 6% for the southern parties.¹⁴⁶ In total, the NCP-SPLM coalition controls 80% of the National Assembly.¹⁴⁷

A number of institutions, commissions and committees were also created, including a new Upper House in Khartoum -- the Council of States -- with two representatives from each of the 25 states.¹⁴⁸ One of the most important of the CPA provisions involves national civil service reform, including incorporation of 20-30 per cent qualified and trained southern Sudanese in the national civil service.¹⁴⁹ The Power Sharing Protocol also provides for a comprehensive bill of rights and the establishment of mechanisms for the protection and promotion of human rights, such as the Human Rights Commission. However, the Power Sharing Protocol fails to provide for a mechanism to either bring the perpetrators of war crimes to justice for the numerous abuses committed during the north-south conflict.

¹⁴⁴ Chapter II 'Power-Sharing Protocol' Art. 2.12.11.

¹⁴⁵ The CPA created the Government of Southern Sudan (GoSS) (Chapter II 'Power-Sharing Protocol' (Art. 1.4). The GoSS has 'authority in respect of the states of the southern Sudan ... [and] acts as a link with the National Government and ensures[s] that the rights and interests of the people of the southern Sudan are safeguarded during the interim period (Chapter II Power-Sharing Protocol)

¹⁴⁶ Chapter II 'Power-Sharing Protocol' (Art. 2.2.5).

¹⁴⁷ The National Assembly (the upper house of the legislative branch) will be composed of 450 members and the Council of Ministers (the Cabinet) will be composed of 30 ministers and 34 State ministers.

¹⁴⁸ The Khartoum-SPLM Agreement, Sudan's Uncertain Peace, Africa Report N°96 – 25 July 2005, International Crisis Group,

¹⁴⁹ Art. 2.6.1.5, Power Sharing Protocol, Comprehensive Peace Agreement, signed 9 January 2005.

The Power Sharing Protocol divides the power mainly between the Southern Sudan and North Sudan, thereby overlooking conflict in other parts of the Sudan (Darfur and Eastern Sudan conflicts), but also consolidates the power of NCP domination over all the Northern States, and SPLM/A over the Southern Sudan. This approach may reinforce ethnicity in the political system. This, in turn, could consolidate the positions of unrepresentative leaders. Thus, undermining long-term reform and compromising the effectiveness of transitional governance or stability that the CPA provisions aspire to achieve.

b. The Wealth Sharing Protocol

The Wealth Sharing Protocol provides for an equitable sharing of common wealth. Specifically, section (8.1) of the Wealth Sharing Protocol provides that the national wealth shall be shared equitably between the different levels of government so as to allow enough resources for each level of government to exercise its constitutional competencies. Section (8.10) of the Wealth Sharing Protocol provides for the establishment of comprehensive equalization criteria, for the sharing of wealth, to be used in allocating intergovernmental grants. To this end, the CPA created the Fiscal and Financial Allocation and Monitoring Commission (FFAMC) to handle such transfers based on mutually agreed criteria.¹⁵⁰

In addition, the CPA provides for the establishment of a National Petroleum Commission (NPC)¹⁵¹ to formulate policies for the management and development of the oil sector, including negotiations and approval of all contracts for the exploration and development of oil industry. The parties to the CPA have also agreed on the sharing of non-oil revenues that will be pooled in a National Revenue Fund. Furthermore, national taxes collected in the Southern Sudan by the national government should be allocated back to the Southern Sudan through the Fiscal and Financial Allocation and Monitoring Commission (FFAMC).

Furthermore, the Southern Sudan Reconstruction and Development Fund and the National Reconstruction and Development Fund are to be established in addition to Multi Donor Trust

¹⁵⁰ For instance, the Protocols on the Resolution of Conflict in Southern Kordofan and Blue Nile States establishes the following criteria for determining transfers from the central government to the war-affected and least-developed areas of the country: population; minimum expenditure responsibilities; human development index/social indicators; geographical area; fiscal effort; and the effect of war. See Article 8.8, The Resolution of the Conflict in Southern Kordofan and Blue Nile States, Comprehensive Peace Agreement.

¹⁵¹ The National Petroleum Commission is composed from four representatives of each side and a maximum of three representatives per producing state/region.

Fund to channel international assistance for developmental projects in the north and the south of Sudan. The division of oil revenues between GoSS and GoNU is tremendously an important attempt to reduce economic and development disparities between the north and the south Sudan.¹⁵² However, longer-term structural issues, such as fair access to land and natural resources, or fair distribution of the State resources across rich and poor areas of Sudan, have received scant attention in the CPA, apart from the establishment of land commissions for the south and the north.

c. The Machakos Protocol

The Machakos Protocol was a major breakthrough in the search for a negotiated settlement of the conflict, as substantive issues were decided, specially the question of the application of the right of self-determination for the Southern Sudan. At the end of six years interim period, there is to be a plebiscite in the Southern Sudan to determine, whether southerners want to continue within Sudan, or they wish for founding their own sovereign state.¹⁵³ More importantly, Machakos Protocol represents a milestone by endorsing the parties' mutual renouncement of their respective positions: the *Islamization* of the north and the secularization of the Southern Sudan. However, Machakos Protocol tends to reinforce ethnic, religious and cultural divisions between the north and the south Sudan, including procedure for separation by holding a referendum for self-determination for the southern Sudan to take place, in 2011.

d. The Protocol on the Resolution of Conflict in Southern Kordofan and Blue Nile States

Blue Nile and the Nuba Mountains, in Southern Kordofan, are areas of the North with large populations culturally that are contiguous with the Southern Sudan and that were drawn into some of the bitterest fronts of the war between the South Sudan and the central government. The populations in these areas mostly supported the SPLM/A because their lands faced encroachment from allies of the NCP.

The Blue Nile and Nuba Mountains in Southern Kordofan States are not granted autonomous status *as per se*. Instead, their case is addressed within the framework of the Resolution of Conflict in Southern Kordofan/Nuba Mountains and Blue Nile states. The two States remain under the jurisdiction of national level that is: NCP controls 55% and SPLM/A dominates 45%

¹⁵² See Wealth Sharing Protocol of CPA 2005

¹⁵³ See Chapter I "Machakos Protocol" of CPA 2005

in the executive and legislative bodies of those States. This division was reversed during the general elections that took place in April 2010. Now, the Blue Nile State is dominated by SPLM/A in the governorship of the State, while the governorship went to NCP in the South Kordofan (Nuba Mountains). In addition to the election, a popular consultation is to be organised in the two States.

Following the secession of South Sudan in 2011, fight broke in South Kordofan State as key grievances in the region had not been solved throughout the CPA period, as the parties to the CPA were unable to negotiate oil agreement, political marginalization and border demarcation. As a result, in July 2013, West Kordofan State was reinstated following a policy of administrative division along ethnic lines as an attempt to resolve the recent conflict in the areas. The newly instated West Kordofan also encompasses a large part of the oil concession in the region and overlaps the Abyei Area, which currently lacks a local administration structure.¹⁵⁴

e. The Protocol on the Resolution of Conflict in Abyei

Abyei is geographically, situated the North and the South of Sudan. It is inhabited by the Ngok Dinka and Misseriya tribes. Misseriya are nomads and migrate seasonally through the territory.¹⁵⁵ There has long been conflict between the two main tribes (Dinka and Misseriya) over land, nomadic grazing rights, security – all contributing to volatility of the area. The Protocol on the Resolution of Conflict in Abyei, provides for special administrative status during the interim period and established provisions for oil revenue-sharing for the nation. The Protocol provides also for Abyei own referendum to decide whether to continue that status within the North or become part of the South.¹⁵⁶ However, who should be considered a citizen of Abyei in order to be qualified to vote on Abyei referendum remained unresolved. Because of these concerns the referendum on Abyei was postponed. The Protocol also spells out how oil revenue produced from Abyei Area will be divided during the interim period: 50% for the National Government and 42% for the Government of the Southern Sudan and 8% to be distributed locally (that is for Abyei Area).

¹⁵⁴ *Shifting Patterns in conflict and Peace Dynamics in the Three Areas: Challenges and Opportunities*, November 2013, UNDP Sudan Document (on file with the author)

¹⁵⁵ Negotiating Sudan's North-South Future, Crisis Group Africa Briefing N°76, 23 November 2010. P.4

¹⁵⁶ Ibid, P.4

The dispute over the Area of Abyei and the referendum on its status as part of South Sudan or Sudan has not taken place due to disagreements around who qualifies as a resident with the right to vote in such a referendum. In 2008, fighting erupted in Abyei Area. Consequently, an agreement between GoS and South Sudan on the temporary arrangements for the administration and security of Abyei Area was signed. The UN Security Council authorized the establishment of the UN Interim Security Force for Abyei (UNISFA).¹⁵⁷ The agreement provided for the establishment of Abyei Joint Oversight Committee, the Abyei Area Administration, the Abyei Legislative Council and the Abyei Police Service.

2. Assessment of the Comprehensive Peace Agreement

The ability of the parties to the CPA to agree on the question of the relation between the religion and the State and on the right to self-determination to the southerners stands as the most striking features. All in all, the CPA attempts to deal with the root-causes of the north-south conflict by providing for: (a) a profound change in the structure of the State institutions by establishing: a decentralised system of governance,¹⁵⁸ a Government of the Southern Sudan;¹⁵⁹ and a bicameral parliament by introducing the Council of the States to represent all the states in Sudan at the national level; (b) distribution of wealth equally between the north and the south; (c) fixing of a timetable for reaching a more permanent resolution of substantive issues, including: holding of a referendum for the Southern Sudan;¹⁶⁰ (d) establishment of joint institutions such as the Government of the National Unity with the participation and sharing of ministerial and senior civil service positions by the southerners;¹⁶¹ and provision for a dual legal system that is premised on the principles of ‘one country, two systems.’¹⁶²

¹⁵⁷ The agreement provides for: (1) the right of return of all former residents of Abyei that had been displaced; (2) Humanitarian access for assistance to reach all those in need; (3) the parties to make a joint appeal for assistance for return and rehabilitation of people displaced or otherwise affected by the conflict, including assistance to those who lost their livelihoods, income or assets; (4) protection of civilians under imminent threat and (5) support for the annual migration of the Misseriya nomads.

¹⁵⁸ Chapter II “Power-Sharing Protocol” (Arts. 1.3, 1.5.1.1)

¹⁵⁹ Chapter II “Power-Sharing Protocol” (Art. 1.3.2)

¹⁶⁰ Chapter I “Machakos Protocol” (Art. 1.3)

¹⁶¹ Chapter II “Power-Sharing Protocol” (Art. 2.5) of CPA 2005

¹⁶² Chapter I ‘Machakos Protocol’ of CPA 2005

Certain key issues were not decided in the CPA, but left to be agreed upon later by the parties. Such unresolved issues, included: the situation in Abyei, the lack of agreement on the boundary between the south and north, the absence of an agreed framework for disarmament, demobilization and reintegration (DDR). Abyei Area remained the main stumbling block, as the South Sudan maintained that the recommendations of Abyei Boundary Commission, as set out in the CPA, were final. Furthermore, the GoS did not recognize the recommendations as being final.¹⁶³ More specially, for example, the crucial issue of the division of water resources is not covered anywhere in the CPA. Another issue is the ownership of land and national resources. This issue lies at the heart of the many conflicts throughout Sudan, taken into consideration the return of refugees and Internally Displaced Persons (IDP) to the Southern Sudan. The CPA provides for a very superficially solution for this issue through the establishment of Land Commissions at the national, the Southern Sudan and the State levels. The land commission will arbitrate between conflicting parties by applying customary law and practices. Moreover, the CPA requires the cooperation of the land commissions, for example, between the Southern Land Commission and the National Land Commission. However, a problem may arise here, especially between the northern and the southern land commissions as the legal system differ in the south and the north, respectively, and, thus it is unlikely that the commissions will apply a similar law.

The CPA addresses some of the root causes of the conflict, but the CPA is perceived as a bilateral agreement between SPLM/A, as the sole representative of the Southern Sudan, and the Government of Sudan, loosely seen to represent the entire of the north, the east, the west and the centre of Sudan.¹⁶⁴ The CPA was primarily focused on southern Sudan, the central government and the transition areas of Abyei, Southern Kordofan and Blue Nile.¹⁶⁵ This narrow description of the parties to the north-south conflict has overlooked other political parties and actors and as such made the CPA vulnerable to criticism. Certainly, some analysts have argued that the term ‘Comprehensive’ is rather incorrect.¹⁶⁶ This is because the CPA essentially distributes the

¹⁶³ *Ann M. Fitz-Gerald*, South Sudan, p. 316.

¹⁶⁴ A Strategy for Comprehensive Peace in Sudan, Crisis Group Africa Report N° 130, 26 July 2007, p.1.

¹⁶⁵ *Ibid*, p.2

¹⁶⁶ *Sarah Nouwen*, Sudan’s Divided (and Divisive?) Peace Agreements, Hague Yearbook of International Law, Vol. 19, 2006.

power and wealth between the SPLM/A, in the Southern Sudan, and NCP at the national level, to the detriment of other marginalised areas of Sudan, such as Darfur, east and far north of Sudan.

This is so because the parties to the CPA decided how the political and economic resources are to be divided within Sudan. This is illustrated by the distribution of, through a fixed percentage, the power in the executive and the legislative at the national, the southern and the state levels.¹⁶⁷ As such, the word ‘comprehensive’ in effect refers to the north-south regions of Sudan, leaving the rest of Sudan outside the framework of the CPA.¹⁶⁸ Therefore, the CPA leans towards the usual but inaccurate way of addressing the problems in Sudan in a fragmented way, ignoring the much bigger and broader issues. Consequently, the CPA has been criticized by lacking a nationwide dimension that would have made it genuinely comprehensive.

Some say that the CPA bears the seeds of secession by the adoption of two different systems of governance in the country (two systems, one country). This, according to some observers, might lead eventually to a fresh eruption of the conflict, as the north does not wish the south to break away with all its oil and other mineral resources. At the outset of the implementation phase of the CPA, the parties disputed over the allocation of portfolios of some of the sensitive ministers (ministers of Energy and Finance) give testament to this.

Those parties (the majority of the Sudanese masses) that are left out of the CPA arrangements may feel disadvantaged and possibly vulnerable. The conflicts in Darfur, East Sudan, Kordofan and Blue Nile areas as well as the far north of Sudan were not resolved by the CPA. The core structural issues causing the conflict in periphery areas are the same as those in the south Sudan and would be significantly ameliorated by implementation of the CPA’s reform and democratization agendas.¹⁶⁹ Each situation has a unique local component which requires a local solution but the implementation of the CPA’s key provisions of democratic transformation

¹⁶⁷ Sarah Nouwen, Sudan’s Divided (and Divisive?) Peace Agreements, *Hague Yearbook of International Law*, Vol. 19, 2006.

¹⁶⁸ The Impact of the Comprehensive Peace Agreement and the New Government of National Unity on Southern Sudan, *Human Rights Watch*, March, 2006.

¹⁶⁹ A Strategy for Comprehensive Peace in Sudan, Crisis Group Africa Report N°130, 26 July 2007, p.2

(such as protection of human rights, wealth sharing, power sharing, etc) would go far towards addressing the common causes of conflict that emanate from the centre.¹⁷⁰

Chapter Three: The Present Governance System of Sudan under the INC

Part I: Historical Background of Federalism in Sudan

The Power Sharing Protocol of the CPA brought some changes to the prevailing structure of the governance system in Sudan. Before examining the structure of governance system under the INC, at the outset, this introductory section provides a brief overview of the characteristics of the federalism and a historical background of federalism in Sudan.

1. The Characteristics of Federalism

Federalism is defined as “an institutionalized division of power between a central government and a set of constituent governments, variously denominated as states, regions, provinces *länder* or cantons, in which each level of government has the power to make final decisions in some policy areas but cannot unilaterally modify the federal structure of the state a governance”¹⁷¹ In other words, in a federal system, powers and resources, within one country, are divided between the central government and a several sub-units, which are variously called: states, regions, provinces, *lander* or cantons. Each level of government “exists separately and independently from others and operates directly on its people within its territorial area”.¹⁷²

Most scholars agree that there are certain features that capture the essence of the federalism.¹⁷³ For example, *Watts* identifies the elements that represent the most common features of federations:

- i. at least two levels of government, each level acts directly on its citizens;
- ii. the legislative and the executive powers and allocation of resources are distributed between the different levels of government, including some areas of autonomy for each level;

¹⁷⁰ A Strategy for Comprehensive Peace in Sudan, Crisis Group Africa Report N° 130, 26 July 2007, p.2

¹⁷¹ *Nancy Bermeo*, Position Paper for the Working Group on Federalism, Conflict Prevention and Settlement 2005, 2. Available under <http://federalism2005.be/home/attachment/i/729>.

¹⁷² *Ben Nwabueze*, Constitutional Democracy in Africa, Volume 1, Structures, Powers and Organizing Principles of Government, Spectrum Books Limited, Nigeria, 2003, P. 59.

¹⁷³ *Ronald L Watts*, Comparing Federal Systems, 2nd edition, Montréal 1999, p. 10.

- iii. the central government and the State government each possesses a range of powers which the other level of government cannot encroach upon, such as legislative and executive powers and the capacity to raise revenue;¹⁷⁴
- iv. representation of the State level within the national level policy making institutions through the establishment of a second legislative chamber within the national legislature;
- v. a written supreme constitution not unilaterally amendable and requiring the consent of all or a majority of the State level for its amendment, and in which the responsibilities of each level of government are defined;¹⁷⁵
- vi. a referrer to rule on disputes between the different levels of government;
- vii. mechanisms and/or processes to facilitate intergovernmental relations for those areas where responsibilities are shared or overlap with each level of government;¹⁷⁶
- viii. each level of government is served by elected, responsible and accountable institutions on the basis of democratic principles;¹⁷⁷
- ix. an independent judiciary is responsible for protecting and enforcing the constitution.

Accordingly, the characteristics of a federal State differ from a unitary State in that a unitary State is a country in which legislative powers are concentrated in the centre and the country is as a whole is governed as a one unit. Different levels of government (that is to say: State or sub-units with an executive and a legislative body) *do not exist* in a unitary system of governance.¹⁷⁸ Furthermore, other characteristics define a unitary State is that the central government is bestowed with all powers, whereas the State level functions as administrative organs of the central government, exercising such powers as the central government might delegate to the State level. In a unitary State, responsibilities/powers delegated to sub-units/regions can be established or eliminated, and have their administrative powers retrieved by the central

¹⁷⁴ Andrew A Heywood, *Key Concepts in Politics*, New York, 2000, p. 141.

¹⁷⁵ Bertus, De Villiers, *Comparative Studies of Federalism: Opportunities and Limitations as Applied to the Protection of Cultural Groups*; 2004 J. S. Afr. L. 209 (2004), p. 213.

¹⁷⁶ Ronald L Watts, *Comparing Federal Systems*, 2nd edition, Montreal 1999, p. 10.

¹⁷⁷ Bertus, De Villiers, *Comparative Studies of Federalism: Opportunities and Limitations as applied to the protection of cultural groups*, 2004 J. S. Afr. L. 209 (2004) p. 213.

¹⁷⁸ Philipp Dann, *Max Plank Manual on Different Forms of Decentralization*, Heidelberg, 2007, p.5. Available at [http://www.mpil.de/shared/data/pdf/decentralizationmanual2007-09-11\(c\).pdf](http://www.mpil.de/shared/data/pdf/decentralizationmanual2007-09-11(c).pdf)

government.¹⁷⁹ When a unitary state devolves power to the State level, the administrative structure can have different forms of devolution. These different forms of devolution are: Deconcentration¹⁸⁰, Delegation¹⁸¹ and Devolution.¹⁸²

2. The Different Forms of Federal Arrangements

In terms of constitutional design, federal arrangements can, and do, take different forms. In general, federations have emerged within the processes of the formation of the country in a variety of ways. For example, independent States can come together to form one State, *coming together federalism*, for the sake of goods otherwise unattainable, such as security or economic prosperity. Examples of *coming together federalism* are: the USA, Switzerland and Germany.¹⁸³

Another form of federalism, *holding together federalism*, evolves generally from unitary States, as the response of the central government to alleviate the threats of secession from various regions by devolving powers to sub-units. Some constitutions implement the idea of a holding together feudalism in order to guarantee a group of people, who share a common culture, the

¹⁷⁹ Philipp Dann, Max Plank Manual on Different Forms of Decentralization, Heidelberg, 2007, p.5. Available at [http://www.mpil.de/shared/data/pdf/decentralizationmanual2007-09-11\(c\).pdf](http://www.mpil.de/shared/data/pdf/decentralizationmanual2007-09-11(c).pdf). See generally Ruth Lapidot, *Autonomy: Flexible Solutions to Ethnic Conflicts*, United States Institute of Peace Press, Washington, D.C., 1996. See Markus Boeckenfoerde, *Bicameral Models in Federal States: A Comparative Analysis with a Specific Focus on Sudan*, UNDP Publication, 2007 (on file with the author); See *Governance in the Sudan: Options for Political Accommodation in the Republic of Sudan*, Feb. 2014, Governance and Peacebuilding Series, Briefing Paper, No. 7.

¹⁸⁰ “Deconcentration (weakest form of decentralization) is a geographical or locational concept. It entails the physical dispersal of the people or offices exercising an administrative or managerial function from one or few locations to several or many locations. These local administrative capacities remain on the level of the one central government”. See Markus Boeckenfoerde, *Bicameral Models in Federal States: A Comparative Analysis with a Specific Focus on Sudan*, UNDP Publication, 2007; See Philipp Dann, Max Plank Manual on Different Forms of Decentralization, Heidelberg, 2007, p. 7

¹⁸¹ “Delegation (a more extensive form of decentralization) usually entails the assignment of a defined decision making power or powers by a superior authority to a subordinated one. The superior authority is able to override the decisions of the subordinated and ultimately remains responsible and answerable for the exercise of the power. However, depending on the delegated tasks, the subordinated authority may also have some discretion in decision making” See Markus Boeckenfoerde, *Bicameral Models in Federal States: A Comparative Analysis with a Specific Focus on Sudan*, UNDP Publication, 2007; See Philipp Dann, Max Plank Manual on Different Forms of Decentralization, Heidelberg, 2007, p. 7

¹⁸² “Devolution (strong form of decentralization) also entails the assignment of decision making power by a superior to a subordinated individual or agency, but in this case the subordinated is directly answerable to some authority other than the superior (eg. Local electorate). Once devolved, the power is exercised independently of the superior, who cannot override the subordinate’s decision.” See Markus Boeckenfoerde, *Bicameral Models in Federal States: A Comparative Analysis with a Specific Focus on Sudan*, UNDP Publication, 2007; See Philipp Dann, Max Plank Manual on Different Forms of Decentralization, Heidelberg, 2007, p. 7

¹⁸³ See generally Max Planck Manual on Different Forms of Decentralization, Heidelberg, 2007. Available at: [http://www.mpil.de/shared/data/pdf/decentralizationmanual2007-09-11\(c\).pdf](http://www.mpil.de/shared/data/pdf/decentralizationmanual2007-09-11(c).pdf)

right to form their own State within the country according to specific procedure. Examples of holding together federalism are: Brazil and Spain.¹⁸⁴

Within the federal system, there is the issue of whether the distribution of powers and resources should apply symmetrically or asymmetrically. *Symmetric federalism* means that all sub-units have the same status vis-à-vis the federal level. That is: the constitution distributes the same powers and resources to all the sub-units. On the other hand, *asymmetric federalism* means that the constitution allows some sub-units to assume more self-governing autonomy status than other sub-units within one country. In other words, some sub-units receive substantial resources and powers comparable to other sub-units. Examples of asymmetrical federalism are: Canada (Quebec), Malaysia (provides Borneo States special powers over native laws), India (with respect to Kashmir).¹⁸⁵

It should be noted, however, that the federal set up and creating an autonomous region within a state are quite distinct. *Autonomy* can be defined as ‘... regions of a State, usually possessing some ethnic or cultural distinctiveness, which have been granted separate powers of internal administration, to whatever degree, without being detached from the State of which they are part’.¹⁸⁶ Thus, autonomy is a certain kind of ‘federal arrangement’; albeit there are several significant differences between autonomy and a ‘federal system’ in that¹⁸⁷ the autonomous entity, as such, does not participate in the national policy-making, whereas the regions in a federal system play a role in the process of national law-making (through the Second Chamber).

Yet, federalism and autonomy sometimes have been combined, as the case of the Southern Sudan, under the CPA in 2005 and Addis Ababa Agreement, in 1972. For instance, under the CPA, the Southern Sudan (as a distinct region) enjoys additional powers and resources on the

¹⁸⁴ See generally Max Plank Manual on Different Forms of Decentralization, Heidelberg, 2007. Available at [http://www.mpil.de/shared/data/pdf/decentralizationmanual2007-09-11\(c\).pdf](http://www.mpil.de/shared/data/pdf/decentralizationmanual2007-09-11(c).pdf)

¹⁸⁵ George Anderson, *Federalism: An Introduction*, Oxford University Press, 2008, p. 28.

¹⁸⁶ Ruth Lapidoth, *Autonomy: Flexible Solutions to Ethnic Conflicts*, United States Institute of Peace Press, Washington, D.C. 1996, p. 32. See Rudolf Bernhardt, *Federalism and Autonomy*, in: Models of Autonomy, Yoram Dinstein (eds), Transaction Books, US & London, 1981

¹⁸⁷ Ruth Lapidoth, *Autonomy: Flexible Solutions to Ethnic Conflicts*, United States Institute of Peace Press, Washington, D.C., 1996, p. 50. See Bernhardt, Rudolf, *Federalism and Autonomy*, in: Yoram Dinstein (ed) *Models of Autonomy*, 1981, Transaction Books, US and London, pp.23-28

basis of autonomy, namely certain powers that are not granted to the rest of the regions in Sudan (asymmetrical federalism). Despite the considerable differences between the federalism and autonomy, however, there is similarity,¹⁸⁸ both federalism and autonomy grant minorities, at least, some degree of State power, thereby enhancing their prospects for preserving their own culture.¹⁸⁹ These arrangements are, therefore, likely to reduce conflict.¹⁹⁰

3. The Historical Origins and Evolution of Federalism in Sudan

4. Federalism in Pre-Independence Era

i. Funj Kingdom, Turko-Egyptian Rule and Mahdiya State

Sudan has adopted some forms of a decentralized governance system since the days of *Funj* Kingdom (1504-1821).¹⁹¹ *Funj* Kingdom delegated powers to tribal leaders to administer the different sheikdoms of *Funj* Kingdom.¹⁹² In effect, all sheikdoms of the Sultanate remained independent to administer their own affairs.¹⁹³ In the far West of Sudan, Darfur Sultanate was divided, administratively, into four levels of government each level was headed by a delegate to be nominated by the king.¹⁹⁴ During the period (1821-1885), the Turko-Egyptian governed Sudan under a form of governance that was based on a decentralised system as was established by *Funj* Kingdom in that Sudan was divided into Directorates and Centres.¹⁹⁵ Then, the Turko-Egyptian rule established a comprehensive centralised system under which Sudan was divided into three bigger regions: the West, the East and the Center.¹⁹⁶ Some scholars have pointed out that the period of Turko-Egyptian that created the base for a strong centralization tendency that have been the hall mark of the Sudanese State.¹⁹⁷

¹⁸⁸ *Ruth Lapidoth*, *Autonomy: Flexible Solutions to Ethnic Conflicts*, United States Institute of Peace Press, Washington, D.C. 1996, p. 50., See *Bernhardt, Rudolf*, *Federalism and Autonomy in: Yoram Dinstein* (ed) *Models of Autonomy*, 1981, Transaction Books, US and London 1996, p. 50.

¹⁸⁹ *Harris & Reilly*, *Democracy and Deep-Rooted Conflict: Options for Negotiations*, 1998, IDEA, p. 161.

¹⁹⁰ *Peter Harris et al*, eds., *Democracy and Deep-Rooted Conflict: Options for Negotiators*, Stockholm: IDEA, p. 161.

¹⁹¹ *Mohamed Eltighani Ahmed*, *Sudanese Federalism Experience: 1991-2005*, Khartoum, 2009, Sinan International, Publisher, p. 62, (in Arabic). See generally *Omer Ali Gasmelseid*, *Federalism as Conflict-Management Device for Multiethnic and Multicultural Societies: the Case of Sudan*, Institut Du Federalisme Fribourg Suisse, Munich, 2006, p.84.

¹⁹² *Ibid.* p. 62

¹⁹³ *Ibid.* p. 62.

¹⁹⁴ *Mohamed Eltighani Ahmed*, *Sudanese Federalism Experience: 1991-2005*, Khartoum, Sinan International, Publisher 2009, p. 62, (in Arabic).

¹⁹⁵ *Ibid.* p. 62

¹⁹⁶ *Ibid.* p. 62

¹⁹⁷ *Peter Woodward*, *Condominium and Sudanese Nationalism*, Rex Collings, London, 1979, p23.

The *Turkiyya* was overthrown by the *Mahdiyya*. During the period, 1885-1898, the *Mahdiya* State adopted a centralized system of governance for security and religious reasons so as to advocate for an Islamic State.¹⁹⁸ Consequently, the powers and the authorities of the elders and tribal chiefs were diminished as was previously established *Funj* Kingdom. It could be argued that the governance system, during *Mahdiya* State, was based on the Turkish- Egyptian Rule's governance system, with a few adjustments through the division of Sudan into divisions and directorates, each level was administered by the so-called “*Wali*” governor.¹⁹⁹

ii. Native Administration System (The British-Egyptian Period)

Thereafter, the status of Sudan was one of a condominium (Anglo-Egyptian Rule). Under the British-Egyptian rule, Sudan was administered under the so-called ‘*Native Administration System*’ – indirect rule.²⁰⁰ The Native Administration system was established in the 1920s and was gradually developed. The ‘*Native Administration System*’ meant that the tribal leaders (*Nazirs*, *Omdas* and *Sheiks*) were given administrative, judicial and policing powers within their territorial domain.²⁰¹ The Native Administration was designed as a key governance system to “manage ... land, render justice, and to represent both the states, in the various and diverse parts of the territory inhabited by diverse communities, and the interests of those constituencies to the authorities”.²⁰² In essence, the Native Administration is linked with the land-tenure system, and especially, in Darfur Region - West of Sudan, most leaders were territorial leaders, and most of the territory was divided into entities administered by leaders.²⁰³ The traditional leaders applied

¹⁹⁸ Mohamed Eltighani Ahmed, *Sudanese Federalism Experience: 1991-2005*, Khartoum, 2009, Sinan International, Publisher p. 62-63, (in Arabic).

¹⁹⁹ Ibid, p. 62-63.

²⁰⁰ The ‘*Native Administration System*’ was based on the following fundamentals: (1) A political hierarchy of local chiefs that would derive its power from the central government and be in charge of the maintenance of law and order, organization of labour and collection of local taxes; (2) A parallel hierarchy of native courts which would deal with minor criminal, civil and personal cases in terms of law and general principles of justice; (3) A native treasury that would manage local revenues and pay out necessary expenses of local authorities and social services; (4) A team of local staff which would carry out its duties under the guidance of British field officers and subject to the laws and policy of administration. See Ibrahim A, Shouk A, Bjorkelo A, *The Principles of Native Administration in the Anglo Egyptian Sudan 1898-1956*. Omdurman, Sudan, 2004, (in Arabic).

²⁰¹ Johnson, the Root Causes of Sudan's Civil Wars, p.12.

²⁰² 2013-2019 Developing Darfur: A Recovery and Reconstruction Strategy, 2013. P. 68, available at: <http://www.sd.undp.org/content/dam/sudan/docs/DDS%20English.pdf>. See John Howell, *Local Government and Politics in the Sudan*, Khartoum University Press, 1974, p. 26.

²⁰³ Jerome Tubiana et al, *Traditional Authorities' Peacemaking Role in Darfur*, United States Institute, p. 6, 2012, available on: <http://www.usip.org/sites/default/files/traditional%20authorities%20peacemaking%20role%20in%20darfur.pdf>

indigenous laws and customs insofar as these were consistent with the British ideas of good government and justice.²⁰⁴ Traditionally, the Native administration played an important role as a link between state and communities.

In 1932, the ‘Native Courts Ordinance’ was enacted to regulate the administrative and the police powers of tribal leaders through the establishment of a hierarchy of local courts. By 1937, municipalities, townships, and councils were created. In 1951, a new ‘Local Government Ordinance’ was passed which empowered the tribal leaders to assume a honorary role in the newly established local councils.²⁰⁵ The 1951 Local Government Ordinance was a historic point of departure in Sudan administration, as the ordinance was credited as giving locally elected councils a magnitude of autonomy in decision-making, a capacity to levy taxes, make sub-laws, and hire local staff.²⁰⁶ In 1971, when President Nimeiri abolished the old Native administration Act, peaceful conflict resolution mechanisms were dismantled and replaced by popular courts and deprived traditional leaders of the government resources and local taxes they relied on to operate.²⁰⁷ In 1980’s, under the Native Administration Act, the system of Native Administration was re-instated in West and East of Sudan, but not in central Sudan.²⁰⁸

5. Federalism in Post-Independence Era

i. The Governance System under Sudan Constitutions: 1958-1989

When the Transitional constitution of 1956 was drafted, the northern political leaders did not consider the option for federalism, as the Southern Sudanese had been promised by the northern political parties, but a strong centralized system was adopted that has led to concentration of wealth and power at the national level and rendered the periphery parts of Sudan

²⁰⁴ Johnson, the Root Causes of Sudan’s Civil Wars, p.12.

²⁰⁵ See: [http://www.unsudanig.org/darfurjam/trackII/data/background/History%20and%20origin%20of%20Darfur%20crisis%20\(Darfur%20Livelihoods%20Unde.doc](http://www.unsudanig.org/darfurjam/trackII/data/background/History%20and%20origin%20of%20Darfur%20crisis%20(Darfur%20Livelihoods%20Unde.doc).

²⁰⁶ *Al-Hadi Abdal Samad Abdalla*, Inter-Governmental Relationships in the Sudan Federal System: Co-operation, Conflict, or Covariance? in *Federalism in the Sudan*, Hassan M. Salih et al (eds), Khartoum University Press, 1995, p. 218.

²⁰⁷ *Developing Darfur: A recovery and Reconstruction Strategy*, 2013-2019, p. 79; See *Jermoe Tubiana* et al, *Traditional Authorities’ Peacemaking Role in Darfur*, United State Institute of Peace, 2012.

²⁰⁸ See *Jermoe Tubiana* et al, *Traditional Authorities’ Peacemaking Role in Darfur*, United State Institute of Peace, 2012

marginalized.²⁰⁹ When the elected parliament convened, in 1955, to consider whether it should endorse a motion for independence, the southerners agreed to support the efforts of the nationalist movement in the north to gain the independence, but only on the condition that Sudan's dual identity be recognised through introducing a federal system in Sudan.²¹⁰ Soon after the declaration of independence, the northerner political parties launched an intensive campaign against federalism describing it as a colonial plot, and argued vigorously that federalism was first step towards separation.²¹¹

During President *Abboud's* era (1958-1964), all legislative and executive powers were vested in a single central government and the responsibilities and powers of the devolved bodies are derived from and are conferred by the centre level. For administrative efficiency, responsibilities were devolved to a several layers of government, as follows: the province administration, the local government system, the Central Council, the Council of Ministers, and the Supreme Council for the Armed Forces etc.²¹²

At the local level, local councils in the north, were mostly elective and took part in decision-making processes at local level in that local council is directly answerable to some authority other than the national level (for instance, local electorate). On the other hand, at the province level, the Province Council was presided by a governor (with veto powers) nominated directly by the Supreme Council of the Armed Forces at the central level. Furthermore, the Central Council, as set-up under the Central Council Act of 1962, where the Province Councils were represented, but the representatives of the Province Councils were selected by the President.

In 1965, a *Round Table Conference* was held to discuss the governance system in Sudan with a view to achieving development and stability in Sudan. The northern politicians were prepared to give only a limited regional autonomy to the Southern Sudan in matters, such as, education, health, while leaving control over economic planning, financial policy, State security and other areas of national policy to the central government. On the other hand, Southerners were also

²⁰⁹ *Hassan Hamid*, Democratic Transformation and the Search for New Constitution under a Federal System in Sudan, 2013. p. 26 (on file with the author)

²¹⁰ *Abel Alier*, The Southern Sudan Question, in: Dunstan Wai (ed.), the Southern Sudan: The Problem of National Integration, London: Frank Cass, 1973, pp.19, 23.

²¹¹ *Johnson*, The Root Causes of Sudan's Civil War, p. 30.

²¹² *Peter Nyot Kok*, Governance and Conflict in the Sudan, 1985-1995: Analysis, Evaluation and Documentation, Deutsches Orient-Institut, Hamburg, 1996, p. 124.

insisting on the right to self-determination in a referendum at which they would choose between separation, confederation, federation, autonomy or the existing unitary State.²¹³

Accordingly, a twelve-member committee was formed to draw up a working paper on the question of the north-south relations. The members of the committee were not able to agree on several issues, including: whether the Southern Sudan should be one region or three regions, as well as the relation between the north and the south on the fiscal aspects of the proposed federal structure. The report of the committee did not see the light, as then President *Abboud* government came to an end, and a transitional government took over.²¹⁴

The first attempt to decentralize power to the local level came with the enactment of '*Local Government Act of 1971*' to decentralize decision-making away from national level and to enhance popular participation at local level (through the creation of regions, districts and areas councils), but in reality, this arrangement had resulted in the concentration of authority at the province headquarters.²¹⁵ Furthermore, the Local Government Act of 1971 meant that a locality belonging to one tribe could be controlled by another tribe.²¹⁶ The objective of the Local Government Act of 1971 was to decentralize decision-making away from national level and to enhance popular participation at local level, but in reality, it resulted in the concentration of authority at the province headquarters.²¹⁷ In fact, the '*Local Government Act of 1971*' triggered conflicts between various tribes soon after its implementation. Some say that abolishment of the '*Native Administration System*' has contributed significantly to tribal conflict,²¹⁸ in particular in Darfur region.

In 1972, when Addis Ababa Agreement was signed, the intergovernmental arrangements, as provided for in that agreement, made the southern Sudan High Executive Council (HEC)

²¹³ *Mohamed El-Tighani Ahmed*, *The Experience of Federalism in Sudan, 1991-2005*, Khartoum, Sinan International Publisher, 2009, p. 87, 88.

²¹⁴ *Ibid*, p. 87, 88.

²¹⁵ *Al-Agab Ahmed Al-Terafi*, *Decentralization in Sudan: Characteristic, Challenges and Opportunities*, in *Federalism in the Sudan*, Hassan M. Salih et al (eds), Khartoum University Press, 1995, p. 67.

²¹⁶ See generally *J. Morton*, *Conflict in Darfur, A Different Perspective*, Hemel Hempstead, UK, 2004

²¹⁷ *Al-Agab Ahmed Al-Terafi*, *Decentralization in Sudan: Characteristic, Challenges and Opportunities*, in *Federalism in the Sudan*, Hassan M. Salih et al (eds), Khartoum University Press, 1995, p. 67.

²¹⁸ *Morton J.* *Conflict in Darfur, A Different Perspective*, Hemel Hempstead, UK, 2004

responsible to both the national president and the southern Sudan Regional Assembly. For instance, the Southern Regional Assembly may, by a three-quarters majority request the national president to relieve the president of the HEC or any member of the HEC from office. The national president shall accede to such request. Thus, the intergovernmental relationship between the national government and the Southern Sudan, under Addis Ababa Agreement, rendered the autonomy of the Southern Sudan vulnerable to the frequent encroachment of the central government into the Southern Sudan internal affairs.²¹⁹

In 1982, the People's Local Government Act was passed (replacing the Local Government Act of 1971), with a view to extending the regionalism idea, as implemented in Addis Agreement of 1972 to the rest of the country. The year 1980 also saw the amendment of the 1973 permanent constitution, and as a consequence, five regions were set up in the north. These were: the Northern region, the Eastern region, the Central region, Kordofan region and Darfur region. Each region was divided into a number of constituencies. The allocation of powers and resources, within the country, were spelled out in the Regional Government Act of 1980. In fact, the constitution gave the national president far-reaching powers at both the regional and national levels, for instance, the president could appoint the Deputy Governor (executive body at the regional level) without formal consultation with the Regional Assembly (legislative body at regional level). As such, the 1980 plans of power devolution to the regions did not reflect the promise to ensure effective participation, as the power remained in the hands of the central government.

ii. The Governance System under Sudan Constitution 1998

In 1992, there were reforms to reorganize the government along the lines of federalism,²²⁰ to address regional disparities in the country.²²¹ A constitutional decree provided for establishment

²¹⁹ *Hurst Hannum*, *Autonomy, Sovereignty, and Self-determination: the Accommodation of Conflicting Rights*, revised edition, University of Pennsylvania Press, 1990, USA p. 323.

²²⁰ *Rohan Edrisinha* et al, *Adopting Federalism: Sir Lanka and Sudan*, p. 439. When NCP took power in 1989, the federal system in Sudan was established based on a number of Constitutional Decrees, as follows: 1. Re-division of Provinces Act of 1991; (2) Local Government Act of 1992; (3) Popular Committees Act 1992; (4) Re-division of State Act 1993; (5) Organization of Organs of Federal System Act 1994; (6) Re-division of Wealth and Power Act 1995; and (7) Local Government Act 1995.

²²¹ African Development Bank Group (2010) 'SUDAN: Country Brief – 2010/2011', Regional Department, East II (OREB). Available at: <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/SUDAN%20-%20Country%20Brief%202010-2011.pdf>

of a federal system, dividing government into three levels: locality, state and national.²²² In 1994, through the 14th Constitutional Decree twenty-six States were created. The 26 states were divided into fifty-seven localities, and the localities into 220 councils. The Fourth Constitutional Decree provided that each of the 26 States to have its own governor, deputy governor and cabinet of ministers, and to assume responsibility for local administration.²²³ Nevertheless, the President maintained the power to appoint all senior positions and starved the State administration of funds in an attempt to diffuse opposition to the regime.²²⁴

In 1993, the Higher Council for Decentralization (HCD) was established to coordinate between the different levels of government and propose legal reforms on issues related to resource sharing and power sharing.²²⁵ In fact, the process of decentralization has exposed severe institutional, human and physical capacity deficits, including weak financial accountability and reporting, lack of transparency and ineffective monitoring of public budget allocations and spending.²²⁶

In 1994, the 14th Constitutional Decree provided for appointment, rather than election, of governors and commissioners of localities.²²⁷ As a consequence, the state governments have become powerful at the expense of local government.²²⁸ The primary functions of state governments were security and political mobilization, rather than public service delivery for community. The national level kept 55 per cent of total national revenue and divided the remaining 45 per cent among the remaining states. Of these funds the large majority was allocated to salaries of federal civil servants. National development projects were still largely

²²² Art. 5 of the 4th Constitutional Decree of 1991 stated that: ‘the Republic of the Sudan shall be administered, on the basis of Federal Government, in accordance with the provisions of the decree ...’

²²³ *Daniel J. Elazer*, *Federal Systems of the World: A Handbook of Federal, Con-federal and Autonomy Arrangements*, 2nd edition, Longman Group Limited, London, 1994, p. 243.

²²⁴ *Rohan Edrisinha et al*, *Adopting Federalism: Sri Lanka and Sudan*, p. 439.

²²⁵ *Mohamed El-Tighani Ahmed*, *The Experience of Federalism in Sudan, 1991-2005*, Khartoum, Sinan International Publisher, 2009, p. 93.

²²⁶ African Development Bank Group (2010) ‘SUDAN: Country Brief – 2010/2011’, Regional Department, East II (OREB). Available at: <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/SUDAN%20-%20Country%20Brief%202010-2011.pdf>

²²⁷ Divisions in Sudan’s Ruling Party and the Threat to the Country’s Future Stability Crisis Group Africa Report N°174, 4 May 2011, p. 20

²²⁸ *Ibid*, p. 20

focused in the centre, rendering the rhetoric of devolution and distribution of resources meaningless.²²⁹

In 1998, a new constitution was promulgated, which described Sudan as a ‘federal republic’, with two levels of government (national level and the State level).²³⁰ However, the 1998 constitution fell short of a federal one with respect to two issues: firstly, States representation at the central level, at the legislative body, was lacking;²³¹ and, secondly, the States lacked involvement in the amendment of the constitution, as the amendment of the constitution required a 2/3 majority of the federal parliament in which the states were not represented. Although Sudan formally became a federation, in 1998, centralized rule continued. In fact, a truly federal structure did not materialize, as in reality the centre level retained all substantive powers.²³² The few powers which were devolved to the State level were highly circumscribed by residual powers that were vested at the national level.²³³

The federal system was characterized by a constitutional centralization of powers in the hands of the federal government, which considerably diminished the decision-making powers of the states and municipalities. For example, the distribution of resources and powers were not balanced and, therefore, circumscribed the ability of the State and locality levels to function and delivery services to the community.²³⁴ Furthermore, the Local Government Act of 1998 made the locality level subservient to the overarching power of the State level. This had resulted in the abolishment of some localities, as the case of one locality in South Kordofan.²³⁵ Thus, there was no devolution of power to the State level as such but the central government retained all

²²⁹ Ibid, p. 20

²³⁰ Art. 56(1) of the 1998 of Sudan Constitution. The division of the powers between two levels are p(Arts. 110-112), independent financial resources (Arts. 113-114) and an arbitration system over disputes of competences between federal and State organs (Art. 105(2)(c)) were provided for in the constitution.

²³¹ Art. 116 of the 1998 of Sudan Constitution established the ‘Federal Government Chamber’ to assume with respect to the process of federal and State government, coordination, communication and organization of conferences between Governors and States’ organs [...]

²³² *Markus Bockenforde*, Constitutional Engineering and Decentralization in: *Transitional Constitutionalism*, Proceeding of the 2nd Vienna Workshop on International Constitutional Law, 2007, Eberhard, Lachmayer, Thallinger (eds), pp. 25(28)

²³³ Art. 122(3) of the 1998 Constitution of Sudan

²³⁴ *Hassan Hamed Mishaka*, *Democratic Transformation and Search for Constitution in Sudan with a Framework of a Federal System*, p. 37, (on file with the author)

²³⁵ Ibid, p. 37

substantive powers, and the powers that devolved to many local governments existed only on paper only.²³⁶

²³⁶ *Rohan Edrisinha et al*, Adopting Federalism: Sri Lanka and Sudan, p. 439.

Part II: The Governance Structure of Sudan under the INC

1. *The Overall Governance Structure of Sudan under the INC*

The governance changes that have been brought by the INC provide for a decentralized system of government with different levels of government (national level, the South Sudan level, the State level and the local level) with the objectives of promoting public participation, empowerment of communities and curbing of regional disparities. Under the INC, Sudan is divided into 25 States, Ten (10) States fall under the exclusive control of the Government of South Sudan (GoSS).²³⁷ Eleven States (11) belong to the national level, however, (2) States (South Kordofan and Blue Nile States) are governed in accordance with the provisions of the Protocol on the “Resolution of the Conflict in Southern Kordofan and Blue Nile States”, and Abyei Area is accorded a special administrative status under the institution of the Presidency as provided for in “the Protocol on the Resolution of Conflict in Abyei Area”.²³⁸

The INC further recognizes ‘the autonomy of the Southern Sudan’²³⁹ within Sudan and provides the Southern Sudan with a constitutional right to secession from Sudan through a referendum, to take place in 2011, as whether to stay in a united Sudan or to separate.²⁴⁰ Now, the powers, within Sudan, are distributed to different levels of government and, more specifically, the provisions defining the resources and the powers of the different levels of government cannot be changed unilaterally by the central government. This is so because the procedure for the amendments of the constitutional arrangements between the different levels of government requires a $\frac{3}{4}$ majority within the Council of States (the Second Chamber of the Legislature which represents the interests of all states in Sudan).²⁴¹

It should be noted, however, that within the Sudanese federal structure all sub-unit (States) are not treated equally as regards their relation with the national level. This is so because the GoSS

²³⁷The Government of Southern Sudan has been established (with executive, legislative and judicial organs) with authority in respect of the South Sudan and the States in the Southern Sudan, as per the boundaries of January 1956 between the north and the south of Sudan 1956.

²³⁸ Protocol on the Resolution of the conflict in South Kordofan and Blue Nile States

²³⁹ Chapter II ‘Power-Sharing Protocol’; Art. 1.4.1; Art. 25 of the INC of 2005.

²⁴⁰ Chapter I ‘Machakos Protocol’ of the CPA.

²⁴¹ Art. 224(1) of the INC of 2005.

acts as a link between the national level and the 10 Southern States in that the GoSS exists as a buffer between the national level and the Southern Sudan states but no such a parallel regional government exists in the north: that is to say: between the national level and the 11 States in north Sudan. In this manner, the INC establishes an additional tier of government by conferring on the GoSS an exclusive power over the 10 Southern Sudan States and placing it between the national level and the 10 States in Southern Sudan.²⁴² On the other hand, the 11 northern States interact directly with the national level.

Put differently, the INC distributes the powers asymmetrical between the different levels of government, as the degree to which powers are assigned to the different levels of government are not equal. For instance, the Southern Sudan level enjoys autonomy and exclusive authority over 10 States in the South. Unlike the Southern Sudan States, which are subordinated to the GoSS, the northern States have symmetrical powers with each other and interact on equal footing with the national level. At present, the governance structure in Sudan represents a complex example of constitutional *asymmetry* (State level in the north and the State level in the south vis-à-vis the national level) and constitutional *symmetry* (national level vis-à-vis the rest of the northern States in Sudan) type of political system in Sudan under the INC.

This constitutional asymmetry refers specifically to the differences in the legislative powers and resources that are assigned to the Southern Sudan level which are substantially different comparable to the rest of the States in Sudan. While constitutional asymmetry introduces complexity, however, such arrangements have proved useful as a transitional arrangement accommodating regions at different stages of political developments.²⁴³ Therefore, the combination of federalism and autonomous status accorded to GoSS renders the current governance structure in Sudan as asymmetrical/symmetrical federalism system.

i) The National Level

a) The National Legislature

The National legislature is now re-structured, under the INC, in a bicameral system where one chamber of the National Legislature (Council of States) embodies the representation of the

²⁴² Art. 24 of the INC.

²⁴³ Watts, Comparing Federal System, p. 68.

different States in the country. Now, the National Legislature in Sudan is composed of two chambers: The National Assembly and the Council of States.²⁴⁴ The National Assembly has 450 members with a ratio 70% for the north Sudan and 30% for the South Sudan (as per CPA Power-Sharing Protocol).²⁴⁵ The Council of the States,²⁴⁶ which is composed of two representatives from each State, elected by the State legislatures, regardless to the population within each state (through a system of proportional representation), plus two observers from Abyei Area (observers from Abyei Area have no voting rights).²⁴⁷

The members of the Council of States its members are voted indirectly by members of each Legislative Council of a particular State. Candidates are chosen from political parties and independent nominations (members of the Council cannot be nominated) and are elected by members of the local Council. Two winners of each State will constitute the Council of States. As Sudan has now 18 States, the number of seats in the Council of States equals 36 + 2 candidates from Abyei that enjoys a special status, thus giving the final number of 38 seats in the Council of States.

The mixed electoral system in Sudan based on geographical constituencies and proportional representation reflects political needs given the complexity of the country. The reason is to incorporate as many candidates as possible from different areas, i. e. to ensure geographical representation, and at the same time to give opportunities to various and small political parties and women as well. That is being said, the composition of the National Legislature was in favour of the parties to the CPA, namely the National Congress Party, which had power over

²⁴⁴ Art. 91 (2) INC stipulates that the National Legislature shall convene for the following purposes to: amend the INC and approve amendments affecting the CPA; authorize the annual allocation of resources and revenues; and reconsider a bill which has been rejected by the President of the Republic. According to Art. 91 (3) INC the National Assembly shall be competent to: undertake legislation in all matters within the areas of national competency; approve plans, programs and policies relating to the state and society; approve the annual national budget; ratify international treaties, conventions and agreements, and adopt resolutions on matters of public concern. According to Art. 91 (4), INC the Council of States shall be competent to: initiate legislation on the decentralized system of government and other issues of interest to the states and pass such legislation with a two-thirds majority of all representatives; issue resolutions and directives that may guide all levels of government; and approve, by a two-thirds majority, national legislation that allows practices or establishes institutions based on a particular religion or on customs, or initiate national legislation which will provide for such necessary alternative institutions.

²⁴⁵ with 60% of seats elected by majority voting in geographical constituencies and 40% by proportional representation, including 25% reserved for women

²⁴⁶ Art. 83 of the INC.

²⁴⁷ Art. 85(2) of the INC.

key institutions. This situation has been reinforced after the elections of 2010. This situation was accompanied by weak political opposition, civil society and the media.²⁴⁸

The CPA provided for a rotating governorship and power sharing formula for all branches of government (55% NCP; 45% SPLM) during the interim period, but, in reality, other armed movements and political groups were largely excluded. This exclusion may contribute to the ongoing conflict in Darfur and other regions of Sudan. Given that marginalization lies at the heart of Sudan's conflict configuration, bringing in outliers to the political process--whether they emanate from rebel groups or opposition parties--must be channelled through dialogue and non-violent means.

In June 2014, the legislative assembly passed a series of amendments to the National Elections Act of 2008 changing the configuration of seats to 50% geographical constituencies through general election and 50% through proportional representation, raising the women's quota to 30% and the minority party quota to 20%. This is a positive indication both that the government is attempting to address issues of underrepresented parties in the legislature and that women are gaining headway in increasing women's participation.

The National Legislature performs the three basic functions that any legislature performs, including: representation, legislative power²⁴⁹ and oversight.²⁵⁰ As will be explained later, the authority to enact laws is divided between the national level, the GoSS level and the state level. In other words: National laws applying throughout the Sudan are to be enacted by the National Legislature; GoSS laws are to be enacted by the Legislative Assembly of Southern Sudan and state laws by the respective state legislatures.²⁵¹

Through the Council of States, the states influence the law making process at the national level by approving a national legislation by a two-thirds majority.²⁵² The Council of the States is also

²⁴⁸ Lutz Oette, *Law Reform in Times of Peace Processes and Transitional Justice* in Lutz Oette (ed.), *Criminal Law and Transitional Justice: Human Rights Perspectives for Sudan*, (Ashgate, Farnham, 2011),

²⁴⁹ Art. 91 (1) INC.

²⁵⁰ Art. 91 (3) (c), 110, 111, 113 INC

²⁵¹ See Max Planck Manual on Sudanese Constitutional Law: Structure and Principles of the INC, 2009, p. 32.

²⁵² Art. 91(4)(d) of the INC.

involved in the amendments of the constitution, as the amendment of the constitution needs to be approved by both chambers of the National Legislature by a three-quarter majority.²⁵³ The Council of States has also to approve by a two-thirds majority the appointment (and removal) of the Justices of the Constitutional Court.²⁵⁴ Furthermore, the Council of the State has the exclusive powers to determine the number of the states as well as their names, capitals and geographic boundaries, as stipulated in Art. 177(2) of the INC. The Council of the States also, as per Art. 24, 25 and 26 of the INC, issues resolutions and directives that may guide all levels of government.

Moreover, the Council of States has the right to initiate the legislative process on issues related the decentralized system of government and other issues that are of interest to the States and pass such legislations with two-thirds majority of all its representatives.²⁵⁵ That is to say: ordinary bills are to be passed by simple majority but, in case of bills affecting the interests of the states the bills are to be passed by a two-third majority. Thus, the rights of the States as enshrined in the INC, however, are safeguarded and cannot be revoked by a decision taken bilaterally by the national level without the consent of the three-quarter majority of the States.

This is so because once it is decided that an issue affects the interests of the States, the Council of the States is deemed to seize of the issue. To illustrate this, Art. 91(5) (a) of the INC, for example, provides that ‘a bill passed by the National Assembly shall be referred to a standing Inter-Chamber Committee for scrutiny and decision on whether it affects the interests of the States [and] should the Committee decide that the bill affects the interest of the States, the bill shall be referred to the Council of States’.²⁵⁶ The Council of the States then might amend the bill or pass it by a two-third majority without necessary returning it to the National Assembly.

²⁵³ Art. 224 (1) of the INC. Additional functions of the Council of States, as provided in Art. 91(4) of the INC, are: (a) issuance of resolutions and directives that may guide all levels of government in accordance with the provisions of articles 24, 25 and 26 of this constitution, (b) approval by two-thirds majority of all representatives, the appointment of the Justices of the Constitutional Court, (c) supervision of the National Reconstruction and Development Fund, (d) decision on objections by states referred to it by the National Petroleum Commission according to the provisions of Art. 191 (4) (d) of the INC, and (e) requesting statements from national ministers regarding the effective implementation of the decentralized system and devolution of powers

²⁵⁴ Arts. 91 (4) (c), 121 (1) INC). See (Arts. 120 (3), 121 (4) INC).

²⁵⁵ Art. 91(4)(a) of the INC.

²⁵⁶ Art. 91(5)(a) of the INC.

Each chamber of the National Legislature, in accordance with its internal regulations, shall have standing specialized committees and *ad hoc* committees, too. The two chambers of the National Legislature may form inter-chamber standing or *ad hoc* committees for specific matters that are of concern to the two chambers.²⁵⁷ Each chamber of the National Legislature shall, on the initiative of its Speaker, make regulations for the conduct of its business. For issues relating to both chambers, internal regulations for both chambers may be made on the initiative of the respective Speakers of the two chambers.²⁵⁸

b) The National Executive

The National Executive in Sudan consists of the Presidency and the National Council of Ministers.²⁵⁹ The Presidency consists of the President of the Republic to be elected directly by the people and two Vice Presidents appointed by the President (the first vice president from the Southern Sudan²⁶⁰ and the second vice president from the northern Sudan).²⁶¹ The Council of Ministers is appointed by the President after consultation within the Presidency institution.²⁶² The President and the two Vice Presidents are members of the Council of Ministers.²⁶³ Generally, the Ministers are *only answerable* to the President,²⁶⁴ but the National Assembly *might* recommend the removal of a Minister to the President after having lost confidence in him/her.²⁶⁵

The Presidency functions as the representative head of the executive branch, while the Council of Ministers carries out any executive functions of a more administrative nature.²⁶⁶ According to

²⁵⁷ Art. 95 of the INC.

²⁵⁸ Art. 96 of the INC.

²⁵⁹ Art. 49 of the INC.

²⁶⁰ The power-sharing protocol also provides for significant southern participation in national institutions with membership in the newly established three-member presidency, reserved seats in the national executive and legislative branches, and quotas in the national civil service. Cf. Art. 138 of the INC

²⁶¹ Art. 51 (1) of the INC.

²⁶² Art. 70 (1) of the INC.

²⁶³ Art. 70 (2) of the INC.

²⁶⁴ Art. 74 of the INC. see Max Planck Manual on Sudanese Constitutional law: Structure and Principles of the INC, 2009, p. 40 (on file with author)

²⁶⁵ Art. 91 (3) (h) of the INC.

²⁶⁶ According to Art. 72 INC, the National Council of Ministers exercises the following functions: planning state policy; implementing the CPA; initiation of national legislative bills, the national budget, international treaties, and of bilateral and multilateral agreements; receiving reports about national ministerial performance for review and action; receiving reports on executive performance of states for purposes of information and coordination, except that in the case of the states of Southern Sudan, reports shall be received through the GoSS; receiving reports and

Art. 72 INC, the National Council of Ministers exercises the following functions, including: planning state policy; implementing the CPA; initiation of national legislative bills, the national budget, international treaties, and bilateral and multilateral agreements, etc. Thus, the National Council of Ministers is the national executive authority. Its decisions shall be adopted by consensus or by simple majority.²⁶⁷ Each national minister is bound by the decisions of the National Council of Ministers.²⁶⁸

The national ministers are collectively and individually responsible to the National Assembly for the performance of the National Council of Ministers.²⁶⁹ According to Art. 73 (1) of the INC, any national minister is the head of his/her ministry, and his/her decisions shall prevail within the ministry. However, the National Council of Ministers may review such decisions and the President of the Republic may suspend the decisions of a national minister pending such review. Without prejudice to the powers vested in the President and the Presidency, the decisions of the Council of Ministers shall prevail over all other executive decisions.²⁷⁰

ii) The Government of the Southern Sudan Level

The CPA provides the Southern Sudan with a greater autonomy by creating the GoSS, as provided for in Art. 159 of the INC. The GoSS exercises its governmental functions in accordance with the Interim Constitution South Sudan (ICSS), which itself must conform to the INC.²⁷¹ Under the INC and ICSS, the GoSS possesses prescribed areas of jurisdiction over the ten Southern Sudan States.²⁷² The GoSS has exclusive power with its own legislature, executive, and judiciary branches,²⁷³ as stipulated in Schedules of the INC and the ICSS, which cannot be invaded by the central government.²⁷⁴

deciding which level of government is competent to exercise residual or concurrent powers in accordance with the INC Schedules.

²⁶⁷ Art. 70 (4) of the INC.

²⁶⁸ Art. 74 (3) of the INC.

²⁶⁹ Art. 74 (2) of the INC.

²⁷⁰ Art. 70 (3) of the INC.

²⁷¹ Art. 160 (1) of the INC.

²⁷² Art. 162 of the INC.

²⁷³ Art. 159 of the INC states that 'there shall be established in southern Sudan, as per its boundaries of January 1st, 1956, a government to be known as the Government of Southern Sudan which shall have legislative, executive and judicial organs'

²⁷⁴ Art. 161 of the INC.

The creation of South Sudan level has added a new level of complexity, and sometimes complication, to the federalism structure of Sudan under the INC. The arrangement under the INC federal system assigns to the South Sudan level powers and resources overwhelmingly greater than those assigned to the states in the south Sudan, thereby depriving the latter of any meaningful autonomy in relation to the federal government.

a) The Executive of the Government of Southern Sudan Level

There is a President for the GoSS, heading the executive branch which shall be elected directly by the people of the Southern Sudan.²⁷⁵ The Southern Sudan President shall be assisted by a Vice President. As opposed to the establishment of the Council of Ministers in the north, the INC and the ICSS prescribe the establishment of a Southern Sudan Council of Ministers, which shall be appointed by the Southern Sudan President, in consultation with the Southern Sudanese Vice President, and approved by the Southern Sudan Legislative Assembly.²⁷⁶ The Southern Sudan Council of Ministers, while performing its functions, is not only accountable to the President of the GoSS but also to the Southern Sudan Legislative Assembly. In addition, the Council may be removed by a motion supported by two-thirds of all members of the Southern Sudan Legislative Assembly.²⁷⁷ The composition of the Government of Southern Sudan reflects a regional balance at the Southern Sudan level – that is, each of the ten Southern Sudan States is represented at the ministerial level.²⁷⁸

b) The Legislature of the Government of Southern Sudan Level

The Southern Sudan Legislative Assembly consists of elected members who represent territorial constituencies in the south Sudan.²⁷⁹ The composition of the Southern Sudan Legislative Assembly is characterized by a fixed quota of at least 25 % for women.²⁸⁰ In accordance with Art. 171 of the INC, the Southern Sudan Legislative Assembly can pass statutory laws, but must respect the exclusive legislative powers of the national level of government (INC Schedule A). In addition, Art. 59 (2) (a) of the ICSS gives the Southern Sudan Legislative Assembly the power to consider and pass amendments to the ICSS.

²⁷⁵ Art. 163 (1) of the INC.

²⁷⁶ Art. 165 (1) of the INC.

²⁷⁷ Art. 166 of the INC.

²⁷⁸ The CPA Monitor – August 2007

²⁷⁹ Art. 58 of the ICSS of 2005.

²⁸⁰ Art. 58 (1) (b) of the ICSS.

At the local level, the local government is organized according to the following units: the 10 Southern Sudan States are divided into counties (a total of 92 counties in the Southern Sudan), the *Payams* (district) and the *Bomas* (village). The counties are led by County Commissioners, who are appointed by the State Governor. The *Payams* are administered by *Payam* Administrators and the *Bomas* are headed by a Chief. At the level of the *Payams* and the *Bomas*, the modern administrative structure interacts or overlaps with the traditional authority.²⁸¹

iii) The State Level

Sudan is now divided into 25 States. The 25 States throughout Sudan shall exercise their powers as specified in Schedules (C), (D) and (E) of the INC, and render public services through the level of government close to the people. The States in the north as in the south, have their own governmental structure with legislative, executive and judicial organs that are organized in accordance with the INC, the ICSS and the State constitution.²⁸² Each State has its own constitution, prepared and adopted by the state's legislature.²⁸³ Each state has its own court system to address laws created by their respective legislatures, as well as national laws.

a) The Executive at the State Level

The INC determines the contents of the State constitutions by giving guidelines for the structure of the State governments. Art. 179 of the INC structures the State's executive by stating that the State executive shall be headed by a Governor elected by the people in the State, in compliance with the procedures prescribed by the National Elections Commission and in accordance with the INC, the ICSS and where applicable, the relevant State constitution and the law.

b) The Legislature at the State Level

The INC provides for a State legislature composed of members elected in accordance with the State constitution and the law and as set forth by the National Elections Commission. The State legislature shall prepare and adopt the State interim constitution which must be in conformity

²⁸¹Barbara Unger et al, Systematic Conflict Transformation and Inclusive Governance in Southern Sudan, Berghof Foundation for Peace Support, May 2007. Available at: www.berghof-peacesupport.org

²⁸²Art. 178 of the INC states that 'there shall be legislative, executive and judicial organs at state level which shall function in accordance with [the INC] (...).

²⁸³Art. 180(2) of the INC states that 'the state legislature shall prepare and adopt the state interim constitution provided that it shall be in conformity with [the INC] (...)

with the INC, the CPA, and the ICSS (where applicable). The State legislature shall have law making competence, as per the Schedules of the INC, which define the scope of the legislative competences at the State level.²⁸⁴ Limited freedom is given to the States in creating their own governments, political institutions and processes of government. This is so because the INC prescribes the legislative, the judicial, and the executive institutions at the State level, as will be explained later. All matters listed in Schedule (C) of the INC are the exclusive competencies at the State level (in the north and the Southern of Sudan) only. This is, in addition, to the residual and concurrent powers of the State level, as provided for in Schedules (D) and (E) of the INC.

iv) The Local Government

The INC recognizes local government as constitutional institution by bringing it alongside the national, the Southern Sudan level and the State level. This follows the trend in some federal constitutions such as those of Germany, South Africa and India. Although the INC primary aim of governance is federalism, the INC says little, if anything on local government in terms of its power and resources. The INC does not include a separate Chapter on local government as such, but the local government is placed on the list of the exclusive powers of the States, thereby placing the local government under the direct control of the States. The States are given general powers to regulate and define aspects of local government, as per Art. (178) of the INC.²⁸⁵ According to Schedule (C3) of the INC, the exclusive legislative power for local government law lies with the States.²⁸⁶ The local government is created and regulated by the State, as subordinate bodies, carrying out the policy and laws of the State level.

Therefore, although the local government level is constitutionally entrenched in the INC, but it does not have a framework for local government powers, functions and structures. Instead, the local governments are subject to regulation by the States.²⁸⁷ As such, in Sudan, local government is subordinate – existing and operating on the basis of delegated powers from the State as if in a unitary system. This is also the case in such federations as Canada, Australia and

²⁸⁴ Art. 180 of the INC.

²⁸⁵ Art. 178 of the INC states ‘... organization of the local government and elections to its respective institutions shall be conducted in accordance with the relevant state constitution’.

²⁸⁶ Schedule C (3) of the INC.

²⁸⁷ Art. 178(2) of the INC states that ‘the state shall promote and empower local government. Organization of the local government and elections to its respective institutions shall be conducted in accordance with the relevant state constitution’.

Germany, where the local governments are periodically reshuffled and where the actions of local governments are always liable to be overridden by their States.²⁸⁸

2. Political Accommodation: Allocation of the Legislative Powers between Levels of Government under the INC

The question here is concerned with what sort of constitutional arrangements the INC puts in place – that is: what kinds of legislative powers are given to the national level and which legislative powers that are allocated to the Southern Sudan level and the State level? That is to say: how the division of powers “can help people reconcile their political interests and viewpoints in governance arrangements and political dialogue processes with a view to managing disputes and preventing violent conflict”.²⁸⁹

The pattern of the constitutional design that delineates the competencies of the central government, the Southern Sudan level and the State level are specified in a number of Schedules annexed to the INC (Schedules A-E). The INC does not provide for exhaustive lists of legislative powers for each level of government. Instead, it enumerates the powers that are assigned to different levels of government, while leaves unspecified powers ‘residual powers’ to be exercised by any level of government in accordance with the ‘nature’ of the power.²⁹⁰ In a nutshell, the legislative powers are distributed between the different levels of government as exclusive, concurrent or residual powers according to the Schedules (A-E). Schedules A-C specify powers which will be assigned exclusively to each level- each having concretely identified jurisdiction. The national level (Schedule A), the Government of Southern Sudan level (Schedule B), and the State level (Schedule C). Schedule (D) is concerned with the concurrent powers, while Schedule (E) deals with the residual powers.

a) The Exclusive Powers

The exclusive power means the legislative and the executive powers are assigned to one particular level of government and thus they are exclusively under the control of that level of

²⁸⁸ Hueglin, Thomas et al, *Comparative Federalism: A systematic Inquiry*, Broadview Press Publisher, Canada, 2006, p. 33.

²⁸⁹ *Governance in the Sudan: Options for Political Accommodation in the Republic of Sudan*, Feb. 2014: Governance and Peacebuilding Series, Briefing Paper, No. 7, Conflict Dynamics International.

²⁹⁰ Schedule (F) of the INC.

government alone. The advantage of assigning a responsibility exclusively to one level of government or another is to reinforce the autonomy of that level of government and to make it clear which level of government is responsible for the policy in that area.²⁹¹ Schedule (A) of the INC stipulates the exclusive legislative and executive powers of the national level, Schedule (B) stipulates the exclusive legislative and executive powers of the Southern Sudan level, and Schedule (C) stipulates the exclusive legislative and executive powers of the State level.

That said, the detailed list of exclusive powers, as contained in the INC, is not without problem. Potential problem (between the national level and the State level) may emerge upon the exercise of some of the specific exclusive powers. For example, Schedule A (33) gives the national level exclusive power over the so-called 'Nile Water Commission', and, at the same time, Schedule (C) (36) gives the State level exclusive competence to regulate irrigation. Although the INC provides for a mechanism to resolve conflict between the laws of the different levels of government, nonetheless, that mechanism is only applicable with respect to the concurrent powers, as will be explained later, and is not applicable to resolve conflict in the exercise of exclusive powers.

In the Southern States, the situation is slightly different with respect to the legislative relation between the GoSS and the Southern Sudan State level. Here, the exclusive powers listed in Schedule (C) are not exclusively reserved for the state level in the south Sudan. Instead, the INC Schedule (B) para. (9),²⁹² empowers the Southern Sudan Legislative Assembly with a far reaching legislative competence with respect to the ten Southern Sudan States. In that the Southern Sudan Assembly can define minimum standards and uniform norms for the 10 Southern states, thereby limiting the legislative power of the Southern Sudan States as provided for in Schedule (C) of the INC.

²⁹¹ *Watts*, Comparing Federal Systems, p. 38.

²⁹² Schedule B, para. 9 reads: The co-ordination of Southern Sudan services or the establishment of minimum Southern Sudan standards or the establishment of Southern Sudan uniform norms in respect of any matter or service referred to in Schedule C or Schedule D, read together with Schedule E, with the exception of Item 1 of Schedule C, including but not limited to, education, health, welfare, police (without prejudice to the National Standards and Regulations), prisons, state public services, such authority over civil and criminal laws and judicial institutions as is specified in the Schedules, lands, reformatories, personal law, intra-state business, commerce and trade, tourism, environment, agriculture, disaster intervention, fire and medical emergency services, commercial regulation, provision of electricity, water and waste management services, local Government, animal control and veterinary services, consumer protection, and any other matters referred to in the above Schedules;

Thus, the federal system in South Sudan contradicts the principle of true federalism which requires that the arrangements should not place such power in the hands of one of the government levels. The federalism system in South Sudan assigns to the south Sudan level powers overwhelmingly greater than those assigned to the state level in south Sudan, thereby depriving the latter of any meaningful autonomy in relation to the Government of Southern Sudan. This implies that the Southern states' margin of discretion (as far as their legislative powers are concerned) is more reduced in comparison with the Northern States. For example, with respect to the concurrent powers listed in Schedule (D), the competences of the Southern Sudan States are narrowed through the Government of Southern Sudan competence as per Schedule (B) of the INC.²⁹³ The same is true in respect of the residual powers listed in Schedule (E) of the INC.

b) The Concurrent Powers

Schedule (D) of the INC refers to the concurrent powers which mean that all three levels (the national level, the Southern Sudan level and the State level) have the authority to enact laws within the areas listed in Schedule (D). In general, no restriction applies to any level of government as whether or not to legislate on areas falling within Schedule (D). In effect, the chapeau of Schedule (D) emphasizes that all three levels of government 'shall have legislative and executive competencies on any of the matters listed [in Schedule D]'. The list covers some of the most important matters in the development of the state: health and education policy; electricity generation; financial and economic policies; water resources. If both the national and a state government passes laws on one of the matters listed in Schedule (D) and the laws conflict (or contradict one another), one must turn to Schedule (F) for a mechanism to determine which law is binding (prevails) in the State.

²⁹³ Schedule (B.19) reads: Any matter relating to an Item referred to in Schedule (D) that cannot be dealt with effectively by a single state and requires government of Southern Sudan legislation or intervention including, but not limited to the following: (1) matters relating to businesses, trade licenses and conditions of operation; (2) natural resources and forestry; (3) Town and rural planning; (4) Disputes arising from the management of inter-state waters within Southern Sudan; (5) fire fighting and ambulance services; (6) GoSS reformatory institutions; (7) firearms licenses within Southern Sudan; and (8) Government of Southern Sudan recreation and sports.

Concurrent power has several advantages in federal systems, as it provides for flexibility in the distribution of the powers between the different levels of government, for example. Moreover, concurrency enables national governments to legislate nation-wide standards, while allowing sub-units a space to legislate details and to deliver the services in a manner that takes in consideration the local circumstances.²⁹⁴ Yet, the legislative power of all levels to be bore concurrently may give rise to some difficulties, when another level of government wants to make use of its legislative power.²⁹⁵ For instance, the national government usually retains an exclusive power over the foreign relations, under the INC, and at the same time, GoSS is also endowed with the power, under Schedule (D), to initiate, negotiate and conclude international and regional agreement on culture, sports, trade. ...²⁹⁶ This concurrent power between the national level and the southern level represents a potential source of conflict.

Normally, where concurrent jurisdiction is specified, the constitution usually specifies that in cases of conflict between federal law and State law, the federal law prevails.²⁹⁷ Constitutions differ in the way to resolve conflict over concurrent powers. For example, the *priority system*: here the constitution sets up standards according to which the national level may regulate; if these standards, as stipulated by the constitution, are met, the national law prevails over the earlier sub-national law.²⁹⁸ Whereas the *Shared system*: This is the system that the INC has chosen, as can be seen from Schedule (F) of the INC. Here, both levels can regulate at the same time. Only in cases of direct collision, the law of that level prevails which can most effectively deal with the subject matter.²⁹⁹ In accordance with the INC, both levels of government can regulate at the same time and on the same subject matter. Only in cases of a direct collision, it has to be determined which level of government prevails. This determination is to be made on a case by case basis according to the principles of Schedule (F).

²⁹⁴ Ronald Watts, Distribution of Powers, Responsibilities and Resources in Federations in Federations, Handbook of Federal Countries, 2002, p. 452

²⁹⁵ Markus Boeckenfoerde et al, Max Planck Manual on Different Forms of Decentralization, 2nd edition, 2007. Available at: http://www.mpil.de/ww/en/pub/research/details/know_transfer/sudan_peace_project.cfm.

²⁹⁶ Schedule (D) (19) of the INC.

²⁹⁷ Watts, Comparing Federal Systems, p. 38.

²⁹⁸ Germany, Art. 72 Basic Law

²⁹⁹ Clemens Feinaugle et al, Max Planck Manual on Procedures before the Sudanese Constitutional Court, 2006. Available at: [http://www.mpil.de/shared/data/pdf/reader_procedures_before_the_constitutional_court\(c\).pdf](http://www.mpil.de/shared/data/pdf/reader_procedures_before_the_constitutional_court(c).pdf)

Schedule (F) is only a provision that deals with the resolution of conflict over the exercise of the concurrent powers – that is, resolving conflict between the laws of different levels- if the two levels of government enact conflicting laws. In essence, Schedule (F) provides for a criterion that determines which law shall prevail in case of conflict. Schedule (F) provides that if there is a contradiction between the provisions of the Southern Sudan law and/or a State law and/or a National law, on the matters referred in Schedule (D), the law of the level of government which shall prevail shall be that which most effectively deals with the subject matter, but the following conditions need to be considered: (a) the need to recognize the sovereignty of the Nation while accommodating the autonomy of the Southern Sudan or of the states; (b) whether there is a need for National or Southern Sudan norms and standards; (c) the principle of subsidiary; and (d) the need to promote the welfare of the people and to protect each person's human rights and fundamental freedoms.

This way (as provided for in Schedule (F) of resolving the conflict between the national level and the State level makes it almost impossible to determine which level's norms will prevail in case of conflict, thereby leading to legal uncertainty. As such, Schedule (F) itself does not establish any hierarchical relationship, in order of their deemed importance or their respective claims to legal authority; nor does it advance any legal criteria for deciding which is to be given priority and to be preferred for application where they arise in conflict in a concrete case. In fact, Schedule (F) is not a provision that allocates legislative authority to a certain level of government.

While Schedule (F) does not aid that much in resolving conflict that may arise as a result of exercising of the concurrent powers by all levels of government, a careful examination of Art. 72(f) of the INC reveals that the INC would prevent conflict between the different levels of government over the exercise of concurrent powers. For instance, the National Council of Ministers receives reports on matters that are concurrent in nature and decides whether it is competent to exercise such power in accordance with Schedules (E) and (F) of the INC. If it so decides, it shall notify the other levels of government of its intention to exercise such power. In

case any other level of government objects thereto, a committee shall be set up by the two levels concerned to amicably resolve the matter before resorting to the Constitutional Court.³⁰⁰

The Council of Ministers has the obligation to clarify the question of a potential conflict with regard to concurrent (or residual) powers when it receives reports on matters that are concurrent in nature. But, again, the involvement of the Council of Ministers in resolving a potential conflict on matters related to concurrent powers as the council of Ministers is not always involved directly in the process tabling bills within the area of Schedule (D).³⁰¹

c) The Residual Powers

Residual Powers in Sudan are not –as in many other constitutions– directly allocated to one or the other level of government. Instead, ‘residual powers shall be dealt with according to its nature’. For example, if the power pertains to a national matter, requires a national standard, or if the matter cannot be regulated by a single state; it shall be exercised by the National Government. If the power pertains to a matter that is usually exercised by the state or local government, it shall be exercised by the state.’

In the federations which were created by the process of aggregating of previously separate units (coming together federalism), the residual powers usually stay with the sub-units (state level).³⁰² Whereas, in those federations where the powers were devolved from a unitary state (holding together federalism), the residual powers usually retained by the central government.³⁰³ Examples have been Canada, India, and the Federation of Malaya, to name but a few examples.

As concerns the INC, the residual powers are allocated according to the ‘nature’ of the matter. Like the South African Constitution, the assignment of the residual powers has to be taken flexibly, according to the nature of the matter. Yet, this model of a flexible assignment of the

³⁰⁰ Art. 72 of the INC states that: “The National Council of Ministers shall have the following functions: (f) receiving reports on matters that are concurrent or residual and decides whether it is competent to exercise such power in accordance with Schedules E and F herein. If it so decides, it shall notify the other levels of government of its intention to exercise such power. In case any other level of government objects thereto, a committee shall be set up by the levels concerned to amicably resolve the matter before resorting to the Constitutional Court”

³⁰¹ Max Planck Manual on Sudanese Constitutional Law: Structure and Principles of the INC, 2009 (on file with author)

³⁰² *Ronald Watts*, *Distribution of Powers, Responsibilities and Resources in Federations*, Handbook of Federal Countries, 2002, p 453.

³⁰³ *Ibid*, p 453.

legislative power may trigger a dispute between the different levels of the government, especially between the national level and the Southern Sudan level.

Schedule (E) of the INC, stipulates that ‘if the power pertains to a national matter, requires a national standard, or is a matter which cannot be regulated by a single state, it shall be exercised by the National Government’. However, this provision is ambiguous, as there is no obvious standard for when ‘a matter’ ‘requires a national standards,’ or ‘to be exercised by a state or local government,’ or ‘is susceptible to the Southern Sudan regulation.’

These legal dilemmas can be addressed through clear constitutional provisions, as the case of the ICSS which states that ‘each state of the Southern Sudan shall have residual executive and legislative competence over matters within their borders that are not exclusive to the National Government or the Government of Southern Sudan. It has to be noted, however, that the significance of the residual powers reduces when the constitution enumerates the other powers in details. In this respect, the INC sets out detailed lists of exclusive national powers, exclusive powers for GoSS, exclusive state powers and concurrent legislative powers for all levels of government. As such, this detailed distribution of powers may render the assignment of residual powers relatively less significant.

Furthermore, the INC stipulates the general principles for interaction between the different levels of the government.³⁰⁴ Unique in this regard is that the division of the legislative and the executive competence is expressly based on ‘cooperative federalism’.³⁰⁵ For example, Art. 148(3) of the INC explicitly stipulates for cooperation on policing matters between the different levels of government,³⁰⁶ and Art. 26(1) of the INC provides that all levels of government cooperate and coordinate their functions.

³⁰⁴ Chapter II ‘Power-Sharing Power Protocol’ of the CPA

³⁰⁵ See Art. 26 of the INC; *Yash Ghai*, *Ethnicity and Autonomy: A Framework for Analysis*, in: *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-ethnic States*, Yash Ghai (eds), Cambridge: Cambridge University Press, 2000, p. 22.

³⁰⁶ Art. 148(3) of the INC states that ‘the police at national, southern Sudan and state levels, shall co-ordinate, co-operate and assist each other in the discharge of their functions, and to that end, shall recommend, through their respective authorities to the Presidency the establishment of these necessary mechanisms’.

More specifically, Schedule (B.19) of the INC, which deals with the delegation of powers from the State level or national level to Southern Sudan, is a basis in the INC for the cooperation between the different levels of government.³⁰⁷ For instance, schedule (B19) of the INC states that ‘any matter relating to an item referred to in schedule D that cannot be dealt with effectively by a single state and requires Government of Southern Sudan legislation ...’. Most significant among these principles is that the INC also permits two or more States to enter into an agreement for joint action to enhance the inter-state co-ordination and co-operation, as provided for in Art. 26 of the INC.³⁰⁸ The principle of cooperative government as contained in Art. 26 of the INC provides some guarantee to the jurisdiction of the State’s, as the States are required to respect each other’s autonomy.

3. Assessment of the Allocation of Legislative Powers under the INC

The INC does not use the label ‘federalism’ anywhere in the text of the INC, although INC has marked federal features. In that the INC allocates the resources and the powers to different levels of government as per Schedules (A-E). However, the INC Schedules give rise to a number of difficulties: First of all, the regulation of several substantive issues is granted to the national level as an exclusive national competence, to the State level as an exclusive State competence and at the same time to all levels of government, including the level of Southern Sudan, as concurrent power. For instance, telecommunication is listed in Schedule (A) as an exclusive power for the national level and again listed in Schedule (B) as exclusive power for the South Sudan level and listed for a third time in Schedule (D) as a concurrent power for all levels of government requires clarification. Secondly, the resolution of conflict in case of concurrent powers follows a number of criteria, as indicated above, that makes it almost impossible to determine which level’s norms will prevail in a case of a conflict between the different levels of government, thereby leading to legal uncertainty.

³⁰⁷ Schedule B.19 of the INC states that ‘any matter relating to an item referred to in schedule D that cannot be dealt with effectively by a single state and requires Government of Southern Sudan legislation or intervention including, but not limited to the following:- (1) Matters relating to businesses, trade licenses and conditions of operation; (2) Natural resources and forestry; (3) Town and rural planning; (4) Disputes arising from the management of interstate waters within Southern Sudan; (5) Firefighting and ambulance services; (6) GOSS reformatory institutions; (7) Firearms licenses within Southern Sudan; and (8) Government of Southern Sudan recreation and sports’

³⁰⁸ Art. 26(2) of the INC

Furthermore, the decentralized system of governance, as stipulated in the INC, allows for an extensive autonomy rights to the Southern Sudan level with complete control by the GoSS over the ten Southern Sudan States that fall within its jurisdiction. This is exemplified by the legislative powers of the GoSS that circumscribes the legislative powers of the Southern Sudan States, as pointed earlier. With the same token, the northern States fall within the jurisdiction of the national level which is dominated by NCP. This arrangement goes beyond the type of asymmetric federalism in that the Sudanese federalism arrangement seems closer to confederation.

The level of autonomy given to the South will most likely be demanded elsewhere in the country with similar distinctive historical, ethnic and cultural features. In the final analysis, one can describe the features of the Sudanese federalism, which places emphasis on the cooperation between the different levels of government, as ‘constitutionally asymmetric’ giving substantial legal statutes and prerogatives to the Southern Sudan level comparable with the rest of the States in Sudan. The important question is whether this way of allocation of the powers asymmetrically will result in a political settlement to the internal conflicts elsewhere in Sudan.

The Power Sharing Protocol and the Wealth Sharing Protocol provide for the principles of effective and fair administration of the country and decentralization of the decision-making. Some observers say that the governance system, under the INC, is satisfactory, but the failure lies with the lack of implementation of governance arrangement. In practice, however, lack of effective implementation of the existing governance system has manifested in violent conflict and exclusion in decision-making processes.³⁰⁹ For example, the high-level of decision-making entrusted to unelected presidential advisors and assistants. This is compounded with lack of transparent fiscal allocation mechanisms and lack of effective role of the Council of States.³¹⁰

Recent assessment conducted on federalism of the INC concludes that:

³⁰⁹ *Governance in the Sudan*: Options for Political Accommodation in the Republic of Sudan, Feb. 2014: Governance and Peacebuilding Series, Briefing Paper, No. 7, Conflict Dynamics International

³¹⁰ Ibid

- “An immature process of decentralization that failed to proceed to a robust devolution of authority to the states and localities and failed to rectify historical disparities and inequalities in development between regions.
- The administration consists of a series of local institutions with relatively unclear or overlapping authorities, often linked to the central Government in decision-making.
- Institutional structures, especially at state and local level, suffer structural and systemic problems including weak systems of planning and management and distorted delegation of authority.
- The progressively increasing number of localities that failed to perform their responsibilities of delivering basic services.
- Years of underfunding in the social sectors, compounded by conflict-related damage in many regions, have left key parts of the administration at state and local level underequipped to deliver core services.
- The limited ability of the administration to fill the kind of participatory planning, management and delivery role essential for peace building and a socially driven recovery and development processes”.³¹¹

Part III: Does the INC Governance System Represent A Paradigm Shift to address Root-Causes of Sudan North-South Conflict?

The question here is concerned with what way can the governance system brought by the INC can be seen as mitigating the causes of Sudan north-south conflict, and constituting a possible factor in sustaining peace in Sudan? Constitutional reform in post conflict societies is usually one big step towards national reconciliation, inter-group rehabilitation and the avoidance of the mistakes of the past.³¹² At the outset, it is useful to briefly outline the various approaches of constitutional design for governance system in divided societies that have been adopted with a view to managing ethnic, linguistic, religious and cultural differences.³¹³

The available literature on how the constitutional design can manage ethnic, linguistic, religious and cultural differences has produced two schools of thought.³¹⁴ These schools of thought are:

³¹¹ UNDP Sudan: Sudan Post 2015 National Consultation Report, July 2013, Khartoum, Sudan (on file with the author)

³¹² *Guther Baechler*, Conflict Transformation through State Reform. Berghof Research Center for Constructive Conflict Management Available at <http://www.berghof-handbook.net>.

³¹³ *Sujit Choudhry*, Constitutionalism in Divided Societies, *International Journal of Constitutional Review* 5(4), 2007, pp. (573-575)

³¹⁴ See *Autonomy and Ethnicity* (Yash Ghai ed., Cambridge University Press 2000); *Stephen Tierney*, *Constitutional Law and National Pluralism*, Oxford University Press 2004; *Donald Horowitz*, *Ethnic Groups in Conflict*, 2nd edition, California Press 2000.

‘*accommodationists*’ and ‘*intergrationists*.’ The former school of thought argues for the need to recognize and institutionalize differences, while the intergrationists propose a range of strategies that transcend and blur the differences including: the wording of the preambles of the constitutions, the choice of official language, the composition and the powers of the legislature, the executive, the judiciary, the electoral system, the relationship between religion and the State.³¹⁵

A third source explains the different approaches that aimed at managing ethnic conflicts, and which can be, according to *Osaghae*, classified into two broad groups: “interventionist” approach and “non-interventionist” approach. Interventionist approach is concerned with the situations in which the constitutional design attempts ‘(i) to give members of all groups fair and equitable access to public goods and privileges or (ii) suppress ethnic claims, restrict the arena of ethnic political participation, thereby perpetuating ethnic hierarchies and domination’.³¹⁶

On the other hand, the non-interventionist approach which usually involves bargaining between the State power-holders and different competing groups is typically distributive (involves the use of quota systems to determine the membership and composition of public-sector institutions); re-distributive (involves the creation of more states/regions and changes of the revenue allocation structures); and re-dressive (includes affirmative action and other policies designed in part to appease and protect minorities’.³¹⁷

In the view of what precedes, the following section will examine how the constitutional design, as per the INC, may transcend the differences that triggered Sudan north-south conflict, especially the relation between the State and religion, the recognition of ethnic and cultural rights and economic marginalization of the periphery of Sudan.

³¹⁵ *Sujit Choudhry*, *Constitutionalism in Divided Societies*, *International Journal of Constitutional Review* 5(4), 2007, pp. (573-575)

³¹⁶ *Eghosa E. Osaghae*, *Ethnicity, the State, and Constitutionalism in Africa: Preliminary Observations*, in: *Constitutionalism and Society in Africa*, Okon Akiba (eds), Ohio University, Ashgate Publishing Limited, 2004, UK, p. 99

³¹⁷ *Ibid*, p. 99

1. Fiscal Federalism: Allocation of Resources

The notion of “Fiscal Federalism” means that the wealth of the country has to be distributed between the different levels of government to enable all levels to fulfil their function.³¹⁸ In this regard, the Wealth Sharing Protocol of the INC provides for the decentralization of service delivery and financing responsibilities in order to enable the government at all levels to provide quality and responsive services to the people that exist across communities. Article (8.1) of South Kordofan and Blue Nile Protocol provides that “the national wealth shall be shared equitably between different levels of government so as to allow enough resources for each level of government to exercise its constitutional competencies”.

Further, the INC regulates legislative powers for raising revenue and collection of revenue for the national, South Sudan and the State levels. Art. 193 of the INC stipulates areas from where the national level,³¹⁹ South Sudan level³²⁰ and the State level³²¹ may raise revenue and collect taxes. The INC also provides for revenue sharing and transfer so as to reduce disparities and contribute to the financial requirement of all levels of government.³²² To that end, a National Reconstruction and Development Fund (NRDF) is created to develop war affected areas and the least developed areas in the Sudan with the aim of bringing them to the national average

³¹⁸ Philipp Dann et al, Max Planck Manual on Different Forms of Decentralization, 2nd edition, 2007,

³¹⁹ The National Level may raise revenues and collect taxes from the following sources: national personal income tax, corporate or business profit tax, custom duties and import taxes, sea-ports and airports revenue, service charges, oil revenues, national government enterprises and projects, grants and foreign financial assistance, value added tax or general sales tax or other retail taxes on goods and services, duties, loans, including borrowing from the Central Bank of Sudan and the public, any other tax as determined by law.

³²⁰ The Southern Sudan Level may raise revenues and collect taxes from the following sources: national revenue allocation to the GoSS and states from the National Revenue Fund as set out in Art. 197 INC, revenue from any of the sources listed as state revenue sources referred to in Art. 195 INC, oil revenues as set out in Art. 192 INC, taxes of Southern Sudan Government, which do not encroach on the exclusive taxing powers of the National Government, service charges of the GoSS, enterprises and projects of the GoSS, grants-in-aid and foreign financial assistance, taxes and levies on small and medium businesses, duties on goods that are deemed to be luxury consumer goods, personal income tax of Southern Sudan, loans and borrowing in accordance with Art. INC, any other taxes as may be determined by law (Art. 194 INC).

³²¹ The State level may raise revenue and collect taxes from the following sources: state land and property tax and royalties, service charges for state services, licences, state personal income tax, levies on tourism, state share of oil revenue as is set out in Art. 192 (5) INC, state government projects and national parks, stamp duties, agricultural taxes, grants-in-aid and foreign aid, duties, border trade charges or levies in accordance with national legislation, other state taxes, which do not encroach on National or Southern Sudan Government taxes, loans and borrowing in accordance with Art. 203 INC, any other tax as may be determined by law (Art. 195 INC)

³²² See generally, *George Anderson*, Fiscal Federalism: A Comparative Introduction, Oxford University Press, 2010.

standards and level of development. In allocating the funds to war affected areas, NRDF shall use the effects of war and level of development as the main criteria

Sharing of natural resources has been one of the sources of Sudan north-south conflict. As a means to address one of the root causes of that conflict, the INC has opted for equal broad sharing between the north and south Sudan with a special contribution going to the producing states. Art. 192 INC regulates the sharing of oil-revenues in that the extraction of natural resources, emanating from Southern Sudan shall balance the needs for national development and for the reconstruction of Southern Sudan. At least two percent of oil revenue shall be allocated to the oil producing states in proportion to the output produced in the state.³²³ After the payment to the Oil Revenue Stabilization Account and to the oil producing states, fifty percent of net oil revenue derived from oil producing wells in Southern Sudan shall be allocated to the GoSS, and the remaining fifty percent to the National Government and states in Northern Sudan.

Furthermore, the INC regulates sharing of non-oil revenues. As per Art. 196 INC, the National Government shall allocate fifty per cent of the national non-oil revenue collected in Southern Sudan, to the GoSS to partially meet the development costs during the interim period. A National Revenue Fund in which all revenues collected nationally for or by the National Government shall be pooled and which shall be administered by the National Treasury. Such fund shall embrace all accounts and sub-funds, into which monies due to the government are collected, reported or deposited. All the revenues and expenditures of the government shall be on-budget operations and made public.³²⁴

The INC also set up commission to recommend detail of revenue sharing. A Fiscal and Financial Allocation and Monitoring Commission (FFAMC) shall be established, to ensure transparency and fairness in regard to the allocation of nationally collected funds both to the GoSS and to the states. Each state will be represented on FFAMC. The FFAMC shall monitor and ensure that equalization grants from the National Revenue Fund are promptly transferred to

³²³ Max Planck Manual on Sudanese Constitutional Law: Part I: Structure and Principles of the INC, 2009 (on file with author)

³²⁴ Art. 197 INC, 2005

respective levels of government.³²⁵ In practice, the fiscal federalism as stipulated in the INC has failed to alleviate economic disparities between the national level and the state level.

A recent assessment of the implementation of INC fiscal federalism notes that:

- “Existence of several parallel institutions (funds and commissions) entrusted with transferring funds to the states coupled with many acts and decrees, resulting in conflict and confusion.
- A multiplicity of estimating and distributing criteria, formulas and indicators for transfers to the different states and a variety of types of transfers.
- Lack of accountability in the management of state finances, including a pervasive lack of transparency and corruption.
- The distribution of resources among the localities is particularly problematic in the absence of a clear formula for resources allocation and distribution.
- The mechanism of revenue collection/generation by the states and localities is under deep scrutiny.
- High fiscal imbalances and the corresponding relatively high share of federal transfers to states have resulted in high dependency of most states on central government transfers”.³²⁶

2. Recognition of the Right to Freedom of Religion under the INC³²⁷

The INC contains commitments to international human rights standards and enunciates specific rights addressing religious rights and prohibits discrimination on the basis of religion.³²⁸ Article 5 of the INC reflects the principle of toleration and non-discrimination on the basis of religion in which the sources of legislation are varied, including *Shari‘ah* law, popular consensus as well as the values and the customs of the people of Sudan.³²⁹ This provision is detailed further by allowing the legislature at State level, depending on the religion of the majority of the

³²⁵ FFAMC shall allocate current transfers to Southern Kordofan/Nuba Mountains, Blue Nile and other war-affected areas and least developed areas according to the following criteria (population; minimum expenditure responsibilities; human development index – social indicators; geographical areas; fiscal effort; and the effect of war factor)

³²⁶ UNDP Sudan: Sudan Views: Contribution to the post-2015: A Global Development Agenda. May 2013 (on file with the author)

³²⁷ This section of the Thesis “Recognition of the Cultural and Ethnic Rights under the INC” will be published as part of a book on “Rights of Religious Minorities in New Sudan, in: Constitutional Change after the Arab Spring”, Oxford University Press, forthcoming.

³²⁸ Noha Ibrahim, 2008, *the Sudanese Bill of Rights*. The International Journal of Human Rights, 12(4), 613-35.

³²⁹ Art. 5(3) of the INC states that: “Where national legislation is currently in operation or is to be enacted and its source is religion or custom, then a state, and subject to Article 26 (1) (a) herein in the case of Southern Sudan, the majority of whose residents do not practice such religion or customs may:- (a) either introduce legislation so as to allow practices or establish institutions, in that state consistent with their religion or customs, or (b) refer the law to the Council of States to be approved by a two-thirds majority of all the representatives or initiate national legislation which will provide for such necessary alternative institutions as may be appropriate”.

population, to opt out of religiously-inspired legislation. That is to say, in such a case, a State where the majority of residents do not practice a given religion or custom may introduce differing legislation that allows practices or establishes institutions in that State that are consistent with its own religion or customs.

Alternatively, the State may refer the religiously-inspired law back to the Council of the States. In the case that the law is referred back to the Council of States, the latter may either approve the law by a two-thirds majority of all representatives or initiate a national legislation which will provide for such necessary alternative institutions as may be appropriate.³³⁰ In practice, deferring religiously-based legislation to the Council of the States has not been utilized.³³¹ The INC, unlike the 1998 Constitution, does not include a provision indicating that any law that applies to the entire nation must comply with *Shari'ah* law. Most religious matters are regulated exclusively at State level.³³² Moreover, the State is empowered to ensure that family and inheritance matters are adjudicated by the laws that apply in the relevant religious and/or cultural communities (i.e. personal law).³³³

Furthermore, Article 6 of the INC respects the religious rights to worship and to establish and maintain places of worship. The freedom of creed and worship is enshrined under Article 38 of the INC which contains the scope of prohibited conduct and protected manifestations of religion. The INC includes explicit provisions that prohibit discriminatory practices on the basis of religion as expressly stated in Articles 31 and 44 that provide a guarantee against discrimination on the basis of religion in education and endorse equality before the law. However, the practical implementation of those articles remains unsatisfactory. For example, according to Sudanese law, Christians are to be given two hours to pray on Sundays. In practice, some employers do not comply. Public schools are in session on Sundays and Christian students

³³⁰ Art. 5(3) of the INC.

³³¹ In interview with Dr. Ghāzī Salāḥ Al-Dīn Atabānī, 4 October, 2012, Khartoum, Sudan.

³³² Par. 10, 18, 20 Schedule C 1 of the INC.

³³³ Par. 10 Schedule C 1 of the INC “all personal and family matters including marriage, divorce, inheritance, succession, and affiliation may be governed by the personal laws (including *Sharia* or other religious laws, customs, or tradition) of those concerned.

are not excused from classes. Instead, most Christians choose to worship on Friday, Saturday, or Sunday evening.³³⁴

3. Recognition of the Cultural and Ethnic Rights under the INC³³⁵

Art. 1(1) of the INC states that Sudan is a multi-cultural, multi-lingual, multi-racial, multi-ethnic multi-religious country where such diversities co-exist. The INC does not contain explicit definition of ethnic minorities. Yet, the INC on its face has a positive vision on the rights of ethnic groups, for instance, the INC recognizes the cultural and ethnic diversity of Sudan in that it contains general references prohibiting discrimination on the basis of ethnic differentiation.³³⁶ For instance, Article 47, entitled “Ethnic and Cultural Communities”, is aimed at allowing the members of ethnic and cultural communities to develop their particular cultures, to practice their beliefs, to use their languages and to observe their religions. To accommodate for the recognition and protection of the rights of different communities, the INC provides for a bicameral system, proportional representation and decentralized system of governance that vests a number of exclusive competences at the State level, while creating other concurrent and residual competences between State level and the national level.³³⁷

Furthermore, the INC makes specific commitments to the protection and the promotion of the indigenous languages and affirms that the indigenous languages ‘shall be respected, developed and promoted’.³³⁸ For this, the INC recognizes all indigenous languages of Sudan as national languages. Accordingly, recognition to all languages in Sudan is to concede equal ownership of the state and the issue of identity, which otherwise would be regulated by limitations on languages.³³⁹ Specifically, the INC makes Arabic and English are the official languages in the country. In addition to Arabic and English, the legislature of any sub-national level of

³³⁴ In Interview with Raja Nicola, September 2012, Khartoum, Sudan.

³³⁵ This section of the Thesis “Recognition of the Cultural and Ethnic Rights under the INC” will be published as part of a book on “Constitutional Change after the Arab Spring”, Oxford University Press, forthcoming.

³³⁶ Arts 38, 39, 40, 44 and 46 of the INC ‘The Bill of Rights’.

³³⁷ Art. 24 of the INC.

³³⁸ Art. 8 of the INC

³³⁹ *Donald Horowitz*, *Constitutional Design: Proposals Versus Processes*, in: *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy*, Andrew Reynolds (eds), 2004, Oxford: Oxford University Press, p. 22.

government may adopt any other national language as an additional official working language at its level.³⁴⁰

4. Mechanisms for Realization of Religious, Cultural and Ethnic Rights³⁴¹

The INC established a special commission to ensure that the rights of non-Muslims are protected and not subjected to the application of *Sharī'ah* law only in the national Capital, Khartoum, to accommodate for religious, social and cultural diversity and for the participation of the Southern Sudanese in national institutions. The aim of the Commission was also to uphold respect for religions, norms and beliefs and establish a spirit of tolerance and coexistence between different cultures in the national capital.³⁴² Furthermore, the INC mandates the establishment of mechanisms such as special courts and prosecutors to ensure all religions and beliefs are protected and enforced in Khartoum³⁴³ by the law enforcement agencies, which shall be adequately trained and made sensitive to the cultural, religious and social diversity in Khartoum.³⁴⁴

The Special Commission for the Protection of the Rights of Non-Muslim in Khartoum was established in 2007 and lasted for 4 years. Its members were mostly religious scholars, both Muslims and Christians,³⁴⁵ community leaders, experts on customary law and representatives from the Ministry of Justice, the Ministry of Interior and the Sudanese Judiciary. The Commission for non-Muslims, during its lifespan, was able to collect and arrange customs and traditions and to codify customary law of different non-Muslim communities.

The Commission recommended the revision of the Criminal Act of 1991 and the Public Order Act of 1996 with the aim of exempting non-Muslims from the imposition of *Sharī'ah* penalties. Some of the recommendations of the non-Muslim Commission included: reform of the curriculum of the Police to include issues related to the rights of non-Muslims, raising awareness on the customs and traditions of non-Muslims, collaboration with the traditional

³⁴⁰ Art. 8(4) of the INC.

³⁴¹ This section of the Thesis "Recognition of the Cultural and Ethnic Rights under the INC" will be published as part of a book on "Constitutional Change after the Arab Spring", Oxford University Press, forthcoming.

³⁴² Art. 155, Article 156 (c) and articles 157, 158 of the INC.

³⁴³ Art. 154 of the INC.

³⁴⁴ Art. 155 of the INC.

³⁴⁵ Art. 157 of the INC.

leaders and native administration for the implementation of customary law.³⁴⁶ Furthermore, the non-Muslim Commission provided a means to address issues involving non-Muslims arrested for violating *Shari'ah* law by advocating on behalf of non-Muslims with law enforcement agencies. It also issued regular reports and recommendations to the government. Also, the Commission intervened to halt decisions by the Supreme Court that carried *Shari'ah* law penalties against Christians that were later substituted by discretionary / *Ta'zir* penalties.³⁴⁷

In practice, however, the provisions of the INC that related to the protection of the rights of non-Muslims in the Capital remained without implementation throughout the interim period (2005-2011). There were shortcomings in the implementation of the recommendations of the Commission for non-Muslims, especially those related to law reform. This was because the decisions of the Commission were regarded as mostly possessing a recommendatory nature.

The Commission was dismantled in 2011 following the secession of the South Sudan, against the desire of the Christian community that made requests to the authorities for its retention.³⁴⁸ Some say that the dismantling of the Commission is not an indicator that non-Muslims will be discriminated after the secession of South Sudan and that the protection of their rights depends on the implementation of the constitutional provisions that guarantee the rights of non-Muslims.³⁴⁹

5. Federalism as a Conflict Management Device in the Context of Fragmented Societies

Societies in their attempts to end ethnic conflicts have adopted a myriad of mechanisms to accommodate ethnic claims through, *inter alia*, affirmative policies, special forms of representation, power-sharing and the integration of minorities.³⁵⁰ Introducing a federal system to regulate center-periphery relation in divided societies, in one form or the other, has several

³⁴⁶ Workshop “*Requirements of Attractive Unity Through Cooperation and Collaboration*”, Mohamed Jaafar, a paper presented in a workshop for the Special Commission for the Rights of non-Muslims (On the file with the author)

³⁴⁷ In interview with Raja Nikola, Ministry of Justice, 9 September 2012, Khartoum, Sudan.

³⁴⁸ Ibid

³⁴⁹ In Interview with Dr. Ghāzī Ṣalāḥ Al-Dīn Atabānī, 4 October 2012, Khartoum, Sudan.

³⁵⁰ *Yash Ghai*, Ethnicity and Autonomy: A Framework for Analysis, in: *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-ethnic States*, Yash Ghai (eds), Cambridge University Press, 2000, p. 1.

advantages. On one hand, federalism may seem an ideal mechanism in maintaining the national unity and, on other hand; it gives the states/regions control over issues of particular concern to them, such as religion, language, education, etc.³⁵¹ Accordingly, in divided societies along ethnic, religious and cultural lines, utilizing of federalism constitutes an attractive device for preventing post-conflict societies from relapsing into conflict through the accommodation of ethnic diversity.³⁵²

Some scholars, however, have argued that federalism neither provides for a solution to achieve conflict resolution nor a guarantee for the protection of minority rights.³⁵³ A case in point is Nigeria, which its ‘mushrooming of states from 3 to 36 has not necessarily contributed to more stability and a better sense of security among cultural groups’.³⁵⁴ The experience of Nigeria, for example, is far from peaceful. Others argue that the federalism increases the chances of inter-communal conflict. This is so because federalism reinforces regionally based ethnic identities,³⁵⁵ producing legislation that discriminates against certain ethnic or religious groups in a country,³⁵⁶ and supplying groups at the regional level of government with the resources to engage in ethnic conflict and secessionism.³⁵⁷

For example, one analysis argues that ‘the use of federalism as an instrument for accommodating minorities would lead to state break-up and the abuse of power by ethnocentric minorities’.³⁵⁸ In addition, the opportunity to reinforce ethnic identities might be seen by some

³⁵¹ David Wippman, Practical and Legal Constraints on Internal Power Sharing: in *International Law and Ethnic Conflict*, David Wippman (ed), Cornell University Press, Ithaca and London, 1998, 211(2121).

³⁵² Rohan Edrisiaha et al, Adopting Federalism: Sir Lanka and Sudan, p. 424; David Turton, *Ethnic Federalism: The Ethiopian Experience in Comparative Perspective*, David Turton (ed), James Currey Ltd, 2006, p. 1

³⁵³ Gunter Bachler, *Conflict Transformation through State Reform*: Berghof Research Center for Constructive Conflict Management. Available at: <http://www.bergho-handbook.net>.

³⁵⁴ De Villiers, *Comparative Studies of Federalism*, p. 214.

³⁵⁵ Robert Hardgrave, India: The Dilemma of Diversity, in: *Nationalism, Ethnic Conflict and Democracy*, Larry Diamond and Marc F. Plattner, Baltimore: John Hopkins University Press, 1994, pp. 71-85

³⁵⁶ See Donald Horowitz, *A Democratic South Africa?: Constitutional Engineering in a Divided Society*, Berkeley: University of California Press, 1991; Rotimi Suberu, *The Travails of Federalism in Nigeria*, in: *Nationalism, Ethnic Conflict and Democracy*, Larry Diamond and Marc F. Plattner, , Baltimore: Johns Hopkins University Press, 1994, pp. 56-70.

³⁵⁷ See Donald Horowitz, *A Democratic South Africa?: Constitutional Engineering in a Divided Society*, Berkeley: University of California Press, 1991; Jack Snyder, *From Voting to Violence: Democratization and Nationalist Conflict*. New York: W.W. Norton, 2000.

³⁵⁸ Eric Nordlinger, *Conflict Regulation in Divided Societies*, 1972, pp. 31-31. As quoted in John McGarry, *Federal Political Systems and Accommodation of National Minorities*, in Griffiths and Nerenberg, *Handbook of Federal Countries*, Forum of Federations, McGill-Queen’s University Press, 2002, p. 429.

ethnic groups as only an intermediate step toward gaining their independence. On the other hand, it has been acknowledged that federalism is, indeed, a mechanism to manage conflict as it allows the different regions to have control over their own matters, and, at the same time, it provides for the participation of the regions at the national level. It therefore creates a constitutional framework to forge unity, while protects the self-determination of the regions to autonomous decision-making.³⁵⁹

The ability of federalism to adjust to the local requirements is widely recognized and the stability it has introduced into precious situations is generally acknowledged.³⁶⁰ Scholars who have studied a wide range of federal systems have generally found that federalism has contributed significantly to the decrease in the recurrent of rebellion and ethnic violence.³⁶¹ For example, one of *Ted Gurr's* main findings, after a massive world-wide study of ethnic hot-spots, is that federal systems have been an effective remedy for conflict in a significant number of cases.³⁶²

For instance, Sudan's decision to give autonomy to the Southern Sudan in 1972 ended the north-south conflict for 11 years, and its recent decision to restore this autonomy reflects the usefulness of some sort of federalism in ending violent conflicts. In addition, minorities in federal systems were found less likely to engage in violence, as the structure of federal systems usually premised on providing for more levels of government and thus allowing for the voice of different segments of the society to participate in the governance of the country.

Yet, according to *Brancati*, the effectiveness of federalism in quelling the ethnic conflict depends more or less on its structures and its effect on the sub-units.³⁶³ The majority of studies claiming that federalism/decentralization decreases ethnic conflict and secessionism are based

³⁵⁹ *De Villiers*, *Comparative Studies of Federalism*, p. 220.

³⁶⁰ *Ibid*, p. 219.

³⁶¹ See *Donald Horowitz*, *A Democratic South Africa?: Constitutional Engineering in a Divided Society*, Berkeley, 1991.

³⁶² *T. Gurr*, *People versus States*, Washington DC: United States Institute for Peace, 2000, p. 208.

³⁶³ *Dawn Brancati*, *Decentralization: Fueling the Fire or Dampening the Flames of Ethnic Conflict and Secessionism?*, in: *International Organization* (2006), p. 661.

on successful examples of federalism/decentralization,³⁶⁴ while the majority of studies claiming that decentralization increases ethnic conflict and secessionism are based on failed examples of decentralization, especially in East Central Europe.³⁶⁵ In the final analysis, federation can provide the mechanism for resolving basic political and social conflicts only if the political leaders have first themselves embraced federalism as a goal good in itself and have persuaded the populace to accept an ideology of union not because of short-term benefits. Federations are apt to fail when they are justified to the participants only in terms of immediately realizable political advantages.³⁶⁶

6. The Case of Sudan: Would Federalism Sustain Peace in Sudan?

In accordance with above survey as concerns the advantages and disadvantages of federal design, federalism is supposed to reduce ethnic conflict through bringing the government closer to the people, allowing people an opportunity to participate in the decision-making process at the national level, thereby giving the sub-units control over their own affairs (social, economic and political).³⁶⁷ This, in turn, will induce ethnic groups to refrain from fighting each other over what they perceive as injustice.³⁶⁸

As to Sudan's scenario, the southerners wished for their own self-rule of the Southern Sudan, and, at the same time, for participation at the national level. Now, the CPA Power Sharing Protocol has given effect to the wishes of the southerners. However, one could argue that Addis Ababa Agreement was conceived in the spirit of federalism that gave the Southern Sudan a self-rule, but did not prevent a relapse into conflict.

³⁶⁴ *Arend Lijphart*, The Puzzle of Indian Democracy: A Consociational Interpretation, *American Political Science Review*, 90(2), 1996, pp. 258-268.

³⁶⁵ See *Valerie Bunce*, *Subversive Institutions: The Design and the Destruction of Socialism and the State*. New York: Cambridge University Press, 1999.

³⁶⁶ *Thomas M. Franck*, *Why Federations Fail? an inquiry into the requisites for successful federalism*, Edited by Thomas M. Franck. (New York: New York University Press, 1968, p, 182.

³⁶⁷ See *Ted Robert Gurr*, *Peoples Versus States: Minorities at Risk in the New Century*, Washington, D.C.: United States Institute of Peace Press, 2000, See generally, *Chaim Kaufman*, Possible and Impossible Solution to Ethnic Civil Wars, *International Security* 20(4), 1996, pp. 133-75.

³⁶⁸ *Dawn Brancati*, Decentralization: Fueling the Fire or Dampening the Flames of Ethnic Conflict and Secessionism? *International Organization* 60, Summer 2006, pp.651-685; See *John McGarry*, Federal Political Systems and the Accommodation of National Minorities, in: Ann Griffiths (eds), *Handbook of Federal Countries*, 2002, Forum of Federations, McGill-Queen's University Press, pp. 416-40.

Accordingly, on the basis of Addis Agreement, the south enjoyed a 10-year period of relative peace within a single Sudan. As discussed earlier, Addis Ababa Agreement failed to sustain peace between the north and the south due to inherent ambiguity in the provisions that dealt with the distribution of the powers between the national level and the Southern Sudan level which did not meet the requirements of true federal structure. Now, the governance system, under the INC, reflects a true federal system which devolves the executive and the legislative powers to the State level, including substantial powers to the Southern Sudan level. Thus, the question here is whether the present system of governance will constitute an appropriate tool in preserving peace between the north and the south. Could political accommodation be found for the south in one united Sudan in a form of a federal system?

As pointed out, the adoption of a federal system in itself does not put an end to violent communal conflict. However, the relatively low incidence of inter-communal violence in federal state leads one to conclude that federalism generally ameliorates conflict in divided societies, as federalism, by definition, allows regions to share power and resources with the central government.³⁶⁹ However, as *Ghai* puts it, ‘whether the political recognition of diversity is beneficial depends on the context, the preferences and aspirations of the various communities, and the forms that political recognition it takes’.³⁷⁰

Conditions that may improve the chance of federal structure to alleviate conflicts, are as summarized by *McGarry* ‘some sense of allegiance to the whole state as well as to its minorities, and this condition is only likely to exist if the majority community also accepts that their state is a multi-national state, and that the survival of the minority national community should be supported’.³⁷¹ The lack of environment conducive to nurture these conditions may affect the federal structure in achieving its mission in ending conflicts.

In the case of Sudan, the constitutional asymmetry in the distribution of the powers and resources between the national level and the Southern Sudan level may well represent a means

³⁶⁹ *Nancy Bermeo*, Position Paper for the Working Group on Federalism, Conflict Prevention and Settlement. Available at: <http://www.federalism2005.be/home/attachment/i/729>.

³⁷⁰ *Yash Ghai*, *Federalism and Autonomy*, p. 144.

³⁷¹ *John McGarry*, *Federal Political Systems and National Minorities*, p. 453/7.

of accommodating the demands of the Southern Sudan on the basis of the past injustices, and, at the same time, will allow for preserving and promoting the distinct identities of the citizens of the Southern Sudan, and hopefully may improve the inter-ethnic relation.

While the current system, by and large, satisfies the demands of the Southern Sudan, there is a doubt as to whether the governance system under the INC is also capable of holding together the different ethnic and cultural groups in the different regions in Sudan. This is so because the conclusion of the other peace accords such as the Darfur Peace Agreement³⁷² and Eastern Sudan Peace Agreement³⁷³ raises the question as to how to preserve the formula of the power-sharing protocol balance of the CPA.

This may necessitate amending the INC so as to accommodate the provisions of those two peace accords. Getting these changes accepted by all sides may not be easy, however. For some observers, the devolution of powers is increasingly seen as a compromise on the road towards secession rather than a permanent solution to the problems of national accommodation of Sudan. The CPA grants the Southern Sudan extensive political accommodation, and as such, one may expect that such accommodation may nurture relations between the north and the south; however, hardliners within the south argue that differences between the north and the south are so profound that there is no point in trying to manage the conflict by a federal structure: only secession will do. The Southern Sudan seems to accept the federal structure as preferable option to the war, but they see it as best a transitional step to secession.

Minority national communities, opposing the CPA distribution of power, they demand recognition and greater symmetry among Sudan's regions. As such, federalism as stipulated in the CPA may increase ethnic conflict because it reinforces ethnic identities by recognizing certain ethnic groups (the Southern Sudan). These groups see the CPA as favoring the Southern Sudan over other States across Sudan. The current structure may not adequately deal with the inequalities and differences that exist within the regions in Sudan. Yet, the composition of the Council of the States, as a desirable institutional element of federalism, may become a solution

³⁷² Darfur Peace Agreement signed in an attempt to end the conflict in Darfur in 2006.

³⁷³ Eastern Sudan Peace Agreement signed to end the conflict in East Sudan in 2006.

for problems of fair representation and inclusion of the States in the national decision-making institutions.

While the structure of the current system may constitute a conducive environment for achieving peace in Sudan, nevertheless there are a number of fragilities to the Sudanese state, as noted by the Norwegian Institute of International Affairs, which is piloting a research to assess the principles for good international engagement in fragile state and situations. According to the Norwegian Institute, Sudan lacks democratic institutions, unequal distribution of development and the benefits of the oil revenue throughout the country. This is coupled with a number of insurgencies that weaken the state to maintain peace and order. These insurgencies together with the policy of arming militias influence the implementation of the CPA and make it vulnerable.³⁷⁴

³⁷⁴ Anita Haslie et al, International Engagement in Sudan after the CPA: Report on the piloting of OECD/DAC's 'Principles for Good International Engagement in Fragile States' for the Case of Sudan, Norwegian Institute for International Affairs, 2007.

Chapter Four: The Legal Structure of Sudan under the INC

Part I: Overview of the Sudanese Legal System

The initial positions of the parties to Sudan north-south conflict were, on one hand, the aim of an Islamic State based on *Sharia* law for the whole country, and, on the other hand, the claim for a secular State as advocated by the SPLM. The provisions of the CPA reconcile these two positions through the introduction of a dual legal system by introducing a *Sharia*/Secular legal system in Sudan to optimize the possibilities for safeguarding the individual rights by enshrining a comprehensive Bill of Rights that incorporates all human rights treaties that Sudan has ratified.

Accordingly, Islamic law will be applicable in the north Sudan, in which *Sharia* law will be one of the sources of the legislation, while the Southern Sudan will have a secular system in which the sources of the legislation will be “the values and customs of the people”. For a proper understanding of the present legal system of Sudan, and, therefore, an assessment of the changes that have been introduced by the INC in to the Sudanese legal system, some general remarks on the nature of the Sudanese legal system before the adoption of the INC seem appropriate.

1. A Brief History of the Sudanese Legal System- Pre-Independence Era

Since colonial days, Sudan had a legal system which reflected the pluralist and diverse nature of the Sudanese society – that is, the legal system was one in which the formal and informal legal systems coexisted and interacted (Islamic law, customary law and statutory law).

The statutory law was introduced during the British administration, and which was based on English common law. In particular, in the north Sudan, the common law governed the relationship arising from the complexities of modern commercial and industrial society,³⁷⁵ while Islamic law and customary law regulated personal matters. A system of informal justice was also established to apply customary laws, as most of the northern Sudan observed customary practices that were different from Orthodox *Sharia* law. The legal system of Sudan is a mixture

³⁷⁵ *Natale O. Akolawin*, ‘Islamic and Customary Law in the Sudan: Problems of Today and Tomorrow’, in Yusuf Fadl Hassan (ed.), *Sudan in Africa*, Khartoum: Khartoum University Press, 1971, p. 279.

of common law inherited from the British colonial times, Islamic law, customary law and Egyptian law.³⁷⁶ According to the available literature, one can say that the Sudanese legal system passed through four phases before coming to the existing structure. These phases are as follows:

- (a) the period of the *Funj* and *Fur* Sultanates;
- (b) the period of the *Turkiyya*;
- (c) the period of *Mahdiyya*; and
- (d) the period of Anglo-Egyptian

a. The Period of the Funj and Fur Sultanates:

The Funj Sultanate was founded, in 1504, when the Christian Kingdoms of *Soba and Dongola* of Sudan were taken over by a group of Muslim tribes from Arabian Peninsula. The Muslim tribes subsequently established the *Funj* Sultanates, and, in the year 1504, the first Islamic monarchy was established in Sudan by *Funj* Sultans. During the period of *Funj* Sultanate different Islamic jurisprudence were advocated and practised.³⁷⁷ Many tribes and kingdoms in Sudan were following Islamic laws based on *Maliki* Islamic jurisprudence which recognized and built on local customs and norms.³⁷⁸ In a nutshell, the law, which was applied during the *Funj* Sultanate, was a mixture of Islamic law, customary law and other forms of superstition practices.³⁷⁹ Judges were appointed by the Sultan as heads of the court to administer justice.³⁸⁰ In the *Fur* Sultanate,³⁸¹ (in West of Sudan) Sharia and customary law co-existed and administered by Chiefs, Qadis and elderly. Matters of inheritance and marriage were regulated by Sharia law.³⁸² Customary law was applied across the remaining territory of Sudan, in

³⁷⁶ *Abdelsalam Hassan Abdelsalam and Amin M. Medani*, Criminal Law Reform and human rights in African and Muslim Countries with Particular Reference to Sudan, in *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan*, edited by Lutz Oette, (Ashgate, Farnham, 2011), p. 33.

³⁷⁷ A person knowledgeable in Islamic sciences.

³⁷⁸ *Mark Fathi Massaud*, Law's Fragile State: Colonial, Authoritarian and Humanitarian Legacies in Sudan, p. 51, Cambridge University Press, 2013

³⁷⁹ *Zaki Mustafa*, p. 33-34.

³⁸⁰ *El Bushra Mohamed El Amin*, The Criminal Justice System of the Republic of Sudan, in: *The Protection of Human Rights in African Criminal Procedures*, M. Cherif Bassiouni & Ziyad Motala (eds.) Martinus Nijhoff Publishers, London, 1995, p. 228.

³⁸¹ *Fur* Sultanate was annexed by the British to Sudan in 1916.

³⁸² *Abdelsalam Hassan and Medani*, Criminal Law Reform and human rights in African and Muslim Countries with Particular Reference to Sudan, in *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan*, edited by Lutz Oette, (Ashgate, Farnham, 2011), p. 38-39.

particular South Sudan, where, for example, the legal system is based on “unity, solidarity, and harmony”³⁸³

b. The Period of the Turkiyy

In the 19th century, the Turk-Egyptian rulers conquered Sudan under the so-called *Turkiyy*, and applied *Sharia* law, and, in some cases, the Egyptian military and civil codes were also applied.³⁸⁴ Turk-Egyptian applied Turkish law (a mixture of *Sharia* law and customary law) in all criminal and civil disputes other than those concerned with personal status and inheritance, as the latter were subject to *Sharia* law.³⁸⁵ The Turk-Egyptian rulers were able to replace Maliki customs in Sudan by imposing the *Hanafi* School of Islamic Law.³⁸⁶ The Governor in Khartoum appointed the judges in the name of the *Khedive* of Egypt to settle disputes according to the *Hanafi* School of Islamic jurisprudence.³⁸⁷ The Turk-Egyptian rulers reversed the policy of the sultans of *Funj* Sultanate (by applying a mixture of *Sharia* law and customary law) and the administration of justice was entrusted to Egyptian personnel.³⁸⁸ According to Zaki, ‘the [administration of justice by] Egyptian Government was associated with excessive taxation, cruel and inhuman means for collecting them, oppression, injustice and corruption’.³⁸⁹ During the *Turkiyy*, the administration of justice was highly centralised.³⁹⁰ According to Zaki, ‘a lot of attention [at the time] was paid to matters of form and procedure while little attention was paid to the substantive issues’.³⁹¹

³⁸³ Francis Deng, Customary Law in the Modern World: The Crossfire of Sudan’s War of Identities. London and New York: Routledge, 2010, p16-17

³⁸⁴ Zaki Mustafa The Common Law in the Sudan, p. 37.

³⁸⁵ Egon Guttman, The Reception of the Common Law in the Sudan, 6(1957), International Comparative Law Quarterly, 401(401)

³⁸⁶ Mark Fathi Massaud, Law’s Fragile State: Colonial, Authoritarian and Humanitarian Legacies in Sudan, p. 52, Cambridge University Press, 2013.

³⁸⁷ M. Khalil, the Legal System of the Sudan, 20(1971), International Comparative Law Quarterly, 624(627).

³⁸⁸ Zaki Mustafa, The Common Law in the Sudan p. 35

³⁸⁹ Ibid, p. 35.

³⁹⁰ The court system was organized on the following hierarchy: each district had a local council, *majlis mahali*, consisted of a president and eight members that constituted a court of first instance. Each province had a province council and a *mufti*. The province *Qadi* presided over the province council but his judgments were subject to confirmation by the *mufti* of the province. The province council functioned both as an appellate court and as a court of original jurisdiction. There were also *majlis* (localities) in Khartoum and consisted of a *Qadi* and notables.³⁹⁰ This was an appellate body, whose decisions had to be approved by the *Mufti* of Sudan and thereafter submitted to the Governor-General who had to communicate the same to *majlis al Ahkam* in Cairo for confirmation.

³⁹¹ Zaki Mustafa, The Common Law in the Sudan, p. 38.

c. The Period of Mahdiyya

In 1880's Sudan was seized with a revolution led by *Mohamed Ahmed Al-Mahad*. In 1883, *Al-Mahadi* ended a 60-year of Turko-Egyptian rule. During *Al-Mahdi* era, justice was administered upon the basis of the strict Code of Islam as set out in the Koran and the *Sunna*.³⁹² Judges were appointed by the Mahdi to settle disputes according to the word of God and the tradition of the Prophet Mohammed. The legislation, especially penal laws were harsh and server, for instance, smoking was to be punishable by 27 lashes, confiscation and destruction of the tobacco, whereas refusal to perform the prescribed prayers was to be punished by 80 lashes, seven days of imprisonment, and confiscation of property.³⁹³ *Al-Mahdi* also compelled non-Muslims to embrace Islam and, as proof of their conversion, they were required to marry more than one wife!³⁹⁴ *Al-Mahdi* was the supreme head of the judicial structure but his power to hear and determine cases was delegated. The *Mahdi*'s proclamation guided his commanders and judicial deputies in matters of criminal and civil cases.³⁹⁵

Al-Mahdi directives to his deputies prescribed the methods of legal procedure and the rule of evidence.³⁹⁶ The administration of justice under the rule of al-Mahdi was combined with the executive as the judges were appointed by the executive.³⁹⁷ The law which the courts purported to apply was Islamic law as set out in the Koran and the *Sunna* and the circulars issued by the Mahdi and his successor (the *Khalifa*). According to historians, the administration of justice during the *Mahdiyya* was associated in the minds of the Sudanese with oppression, excessive

³⁹² *Zaki Mustafa*, *The Common Law in the Sudan*, p. 39.

³⁹³ *Ibid*, p. 39.

³⁹⁴ *Ibid*, p. 39-40.

³⁹⁵ There was a *qadi al-Islam*, province *qadis* and district *qadis*. During Al-Mahdi era, the court structure became more complex with special courts being set up for the determination of claims for the determination of the minor disputes or offences arising in the market (*bayt al-mal*). A number of courts were set-up to settle claims between and against the soldiers and for the investigation and determination of claims of complaints against the governors, princes, commanders of the army and the ruling class in general. The latter court was known as (*Mahkamat Radd al-Mazalim*).

³⁹⁶ *El Bushra Mohamed El Amin*, *The Criminal Justice System of the Republic of Sudan*, in: *The Protection of Human Rights in African Criminal Procedures*, M. Cherif Bassiouni & Ziyad Motala (eds.) Martinus Nijhoff Publishers, London, 1995, p. 228.

³⁹⁷ *Zaki Mustafa*, *The Common Law in the Sudan*, p. 41.

cruelty and arbitrary government.³⁹⁸ In fact, many Sudanese and foreign residents fled to Egypt and elsewhere.³⁹⁹

d. The Anglo-Egyptian Rule

After the overthrow of al-Mahdi State by the Anglo-Egyptian armies in 1898, martial law was proclaimed by the British administration.⁴⁰⁰ When the British dominion began over Sudan, there already existed *Sharia* courts that administered *Sharia* law. The British administration enacted a penal code, a code of criminal procedure, a code of civil procedure and *Mohammedan* Law Courts for personal law of Muslims which were presided by Grand *Kadi*.⁴⁰¹ The criminal law was secular and administered by criminal courts.⁴⁰² *Sharia* law governed personal matters such as inheritance and marriage, and customary law was administered outside the urban centre.⁴⁰³ The application of English Common Law did not exclude the application of Egyptian, French or any other law when the result of applying the English Law was repugnant to the idea of justice, equity and good conscience.⁴⁰⁴ The penal and criminal procedure codes were introduced in 1898 and constituted the first codification of criminal laws in modern Sudan. The penal code was derived from India and adapted to suit the needs of Sudan.⁴⁰⁵ The penal and criminal procedure codes were amended in 1925 and remained in force until 1970. The application of the legal system by the judges took into consideration the social elements of Sudan's culture and customs.⁴⁰⁶

Under the Anglo-Egyptian rule, all the legislative, the executive and the judicial powers were consolidated into the hands of the Governor-General of Sudan (the executive branch of the

³⁹⁸ *Zaki Mustafa*, *The Common Law in the Sudan*, p. 47.

³⁹⁹ *Mark Fathi Massaud*, *Law's Fragile State: Colonial, Authoritarian and Humanitarian Legacies in Sudan*, p. 52, Cambridge University Press, 2013

⁴⁰⁰ *Zaki Mustafa*, *The Common Law in the Sudan*, p. 42.

⁴⁰¹ *Egon Guttman*, *The Reception of The Common Law in the Sudan*, p.405.

⁴⁰² *Fluehr-Lobban, C.* *Islamic Law and Society in the Sudan*, 1st edition, London: Frank Cass, 1987, p. 30

⁴⁰³ *Francis Deng*, *Customary Law in the Modern World: The Crossfire of Sudan's War of Identities*. London and New York: Routledge, 2010, p. 30.

⁴⁰⁴ *Egon Guttman*, *The Reception of The Common Law in the Sudan*, *The International and Comparative Law Quarterly*, 6(3), 401-17, p. 405.

⁴⁰⁵ *Ibid*, p. 405.

⁴⁰⁶ *Abdelsalam Hassan and Median*, *Criminal Law Reform and human rights in African and Muslim Countries with Particular Reference to Sudan*, in *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan*, edited by Lutz Oette, (Ashgate, Farnham, 2011), p. 42.

government).⁴⁰⁷ At the beginning of the Anglo-Egyptian rule, the administration of justice was part of the functions of the administrator- that is, the judges were appointed by, and derived their powers from the Governor of the province.⁴⁰⁸ Later, the judiciary was made independent and free from interference by any organ of the government. Furthermore, the British administration created an extensive legislative rules and procedures and reformed the legal system of criminal and civil justice by adopting substantive and procedural laws. The most important features of this legal system was its dual character, which was manifested in the existence of two divisions, the *Sharia'a* law division and the Civil law division each comprising its own set of courts which exercised independent jurisdiction and applied different jurisprudence.

The modern legal system in Sudan was set up by the British administration. In 1953, the legislative power was rested in an elected Parliament which was composed only of Sudanese.⁴⁰⁹ The criminal law and criminal procedure codes closely resembled their Indian counterparts, the legislation dealing with the commercial matters were closely modeled after the corresponding English Acts then in force. The Civil Code was an amalgam of Indian civil procedures and rules and English common law.⁴¹⁰

In 1971, a new civil code was enacted to replace the 'colonial laws' which were in force since 1898. The new civil code was based on Socialist laws,⁴¹¹ similar to those applicable in Egypt and Syria.⁴¹² It should be noted, however, that the English common law provided Sudan with its main modern source of law is still intact. The Sudanese legal system, though now described as Islamic in the north, is in fact overwhelmingly still based on the English common law system. For instance, in the area of commercial law, such laws as the Companies Act, the Bankruptcy Act, and the Business Exchange Act, are still based on the English common law system. In the areas of Law of Contracts, the Law of Torts and the Law of Agency, the relevant legislation,

⁴⁰⁷ Art. 3 & 4 of the Anglo-Egyptian Agreement of 1899.

⁴⁰⁸ *Egon Guttman*, The Reception of The Common Law in the Sudan, *The International and Comparative Law Quarterly*, 6(3), 401-17, p. 405.

⁴⁰⁹ *Egon Guttman*, The Reception of The Common Law in the Sudan, *The International and Comparative Law Quarterly*, 6(3), 401-17, p.413.

⁴¹⁰ *M. Khalil*, the Legal System of the Sudan, p.643.

⁴¹¹ *Ibid*, p.643.

⁴¹² *Ibid*, p. 643.

including the Contract Act, Sale of Goods Act, and the Agency Act, are based on the English common law, and are supposedly still applicable.

2. The Development of the Sudanese Constitutional Law 1943-1998

Shortly before the independence of Sudan, a legal procedure for self-determination of Sudan was prepared, the Self-Government Statute of 1953, which laid the foundation for the governance of Sudan after the independence. Subsequently, a legislative assembly was established – a bicameral parliament. The Self-Government Statute of 1953 could be regarded as the first constitutional document in the modern history of Sudan. Chapter 2 of the Self-Government Statute entitled ‘Fundamental Rights’ provided a list of civil rights.⁴¹³ According to Robertson, ‘the Sudan Self-Government Statute of 1953 contained the first bill of rights written in a territory under British dominion’.⁴¹⁴ The Self-Government Statute made the judiciary the guardian of its rules and gave it jurisdiction to hear and decide any matter involving the interpretation of the Statute or the enforcement of the rights and freedoms guaranteed by Chapter 2.⁴¹⁵ The fundamental rights and freedoms guaranteed by the Self-Government Statute were accompanied by procedures to ensure that the rights were respected in practice.⁴¹⁶

When Sudan gained its independence, in 1956, no constitution was in place, and on the basis of the Self-Government Statute of 1953, a Transitional Constitution was drafted.⁴¹⁷ The main features of the Transitional Constitution of 1956 of Sudan were: the religious plurality of Sudan was respected; the diversity of Sudan was recognized by forming a Presidency Council which represented all peoples of Sudan, and, fundamental rights and freedoms were guaranteed.⁴¹⁸ At the same time, a constitution-making process was ensued by an elected constituent Assembly to

⁴¹³ Such as for the right to freedom and equality (Art. 5), freedom from confiscation of property and arrest (Art. 6), freedom of religion, opinion, and association (Art. 7), the supremacy of the rule of law (Art. 8), the independence of the judiciary (Art. 9), and the right to a constitutional remedy (Art. 10).

⁴¹⁴ See generally, *James Robertson*, *Transition in Africa: from Direct Rule to Independence*, London: Hurst & Co, 1974.

⁴¹⁵ Art. 82 of the Self-Government Statute of 1953.

⁴¹⁶ Art. 4 of the Civil Justice Ordinance of 1954

⁴¹⁷ *Ilias Bantekas et al*, *Reconciliation of Islamic Law with Constitutionalism*, *African Journal of International and Comparative Law*, Vol. 12(2000), p.535.

⁴¹⁸ *Balghis Badri*, *A Critical Analysis of the Evolution of Constitutions in Sudan*, a research funded by the Micro-Marco Peace Project in Sudan, supported by CMI-Norway in collaboration with Ahfad and Khartoum universities, 2009-20120 (on file with author)

draft a permanent constitution. However, the first military coup of General *Abboud*, in 1958 took place before the draft constitution could be enacted.⁴¹⁹

General *Abboud* proclaimed marital law,⁴²⁰ the Defence of Sudan Act of 1958, under which Sudan was governed until 1964. General *Abboud* dissolved political parties and said that the army took power to ‘ensure political stability’ and to stop any ‘more clamouring for federalism.’⁴²¹ *Abboud* initiated a constitution-making process, but, in 1964, the military regime was overthrown. Following the October 1964 revolution, the Transitional Constitution of 1956 was amended as 1964 Transitional Constitution and reiterated the fundamental rights recognized by Transitional Constitution of 1956, legalized the opposition parties and provided for an independent judiciary.⁴²²

In 1966, a National Constitutional Committee was formed to draft a permanent constitution. The constitution-making process in 1965-1968 resulted in a draft constitution, which proposed: a) Islam as the official religion of the state; b) Arabic as the official language of the country; c) *Sharia*’s law as the basic source of the state laws; and d) the revision of all laws to conform to *Sharia* Law. But, another coup d’état led by *Nimeiri* prevented the draft constitution, of 1968, from being enacted.⁴²³

Nimeiri regime enacted its own constitution, the Permanent Constitution of 1973, which contained a comprehensive list of fundamental rights and freedoms that guaranteed numerous civil, political, social and economic rights.⁴²⁴ In particular, the constitution was much more

⁴¹⁹ *Siddig A. Hussein*, Sudan: in the Shadows of Civil War and Politicization of Islam, in: Human Rights under African Constitutions: Realizing the Promise for Ourselves, Abdullahi An-Na’im (ed), University of Pennsylvania Press, Philadelphia, 2003, p. 346.

⁴²⁰ *Abdullahi An-Na’im*, African Constitutionalism and the Role of Islam, University of Pennsylvania Press, 2006, Philadelphia, p. 133.

⁴²¹ *Angelo L. L. Loiria*, The Search for a Permanent Constitution in Sudan: Political Implications, in: Hassan M. Salih et al (eds), Federalism in Sudan, Khartoum University Press, 1995, p. 115.p. 122

⁴²² *Balghis Badri*, A Critical Analysis of the Evolution of Constitutions in Sudan, a research funded by the Micro-Marco Peace Project in Sudan, supported by CMI-Norway in collaboration with Ahfad and Khartoum universities, 2009-20120 (on file with author) See Arts. 4, 5, 6, 8, 9 of Sudan Transitional Constitution (Amendment) 1964. See *Hassan M. Salih* et al (ed), Sudan, Khartoum, Khartoum University Press, 1995, p. 129.

⁴²⁴ See Arts. 20, 21, 18, 24, 25, 26, 27, 29, 33, 34, 36, 38, 42, 43, 46, 48, 47, 49, 50, 51, 52, 53, 56, 63, 64, 65, 67, 66, 68, 69, 71, 70, 72, 75, of the 1973 Sudan Constitution.

pluralistic on the issue of religion in comparison with other Sudanese constitutions.⁴²⁵ For this, the constitution banned the exploitation of religion for political purposes.⁴²⁶ On the other hand, the 1973 Constitution, guaranteed the Southern Sudan with autonomous status within a unitary state through the incorporation of the Regional Self-Government Act of 1972 for the South Sudan, as provided for in Addis Abba Agreement of 1972, in the constitution. However, the 1973 Constitution collapsed when *Nimeiri's* infamous 'September Laws of 1983' came into force and suspended the constitution and all the existing legislation.⁴²⁷

Nimeiri regime was toppled in a popular uprising, in 1985, and a democratic government took over and adopted the Constitution of 1985 (readopted the 1956/64 Constitutions). The 1985 Constitution provided for a list of fundamental rights and freedoms.⁴²⁸ It is interesting to note that Art. 16(2) of the 1985 Constitution provided for the re-establishment of the regional self-government in the Southern Sudan, as was provided for under the Southern Sudan Regional Self-Government Act 1972, and, at the same time, to the contrary of Art. 16(2), Art. 4 of the constitution of 1985 reaffirmed that '[t]he Islamic *Sharia* and customs shall be the main sources of legislation'. Although the government that overthrew *Nimeiri* was very critical of 'September Laws of 1983'; nonetheless, the government neither repealed September Laws nor provided for alternatives. In fact, they did not enforce 'September Laws' in practice. Once again, the civilian government was overthrown by a military coup led by al-Bashir, in 1989.

Al-Bashir suspended the 1985 Constitution, disbanded all the political parties and the trade unions, dissolved the government and prohibited the formulation of the political parties and ruled Sudan through constitutional decrees. In 1989, a National Commission was formed, to draft a constitution which was later approved in a national referendum, in 1998. The 1998 constitution was drafted largely by the National Congress Party (the current ruling party) with the opposition parties boycotting the constitution-making process.

⁴²⁵ Art. 16 recognized Islam as the religion of the majority of Sudanese, and stated that Christianity 'is the religion of a large number of people and that divine and sacred spiritual belief shall not be insulted or belittled. It also stated that the followers of all religions and spiritual beliefs were equal.

⁴²⁶ Art. 16(e) of the 1973 Sudan Constitution.

⁴²⁷ *Aharon Layish et al, the Reinstatement of Islamic Law in Sudan under Numayri: An Evaluation of a Legal Experiment in the Light of its Historical Context, Methodology, and Repercussions*, Koninklijke Brill NV, Leiden, 2002, p. 143.

⁴²⁸ Arts. 27, 32 of 1985 Constitution.

The 1998 constitution made Sharia the sole source of legislation and increased the power of the presidency. The 1998 Constitution did not differ from the 1973 Permanent Constitution in that it placed emphasis on the social and economic rights (as directive principles to guide the policy of the State) and a catalogue of civil and political rights.⁴²⁹ Furthermore, Art. 105 of the Constitution provided for the establishment of a Constitutional Court, as an independent body from the judiciary, for the first time in Sudan. It is worth noting that the Constitution was ambiguous on how the fundamental rights and freedoms were to be regulated. This ambiguity was evident in the text of the 1998 Constitution by way of phrasing the limitation clause in three different ways: ‘*as regulated by law*’, ‘*under safeguards of law*’ and ‘*saved upon permission by law*’.⁴³⁰

3. Constitution Making Process of the Interim National Constitution

a. Concept of Constitution-Making Process

The constitution defines and limits the powers of government and its various branches, and the people, and provides a strong foundation for a state based on the rule of law. Making a new constitution is a special and rare political activity. It is, therefore, the process of drafting a constitution and the manner of organizing such a process are very crucial. The concept of the constitution-making process “covers the process of drafting and substance of a new constitution or reforms of an existing constitution”.⁴³¹ There are many ways of organizing a constitution making process. In general, a constitution process may be characterized by (1) preparatory phase (assessment of the need for a constitution-making process); (2) establishment of a representative body (constitutional commission); (3) organization of a public consultation process; (4) submission of the draft constitution to a representative forum; (5) final adoption procedures (e.g. referendum). Ultimately, the legitimacy of the constitution process rests on the extent to which the process was participatory, open, democratic, inclusive, transparent,

⁴²⁹ Arts. 8, 11, 12, 13, 15, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 31 of the 1998 Sudan Constitution.

⁴³⁰ The 1998 Sudan Constitution.

⁴³¹ Guidance Note of the Secretary-General: United Nations Assistance to Constitution-Making Processes, 2009.

accommodating different interests and respecting the will of the majority as well as minorities.⁴³²

b. The Constitution Making Process of the INC: National Constitutional Review Commission

The CPA stipulates that a ‘representative’ National Constitutional Review Commission (NCRC) will be responsible for drafting an interim constitution that incorporates the provisions in the CPA. This Commission must be ‘inclusive’⁴³³ and will be comprised of GoS, SPLM/A and representatives of such other political forces and civil society as agreed by the parties.⁴³⁴ The 60-member of the NCRC were to be allocated in accordance with the power sharing formula of the CPA: that is, 52% for the north (NCP), 28% for SPLM/A, 14% for other northern political forces, and 6% for other southern political forces. The task of the NCRC was to discuss and finalize the draft constitution within six weeks for the approval by the parliament. And the discussions in the NCRC were to be taken by consensus if possible, otherwise by a two-third majority, which meant the parties to the CPA could push through any part of their common draft, as they control 60% of the seats in the parliament.

But, due to unhappiness of the main opposition groups, which argued that the constitution should be national, the NCRC composition was expanded to 180 members, by including representatives from opposition parties in the north and the south, making the interim constitution drafting process more inclusive than the CPA negotiations.⁴³⁵ Some say that the process of the constitution drafting is far from fully transparent and democratic, as the bulk of the drafting was made by the parties to the CPA, prior to the expansion of the membership of the NCRC. Strong criticisms have been levelled against the drafting process of the INC for its exclusiveness, especially that the Sudanese populace was not consulted in the process,⁴³⁶ and

⁴³² Guidance Note of the Secretary-General: United Nations Assistance to Constitution-Making Processes, 2009.

⁴³³ Chapter I ‘Mackakos Protocol’ Arts. 3.1.2, 3.1.4

⁴³⁴ Chapter II ‘Power-Sharing Protocol’ Arts. 2.12.4.3

⁴³⁵ *International crisis Group*, The Khartoum-SPLM Agreement: Sudan’s Uncertain Peace, Africa Report No 96, 25 July 2005.p. 3. Available at: www.crisisgroup.org.

⁴³⁶ *Marti Alane Flacks*, Sudan’s Transitional Constitution: Potential Perils and Possibilities for Success, the Journal of International Policy Solutions 3(2005), p.8, available at: <<http://irps.ucsd.edu/assets/004/5377.pdf>> see *Dann/Al-Ali*, The Internationalized *Pouvoir Constituant*, 424(458-59).

that the NCRC failed to include representatives of armed groups from other parts in Sudan, especially, Darfur and the East regions.

The whole process was concluded without ‘getting all on board’. On the other hand, the inclusivity proved especially difficult to achieve in Sudan because, as already indicated, the exclusivity of the drafting-process of the INC might be explained on the grounds that the composition and the mandate of the NCRC itself⁴³⁷ was inextricably connected to, and derived from the CPA; and the CPA in itself, was strictly bilateral, including only the parties to the north-south conflict, leaving other segments of the Sudanese society unrepresented.⁴³⁸ In the final analysis one could conclude that the history of the constitution making in Sudan is still dominated by the legacy of the north-south conflict, the underlying causes of that conflict and conflict between the different political parties in the north.

The supremacy of the INC is laid down in Art. 3 of the INC,⁴³⁹ and, as such, the INC takes precedence over any constitutional norms, such as the ICSS or any other State constitution. As concerns the hierarchical relationship among statutory laws passed by the national legislature, the hierarchy of norms in the Sudanese legal order is as follows: (a) the INC; (b) the ICSS must comply with the INC; (c) the State constitutions; (d) the National statutory laws must comply with the INC; (e) all Sudanese state statutory laws must comply with the INC and the respective State constitution; and (f) the Southern Sudanese state statutory laws must comply with the INC, the ICSS and the respective State constitution.

Art. 225 of the INC incorporates the CPA into the INC. All provisions of the CPA, even if not mentioned explicitly in the INC, are deemed to be part of it. According to Art. 226(1) of the INC, the CPA is one of the bases of the INC. Art. 224(1) of the INC states that the INC cannot

⁴³⁷ The Power Sharing Protocol fixes a formula for the composition of the NCRC as follows: 52% for the GoS (the ruling party, that is, National Congress Party), 28% for the SPLA/M, 14% for other northern political forces and 6% for other southern political forces. The NCRC should take decisions by consensus, but if not possible by a two third majority, thus, the parties to the CPA (GoS and SPLA/M) could exclude the voices of other forces. Furthermore, Art. (2.12.4.3) of the Power-Sharing Protocol states that: [the NCRC] shall comprise of the NCP, SPLM [the parties] and representatives of such other political forces and civil society as agreed by the *parties*” (meaning the GoS and SPLM) emphasis added.

⁴³⁸ *Sara Basha*, The Comprehensive Peace Agreement – A synopsis in: *Peace in Balance: the Crisis in Sudan*, Brian Raftopoulos and Karin Alexander (eds.), Institute of Justice and Reconciliation, South Africa, 2006, p.25.

⁴³⁹ Art. 3 of the INC states that the interim National Constitution shall be the supreme law of the land.

be amended unless the amendments are approved by three-quarters of all members of each chamber of the national legislature. Any amendment affecting the provisions of the CPA can only be introduced with the approval of both parties signatory to the CPA, as provided for in Art. 224(2) of the INC.

c. The Interim Constitution of Southern Sudan

One of the typical characteristics of a federal State is that the sub-national levels usually have constitutional autonomy to enable the States to enact, through their legislatures, their own electoral and governmental systems, their fundamental aims and programs, and their administrative organization, their fundamental rights, and their internal structure of the local units.⁴⁴⁰ While the sub-national levels are authorized to enact their constitutions; nonetheless, the sub-units should not violate the national constitutional law.

The federal constitutions usually do not spell out the entire constitutional arrangements for the constitutions of the sub-units. Instead, the sub-units constitutions are provided with a room to architecture their own governmental institutions, etc.⁴⁴¹ In general, most federal constitutions differ as regards the space that they allow for sub-units to organize their own political institutions.⁴⁴² The following section will elaborate on the sub-units constitutions as mandated by the CPA/the INC. These include the Interim Constitution for the Southern Sudan and the State constitutions which to be enacted by 25 States in Sudan.

Besides the INC, the CPA provides for the enactment of the Interim Constitution for the Southern Sudan (ICSS)⁴⁴³ and additional 25 transitional State constitutions.⁴⁴⁴ In effect, the ICSS mirrors the INC, as important key issues had already been decided on the INC (as a supreme law of the land) and the CPA. The ICSS and the State constitutions are permitted to

⁴⁴⁰ *Peter Pernthaler*, Asymmetric Federalism as a Framework of Regional Autonomy, in *Handbook of Federal Countries*, p. 485, Katey Le Roy and Cheryl Saunder (eds) 2002, Montreal: Mc-Gill-Queens University Press.

⁴⁴¹ *Robert F. Williams* et al, Sub-national Constitutional Space: A View from the States, Provinces, Regions, Länder, and Cantons, in: *Federalism, Sub-national Constitutions, and Minority Rights*, G. Alan Tarr, Robert Williams & Josef Marko (eds), Praeger Publisher, USA, 2004, p. 3&4.

⁴⁴² *Robert F. Williams* et al, Sub-national Constitutional Space, p. 3&4.

⁴⁴³ Chapter II “Protocol on Power Sharing” (Art 1.5.1.2 ; Art 3.2); Art. 160(1) of the INC

⁴⁴⁴ Chapter II “Power-Sharing Protocol” (Art 2.12.11; Art. 3.2; Art. 4.4.4) require that the ICSS and the State constitutions to comply with the INC; Cf. Art. 178 and 180 of the INC

extend their provisions as long as certain provisions of the INC are not cut-down and/or limited by the ICSS and the State constitutions, especially the provisions on the Bill of Rights and allocation of powers between the different levels of government, as spelled out in the Schedules annexed to the INC.⁴⁴⁵ The ICSS departs from the INC in that the ICSS Bill of Rights provides more rights granted to women, children, and HIV positive persons and it imposes greater restriction on the use of death penalty.

d. The State Constitutions

The INC restricts the space of sub-units constitutional, as the INC prescribes the governance institutions for sub-units. According to Williams et al, prescribing the contents of the sub-units constitutions may obviate the need for sub-units constitutions altogether by prescribing in details, in the federal constitution, the form of the institutions at the State level.⁴⁴⁶ The INC establishes principles to guide the constitution-making process at the State level and contains very express restriction on how the States should adopt their constitutions. Art. 178(1) of the INC, for instance, states that ‘there shall be legislative, executive and judicial organs at state level which shall function in accordance with [Interim National Constitution].’⁴⁴⁷

e. The Role of the National Ministry of Justice to Ensure Compliance with the INC

In order to ensure the consistency of the legal order, the structure of the sub-units needs to be in line with the principles of the national constitution. The INC defines certain requirements with which the constitutions of all Sudanese States should meet. The INC confers this policing power on the National Ministry of Justice as to act as a supervisory authority in ensuring compliance of the ICSS and the State constitutions with the INC by issuing the compatibility certificate.

The National Ministry of Justice declares the compatibility of the constitution of the ICSS and the State constitutions with the INC and issues “certificate of compatibility”.⁴⁴⁸ The final ICSS and the state constitutions could come into force unless and until the National Ministry of Justice “certified” that there were no conflict between the ICSS, the state constitutions and the

⁴⁴⁵ Compare the ICSS “Bill of Rights” Art 13-37 with the INC “Bill of Rights” Art.27-47.

⁴⁴⁶ Robert F. Williams et al, Sub-national Constitutional Space, p. 10

⁴⁴⁷ See Arts. 177, 178, 179 of the INC

⁴⁴⁸ Art. 226(1)(8) of the INC states that: “The National Ministry of Justice shall, within two weeks from the date of receipt, declare the compatibility of the Interim Constitution of Southern Sudan and state constitutions with the Interim National Constitution.” Emphasis added.

INC. The State constitutions were to be prepared and adopted by the state legislatures, but they were to be guided in this task by a model constitution to be prepared by the National Constitutional Review Commission.⁴⁴⁹ It is worth noting that there were many cases, for example, in which the National Ministry of Justice had declared that the provisions of state constitutions to be in violation with the provisions of the INC. The National Ministry of Justice can require changes in a proposed constitution as a condition for its acceptance.

Part II: The Structure of the Court System in Sudan under the INC

1. Decentralization of the Court System in Sudan: The Structure of the Court System in the North Sudan

The court system, under the INC, is a relatively complex one. The INC under Arts 119-123 and 172-174 deals with the National Judiciary, the Southern Sudan Judiciary and the State Judiciary respectively and outlines in general terms the structure of the court system, both in the north and the south Sudan. The current court system comprises two different court hierarchies. One hierarchy applies for the 15 States in the north Sudan, the other one for the 10 States in the south Sudan.

The court system in Sudan is designed according to the integrated model - that is, the courts across Sudan, in general, have jurisdiction to deal with both: state law and national law. The national level and the State level have their own specific courts, but all courts apply the same law: that is: state law and national law. That means there are a number of State courts that exercise jurisdiction over national and state laws. Appeals against the decisions of lower State courts go to higher State courts. These higher State courts are less in number and have jurisdiction over the appeals from a large number of lower State courts but serve also as court of first instance for some larger cases.⁴⁵⁰ In addition, appeals against the decision of appeals courts go to the top State level court (the higher State courts). These higher state courts have jurisdiction over both, State law and national law case, and generally, there exists one Supreme

⁴⁴⁹ Chapter II 'Power-Sharing Protocol' (Art. 2.12.11) states that: "Without prejudice to the functions of the State Legislatures, the National Constitutional Review Commission shall prepare model Constitutions for the States, subject to compliance with the National Constitution, and, as relevant, the Constitution of Southern Sudan."

⁴⁵⁰ *Clemens Feinaugle et al*, Max Planck Manual on the Judicial Systems in Germany and Sudan, Heidelberg, 2006. Available at: [http://www.mpil.de/shared/data/pdf/manual_judicial_systems_of_germany_and_sudan\(c\).pdf](http://www.mpil.de/shared/data/pdf/manual_judicial_systems_of_germany_and_sudan(c).pdf)

Court. The higher State courts are the courts of last instance with regard to State courts. It is to be noted that State courts are organized and financed by the State level.⁴⁵¹

2. Description of the Existing Court System in the North Sudan

The INC defines the Judiciary at the national level as consisting of the National Supreme Court, the Appeal Courts and any other courts,⁴⁵² and sets up the Constitutional Court as a separate body from the ordinary Judiciary.⁴⁵³ The Judiciary Act of 1986 arranges the courts into 7 different layers.⁴⁵⁴ These include the Supreme Court, the Appeal Court, the General/Public Court, the District Courts of First Instance, the District Court of Second Instance, the District Court of Third Instance and the Rural and Towns Courts. These courts have a general jurisdiction over all matters, including: civil, criminal, administrative and family matters, as prescribed by the substantive and procedural laws such as the Criminal Procedure Act, Criminal Code, Civil Transactions Act, and the Civil Procedure Act, etc. The INC provides that the national laws will be implemented by the courts at the State level, including the courts in the Southern Sudan as well.⁴⁵⁵ It should be noted, however, that the organization of the courts at the Southern Sudan level falls under the jurisdiction of the GoSS.

a. The National Supreme Court

The National Supreme Court is at the top of the system of ordinary courts, in the north, and organized in circuits operating in the capital (Khartoum). The National Supreme Court operates through panels each composed of three judges⁴⁵⁶ and reaches its decisions by the majority of opinion. The panels of the Supreme Court are arranged according to the legal specialization,

⁴⁵¹ See generally *Philipp Dann* et al, Max Planck Manual on Different Forms of Decentralization, 2005. Available: [http://www.mpil.de/shared/data/pdf/manual_judicial_systems_of_germany_and_sudan\(c\).pdf](http://www.mpil.de/shared/data/pdf/manual_judicial_systems_of_germany_and_sudan(c).pdf); *Clemens Feinaugle* et al, Max Planck Manual on the Judicial Systems in Germany and Sudan, Heidelberg, 2006. Available at: [http://www.mpil.de/shared/data/pdf/manual_judicial_systems_of_germany_and_sudan\(c\).pdf](http://www.mpil.de/shared/data/pdf/manual_judicial_systems_of_germany_and_sudan(c).pdf)

⁴⁵² Art. 124 of the INC; *Philipp Dann* et al, Max Planck Manual on Different Forms of Decentralization, 2005. Available: [http://www.mpil.de/shared/data/pdf/manual_judicial_systems_of_germany_and_sudan\(c\).pdf](http://www.mpil.de/shared/data/pdf/manual_judicial_systems_of_germany_and_sudan(c).pdf);

⁴⁵³ Art. 119 of the INC

⁴⁵⁴ Art. 10 of the Judiciary Act, 1986

⁴⁵⁵ Art. 181(2) of the INC states that ‘state courts shall have civil and criminal jurisdiction in respect of state, Southern Sudan, and national laws, save that a right of appeal shall lie as provided in this Constitution, the Interim Constitution of Southern Sudan whenever applicable, however, national legislation shall determine the civil and criminal procedures in respect of litigation or prosecution under National laws in accordance with this Constitution.; Cf. Art. 5(1) of the INC states that: “Nationally enacted legislation having effect only in respect of the Northern states of the Sudan shall have as its sources of legislation Islamic Sharia and the consensus of the people.

⁴⁵⁶ The panel is composed of five judges upon confirming criminal matters as provide for under Art. 17(2) of the Judiciary Act, 1986: “[...] the criminal circuit, which considers confirmation of death sentences, amputation sentences and sentences of cross amputation, which shall be constituted of five judges.”

including: civil matters, criminal matters, administrative matters and family matters for Muslims and non-Muslims. In addition, there is a panel for revision of judgments on points of law and *Sharia* law. Furthermore, the Chief Justice of Sudan “*may establish panels* [within the Supreme Court] for ... considering and deciding on matters ... including commercial ... or labor [matters]”.⁴⁵⁷

The National Supreme Court represents the final court of cassation and review in respect of any civil, criminal, administrative and family matters arising under the national laws. It also entertains original jurisdiction to revise the administrative decisions of certain entities, including: the administrative decisions of the President of the Republic, the Governors of the States and the State Ministers. These administrative decisions are considered by a single judge, and the decisions of a single judge can be appealed to a Supreme Court panel of three judges. Additionally, the Supreme Court has criminal jurisdiction over the Justices of the Constitutional Court.⁴⁵⁸

b. Other Courts

(1) The Appeal Court

The Appeal Court sits as a panel of three judges and reaches its decisions by the majority of opinion. It deals with appeals against the preliminary and appellate decisions of the General Court, as well as appeals against the preliminary decisions of the District Court of 1st Grade in respect of civil, criminal and family matters. In addition, the Appeal Court revises the decisions of certain administrative authorities that do not fall within the jurisdiction of the Supreme Court. The Appeal Court is entrusted with power to revise its own decisions.

(2) The General Court

The General Court is a trial court. It sits as a single judge court that entertains original jurisdiction in respect of civil, criminal and family matters. It also functions as an appellate court for decisions originating from District Courts (2nd and 3rd Grades). It also considers

⁴⁵⁷ Art. 125(2) of the INC.

⁴⁵⁸ Art. 125(1) (b) of the INC.

appeals against the appellate decisions of District Courts (1st Grade) passed against the decisions of Rural and Town Courts in civil matters.⁴⁵⁹

(3) *The District Court*

The District Court sits as a single judge. There are three levels of District Courts: District Court of 1st Grade, District Court of 2nd Grade and District Court of 3rd Grade. District Courts of 1st Grade holds original jurisdiction in civil, criminal and family matters, while the District Court of 2nd and 3rd holds original jurisdiction in civil, criminal matters. These courts are distributed all over the country and the District Court of the 1st Grade functions as a Court of Appeal to consider decisions originating from Rural and Town Courts. District Courts consider cases summarily⁴⁶⁰ or non-summarily, depending on the merits of the case. In general, these courts have a more limited jurisdiction.

(4) *Rural and Town Courts and Other Courts*

Rural and Town Courts are distributed at local level. **Rural Courts** are suited in remote areas and their membership includes tribal chiefs, *Omdas*, *Sheiks* and *Nazir*, and their competencies are specified in the warrant of establishment issued by the Chief Justice of Sudan. The members of these benches are, like justices of peace, usually laymen who enjoy a reputation for moral integrity and hold a good social position in their locality. The Rural courts apply customary law that is consistent with the general law, and, in most cases these courts, resort to conciliation in settling disputes over areas of pasture, water and cultivation. **Town Courts** are found in the Towns and they deal with simple cases referred to them by the competent judge in the locality. In addition, **other Courts** may be established as necessary by the Chief Justice of Sudan. It is should be noted, however, that the Rural and Town Courts are organized and financed by the local level. However, the current set-up of the courts at the state level does not violate the INC. This is so because the INC allows for, but do not require the establishment of courts at the State level. In the view of the foregoing, it is clear that there is no substantial departure from the pre-INC with respect to the structure of the court system in the north.

⁴⁵⁹ Art. 190(1) of the Civil Procedure Act 1983.

⁴⁶⁰ Summary mode of trial means dispensing of the suit without adherence to the formalities of preliminary memoranda, pleading and procedural limitations, except what is essential to ordinary determination of the suit.

c. Customary Courts

In localities where there are no statutory courts, people can use customary methods that operate under an informal, traditional court system – the so-called “Native Administration”. This was originally established during the British colonial time to solve local disputes on the basis of traditional and customary law. In various parts of Africa, the British Administration created legal institutions in which local elites were integrated in the adjudication process.⁴⁶¹ The Native Administration, administering customary law, played a crucial role in resolving community dispute in a peaceful means.⁴⁶²

In 1932, the Native Courts Ordinance formalized customary courts into the judicial system. In 2004, Customary Courts have been integrated, through Town and Rural Courts Act, as part of the formal justice system as the lowest tier of the court system. These courts were presided over by traditional leaders to resolve tribal disputes.⁴⁶³ A recent assessment of the customary courts concludes that “those customary courts that still exist are severely under-sourced and understaffed ...”⁴⁶⁴

Besides the customary courts, there exist traditional Conflict Resolution Mechanisms, such as “*judiya*”, through which inter-tribal conflict is managed, especially in Western Sudan (Darfur Region).⁴⁶⁵ Conflict resolution process through “*judiya*” system involves a third party as arbiter. Under the “*judiya*” system, the proceedings deal with the cause of the dispute and the damage incurred and recommend solution to address the cause of the dispute and compensation as a means of reconciliation and promotion of dialogue amongst the tribes.⁴⁶⁶ This system of conflict resolution “*judiya*” has played a vital role in the administration of, and access to justice, for communities when compared to the formal justice system.⁴⁶⁷

⁴⁶¹ Mark Fathi Massaud, *Law's Fragile State: Colonial, Authoritarian and Humanitarian Legacies in Sudan*, p. 48, Cambridge University Press, 2013

⁴⁶² Developing Darfur: A recovery and Reconstruction Strategy, 2013-2019, p. 79.

⁴⁶³ Jerome Tubiana et al, *Traditional Authorities' Peacemaking Role in Darfur*, United States Institute of Peace, p. 173, 2012.

⁴⁶⁴ Developing Darfur: A recovery and Reconstruction Strategy, 2013-2019, p. 79.

⁴⁶⁵ Jerome Tubiana et al, *Traditional Authorities' Peacemaking Role in Darfur*, United States Institute of Peace, p. 134, 2012

⁴⁶⁶ Ibid, p. 134

⁴⁶⁷ Developing Darfur: A recovery and Reconstruction Strategy, 2013-2019, p. 79.

d. Land Commissions

Further, the INC establishes land commissions (northern land commission and southern land commission).⁴⁶⁸ Their mandate, competences, composition, etc are specified under articles 187 and 188 of the INC and articles 181 and 182 of the ICSS. The Land Commissions will play a vital role in resolving any potential conflict that might arise with respect to land ownership. No doubt, the aftermath of Sudan north-south conflict will witness massive influx of Internally Displaced Persons (IDP) to their land which is now occupied by others. It is important to note that the land Commissions will exercise a quasi-judicial function through the application of customary law. The decisions of land commission will only be binding on the basis of mutual consent of the parties and upon the registration of the award on the court. The Constitutional Court considers conflicts that may arise between the findings of the National Land Commission and the Southern Land Commission.⁴⁶⁹

In this respect, it is to be noted that the Judiciary in Sudan has also the responsibility to oversee the land registration system. The system consists of central administration represented by the office of the Registrar General of lands, based in Khartoum, and 106 branch offices established by special warrants of the Chief justice and distributed in the different states under the supervision of the respective judicial organs. Land registries play an important role in the settlement and registration of land. They have quasi-judicial powers combining powers to manage land tenure with adjudicating and arbitration powers. Civil courts are empowered to intervene in certain of the land registry decisions and certain decisions of the land registry offices can be appealed before civil courts.

e. The State Judiciary: The National Judiciary vis-à-vis The State Judiciary

The INC also requires that the State constitution shall provide for the establishment of State courts by the state judiciary as necessary. Art. 124 of the INC reads together with Art. 127 of the INC allows for, but do not require the establishment of courts at the state level.

⁴⁶⁸ Arts. 182, 183, 187 and 188 of the INC

⁴⁶⁹ Art. 189(4) of the INC

The State courts shall have civil and criminal jurisdiction to execute the state and the national laws.⁴⁷⁰ However, national law shall determine the civil and the criminal procedures in respect of litigation or prosecution under national laws in accordance with the INC. On the other hand, the State law shall provide for the appointment and dismissal of lay magistrates, shall guarantee the independence and impartiality of the State judiciary, and shall ensure that judges are not subjected to any interference. At the State level (meaning northern states) courts are administered by the Head of a Judicial Organ⁴⁷¹ which is appointed by the national judiciary. At present, the State Judiciary consists of the Court of Appeal,⁴⁷² the General Courts and the District Courts and any other courts that the Chief Justice may establish on the recommendation of the of the Chief Judge of a State. Each State Judiciary is headed by the President of the Court of Appeal in the State.⁴⁷³

At present, the structure of the court system in the north Sudan remains virtually unchanged under the INC, as the courts at the state level are organized and financed by the national judiciary, as until now none of the 15 northern States has used its right to establish its own courts. For instance, the judges for the State judiciary are nominated by the newly established National Judicial Commission, at the national level, and appointed by the President of the Republic. Their salaries are paid from the national budget.

3. Description of the Existing Court System in the Southern Sudan

Art. 172 (1) of the INC establishes the Southern Sudan judiciary as an independent institution from the National Judiciary with the power to structure its own court system independently.⁴⁷⁴ As per Art. 127 and 171(1) of the ICSS read in conjunction with Art. 125 of the State Model Constitution of the Southern Sudan,⁴⁷⁵ the structure of the court system at Southern Sudan level

⁴⁷⁰ Art. 181(2) of the INC states that: "State courts shall have civil and criminal jurisdiction *in* respect of state ... and national laws [...]".

⁴⁷¹ The "Judicial Organ" comprises, as stipulated under Art. 12 of the Judiciary Act, of Appeal Courts, General Courts, District Courts and Rural and Towns courts. There are a number of "Judicial Organs", distributed in the northern states. The judicial organs are based at the state capital.

⁴⁷² Art. 124 and 181 of the INC

⁴⁷³ Art. 7 (1)-(3) of the Sudan Judiciary Act of 1986.

⁴⁷⁴ Art. 172 (1) of the INC states that: the judicial competence in southern Sudan shall be vested in an independent institution to be known as the Judiciary of Southern Sudan"; Art. 126(2) of the ICSS

⁴⁷⁵ Art. 125 of the State Model Constitution states that: "The Judiciary of the State shall be established and structured as follows: a High Court; County Courts; Payam Courts; and other courts or tribunals as deemed necessary to be established ..."

encompasses the following: a) the Supreme Court of Southern Sudan and b) the Court of Appeal at the level of the Government of Southern Sudan.⁴⁷⁶

On the other hand, at the State level (meaning at the state level of the Southern Sudan), courts are organized, financed and administered by the State and include: a) High Courts; b) County Courts; c) *Payam* Courts; d) and any other court that may be established (such as Chief Courts).⁴⁷⁷ As such, provision of Art. 181 of the INC as concerns the establishment of courts at the State level has been implemented by the drafters of the ICSS. The legal system in South Sudan had been rudimentary at the time of the CPA was agreed, but the South Sudan benefited from considerable international financial and technical support for the building up of its legal infrastructure and legal system.⁴⁷⁸

a. The Supreme Court of the Southern Sudan

The Southern Sudan Supreme Court is the court of final instance (court of review and cassation) in respect of any matter arising under the Southern Sudan laws.⁴⁷⁹ It consists of three circuits: a) the Constitutional Circuit (the Court sits as a whole when considering constitutional matters); b) Criminal Circuit (3 judges); c) and the Civil Circuit (3 judges). The Southern Sudan Supreme Court (sitting as a Constitutional Court) also adjudicates on the constitutionality of laws or provisions of laws that contradict the ICSS or the constitutions of the Southern Sudan States, and considers disputes between the organs of the GoSS.⁴⁸⁰ The Southern Sudan Supreme Court only sits as a constitutional court on issues related to the Southern Sudan laws and the Southern Sudan State constitutions. But, it is not a constitutional court as such. It has criminal jurisdiction over the President of Government of Southern Sudan and Vice President of the Government of Southern Sudan and the Speaker of the Southern Sudan Legislative Assembly. The Southern Sudan Supreme Court considers issues arising under the national law, but its decisions on national laws are subject to review by the National Supreme Court.⁴⁸¹

⁴⁷⁶ Art. 131 and 132 of the ICSS

⁴⁷⁷ Art. 133 of the ICSS

⁴⁷⁸ *Oette*, Law Reform in Times of Peace Processes and Transitional Justice, p. 28

⁴⁷⁹ Art. 173(1), 174 of the INC and Art. 130 of the ICSS

⁴⁸⁰ Art. 174 of the INC; Cf. Art. 130 of the ICSS

⁴⁸¹ Art. 173 (2) and 174(a) of the INC and Art. 130 of the ICSS

b. Other Courts

(1) The Appeal Court,

The Appeal Court of the Southern Sudan, its competences and procedures shall be determined by law.⁴⁸² It considers appeals from the High Court.⁴⁸³

(2) The High Court

The High Court is the highest court at the level of the State in the Southern Sudan,⁴⁸⁴ and its establishment, competence, jurisdiction and procedures shall be determined by law.

(3) The County Court

The County Court is at the State level and to be established within the jurisdiction of High Court.⁴⁸⁵ It is a court of one judge and consists of three grades: a) the County Court of 1st Grade; b) the County Court of 2nd Grade; c) and the County Court of 3rd Grade. Art. 133 of the ICSS provides also for the establishment of other courts at lower levels in the States of the Southern Sudan, such as Payam and Chiefs Courts.

c. The State Judiciary: The Southern Sudan Level vis-à-vis the Southern State Level

The ICSS and the State Model Constitution of the Southern Sudan State spell out clearly the structure of the court system at the Southern Sudan State level,⁴⁸⁶ and they do not, like the INC, leave a room for discretion by the State as whether or not to establish its own court system. The courts at the Southern Sudan Government level and the State level execute both national laws and the Southern Sudan laws.⁴⁸⁷

It should be noted, however, that the Constitutional Court does not act as a general court of appeal with regard to decisions of the Southern Sudan Supreme Court. Only the decisions of the Southern Sudan Supreme Court pertaining to the ICSS, the Constitutions of Southern Sudan States, and the Southern Sudan laws may be appealed to the National Constitutional Court,

⁴⁸² Art. 131 of the ICSS

⁴⁸³ Art. 132(3) of the ICSS

⁴⁸⁴ Art. 132 of the ICSS

⁴⁸⁵ Art. 133 of the ICSS

⁴⁸⁶ Art. 132(2) of the ICSS

⁴⁸⁷ Art. 181(1) of the INC; Art. 127 of the State Model Constitution of the Southern Sudan; Article 171(2) of the ICSS

should the case be concerned with the constitutionality of the decisions of the Southern Sudan Supreme Court.⁴⁸⁸

Thus, the National Constitutional Court constitutes part of the appeal process with respect to the Southern Sudan judiciary. Whereas, the National Constitutional Court vis-à-vis the national courts constitutes a separate body that adjudicates only on constitutional questions. Clearly, then, the INC provides the Southern Sudan with semi-constitutional autonomy as it links the Southern Sudan Judiciary with the National Judiciary by way of giving the National Supreme Court a monopoly as a court of last instance in respect of matters arising under the national laws and adjudicating by the Southern Sudan judiciary. Additionally, the INC entrusted the Constitutional Court with power to function as a court of appeal to consider appeals concerning the constitutionality of decisions originating from the Southern Sudan Supreme Court and related to ICSS or the South Sudan State constitutions.

The South Sudan applies laws of the new Sudan that was drafted by SPLM before the CPA. In addition, new laws were drafted and new institutions were also formed, such as the South Sudan Human Rights Commission. Furthermore, a law reform commission was formed to review laws applicable in the South Sudan, but the process of law reform faced formidable challenges and delays.⁴⁸⁹

4. The National Constitutional Court

The National Constitutional Court has an original jurisdiction to decide on the constitutionality of the decisions of the National Supreme Court and the Southern Sudan Supreme Court. The jurisdiction of the Constitutional Court for this purpose maybe invoked by an aggrieved party in proceedings, provided that the aggrieved party can establish a *locus standi* entitling the aggrieved party to challenge the decision in question.⁴⁹⁰ Please refer to Chapter Five for closer look at the competence, composition, and the jurisprudence of the constitutional court, and role of the Sudanese Constitutional Court in upholding human rights and bringing about law reform.

⁴⁸⁸ Art. 122 (1) (c) of the INC.

⁴⁸⁹ *Abdelsalam Hassan and Median*, Criminal Law Reform and Transitional Justice, p. 54.

⁴⁹⁰ See the Constitutional Court Act, 2005, and Art. 122 of the INC.

5. Similarities and Dissimilarities: Court System in the North and the South Sudan

i. Similarities of the Court System in the North and the South of Sudan

There is a clearly similarity between the legal system in the north and the legal system in the south, as, for instance: i) the application of the national laws by the courts at all levels of government in Sudan, including the Southern Sudan level; ii) the appeal system, especially with respect to matters arising under national laws, as the decisions originating from the Southern Sudan Supreme Court go to the National Supreme Court; iii) the National Constitutional Court has jurisdiction over constitutional matters for the north and the Southern Sudan with respect to the INC, ICSS and the State constitutions.

ii. Dissimilarities of the Court System in the North and the South of Sudan

The north and the Southern Sudan judiciaries differ in a number of aspects including: i) the important difference is the source of the legislation,⁴⁹¹ as the INC allows for the co-existence of two legal systems (*Sharia* as a source of legislation in the north and secular-based legislation in the Southern Sudan)⁴⁹²; ii) the appeal system, especially on constitutional matters, the difference lies between the National Supreme Court and Southern Sudan Supreme Court. For instance, the National Supreme Court is not empowered to consider constitutional cases (apart from deciding on the constitutionality of subsidiary laws). By contrast, the Southern Supreme Court sits as a Constitutional Court with respect to cases originate under the ICSS and the Southern Sudan state constitutions.

Again, iii) the appeals against the decisions of the Southern Sudan Supreme Court on matters related to the ICSS and the Southern Sudan State constitutions can be brought before the National Constitutional Court, in Khartoum. Thus, the National Constitutional Court constitutes part of the appeal process in respect to the Southern Sudan; however, iv) with respect to the national level, the Constitutional Court scrutinizes the compatibility of the National Supreme Court's decisions with the constitutional norms.

⁴⁹¹ Art. 5(2) of the INC; Art. 6 of the ICSS.

⁴⁹² Art. 5 of the INC differentiates between the north and the Southern Sudan as concerns the sources of legislation. Art. 5(1) of the INC lists the *Sharia* as one of the sources of national legislation in the northern States. Art. 5(2) of the INC names popular consensus, the values and the customs of the people of Sudan, including their varied traditions and religious beliefs as sources of the national laws applicable in the Southern Sudan and the Southern Sudan States

6. The Role of the Courts in Contributing to Democratic Transformation

Many studies have attempted to explain the preconditions for transition to democracy, the factors that influence the success or the failure of transition, and the relationship of particular institutions to society in politically developing countries.⁴⁹³ While the scholars have differed widely, however, as to their prescription as regards the institutions that are best placed to foster democracy⁴⁹⁴ in societies,⁴⁹⁵ some studies have shown that independent courts have played a major role in the widespread acceptance of governance in many of the advanced democracies.⁴⁹⁶ It is undisputable that by the application of judicial review, courts cannot only be able to mediate conflicts between the political actors but also put restraint on the arbitrary exercise of the governmental power.⁴⁹⁷

Widner, for instance, thinks that the courts are themselves sites for democratization, as the courts themselves can enhance the development of a democratic political culture and thus the judiciary is not only reflective of democracy, but constitutive of it.⁴⁹⁸ *Widner* further argues that, in Africa, ‘the courts have played a range of roles and, indeed, they have figured prominently in the settlement of conflict and the move to multiparty systems’.⁴⁹⁹ A number of studies argue in support of the benefits that might be gained from an independent judiciary in transition. For instance, *Fombad* summarizes these benefits in one point which says that ‘the constitutionalisation of a credible framework that ensures the independence of the judiciary signifies a clear pre-commitment to certain minimum standards of civilized behavior for the respect for constitutional norms and the rule of law in a way that will likely promote democratic

⁴⁹³ See *Guillermo O’Donnell & Philippe Schmitter*, *Transitions from Authoritarian Rule: Tentative Conclusions About Uncertain Democracies*, 1986, the Johns Hopkins Press Ltd, London

⁴⁹⁴ The available literature defines democratization, in general, ‘as a gradual, evolutionary, and delicate process during which democratic procedures of government are established and maintained and the preservation of the rule of law becomes an essential task in these transitional regimes. See *Irwin Stotzky* (ed.), *Transition to Democracy in Latin America: the Role of the Judiciary* (1993). As quoted in *C. Larkins*, *Judicial Independence and Democratizations*, p.606

⁴⁹⁵ *Katharine Belmont et al*, *Institutional Design, Conflict Management, and Democracy*, p. 1, in: *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy* Andrew Reynolds (eds), Oxford, 2002

⁴⁹⁶ See *H. Jacob, E. Blankenburg et al.*, eds, *Courts, Law and Politics in Comparative Perspective*, Yale University Press, 1996

⁴⁹⁷ *C. Larkins*, *C. Larkins*, *Judicial Independence and Democratizations*, *Comparative Politics*, Vol. 30, No. 4 (July 1998), p. 606.

⁴⁹⁸ See *Jennifer Widner*, *Courts and Democracy in Post Conflict Transition: A Social Scientist’s Perspective on the African Case*, 95(2001), *The American Journal of International Law* 64(65).

⁴⁹⁹ *Ibid*, 64(65).

consolidation'.⁵⁰⁰ As to the role of the courts in transition, according to *Bugaric*, while referring to transition in Eastern Europe, the normative policy defining the role of courts in transitional period has significant consequences for: '(1) the distribution of political power between different government branches; and (2) the courts' application of the rule of law'.⁵⁰¹

Limiting the acts of the government through the neutral arbitration of independent judges also provides for predictability because individuals will know in advance how they stand with respect to the government and to what extent the government is permitted to interfere with the individuals' fundamental rights and freedoms.⁵⁰² Other benefits that may be gained from the enhanced prospect for an independent judiciary are the possibility of accountability, certainty and application of the law. These benefits, in turn, will also ensure the recognition and the enforcement of the various forms of contractual and property rights which could play a crucial role in attracting foreign investment, thereby enhancing the economy of the country.⁵⁰³ Therefore, the role of the judiciary is increasingly recognized as a key tool for building the rule of law and protecting human rights.⁵⁰⁴

7. Issues Impacting on the Role of the Courts in Contributing to Democratic Transformation

The role of the courts in contributing to democratic transformation of regimes is not automatic. For instance, the effectiveness of the judiciary in a democratic society resides in it being autonomous from the executive branch of the government. Thus, some scholars see the judicial independence as an indicator to measure democratization.⁵⁰⁵

⁵⁰⁰ *Charles Fombad*, Preliminary Assessment of the Prospects for Judicial Independence in Post-1990 African Constitutions, p. 238.

⁵⁰¹ *Bojan Bugaric*, Courts as Policy-Makers: Lessons from Transition, 42(2001), Harvard International Law Journal, 42 Harv. Int'l L.J. 247, p. 248.

⁵⁰² *Charles Fombad*, *Charles M. Fombad*, Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa, the American Journal of Comparative Law, Vol. 55(2007), p. 238.

⁵⁰³ *Ibid*, p. 238.

⁵⁰⁴ See generally *C. Larkins*, Judicial Independence and Democratizations, Comparative Politics, Vol. 30, No. 4 (July 1998).

⁵⁰⁵ See generally *C. Larkins*, Judicial Independence and Democratization, Comparative Politics, Vol. 30, No. 4 (1998); See *Jennifer Widner*, Courts and Democracy in Post Conflict Transition: A Social Scientist's Perspective on the African Case, 95(2001), The American Journal of International Law

However, the ability of the courts in post conflict to stabilize peace is contingent, amongst other, on the wording of the constitution and the character of the substantive law.⁵⁰⁶ According to *Winder*, in post conflict situations, the courts may exercise limited influence over the prospects for peace. This is so because such factors like attitudes of other actors and the efficacy of the courts in signalling their ambitions for intervention may impact on the role of the courts in stabilizing peace in transitional countries.⁵⁰⁷

The most direct impact of the courts on democratization process, in transitional countries, may reside in limiting the acts of the government organs,⁵⁰⁸ since inability of the courts to handle challenges expeditiously can undermine the legitimacy of the new governments.⁵⁰⁹ But, however, the role of courts in preserving peace is correlated with the willingness of incumbents and the behaviour of the legal community, as these are the necessary conditions for the success or the failure of the courts' involvement in the democratization process.⁵¹⁰

While it is true that courts may provide solution for political contentions, nonetheless, the relevance of the role of the courts in resolving the intractably political 'deadlock' in federal countries, especially in transition is yet uncertain. That is, noticeably missing from the literature is the study and analysis of the consequences of the role of courts in transition. For example, according to *Winder*, 'little hard empirical evidence can be adduced to ground claims about the relative contribution of the state courts, in general, to post conflict reconstruction'.⁵¹¹ For example, few scholars have examined the role of courts in transition in comparison with the extensive research on the economic and political aspects of transition.⁵¹² More problematic, legal scholars have disagreed on how to test empirically the impact of the role of the courts on

⁵⁰⁶ *Jennifer Winder*, Courts and Democracy in Post Conflict Transition: A Social Scientist's Perspective on the African Case, 95(2001), *The American Journal of International Law* 64(65), p.73.

⁵⁰⁷ *Ibid*, p.75.

⁵⁰⁸ *Ibid*, p.70.

⁵⁰⁹ *Ibid*, p.70.

⁵¹⁰ *Ibid*, p.70.

⁵¹¹ *Ibid*, 64(75)

⁵¹² *Bojan Bugarcic*, Courts as Policy-Makers: Lessons from Transition, 42(2001), *Harvard International Law Journal*, 42 Harv. Int'l L.J. 247, pp. 247-8

the political performance of a country.⁵¹³ In general, scholars have assumed that the role of courts in transition is to promote the rule of law.⁵¹⁴

On the other hand, according to some observers, the results from comparative research clearly suggest that there may be instances when the courts do not constitute the appropriate devices for bringing about the desired outcomes in transition, especially on issues related to major social and political changes.⁵¹⁵ As the courts may be faced with difficulties that may prevent them from contributing significant social and/or political reforms such as ‘limited nature of constitutional rights ... and ... lack of implementation power’.⁵¹⁶ More importantly, in most cases, courts are often depended on other branches of the government to effectuate their decisions.⁵¹⁷

The role of the courts to play an effective role in reforming and/or facilitating a systematic change usually becomes more visible when embarking to decide on sensitive political issues.⁵¹⁸ However, the lack of implementation of the court decisions, when deciding on political cases, may significantly constrain the ability of the courts to play a role in transition to democracy. But, one should not lose sight of the fact that the central tenet of constitutionalism postulates that judiciary system should be separated from more overtly ‘political’ institutions, as the doctrine of separation of powers expects judges to act independently under the constitution.⁵¹⁹

The existing legal literature on the role of the courts in transition democracies reflects a clash between two stands: one camp of some theorists argue that the period of transition requires a stronger and more activist courts,⁵²⁰ while the other side warns against too strong a judicial role

⁵¹³ See *Richard E. Messick*, Judicial and Economic Development: A survey of the issues, 14 World Bank Research Observer 177, 117 (1999)

⁵¹⁴ *Bojan Bugaric*, Courts as Policy-Makers: Lessons from Transition, 42(2001), Harvard International Law Journal, 42 Harv. Int'l L.J. 247, pp. 247-8

⁵¹⁵ *Ibid*, p. 272

⁵¹⁶ *Ibid*, p. 272

⁵¹⁷ *Ibid*, p. 272

⁵¹⁸ *Ibid*, p. 272

⁵¹⁹ See *Stephen Tierney*, Constitutional Law and National Pluralism, Oxford University Press, Oxford, 2004.

⁵²⁰ *Ruti Teitel*, Transitional Jurisprudence: the Role of Law in Political Transformation, 106 Yale Law Journal 2009(1996-1997)

and advocate for a judicial deference to the legislature in creating a new constitutional order.⁵²¹ Despite of these opposing views as to role of the courts in transition, according to Bugaric, several studies of other countries describe the interaction between the role of courts and the political structure of those nations.⁵²² For example, the South African Constitutional Court has given effect to certain social and economic rights by challenging the view that the political allocation of resources should not be subject to a judicial review because by doing so the courts trample with the principle of separation of powers.⁵²³ As the above survey shows, the involvement of the courts in deciding the way the federal system works is not without controversies and has far-reaching important political consequences. It must be emphasised that the courts do not operate in a vacuum and a number of factors (political and social) do impact on their impartiality and the scope of their authority. In addition, emergent circumstances, for example, the outbreak of war, will tend to circumscribe the courts' impartiality and scope of authority.⁵²⁴

Part III: Constitutional Guarantees of, and Mechanisms for Protection and Promotion of Human Rights under the INC

The INC contains certain constitutional guarantees for promotion and protection of human rights. The INC further stipulates for institutional reforms that may protect and promote human rights and uphold the rule of law. The aim here is being to review constitutional guarantees, institutional reforms and mechanisms for effective promotion and protection of human rights. In particular, this part will examine the institutional reforms for the protection and promotion of human rights, including: (1) constitutional guarantees for the promotion and protection of human rights (the INC Bill of Rights); (2) mechanisms for the protection and promotion of human rights and this will entail analysing the constitutional structuring of the independence of the judiciary under the INC as well as the judicial review powers vested in the judiciary to limit the acts of the government; (3) and finally, this part will review the implementation of the

⁵²¹ Stephen Holmes, Back to Drawing Board: An argument for constitutional postponement in Eastern Europe, E. Eur. Const. Rev. Winter 1993, p. 21.

⁵²² See Donald Horwitz, The Courts and Social Policy, Washington, DC, the Brookings Institute, 1977.

⁵²³ See Theunis Roux, Legitimizing Transformation: Political Resource Allocation in the South African Constitutional Court, in: Democratization and the Judiciary: the Accountability Function of Courts in New Democracies, Siri Gloppen et al (eds.), Frank Cass Publisher, London, 2004.

⁵²⁴ C. Larkins, Judicial Independence and Democratization, p.614

institutional reforms for the protection and promotion of human rights in practice, especially the political, civil and cultural rights.

1. Constitutional Guarantees of Promotion and Protection of Human Rights: Overview of the INC Bill of Rights

The scope of the recognition and protection of the fundamental human rights vary greatly from constitution to another. For instance, in some constitutions, the fundamental human rights are contained in a form of a Bill of Rights, while in other constitutions this is usually found in a section entitled “Protection of fundamental rights and freedoms”. As to the scope of the protection of the fundamental human rights, some constitutions cover only the first two generations of human rights treaties (civil and political rights and cultural, economic and social rights), while most constitutions cover all three generations of human rights treaties, including right to development.⁵²⁵ As to the Sudanese constitution, the INC goes even further and includes, under Art. 27(3) of the INC all international human rights treaties, covenants and instruments that Sudan has ratified under the heading “Bill of Rights”.

The Sudanese Bill of Rights is embedded in Chapter IV Part Two of the INC. Art. 27 of the INC entitles: “Nature of the Bill of Rights” sets out the scope of the Bill of Rights and reads as follows:

- “(1)The Bill of Rights is a covenant among the Sudanese people and between them and their governments at every level and a commitment to respect and promote human rights and fundamental freedoms enshrined in this Constitution; it is the cornerstone of social justice, equality and democracy in the Sudan.
- (2) The State shall protect, promote, guarantee and implement this Bill.
- (3) All rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of the Sudan shall be an integral part of this Bill.
- (4) Legislation shall regulate the rights and freedoms enshrined in this Bill and shall not detract from or derogate any of these rights.”

⁵²⁵ *Charles M. Fombad*, Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa, the American Journal of Comparative Law, Vol. 55(2007), pp. 11-12.

The Bill of Rights comprises Arts. 27 through Art. 47 of the INC,⁵²⁶ expressly committing the state to “respect and protect human rights and fundamental freedoms enshrined in [the] constitution”.⁵²⁷ When the INC is compared to Sudan’s previous constitutions, the enactment of an express Bill of Rights no doubt represents a remarkable shift in the history of the Sudanese constitutional law. Although previous Sudan constitutions proclaimed a number of fundamental rights and freedoms,⁵²⁸ yet, one of the most notable features of the INC has been the incorporation into the Bill of Rights of *all* rights and freedoms in the human rights treaties, covenants and instruments that Sudan has ratified via Art. 27(3) of the INC.

Thus, Art. 27(3) of the INC means that the ambit of the Bill of Rights is not restricted to the provisions expressed in Arts. 28-47 OF THE INC, but goes beyond that to embrace all rights and freedoms enshrined in international human rights treaties, covenants and instruments to which Sudan is a party, and making these international treaties an integral part of the bill of rights. That is to say: an integral part of the Sudan constitution. These treaties and instruments include, *inter alia*, a number of the United Nations human rights treaties and International Labor Organization Conventions, such as the International Covenant on Civil and Political Rights, the Convention on Freedom of Association and Right to Organize, etc.⁵²⁹ A bill of rights is meant to put in place mechanisms for the promotion and respect for human rights”.⁵³⁰ Thus, the incorporation of a bill of rights is a positive step to give guidance to the governmental organs to

⁵²⁶ The INC Bill of Rights (Arts 28-47) includes: the right to life and human dignity (Art. 28); personal liberty (Art. 29), sanctity from slavery and forced labour (Art. 30), equality before the law (Art. 31), rights of women and children (Art. 32), sanctity from torture (Art. 33), fair trial (Art. 34), right to litigation (Art. 35), restriction on death penalty (Art. 36), privacy (Art. 37), freedom of creed and worship (Art. 38), freedom of expression (Art. 39), freedom of assembly and association (Art. 40), right to vote (Art. 41), freedom of movement and residence (Art. 42), right to own property (Art. 43), right to education (Art. 44), rights of persons with special needs and the elderly (Art. 45), public health care (Art. 46) and ethnic and cultural communities (Art. 47).

⁵²⁷ Art.27 (1) of the INC.

⁵²⁸ For example, Sudan 1973 Permanent Constitution and the 1998 Constitution provided, *inter alia*, for freedom of religion, freedom of speech and various guarantees related to criminal procedure. Older constitutions, such as the 1956 Transition Constitution and the 1964 Constitution contained such references

⁵²⁹ So far, Sudan has ratified a number of regional and international human rights treaties, such as ICCPR, African Charter. A list of the human rights treaties to which Sudan is a party is available at:

[http://www.mpil.de/shared/data/pdf/international_human_rights_treaties_sudan_english\(c\).pdf](http://www.mpil.de/shared/data/pdf/international_human_rights_treaties_sudan_english(c).pdf)

⁵³⁰ Ben Nwabueze, *Constitutional Democracy in Africa: Constitutionalism, Authoritarianism, Statism*, 2003, Spectrum Books Limited, Abuja, p.44.

observe the bill of rights while exercise their powers. The legislature is more likely to pay attention to the fundamental principles of the bill of rights in the course of making-law.⁵³¹

a. The Application of the INC Bill of Rights

Art. 27(2) of the INC states that: “[t]he state shall protect, promote, guarantee and implement this Bill”. But, Art. 27(2) does not expressly specify the organs of the state upon which it imposes a duty to protect, implement, etc the Bill of Rights. The effect of article 27(2) of the bill of rights is to cast upon the legislative, the judiciary and the executive organs of the government obligation to inform and guide their actions in accordance with the provisions of the bill of rights. Thus, the Bill of Rights functions as guidelines for lawmaking and law enforcement agencies. The Bill of Rights limits the power of the State in all types of acts it passes and the manner in which it conducts itself. As such, a citizen may challenge the constitutionality of a law passed by the legislature or challenge the conduct of the executive on the ground that that the conduct of the executive conflicts with the bill of rights.⁵³²

Mechanisms for the application of the bill of Rights are contained in Art. 48 of the INC which states that: “... the Bill of Rights shall be upheld, protected and applied by the Constitutional Court and other competent courts ...”. Art. 122(1)(d) of the INC gives the Constitutional Court the competence to protect human rights and fundamental freedoms. In practical terms, this can be construed to mean that individuals are allowed to file suits on grounds of (alleged) human rights violations. The lawsuits are then directed against the state authority that allegedly has violated the human rights of the individuals. In addition, the aggrieved individuals can contest any act of the President or the Presidency before the Constitutional Court if the alleged act involves a violation of the Bill of Rights.⁵³³ However, such a claim before the Constitutional Court can only be initiated by someone who is personally aggrieved by the alleged human rights violations.

⁵³¹ *Tom Ginsburg*, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, Cambridge University Press, 2003, p. 32

⁵³² *Cheadle, Davis, Haysom*, *South African Constitutional Law: The Bill of Rights*, Durban, Butterworth, 2002, pp. 20-24

⁵³³ Art. 61(a) of the INC.

Besides the Constitutional Courts, the INC provides for the establishment of a number of quasi-judicial institutions for the implementation of the rights guaranteed by the Bill of Rights, such as the Public Grievances Chamber and the National Human Rights Commission. The National Human Rights Commission⁵³⁴ is a public body. The National Human Rights Commission Act 2009 provides the commission with a mandate to monitor the application of the rights and freedoms provided in the Bill of Rights, as well as the power to receive complaints of violation of human rights,⁵³⁵ and to ensure harmonization of laws with the Bill of Rights. The Commission may also express opinions or present advice to State organs on any issue related to human rights.⁵³⁶ However, one of the complicating factor in the current governance of human rights in Sudan is the existence of the Advisory Council for Human Rights (a department within the Ministry of Justice), which has occupied a *de facto* role of a human rights institution in Sudan.

The INC established also a special commission to ensure that the rights of non-Muslims are protected and not subjected to the application of *Sharī'ah* law only in the national Capital, Khartoum and to accommodate for religious, social and cultural diversity in Khartoum - the national capital.⁵³⁷ Furthermore, the INC mandates the establishment of mechanisms such as special courts and prosecutors to ensure all religions and beliefs are protected and enforced in Khartoum⁵³⁸ by the law enforcement agencies, which shall be adequately trained and made sensitive to the cultural, religious and social diversity in Khartoum.⁵³⁹

b. Reception of International Human Rights Law within the Sudanese legal System

The relationship between international law and domestic law are governed by two different theories: *the dualist theory* which claims that international law and domestic law are different as regards their sources, contents, and as such they must represent two separate legal systems and that international law needs to be transformed into national legal system through a legislative act so as to be applicable before the national courts. The second theory, *the monist theory*, on

⁵³⁴ Arts. 48, 142(3) of the INC.

⁵³⁵ Art. 9(2) of the National Human Rights Commission.

⁵³⁶ Art. 142(4) of the INC.

⁵³⁷ Art. 155, Art. 156 (c) and Artt. 157, 158 of the INC.

⁵³⁸ Art. 154 of the INC.

⁵³⁹ Art. 155 of the INC.

the other hand, maintains that international law and domestic law are one legal system and in case of conflict, international law prevails over domestic law.⁵⁴⁰

In Sudan, the reception of international law within the Sudanese legal system lacks a concrete legislative and judicial approach. As a common law country, however, Sudan used to follow a dualist approach as to the reception of international law within the Sudanese legal system in that international law needs to be transformed into the Sudanese legal system through a legislative act.⁵⁴¹ Art. 27(3) of the INC confers constitutional status on a number of human rights treaties and renders these norms directly applicable before the Sudanese courts. This provision, which makes international law as an integral part of domestic law, has been the subject of a great deal of controversy as writers and lawyers have tried to establish whether international legal rules would invalidate any inconsistent domestic legislation.⁵⁴²

To illustrate this, the INC, however, does not provide for an express hierarchy between the provisions of the INC Bill of Rights and the provisions of human rights treaties that Sudan has ratified. Lack of clarity on the relationship between the provisions of the INC Bill of Rights and the provisions of human rights treaties could lead to substantial problems insofar as the interpretation of the INC Bill of Rights is concerned. This problem stems largely from the fact that the wording of the INC Bill of Rights does not correspond to that of human rights treaties provisions that have been incorporated via Art. 27(3) of the INC into the constitution (compare, for example, Art. 14 of the ICCPR with Art. 34 of the INC).⁵⁴³ Much more difficult to answer is the question of what should happen in case that the provisions of the INC Bill of Rights diverge from the provisions of the human rights treaties incorporated in the INC. The question then would be which level shall prevail. This tension is likely to arise since rights conferred by the

⁵⁴⁰ *John C. Mubangizi*, the Protection of Human Rights in South Africa, a Legal and Practical Guide, 2nd edition, South Africa, Publisher, Juta, p. 39, 2013

⁵⁴¹ *Mohamed Abdelsalam*, Why Constitutional Bills of Rights fail to protect Civil and Political Rights in Sudan: Substantive Gaps, Conflicting Rights, and Arrested Reception of International Human Rights Law, in *The Constitutional Protection of Human Rights in Sudan: Challenges and Future Perspectives*, 2014, p. 26, Conference Papers and Proceedings, Khartoum, Sudan.

⁵⁴² See generally on the relation between international law and municipal law, *Malcolm N. Shaw*, *International Law*, Sixth edition, Cambridge Press, 2008.

⁵⁴³ Compare Article 34 of the INC with and Article 14 of the ICCPR

international human rights treaties (ratified by Sudan) are broader than the list of specific rights as set out in the INC Bill of Rights.

As stated above, article 27(3) of the INC incorporates all human rights treaties that Sudan has ratified and makes them as directly applicable before the courts. According to some scholars, article 27(3) of the INC reflects a monist doctrine of international law, which means that international law becomes part of the domestic law following ratification of a treaty and prevails over the domestic law. According to this view, all rights and freedoms enshrined in the INC Bill of Rights can be applied and guided by international human rights treaties ratified by Sudan.⁵⁴⁴ Nevertheless, this has raised some difficulties in practice in terms of the actual application of the law by law enforcement officials and the judiciary, especially the Sudanese Constitutional Court. This has been particularly the case where there is a discrepancy between the provisions of the INC Bill of Rights and the provisions of human rights treaties.⁵⁴⁵ To illustrate this, for example, the INC Bill of Rights guarantees rights contained in human rights treaties, such as the right to a fair trial and freedom from torture, whose definition is at times at variance with international human rights treaties. For instance, in contrast to article (7) of the ICCPR, article (33) of the INC Bill of Rights omits the word “punishment” from the definition of article (33) in that article (33) of the INC provides that “No one shall be subject to torture or the cruel, inhuman or degrading treatment.”

In practice, security sector institutions, such as National Security Agencies, as per the provisions of the National Security Act 2010, violate article 9(4) of ICCPR⁵⁴⁶ (which is now an integral part of the INC), as well as article (29) of the INC which provides that persons can be deprived of their liberty “for reasons and in accordance with the procedures prescribed by law”. In that the National Security Act 2010 provides the security agencies with wide powers: summoning persons for investigation, arrest, and detention for several months without charge or trial, with

⁵⁴⁴ *Mohamed Abdelsalam*, Why Constitutional Bills of Rights fail to protect Civil and Political Rights in Sudan: Substantive Gaps, Conflicting Rights, and Arrested Reception of International Human Rights Law, in *The Constitutional Protection of Human Rights in Sudan: Challenges and Future Perspectives*, 2014, p. 26, Conference Papers and Proceedings, Khartoum, Sudan.

⁵⁴⁵ *Ibid*

⁵⁴⁶ Article 9(4) of ICCPR provides namely for the right to habeas corpus which is enshrined in article 9 (4) of the ICCPR. The right to habeas corpus entitles any person who has been deprived of his or her liberty, for whatever reason, to challenge the lawfulness of his/her detention in a court without delay.

no real judicial supervision.⁵⁴⁷ Further, the new amendments of Sudan's Criminal Procedure and Criminal Panel Act contravene the provision of the right to a fair trial, as provided in ICCPR, as the new amendments provide that civilians can stand trial before military courts. This clearly deprives the accused of his or her right to a fair trial.⁵⁴⁸ Thus, the protection against arbitrary deprivation of liberty and the right to a fair trial are in practice further limited by Sudanese criminal laws, security laws.⁵⁴⁹ In this connection, nowhere in the Sudanese laws there any provisions that provide detainees with an effective remedy against arbitrary detention.⁵⁵⁰

As a general principle, national law should, or indeed must, be interpreted so as to avoid any discrepancies with a state's international obligations.⁵⁵¹ States must comply with international obligations they have incurred as a matter of treaty or customary international law.⁵⁵² Some legal scholars think that a conflict of this nature can often be settled by interpreting the national law in a manner that conforms to the international treaty. If a treaty and a national law are of equal rank, in this case one might refer to the doctrine "*lex specialis derogat legi generali*" by considering the provisions in the INC Bill of Rights as the more specific laws that supersedes the rather general provisions of international human rights treaties. According to this view, the norms of the INC Bill of Rights might restrict some human rights deriving from international human rights treaties.⁵⁵³ In practice, judges in ordinary courts rarely rely on the Bill of Rights and international human rights law.⁵⁵⁴ Irrespective of the reading of Art. 27 (3) of the INC, it is

⁵⁴⁷ *Amin M. Medani*, The Constitutional Bill of Rights in the Sudan: Towards Substantive Guarantees and Effective Realization of Rights, in *The Constitutional Protection of Human Rights in Sudan: Challenges and Future Perspectives*, January, 2014. Papers and Proceedings: REDRESS, University of Khartoum, faculty of Law, Sudanese Human Rights Monitor, Khartoum, Sudan.

⁵⁴⁸ *Ibid.*

⁵⁴⁹ *Mohamed Abdelsalam*, Why Constitutional Bills of Rights fail to protect Civil and Political Rights in Sudan: Substantive Gaps, Conflicting Rights, and Arrested Reception of International Human Rights Law, in *The Constitutional Protection of Human Rights in Sudan: Challenges and Future Perspectives*, 2014, p. 26, Conference Papers and Proceedings, REDRESS, University of Khartoum, faculty of Law, Sudanese Human Rights Monitor Khartoum, Sudan.

⁵⁵⁰ *Ibid*

⁵⁵¹ Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

⁵⁵² Article 26 Vienna Convention on the Law of Treaties, 23 May 1969

⁵⁵³ Max Planck Manual on the Sudanese Constitutional Law: Part 1: Structure and Principles of the INC (on file with the author).

⁵⁵⁴ *Mohamed Abdelsalam*, Why Constitutional Bills of Rights fail to protect Civil and Political Rights in Sudan: Substantive Gaps, Conflicting Rights, and Arrested Reception of International Human Rights Law, in *The Constitutional Protection of Human Rights in Sudan: Challenges and Future Perspectives*, 2014, p. 26, Conference Papers and Proceedings, Khartoum, Sudan.

good practice for a state to undertake compatibility studies that examine to what degree its criminal law conforms to its international obligations.⁵⁵⁵

c. Derogation on Human Rights and Limitations of Human Rights

i. Derogation of Human Rights Obligations:

International human rights instruments make a distinction between *derogation* and *limitation* of the fundamental human rights. In the times of ‘war or other public emergency’, a State is free from the obligations imposed by human rights norms. This is called derogation. *Derogation*, in effect means that though a law violates a guaranteed human right, it will not be unconstitutional or invalid, during a period of war or proclamation of emergency. The exercise of the right of derogation, again, is subjected to two conditions by the International Instruments: (a) the measures taken to derogate from certain human rights must be strictly required by the exigencies of the situation; and (b) such measures must not be inconsistent with the other obligations of the State under international law.⁵⁵⁶

Derogation permits the States to suspend the application of certain provisions of human rights treaties.⁵⁵⁷ According to the INC, the President “may, upon the occurrence or approach of any emergent danger, whether it is war, invasion, blockade, disaster or epidemic, as may threaten the country or any part thereof or the safety or economy of the same declare the state of emergency in the country, or in any part thereof, in accordance with the Constitution and law. Before the declaration of the emergency, the President, however, requires the consent of the First Vice President.

ii. Limitations of Human Rights:

The most important function of the limitation clause is the explicit recognition that constitutional rights are not absolute and that they may be limited by law giving effect to social

⁵⁵⁵ See on the practice of states to conduct compatibility studies the comparative survey by *Christof Heyns and Frans Viljoens*, *Impact of the Human Rights Treaties on the Domestic Level*, Kluwer Law International, 2002.

⁵⁵⁶ *Durga Das Basu*, *Human Rights in Constitutional Law*, 1994, p. 317-318.

⁵⁵⁷ *Mohamed Abdelsalam*, *Why Constitutional Bills of Rights fail to protect Civil and Political Rights in Sudan: Substantive Gaps, Conflicting Rights, and Arrested Reception of International Human Rights Law*, in *The Constitutional Protection of Human Rights in Sudan: Challenges and Future Perspectives*, 2014, p. 27, Conference Papers and Proceedings, Khartoum, Sudan.

interests, as articulated by a democratically elected legislature.⁵⁵⁸ The need for limitations stems from two basic prepositions: (i) that no individual right can be absolute and (ii) that some limitation is needed for the protection of the individual rights themselves.⁵⁵⁹

Fundamental rights can be divided into absolute rights and qualified (limited) rights.⁵⁶⁰ Absolute rights are not subject to restrictions, as their exercise cannot be limited by legislation. Absolute rights are rare and include rights such as freedom from torture and freedom from servitude. Whereas, qualified rights may be restricted by law. A typical limitation clause can be construed as follows: “*as determined by law*”; “*in accordance with the law*” and “*on the basis of a law*”. Limitation clauses, in turn, can be classified into: (a) general limitation clauses which are applicable, in principle, to all rights in the Bill of Rights and (b) particular limitation clauses that are applicable in respect of a particular right.⁵⁶¹

Many constitutions and international human rights instruments contain general limitation clauses, which are applicable to all human rights in the respective instrument/constitution. Such general limitation clauses can usually be found at the beginning or the end of the bill of rights. In contrast, particular limitation clauses are applicable only in respect of a particular fundamental right or a specified number of fundamental rights.⁵⁶² Some fundamental rights contain explicit permissions to limit the respective fundamental right. Such limitation clauses provide legitimate purposes for the limitation of human rights and are designed to protect community interests or the rights of others. These limiting statutes must be interpreted narrowly.⁵⁶³

⁵⁵⁸ Cheadle, Davis, Haysom, South African Constitutional Law: The Bill of Rights, p. 694.

⁵⁵⁹ Durga Das Basu, Human Rights in Constitutional Law, 1994, p. 319-320

⁵⁶⁰ M. Mahmood, the Constitution of the Islamic Republic of Pakistan, Pakistan Law Times Publications, 1973, p. 144.

⁵⁶¹ Ibid p. 85.

⁵⁶² Ibid p.85.

⁵⁶³ For comprehensive analysis on this cf. Max Planck Manual on Sudanese Constitutional Law: Part II: Individual Constitutional Rights and Freedom, October, 2009 (on file with author).

d. Limitation Clauses of Human Rights in the INC Bill of Rights

i. Article 27(4) of the INC

Art. 27(4) of the INC provides a general direction to the legislature on how to regulate the fundamental rights enumerated in the INC Bill of Rights in such a way that does not “detract from or derogate any of these rights [contained in the Bill of Rights].”⁵⁶⁴ Yet, Art. 27(4) provides neither for limitation of the fundamental rights by way of a general limitation, nor specifies standards against which the limitation of the Bill of Rights is permissible. A closer look, however, at the INC Bill of Rights discloses different kinds of limitation clauses that are contained within the INC Bill of Rights. For example, Art. 29 “Right to Personal Liberty” provides that “[...] no person shall be subjected to arrest, detention, deprivation or restriction ...except ... *in accordance with procedures prescribed by law.*” That means, the limitation of the right to personal liberty must be achieved through a law of general application. Other human rights provisions contain similar general limitations clauses, for instance, the right to privacy (Art. 37), the right to freedom of assembly and association (Art. 40).

On the other hand, the INC bill of Rights has more detailed/specific provisions for restrictions and limitation of specific human rights in the Bill of Rights. For instance, Art. 39 ‘Freedom of Expression and Media’ provides that “[e]very citizen shall have an unrestricted right to the freedom of expression, reception and dissemination of information, publication, and access to the press without prejudice to *public order, safety or public morals* as determined by law [...] all media shall abide by professional ethics, shall refrain *from inciting religious, ethnic, racial or cultural hatred and shall not agitate for violence or war*”.

Another example is Art. 42 of the INC which provides for the right to “Freedom of Movement and Residence” which provides that “every citizen shall have the right to freedom of movement and the liberty to choose his/her residence except for reasons of public health and safety as shall be regulated by law”. This means that a law of general application limits the fundamental rights and that certain reasons justify *the imposition of further restrictions on certain fundamental rights*. Such reasons include for example, public order, safety, or public morals and health. In the final analysis one could conclude that the INC Bill of Rights has *general and*

⁵⁶⁴ Art. 27 of the INC.

specific limitation clauses for the different fundamental rights contained in the INC Bill of Rights

ii. Article 48 of the INC

Art. 48 of the INC reiterates the content of Art. 27(4) by stating that “no derogation from the rights and freedoms enshrined in this Bill shall be made ...”. Yet, this emphasis of no derogation from fundamental rights of the INC is preceded by proviso which states that “subject to Article 211 herein, no derogation ...”. Art. 211(a) of the INC states that:

“[t]he President of the Republic, with the consent of the First Vice President, may during the state of emergency take ... any measures that shall not derogate from the provisions of this Constitution ... except as may be provided herein:- (a) to suspend part of the Bill of Rights. However, there shall be no infringement on the right to life, sanctity from slavery, sanctity from torture, the right of non-discrimination on the basis of race, sex, religious creed, the right in litigation or the right to fair trial [...]”.

Thus, in addition to the general and specific limitations of human rights provisions as contained in the different rights in the Bill of Rights, the exercise of certain constitutional rights can be limited in extraordinary cases when states of emergency are declared. However, Art. 211(a) of the INC prescribes that certain fundamental rights in the INC Bill of Rights that may not be suspended even under a state of emergency such as the right to life, sanctity from slavery, etc. Here, the INC reflects the general norms expressed under international law. As such, Art. 211(a) of the INC accords with Art. 4 of the International Covenant on Civil and Political Rights which spells out certain human rights provisions that are not subject to limitation during the state of emergence.

2. Mechanisms for the Protection and Promotion of the INC Bill of Rights

i) Assessing the Role of the Judiciary in Protection and Promotion of Human Rights Pre- the INC⁵⁶⁵

Since the independence, Sudan has undergone a succession of constitutions and constitutional amendments, each new one marking the birth of a ‘new’ regime. Every Sudanese constitution stressed the judicial independence and offered a fair degree of institutional independence. All previous constitutions indeed contained ringing declarations on proclaiming rights to economic security, equality, protection of individual rights, etc.

The Self-Government Statute, which was promulgated in 1953 shortly before the independence of Sudan, provided for the establishment of the executive, the legislative and judicial branches.⁵⁶⁶ It entrusted the judiciary with jurisdiction to hear and determine any matter involving its interpretation or the enforcement of the fundamental rights.⁵⁶⁷ The Supreme Court, as declared the guardian of the constitution, was granted unfettered jurisdiction of judicial review in the 1956 Transitional Constitution.⁵⁶⁸ The judiciary in the case of *Mohamed Adlan v. Sudan Government* asserted the right of the judiciary to review the government actions. In that case a citizen brought a suit in Sudan’s civil court, seeking the court to issue an order to force the government to renew his lease.⁵⁶⁹ Although the petition of the plaintiff in that case failed, nonetheless, the court pointed out that “while the Court chose not to force the government to renew the lease, it was nevertheless within the Court’s ability to do so and that the Court has the power to enforce government and to control executive acts, but the plaintiff has not shown he is entitled to this remedy”.⁵⁷⁰

⁵⁶⁵ The author contributed substantively to the research of this section which was published in REDRESS under the title: “*Arrested Development: Sudan’s Constitutional Court, Access to Justice and the Effective Protection of Human Rights*”, August, 2012. Available at: <http://www.redress.org/publications>

⁵⁶⁶ Art. (76) of the Self-Government Statute of 1953.

⁵⁶⁷ Art. 42 of the Sudan Self-Government Statute, 1953.

⁵⁶⁸ Art. 102 of the Sudan Transitional Constitution of 1956.

⁵⁶⁹ *Mark Fathi Massoud*, *Law’s Fragile State, Colonial, Authoritarian, and Humanitarian Legacies in Sudan*, pp. 100-101, Cambridge University Press, 2013.

⁵⁷⁰ *Mohamed Adlan v. Sudan Governments* SLJR (1956), p. 64. as quoted in *Mark Fathi Massoud*, *Law’s Fragile State, Colonial, Authoritarian, and Humanitarian Legacies in Sudan*, pp. 100-101, Cambridge University Press, 2013.

During Abboud's military government (1958-1963), the Transitional Constitution was abrogated and the judiciary was made directly answerable to the President. Subsequently, the Judiciary Act of 1959 was passed, which provided that the judiciary was to be represented in the Council of Ministers (Cabinet) by the Minister of Justice. The judiciary was subordinated to the executive, i.e. the military, and the Chief Justice and the judges were to be appointed by the Supreme Council of the Armed Forces on the advice of the Prime Minister who was required to consult the members of the judiciary.

Following a popular revolution in 1964, the Transitional Constitution of 1956 was resorted and the Judiciary Act of 1959 was repealed and article 99 of the amended Transitional Constitution vested the Supreme Court with the power of constitutional review and, in 1966, Supreme Civil and Sharia Courts were established. In 1967, Islamist parliamentarians successfully lobbied to amend the Constitution with a view to banning the Communist Party from the Parliament. The Communist Party challenged this amendment before the Supreme Court which, in turn, declared it unconstitutional.⁵⁷¹ However, the parliament supported by the executive and refused to obey the decision of the Supreme Court.⁵⁷² In 1968, the government Parliament by forcing ninety of its members to resign with a view to pre-empting a planned no-confidence vote that needed a two-third majority. This decision was challenged before the Supreme Court, which, however, upheld the dissolution of Parliament.⁵⁷³

Further, Art. 66 of the 1973 constitution was amended to deny the writ of habeas corpus to those administratively detained. Some say that the amendment of 1973 Constitution was requested by the State Security apparatus following an abortive coup in 1975 and in anticipation of a Supreme Court judgement that was going to rule preventive detention under the State Security Act, as unconstitutional.⁵⁷⁴

⁵⁷¹ *Joseph Garang and another v. The Supremacy Council the Constituent Assembly & the Attorney-General*, see Highlights of the Judicial System in Sudan, 2009, 14, available at www.sudanjudiciary.org/judiciarye.pdf.

⁵⁷² *Al-Shaf'i Bashir*, Constitutional Law and Sudanese Political Systems, 1970, Khartoum, p. 261 (in Arabic)

⁵⁷³ See generally *Ahmed el-Tayeb el-Gaili*, The Politics of Judicial Independence in Sudan: The Equilibrium, (on file with the author), May 2002.

⁵⁷⁴ *Ahmed Mohamed Kheir and Khalid Elias v. The Sudan Democratic Republic* S.CT./CC No. 2/1974

Following the coup by Nimeiri, a new Judiciary Act was passed in 1969. The judiciary, as structured under the 1969 Act, was consisted of a Civil and Sharia Divisions.⁵⁷⁵ The Judicial Act of 1969 provided for an ‘independent judiciary’ that was directly responsible to the Council of the Revolution for the performance of its functions and that the Minister of Justice was to represent the judiciary in the Council of Ministers.⁵⁷⁶ The Judiciary, including the Chief Justice and the Grand Gadi were appointed by the Council of the Revolution on the advice of the Prime Minister. In practice, the independence of the judiciary during Nimeiri’s era was severely curtailed, as the judicial review of ‘sovereign acts’ which covered a wide range of political decisions were considered outside the remit of the judicial review. Following the adoption of the Constitution of 1973, which created ‘a modicum of constitutionalism’, the Supreme Court ruled in the Sol Nasr case that ‘the trial of civilians before military tribunals, using a penal law that had retroactive effect, offended against the “letter and spirit” of that constitution’.⁵⁷⁷ Shortly thereafter, constitutional amendments ‘greatly enhanced[d] the powers of the president, ensure[d] the constitutionality of preventive detention and special courts’.⁵⁷⁸

Nimeiri embarked on the establishment of special emergency courts that were given jurisdiction to try opposing political figures.⁵⁷⁹ The special courts created a parallel legal system and were composed of judges from outside the judiciary who operated without any real supervision by the Chief Justice.⁵⁸⁰ Several judges protested against the establishment of special courts, as a result, forty two judges were purged by Nimeiri.⁵⁸¹ A review of judicial practice in the period from 1973 to 1985 found that the judiciary did not nullify any legislation.⁵⁸² In 1975, the Supreme Court upheld constitutional amendments to allow arrests without trial.⁵⁸³ In other cases, the Supreme Court deemed the President’s declaration of emergency and the dissolution of

⁵⁷⁵ Art. 5 of the Sudanese Judiciary Act of 1969.

⁵⁷⁶ Article 4 of the Sudanese Judiciary Act 1969.

⁵⁷⁷ *Ali Suliman*, ‘Constitution-Making in the Sudan: Past Experiences 1956-2005’, in UNDP, *The Republic of Sudan Constitution Making Forum*, 24-25 May 2011, 73-79.

⁵⁷⁸ *Ibid.*

⁵⁷⁹ *Mohammed Mashawi*, *Grievance Law*, 1999, Khartoum, p.89 (in Arabic).

⁵⁸⁰ *Ibid.*, 9.

⁵⁸¹ *Mohammed Mashawi*, *Grievance Law*, 1999, Khartoum, 89 (in Arabic).

⁵⁸² *Ahmed Shawqi Mahmoud*, *Constitutional Law Principles and Sudan’s Experience in Politics and Governance System*, 1999, 255 (in Arabic).

⁵⁸³ Lawyers Committee for Human Rights, *Sudan: Attack on the Judiciary* 4 (1991), available at: http://www.africa.upenn.edu/Urgent_Action/apic_1177.html

Parliament non-justiciable sovereign acts that were not subject to judicial review, regardless of their constitutional implications.⁵⁸⁴

Following the end of Nimeiri's regime, a new Transitional Constitution was enacted in 1985. A Judiciary Act 1986 was enacted which entrusted the High Judicial Council with the appointment, dismissal and transfer of judges. Notably, its article 11 of Transitional Constitution of 1985 subjected all acts of the state to judicial review. Yet, in 1987, after the consolidation of power of the transitional government, the Constitution was amended to exempt certain legislation from judicial review. Shortly thereafter, a law was passed to exempt a long list of officials from criminal and civil prosecution.⁵⁸⁵ The shift towards the executive was also apparent in the jurisprudence of Sudan's Supreme Court. In 1987, for example, it considered the state of emergency that had been declared a non-justiciable political matter, although the declaration of the State of emergency resulted in the suspension of constitutional rights.⁵⁸⁶

The civilian government was overthrown and a state of emergency was declared and the country was ruled by decrees. In 1998, a new constitution was promulgated. Art. 101 of the constitution stated that 'judges are independent in the performance of their duties ... and they shall not be influenced in their judgment.' At. 103(4) stated that "[n]o judge shall be dismissed except after a disciplinary process and a recommendation from the Supreme Judicial Council".⁵⁸⁷ Further guidelines for the preconditions of such a disciplinary process could be found on the statutory law, in Arts 55 et seq. of the Judiciary Act of 1986. The appointment of judges was also prescribed in the 1998 Constitution. For instance, Art. 104 empowered the President of Sudan to appoint the Chief Justice, his deputies and any other judges, requiring a recommendation of the High Judicial Council only with regard to the latter. The 1998 Constitution did not prescribe specific qualifications as regards the appointment of the judges, whereas the National Judiciary Act of 1986 stipulated explicitly the general conditions for the appointment of the judges. Those conditions, however, did not require consensus and/or the participation of the parliament with

⁵⁸⁴ *Ahmed Shawqi Mahmoud*, *Constitutional Law Principles and Sudan's Experience in Politics and Governance System*, 1999, p. 223 (in Arabic)

⁵⁸⁵ *Ahmed el-Tayeb el-Gaili*, *The Politics of Judicial Independence in Sudan: The Equilibrium*, (on file with the author), May 2002.

⁵⁸⁶ *Ibid.*

⁵⁸⁷ Art. 103(4) of the 1998 Constitution of Sudan.

the exception, according to Art. 105(1) of the 1998 Constitution, to the judges of the Constitutional Court.

Therefore, in demanding only a “recommendation” by the High Judicial Council, a term which undefined in the 1998 Constitution, the latter seemed to allow the Sudanese President a relatively free hand in appointing judges. In addition, the government excluded women and non-Muslims from joining the judiciary.⁵⁸⁸ According to the Report of the International Commission of Inquiry on Darfur, “Judges disagreeing with the Government often suffered harassment including dismissals”.⁵⁸⁹ In addition, the UN Human Rights Commission has stated that ‘in appearance as well as in fact the judiciary is not truly independent, that many judges have not been selected primarily on the basis of their qualifications, that judges can be subject to pressure through a supervisory authority dominated by the Government.’⁵⁹⁰

As indicated above, the use of special courts was very widespread, especially in the first years of the regime for dealing with any case of political opponents. In these courts, traditional notions of fair trial were waived. For example, some commentators observed that the Sudanese courts “routinely sentence unrepresented defendants to death after secret trials involving confessions obtained through torture.”⁵⁹¹ By 1991, some say that the mass purge of the judiciary was estimated between 300-400 judges dismissed or resigned.⁵⁹² At the same time, the judiciary was stacked with individuals closely associated with the military regime. Paralleling the purges that were undertaken in the armed forces, the public sector, universities and the educational, the Supreme Court also moved to cleanse itself of scores of judges and judicial personnel thought to

⁵⁸⁸ Lawyers Committee For Human Rights, *Beset by Contradictions: Islamization, Legal Reforms, and Human Rights in Sudan*, (1996), 41. UNIVERSITY OF PENNSYLVANIA - AFRICAN STUDIES CENTER. Available at: http://www.africa.upenn.edu/Urgent_Action/apic_1177.html.

⁵⁸⁹ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General pursuant to Security Council Resolution 1564 of 18 September 2005, Geneva, 25 January 2005, para. 432, available at http://www.icc-cpi.int/library/cases/Report_to_UN_on_Darfur.pdf (UNCOI Report; last visited 9 November 2007).

⁵⁹⁰ Consideration of Sudan’s Second ICCPR Periodic Report, CCPR/C/75/Add.2), Supplement No. (40/53/40), Para. 132, at 25. On dismissal of judges.

⁵⁹¹ Kevin John Heller, *The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process*, Criminal Law Forum 17 (2006)p.256; see also U.S. Department of State, Country Reports on Human Rights Practices, Sudan (2005), available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61594.htm> (last visited 9 November 2007); Human Rights Watch, *Lack of Conviction: The Special Criminal Court on The Events on Darfur 1* (2006), 25, available at <http://hrw.org/backgrounder/ij/sudan0606/sudan0606.pdf> (last visited 9 November 2007).

⁵⁹² Ahmed el-Tayeb el-Gaili, *The Politics of Judicial Independence in Sudan: The Equilibrium*, (on file with the author), May 2002.

be politically unreliable. Recently, Specialized Courts were established in West, North and South Darfur by a decree in 2003 by the Sudan Chief Justice and replaced the Special Courts established by decrees under the state of emergency in Darfur in 2001.

For the first time in Sudan's history, the 1998 constitution established a Constitutional Court⁵⁹³ vested with the power to decide on constitutional matters. The Administrative Act of 1998, which set out relevant procedures, empowered all courts to exercise constitutional review in the course of their adjudication and to refer cases to the constitutional court to decide on the constitutionality of laws. Notably, the 1998 Constitutional Court Act also vested the Court with the power to reconsider Supreme Court judgments.⁵⁹⁴ In practice, defence lawyers brought a large number of cases before the Constitutional Court in which they challenged the constitutionality of murder convictions on the ground that they constituted a violation of the right to life. The Constitutional Court repeatedly concurred with this interpretation, with the result that those convicted were no longer subject to the death penalty, a situation that created considerable tension between the Supreme Court and the Constitutional Court.

As the review demonstrates, the only periods where the Supreme Court had both a measure of independence and the power of judicial review was during the transitional periods from 1964-1969 and 1985-1989 respectively. Yet, even during these periods, where the Supreme Court did rule against the then Government on occasions, its position was fragile as evident in the curtailment of judicial review powers in 1987. As to the status of constitutionalism in Sudan before the adoption of the INC, in practice, the judiciary enjoyed little independence. In general, when looking at the Sudanese experience with constitutionalism, due to the political instability, the history of constitutionalism in Sudan is a troubled one. On several occasions, the successive governments trampled on the independence of the judiciary in way or another. Some observers have described Sudan's legal system as a tool in the hands of the State authorities to redesign the legal system to serve their interests, political, economic and social conditions. While the judiciary had been used to foster stability and predictability in the aftermath of the independence

⁵⁹³ Art 105 of Sudan Constitution of 1998.

⁵⁹⁴ *Amin Medani*, 'A Legacy of Institutionalized Repression: Criminal Law and Justice', in *Criminal Law and Transitional Justice: Human Rights Perspectives for Sudan*, L. Oette (ed.), Ashgate, Farnham, 2011, 67-88, at 69.

of Sudan, nonetheless, in the ensuing decades, the legal system was used to intimate political opponents and as a tool for regime preservation and establishing military dictatorship.⁵⁹⁵

As *Hyden* puts it ‘the extent to which constitutionalism is practiced in a country depends ultimately on the behavior of its ... political leaders, who typically set the tone for the rest of society’.⁵⁹⁶ The establishment of a parallel system of justice the so-called ‘the special courts’, which allowed extensive derogation from the principles of the fair trial, as such, the constitution lost most of its claim to being the basic law of the land. More importantly, the judiciary was intimidated by the power of the military regimes which exemplified in mass purge of the judiciary⁵⁹⁷ and thus the judiciary avoided dealing with matters against the government. In consequence, the public perceive the judiciary as politically marginalized and manipulated by the executive branch of the government.

Some observers say that ‘the application and enforcement of law also vary considerably across Sudan. The political and judicial power is centralized in Khartoum. As a consequence, the periphery regions are not governed by the central government in Khartoum. This, in turn, has led to the existing of number of legal systems that overlap to some extent, including formal, informal and Islamic law. This is coupled with lack of connection between state law, customary law and inconsistency with international law. All of these factors have contributed to disorder of Sudan legal system as a whole.’⁵⁹⁸

⁵⁹⁵ *Mark Fathi Massoud*, *Law’s Fragile State, Colonial, Authoritarian, and Humanitarian Legacies in Sudan*, p. 87, Cambridge University Press, 2013.

⁵⁹⁶ *Goran Hyden* et al, *Constitution-making in Africa: Political and Theoretical Challenges*, in: *Goran Hyden et al, Constituting-Making and Democratization in Africa*, Africa Institute of South Africa, 2001, p.3

⁵⁹⁷ *H.W.O. Okoth-Ogendo*, *Constitutions without Constitutionalism: Reflection on an African Political Paradox*, in *Constitutionalism and Democracy: Transitions in the Contemporary World*, Oxford University Press, 1993, Douglas Greenberg et al (eds.) p. 73.

⁵⁹⁸ *Mark Fathi Massoud*, *Law’s Fragile State, Colonial, Authoritarian, and Humanitarian Legacies in Sudan*, pp. 100-101, Cambridge University Press, 2013, p. 37.

ii) The Constitutional Structure of the independence of the Judiciary under the INC

As indicated above, the court may contribute to democratic transformation in transitional countries, through the revision of the actions of the government acts. In this respect, a number of studies have suggested that in order to assess the impact of the courts on democratic transformation, the outcome of cases decided by the courts should be examined. Or, a careful interpretative exercise in which the structural conditions of the courts should be analyzed.⁵⁹⁹ According to these studies, this assessment should be conducted along with the functional relationship of the judiciary with other political institutions.⁶⁰⁰

However, some scholars do not agree with the above-mentioned method, for example, *Fombab* argues that, ‘although [the above-method] is useful, it is unlikely to produce a result that will be more accurate and thus *Fombab* suggests that what maybe more usefully to be done is to assess the ‘prospects’ for, rather than the actual ‘existence’ of the judicial independence. By focusing such an analysis on the constitutional provisions as regards the independence of the judiciary, one will be looking at legal rules that set standards that are, in principle, less vulnerable to frequent changes and governmental manipulation.’⁶⁰¹

Fombab argues that the ‘institutionalization of judicial independence, within a framework that offers good prospects for constitutionalism, reduces and controls the potentially enormous powers of the state and ruling parties to act arbitrarily.’⁶⁰² The existence of an independent judiciary indicates the commitment of the state to constitutionalism and the rule of law.⁶⁰³ However, *Fombab* confesses to a number of problems that may associate with his approach as to the measurement of the independence of the judiciary. One of these problems, as described by *Fombab*, is that courts do not exist or operate in a vacuum but are subject to some democratic restrictions that inevitably limit their independence and the scope of their authority,

⁵⁹⁹ *Charles Fombad*, Preliminary Assessment of the Prospects for Judicial Independence, *Independence in Post-1990 Africa Constitution*, 2 Public Law (2007), p. 237-8

⁶⁰⁰ *Ibid*, p. 237-8

⁶⁰¹ *Charles Fombad*, Preliminary Assessment of the Prospects for Judicial Independence in Post-1990 Africa Constitution, 2 Public Law (2007), p. 238, pp 233-257

⁶⁰² *Charles Fombad*, Preliminary Assessment of the Prospects for Judicial Independence, p. 239.

⁶⁰³ *Ibid*, p. 239.

as most constitutions usually allow restrictions to be imposed in certain situations, such as the outbreak of civil insurrection and grave natural disasters.

It is therefore, the quality of the judicial independence in any country will depend on the nature of the restrictions that are contained in the constitutions, for example, those restrictions that pertain to emergency situations which may arise and how often the power to impose these restrictions is exercised.⁶⁰⁴ *Fombab* goes on to elaborate on a number of difficulties that are often directly or indirectly impact on the assessment of the independence of the judiciary, and which are related to the general structural and contextual issues such as poor training of the judges, poor quality or unavailability of legal services, inadequacy of courtrooms' facilities, lack of essential material resources and other logistical issues. *Fombab* argues that looking at the independence of the judiciary without treating these issues may not give accurate picture.⁶⁰⁵

Other scholars in their attempt to explain the judiciary' performance, have identified a number of independent variables. For example, *Gloppen* has identified three set of these variables, including: the legal culture, the institutional structure, and the courts' social legitimacy.

(a) The legal culture which is concerned with the understanding of the judges of what their role should be in a democratic system. For instance, how do judges conceive their relationship with other arms of the government? Is a deferential attitude to political power prevalent that advises for a judicial self-restraint in politically sensitive cases, or do they favor more assertiveness approach towards political cases?⁶⁰⁶

(b) Another variable is pertaining to the institutional structure, which includes the legal framework, regulations and organization of the judiciary, as well as the financial and professional resources. That is, how do the institutional and the structural factors affect the ability of the judiciary to perform its duty to prevent illegitimate use of the political power? In this respect, important indicators need to be considered and which include the procedure of the judicial appointment, security of tenure, the terms of service, the disciplinary mechanisms for the judges, budgetary autonomy and the availability of resources. (c) The third variable focuses on the social legitimacy of the judiciary – that is, how the judges are perceived in the society to

⁶⁰⁴ *Charles Fombab*, Preliminary Assessment of the Prospects for Judicial Independence, p. 237.

⁶⁰⁵ *Ibid*, p. 237.

⁶⁰⁶ *Siri Gloppen*, the Accountability Function of the Courts in Tanzania and Zambia, in *Siri Gloppen*, Courts and Powers in Latin America and Africa, Palgrave Macmillan, New York, 2010, p. 113.

fulfill their role, that is to say, whether judges are seen as relevant, competent, fair and independent.⁶⁰⁷ Other have maintained that like, Mark, “delivery ... legal services in the form of an efficient judiciary increases the likelihood that a government will be trusted and accepted by its subjects. and having accessible and responsive judiciary make it more likely that subject will file their grievances through government channels, further supporting the regimes authority and stability”.⁶⁰⁸

In general, the independence of the judiciary describes the functional and structural safeguards against undue intrusion into the administration of justice by any other state organs, political parties, legal professions, media, civil society, litigants, or any other ‘forces outside of the judiciary itself that can encroach on the autonomy of the judiciary’.⁶⁰⁹ The exclusion of other state organs from the performance of judicial function is essentially linked to the doctrine of separation of powers.⁶¹⁰ In this sense, the exclusive authority of the judiciary encompasses: ‘(i) the judiciary should be authorized to deal with all matters of a judicial nature; (ii) the judiciary should have the exclusive authority to decide whether a matter submitted to it is under its jurisdiction; and (iii) the final decisions of the judiciary are not subject to revision by any other institutions.’⁶¹¹

In the view of what precedes, it is therefore the below section will examine the independence of the judiciary as a means of assessing the prospects of the courts in contributing to democratic transformation. In particular, the following sections will examine the legal framework and the regulations of the judiciary to assess how the institutional and the structural factors affect the ability of the judiciary to limit the acts of the government. As put by *Gloppen*, important indicators that need to be considered and which include: the procedure of the judicial appointment, security of tenure, disciplinary mechanisms, and budgetary and the availability of resources.

⁶⁰⁷ *Siri Gloppen*, the Accountability Function of the Courts in Tanzania and Zambia, p. 113.

⁶⁰⁸ *Mark Fathi Massoud*, Law’s Fragile State, Colonial, Authoritarian, and Humanitarian Legacies in Sudan, p. 87, Cambridge University Press, p. 51, 2013

⁶⁰⁹ *Petter. H et al*, (eds.), Judicial Independence in the Age of Democracy, University Press of Virginia, 2001, p. 11.

⁶¹⁰ *Peter Radlr*, Independence and Impartiality of Judges, in: *The Right to a Fair Trial*, David Weissbrodt & Rudiger Wolfrum (eds.), Springer Publisher, Heidelberg, London, 1998, p.737.

⁶¹¹ *Luu Dung*, Judicial Independence in Transitional Countries, UNDP, 2003, p. 12.

a) The Institutional Independence of the Judiciary under the INC

The INC stresses explicitly the independence of the judiciary from other state organs, and vests the administration of justice on the judiciary as a monopoly.⁶¹² The central norms that regulate the relationship between the judiciary and other organs of the state are Arts. 123 and 128(1) of the INC that establish the independence of the Judiciary. Art. 123(2) of the INC states that ‘the National Judiciary shall be independent of the Legislature and the Executive, with the necessary financial and administrative independence.’⁶¹³ This statement is not without legal significance, which goes further to impose a positive duty on ‘all organs and institutions of the State [to] execute the judgments and orders of the courts.’⁶¹⁴ This is, however, no change in comparison with the 1998 Constitution of Sudan, which had already asserted the independence of the judiciary under Art. 99 of 1998 Sudan constitution.⁶¹⁵

Art. 123 of the INC treats the judicial independence in ambivalent manner. On one hand, subsection (2) of Art. 123 of the INC empowers the judiciary to have ‘judicial competence to adjudicate on disputes and render judgments in accordance with the law.’⁶¹⁶ On the other hand, subsection (4) of Art. 123 of the INC makes the Chief Justice of Sudan, who is the head of the National Judiciary, answerable to the President of the Republic for the administration of the National Judiciary.⁶¹⁷ The independence of the judiciary requires that in discharging of the judicial duty, a judge is answerable to the law and his conscience only.⁶¹⁸ Thus, Art. 123(4) of the INC appears to subordinate the judiciary to the executive branch of the government.

On the other hand, the INC adds another safeguard against the influence of other organs of the state on the independence of the judiciary by establishing a National Judicial Service

⁶¹² Art. 123(1) & (3) and 172(1) of the INC.

⁶¹³ Art. 123(2) of the INC.

⁶¹⁴ Art. 123(5) of the INC.

⁶¹⁵ Art. 99 of the 1998 Sudan Constitution stated that: “the Judiciary in the Republic of Sudan shall be vested in an independent body called the judicial authority. The judicial authority shall undertake the administration of justice through adjudication of disputes and the giving of judgment in accordance with the Constitution and law”

⁶¹⁶ Art. 123(2) of the INC.

⁶¹⁷ Art. 123(4) of the INC.

⁶¹⁸ Principle (2) of the UN Basic Principles on the Independence of the Judiciary. Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985

Commission (NJSC),⁶¹⁹ which supersedes the “High Judiciary Council”,⁶²⁰ to undertake the overall management of the National Judiciary, including the preparation of the budget of the National Judiciary.⁶²¹ The NJSC is also empowered to make recommendations, to the President of Republic, with respect to the appointment, promotion and dismissal of the judges.

The NJSC is a relatively new body; yet, its mandate and composition⁶²² do not differ substantially from its predecessor “the High Judiciary Council”⁶²³ except in the inclusion of three representatives from the Southern Sudan legal entities as members of the NJSC.⁶²⁴ The independence of the judiciary requires institutional separation from the legislative and the executive branches. This institutional separation relates to a number of questions, such as the procedure for the appointment of the judges, management of the judiciary budget, etc. The following parts will examine the institutional structure contained in the INC that regulate the appointment of the judges, removal of the judges, the financial autonomy of the judiciary, etc.

i) The Appointment Procedures of Judges at the National Level

In general, the methods of the judicial appointment vary greatly among the different legal jurisdictions. These appointment methods include, *inter alia*, the appointment by the parliament; by the government; by the government with consent of the parliament; by the government with consent of a judicial service commission; co-option by the Supreme Court or the Court of

⁶¹⁹ Art. 129(1) of the INC states that: “The President of the Republic, after consultation within the Presidency, shall establish a commission to be known as the National Judicial Service Commission to undertake the overall management of the National Judiciary; its composition and functions shall be prescribed by law ...”

⁶²⁰ Art. 4 et seq of the Judiciary Act, 1986

⁶²¹ Art. 6 of the National Judicial Commission Service (2005) states that: (1) The Commission shall be responsible for the general administration of the National Judiciary ... with respect to the following: (a) Approval of the general policy of the Judiciary; (b) Approval of the budget of the National Judiciary; (c) Recommendation for the appointment of the justices of the Constitutional Court; (d) Recommendation, to the President of Republic, with respect to the appointment of the Chief Justice and his deputies; (e) Recommendation, to the President of the Republic, with respect to appointment of the justice of the National supreme Court and all the justices of Sudan; (f) Consenting to the recommendation of the Chief Justice with respect to the dismissal of justice in accordance with the law; (g) Recommendation with respect to the promotion of the justice in accordance with the law.

⁶²² The composition of the NJSC’s includes representatives from the legal profession, academic, the executive (ministers of justice and finance).

⁶²³ Compare Article 6 of the National Judicial Service Commission with Article 6 of the of the Judiciary Act 1986 which stated that: “The [High Judiciary] Council shall be competent to recommend, to the president of the Republic, with respect to the following: (a) promotion of judges, (b) appointment of judges, (c) discipline of deputies of the Chief justice and Supreme Court judges (d) dismissal of judges of Court of Appeal, General Court, District Court, (e) approval of the budget of the judiciary”

⁶²⁴ Art. 5 of the NJSC Act, representatives from the Southern Sudan legal entities include: the President of the Southern Sudan Supreme Court, Chairperson of the Legal Affairs of Southern Sudan Legislative Assembly and a member from the Southern Sudan Bar Association.

Appeals.⁶²⁵ In order to secure the independence and the impartiality of the judiciary, the appointment procedure needs to adhere to transparent and objective a criterion that relies on factors such as qualification, competence and integrity.⁶²⁶

Art. 130⁶²⁷ of the INC prescribes the procedure for the appointment of the judges of the national Judiciary by empowering the President of the Republic, with the consent of the First Vice President and upon the recommendation of the National Judicial Service Commission (NJSC),⁶²⁸ to appoint the Chief Justice, his deputies and other judges of the national judiciary.⁶²⁹ Leaving the appointment of the judges to the executive branch could compromise the judicial independence -- the participation of the parliament could improve the transparency of the appointment process of the judges so to ensure the independence of the judiciary.⁶³⁰ The INC does not make distinction between the appointment of the Chief Justice on one hand, and the appointment of other judges on the other hand. As to the criteria for the appointment of the judges, the INC does not prescribe specific qualifications other than stating: competence, integrity and credibility,⁶³¹ while the Judiciary Act of 1986 stipulates explicitly the general conditions for the appointment of the judges,⁶³² such as possession of a degree in law, good

⁶²⁵ Peter Radlir, *Independence and Impartiality of Judges*, p738,739.

⁶²⁶ Principles 11-12 of the Beijing Statement of the Independence of the Judiciary. Available at: <http://lawasia.asn.au/objectlibrary/147?filename=Beijing%20Statement.pdf>; Principle 10 of the UN Basic Principles on the Independence of the Judiciary. Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>

⁶²⁷ Art. 130 of the INC states that (1) having regard to competence, integrity and credibility, the Chief Justice of the Republic of the Sudan, his deputies, Justices and Judges shall be appointed by the President of the Republic in accordance with Article 58 (2) (c) herein, where applicable, and upon the recommendation of the National Judicial Service Commission ... (2) The law shall determine the terms of service, discipline and immunities of Justices and Judges.[...]. Art. 58(2)(c) of the INC states that (⁶²⁷Art. 58(2) of the INC reads:” Notwithstanding sub-Article (1) above, the President of the Republic shall, in respect of the following matters, take decisions with the consent of the First Vice President:- (c) appointments that the President of the Republic is required to make according to Appendix B1 of the Comprehensive Peace Agreement”. Appendix B1 of the Comprehensive Peace Agreement points out: “ ... (9) Appointment of judges other than justices of the Constitutional Court (Article 2.11.4.6(i) of Power Sharing Protocol) and ... (11) Appointment of justices of the National Supreme Court (Article 2.11.4.6(ii) of the Power Sharing Protocol)

⁶²⁸ Art. 6 of the National Judicial Service Commissions Act 2005

⁶²⁹ Art. 121(1) of the INC deals with the appointment of the Constitutional Court judges who shall be “be appointed by the President of the Republic in accordance with Art. 58 (2) (c) ... and upon the recommendation of the National Judicial Service Commission and subject to approval by a two-thirds majority of all the representatives at the Council of States”.

⁶³⁰ See generally *Moshtaghi*, *Organization and Jurisdiction of the Newly Established Afghan Courts – The Compliance of the Formal System of Justice with the Boon Agreement*, Max Planck 10 UNYB (2006), Armin Von Bogdandy, Rüdiger Wolfrum (eds.) Nijhoff Leiden, Publisher.

⁶³¹ Art. 130(1) of the INC (2005)

⁶³² Art. 23 through 30 of the Judiciary Act of 1986 of Sudan.

reputation, and the different requirements for the appointment of judges for the different court levels within the national judiciary.

Thus, the procedure for the appointment of the judges allows the executive a relatively free hand in selecting the judges, as the term “recommendation” as contained in Art. 130(1) of the INC is not defined anywhere in the INC. And it could be interpreted as to mean that the executive enjoys unfettered discretion when appointing the judges. A stronger approach is one that requires the President of the Republic to act ‘on the advice of’ the NJSC’. But since the list of nominees is not public, it is difficult to know what weight the president attaches to the recommendations of the NJSC. Again, the president has a strong hand in the composition of the nominating body: that is, the NJSC.

Art. 129 of the INC empowers the President, in consultation with the Presidency institution, to constitute a National Judicial Service Commission. No approval of the parliament is required for the appointment of the members of the NJSC. Thus, the executive is likely to have much effect on the composition of the NJSC. The NJSC Act 2005 elaborates on the functions, mandate and membership of the NJSC. According to Art. 5 of the National Judicial Service Commission Act, the NJSC is composed from both judicial and non-judicial institutions, like the Minister of Justice and the Minister of Finance.⁶³³ Any involvement of the executive branch with the management of the judiciary is unfortunate. The one issue is over possible excessive executive influence in the appointment of the Chief Justice and thence over the entire Commission.

On the other hand, the INC makes a further distinction as regards the appointment of the judges of the Constitutional Court in that it sets a higher threshold for the appointment of Constitutional Court Justices, by demanding the approval of the Council of States by *a two-thirds* majority.⁶³⁴ The inclusion of the Council of the States in the process of the appointment

⁶³³ The members of the NJSC are the Chief Justice of Sudan and his two deputies, the Minister of Justice, the Minister of Finance, two members from the Parliament, members from the Government of the Southern Sudan (Parliament and the legal affairs of the Government of Southern Sudan), Dean of the School of Law, two representatives from the Bar Association and one of them has to be from the southern Sudan.

⁶³⁴ Art. 121 (1) of the INC

of the judges restricts the power of the executive. More specifically, it shows the combination of transparency and pluralism in a manner that limits the possibility of the executive interference.

In view of what precedes, it is clear that the centralized nature of the judicial authority has not been substantially changed with respect to the procedure of the appointment of the judges through devolution of the power down to the state level as envisaged by the INC, as the executive still appoints all the judges in the northern states and the state is only empowered to appoint lay magistrates.⁶³⁵ A welcome step, however, seems to be that the INC attempts to some extent to reflect the racial composition of Sudan by underscoring the need for the “[presentation of Southern Sudan] in the National Supreme Court and other national courts that are situated in the National Capital ...”.⁶³⁶

ii) The Financial Autonomy of the Judiciary

It is unlikely that the judiciary is able to function independently in the absence of adequate financial resources. The United Nations Basic Principles on the Independence of the Judiciary make it a duty on each Member State to provide adequate resources to enable the judiciary to perform its functions properly.⁶³⁷ Dung explains the different approaches of preparing the judicial budget estimations. In general, there is one approach that involves the preparation of the budget by the executive in collaboration with the judiciary. Another approach allows the judiciary to prepare the budget and submit it to the executive who may amend it before presenting it to the Parliament.⁶³⁸

As to the financial independence of the Sudan judiciary, Art. 123(2) of the INC requires that the judiciary should be provided “[...] with the necessary financial and administrative independence.” Although the INC explicitly states the necessity of providing the judiciary with financial and administrative independency, nonetheless, the INC does not provide for a more precise constitutional provision as to the role of the judiciary in preparing its financial estimates. It seems, however, that this matter is regulated by the National Judicial Service Act (2005),

⁶³⁵ Art. 181(3)(a) states that ‘the state legislation shall provide for the appointment of lay magistrates’.

⁶³⁶ Art. 130(3) of the INC

⁶³⁷ Art. 7 of the United Nations Basic Principles on the Independence of the Judiciary

⁶³⁸ *Luu Dung*, *Judicial Independence in Transitional Countries*, 2003, available at: <http://unpan1.un.org/intradoc/groups/public/documents/untc/unpan018253.pdf> . p. 15-17

which vests the NJSC with a power over the overall management of the judiciary, including the preparing of the budget of the National Judiciary.⁶³⁹

The budget of the judiciary, according to Art. 91 (3) (c) of the INC, is approved by the national legislature on the initiative of the National Council of Ministers (72 (c) of the INC. The budget of the judiciary passes through many stages in accordance with the laws and regulations which organize the work of the judiciary until it is approved in its final form.⁶⁴⁰ This enables the judiciary to estimate how much it needed for its proper performance. Also, by allowing the NJSC to prepare the budget of the judiciary and the general policy of the judiciary, this may enable the judiciary to preserve its financial autonomy.

⁶³⁹ Art. 6 of the National Judicial Service Commission Act 2005.

⁶⁴⁰ '1. The Circular which is issued by the Ministry of Finance containing the general guidelines of the state budget bears the general features of the budget and all that needs to be followed in order to implement the aspirations of the budget and the country's economic policy. 2. In accordance with the contents of the circular of the Ministry of Finance, the Chief Registrar issues a circular to all organs of the judiciary and the different administrations to prepare budget proposals based on the guidelines of the Ministry of Finance. 3. The Chief Registrar issues an order for the formation of a Committee comprising the Director General of the Courts administration, the budget and follow up section and the Directors of related administrations and the different organs of the state judiciary. 4. The Budget committee discusses the budget proposals of the organs and the different administrations with their representatives in order to reach specific figures in every chapter of the budget except for the chapter which is prepared by the budget and follow up section in order to unify and adjust salaries in accordance with the circulars issued by the Service Affairs chamber and the Ministry of Finance. 5. The Chief Justice issues an order forming a consultancy committee headed by the Deputy Chief Justice and comprising as members delegates from the Ministry of Finance to study the budget proposals and make specific recommendations to the High Judiciary Council (Judicial Service Commission). 6. The Ministry of Finance and the Judiciary form technical committees to study the total figures of the budget proposals with view to arriving at specific figures upon which a recommendation is made to the consultancy committee. 7. The consultancy committee studies the proposals and the recommendations of the technical committees and makes its recommendations to the High Judiciary Council (Judicial Service Commission). 8. The budget proposals are studied by the High Judiciary Council (Judicial Service Commission) which includes as members the Ministry of Finance and a directive is made by the Council to the President of the Republic to approve the budget of the Judiciary as a lump-sum figure in accordance with the Judiciary Act and the Judiciary financial regulations and as stipulated in the Interim National Constitution. 9. The President of the Republic issues a Presidential order approving the budget of the Judiciary. 10. Based on the contents of the Presidential order the budget of the judiciary is then added to the state budget at the Ministry of Finance. 11. After the passing of the general state budget the accompanying circulars are issued for its execution and from there the drawl and the spending from it will be authorized in order to implement it starting from the beginning of the year. See Max Planck Manual on the Judicial Systems in Germany and the Sudan, *Böckenförde, Markus / Feinäugle, Clemens/ Ibrahim, Noha/ Wiesner, Verena*. Available at: http://www.mpil.de/shared/data/pdf/manual_judicial_systems_of_germany_and_sudan.pdf

b) Individual Independence of the Judges under the INC

The independence of the judiciary goes beyond the mere prohibition of undue influence by other state organs on the judicial performance, and entails also the individual independence of the judges.⁶⁴¹ The constitutional guarantee of individual independence of the judiciary is in practice assured in the form of classical protection against dismissal, removal from office and being transferred to another post.⁶⁴²

i) Removal Grounds of the Judges

The judicial independence is impeded, if the judges can easily be removed from office arbitrarily.⁶⁴³ Art. 131(2) of the INC explicitly provides, that a judge may be removed from office only by an order of the President of the Republic if a judge suffers from an incapacity, gross misconduct, incompetent in accordance with the law and upon the recommendations of the Sudan Chief Justice and with the approval of the NJSC.⁶⁴⁴

There is clearly, then, change, albeit minimal, with respect to the removal of the judges under the INC in that the INC spells out certain criteria for the removal of the judges and additionally requires the approval of the NJSC.⁶⁴⁵ By contrast, the threshold of removing of the judges was lower under the 1998 Constitution which required the recommendation of the High Judiciary Council (which has now been replaced by NJSC) by stating that no judge shall be dismissed

⁶⁴¹ See generally, *Michael Dodson et al*, Judicial Independence and Instability in Central America, in *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World*, Peter Russell & David O'Brien (eds), 2001, University Press of Virginia, 251(256); See *Ramin Moschtaghi*, Organization and Jurisdiction of the Newly Established Afghan Courts – The Compliance of the Formal System of Justice with the Bonn Agreement, Max Plank 10 UNYB(2006), Armin von Bogdandy, Rüdiger Wolfrum (eds.), Martinus Nijhoff Publishers, Leiden; Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary, 2nd edition, N.P. Engel Publisher (2005), p. 320; See *Peter Radler*, Independence and Impartiality of Judges in: *The Right to a Fair Trial*, David Weisbrodt & Rüdiger Wolfrum (eds), 1998, Springer-Verlag Publisher, Berlin etc, pp.728(729).

⁶⁴² *Dieter C. Umbach*, The Independence of the Judiciary and the Rule of Law, in: *the Role of the Judiciary in the Protection of Human Rights*, edited by Eugene Cotran and Adel Omer Sherif, Kluwer Law International, London, The Hague, Boston, 1995, p. 247

⁶⁴³ *Charles Manga Fombad*, A Preliminary Assessment of the Prospect for Judicial Independence in Post-1990 African Constitutions, p. 247.

⁶⁴⁴ Art. 131(2) of the INC (2005) “Justices and Judges may only be removed by an order of the President of the Republic for gross misconduct, incompetence and incapacity in accordance with the law and upon recommendation of the Chief Justice and with approval of the National Judicial Service Commission.”; Article 6 of the National Judicial Commission Act 2005.

⁶⁴⁵ Art. 6(1)(f) of the National Judicial Service Commission Act.

except after a disciplinary process and a recommendation from the High Judicial Council and without stating any certain criteria for removing judges.⁶⁴⁶

ii) Discipline Procedures of the Judges

Art. 131(1) of the INC provides that “discipline of justices ... shall be exercised by the Chief Justice in accordance with the law”. The details on the disciplinary measures of the judges of the national judiciary are dealt with more fully in Arts 55 et seq. of the Judiciary Act of 1986. Any complaint must be referred to the Chief Justice (Art. 56(1)) and the offences that can lead to disciplinary action are set forth in Art. 57(2) of the Judiciary Act 1986.⁶⁴⁷ If there is a *prima facie* case, the Chief Justice may warn or discipline the judge in question (the judge who will be disciplined).⁶⁴⁸ The judge has a right to a fair hearing⁶⁴⁹ before a board of discipline.⁶⁵⁰ The board of discipline is to be constituted under the presidency of one of the Chief Justice deputies and a Supreme Court judge who should be senior to the judge in question, and another member to be selected from the NJSC. The decision of the board of discipline can be appealed, thereby ensuring the impartiality of the process.

Thus, the selection of a non-judicial member from the NJSC (in the board of disciplinary of judges) may lead to the involvement of the executive in the disciplinary process of the judges, which may make it possible to remove a judge on purely political grounds. One could argue that the involvement of the parliament in removal of the judges would further the impartiality of the process. On the other hand, what is intriguing about the disciplinary measure is that the Chief Justice and his deputies cannot be disciplined under the Judiciary Act 1986, thereby adding protection to the Chief Justice and his deputies. Nowhere in the Judiciary Act is provided as to how the Chief Justice and his deputies are to be disciplined!

⁶⁴⁶ Art. 103(4) of the 1998 Constitution of Sudan.

⁶⁴⁷ Art. 57(2) of the Judiciary Act, 1986 states: „There shall be presented, for discipline, every Judge, who contravenes the duties of his post, or the honour of the profession thereof, or conducts himself, either by act, or omission, in such way, as may degrade the same, or absents himself, from work, without permission, or acceptable excuse.“

⁶⁴⁸ Art. 56(3) of the Judiciary Act of 1986.

⁶⁴⁹ Art. 57(1) of the Judiciary Act of 1986.

⁶⁵⁰ Art. 59 of the Judiciary Act of 1986.

ii) Remuneration of the Judges

The State must ensure that the judges enjoy pay and benefits that commensurate with their status and the responsibility and the importance of their office for the general public.⁶⁵¹ The INC does not explicitly regulate the remuneration of the judges, but Art. 130(2) of the INC provides that “the law shall determine the terms of service ... of judges”. The Judiciary Act of 1986 addresses the remuneration of judges under Art. 33 which provides that “salaries and emoluments of judges shall be as set forth in Schedule II [of the Judiciary Act of 1986] and the President of the Republic, upon recommendation of the Judicial Council [which is now replaced by the NJSC], may amend such Schedule on condition that the amendment shall not entail prejudice to judges’. It is therefore that salaries of the judges shall not be varied to the disadvantage of the judges. The Judiciary Act of 1986 goes further to state how the pension and gratuities of the judges are to be calculated (Art. 77)) of the Judiciary Act, albeit in accordance with the Public Service Act of 1992.

iv) Security of the Judicial Office

The security of tenure enables the judges to avoid external pressure and has rightly been regarded as *sine qua non* of the judicial independence.⁶⁵² The security of tenure is one of the most important safeguards for judges, as it ensures that judges will not be guided by consideration of possible repercussions of their decisions. It is generally accepted today that the security of tenure does not require that judges are appointed for life time or that they are irremovable in law. It is, however, essential that for a specific period of time they enjoy certain stability.⁶⁵³

The INC does not provide details for the terms of office for judges. Art. 130(2) of the INC states that the law shall determine the terms of service [...]. Further, the Judiciary Act of 1986 does not provide detailed regulation as to terms of the service of the judges. In general, there are two

⁶⁵¹ Dieter C. Umbach, *The Independence of the Judiciary and the Rule of Law in : The Role of the Judiciary in the Protection of Human Rights*, edited by Eugene Cotran and Adel Omar Sherif, Klumer Law International, London, The Hoge, Boston, 1995, p. 248.

⁶⁵² Charles Manga Fombad, *A Preliminary Assessment of the Prospect for Judicial Independence in Post-1990 African Constitutions*, p. 246

⁶⁵³ Peter Radler, *Independence and Impartiality of Judges*, p743. The UN Basic Principles on the Independence of the Judiciary state: subsection (11) the term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law, and subsection (12) Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

types of judicial appointments in Sudan: (a) most of the judges are appointed to serve until the national compulsory retirement of age of sixty-five and (b) appointment on a contract basis, as Art. 30(3) of the Judiciary Act of 1986 empowers the Sudan Chief Justice to appoint judges on “a special contract judges”.

Appointing judges on contract basis may impact negatively on the independence of the judiciary. A short tenure with the possibility of a renewal may cause judges to come to decisions that they deem instrumental in renewing of their term of office, as such appointment may create a sense of insecurity that exposes judges, on temporary contract, to avoid conflict with the executive.⁶⁵⁴ With regard to the term of office for Constitutional Court Justices, the INC has a specific regulation in that Art. 119 (2) of the INC states that the President and Justices of the Constitutional Court shall be appointed for a term of seven years, subject to renewal.

iii) The Rules of Judicial Review under the INC

The expression of ‘judicial review’ means ‘the review by a competent court, of the validity of a law passed by the legislature and actions of the executive, on the grounds of transgression of the limitations imposed by the constitution,⁶⁵⁵ and the power of the court to declare such law/executive action to be unconstitutional and invalid’.⁶⁵⁶ The judicial review facilitates the democratic process,⁶⁵⁷ and constitutes a basic element in the protection of human rights as it allows judges to suppress actions that constitute or may constitute threats against or suppression of the fundamental rights by other branches of the government.⁶⁵⁸

It is therefore contended that there can be no constitutionalism, in terms of respect for the constitution and values and principles that underline it, if there is no secure judicial review

⁶⁵⁴ L. Van De Vijver, ed., *The Judicial Institution in Southern Africa: A Comparative Study of Common Law Jurisdictions* (Siber In K CC, 2006), p.47,177-180

⁶⁵⁵ Jenny Martinez, *Horizontal Structuring*, in *The Oxford Handbook of Comparative Constitutional Law*, Michel Rosenfeld, András Sajó, editors, Oxford, UK: Oxford, 2008, p. 569.

⁶⁵⁶ Durga Das Basu, *Comparative Constitutional Law*, Prentice-Hall of India Private Limited, New Delhi, 1984, p. 465.

⁶⁵⁷ Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, Cambridge University Press, 2003, p. 21.

⁶⁵⁸ James G. Apple, *The Role of Judicial Independence and Judicial Leadership in the Protection of Human Rights*, in *The Role of the Judiciary in the Protection of Human Rights*, edited by Eugene Cotran and Adel Omar Sherif, Kluwer Law International, London, The Hague, Boston, 1997, p. 209.

mechanism, whether by ordinary courts or other specialized courts such as the constitutional court that can independently and impartially enforce the provisions of the constitution and check and control any abuses of its provisions by the executive and the legislature.⁶⁵⁹

In essence, there are two ways in which the actions of the government can be challenged before the courts through judicial review: a) either it is alleged that a law or other government action violates the constitutional division of powers, or b) it is argued that a law, while within the constitutional range of powers, violates other constitutional provisions such as individual rights and freedoms, in particular.⁶⁶⁰

The powers of the executive and the legislature are defined and limited by the constitution. On the other hand, the courts are empowered to scrutinize the actions of the government branches, if those actions are alleged to be in violation with the constitution.⁶⁶¹ In this respect, the courts are empowered to enforce the limitations imposed by the constitution on the executive and the legislature organs through different forms of judicial review that can be initiated at the request of those aggrieved by the law.⁶⁶²

As a result of the judicial review, the courts may overrule the actions of other government organs that might infringe on the limitation put by the constitution.⁶⁶³ In general, when the court declares that a statute is unconstitutional; its decision is binding on everyone. It produces “*ergo omnes*” effects. The statute is effectively repealed and no court or government organ is allowed to apply it.⁶⁶⁴ On the other hand, if the court upholds a statute as constitutional, in contrast, one may still challenge that statute in the future by bringing new objections in subsequent proceedings. It should be noted that courts, for instance, sometimes suspend the effects of their

⁶⁵⁹ Charles M. Fombad, Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa, 55 American Journal for Comparative Law, 2007, p. 20.

⁶⁶⁰ Thomas Hueglin et al, Comparative Federalism: Systematic Inquiry, Broadview Press, 2006, p. 278

⁶⁶¹ James Allan, Bills of Rights and Judicial Power- A Liberal's Quandary, Oxford of Legal Studies, 16(1996), 337(337).

⁶⁶² Yash Ghai, The Theory of the State in the Third World and the Problems of Constitutionalism, in: Douglas Greenberg, Constitutionalism and Democracy: Transitions in the Contemporary World, Oxford, Oxford University Press, 1993, p. 187.

⁶⁶³ James Allan, Bills of Rights and Judicial Power- A Liberal's Quandary, p.337.

⁶⁶⁴ Victor Ferreres Comella, Constitutional Courts and Democratic Values, Yale University Press, New Haven and London, 2009, p.9.

decisions declaring a law unconstitutional in order to give the parliament enough time to repair the defects.⁶⁶⁵

The impact of the judicial review is likely to increase the efficiency of the government as a whole,⁶⁶⁶ as the judicial review holds the government accountable,⁶⁶⁷ thereby constituting a useful building block for constitutionalism and contribute to democratic development. In federal systems, judicial review acquires the ‘utmost importance’, as the laws enacted by the legislative assemblies at the state level may contravene the laws of the federal level. Since it is not reasonable to allow each level of government to decide the limits of its own authority, the intervention of the courts, through the judicial review, seems justified.⁶⁶⁸

1. Overview of the Rules of Judicial Review in Sudan

The procedural rules for judicial review were first codified in 1954 and remained unchanged until 1972. In 1974, the legislature consolidated the rules for judicial review into the Civil Procedure Act of 1974 (Chapter 2, 4 and 5 of Part 7). The judicial review rules remained unchanged until the beginning of 1996. In March 1996, the legislature enacted the Constitutional and Administrative Act of 1996. The 1996 Act consolidated the rules of the judicial review as previously embodied into the Civil Procedure Act of 1974.

The Constitutional and Administrative Act of 1996 did not make any significant changes to the general rules of judicial review. In general, many of the main features of the rules of the judicial review have remained constant since they were first codified in 1954. The main characteristics of the rules of the judicial review include: (a) Sudan has a single system of judicial review, and (b) the procedural rules for the judicial review are meant to limit the extent of the intervention of the courts into the legislative or the executive autonomy. These procedural rules limit the exercise of the judicial review in various forms, such as the tests of justifiability, standing,

⁶⁶⁵ *Victor Ferreres Comella*, *Constitutional Courts and Democratic Values*, Yale University Press, New Haven and London, 2009, p.9.

⁶⁶⁶ *Martin Shapiro*, *Judicial Review in Developed Democracies*, in *Democratization and the Judiciary: the Accountability Function of Courts in New Democracies*, Siri Gloppen et al (eds), 2004, Frank Cass, London, p. 21.

⁶⁶⁷ *Ibid*, p. 21.

⁶⁶⁸ *Tom Ginsburg*, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, Cambridge University Press, 2003, p. 29.

exhaustion of alternative remedies, and formal requirement of pleas which limit access to the courts and the ability of aggrieved citizens to obtain a remedy.⁶⁶⁹

The judicial review is further being limited with the enactment of the Constitutional and Administrative Act of 2005 and the repeal of the Judicial and Administrative Act of 1996. The Constitutional and Administrative Act of 2005 does not empower the ordinary courts, when deciding a case, to stay the court proceedings in cases where the constitutionality of a law is at issue.⁶⁷⁰ According to the Judicial and Administrative Act of 2005, the ordinary courts are prohibited from enquiring into the constitutionality of the laws by way of judicial referral to constitutional courts.

Before elaborating on how the INC regulates the judicial review of the executive or the legislature organs, it is useful at the outset to briefly describe the different methods of judicial review in federal system.

i) Diffuse System of Judicial Review

The system of diffuse judicial review is headed by a Supreme Court, each judge may review laws with respect to their constitutionality – if found the laws unconstitutional- the judge refuses to apply the norm in the case at hand. A typical example of a system of diffuse judicial review is the court system of the United States of America. This system consists of a number of state and federal courts all of which are headed by one Supreme Court. The judges of the lower courts are allowed to review laws with respect to their constitutionality in concrete cases. That is to say, the constitutionality of a law or legal provision is scrutinized during a lawsuit over an actual dispute in which the question of constitutionality is decisive.⁶⁷¹

⁶⁶⁹ *Siddig A. Hussein*, Sudan: in the Shadows of Civil War and Politicization of Islam, in: Human Rights under African Constitutions: Realizing the Promise for Ourselves, Abdullahi An-Na'im (ed), University of Pennsylvania Press, Philadelphia, 2003 p. 374.

⁶⁷⁰ Art. 5 of the Constitutional and Administrative Act of 1996 of Sudan

⁶⁷¹ *Feinaugle/Clemens, Ibrahim/Noha, Roder/ Tilmann, Wiesner/Verena*, Max Plank Manual on the Impact on the Constitutions on the Work of the Judiciary, Heidelberg, 2006. For comprehensive review of the different methods of judicial review, See *Mohammed M*, The Emergence of Constitutional Courts and the Protection of Individual and Human Rights: A Comparative Study in: The Role of the Judiciary in the Protection of Human Rights, Eugene Cotran and Adel Sharif (eds), Kluwer Law International, The Hague, 1997, p. 283 et seq.

ii) Concentrated System of Judicial Review

The concentrated (centralised) system of judicial review is built on two basic assumptions. It concentrates the power of the constitutional review within a single judicial body, typically the constitutional court, and it situates that court outside the ordinary structure of the judicial branch.⁶⁷² When the constitutional court declares a statute unconstitutional, its decision has general effect – binding *erga omnes*.⁶⁷³ Germany, for example, provides for the concentrated system of judicial review with the Federal Constitutional Court separated from the rest of the judicial system.

The main feature of the concentrated system of judicial review is that only one court, that is the constitutional court, has authority to decide constitutional issues such as the interpretation or the review of laws, and this court is separate from the ordinary judicial system.⁶⁷⁴ There are a number of reasons for establishing a constitutional court. These are, *inter alia*, first to ensure adherence to the constitution and its protection against legislative majorities; second, to ensure unity and finality in interpretation, avoiding the possibility of different court adopting different interpretations of the constitution; and third, to provide a visible symbol of constitutional progress.⁶⁷⁵ The general idea is that resolution of all cases of constitutional matters should go to the constitutional court, whereas the resolution of all cases involving the application of ordinary legislation should go to the ordinary courts.⁶⁷⁶

In the case of Sudan, the INC has chosen a concentrated system of judicial review. According to Art. 119(2) of the INC, the Constitutional Court ‘shall be [...] separate from the National Judiciary’. In respect of the judiciary, the Constitutional Court exercises a supervisory function

⁶⁷² Lech Garlicki, Constitutional Courts versus Supreme Courts, *International Constitutional Law Journal*, January 2007, Vol. 5:44, p. 44.

⁶⁷³ Feinaugle/Clemens, Ibrahim/Noha, Roder/Tilmann, Wiesner/Verena, *Max Plank Manual on the Impact on the Constitutions on the Work of the Judiciary*, Heidelberg, 2006. For comprehensive review of the different methods of judicial review, See Mohammed M, *The Emergence of Constitutional Courts and the Protection of Individual and Human Rights: A Comparative Study in: The Role of the Judiciary in the Protection of Human Rights*, Eugene Cotran and Adel Sharif (eds), Kluwer Law International, The Hague, 1997, p. 283 et seq.

⁶⁷⁴ Andrew Harding *et al*, *Constitutional Courts: Forms, Functions and Practice in Comparative Perspective*: in *Constitutional Courts – A Comparative Study*, edited by Andrew Harding *et al*, Widly, Simmonds & Hill Publishing, 2009, London, p. 3-4.

⁶⁷⁵ *Ibid*, p. 4-5.

⁶⁷⁶ Lech Garlicki, Constitutional Courts versus Supreme Courts, *International Constitutional Law Journal*, January 2007, Vol. 5:44, p. 46,

as a highest court in constitutional matters, as spelled out in Art. 122 of the INC. As we recall from the previous section, for the northern states, cases in constitutional matters go directly to the Constitutional Court (after exhausting of all available remedies as provided in Art. 20(d) of the Constitutional Court Act of 2005). On the other hand, cases from the Southern Sudan states have to appeal first to the Supreme Court of the Southern Sudan which functions as a Constitutional Court for the Southern Sudan, as stated in Art. 174(b) and (c) of the INC.

Thus, the INC opts for a hybrid system in respect of the Southern Sudan, as the Supreme Court of Southern Sudan operates as a highest court for appeals, but also as a constitutional court for the Southern Sudan. The Southern Sudan Supreme Court has the power to, according to Art. 174(c) of the INC, to ‘adjudicate on the constitutionality of laws and set aside or strike down laws or provisions of laws that contradict the Interim Constitution of Southern Sudan and of the constitutions of Southern Sudan states.’ However, the Supreme Court of the Southern Sudan may not strike down laws for their incompatibility with the INC, as the National Constitutional Court has the monopoly over constitutional matters related to the INC, as well as appeal jurisdiction in respect of constitutionality of the Interim Southern Sudan Constitution and the Southern Sudan state constitutions.

2. The Judicial Review of the Executive and the Legislature Acts

a) The Judicial Review of the Executive Acts

Concerning the judicial review of the executive acts, Art. 125(1) of the INC empowers the National Supreme Court, as a last court of cassation, to review any administrative matters of certain entities. The National Supreme Court considers contests against the administrative decisions of certain entities, i.e., the President of the Republic, Governors of the States and the State Ministers. A single Supreme Court judge reviews these administrative decisions. The decision of a single Supreme Court judge can be appealed to a Supreme Court panel of three judges. The complainant, challenging the constitutionality of an administrative decision, has to exhaust all available ways of remedies before approaching the Constitutional Court.⁶⁷⁷ The procedures and access to the Constitutional Court will be explained in Chapter Five.

⁶⁷⁷ Art. 18 et seq of the Constitutional Court Act (2005) of Sudan

The National Appeal Court considers contests against the administrative decisions of other administrative authorities, with exception to the administrative decisions of the President of the Republic, Governors of the State and State Ministers.⁶⁷⁸ The National Supreme Court holds appellate jurisdiction in respect of contests by cassation against the decisions of the National Appeal court on administrative matters of other administrative authorities.

b) The Judicial Review of the Legislature Acts

Before consider how the INC regulates the judicial review of the legislature, it is useful to briefly overview the main types of Judicial Review of the Legislature:

i) Concrete Judicial Review

Concrete judicial review is a procedure through which constitutional issues are dealt with in the course of the actual litigation between parties.⁶⁷⁹ That is, the judge is authorized to suspend the proceedings if the judge deems a statute relevant to the case unconstitutional and to submit the statute to the constitutional court for ultimate consideration. This procedure is intended to aid the judge who finds himself, on the one hand, bound by the (unconstitutional) law and, on the other, committed to the constitution.⁶⁸⁰ This procedure is only limited if the supposedly unconstitutional statute is relevant to the issue.

ii) Abstract Judicial Review

This type of judicial review allows limited access to the court by the government and law makers. It involves no contentious proceedings, i.e. there is in fact applicant but no opponent of the petition. This procedure of judicial review differs in many aspects from the procedure of concrete judicial review. That is, when exercises judicial review in an abstract manner, the constitution court interprets a piece of legislation that has been adopted by the parliament without controversies and this type of judicial review procedure is initiated by specifically designated government officials.⁶⁸¹

⁶⁷⁸The Civil Procedure Act (1984) of Sudan; See The Judicial and Administrative Act (2005) of Sudan

⁶⁷⁹ *Jorn Ipsen*, Constitutional Review of Laws, in: *Main Principles of the German Basic Law*, Christian Starck (ed.) Nomos Verlagsgesellschaft, Baden-Baden, 1983, Germany, p. 122

⁶⁸⁰ *Ibid*, P. 122

⁶⁸¹ *Victor Ferreres Comella*, *Constitutional Courts and Democratic Values*, Yale University Press, New Haven and London, 2009, p.7-8.

With regard to the review of the *legislature* act, the National Judiciary has no jurisdiction to strike down unconstitutional laws. However, the National Supreme Court has jurisdiction to decide on constitutional matters that are related *only* to subsidiary legislation and regulations.⁶⁸² On the other hand, Art. 122 (1)(e) INC empowers the Constitutional Court with the task to “adjudicate on the constitutionality of laws”. Interesting, the INC does not authorize the ordinary courts, if a constitutional matter arises during the course of litigation, to submit any constitutional question to the Constitutional Court for a decision on the constitutionality of any law in question.⁶⁸³

Now, no ordinary court of law can question the validity of law regardless of how serious encroachment the law may be on fundamental rights and freedoms. This means that the ordinary courts have to assume that the laws they are administering are constitutional whatever the true position might be. The litigants only remedy in this regard is to approach the Constitutional Court, after exhausting all available remedies, to rule on the constitutionality of the legislation in question,⁶⁸⁴ which has the power to set aside unconstitutional laws.⁶⁸⁵

a) Judicial Review under the Constitutional and Administrative Act of 1996

Constitutionally, the judges must at any time examine and establish whether the law to which the judges is supposed to be bound is valid.⁶⁸⁶ The concrete constitutional review of laws used to be regulated under Art. 5(1) of the Constitutional and Administrative Law Act of 1996. Art. 5(1) of the Constitutional and Administrative Act of 1996 provided for the case of a claim of unconstitutionality of a law in a lower court, i.e. during concrete adversarial litigation. In this case, the court, having assessed the validity of the claim, had to set a time limit for the party to present the case to the Supreme Court. If the claim was filed on time, the lower court had to halt the proceedings until the Supreme Court had taken a final decision on the constitutionality of the statute.

⁶⁸² Art. 16(d) of the Civil Procedure Act of 1983 of Sudan states that: “[the Supreme Court] consider[s] contests against the subsidiary legislation on account of alleged inconsistency with the enabling legislation”

⁶⁸³ The Administrative and Judicial Act (2005) of Sudan; Art 125(1)(d) of the INC states that: “... other jurisdiction as determined by this Constitution and the law ...”

⁶⁸⁴ Art. 122(1)(e) of the INC.

⁶⁸⁵ Art. 122(1)(e) of the INC; Art. 15 et seq of the Constitutional Court Act of 2005.

⁶⁸⁶ Dieter C. Umbach, *The Independence of the Judiciary and the Rule of Law*, in : *The Role of the Judiciary in the Protection of human Rights*, Eugene Cotran and Adel Omer Sheirf (eds), Kluwer, 1995, p. 255.

b) Judicial Review under the Judicial and Administrative Act of 2005 and the Constitutional Court Act of 2005

The new Judicial and Administrative Act of 2005, which repeals the Constitutional and Administrative Court Act of 1996, does not cover anywhere the concrete constitutional review of laws. Furthermore, the Constitutional Court Act of 2005 (CCA) is silent as to the concrete review of laws. Whereas the abstract constitutional review of laws is regulated under articles 18-20 of CCA where the preconditions for the admissibility of the procedure are set out.

One would wonder how the lower courts are supposed to apply the criminal law, if they cannot test its constitutionality. If a charge is invalid, why an accused must be forced to go through the entire trial, face conviction etc. before the validity of the charge is proved. It is inconceivable that ordinary courts could not question the constitutionality of legislation by way of referring the matter to the Constitutional Court, as the ordinary courts where the majority of the people have contact with the court system. This prevents a system of constitutional review which presents human rights protection.

Another implication is that the Constitutional Court will be overloaded with cases which the lower courts could have resolved had the ordinary courts are permitted to refer constitutional questions to the Constitutional Court. Based on the assumption that the Sudanese Constitutional Court is granted a monopoly for the decision on the constitutionality of statutes while the judiciary is denied such power, two solutions seem possible:

- (a) The courts are forced to apply the law found unconstitutional with “their eyes open” until someone makes use of the procedure of constitutional complaint before the Constitutional Court and the problematic statute is declared void.
- (b) The Constitutional Court may bridge gap here by accepting applications coming from the ordinary courts (through judicial referral) thereby clarifying the details of a concrete review of laws by way of interpreting Art. 122(1)(e) INC. A judge holding a law unconstitutional might thereby be allowed to halt proceedings and refer this question of unconstitutionality directly to the Constitutional Court. In this case, the court judges are not forced to apply laws held unconstitutional, and, at the same time, the decision on the unconstitutionality is exclusively assigned to the Constitutional Court as foreseen in a concentrated system.

c) Assessment of the Judicial Review Rules under the INC

Prohibiting the lower courts from referring constitutional questions to the Constitutional Court, as provided for in the Judicial and Administrative Act of 2005, is clearly problematic. And this will not be beneficial to the protection and promotion of human right in Sudan. This will prevent constitutionalism from filtering down to lower courts and to take roots and to operate effectively- which is essential. Also, there is danger that people are forced to go through years of expensive litigation. In the final analysis, the Judicial and Administrative Act of 2005 (which prevents the ordinary courts from using the procedure of judicial referral) renders the judiciary unable to deal with the crucial legal and constitutional issues that matter in the country, it will prevent the courts from playing a role in limiting the authority of government organs, because the judicial review powers of the courts are weaker.

The INC restricts the scope of their authority to regulate the legality of the government's behavior and thus undermine the effectiveness of the judiciary. Allowing the lower courts to treat constitutional cases before going to the constitutional court may strengthen the judiciary's accountability and avoiding the drain on financial resources that the constitutional court would entail. As Shapiro has rightly pointed that 'statutory judicial review by courts may, particularly in new democracies, offer greater immediate prospects of rendering government accountable and protecting individual interests than does the constitutional rights review by a constitutional court. Such courts may successfully restrain arbitrary government because they are perceived as serving rather than opposing the government.'⁶⁸⁷

The inability of the lower courts to refer constitutional questions to the Constitutional Court might undercut the ability of the courts to contribute to the consolidation of democratic transformation in Sudan. The enactment of the Judicial and Administrative Act of 2005 represents one of the defects of the current constitutional reform, despite the existence of the favorable indications towards constitutionalism such as a comprehensive bill of rights and other mechanisms for the promotion and protection of human rights such as the national human rights commission.

⁶⁸⁷ *Martin Shapiro*, *Judicial Review in Developed Democracies*, p. 25.

3. Assessment of Constitutional Guarantees of Promotion and Protection of Human Rights under the INC

The INC provides for specific changes in the legal system that aims at laying the foundation for a country that is based on the ideals of rule of law.⁶⁸⁸ In general, the INC, among other issues, has introduced two key elements, at least, during the Interim Period (2005-2011): For the first time Sudan has established under the INC a truly federal system of governance with substantial devolution of powers and resources to the sub-units, especially the Southern Sudan level. Secondly, the INC establishes a dual legal system (*Sharia*/secular) to exist side by side.

In particular, the INC restructures the judiciary by establishing the Southern Sudan Judiciary and the State Judiciary besides the already existing National Judiciary with the Constitutional Court at the top of the judicial pyramid with power to decide on constitutional issues nationwide.⁶⁸⁹ Thirdly, in unprecedented way, Art. 27(3) of the INC incorporates all international and regional covenants, treaties and instruments that Sudan has ratified into the INC.⁶⁹⁰ In addition, the INC makes enforceable before the Sudanese courts the socio-economic rights, as stipulated in ICESCR. In contrast, the previous Sudanese constitutions treated the socio-economic rights under the heading “Directive Principles” of State Policy. This has a dramatic impact not only on the issues of human rights in a more narrow sense, but it will change large parts of presently existing legislation to make them compatible with the INC.

In the final analysis, the INC attempts to resolve the north-south conflict through the distribution of the power and resources between the different groups, albeit only between the north and the Southern Sudan by way of changing the prevailing governance system by opting for asymmetrical federalism. Secondly, the INC expresses the State’s commitment to the promotion of equality and emphasizes the importance of enforcing fundamental human rights and freedoms by incorporating a number of human rights treaties into the INC and provides for the promotion of group identities through the recognition of the different cultures, languages and religions.

⁶⁸⁸ Art. 1(2) of the INC

⁶⁸⁹ Art. 123 “the National Judiciary”; Art. 172 “Southern Sudan Judiciary” and Art.181 “the State Judiciary” of the INC

⁶⁹⁰ Arts 27-47 of the INC.

The INC also establishes institutions designed to ensure the implementation of individuals and groups rights such as the Commission for the Protection of the Rights of non-Muslims, the Human Rights Commission, etc. Thus, the INC may play a role in achieving peace in Sudan, albeit a very limited role, as the constitution-making process in Sudan lacks the element of inclusiveness. The INC, like other transitional constitutions, is explicitly political in that it ratifies the features of the CPA which is a political agreement. The INC also maintains some residual continuity with the past by basing itself on the 1998 Sudan Constitution.⁶⁹¹

⁶⁹¹ Art. 226(1) of the INC.

Part IV: Practice of Constitutionalism under the INC

1. Legislative Reform

The implementation of the INC requires a comprehensive law reform process. The law reform process forms a key component of the CPA so as to establish and promote the rule of law.⁶⁹² This entails bringing existing laws in line with the INC provisions and enacting new laws, a process that is seen as a prerequisite for democratic transformation in Sudan. To this end, a law reform process has already begun, in effect, with the establishment of the NCRC, in 2005, to draft new statutes, as stipulated in the CPA. Almost five years have now passed since the passage of the INC, but the process of law reform is moving very slowly.

In parallel, and in order to give effect to the CPA, the Ministry of Justice formed a Law Review Committee (LRC) with a view to reviewing the existing legislation and preparing recommendations for the law reform process (to be submitted to the other ministries/entities).⁶⁹³ The NCRC and the LRC are *ad hoc* committees with specific mandates whose rules and procedures are stipulated in the INC, the CPA and the existing statutory laws. There is no permanent law reform commission or committee in Sudan at present.

In addition, several of the newly enacted and/or amended laws do not fully conform to the provisions of the INC. This impacts negatively on the implementation of the INC and constitutes a serious impediment to the process of democratic transition in Sudan. The perceptions of different actors as to why the law reform process is lagging behind schedule vary greatly. Some say that the delays result from the fact that the law reform process lacks public participation and transparency, and that the capacity of those carrying out the process is weak.

Others insist that the process of law reform is being carried out in a consultative and participatory manner and that its outcomes are reflective of this. It is within this context that

⁶⁹² Lutz Oette, Law reform in Times of Peace Processes and Transitional Justice: The Sudanese Dimension, in Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan edited by Lutz Oette, Publisher, Ashgate Publishing Limited, England, 2011, p. 11.

⁶⁹³ Interview with the legal advisor of the Council of Child Welfare and a former member of the Law Review Committee of the Ministry of Justice, February 2009, Khartoum.

section seeks to clarify the legal framework that regulates the process of law reform in Sudan, including the existing law reform institutions that are tasked with bringing the existing law in line with the provisions of the INC and to examine whether the existing laws are in compliance with the provisions of the INC, and the implementation of the newly enacted/amended legislation in practice.

a. The Legal Framework of Law Reform Process in Sudan⁶⁹⁴

i. Law Reform

Law reform is a mechanism through which governments and parliaments may respond to the emerging needs of their societies.⁶⁹⁵ It is a process that involves a number of actors, in particular the governmental bodies tasked with law reform (i.e., the various ministries such as the Ministry of Justice, as well as the Parliament) and the judicial system through its jurisprudence, especially the Constitutional Court. In a broader sense, political parties, civil society and the media also play a crucial role in influencing law reform though they may not be directly engaged in the technical process of drafting and passing legislation. Law reform in Sudan also involves several international actors, in particular the UNMIS, UNDP, the African Union (AU), through their various developmental projects that aimed at enhancing the capacity of the justice sector institutions.

A fundamental distinction needs to be made between the process of law revision and law reform. Law revision is not concerned with the substance of the law as such. Instead, it focuses on the organizational aspects of a given act relating to issues such as simplification, modification, format, style, structure and terminology. The normative framework that regulates the law revision process is set out in the Ministry of Justice Organization Act of 1983, which empowers the Ministry of Justice to undertake such a task.⁶⁹⁶ Following the enactment of the INC, the Ministry of Justice commenced a comprehensive law revision project with a view to

⁶⁹⁴ The author published the section on “The Legal Framework of Law Reform Process” available at: http://www.redress.org/downloads/publications/Implementing_the_Comprehensive_Peace_Agreement.pdf

⁶⁹⁵ *Keith Patchett*, Preparation, Drafting and Management of Legislative Projects, UNDP Lebanon, 2003, available at: www.arabparliaments.org/publications/legislature/legdraft/kpe.pdf.

⁶⁹⁶ Art. 5(2) (c) of the Ministry of Justice Organization Act of 1983 of Sudan.

revising the existing legislation. As a result, a complete set of the revised laws has now been published in a number of volumes that contain laws from 1901 to 2008.⁶⁹⁷

On the other hand, the Law reform process is concerned with the identification and reform of specific legislative acts. It defines new laws and creates new regulatory frameworks to respond to challenges that have been identified and, at times, to fill gaps in the existing legal framework. Legal reform can take the form of repealing the legislation in force completely, or, enacting a new legislation, or, amending the existing legislation, and may also be undertaken through a combination of the three.⁶⁹⁸ The amendment process can be important in addressing urgent needs without having to embark on the time-consuming process of reforming the entire legal framework. In Sudan, it is understood that if an existing legislation requires extensive amendments, for example, if more than a third of the legislation needs to be amended, the existing legislation will be repealed completely and an entirely new legislation will be drafted.⁶⁹⁹

ii. Law-Making Process in Sudan under the INC

As indicated in the previous Chapters, under the INC, the authority to enact laws is divided between the national level, the level of the Government of Southern Sudan and the State level.⁷⁰⁰ The National Assembly enacts national laws applied throughout Sudan, the Legislature of the Southern Sudan enacts laws of the Government of the Southern Sudan and the Legislature of the 26 States enacts State law. The body concerned has to establish whether the subject matter in question falls within its field of legislative competence, as provided for in the different Schedules of the INC.⁷⁰¹

⁶⁹⁷ Interview with a former member of the Law Reform Committee of the Ministry of Justice, Khartoum, Feb.2009.

⁶⁹⁸ See REDRESS Trust, A concept paper on the law reform process, 2008, available at: http://www.redress.org/publications/Options_Paper_Law_Reform%20FinalEngl.pdf.

⁶⁹⁹ Interview with the Legislation Department of the Ministry of Justice, Khartoum, February 2009.

⁷⁰⁰ See Interim National Constitution Schedules A-E.

⁷⁰¹ See INC. National Laws: Exclusive Powers: Schedule (A), Concurrent Powers: Schedule (B), Residual Power: Schedule (C). Laws of the Government of Southern Sudan: Exclusive Powers: Schedule (B), Concurrent Powers: Schedule (B). States Laws: Concurrent Powers: Schedule (D), Exclusive Powers: Schedule (C).

The normative framework that governs the national law-making process ‘law reform’ is stipulated in article 106 of the INC ‘Tabling of Bills’,⁷⁰² and scattered in a number of statutes, including: the Directive of the Ministry of Justice (the 1996 Circular),⁷⁰³ the Ministry of Justice Organization Act of 1983, the Rules and Procedures of the Council of Ministers of 2005, and the National Assembly Rules and Procedures. The right to initiate the process of law making is shared between the executive and the legislative branches of the government, namely the President of the Republic, the institution of the Presidency and the Council of Ministers pursuant to article 106 of the INC. In addition, the right of legislative initiative may be exercised by a private member of the National Assembly (‘private bills’) if such an initiative involves an issue of important public interest and the development of the legislative proposal and its drafting are undertaken by a committee within the legislature.⁷⁰⁴ In practice, however, most legislative proposals are initiated by the executive, that is, by the various ministries.⁷⁰⁵

iii. Mechanisms Trigger Law Reform Process under the INC

There are also other mechanisms that may trigger the process of law reform. This includes article 5(2)(c) of the Ministry of Justice Organization Act of 1983. This law empowers the Minister of Justice, *inter alia*, to amend any legislation so as to bring it in line with the constitution, or any other statutory law(s) so as to address the urgent needs of the society, while taking into consideration the values of the Sudanese society.⁷⁰⁶ Other individual ministries and competent bodies are also empowered to initiate law reform proposals by forming an ad hoc ‘Law Reform Committee’ to reform and/or amend laws that fall within their area of competence, for example, the Ministry of Education may initiate law reform proposals to amend legislation that pertains to a particular policy on education.⁷⁰⁷

⁷⁰² See Art. 106 of the INC states that ‘The President of the Republic, the Presidency, the National Council of Ministers, a national minister or a committee of the National Legislature may table a bill before either Chamber of the National Legislature subject to their respective competences. (2) a member of the National Legislature may table a private bill before the Chamber to which he/she belongs on a matter that falls within the competence of that Chamber. (3) a private member bill shall not be tabled before the appropriate Chamber save after being referred to the concerned committee to determine whether it involves an issue of important public interest’

⁷⁰³ The Directive of the Ministry of Justice (the 1996 Circular) of Sudan

⁷⁰⁴ Patchett, above n.3, p. 4.

⁷⁰⁵ Interview with member of National Assembly, Khartoum, May 2009.

⁷⁰⁶ The Ministry of Justice Organization Act of 1983 (in Arabic).

⁷⁰⁷ Interview with a member of the NCRC, Khartoum, February 2009.

For its part, the Ministry of Justice is concerned with the initiation of law reform proposals relating to public law, including criminal law. The Ministry of Justice does not have a standing law reform committee to undertake such a law reform process, but when the need arises the Minister of Justice usually forms a law reform committee on an *ad hoc* basis.⁷⁰⁸ This practice differs from many other systems, in which the development of law reform proposals and the drafting of the legislative texts are entrusted to a formally instituted law reform committee.⁷⁰⁹

b. Law Reform Institutions

There are two sets of legislative reform actors within the current legal framework, namely bodies established by the CPA and other actors normally tasked with legislative reform, in particular the Ministry of Justice as well as individual ministries as explained above. The CPA provides for the establishment of a NCRC and mandates it, *inter alia*, with preparing “other legal instruments as is required to give effect to the Peace Agreement”.⁷¹⁰

i. Law Review Committee of the Ministry of Justice

The Law Review Committee of the Ministry of Justice was established by the Minister of Justice, in 2005, following the conclusion of the CPA. The LRC was largely responsible for reviewing national legislation with a view to identifying laws that did not comply with the provisions of the INC. It was set up as an *ad hoc* law review committee composed of legal advisors from the Ministry of Justice tasked with preparing recommendations and advising the relevant ministries and/or entities on how to align the existing legislation with the provisions of the INC.⁷¹¹ The mandate of the LRC included the task of ensuring the compatibility of the State constitutions and ICSS with the INC.

The LRC had identified over 61 laws which needed reform. These included the Criminal Procedure Act of 1991, the Criminal Act of 1991, the Prison Act of 1986, the National Security Forces Act of 1999, the Police Act of 1986, the Judiciary Act of 1986. Little is known about the working methods of the LRC. It apparently did not follow a consultative procedure when

⁷⁰⁸ Art. 5 of the Ministry of Justice Organization Act of 1983 of Sudan

⁷⁰⁹ Patchett, above n.3.

⁷¹⁰ Art. 2.12.9 of the Power Sharing Protocol of the CPA.

⁷¹¹ Interview with a former member of the Law Review Committee, February 2009, Khartoum.

reviewing the existing legislation. The LRC was dissolved following the completion of its task of ensuring the compatibility of the ICSS and State Constitutions with the INC.

Its mandate of revising laws in need for reform has been transferred to the Legislation Department of the National Ministry of Justice. The Government has acted upon some of the recommendations of the LRC that related to the reform of 61 laws referred to above but many of the laws identified are still to be reformed. Officials of the Ministry of Justice are of the view that the LRC's role in carrying out the constitutional compatibility exercise was crucial in moving forward the process of law reform.⁷¹²

The Legislation Department is currently engaged in a comprehensive law review process aimed at bringing the entire national legal system in line with the provisions of the INC.⁷¹³ At present, the Legislation Department is tasked with incorporating all international treaties that Sudan has ratified into national legislation.⁷¹⁴ The amendment to the Criminal Act 2009, signed into law in July 2009, was drafted by a special committee formed in the Ministry of Justice in 2008. The amendments added a whole chapter to the Criminal Act of 1991 (total of 7 articles) on crimes against humanity, genocide and war crimes. The amendments entail the inclusion of rape and other acts of sexual violence as war crimes and crimes against humanity. However, the definition of rape as an ordinary offence (article 149 of the Criminal Act) is at variance with the one for rape as a war crime or crime against humanity.⁷¹⁵

The INC places an obligation on the legislative drafters to observe international norms and standards.⁷¹⁶ There is no similar obligation in respect of foreign laws. In principle, legislative drafters may refer to foreign law as a source of new ideas, especially as a means to find a

⁷¹² Opening remarks, the Ministry of Justice officials in UNDP-Ministry of Justice Workshop, Khartoum, Aug.2009 (on file with the author)

⁷¹³ Interview with the Legislation Department of the Ministry of Justice, Khartoum, February, 2009.

⁷¹⁴ Sustaining Peace through Development, 2008-2011, Prepared for the Third Sudan Consortium, May 2008 (on file with the author)

⁷¹⁵ REDRESS and KCHRED, Comments on the proposed amendment of the Sudanese Criminal Act, Position Paper, September 2008, available at http://www.redress.org/reports/Penal_Code_Amendment_Position%20Paper%202_2_.pdf.

⁷¹⁶ Art. 27 of the INC

solution to a given problem.⁷¹⁷ However, it appears that it is mainly comparative foreign law of Arab countries that plays a role in guiding the process of law reform. The Ministry of Justice is planning to merge the International Law and Treaties Department with the Department of Legislation.⁷¹⁸ Such a new unit has the potential to serve as a source of knowledge that may assist in developing a special legislative competence, including by increasing the appreciation of international norms and standards.

The Department of International Treaties advises the government on the ratification, accession or other means of becoming a party to international treaties. This includes the compatibility of legislation with an international treaty that Sudan intends to ratify. In practice, the Department carries out a “Compatibility Study” before Sudan becomes a party to a treaty.⁷¹⁹ New legislation ought to be drafted in such a way that any incompatibility of its provisions with existing international treaties obligations is avoided. However, this is rarely followed in practice, as some of the drafters are not always aware of the existing international treaties that Sudan has ratified. As a result, some of the newly amended laws are not entirely in compliance with the provisions of some of the international treaties to which Sudan is a party.⁷²⁰

Some progress, albeit rather limited, has been made by the Ministry of Justice in engaging in civic education in relation to the law reform process.⁷²¹ Officials of the Legislation Department point to consultation with civil society organizations, interest groups and the media in the process of the reform of the Child Act of 2009. This triggered reform proposals for other laws, such as the Evidence Act of 1994 in relation to the witness of the child as admissible evidence in cases of sexual violence.⁷²² The envisaged amendment would likely entail lowering the age of those who could appear before the court as witnesses.⁷²³ However, the newly enacted Child Act

⁷¹⁷ See general Jan M. Smits, *Comparative Law and its influence on National Legal Systems*, Oxford Handbook on Comparative Law, 2008, Mathias Reimann and Reinhard Zimmermann (eds), Oxford.

⁷¹⁸ Interview with the Legislation Department of the Ministry of Justice, Khartoum, February, 2009.

⁷¹⁹ Interview with *Sabit Hamid*, Legal Advisor, International Law and Treaties Department of the Ministry of Justice, August 2009, Khartoum.

⁷²⁰ *Ibid.*

⁷²¹ Interview with the Legislation Department of the Ministry of Justice, Khartoum, February 2009.

⁷²² The Sudanese Evidence Act of 1994.

⁷²³ Interview with the Legislation Department, Ministry of Justice, Khartoum, February 2009.

fails to fully criminalize female genital mutilation as originally envisaged and called for by a coalition of women's groups, civil society organizations and others.

ii. The National Constitutional Review Commission

The CPA provides for the establishment of a NCRC to expedite the process of law reform.⁷²⁴ The mandate of the NCRC includes, *inter alia*, the preparation of legal instruments required to give effect to the CPA, such as the preparation of draft statutes of the National Electoral Commission, the National Human Rights Commission, the National Judicial Service Commission, and the National Civil Service Commission.⁷²⁵ It is clear that the mandate of the NCRC is very specific as far as the law reform process is concerned. The NCRC is an *ad hoc* law reform commission that is tasked with the preparation of certain Acts with a view to implementing the CPA and the INC.

The Commission is comprised of representatives from the parties to the CPA, meaning the NCP and the SPLM and representatives from other political parties and civil society, as agreed by the parties to the CPA. Neither the CPA nor the INC provides for specific rules and procedures for the Commission, apart from stipulating that the Commission “shall be responsible for organizing an inclusive constitutional review process [and that] the process must provide for political inclusiveness and public participation.”⁷²⁶

In practice, the Commission adopts a process that includes:

- firstly, consideration of the subject-matter in a plenary session by the Commission;
- secondly, the Commission forms a number of sub-committees to prepare a comprehensive study on the subject-matter and solicits views and inputs from various bodies;
- thirdly, another committee prepares the drafts;
- finally, the proposed draft text is presented before the Commission in a plenary session for approval and submission to the concerned entity/authority.⁷²⁷

⁷²⁴ Art. 140 of the INC provides that the National Constitutional Review Commission ‘shall continue to perform its functions as prescribed by the Comprehensive Peace Agreement’.

⁷²⁵ Art. 2 seq. of the Power Sharing Protocol of the CPA.

⁷²⁶ Ibid.

⁷²⁷ Interview with the NCRC, February 2009, Khartoum.

It is clear that the Commission follows, to some extent, the same procedures on policy formulation as specified in the Directive of the Ministry of Justice (1996 Circular of the Ministry of Justice). The fact that the Commission is responsible for both the policy formulation and the drafting of the legislative text distinguishes it from other *ad hoc* law reform commissions.⁷²⁸ The Commission endeavours to adopt a transparent process by employing a number of consultative modalities, such as organization of workshops, public debate and consideration of submissions from the public.⁷²⁹ Submissions were considered in the preparation of election laws. In addition, the NCRC has indicated that it invites international experts and considers foreign comparative law during the drafting process.⁷³⁰

The Commission attempts to reach consensus when preparing the draft statutes. However, some observers have argued that the composition of the Commission, being dominated by the NCP and the SPLM/A, does not allow it to reach out to the public and conduct an inclusive consultative process. The Commission has attempted to solicit the views of other political parties that are not presented by way of forming an *ad hoc* committee. This has been the case during the preparation of the Election Act.⁷³¹

The Commission usually prepares the draft statutes based on consensus,⁷³² which are then submitted to the Council of Ministers (CoM) for consideration and input. But, it is understood that feedback provided by the CoM on the draft of the statutes is usually rejected by the Commission.⁷³³ And, as such, this blocks the CoM from debating further statutes prepared by NCRC, thereby limiting the effectiveness of consultations.

It is understood that the Rule of Law and Judicial Affairs Section of UNMIS provides advisory services to the NCRC as to the substance of the various statutes but it is not clear to what extent

⁷²⁸ Interview with the National Council for Child Welfare, February 2009, Khartoum.

⁷²⁹ Interview with the NCRC, February 2009, Khartoum.

⁷³⁰ Ibid.

⁷³¹ Interview with the Council of States of the National Parliament, February 2009, Khartoum.

⁷³² Interview with Mr. *Omer Shumina*, Lawyer, July 2009, Khartoum.

⁷³³ Interview with *Motasim El-Amir*, Lawyer, Khartoum, July 2009.

the inputs of UNMIS are considered by the NCRC while preparing the different statutes.⁷³⁴ The Commission does not widely disseminate information about the legislative reform process, including drafts, to the public, representatives and members of the relevant bodies. This hampers transparency and broad public participation in the law reform process.

iii. A Standing Law Reform Commission

In the seventies, there was a standing law reform commission as a division within the Legislation Department of the Ministry of Justice.⁷³⁵ Members of the Sudanese legal community,⁷³⁶ including members of the NCRC, believe that the law reform process can be greatly enhanced, if an independent law reform committee would be re-established. Such a body could keep the law under review and make recommendations for reforms, either on its own motion or upon recommendation of the government. It could also work on the consolidation and revision of statutes and research.

c. Protection of Civil and Political Rights in Practice

1. Administration of Justice: The Fair Trial Standards under the INC

The right to a fair trial is designed to ensure that all individuals are protected by the law throughout the criminal process – that is, from the moment the investigation process starts until the final disposition of the case.⁷³⁷ The principle of a fair trial embodies certain procedural guarantees, which accrue to the accused persons the following guarantees: presumption of innocence; the right to be promptly informed of the charge; the right to a fair and public trial; no retroactive operation of the offences or the sentences; the right of the accused to be tried in his/her presence; the right to legal representation; the right to legal aid; the right to trial without undue delay. A number of certain principles which constitute the minimum guarantees for the accused throughout the criminal proceedings are stipulated under Art. 34 of the INC. The right to a fair trial is further supplemented by international and regional human rights norms that are

⁷³⁴ Interview with Rule of Law and Judicial Affairs Section of UNMIS, October 2009.

⁷³⁵ Interview with a former member of the law reform committee of the Ministry of Justice, Feb. 2009, Khartoum.

⁷³⁶ *Mohamed Eltahir*, Law Reform in the Light of the Comprehensive Peace Agreement. (on file with author); Interview with the School of Law, University of Khartoum, February 2009, Khartoum.

⁷³⁷ *Manfred Nowak*, U.N. Covenant on Civil and Political Rights: CCPR Commentary, p. 314. Publisher, N.P. Engel, 2005

now directly applicable before the Sudanese courts, as, for instance, the provision of Art. 14 of the ICCPR.⁷³⁸

2. A Few Aspects of the Right to Fair Trial under the INC⁷³⁹

a. Equality before the law & Equal Treatment by the Law

The right to equality before the law and equal treatment by the law means that discrimination is prohibited throughout the trial proceedings. Equality “before the law” means equality “before the given law” – that is, the executive and the judiciary are obliged to respect the equality clause when applying the statutes made by the legislature. It also means that the legislature has to provide equal treatment in law making.⁷⁴⁰ The right to equality before the law is anchored in Art. 31 of the INC which prohibits discrimination while enforcing law throughout the criminal process.⁷⁴¹

Even though the general equality clauses of the INC already prohibit the discrimination on the basis of “race, colour, sex, language, religious creed, political opinion, or ethnic origin”; nonetheless, an exception to the equal treatment by the law is provided for under Art. 5 of the INC which provides that in the north Sudan legislation shall have as one of its sources *Sharia’a* law and the consensus of the people, whereas in the Southern Sudan legislation shall have its sources popular consensus, the values and customs of the people.⁷⁴² This exception lies on the premise that non-Muslim are not subject to penalties as prescribed in *Sharia’a* law. To this end, the INC (Art. 156(d)) states that “the judicial discretion of courts to impose penalties on non-Muslims shall observe the long-established *Sharia* principle that non-Muslims are not subject to prescribed penalties and therefore remitted penalties shall apply according to law”.⁷⁴³

⁷³⁸ Art. 27(3) of the INC states that: “27(3) All rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of the Sudan shall be an integral part of this Bill”

⁷³⁹ The author published the section on “A Few Aspects of the right to fair trial under the INC” in *Noha Ibrahim, The Right to Fair Trial in the Light of the Interim National Constitution of Sudan: Theory and Practice*, in *Recht in Afrika*, 83-100.

⁷⁴⁰ See generally Max Planck Manual on the Impact of the Constitutions on the Work of the Judiciary. Available at: [http://www.mpil.de/shared/data/pdf/constitutionalism_manual\(c\).pdf](http://www.mpil.de/shared/data/pdf/constitutionalism_manual(c).pdf)

Feinäugle, Clemens / Ibrahim, Noha / Röder, Tilmann / Wiesner, Verena: Max Planck Manual on the Impact of the Constitutions on the Work of the Judiciary. Available at:

[http://www.mpil.de/shared/data/pdf/constitutionalism_manual\(c\).pdf](http://www.mpil.de/shared/data/pdf/constitutionalism_manual(c).pdf).

⁷⁴¹ Art. 31 of the INC states that: “all persons are equal before the law and are entitled without discrimination, as to race, colour, sex, language, religious creed, political opinion, or ethnic origin, to the equal protection of the law”

⁷⁴² Art. 5 of the INC

⁷⁴³ Art. 156(d) of the INC; Cf. Art. 126 & Art. 78(1) of the Criminal Procedural Act of 1991.

As to the existing Sudanese statutory laws, something is problematic insofar as the right to equality before the law is concerned. For instance, the executive exerts influence in criminal matters in that Arts 37(1)(d)⁷⁴⁴ and 58(1)⁷⁴⁵ of the Sudanese Criminal Procedure Act of 1991 empower the Minister of Justice to stay a criminal suit at any stage of the criminal process. This considerable power is inconsistent with the separation of powers and therefore violates the rule of law, especially the principle of equality before the law. Further, the Criminal Act of 1991 provides for severe penalties, especially for women that violate the requirement of equal treatment.

The Public Order Act of 1996, the Criminal Act 1991, the Public Order Police and the Public Order Courts all have discriminate against women, especially marginalized groups and are not in line with the INC Bill of Rights and Sudan International Human Rights obligations.⁷⁴⁶ For instance, Public Order Act of 1996, which is in force in Khartoum State only and restricts the civil liberties and religious rights of Muslims and non-Muslims alike. The Act prohibits indecent dress and brings within this ambit other “offences of honour, reputation, and public morality.” The Act does not define what “indecent dress” means, leaving such interpretation to the discretion of judges and the police. The Act contains other restrictions, for example, offences related to concerts (obtaining permission from the authorities to organize private and public concerts), regulations about the use of public transport, offences related to hair dressing salons, etc.⁷⁴⁷

b. Trial without Undue Delay

The requirement of a prompt trial in criminal cases obliges the State to ensure that all criminal proceedings are conducted in a reasonable time. In the detention phase, the accused person should be brought promptly before the court within a reasonable time or to be released. The period to be taken into consideration begins on the day a person is either charged or arrested or

⁷⁴⁴ Art. 37(1)(d) reads: ‘The Criminal Suit shall lapse for the following reasons: (f) passing a grounded decision by the Minister of Justice staying the criminal suit’.

⁷⁴⁵ Art. 58(1) states: “The Minister of Justice, at any time, after completion of inquiry, and before passing the preliminary judgment, in the criminal suit, may take a grounded decision, in his own hand, to stay the criminal suit, against any accused; and his decision shall be final, and shall not be contested. The court shall thereupon stay the proceedings and pass the orders necessary for terminating the criminal suit.”

⁷⁴⁶ See REDRESS in *The Constitutional Protection of Human Rights in Sudan: Challenges and Future Perspectives*, 2014, p. 26, Conference Papers and Proceedings, Khartoum, Sudan. Available at (www.pclrs.org)

⁷⁴⁷ Art 5, 6, 9, 13, 20, 24 of the Public Order Act of 1996.

committed for trial and ends when the final appeal judgement is issued. The definition of the reasonable time depends upon the circumstances of the individual case, and the complexity of the case at hand.⁷⁴⁸ Art. 34 of the INC explicitly requires that ‘any person shall be entitled to be tried ... without undue delay ...’.

The Criminal Procedure Act 1991 specifies a period of 3 days within which a person needs to be brought before a judge and provides for a number of safeguards. On the other hand, the Criminal Procedure Act of 1991 does not provide for time-limit for pre-trial detention nor a timeframe for commencement of the trial.⁷⁴⁹ In practice, pretrial detention can be prolonged for a period of six months, after which any further extensions need to be approved by the Chief Justice.⁷⁵⁰ At the investigation stage, in practice, the police may, for the investigation purposes, detain a person for 24 hours. Furthermore, the prosecuting attorney may renew the detention for a period not exceeding three days, after which the judge may order detention for a period of one week, which can be extended once. The judge must therefore examine the legality of detention after 96 hours.⁷⁵¹ If the person concerned has been charged, the judge may order to extend detention every two weeks for a total of six months, after which any further extensions need to be approved by the competent Chief Justice.⁷⁵² Thus, the accused may be detained for prolonged period and the Criminal Procedure Act 1991 does not state the grounds that justify the prolonged detention, apart from for the purpose of inquiry.

Other laws also breach the right to be tried in a reasonable time, for instance, Art. 50 of the National Security Act of 2010 retains the power to detain any suspected person for a period of up to thirty days. This period may be renewed by the Director of the National Security Services for another 15 days, which can be prolonged to 45 days detention without charge.

⁷⁴⁸ *Ziyad Motala*, Right to Fair Trial in South Africa under the Interim Constitution, in: David Weissbrodt et al, *The Right to A Fair Trial*, Springer Publisher, Heidelberg, 1998, p. 305; See *Gamal Attia*, *The Right to A Fair Trial in Islamic Countries*, in: David Weissbrodt et al, *The Right to A Fair Trial*, Springer Publisher, Heidelberg, 1998, p. 343.

⁷⁴⁹ *Mohamed Abdelsalam Babiker*, Why Constitutional Bill of Rights fail to protect Civil and Political Rights in Sudan: Substantive Gaps, Conflicting Rights, and “Arrested Reception of International Human Rights Law, in the Constitutional Protection of Human Rights in Sudan: Challenges and Future Perspectives, 2014, Khartoum, Conference Papers and Proceedings. P. 19. Available at: (www.pclrs.org),

⁷⁵⁰ Art. of the Criminal Procedure Act 1991 of Sudan

⁷⁵¹ Art. 79 of Sudan Criminal Procedure Act 1991.

⁷⁵² Art. 79(4) of Sudan Criminal Procedure Act 1991

The National Security Act also provides for a right of an arrested or detained person to inform his or her family members, but, the right to communicate with family members or a lawyer shall not prejudice the investigation. Thus, the National Security Act contravenes the international standards that provide for a right of access to a lawyer.⁷⁵³ Furthermore, art. 51(10) of the National Security Act 2010 makes it clear that a detained person has no right to challenge the legality of detention before a judicial body for a period of 45 days or four and a half months respectively as any such challenge can only be brought thereafter.⁷⁵⁴ This is in clear violation of the applicable norms under international human rights law, such as ICCPR, for example.⁷⁵⁵

It has to be noted that Art. 8 of the People's Armed Forces Act, the armed forces enjoy the same powers and legal immunity granted to all other internal security forces when charged with providing internal security.⁷⁵⁶ Also covered by this immunity are the members of the Popular Defence Forces (PDF) (paramilitary forces), since they are placed under the control of the Sudanese Army and the Minister of Defense in 1989.⁷⁵⁷ This means that the administration of justice is dominated by the executive as several pieces of legislation contain immunities for government officials as contained in the Armed Forces Act of 2007, the Police Act of 2008, and the National Security Act of 2010.⁷⁵⁸ In practice, the judiciary as well as the constitutional Court have upheld such immunities in practice. In turn, this has led to impunity, including for serious human rights violations.⁷⁵⁹ Immunity for government officials as provided for in these laws contradicts the right to an effective remedy as provided for in the INC Bill of Rights (Art. 48 the right to litigation). Recently, Sudan's Ministry of Justice has reportedly announced a

⁷⁵³ See *Nabil Adib*, At the State's Mercy: Arrest, Detention and Trial under Sudanese Law, in *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan*, p. 135, Lutz Oette (ed.), Ashgate, the UK, 2011.

⁷⁵⁴ *Nabil Adib*, At the State's Mercy: Arrest, Detention and Trial under Sudanese Law, p. 135.

⁷⁵⁵ *Ibid*, p. 135.

⁷⁵⁶ *Refugees International*, *Laws without Justice*, An Assessment of Sudanese Laws Affecting Survivors of Rape, June 2007, 10, available at http://www.refugeesinternational.org/files/10070_file_Lawsoutjustice.pdf (last visited 9 November 2007).

⁷⁵⁷ Arts 6-8 of the Sudanese Popular Defense Forces Law, 1989 (the Arabic text is on file with the author; see also *Human Rights Watch*, *Lack of Conviction: The Special Criminal Court on The Events on Darfur* 1 (2006), 25, available at <http://hrw.org/backgrounder/ij/sudan0606/sudan0606.pdf> (last visited 9 November 2007).

⁷⁵⁸ Immunities contained in Art. 42(2) of the Armed Forces Act 2007, Art. 45(1) of the Police Act 2008, and Art. 52 of the National Security Act 2010.

⁷⁵⁹ REDRESS: Human Rights Concerns and Barriers to Justice in Sudan: National, Regional and International Perspectives: A Compilation of Sudan Law Reform: Advocacy Briefing, 2014. Available at: (www.pclrs.org)

review of immunity laws amidst concerns over the adverse impact of immunities on the administration of justice.⁷⁶⁰

c. The Public Conduct of the Trial

The right to a public hearing before a court in criminal matters is the core of the right to a fair trial - conducting the criminal trial in public ensures the legitimacy of the criminal justice system and is an important safeguard of impartiality of the criminal proceedings.⁷⁶¹ This means that the courts must conduct the hearing publicly and that they must make the judgments public.⁷⁶² However, there are several permissible exceptions to conduct public hearing, by which the press and the public may be excluded from all or parts of the hearing procedures. In some cases, the exclusion is even necessary to ensure the rights of the accused, for example in juvenile cases. Grounds for exempting the public from the court proceeding include, for example, on the grounds of “public order” exception, referring primarily to the order within the courtroom. A second exemption of the public from the court proceedings relates to the “national security” interests which relates primarily to the secrecy of important information, or for the protection of the judges against terrorist attacks if this protection cannot be achieved by other means.⁷⁶³ Art. 34 of the INC expressly provides for the right to a public hearing. But, the grounds on which the public may be excluded from all or parts of the court proceedings are not stated in the INC.

The right to a public hearing, as provided for in the INC is qualified. The qualification of the right to public hearing is “in accordance with the procedures prescribed by the law”, which renders the grounds for excluding the public from the court proceedings difficult for which to find a precise meaning. The criteria for determining the necessity for the exclusion of the public from a public hearing, as provided for in the INC, is certainly wider and lacks precision in comparison with Art. 14(1) of the ICCPR which prescribes criteria for determining the necessity

⁷⁶⁰ A workshop organized by UNDP and the Sudan Ministry of Justice (General Prosecutor), Sept. 2012 (recommendations of the workshop available with the author)

⁷⁶¹ *Johan De Waal, Iain Currie & Gerhard Erasmus*, *The Bill of Rights Handbook*, 4th edition, 2001, JUTA & Co LTD Publisher, South Africa, p. 622.

⁷⁶² *Manfred Nowak*, U.N. Covenant on Civil and Political Rights: CCPR Commentary, p. 314.; R. L. Bhatia, *Fair Trial in Criminal Proceeding in India*, in: David Weissbrodt et al, *The Right to A Fair Trial*, Springer Publisher, Heidelberg, 1998, p. 373

⁷⁶³ *Manfred Nowak*, p 325.

for excluding public from court proceedings, such as morals, public order and national security, etc.

Although the Criminal Procedure Act of 1991 recognizes exception to the public hearing nonetheless, the Act leaves the criterion for determining the necessity for the exclusion of the public for the discretion of the court. Art. 133 of the Criminal Procedure Act of 1991 states that “trial shall be publicly conducted, and the public may attend the same; provided that the court may, in its discretion, order at any of the stages of the trial, exclusion of the public generally, or any person of those attending, or remaining at the sitting, whenever the nature of the trial procedure, or order requires the same.”⁷⁶⁴ Whether the trials are to be heard, in public, lies with the discretion of the court without any requirements, which makes the rule open to abuse.⁷⁶⁵

d. Right to Free Legal Aid

The right of an accused to be assisted by a lawyer is a prerequisite for the exercise of the right to a fair trial.⁷⁶⁶ The right to legal aid is provided for in the INC and various other pieces of the Sudanese legislation.⁷⁶⁷ The Ministry of Justice provides legal services to indigent persons through the Department of Legal Aid (LAD). The principle objective of the LAD was initially to provide legal aid to indigent persons who had passed the means test: that is, the legal aid is provided only to indigent persons. The LAD provides legal aid in criminal and certain civil cases, and does not cover support during the stages of the arrest/detention, interrogation and the appellate stage. The INC now has changed this criteria and the LAD has to meet the constitutional obligations of providing legal services to the accused persons, as per Art. 27(3) of the INC throughout the criminal process (pre-trial until the post-trial).

In Sudan, the provision of legal aid is only limited to serious offences, such as the death sentence, imprisonment (10 years). Indigent defendants do not automatically receive court-appointed lawyer. The basic criterion of substantive eligibility for legal aid, in accordance with

⁷⁶⁴ Art. 133 of the Criminal Procedure Act of 1991.

⁷⁶⁵ See Article 133 of Sudan Criminal Procedure Act 1991.

⁷⁶⁶ *Nabil Adib*, At the State’s Mercy: Arrest, Detention and Trials under Sudanese Law, in *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan*, p. 125.

⁷⁶⁷ Art. 34(6) of the INC; Art. 135(3) of the Criminal Procedure Act 1991 states that: “where the accused is accused of an offence punishable with imprisonment, for the term of ten years or more, amputation or death, is insolvent, the Ministry of Justice upon request of the accused shall appoint a person to defend him, and the state shall bear all, or part of the expenses.”

Art. 135(3) of the Criminal Procedure Act of 1991, are limited to certain offences and subject, however, to the accused being an insolvent. Art. 135 of the Criminal Procedure Act⁷⁶⁸ provided for the right to be defended by a lawyer, but, without explicitly providing for the right of access to a lawyer at an earlier stage of the criminal process, i.e., from the commencement of an investigation. The attainment of the above-mentioned criteria does not mean automatic access to legal aid by indigents. The provision of legal aid is limited to serious crimes, and this undermines access to a lawyer and the right to an adequate defense.⁷⁶⁹

In general, Art. 83(3) of the Criminal Procedure Act of 1991 provides for the right of the arrested person to “contact his advocate” but how to translate this provision in practice is not clear. In practice, lawyers in Sudan are excluded from all investigation and interrogation procedures, as there is no clear stipulation in the Sudanese legal system allowing the accused to have the benefit of legal assistance at the initial stages of the police interrogations.⁷⁷⁰ Furthermore, the lawyer is not allowed to attend the interrogations and to review the investigations daily registry once the indictment has been filed by the prosecution.⁷⁷¹

The limited extent to which the judicial system in Sudan renders the justice system accessible to the public is apparent from the fact that the majority of people are still being denied access to legal representation. Very little has been done to establish the financial and administrative structure for the realization of the right to free legal aid in Sudan. Most of the practitioners concentrated in the big cities, literally beyond the reach of the largely poor rural population. Public defenders, if found at all, are available only for criminal defendants in serious cases. The right to equal access to the courts may also be violated if the State fails to make legal aid available for the purpose of pursuing remedies for addressing violations of fundamental

⁷⁶⁸ Art. 135 of Sudan Criminal Procedure Act 1991 provides for “(1) the accused shall have the right to be defended by an advocate, or pleader. (2) The court may permit any person to plead before it, where it deems him qualified therefor. (3) Where the accused is accused of an offence punishable with imprisonment, for the term of ten years, or more, amputation or death, is insolvent, the Ministry of Justice, upon request of the accused, shall appoint a person to defend him, and the State shall bear all, or part of the expenses.”

⁷⁶⁹ *Noha Ibrahim*, The Right to Fair Trial in the Light of the Interim National Constitution of Sudan: Theory and Practice, in *Recht in Afrika*, 83-100, at 90.

⁷⁷⁰ *Nabil Adib*, At the State’s Mercy: Arrest, Detention and Trials under Sudanese Law, p. 128.

⁷⁷¹ *Ibid*, p. 128.

rights.⁷⁷² At present, the international community (UN agencies, such as UNDP) in collaboration with the civil society and the Ministry of Justice is lobbying for the passage of legal aid legislation with a view to providing access to justice to vulnerable and marginalized groups in which the State shall play a crucial role in providing free legal aid.

e. Treatment of Juveniles

Accused juveniles are accorded a special treatment, during criminal trials, by virtue of their status as minors. Juvenile offenders by the reason of their physical and mental immaturity need special safeguards and care, including appropriate legal protection.⁷⁷³ Children under a certain age are presumed not capable of having a *mens rea*, so they cannot be held criminally responsible for committing a criminal offence.⁷⁷⁴ Under the Sudanese constitutional and statutory norms, accused juveniles are accord preferential treatment, including: special criminal law, different court proceedings, prohibition of imposing death sentence, during the criminal proceedings, by virtue of their physical and mental immaturity.

Art. 32(5) of the INC stipulates that ‘the State shall protect the rights of the child as provided in the international and regional conventions ratified by Sudan’. Special measures are also provided in the Child Act of 2010. The Child Act aims at bringing the juvenile justice system in line with international Convention on the Rights of Child and the United Nations Minimum Model Rules for Juvenile Judicature and Beijing Rules. The Child Act places emphasis on the care, protection, treatment, development and rehabilitation of delinquent juveniles. The Child Act establishes special institutions to handle juvenile cases, including: Children Police, Social Service Offices, Children Prosecution Bureau and a Children Court in which criminal trials are to be held differently from those of adult offenders.

⁷⁷² Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary, 2nd edition, N.P. Engel Publisher, 2005, p. 313.

⁷⁷³ Sara Joseph et al, The International Covenant on Civil and Political Rights, Cases, Materials, and Commentary, 2nd edition, 2004, Oxford, Oxford University Press, pp 623-49.

⁷⁷⁴ Dickson, Brice, The Right to a Fair Trial in England and Wales, in: David Weissbrodt et al, The Right to A Fair Trial, Springer Publisher, Heidelberg, 1998, pp. 507-08.

During criminal proceedings, juveniles also enjoy the same guarantees and protection as accorded to adults under the principles of fair trial.⁷⁷⁵ Yet, in Sudan, the juvenile justice system faces numerous problems. In total, there are few juvenile reformatories which are poorly maintained - the infrastructure is in need of a complete overhaul.⁷⁷⁶ In practice, due to overcrowding, juveniles are often found to be detained with adult persons in custody. Moreover, access to legal advice is not easily available, as most of those arrested are usually poor.⁷⁷⁷

f. Special Courts

A basic prerequisite for a fair trial is that proceedings are conducted by a competent, independent and impartial tribunal established by law, as stipulated in Art. 14 of the ICCPR. Likewise, Art. 34(2) of the INC guarantees that every person shall be entitled to be tried by an ordinary competent court of law in accordance with procedures prescribed by the law. Thus, trials should not be conducted by special tribunals. That said, specialised courts do not necessarily violate fair trial principles per se, they must be established to try certain groups of people based on permissible categories that do not violate the principles of equality and non-discrimination. In this connection, in its General Comment on Art. 14 of the ICCPR, the UN Human Rights Committee has stated: "while the Covenant does not prohibit such categories of courts [i.e. military or special courts], nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in Article 14".⁷⁷⁸

Under the Sudanese law, special courts must be established and regulated by law, as stipulated in Arts. 127 and 172(3)(c) of the INC. Art. 14 of the Criminal Procedure Act of 1991 demands that the powers of special criminal courts shall be specified by law, or by the warrant establishing them. It is worth noting that there are other special courts in Sudan that have

⁷⁷⁵Roger Levesque, *Future Visions of Juvenile Justice: Lessons from International and Comparative Law*, Creighton Law Review 29 (1996) 4, S. 1563 - 1585.

⁷⁷⁶Sudan Joint Assessment Mission: Governance and Rule of Law, March 18, 2005. Available at: <http://www.reliefweb.int/library/documents/2005/jam-sdn-18mar3.pdf>.

⁷⁷⁷Sudan Joint Assessment Mission: Governance and Rule of Law, March 18, 2005. Available at: <http://www.reliefweb.int/library/documents/2005/jam-sdn-18mar3.pdf>.

⁷⁷⁸Human Rights Committee, General Comment No. 32, Art. 14 of CCPR "right to equality before the court and tribunal and to a fair trial), CCPR/C/GC32, August 2007. Available at: http://ccprcentre.org/doc/ICCPR/General%20Comments/CCPR.C.GC.32_En.pdf

jurisdiction over the members of the Army and the Police forces.⁷⁷⁹ A recent amendment of Sudan's law enables the authorities to try citizens before military courts. This deprives the accused of his or her right to a fair trial, which is a right that can hardly be available to a civilian before a military court.⁷⁸⁰ Trying civilians before military courts contravenes with Sudan's international obligations, including Art. 14 of ICCPR. In effect, a number of individuals were tried before special courts in proceedings that did not meet fair trial standards, including by accepting evidence obtained as a result of torture.⁷⁸¹ Death penalty was imposed by these courts in some instance, thus, violating the right to life of the convicts.⁷⁸² The constitutionality of such trials before the special courts was upheld by Sudan's Constitutional Court in 2009.⁷⁸³

3. The Role of the Prosecutor

The introduction of a separate system of the prosecution is new in Sudan. Previously, the role of the prosecutor was undertaken by the police. For example, the police, upon taken notice of the commission of a crime and obtaining the relevant warrant from the competent Magistrate, proceeded with the investigation, search and arrest, deciding on the charge, summarizing the case and, finally, presenting the case to the Court for trial.⁷⁸⁴

Now, with the establishment of the Public Prosecutor Office, as part of the Ministry of Justice, the prosecutorial tasks of the police has gradually undertaken by the prosecutors who, at present cover, most criminal cases within the country where criminal courts are found. Arts 17, 18, 19, 20, 21 and 21 of the Criminal Procedure Act give the prosecutor the power to initiate, continue or discontinue the prosecution. The prosecutors now issue warrants of arrest to be executed by the police, they can order search and detention of a person for up to 3 days. Such tasks were

⁷⁷⁹ Security Forces Courts (Art. 62 of the National Security Forces Act, 1991 as amended 2010); the Armed Forces Court (Art. 72, 73 of the Armed Forces Act, 1986 as amended in 2007) and the Police Courts (Art. 50 of the Police Forces Act, 1999 as amended 2008)

⁷⁸⁰ REDRESS and Sudanese Human Rights Monitor, Sudan; Amendment of Armed Forces Act runs counter to international standards and risks fostering human rights violations, July 2013. Available at: http://www.pclrs.org/downloads/Submission-on-Amendment_Sudan-Armed-Forces-Act_23July2013.pdf

⁷⁸¹ See *Amin M. Medani*, 'A Legacy of Institutionalized Repression: Criminal Law and Justice in Sudan', in Lutz Oette (ed.), *Criminal Law and Transitional Justice: Human Rights Perspectives for Sudan* (Ashgate, Farnham, 2011), pp.6788

⁷⁸² See also Human Rights Committee, Concluding Observations: Sudan, UN Doc. CCPR/C/SDN/CO/3/CRP.1 (26 July 2007), para.25.

⁷⁸³ See *Kamal Mohammed Saboon v Sudan Government*, CS (Constitutional Court) (60) of 2009,

⁷⁸⁴ *Amin M. Medani*, *Criminal Law and Justice in Sudan*, Occasional Paper, February, 2010. Available on http://www.pclrs.org/Amin_Mekki_Medani_Paper.pdf

previously authorized by the magistrates. Moreover, the prosecutors may ask the magistrates to extend the detention period beyond the 3 days for the purposes of continuing the investigation. Further, they conduct prosecutions during the trial.

One criticism of the present prosecution system is that the prosecutors are part of the Ministry of Justice (the executive). In many systems, public prosecution is undertaken by prosecutors working under the Public Prosecutor or Director of Public Prosecutions, who is responsible to the Attorney General. Under such systems, the Attorney General is an independent office, not subordinate to the Minister of Justice who is part of the executive branch of the government. Exponents of an independent prosecutor system argue, in particular, that the power of *nulle protecul* (i.e. stopping proceedings in a criminal case at any stage before reaching a verdict by the Court) may be abused or influenced by the political considerations if the Minister is himself the Attorney General, or if the latter is subordinate to him. In Sudan, the Attorney General is the Minister of justice and the chief prosecuting authority and the chief advisor to the government.⁷⁸⁵

Another very serious criticism against the present prosecution system is the complex hierarchy of procedures in criminal litigation. A person aggrieved of a decision to refuse a criminal complaint (that is refused framing of a charge), whose case is refused by the Prosecutor, can appeal to the direct Higher Prosecutor, then to the Chief Prosecutor of the State level, then to the Public Prosecutor at of the Ministry of Justice and, finally, to the Minister.⁷⁸⁶ Such a protracted process may take months, or more, thus seriously jeopardizing fundamental rights and freedoms.⁷⁸⁷ Further, the system of “specialized” prosecutions: that is to say, there are now a number of specialized prosecutors for: The State Security, the Press, Banks, Tax Department, Building’s Rates Department, Public Funds, telecommunication, etc. This raises the question of the prosecutor’s impartiality towards the public, vis-à-vis the organization to which the prosecutor is assigned to.

⁷⁸⁵ Amin M. Medani, Criminal Law and Justice in Sudan, Occasional Paper, February, 2010. Available on http://www.pclrs.org/Amin_Mekki_Medani_Paper.pdf

⁷⁸⁶ Regulations of the Work of Public Prosecutions, 1998.

⁷⁸⁷ Ibid

4. Protection of the Rights of Religious Minorities in Practice⁷⁸⁸

A variety of mechanisms and measures are envisaged under the INC for the protection of the rights of religious minorities. Furthermore, the INC provides for the establishment of a system of judicial circulars and specialized courts and specialized public attorneys to observe that non-Muslims are not subject to the penalties prescribed under *Sharī'ah* law.⁷⁸⁹

Despite the INC's great advances in human rights protection with provisions that outline in detail the rights of religious minorities and the duties of the state to uphold these rights, the value of these constitutional guarantees is greatly diminished by weak enforcement mechanisms and the slow implementation of constitutional provisions that guarantee these rights.⁷⁹⁰ In practice, the law reform process is lagging in its effort to bring the Sudanese law into line with the provisions of the INC, as some legislation is still based on *Sharī'ah* law, including the Criminal Act of 1991 and the Public Order Act of 1996.⁷⁹¹ The rule of law institutions face a challenging task to harmonize national laws with international and regional obligations, which require clear policies and administrative support. Limited awareness of rights, access to resources and other institutional capacities remain a challenge.

The practice negates the constitutional guarantees of religious freedom, including the dissemination of religious ideas, freedom of speech and association, teaching, practice and observance, freedom of worship and the maintenance of places of worship, as provided for in the INC. In practice, public schools are required to provide religious instruction to non-Muslims, but some public schools excuse non-Muslims from Islamic education classes, and, at the same time, do not provide teachers for non-Muslims.⁷⁹² Such a practice contravenes the right to equality and freedom of religion and means that the state does not treat religions on an equal footing, as provided for in the Constitution. These restrictions have been extended to the right to association and the right to freedom of expression of the Christian community in Sudan. For example, the organization of Christian religious festivals requires permission from the

⁷⁸⁸ This section will be published by the author in *The Rights of Religious Minorities in New Sudan*, in *Constitutional Change After the Arab Spring*, Oxford University Press 2014 (forthcoming)

⁷⁸⁹ Art. 158 of the INC.

⁷⁹⁰ In Interview with Dr. Ghāzī Ṣalāḥ Al-Dīn Atabānī, 4 October 2012, Khartoum, Sudan.

⁷⁹¹ Ibid.

⁷⁹² In Interview with Raja Nikola, Ministry of Justice, 29 September 2012, Khartoum, Sudan.

authorities (i.e. the police). Furthermore, in spite of existing legal instruments, the protection of the cultural rights or minorities is not completely satisfactory. This is illustrated by a pending case before the Sudanese Courts. There, a primary school that belongs to the Combani Christian Mission in Sudan and is situated in the locality of Mayo in the outskirts of Khartoum State was incorporated by the authorities to Secondary school after the secession of South Sudan.⁷⁹³

Moreover, the freedom of worship and keeping places of worship, in practice, is restricted. One of the main grievances in Khartoum has to do with permits to build new churches. Building of churches has become difficult in terms of acquiring a permit since 1970. However, some improvements were made and the government allocated plots for the construction of churches in Khartoum in early 1990⁷⁹⁴ through the Sudan Inter-Religious Council (which is composed of an equal number of Muslims and Christians with a view to converging Muslims and Christian communities, solving problems and promoting religious co-existence and tolerance).⁷⁹⁵ Also, during the CPA, due to the efforts of the Sudan Inter-Religious Council and the Guidance and Endowment Ministry,⁷⁹⁶ permits for building new churches were provided.⁷⁹⁷ While the constitutional and legal provisions protect the rights of religious minorities, what is problematic is that the regulations for their implementation usually violate the law and are compounded with erratic implementation. In effect, public opinion has been swayed to think that Christian missionaries are agents of external powers and as a result they are perceived with suspicion and hostility by the authorities.⁷⁹⁸

As to the participation in decision-making institutions, the INC requires that government institutions respect diversity and ensure equality. Despite the clear stipulation of universal equality in all Sudanese constitutions, religious minorities are relatively more visible in the

⁷⁹³ In interview with Rifat Makawī, Lawyer, 3rd October 2012, Khartoum, Sudan.

⁷⁹⁴ In interview with Ghāzī Ṣalāḥ Al-Dīn Atabānī, 4 October 2012, Khartoum, Sudan.

⁷⁹⁵ In interview with Dr. Sawfat Fanūs, University of Khartoum, 4 October 2012, Khartoum, Sudan.

⁷⁹⁶ *Department of Churches* within the Ministry of Guidance and Endowment summarizes difficulties facing non-Muslims to the commission for non-Muslims which contains the following: reform of educational curriculum; permission to construct churches, civil service to allow non-Muslims time for worship on Sundays, freedom of preaching.

⁷⁹⁷ In *Discrimination in the Name of Religious Freedom*, p. 15. Available at <http://dspace.mah.se/dspace/bitstream/handle/2043/12671/discrimination-religious-freedom.pdf;jsessionid=3DD186EDF184699E7088E5B17CDE6135?sequence=2>.

⁷⁹⁸ In interview with Rifat Makawī, Lawyer, 3rd October 2012, Khartoum, Sudan.

private and NGO sectors, but overall their presence is lacking in public sectors. The lack of comprehensive statistics has made it difficult to ascertain this fact. In practice, ever since independence, policies were geared towards the development of the centre thereby neglecting the periphery. For example, the south and the west were excluded from any development projects, education and employment in the civil service.⁷⁹⁹ However, the situation has been somewhat rectified in the INC through the establishment of a special commission for civil service. At the onset of the implementation of the CPA, 60 Southerners were appointed in the Ministry of Foreign Affairs.⁸⁰⁰ This has resulted in criticisms by certain quarters who claim that this policy discriminated other minorities by favouring the southerners in certain positions. Previously, application forms for Sudanese nationality, identity cards and passports did not contain any reference to religion. Now, the new National Registration application mentions religion. This violates the INC provisions on non-discrimination.

Some argue that religious intolerance is related to ethnicity issues (north vis-à-vis south); for example, the Copts have not been subjected to racial or religious discrimination comparable to the Southern Sudanese.⁸⁰¹ By way of illustration, whereas Catholic Churches (associated with South Sudan) appeared to be vulnerable to attacks in Khartoum, Coptic Churches were not. Despite the constitutional protection, in the 1990s religious intolerance manifested itself in attacks against churches and cemeteries of non-Muslims while criticism of other religions in the state-run media was a norm.⁸⁰² This practice, however, has now been reversed (although occasionally churches are attacked) and non-Muslim communities acknowledge the existence of greater religious tolerance, however, the treatment of all religions is not on an equal footing.⁸⁰³ In former times, religious leaders were not radical in their views as opposed to the current situation.⁸⁰⁴ At present, what is considered problematic is the recent resurgence of Islamic fundamentalists who view religion as an ideology. Sudanese governments which ruled the

⁷⁹⁹ In interview with Dr. Ghāzī Ṣalāḥ Al-Dīn Atabānī, 4 October 2012, Khartoum, Sudan.

⁸⁰⁰ Ibid.

⁸⁰¹ In interview with Nabīl Adib, Lawyer, 30 September 2012, Khartoum, Sudan.

⁸⁰² In interview with Dr. Sawfat Fanūs, University of Khartoum, 4 October, 2012, Khartoum, Sudan. See *Miguel Ayuso Guixot*, Human Rights and Islamic Law in the Sudan, in *Building a Multi-Religious Society in the Context of Islamic Fundamentalism: Challenges and Appropriate Christian Responses* at 43 (Ed Brady and Cirino Hiteng Ofuho eds., 2001).

⁸⁰³ In interview with Dr. Sawfar Fanūs, University of Khartoum, 4 October, 2012, Khartoum, Sudan.

⁸⁰⁴ In interview with Dr. Mansour Khālid, 7 October 2012, Khartoum, Sudan.

country on the basis of an Islamic reference advocated for religious tolerance, however, the concept of religious tolerance differs from the constitutional right of equality between religions.⁸⁰⁵ On the other hand, at the community level, there are no attempts to distinguish between Muslims and Christians by the general people.⁸⁰⁶

The constitutional provisions that protect the religious rights of non-Muslims are broad and there is a need for explicit and detailed provisions. While the provisions of the constitution on the right of religion may be read as an expansive guarantee, a lack of detail leaves questions of the extent and manner of enforcement to political will. As such, the provisions of the constitution on religious equality remained essentially dormant as regards the promulgation of new legislation. Observers asserted that in order to enhance the implementation of the constitutional and other statutory provisions that guarantee the rights of minorities, it is important to raise the public awareness.⁸⁰⁷ Some say that policies are needed in a range of areas to promote recognition of minorities' rights, including support for broadcasting in minority languages, school curriculum reform to raise awareness of diversity of religion in Sudan and others.⁸⁰⁸

d. Assessment of Legislative Reform under the INC: Compliance with the INC and the Status of Criminal Law Reform

Chapter II Art. 1.6 of the PSP of the CPA obliges Sudan to comply fully with its international human rights treaty obligations and lists a series of human rights and fundamental freedoms.⁸⁰⁹

The INC provides for a catalogue of rights for citizens, including equality, liberty, public trial, freedom from torture, rights to counsel, freedom of thought and expression and freedom of assembly. In essence, the INC Bill of Rights features the characteristics of international human

⁸⁰⁵ In interview with Dr. Safwat Fanūs, University of Khartoum, 4 October 2012, Khartoum, Sudan.

⁸⁰⁶ In interview with Dr. Mansour Khālid, 7 October 2012, Khartoum, Sudan.

⁸⁰⁷ In interview with Dr. Ghāzī Ṣalāḥ Al-Dīn Atabānī, 4 October 2012, Khartoum, Sudan.

⁸⁰⁸ Ibid.

⁸⁰⁹ Art. 2.4.3 of the Power Sharing Protocol states that “human rights and fundamental freedoms as specified in the Machakos Protocol, and in the Agreement herein, including respect for all religions, beliefs, and customs, shall be guaranteed and enforced in the National Capital, as well as throughout the whole of Sudan, and shall be enshrined in the Interim National Constitution.”

rights treaties, especially the ICCPR, albeit with some variations.⁸¹⁰ All of these rights are subject to specific limits as determined by law. Article 27(4) of the INC prohibits the State from making a law which either takes away totally or abrogates in part a fundamental right. Legislative reforms, especially the criminal law reform process, should ensure compliance with fundamental rights and freedoms and the rule of law. Attention should also be given to the guiding principles of the INC, although these principles are not enforceable before a court of law.

Several laws have been reformed, resulting in amendments to the substantive provisions of the Armed Forces Act and the Police Act. The incorporation of international crimes in the Criminal Code in May 2009 is based on the Model Code of the Arab League.⁸¹¹ It is questionable, however, whether these legislative reform can result in effective application (protection of human rights). Deficient provisions have been retained that are related to the immunity for officials suspected of having committed human rights violations,⁸¹² with the amendments falling short of what is laid down in the INC Bill of Rights.⁸¹³

The laws adopted are deficient. The laws retain provisions incompatible with Sudan international obligations as enshrined in international standards even though the latter form an integral part of the INC by virtue of article 27 (3).⁸¹⁴ The definition of international crimes incorporated by virtue of the Criminal Code Amendment Act 2009 is partially at variance with international standards.⁸¹⁵ The amendment also fails to provide for a framework in which there would be a reasonable prospect for its effective application, as laws governing the Armed Forces Act of 2007, and the National Security Act of 2010 and the Police Act of 2008 still keep

⁸¹⁰ Noha Ibrahim, 'The Sudanese Bill of Rights,' *International Human Rights Journal*, Vol. 12 (September 2008), 4, pp.613-635.

⁸¹¹ Interview with the officials of the Advisory Council of Human Rights (ACHR) and the Legislation Department of the Sudan Ministry of Justice, February, 2009, Khartoum.

⁸¹¹ Interview with the officials of the Advisory Council of Human Rights (ACHR) and the Legislation Department of the Sudan Ministry of Justice, February, 2009, Khartoum.

⁸¹² Interview with Mekki Madani, February 2009, Khartoum.

⁸¹³ REDRESS and KCHRED, Comments on the proposed amendment of the Sudanese Criminal Act, 2008, http://www.redress.org/reports/Penal_Code_Amendment_Position%20Paper%20_2_.pdf.

⁸¹⁴ Article 27 (3) Interim National Constitution of 2005: 'All rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of the Sudan shall be an integral part of this bill'

⁸¹⁵ REDRESS and KCHRED, Comments on the proposed amendment of the Sudanese Criminal Act, Position Paper, September 2008, http://www.redress.org/reports/Penal_Code_Amendment_Position%20Paper%20_2_.pdf

immunity provisions that have facilitated impunity for human rights violations,⁸¹⁶ thereby questioning the compatibility of the above-mentioned Acts with the international human rights standards.⁸¹⁷ In other areas, such as gender based violence, the complete ban on FGM envisaged in the Child Act failed because of opposition by the Islamic Jurisprudence Council.⁸¹⁸ In some instances, such as in case of the recently amended article 127 of the Sudan Criminal Procedure Code, reforms have been made to restrict rights, namely freedom of assembly.

International human right bodies such as the Human Rights Committee and the African Commission on Human and Peoples' Rights, have made a series of recommendations to change laws that are not in line with Sudan's human rights treaty obligation, including, for instance, public order laws,⁸¹⁹ security laws,⁸²⁰ immunity laws,⁸²¹ etc. According to the Report of the Independent Expert on the situation of human rights in the Sudan "in spite of the government's general progress made in the areas of policy, legislative and institutional development ... there are substantive challenges in the following specific areas that adversely affect the tangible enjoyment of human rights such as ... the need for more transparency and public dissemination of human rights strategies of the different relevant institutions indicating the tangible human rights results achieved to encourage public evaluation and local human rights accountability".⁸²²

In September 2013, the Independent Expert on the situation of human rights in the Sudan notes that "a Committee of Experts set up by the government to study the necessary reforms for relevant laws such as the Criminal Procedure Act, the Criminal Law Act, the Evidence Act, the Personal Law Act and the Labour Act is said to have submitted its recommendations to the

⁸¹⁶ See REDRESS and KCHRED, Police Forces Act falls short of the Bill of Rights, Press Statement, 18 June 2008, at http://www.redress.org/news/08-06-13%20P%20R_Police_Act_English%20Press%20Release%20-%2017%20June.pdf

⁸¹⁷ *Abdelsalam Hassan and Medani*, Criminal Law Reform and Transitional Justice, p.53.

⁸¹⁸ REDRESS, *Comments on the ban of female genital mutilation in Sudan's Legislation*, February 2009, at http://www.redress.org/documents/FGM_Bill_Commen_Eng.pdf

⁸¹⁹ Report of the independent expert on the situation of human rights in the Sudan, Mohamed Chande Othman, UN Doc. A/HRC/14/41, 26 May 2010, para.29

⁸²⁰ Report of the Working Group of Universal Periodic Review: Sudan, UN Doc. A/HRC/18/16, 11 July 2011.

⁸²¹ UN Security Council, Report of the Panel of Experts on Sudan, 20 September 2010, UN Doc. S/2011/11, 8 March 2011, para.159.

⁸²² Report of the Independent Expert on the situation of human rights in the Sudan, September 2013, UN Doc. A/HRC/24/31

government for consideration. The government is also said to be working on the amendment of the Press and Publication Act of 2009 to give more protection to journalists and publishers".⁸²³

It is to be noted that, based on recommendations of the Independent Expert in 2012, the Ministry of Justice, with the support of UNDP, has adopted a ten-year national action plan for the protection of human rights in the Sudan, which was formally launched in June 2013. The National Human Rights Action Plan articulate, by and large, the recommendation contained in Sudan Universal Period Review Recommendations Report of 2011,⁸²⁴ including: (i) Human Rights Education, (ii) Civil and Political Rights, (iii) Socio-Economic Rights, (iv) Law Reform, (v) Awareness and Capacity Building on Human Rights and Humanitarian Law, (vi) Relations with International and Regional Mechanisms, (vii) Partnership with Civil Society Organisations and (viii) Strengthening Cooperation and Coordination between Law Enforcement Mechanisms.

Another important area is the making of secondary legislation in form of local directives or regulations. Individual ministries usually have constitutional power to make secondary normative acts to implement primary legislation in their area of competence. However, little guidance is given as to the limits within which that power may be exercised as well as to the principles to be followed in determining which matters should be dealt with by secondary legislation. Misuse by government of these powers goes beyond implementation. This gives rise to serious deficits as concerns mechanisms and administrative arrangements essential to implementation. Some governmental agencies have issued directives that do not fall within their authorities, such as the Police. As such, the Parliament may set more precise limits in bills to secondary law-making powers. The federalism introduced by the INC has led to an increase in the number of the legislatures in Sudan. This, in turn, may result in poor drafting quality because of lack of training. Poor drafting quality leads to poor quality of legislation.

The law reform process itself is flawed. It is marked by a lack of public consultation and inadequate media coverage. The ruling party (NCP) has restricted public participation in the law reform process, as opposition parties were excluded from the process of law reform and were only

⁸²³ Report of the Independent Expert on the situation of human rights in the Sudan, September 2013, UN Doc. A/HRC/24/31

⁸²⁴ Report of the Working Group on the Universal Period Review, Sudan,, UN Doc. A/HRC/18/16, July 2011

invited when the final versions tabled in the national assembly. The NCP has the monopoly in the national assembly. Therefore, the adoption of laws has been possible. On the other hand, lack of cooperation has prevented the passage and revision of numerous laws, including review or passage of those establishing basic freedoms of expression, association and movement and regulating the security services.⁸²⁵

The process and contents of any legislation that has been proposed or adopted largely reflect the allocation of power. It is often the result of negotiations between the two main parties, namely the NCP and the SPLM/SPLA, rather than that of an informed public and parliamentary debate. The composition of the bodies tasked with law reform, such as the NCRC, equally reflects the existing balance of power.⁸²⁶ The effectiveness of law reform mechanisms was affected by factors such as limited resources, capacity and composition of the mechanisms. The absence of a single dedicated body such as a law reform commission has undermined law reform in the absence of a coordinated and concerted effort by the various bodies to identify priorities and concentrate on concrete reform.⁸²⁷ The work of such bodies has suffered from capacity constraints and lack of coordination and has had limited impact to date. As a result, the process of law reform has failed to provide for ‘political inclusiveness and public participation’ as envisaged in the CPA.⁸²⁸

The conclusion of the CPA has had allowed civil society and foreign aid actors an opportunity to develop grassroots legal culture (with a focus on legal empowerment). In this connection, civil society has taken the initiative to enhance public participation, and several campaigns on press freedom and women’s rights have raised awareness and influenced debates. However, the government has enacted a restricted regulatory framework to monitor and control civil society and community-based organisation as a means to defuse tension against the government.⁸²⁹ The combinations of a lack of discernible political will, the weakness of the reform process and shortcomings in drafting have resulted in little progress towards achieving the CPA objectives.

⁸²⁵ Sudan: Preventing Implosion, Crisis Group Africa Briefing N°68, 17 December 2009, p. 5

⁸²⁶ The NCP has 52% of the seats in the National Assembly and the SPLM/SPLA 28% seats pursuant to the CPA.

⁸²⁷ *Abdelsalam Hassan and Medani*, Criminal Law Reform and Transitional Justice, p.52.

⁸²⁸ Article 2.12.4.3. The CPA.

⁸²⁹ *Mark Fathi Massoud*, Law’s Fragile State, Colonial, Authoritarian , and Humanitarian Legacies in Sudan, p, 9-10, Cambridge University Press, 2013

This negatively impacts the enhanced recognition and protection of rights and the strengthening of the rule of law. Recent developments have not changed the fabric of the system in place, which is marked by executive bodies vested with broad powers without any strong safeguards or accountability mechanisms in place.

On the other hand, the UN agencies and other international agencies have been actively engaged in the provision of legal and judicial development assistance to the Sudanese legal sector with a view to promoting and upholding the ideals of rule of law. The support of the international community also included infrastructural support (construction of police posts and court houses across Sudan and improving the living conditions of the prisons).⁸³⁰

The technical support has been provided at the institutional level: that is: provisions of legal advice and training programmes to judges, prosecutors, Bar Association, police officers and prison officers on a wide range of topics (international human rights law and Sudanese mixed with international best practices). On the other hand, capacity development support has been provided at the community level focusing on civil society and community-based organisations, at the grassroots level, to provide legal awareness and legal aid to their own communities.

In particular, UNDP programming in the area of rule of law focused on: 1) strengthening access to justice for all segments of the population at the community level, (particularly for vulnerable groups) and increase the institutional availability of pro-bono or affordable services through support by the Civil Society and other mechanisms; 2) promoting accountable, accessible justice sector institutions through capacity development and advisory support to critical rule of law institutions (mentioned hereunder); and 3) supporting the adoption of public policies to facilitate access to justice for the poor and marginalized.⁸³¹

UNDP rule of law programmes underwent an independent assessment which found that “ [UNDP rule of law support] has had positive influence on recipients attitude and behaviour, with emphasis on gender response (e.g. Survivors report cases voluntary, police attitude to GBV

⁸³⁰ *Mark Fathi Massoud*, *Law's Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan*, Cambridge Press, 2013, p.3

⁸³¹ Evaluation of UNDP Sudan Rule of Law Projects 2009-2012” (on file with the author)

incidences have improved ...”.⁸³² However, UNDP main rule of law programme’s partners (the Sudanese Justice Institutions) will remain dependent on donor support for implementation of such programmes. More importantly, UNDP rule of law programme has failed to develop a sustainability strategy to enable national institutions to afford the institutional changes and maintenance of services that have resulted from the rule of law programme.

In the final analysis, international actors working on the CPA implementation and in the area of law reform have succeeded only partially in highlighting the importance of, and contributing to, a successful reform process. Their impact has been marginal due to various constraints and the difficulties of pursuing an integrated strategy. A stronger pressure at the national, regional and international level may spur the parties to the CPA to take legislative reforms more seriously and may result in a strengthened role of civil society.⁸³³

⁸³² Evaluation of UNDP Sudan Rule of Law Projects 2009-2012” (on file with the author)

⁸³³ Promoting Law Reform in Sudan to enhance human rights protection, strengthening the rule of law and foster democratic process. Available at: <http://www.pclrs.org/downloads/Miscellaneous/REDRESS%20Submission%20CPA%2015%20October%202009.pdf>

Part V: The Role of the Sudanese Constitutional Court in Law Reform in Sudan

As the custodian of the INC, the constitutional court ensures that the exercise of the State powers remains within the limits of the constitution when employs the power of judicial review of legislative and actions of the government. If the constitutional court declares a statute as unconstitutional, this, in turn, entails the non-applicability of the statute, and the legislator is to be directed, by the constitutional court, to take measures to bring the legislation in line with the constitution. Thus, the constitutional court has a role as a “positive legislator” given its power to invalidate statutory provisions as unconstitutional.⁸³⁴ Thus far, the Sudanese constitutional court, under the INC, has received a number of cases that alleged the violation of fundamental rights or involved issues related to the constitutionality of key legislation, such as counter-terrorism laws, immunities for government officials and statutes of limitation for torture.

This Chapter seeks to review the way in which the Sudanese constitutional court has employed and expanded the power of the judicial review and played a role in legal reform by acting as positive legislator by review a number of human rights jurisprudence of the Sudanese constitutional court that may have given directions to the other organs of the State to follow the constitutional mandate. The Chapter will focus primarily on the jurisprudence of the Sudanese constitutional Court. However, a reference will be made to the jurisprudence of the German and South African constitutional courts, and the Supreme Court of India, as examples of constitutional courts that have been thus far successful in expanding the authority of both the Court and the constitution within the legal system as a whole. At the outset, it may be useful to begin with some foundational questions about the main functions and procedures of the constitutional courts.

⁸³⁴ *Robert Alexy*, Balancing, Constitutional Review, and Representation, *International Constitutional Law Journal* (October 2005) 3(4)582-616, p. 578

I. The Role of the Constitutional Court as a Positive Legislator

The constitutional court has the power to guarantee the supremacy of the constitution, to enforce the fundamental rights and freedoms, and to solve conflicts between the different government bodies.⁸³⁵ The role of the constitutional court, as a distinct branch of government which stays outside the ordinary judiciary, is to review the constitutionality of statutes and to annul them, with *erga omnes* effects, if they violated the constitution. In the diffused system of judicial review, the courts are not empowered to annul the statutes with *erga omnes* effects but to only declare their unconstitutionality with effect limited in principle to the case decided, although the decision has generally authority for the lower courts.⁸³⁶

The constitutional court, in principle, exercises three basic types of judicial review: abstract review, concrete review.⁸³⁷ In addition, a constitutional challenge could be invoked before the constitutional court by a private individual (*individual complaint*) alleges the violation of a constitutional right by a public act or government official and seeks redress from the court through direct petition.⁸³⁸ When exercises judicial review in an abstract manner, the constitutional court interprets a piece of legislation that has been adopted by the parliament without controversies, and this type of judicial review procedure is initiated by specifically designated government officials.⁸³⁹

The constitutional court also reviews laws through which the constitutional issues are dealt with during the actual litigation between the parties (*concrete review*).⁸⁴⁰ Under this type of procedure, the ordinary courts are to refer constitutional questions to the constitutional court, if: (1) the constitutional question is material to the litigation; and (2) if the judge deems a statute relevant to the case unconstitutional and to refer the statute to the constitutional court to

⁸³⁵ Andrew Harding *et al*, Constitutional Courts: Forms, Functions and Practice in Comparative Perspective: in Constitutional Courts – A Comparative Study, edited by Andrew Harding *et al*, Widly, Simmonds & Hill Publishing, 2009, London, p. 6-7.

⁸³⁶ Gustavo Fernandes de Andrade, Comparative Constitutional Law: Judicial Review, Journal of Constitutional Law, Vol. 3, May 2001, p. 979

⁸³⁷ Alec Stone Sweet, Constitutional Courts and Parliamentary Democracy, West European Politics, p. 86. West European Politics 25 (2002): 77-100.

⁸³⁸ Victor Ferreres Comella, Constitutional Courts and Democratic Values, Yale University Press, New Haven and London, 2009, p.7-8.

⁸³⁹ Ibid, p.7-8.

⁸⁴⁰ Jorn Ipsen, Constitutional Review of Laws, in: Main Principles of the German Basic Law, Christian Starck (ed.) Nomos Verlagsgesellschaft, Baden-Baden, 1983, Germany, p. 122

determine its constitutionality.⁸⁴¹ In general, the constitutional court does not exercise its judicial control over the constitutionality of the legislation without a request of a particular party based on a particular interest. As to the *admissibility* of a constitutional petition before the constitutional court, constitutional complaints must be lodged within a certain time, identify the offending action and the body responsible for violating the constitutional right, and specify the constitutional right that has been violated. However, the requirement for lodging such a constitutional complaint is after exhausting all other available means to find relief in the ordinary courts.

As concerns the *appointment* process, the majority of the constitutional courts conforms to one of the following models for selecting the judges of the Constitutional Court: (a) divides the selection of the judges between the executive and the legislative organs; (b) the legislature may be solely responsible for making the final appointment of the judges; (c) another method of appointment is the division of the selection process between (senior judges, the President and the parliament); (d) establishment of a commission to participate in the selection process before the candidates are finally endorsed, such as, the South African Judicial Service Commission.⁸⁴² The Sudanese Interim National Constitution has chosen the system that requires a legislature to approve the appointment of the judges chosen by the executive.⁸⁴³ The tenure of the constitutional court judges varies, too. Some constitutional court judges serve either nine or 12 year, non-renewable, terms.

The direct effect of the constitutional court's decisions is the exclusion from the legal order pieces of legislation that are unconstitutional, and directs the legislator as how unconstitutional statute can become constitutional.⁸⁴⁴ As a consequence, the legislator decides to reform the legislation or to enact a new piece of legislation to comply with the constitution court ruling. The constitutional court's decisions, in many countries, resulted in important revisions of penal

⁸⁴¹ *Jorn Ipsen*, Constitutional Review of Laws, in: *Main Principles of the German Basic Law*, Christian Starck (ed.) Nomos Verlagsgesellschaft, Baden-Baden, 1983, Germany, p. 122

⁸⁴² See generally Max Planck Manual on the Procedures before the Sudan Constitutional Court, 2006, available at: http://www.mpil.de/shared/data/pdf/manual_procedures_before_the_constitutional_court_of_the_republic_of_sudan.pdf

⁸⁴³ Art. 58(2)(c) and 212(1) of the INC 2005.

⁸⁴⁴ *Martin Shapiro and Alec Stone*, the New Constitutional Politics of Europe, 26 *Comparative Political Studies*, 397, 404 (1994).

codes, for instance, the German Constitutional Court, in the abortion case, declared void a statute that had legalised abortion, and additionally, directed the parliament to pass a statute to make abortion a crime.⁸⁴⁵ Thus, the constitutional courts can act as an accountability mechanism by ensuring that no groups, and particularly minorities and vulnerable groups directly discriminated or marginalized from decision making process.⁸⁴⁶ The ways in which the constitutional courts exercise this accountability function is crucial, especially in societies in transition in which political institutions tend to be weak and that checks and balances of the powers of governmental organs are less respected.⁸⁴⁷ However, the extent to which constitutional courts influence the legislative processes and shape outcomes varies.

The ability of the constitutional courts to interpret and develop their respective constitutions, and thus to utilize judicial review, depends on certain factors, such as: (1) the extent of the Court's jurisdiction; (2) the judicial review over certain types of political questions; (3) the nature of the constitution which the Court is called upon to interpret influences the role of the Court.⁸⁴⁸ For example, the question of whether or not the constitutional court is empowered to exercise abstract judicial review. And, where abstract review does not exist, the constitutional court's impact on law reform is limited.⁸⁴⁹

II. Reference to the Jurisprudence of Other Constitutional Courts

a. The German Constitutional Court (*Bundesverfassungsgericht*)

Art. 92 of the German basic Law establishes the Federal Constitutional Court and enumerates its jurisdiction, and the Federal Constitutional Court Act provides for the court's organization, powers, and procedures. The judges are elected half by the parliament (*Bundestag*) and half by the Federal Council (*Bundesrat*).⁸⁵⁰ The Constitutional Court's jurisdiction⁸⁵¹

⁸⁴⁵ GERMAN CONSTITUTIONAL COURT ABORTION DECISION, 970. BVerfGE 39, 1

⁸⁴⁶ *Sirri Gloppen et al*, Courts and Power in Latin America and Africa, pp. 20-12

⁸⁴⁷ *Ibid*, pp. 20-12

⁸⁴⁸ *Danielle E. Finck*, Judicial Review: the United States Supreme Court Versus the German Constitutional Court, Boston College International and Comparative Law Review, Vol. 5, Nr. 1, 1997, p. 123.

⁸⁴⁹ *Alec Stone Sweet*, Constitutional Courts and Parliamentary Democracy, West European Politics, 25 (2002): 77-100, p.93.

⁸⁵⁰ The German Constitutional Court consists of sixteen judges make up the Federal Constitutional Court. They are selected to serve twelve-year, non-renewable terms and can only be removed from office for abuse of their position and then only by a motion of the court itself. The *Bundestag* (national assembly) and the *Bundesrat* (chamber of states) each choose half of the court's members. Judges are formally appointed by the states' Ministries of Justice, but the decision is taken by judicial service commissions.

includes *abstract judicial review*,⁸⁵² *concrete judicial review*, and *individual complaints*.⁸⁵³ Art. 93(1) of the German Basic Law provides that any person may enter a complaint of unconstitutionality if one of his or her fundamental constitutional right under the constitution has been violated by “public authority,” including judicial decisions, administrative decrees and legislative acts. Before filing a constitutional complaint, all other available means to find relief in the ordinary courts must be exhausted. Constitutional complaints must be lodged within a certain time, specifying the constitutional right that has been violated. The procedure for filing complaints in the Constitutional Court is relatively easy and inexpensive.⁸⁵⁴

The German Constitutional Court has accumulated a considerable authority and public approval and trust.⁸⁵⁵ The court has invalidated laws and administrative regulations under the German Basic Law. In addition, the court has banned political parties as unconstitutional,⁸⁵⁶ policed federal-state relations, monitored the democratic process,⁸⁵⁷ overseen the dissolution of the parliament,⁸⁵⁸ and defined and enforced a regime of basic liberties. The most significant areas of judicial review involve abstract and concrete judicial review that make up the bulk of the work of the constitutional court. For example, in the *Princess Soraya* case (1973),⁸⁵⁹ the court affirmed a monetary damage award for an invasion of privacy, despite the fact that the German law contained no provision in this respect. The court ordered compensation, in the light of changing social conditions and fundamental values of the Basic Law. In the field of upholding the fundamental rights and freedoms of individuals (the right to life), for instance, in the *Abortion case* (1975), the constitutional court held that a certain section of the criminal code is

⁸⁵¹ Forfeiture of basic rights (Art.1), constitutionality of political parties (Art. 21), review of election results (Art. 41), impeachment of the federal president (Art. 61), disputes between high state organs (Art. 93), federal-state conflicts (Art. 93 and 84), (Art. 100) removal of judges (Art. 98) intrastate constitutional disputes (Art. 99), public international law actions (Art. 100), state constitutional court references (Art. 100), applicability of federal law (Art. 126)

⁸⁵² Art. 93 of the German Basic Law.

⁸⁵³ Art. 93 of the German Basic Law.

⁸⁵⁴ See general, Max Planck Manual for Procedures before Constitutional Court, 2006.:

⁸⁵⁵ *Donald P Kommers et al*, *Das Bundesverfassungsgericht: Procedure, Practice and Policy of the German Federal Constitutional Court*, Constitutional Courts: Forms, Functions and Practice in Comparative Perspective: in *Constitutional Courts – A Comparative Study*, edited by Andrew Harding et al, Widly, Simmonds & Hill Publishing, 2009, London, p. 119.

⁸⁵⁶ *Socialist Reich Party Case*, BVerfGE2,1; *Communist Party of Germany Case*, BVerfGE5,85.

⁸⁵⁷ *National Unity Election Case*, BVerfGE 82,322.

⁸⁵⁸ *Parliamentary II Case*, BVerfGE 62, 1; *Parliamentary II Case*, BVerfGE 114,121.

⁸⁵⁹ *Princess Soraya Case* (1973) 34 BVerfGE 269

void insofar as it exempts termination of pregnancy from punishment in cases where no reasons exist.⁸⁶⁰

The Court's decisions generally bind all constitutional organs, courts, and authorities of Germany, but the decisions of the court, however, are not binding on the court itself. The court has explicitly declared that it is permitted to dismiss legal opinions stated in earlier decisions, regardless of its importance to the earlier decision.⁸⁶¹ When the constitutional court declares unconstitutionality of a statute, it fixes a definite deadline for the legislature to take necessary action to correct the statute at issue. Art. 35 of the German Constitutional Court Act sets the deadline for the legislator to revise the unconstitutional statute to be in line with the Basic Law.⁸⁶² For instance, in its *Lüth* decision, the court ordered the civil courts to give effect to rights and to the constitutional court's jurisprudence in their application of the German Civil Code.⁸⁶³ The court provided guidelines for legislation and has frequently outlined specific provisions to the legislator in order to specify comprehensive constitutional norms.⁸⁶⁴ For instance, in the abortion case, the constitutional court considered the legislator responsible for determining an absolute threat of punishment in the case of abortion to protect the system and values of Basic Law.⁸⁶⁵

b. The South African Constitutional Court

The South African Constitutional Court is a product of the country's democratic transition from apartheid in 1990.⁸⁶⁶ The court is the highest court with regard to all matters of a constitutional nature. The court is empowered to exercise both concrete and abstract judicial review and to

⁸⁶⁰ German Constitutional Court, Abortion decision, 39 BVerfGE 1 (1975), as quoted in Supranational and Constitutional Court in Europe; Functions and Sources. Papers presented at the 30th Anniversary of the International Association of Law Libraries, August 1989, compiled and edited by Igor I. Leavass, Williams Hein Co, INC, Buffalo, New York, 1992.

⁸⁶¹ *Danielle E. Finck*, Judicial Review: the United States Supreme Court Versus the German Constitutional Court, *Boston College International and Comparative Law Review*, Vol. 5, Nr. 1, 1997, p. 123.

⁸⁶² See generally *Ines Hartel*, Constitutional Courts as Positive Legislators, Germany, in *Allan R. Brewer-Carias*, Constitutional Courts as Positive Legislators, A Comparative Law Study, Cambridge University Press, 2011

⁸⁶³ See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 15, 1958, 7 Entscheidungen des Bundesverfassungsgericht [BverfGE] 198 (1958) (F.R.G.); *Mattias Kumm*, Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law, 7 German L.J. 341, 346–51 (2006).

⁸⁶⁴ See generally *Ines Hartel*, Constitutional Courts as Positive Legislators, Germany, in *Allan R. Brewer-Carias*, Constitutional Courts as Positive Legislators, A Comparative Law Study, Cambridge University Press, 2011

⁸⁶⁵ *Ines Hartel*, Constitutional Courts as Positive Legislators, Germany, in *Allan R. Brewer-Carias*, Constitutional Courts as Positive Legislators, A Comparative Law Study, Cambridge University Press, 2011.

⁸⁶⁶ *Heilzklug*, South Africa's Constitutional Court: Enabling Democracy and Promoting Law in the Transition from Apartheid in: Constitutional Courts – A Comparative Study, edited by Andrew Harding et al, Widly, Simmonds & Hill Publishing, 2009, London, p 263.

take direct individual complaints. It has an exclusive jurisdiction to determine: (a) disputes between the organs of the State in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of State; (b) constitutionality of any parliamentary or provincial bill; (c) decide that parliament or the president has failed to comply with a constitutional duty; or (d) certify a provincial constitution.⁸⁶⁷

The judges of the court are appointed by the President, from a list prepared by the National Judicial Service Commission, after consultation with the chief justice and the leaders of the parties represented in the National Assembly of South Africa.⁸⁶⁸ The tenure of the judge is a single 12 year term of office⁸⁶⁹ or until the age of seventy. Constitutional cases come before the court by appeal directly to the constitutional court from any other court, by a way of a reference (the constitution laid down precise rules as to how and when such referral are to occur), or, a direct access on the part of the litigant where it is in the interest of justice to do so in respect of any matter over which it has jurisdiction.

The South African Constitutional Court played an important role in the adoption of the 1996 Constitution. Under the Interim Constitution of South Africa, the Parliament, sitting as the Constitutional Assembly, was required to produce a new constitution. In turn, the court was required to certify that the new constitution complied with the 34 constitutional principles agreed upon in advance by the negotiators of the Interim Constitution. The court identified the features of the new text that did not in its view comply with the Constitutional Principles and gave its reasons for that view. In its judgment in the Certification⁸⁷⁰ of the Amended Text of the Constitution of the Republic of South Africa, 1996, the court held that all of the grounds for non-certification of the earlier text had been eliminated in the new draft and accordingly certified that the text complied with the requirements of the 34 Constitutional Principles.⁸⁷¹

⁸⁶⁷ Art. 167(4) of South Africa Constitution of 1996.

⁸⁶⁸ Art. 174(4) of South Africa Constitution of 1996.

⁸⁶⁹ Art. 176 of the South Africa constitution provides (a) constitutional court judge is appointed for a non-renewable term of 12 years, but must retire at the age of 70.

⁸⁷⁰ Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (6CC) (September 1996)

⁸⁷¹ Case CCT 23/96 CERTIFICATION OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996.

The South African Constitutional Court has expanded the power of judicial review and played a role in legal reform. For example, in *S v Boesak*,⁸⁷² the court interpreted Art. 167(4)(a) and Art. 172(1)(a) of the South African constitution to confer upon itself the authority not only to determine whether any acts or law in line with the constitution but also to examine the statute, power and functions of a state institution from a constitutional perspective. In that case, the court struck down legislation in violation of equality clause.⁸⁷³ On economic and social and cultural rights, the court, in *Treatment Action Campaign*,⁸⁷⁴ declared that restriction of the government's mother-to-child prevention program to research and training sites was unconstitutional and in violation of the applicant's right to have access to health care services. In this respect, the court imposed a wide-ranging order, with immediate effect, mandating the provision of treatment in all hospitals.⁸⁷⁵

On civil and political rights, in *Doctors for Life*,⁸⁷⁶ the case gave rise to the nature and the scope of the constitutional obligation of a State's legislative organ to facilitate public participation in the legislative processes and the consequences of the failure to comply with that obligation. The importance of that case lies with the court's approach to the role of legislature in promoting human rights and democracy through public participation processes.⁸⁷⁷ The court required the legislature to facilitate public participation in the legislative process with a view to promoting human rights and democracy.

On the other hand, the court has been criticized as being timid as not being able to decide cases that may lead to political confrontation. For example, in *New National Party of South Africa v.*

⁸⁷² *S v Boesak* (CCT25/00) [2000] ZACC 25; 2001 (1) BCLR 36; 2001 (1) SA 912 (1 December 2000)

⁸⁷³ See *Albertyn, C*, Substantive Equality and Transformation in South Africa, 23 *South African Journal on Human Rights* (2007), pp. 253-276 .

⁸⁷⁴ *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033 (5 July 2002)

⁸⁷⁵ *Theunis Roux*, Principle and Pragmatism on the Constitutional Court of South Africa, *International Constitutional Law Review*, Vol. 7. No. 1, 2009, pp. 106-138

⁸⁷⁶ *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006)

⁸⁷⁷ *Karen Syma Czapanskiy and Rashida Manjoo*, The Right of Public Participation in The Law-Making Process and the Role of Legislature in the Promotion of this Right, *Duke Journal of Comparative and International Law*, Vol. 19, 2008-2009, p.3.

Government of the Republic of South Africa,⁸⁷⁸ the case was concerned with an application by a minority party for an order to declare certain sections of the Electoral Act unconstitutional because the Act in question provided that citizens who want to register as voters had to be in possession of a particular kind of identity document. The applicant challenged the Act on the basis that the Act prevented a significant number of citizens from voting. The court asserted that the separation of powers doctrine placed an absolute bar on the power of the courts to review statutory provisions on the grounds of reasonableness. In the final analysis, the Court also took up numerous criminal cases involving the procedural and substantive rules that the court found in violation of the human rights. The South Africa Constitutional court has decided a number of important cases addressing a range of difficult issues affecting the majority of ordinary South Africans.

c. The Supreme Court of India

In India, there is no separate constitutional court to deal exclusively with constitutional issues. Under the Indian constitution, the power to interpret the constitution and entertain judicial review is entrusted to the Supreme Court.⁸⁷⁹ The judges of the Supreme Court of India are appointed by the President of India. The Supreme Court of India consists of the Chief Justice and 25 other judges. The judges of India Supreme Court hold office until the age of retirement (65 years). The judges are removable by a two-thirds vote of the parliament.

The jurisdiction of the Supreme Court of India is wide and varied. In addition to appellate jurisdiction from the high courts, and advisory jurisdiction at the request of the president, the Supreme Court of India is vested with original jurisdiction⁸⁸⁰ to issue writs in defense of the

⁸⁷⁸ *New National Party v Government of the Republic of South Africa and Others* (CCT9/99) [1999] ZACC 5; 1999 (3) SA 191; 1999 (5) BCLR 489 (13 April 1999)

⁸⁷⁹ It should be pointed out that the power of judicial review is not granted to the Supreme Court, explicitly by the Constitution. However, the court has derived this power from article 13(2) through gradual enlargement under theory of implied powers. Article 13(2) provides that the state shall not make any law which takes away or abridges the rights conferred by this part (Fundamental Rights) and any law made in contravention of this clause shall, to the extent of contravention, shall be null and void. Thus, the Article 13(2) provides the power of judicial review with respect to the provisions related to the Fundamental Rights. However, the courts have enlarged the mandate of this article to cover the entire provisions of the Constitution under the power of judicial review by applying the theory of implied powers. This theory indicates that certain powers, are not explicit but implied in other powers.

⁸⁸⁰ Art. 32 of the Constitution of India.

fundamental rights⁸⁸¹ as provided for in the India constitution. The Court is also empowered to invalidate any law that contravenes the fundamental freedoms and rights.⁸⁸²

The Supreme Court of India has enhanced the judicial independence in the areas of judicial appointment and transfers; preserved judicial review through the declaration of several constitutional amendments unconstitutional; protected fundamental rights of speech, equality, religious freedom, and personal liberty. For instance, in *S. P. Gupta v. Union of India*,⁸⁸³ the Supreme Court forged a unique appointment procedure that minimizes the political influence, in the appointment of judges, while assuring broad participatory consultations regarding proposed appointments to both the Supreme Court and the high courts of the states in India. In that the Supreme Court prescribed an elaborate process of participatory consultation among the Chief Justice, the executive, the senior justices of the Supreme Court, and the justices of the affected high court (that is the court for which the new judges will be appointed).

More importantly, the Supreme Court of India embarked on a remarkable and sustained effort to enforce the rights of the weak, which has come to be known as the public litigation interest movement that used to protect the fundamental rights and freedoms of the poor, marginalised and vulnerable segments of the society. In that the India Supreme Court has liberalized the *locus standi* requirements for filing writ petitions for violations of fundamental rights.⁸⁸⁴ In effect, litigation abandons the requirement of standing which required that litigation be carried on by an aggrieved person and permitted access to the courts by others on the behalf of the aggrieved persons. Public Interest Litigation has had a direct relation with the court acting as a positive legislator.⁸⁸⁵

During the early years of the Indian Constitution, the Supreme Court took a relatively passive role in interpreting the constitution, despite the explicit list of fundamental rights and the

⁸⁸¹ The judicially enforceable (fundamental rights) provisions of the Indian Constitution are set forth in part III of the Indian Constitution.

⁸⁸² Art. 13 of the Indian Constitution

⁸⁸³ *S.P. Gupta vs President of India And Ors.* on 30 December, 1981: AIR 1982 SC 149, 1981 Supp (1) SCC 87, 1982 2 SCR 365

⁸⁸⁴ *Surya Deva*, Constitutional Courts as Positive Legislators: The Indian Experience, in *Allan R. Brewer-Carias*, Constitutional Courts as Positive Legislators, A Comparative Law Study, Cambridge University Press, 2011.

⁸⁸⁵ *Ibid*

extensive powers granted to the court as a protector of those rights.⁸⁸⁶ However, it became much more active in criminal procedure and restraining the power of the state. Judicial review of administrative action in India has also developed rapidly in the recent years. The court also created, in effect, a right to legal aid.⁸⁸⁷

For example, the Indian Constitution does not provide for the right to freedom of press. It was decided by the Supreme Court that freedom of press as a right is implied in the right to freedom of expression. Thus, the Court expanded the right to freedom of express. The Supreme Court has used its power of judicial review and given various historic decisions to safeguard the rights of the individuals. The court in *Kesvananda Bharti v. State of Kerala*,⁸⁸⁸ held that the parliament cannot amend the basic features or basic structure of the constitution. Also, the court held that the power of the President of India to appoint judges of the Supreme Court is not unfettered and that appointment of judges should be based on consultation.

While the Supreme Court of India succeeded to protect human rights through public litigation movement, nonetheless, the court has failed to protect the basic rights during the emergency periods, especially preventative detention. For example, the court in *Shiv Kant Shukla*, denied any form of judicial review to administrative detentions during the emergency. After emergency rule ended, the court became bolder and rejected the amendment that had purported to prevent review of constitutional amendments. In the final analysis, the court has played a major role in protecting and sustaining democratic governance and the rule of law in India and its jurisprudence is rich and varied. The public litigation movement stands as one of the most remarkable mobilization of judicial resources on behalf of the poor.

Other national courts have contributed, through their jurisprudence, to the promotion and protection of human rights, as demonstrated in countries such as Colombia and the UK where

⁸⁸⁶ See generally *George Gadbois*, The Institutionalization of the Supreme Court of India, in *Comparative Judicial Systems: Challenging Frontiers in Conceptual and Empirical Analysis* 111-42, John Schmidhauser, ed., 1987.

⁸⁸⁷ *Tom Ginsburg*, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, Cambridge University Press, 2003, p. 97.

⁸⁸⁸ THE SUPREME COURT OF INDIA IN 1973 IN KESAVANANDA BHARATI VS. STATE OF KERALA : AIR 1973 SC 1461

the courts were involved in the law reform process through striking down legislation or declaring the legislation incompatible with the constitution.⁸⁸⁹ The courts may also interpret constitutional and legal provisions so as to give guidance to the legislature to enact laws that protect and promote human rights.⁸⁹⁰ The courts also play a crucial accountability role to limit the acts of the government and, additionally, provide guidance to ensure that legal systems in practice are in line with the constitutional standards.⁸⁹¹

III. The Sudanese Constitutional Court

1. A brief History of the Sudanese Constitutional Court Pre-INC

Since the independence of Sudan, the Supreme Court sat as a constitutional court to consider constitutional matters. Since the independence up until 1998, the Supreme Court was the highest court of the land. However, its judicial review powers were often limited and the exercise of its jurisprudence largely deferential to the executive, also due to its lack of independence.⁸⁹² The promulgation of the 1998 Sudan constitution created for the first time a constitutional court⁸⁹³ and vested it with a power to decide on constitutional matters. This is effectively eliminated the constitutional circus of the Supreme Court.

The procedures before the constitutional court were further elaborated under the Administrative Act of 1998. That Act empowered all courts to exercise constitutional review in the course of an ordinary adjudication and to make a judicial reference to the constitutional court to decide on the constitutionality of laws. That is, ordinary judges were allowed to stay the proceedings of a given case in order to make an application to the constitutional court for decision on constitutional matters.

⁸⁸⁹ See generally *J. Goldsworthy (ed.), Interpreting Constitutions: A Comparative Study*, Oxford University Press, 2006.

⁸⁹⁰ Arrested Development: Sudan's Constitutional Court, access to justice and the effective protection of human rights, March 2012. Available at : <http://www.redress.org/publications>. The research for this report was conducted by the author.

⁸⁹¹ See generally T. Bingham, *The Rule of Law*, London, Allen Lane, 2010.

⁸⁹² Arrested Development: Sudan's Constitutional Court, access to justice and the effective protection of human rights, March 2012. Available at : <http://www.redress.org/publications>. The research for this report was conducted by the author

⁸⁹³ Art. 105 of Sudan Constitution of 1998.

The constitutional court (operating under the 1998 Constitution) interpreted the existing legislation in a way, which established the constitutional court practically as ‘super appellant court’ usurping for it the right to practically reviewing all decisions and judgments of the Supreme Court regardless of its jurisdiction as stipulated in Art. 105 of the 1998 Sudan Constitution.⁸⁹⁴ It is therefore no coincidence that the Constitutional Court Act of 2005 does not include a similar provision, thereby depriving the Constitutional Court of direct review function vis-à-vis the Supreme Court. Art. 15(2) of the constitutional court Act (CCA), 2005 says: *"Notwithstanding the provisions of sub-section (1), there shall not be subject, to review of the Constitutional Court, the business of the Judiciary, the judgments, decisions, proceedings and orders passed by the courts thereof."* By virtue of this provision, the business of the constitutional court is strictly confined to the expressly stated competences in Art. 15(1) CCA and the cases enumerated in Art. 122 of the INC. As such, the constitutional court will not function as the highest court of appeal, but it scrutinizes the decisions of the courts with respect to alleged violations of the constitutional rights.

2. The Sudanese Constitutional Court under the INC

The INC retained the constitutional court, but because of the transformation in the judicial structure that the INC mandated, the constitutional court now at the apex of a centralized judicial system and separate from the national judiciary.⁸⁹⁵ The constitutional court will not supervise the highest state courts, but only be responsible for alleged violations of the INC, the constitutions of the States, and Interim Constitution of the Southern Sudan. Towards the National Judiciary, the constitutional court exercises its control functions as highest court in constitutional matters, after all available remedies have been exhausted first.⁸⁹⁶

⁸⁹⁴ Art. 105 (2) of the 1998 Sudan Constitution states that: “the Constitutional Court shall be the custodian of the Constitution, and shall have the jurisdiction to consider and adjudicate any matter relating to the following: (a) interpreting constitutional and legal provisions submitted by the President of the Republic, the National Assembly, half the number of Governors or half the States’ Assemblies; (b) claims by the aggrieved for the protection of freedoms, sanctities or rights guaranteed by the Constitution; (c) claims of conflict of competence between federal and State organs; and (d) any other matters referred thereto by virtue of the Constitution or the law.

⁸⁹⁵ Art. 119(2) of the INC.

⁸⁹⁶ Art.122 (1)(b) and (c) of the INC.

3. The Composition of the Sudanese Constitutional Court

In Sudan, the judges of the Constitutional Court are appointed by the President of the Republic with the consent of the First Vice President⁸⁹⁷ upon recommendation of the National Judicial Service Commission and subject to approval by a two thirds majority of all representatives at the Council of States (the second chamber of the legislature). The involvement of the legislature introduces an element of democratic involvement and scrutiny in the selection process of the judges. The nine justices of the constitutional court are appointed to a term of seven years, subject to renewal. The criteria for their appointment are: proven competence, integrity, credibility, and impartiality.⁸⁹⁸ In addition, the INC and the Constitutional Court Act, of 2005, set out requirements for candidates relating to their nationality, age, qualifications, experience, record, etc. The constitutional court sits on quorum of seven judges.

4. The Competencies of the Sudanese Constitutional Court

The competencies of the constitutional court are set out under the INC⁸⁹⁹ and the constitutional court act of 2005. It has an exclusive jurisdiction with regard to constitutional matters, including:⁹⁰⁰ resolution of disputes between the different levels of government with respect to the areas of exclusive, concurrent or residual competences as stated in the INC Schedules;⁹⁰¹ complaints against any act of the Presidency or the National Council of Ministers if the act involves a violation of the decentralized system of government;⁹⁰² protection of human rights and fundamental freedoms.⁹⁰³ It has the mandate to interpret constitutional provisions at the instance of the President of the Republic, the National Government, the GoSS, any State government, the National Assembly, or the Council of States.

⁸⁹⁷ Arts. 112(1), 58(2)(c) of the INC

⁸⁹⁸ Art. 119(1) and 121(2) of the INC.

⁸⁹⁹ Art. 122 (b) have original jurisdiction to decide disputes that arise under [the INC] and the constitutions of Northern states at the instance of government, juridical entities or *individuals*"; (c) decide on appeals against the decisions of Southern Sudan Supreme Court on the Interim Constitution of Southern Sudan and the constitutions of Southern Sudan states, (d) "protect human rights and fundamental freedoms" and (e) "adjudicate on the constitutionality of laws or provisions in accordance with this Constitution, the Interim Constitution of Southern Sudan or the relevant state constitutions"

⁹⁰⁰ Art. 122(1) (b) of the INC, including: alleged violation of the INC such as the bill of rights, the decentralized system of government, the CPA, etc.

⁹⁰¹ Art. 122(1)(f) of the INC.

⁹⁰² Art. 61(a) and 78(a) of the INC.

⁹⁰³ Art. 122(1) of the INC.

It also has the original jurisdiction to decide disputes that arise under the INC and the constitutions of Northern states at the instance of government, juridical entities or individual. Moreover, it adjudicates on the conformity of laws or legal provisions with the INC, the ICSS or the relevant state constitutions, if any law or provision of the State (law or the State constitution) is in conflict with the INC as the supreme law of the land, the constitutional court has to declare that statute unconstitutional. When the constitutional court declares a statute unconstitutional, its decision has general effect; it is binding *erga omnes*. Lastly, it has criminal jurisdiction with respect to the First Vice President, the Vice President⁹⁰⁴, the Speakers of the National Legislature and the Justices of the National Supreme Court and the Southern Sudan Supreme Court.⁹⁰⁵

5. The Procedures before the Sudanese Constitutional Court

The procedures before the Sudanese constitutional court are governed by the INC under Art. 122 and the constitutional court Act, 2005. Further provisions regarding the procedures before the constitutional court can be found in Art. 58(1) (I) of the INC: opinion of the Constitutional Court sought by the President (these procedures are limited to certain applicants)⁹⁰⁶; Art. 60(2) of the INC: impeachment procedure; Art. 61(a) of the INC: contesting acts of the President or the Presidency; Art. 78(a) of the INC: contesting ministerial acts; Art. 185(11) of the INC: disputes regarding financial transfers, and 189(4) of the INC: conflicts between the finding of National and Southern Sudan Land Commissions. Conditions regulating the access to the constitutional court and the procedures before it are regulated fragmentally in the INC.

a. The Procedures of Constitutional Review of the Constitutionality of Laws

The INC has chosen a concentrated system of constitutional review, so the lower courts do not have the competence to decide about the constitutionality of laws on their own. It follows the National Judiciary –apart from the Southern Sudan Supreme Court-have “the competence to

⁹⁰⁴ Art. 60 (2)and (3) of the INC states that “in case of high treason, gross violation of this Constitution or gross misconduct in relation to State affairs”.

⁹⁰⁵ Art. 122(2) of the INC.

⁹⁰⁶ The INC permits a certain exhaustive number of applicants to request an abstract interpretation of the constitution, including: the President of the Republic, the National Government, the Government of Southern Sudan, any state government, the National Assembly or the Council of State. The subject of the procedure is the interpretation of constitutional provisions and not any ordinary laws or court decisions. The procedure of interpretation of constitutional provisions includes the INC, ICSS and all State constitutions.

adjudicate on disputes and render judgments in accordance with the law”⁹⁰⁷, may not declare statutes unconstitutional. Instead, the constitutional review is conducted by a specialized court: the constitutional court.

Art. 122(1)(e) of the INC regulates the constitutional review of laws, and further details are provided for under Arts. 18-20 of the constitutional court Act of 2005. As indicated above, there are two categories of constitutional review of law (abstract or concrete constitutional review). As to the INC, there is no provision in the INC that regulates explicitly the concrete constitutional review. Art. 122(1) (e) of the INC empowers the constitutional court with the task “*to adjudicate on the constitutionality of law*”. This may include concrete and abstract categories of constitutional review. On the other hand, the constitutional court Act 2005, which is to elaborate on the procedures before the constitutional court, is silent as to the procedure of concrete constitutional review before the constitutional court. Abstract constitutional review of laws is regulated in Arts. 18-20 of the constitutional court Act of 2005 where preconditions for the admissibility of the procedure are set out.

It should be note, however, that the concrete constitutional review of laws was regulated under the Constitutional and Administrative Act of 1996. Art. 5(1) as previously indicated under Sections of “The Rules of Judicial Review under the INC). However, the Judicial Administrative of 2005 which repeals the Constitutional and Administrative Act of 1996 does not cover the concrete review of the constitutional matters. This may be a serious limitation on the powers of the constitutional court. The INC omits the referral of constitutional issues to the constitutional court and offers little clarification of that process.

As to the applicant in the procedure of constitutional review of the constitutionality of laws before the constitutional court, Art. 122(1) (e) of the INC does not provide any details as concerns the applicant in this type of procedure. On the other hand, Art. 18(1) (d) of the constitutional court Act provides that the application shall contain the interest that may have been prejudiced if the suit is brought by individuals or groups. Therefore, the examination of the constitutionality of laws can be brought by citizens and by other applicants. In case of the

⁹⁰⁷ Art. 123(3) of the INC.

examination of the constitutionality of laws, the applicant does not need to exhaust all available remedies before addressing the constitutional court, because the applicant does not need to go to ordinary courts first since the exclusive jurisdiction to review the constitutionality of laws lies with the constitutional court. The constitutional court in *Association of Auditors and Accountants v. Government of Sudan and Council of Accountants* held that the precondition of the “exhaustion of remedies” does not apply if the subject matter of the suit is reviewing the constitutionality of a legal act.⁹⁰⁸

b. The Procedures of Interpretation of Constitutional Provisions

Art. 122(1)(a) of the INC gives the constitutional court the competence to “interpret constitutional and legal provisions”. This constitutional procedure is only limited to certain applicants. The INC permits a certain exhaustive number of applicants to request an abstract interpretation of the constitution, including: the President of the Republic, the National Government, the Government of Southern Sudan, any state government, the National Assembly or the Council of States”. The subject of the procedure is the interpretation of constitutional and legal provisions. Further, Art. 58(1)(i) of the INC permits the President of the Republic to “seek the opinion of the constitutional court on any matter in connection with the constitution”. The matter on which the President may seek the court’s opinion has to be constitutional in substance. In 2009, for example, the Constitutional Court heard a petition by the then Minister of Justice Abdelbasit Sabdrat concerning article 133 of the INC and article 58 of the 1991 Criminal Procedure Act, namely the power of the Minister of Justice to stay a suit. The Court found that decisions by the Minister of Justice in this regard were final and not subject to judicial review, the only exception being Islamic punishments, i.e. *hudud* and *quisas*.

c. The Procedures of Individual Complaints

Individuals’ applicants are granted the right to submit to the constitutional court if the constitutional right of individual has been violated. This procedure is established for the protection of human rights, and is aimed to repeal the alleged unconstitutional acts of the government organs that violated constitutional rights of an individual. A constitutional complaint can be lodged by any person asserting a violation by a public authority of basic

⁹⁰⁸ *Association of Auditors and Accountants v. Government of Sudan and Council of Accountants*, Case Number: MD/KD/11/1999 of June 1999.

rights; however, the available remedies must be exhausted prior to any such review by the constitutional court. Articles 18 (1) (d) and (d) of the Constitutional Court Act provides that a complaint need to specify

- ‘the constitutional right, which has been violated, or the freedom, which has been breached;
- the interest, which has been prejudiced, where the suit is presented by individuals, or collectively, or the injury, which has been sustained thereby’.

This provision limits standing to those who claim to have suffered a violation of their rights. It seemingly does not permit an ‘actio popularis’, i.e. a case brought in the public interest where anyone can allege that a certain act or law violates constitutional rights.

d. Access to the Sudanese Constitutional Court

Arts 78(a) and 122(1) (b), (c), (d) and (e) of the INC allow an individual to apply to the constitutional court in the case of an infringement of the individual’s human rights as contained in the Bill of Rights. If an individual is the applicant, the precondition of an “interest” that may have been prejudiced, as provided for in Art. 18 (1)(d) of the constitutional court Act, applies. In addition, the applicant has to exhaust all available remedies before approaching the constitutional court. A time limit is set out in Art. 20 (a) of the Constitutional Court Act of 2005 allows for summary dismissal if more than two months have elapsed after the alleged violation of that right or that interest of the plaintiff.

Moreover, the constitutional court Act of 2005⁹⁰⁹ lies down the procedure through which an individual can lodge a constitutional litigation before the constitutional court.⁹¹⁰ In particular, Art. 19(4) of the constitutional court Act provides that:

“saving the rights and freedoms contained in the Bill of Rights, set out in the [INC], where the decision, or work, which is constitutionality contested is from such, as the law may empower a higher authority to review it, the plaintiff shall produce such, as may prove his exhaustion of the ways of grievances or the expiry of thirty days, of the date of receipt by the higher authority, of the grievance”

⁹⁰⁹ Article 15(1) of the Constitutional Court Act (2005). The text of this Act is available at: http://www.mpil.de/shared/data/pdf/cca2005_official_english_-_neue_version.pdf.

⁹¹⁰ Art. 122(1)(d) of the INC (2005); Cf. Art. 15(1)(d), 16(1)(a) & 18 of the Constitutional Court Act (2005)

According to Art. 19(4) of constitutional court Act, an individual can bring a constitutional claim *directly* before the constitutional court, if the constitutional complaint involves violation of rights and freedoms contained in the Bill of Rights. However, Art. 19(4) of the constitutional court act, at the same time, requires that in case that a complainant is challenging the constitutionality of a decision or conduct the complainant needs to exhaust all available ways of remedies, as stated in the law, before approaching the constitutional court.

Yet, one would think that in case of an infringement of individual rights on the score of an unconstitutional law, a complainant who is contending the constitutionality of such law does not need to exhaust all available remedies, since the constitutional court is the highest authority that adjudicates on the constitutionality of laws.⁹¹¹ It is, therefore, in the case of the examination of the constitutionality of laws there is no higher authority in the sense of Art. 19 (4) that could revise the law. At the same time, the applicant does not need to go to the ordinary courts first since the exclusive jurisdiction to review the constitutionality of laws, i.e. the “monopoly to question and quash laws” lies with the Constitutional Court. Thus, there is no a requirement of exhaustion of remedies in the procedure of the constitutional review of laws, in case that the applicant is an individual seeking a remedy for the violation of his/her constitutional rights.

The orthodox view that had been prevailing was that a person who sought to enforce his fundamental rights through a court must establish that he had been personally aggrieved or affected by the State act complained of. The foregoing rule is known as the rule of *locus standi* or standing of the petitioner before the court, who complains of a violation of his constitutional rights. While this rule still applies in the generality of cases, an exception has been introduced in the case of laws, which affect the public in general, but the persons who are directly affected are not likely to come to court to assert their rights. In such cases, an association or an individual has been allowed to fight for the public cause and challenge the constitutionality of the law or order, though the petitioner may not be able to show that he has been directly injured or affected

⁹¹¹ Art. 122(1)(e) of the INC

by it. S/he may move the court for enforcement of a public right provided that person has a ‘reasonable concern with the matter, to which his application relates.’⁹¹²

In Sudan, as to the admissibility of constitutional complaints, the question here is what criterion is applied by the constitutional court when considering the admissibility of a constitutional complaint by individuals seeking to redress the violation of a right in the Bill of Rights? Arts. 18(1) sub-sections (a) and (d) of the CCA specify those who may competently bring a constitutional case before the Constitutional Court. This includes a person alleging a violation of his/her constitutional rights. In addition, Art. 18(1)(d) of the constitutional court Act provides that a suit can be brought to the constitutional court by individuals, or collectively provided that the constitutional complaint contains the interest which has been prejudged, or the injury which has been sustained.

This is restrictive criterion as it leaves out the possibility of “*action popularis*” (public interest litigation) and the position of persons without capacity to act for themselves is not clear. Thus, in order for a constitutional complaint to be admissible, the complainant has to clearly specify his/her interest in the petition. This requirement is particularly clearly stated, once again, in Art. 20(a) of the constitutional court act which authorizes the constitutional court to summarily dismiss the case, if it transpires that the applicant has no interest in instituting the case.

It is of particular importance in this regard to note that access to the constitutional court is still further limited in Sudan, because of the costs of litigation, which an average Sudanese citizen cannot afford. Thus, access to the constitutional court may be influenced by the financial implications of constitutional litigation and also considering other costs that may be incurred for legal representation, which can only be undertaken by a representative with at least ten years’ experience. The requirement under article 29 of the Constitutional Court Act that a constitutional suit can only be conducted by a lawyer with at least ten years’ experience acts as a further bar. While the rationale of ensuring the quality of submissions is sound, the requirement effectively means that a litigant needs to instruct a senior lawyer.

⁹¹² *Durga Das Basu*, Human Rights in Constitutional Law, Prentice-Hall of India Private Limited, New Delhi, 1994, p. 28-29.

Other constitutional courts and international human rights treaty bodies frequently allow anyone to bring a case, even without legal representation, because the ultimate goal of proceedings is the protection of the rights protected in the constitution or human rights treaty respectively. Article 29 of the Constitutional Court Act is restrictive. In addition, litigants may incur travelling costs, particularly for those who live outside Khartoum where the Court is based. On the other hand, legal aid in Sudan is very limited and only available for serious criminal cases.

The Court has broad decision making powers. It may ‘consider and adjudge and annul any law, or work, in contravention of the Constitution, and restitute the right, and freedom, to the aggrieved person, and compensate him [or her] for the injury’.⁹¹³ Even before its final ruling, the Court may order interim measures to avoid irreparable harm and effectively guarantee rights and freedoms.⁹¹⁴ Final judgments are binding on all levels of government.⁹¹⁵ Where the Court finds that laws or parts thereof are unconstitutional, the provisions concerned must not be applied.⁹¹⁶ However, neither the INC nor the Constitutional Court Act stipulate what laws should apply between the declaration of unconstitutionality and the enactment of new legislation where required to avoid a legislative gap, and this question still needs to be settled in practice.

IV. Review of Selected Human Rights Jurisprudence of the Sudanese Constitutional Court

Scholars have argued that because the decisions of the constitutional courts are final and binding, the constitutional courts have the power “to recast policy-making environments, to encourage certain legislative solutions ... and to have the precise terms of their decisions written directly into legislative provisions”.⁹¹⁷

Thus far, the Sudanese constitutional court has dealt with numerous constitutional cases. Clearly the provision of statistics showing the proportion of cases which have been dealt with provides no

⁹¹³ 16 (1) (a) of the Constitutional Court act 2005

⁹¹⁴ 16(2) of the Constitutional Court Act 2005

⁹¹⁵ 24(1) of the Constitutional Court Act 2005

⁹¹⁶ 24(2) of the Constitutional Court Act 2005 of Sudan

⁹¹⁷ *Lee Epstein*, The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government, *Law and Society Review*, 2001. *Law & Society Review* 45 (April): 362-377, p. 6.

guidance as to the effectiveness of the court, as the efficacy of a decision has to be judged against the case presented. Harding et al indicates that the ultimate criteria of measuring the effectiveness of the constitutional court are to deter constitutional actors from abusing their position or abusing individual rights. If we find that in fact they were so deterred because of the prospect of a robust response from the court, we could conclude that the court has been effective.⁹¹⁸

Thus far, the Sudanese constitutional court has received a number of cases that alleged the violation of fundamental rights or involved issues related to the constitutionality of key legislation, such as counter-terrorism laws, immunities for government officials and statutes of limitation for torture. This section seeks to review the way in which the Sudanese constitutional court has employed and expanded the power of judicial review and played a role in legal reform by acting as positive legislator by review a number of human rights jurisprudence of the Sudanese constitutional court that may have given directions to the other organs of the State to follow the constitutional mandate.

a. The Right to Life

*In Nagmeldin Gasmalla v. Government of Sudan and the relatives of Abdelrahman Ali*⁹¹⁹, the applicant contended the decision of the Supreme Court that upheld the decision of the lower court that sentenced the applicant to death penalty and as such violating the right to life. The applicant contended that the right to a counsel was violated and that the Sudanese Child Act of 2010 which excludes children below 18 years from death penalty, except in *Hudud* and retribution, as provided for in *Sharia* law, was violated. The Constitutional Court upheld the decision of the supreme court and its reasoning being that the right of the applicant to fair trial, including the right to counsel, was not violated because the applicant did not specify clearly how his right to a fair trial was violated and that the applicant did not request the Ministry of Justice to appoint a counsel and that the applicant was not insolvent. In its reasoning, the constitutional court made a reference to the ICCPR and CRC in a detailed manner.

⁹¹⁸ Andrew Harding et al, *Constitutional Courts: Forms, Functions and Practice in Comparative Perspective*: in *Constitutional Courts – A Comparative Study*, edited by Andrew Harding et al, Widly, Simmonds & Hill Publishing, 2009, London, p. 23.

⁹¹⁹ MD/GD/18/2005/ *Nagmeldin Gasmalla v. Government of Sudan and the relatives of Abdelrahman Ali*

On the other hand, a dissenting opinion found that the Sudanese Criminal Act of 1991 violated the CRC and the INC because the CRC has become part of the INC via Art. 27(3) of the INC and concluded that the decision of the Supreme Court was unconstitutional. This opinion further indicated that Art. 27(3) of the INC incorporated all international human rights treaties into the INC. As such, the provisions of Art.27(3) to be considered special law, and, as such, prevails over the general provisions. That means the Sudanese Child Act of 2010 prevails over the Sudanese Criminal Act upon which the Supreme Court based its decision. Judges split as whether the court should be abided by its previous decisions on similar cases in which a decision to sentence a child below 18 was upheld unconstitutional.

The Constitutional Court interpreted the Sudanese Child Act of 2010 which does not impose death penalty on children below 18 years old. The Constitutional Court found that the Child Act conflicted with the Criminal act which also does not impose death penalty on those below 18, unless in case of *huddua* and retribution. The court interpreted the Child Act as a specific act and therefore should prevail over the general law (Criminal Act) and that the Child Act does not violate the INC. As such, the court upheld that the decision of the Supreme Court was unconstitutional. The court had extensively referred to international human rights law as incorporated via Art. 27(3) of the INC and concluded that Art. 27(3) made human rights treaties part and parcel of the domestic law and as specific law should be prevailing over the domestic law. The judgment may play an important role to clarify the relationship of the human rights treaties, incorporated in the INC via Art. 27(3) and the constitutional law. Since the INC does not provide clear guidance on this regard and on how human rights treaties are to be interpreted.

b. Prohibition of Torture

In *Faruk Mohamed Ibrahim v. Government of Sudan and the National Legislature*,⁹²⁰ the applicant was subjected to torture by the National Security apparatus, in 1989, however, the Statute of Limitation as provided for under Art. 39 of the Criminal Procedure Act for 1991 prevented the applicant from suing the National Security apparatus. The plaintiff sought the constitutional court to declare Art. 39 of the Criminal Procedures Act of 1991 unconstitutional because it violated Art. 35 of the INC and the International Convention Against Torture (CAT)

⁹²⁰ MD/GD/18/2007, *Faruk Mohamed Ibrahim v. Government of Sudan and the National Legislature*

and Rome Statute (ICC) because Sudan has signed but not ratified these international treaties, and, as such, the State acts should not conflict with the object and purpose of these treaties. In addition, the applicant sought the court to declare Art. 33(b) of the National Security Act unconstitutional for violating the equality provision (Art. 31) of the INC because it provides the security personnel with immunity from prosecution. The applicant also sought the court to declare Art. 58 of the Criminal Procedure Act unconstitutional as it empowers the Attorney General to suspend criminal proceedings at any stage of the proceedings.

The court rejected the case because the applicant had no interest which is one of the main preconditions for the admissibility of the case. Furthermore, the court concluded that Art. 58 of the National Security Act, which provides immunity for the security personnel, did not violate the INC, because it provides immunity for security personnel while on duty and can be waived by the Director of the National Security. The court argued that the immunity was procedural immunity to the security services and could not be unconstitutional. The court had clearly erred in uphold the constitutionality of the National Security Act because Art. 33(b) of that Act clearly violates the INC and the court should have interpreted it in conformity with the right to equality before the law. The court also failed to define the procedural immunity endowed upon the security personnel while on duty.

Moreover, the constitutional court argued that Art. 27(3) of the INC incorporates only the international human rights that have been ratified by Sudan, and, therefore, Art. 27(3) of the INC does not incorporate the international Convention against Torture into the INC, because Sudan has only signed the convention. Although Sudan is yet to ratify the international convention against torture, nonetheless, the courts are under a general duty to interpret international convention in a way that does not deviate from the purpose and object of the convention.

Unfortunately, the court gave little guidance on how to treat human rights treaties that have been signed by Sudan and yet to be ratified by Sudan. And as such, the court failed to provide a unified position as how the bill of rights is to be interpreted. This judgement is in variance with the judgement on *Nagmeldin Gasmalla v. Government of Sudan and the relatives of*

Abdelrahman Ali. The court also relied on the rules of interpretation of statutory laws as provided for in the Interpretation of Law Act of 1974. The court would have added to the jurisprudence of the court if it were to open up the legal order of Sudan to international law, and therefore that the human rights contained in international treaties should be interpreted according to the international legal rules of interpretation, as contained in Vienna convention on the Law of Treaties.⁹²¹ The court did not attempt to interpret the bill of rights and other constitutional provisions in a generous and purposive way. According to this approach, any ambiguity in the constitutional text must be resolved in favour of the interpretation that best gives effect to the purposes and values underlying the new constitutional order.

c. Right to Liberty, Security and Fair Trial

*In Kamal Mohamed Sabon and Other v Government of Sudan*⁹²², the case was concerned with the constitutionality of Art. 13(2) and 21 of Anti-Terrorism Act and Rules and Measures for implementation of Anti-Terrorism Act (hereinafter Rules and Measures) issued by Sudan Chief Justice because these provisions violate the provisions of the INC, especially: Arts. 123(2) (separation of powers), Art. 128(1) (Independence of Judges), Art. 34 (right to fair trial). The applicant contested unconstitutionality of the Rules and Measures for the implementation of Anti-Terrorism Act, especially the duration of appeal, summary proceedings of the Appeal Court, trial in absentia, right for trial before competent and independent court, right to counsel, right to appeal, special court.

The court concluded that the issuance of the Rules and Measures by the Chief Justice in consultation with the Minister of Justice did not violate the principle of separation of powers because the doctrine of separation of powers is not an absolute doctrine as such. The court also upheld the constitutionality of the Rules and Measures that stipulated for trial in absentia. In this respect the court made a reference to ICCPR which provides for the trial in absentia. The court also did not find that the Rules and Measures that provided for the establishment of Special Court to violate the right to a fair trial. The court, however, stressed that the special court should not contravene the principles of fair trial as provided in the INC.

⁹²¹ Art. 31 of Vienna Convention on the Law of Treaties. *Kamal Mohamed Sabon and Other v Government of Sudan*

⁹²² GD/60/2008/ Kamal Mohamed Sabon and Other v Government of Sudan

The President of the court contradicted the preceding reasoning which stressed the fact that the special court should be in line with the principles of fair trial by concluding that the rules which were applied by the special court (established to deal with terrorism offences) are special and should not be comparable to the rules applied by ordinary court. The court upheld the constitutionality of the Rules and Measures (subsidiary law) that contravened the provisions of the Criminal Procedures Act and Evidence Act. The court reasoning being that the special circumstances necessitated that the Rules and Measures took precedence over the ordinary legislation. The court resembled the circumstances that necessitated the establishment of special court with the emergency situation that necessitates the derogation from certain human rights. The court made a reference to *Nuremberg Trial* which legalized the retroactivity of laws. The court also upheld the constitutionality of the Rules and Measures that allowed for shortening the duration of the appeal.

The court also upheld the constitutionality of the Rules and Measures that did not allow the counsel of the accused ample time to prepare for the defense as well as the conviction of the accused upon confession of serious crimes. The reasoning of another judge being that the Rules and Measures were special rules and therefore prevailed over the provisions of the Criminal Procedures and the Evidence Act, however, this reasoning overlooked the fact that the rules and measures conflicted with the provisions of the Criminal Procedures and the INC by circumventing the right to fair trial as provided for in the Criminal Procedures Act.

One dissenting judge concluded that the Anti-Terrorism Act was unconstitutional. Under the constitutional law, a court is constantly called to assess the merits of legislation according to the standards embodied in fundamental rights and other constitutional norms. The holding of the court did not find much support in the constitutional text. This type of decisions in controversial cases, the court will not be in a position to build the reputation for legally credible decision making. Thus, the court may be seen as to have been careful to manage its relationship with the political branches of the government. This decision contradicts both the language of the constitution and the standard review of statutory law by the courts.

d. The Right Freedom of Expression

In ElSudani newspaper v the Ministry of Justice and the Press and Publications Prosecution Bureau,⁹²³ the Press and Publication Bureau suspended, for indefinite time, the publication of *Elsudani* Newspaper for violating Art. 130 of the Criminal Procedure Act of 1991. This case raised a number of issues: (a) whether constitutional damages can be awarded for the breach of the right to freedom of expression, as guaranteed by Art. 39 of the INC; (b) the constitutionality of the decision of the Press and Publication Bureau; and (c) whether the Press and Publication Bureau is empowered to suspend the publication of the newspapers. During the court proceedings, the Attorney General repealed the decision of the Press and Publication Bureau and the newspaper continued to be published.

Accordingly, the court dismissed the case and its reasoning being that the interest of the application ceased to exist after the Attorney General had repealed the decision of the Press and Publication Bureau. Furthermore, the court rejected the claim for constitutional damages for the violation of the right to freedom of expression and justified its action on the basis that the claim of the applicant was in abstract terms. The court decision on this case may be criticized, for rejecting the claim of the applicant for relief for the violation of the constitutional right, on the grounds that the issues raised by the applicant turn on the proper construction of the INC which entitles any person to apply to a competent court of law for appropriate relief. The INC confers rights on persons to resort to the court for the protection and enforcement of such rights. The INC is prescriptive as to how rights should be protected and enforced.

It is left for the court to decide what would be appropriate relief in any particular case. Moreover, it is clear from the provisions of the Constitutional Court Act of 2005 that the underlying principles governing the admission of any case is that it must have an interest in the proceedings. However, the court interpreted narrowly the provisions of the Constitutional Court Act regarding the interest of the applicant by dismissing the case when the newspaper continued to be published which meant that the applicant's interest ceased to exist. This more likely required a broad rather than narrow interpretation.

⁹²³ MD/GD/46/2007 *ElSudani* newspaper v the Ministry of Justice and the Press and Publications Prosecution Bureau.

e. The Right to Political Participation (Election Rights)

In *Baath Arabic Socialist Party v the National Election Commission*,⁹²⁴ the Baath Party after complying with the prerequisites to contest the elections, in the polling day, the voting symbol of the plaintiff was not displayed in the geographical constituencies and the State. The polling took place despite the fact that the plaintiff lodged an appeal to the Election Commission. Thereafter, the Election Commission had decided to postpone the election in the geographical constituencies and the State where the plaintiff meant to contest the elections.

The applicant challenged the Election Commission for violating Art. 41(1) & (2) of the INC as well as Art. 48 of the INC. The constitutional court dismissed the case for the violation of Art. 41 of the INC and the reasoning being that the interest of the plaintiff did not exist because the Election Commission postponed the polling in geographical constituencies where the applicant meant to contest the election. Furthermore, the court argued that the plaintiff ought to have exhausted all means of remedies by resorting to the Election Court first which had jurisdiction to deal with all electoral disputes and infringements of the Election Act. Although the court ascertained the right of the individual to directly resort to the court, in according with Art. 19(4) of the constitutional court act, before exhausting all available remedies if a constitutional right is violated; nevertheless, the court concluded that the constitutional court act must be read in conformity with the Election Act of 2008 and that the Election Act prevails over the constitutional court act. As such, the plaintiff had not complied with the election act.

Yet, one would think that in case of an infringement of individual rights on the score of an unconstitutional law, a complainant who is contending the constitutionality of such law does not need to exhaust all available remedies, since the constitutional court is the highest authority that adjudicates on the constitutionality of laws.⁹²⁵ It is, therefore, in the case of the examination of the constitutionality of laws there is no higher authority in the sense of Art. 19 (4) that could revise the law. At the same time, the applicant does not need to go to the ordinary courts first since the exclusive jurisdiction to review the constitutionality of laws, i.e. the “monopoly to question and quash laws” lies with the constitutional court. Thus, there is no a requirement of

⁹²⁴ MD/GD/67/2010, *Baath Arabic Party v the National Election Commission*.

⁹²⁵ Art. 122(1)(e) of the INC

exhaustion of remedies in the procedure of the constitutional review of laws, in case that the applicant is an individual seeking a remedy for the violation of his/her constitutional rights.

f. Constitutionality of the Executive Acts

In *Abdelbagi Ali and others v. The Governor of South Kordofan State*,⁹²⁶ two members of the legislative council contended the decision of the Governor of South Kordofan State which violated the INC by revoking their membership in the legislative council. The plaintiffs argued that the INC does not allow the Governor of the State to appoint or dismiss members of the legislative council, as the Governor of the State was the head of the executive branch in the State. The legislative council revoked the decision of the Governor of the State by re-appointing the plaintiffs before the court reached its final decision.

The court upheld that the decision of the Governor was unconstitutional. However, some judges argued that because the interest of the plaintiffs ceased to exist and therefore concluded by dismissing the case due to lack of interest in the case as provided for in Art. 18 of the Constitutional court Act. On the other hand, some judges argued that if the interest of the plaintiff in the case ceases to exist before the court reaches its decision does not entail dismissal of the case. It appears that the court is not settled as to whether the interest in the case is a precondition for the court to proceed and decide in the case even if the interest in the case cease to exist before the court reaches its decision. One judge concluded that the lack of procedural code to organize the function of the court would hamper the efficiency of the court.

g. Judicial Review of the Judicial Decisions

In *Mubark Khatimi Hamid v. the National Legislature and Mubark Khatimi Hamid v. Heirs Mahiledin Amin and Government of Sudan*,⁹²⁷ the applicant sought the constitutional court to declare Art. 15(2) of the constitutional court act unconstitutional because Art. 15(2) bars the constitutional court from reviewing the decisions of the Supreme Court. The applicant contended that this provision violated the Arts 122 & 48 of the INC. The court found that the previous constitutional court interpreted the constitutional court act (1998) broadly and this led the court to review the decisions of the Supreme Court. To avoid this, the legislature repealed

⁹²⁶ MD/GD/10/2007/ Abdelbagi Ali and others v. The Governor of South Kordofan State.

⁹²⁷ MD/GD/11/2006 *Mubark Khatimi Hamid v. the National Legislature and Mubark Khatimi Hamid v. Heirs Mahiledin Amin and Government of Sudan*.

this provision in the constitutional court act (2005) so that the court jurisdiction is to confine only to review the constitutionality of the decisions of the Supreme Court. The previous constitutional court had erred in interpreting Art. 11 of the constitutional court Act 1998 and Art 31 of 1998 constitution.

In this case, the court upheld that the constitutional court was not part of the ordinary judiciary and that the constitutional court was not an appeal court for the revision of the decisions of the Supreme Court. The constitutional court only considers the constitutionality of the decisions of the Supreme Court. This is so because the constitutional court, as provided in Art. 122(1) of the INC is the custodian of the constitution. As such, the court attempted to play a role in law reform by providing further explanation as how the legislature should have drafted Art. 15(2) of the constitutional court act so as to avoid misinterpreting Art. 15(2) of the constitutional court act. (2005). The court dismissed the case and upheld the constitutionality of Art. 15(2) of the constitutional court act (2005). However, the Constitutional Court Act has not been amended to reflect the court decision.

The court also elaborated on the concept of constitutionalism and the role of the judge in interpreting the constitutional provisions and the methods of interpretation of the constitution. In this respect, it seems that the court adopts the purposive method of interpretation. The court also hinted to the importance of the judicial review of the constitutionality of laws. The court also enumerated the principles that should be taken into consideration while considering the constitutional of provisions and that the court should refraining from considering political questions in the course of judicial review of the constitutionality of laws.

V. Assessment of the Role of the Constitutional Court in Law Reform Process in Sudan

The Constitutional Court could have played an important role in the law reform process during the interim period given its power to annul laws that it adjudges to be unconstitutional.⁹²⁸ This entails the non-applicability of such laws⁹²⁹ and, as a result, would compel the government or state concerned to adopt new legislation that is in conformity with the Bill of Rights and the

⁹²⁸ Art. 16 (1) (a) Constitutional Court Act, 2005.

⁹²⁹ Art. 24 (2) Constitutional Court Act, 2005.

INC. The constitutional court received a number of cases that alleged the violation of fundamental rights or involved issues related to the constitutionality of key legislation, such as counter-terrorism laws, immunities for officials and statutes of limitation for torture. In most cases it ruled in favour of the government, such supporting the application of the death penalty by invoking arguments that echoed executive interests instead of examining in-depth the alleged violations of fair trial rights, such as confessions extracted under torture while being held incommunicado.⁹³⁰ In this respect, the Constitutional Court dismissed allegations brought by defendants that confessions had been extracted under torture. As such, the court fails to provide guidance to government actors so that investigating authorities refrain from using torture to extract confessions or obtain evidence. Such cases demonstrate the shortcomings in legal protection provided by Sudanese laws against forced confessions.⁹³¹

The court is unclear as whether to abide by its previous decisions. On one hand, the court provided guidance as to the relationship of human rights treaties, incorporated in the INC via Art. 27(3), and the constitutional law. On the other hand, the court declared that Art. 27(3) of the INC incorporate only the international human rights that have been ratified by Sudan, and, therefore, Art. 27(3) of the INC does not incorporate those human rights treaties that have been signed. This interpretation contracts the provisions of Power Sharing Protocol of the CPA, which constitutes part of the INC, which obliges Sudan to meet its international obligations. Unfortunately, the court gave little guidance on how to treat human rights treaties that have been signed by Sudan and yet to be ratified by Sudan. And as such, the court failed to provide a unified position as how the bill of rights is to be interpreted.

The court's reasoning in a number of judgments has been inconsistency. For example, it appears that the court is not settled as to whether the interest in the case is a precondition for the court to proceed and decide in the case even if the interest in the case cease to exist before the court reaches its decision. One judge concluded that the lack of procedural code to organize the

⁹³⁰ See *Paul John Kaw and others vs (1) Ministry of Justice; (2) Next of kin of Elreashhed Mudawee*. 2009. Case No. MD/QD/51/2008. Constitutional Court. Judgment of 13 October 2009, confirming the death sentence of six men accused of murder committed in the Soba Aradi riots of May 2005. *Isahq al-Sanusi and others vs Successors of deceased Mohamed Taha Mohamed Ahmed*. 2008. Case No MD/QD/121/2008. Constitutional Court Order of 23 March 2009, confirming the death sentence of nine men convicted for the murder of the journalist Mohamed Taha.

⁹³¹ REDRESS: Human Rights Concerns and Barriers to Justice in Sudan: National, Regional and International Perspectives: A Compilation of Sudan Law Reform: Advocacy Briefing, 2014. Available at: (www.pclrs.org)

function of the court would hamper the efficiency of the court. More importantly, the court does not appear to have instructed the legislator to change the law, within a specified time. Although the court attempted to play a role in law reform by providing further explanation as how the legislature should have drafted Art. 15(2) of the constitutional court act so as to avoid misinterpreting Art. 15(2) of the constitutional court act. (2005).

The constitutional court has not acted the role it's assigned to as a guardian of the constitution. The court has been beset with institutional weaknesses, and its jurisprudence has largely upheld existing laws, including provisions and acts such as immunities laws. The jurisprudence has also been marked by limited reference to international standards or relevant comparative experiences.⁹³²

Chapter Five: Post-Referendum Sudan

Part 1: Post-Referendum of South Sudan

1. The Right to Self-Determination in the INC

Major international instruments and constitutions do grant the right to self-determination. Article (1) common to ICCPR and ICESCR provides that “all peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”. The right to self-determination as proclaimed in various international instruments includes two distinct components: *external self-determination and external self-determination*. The external self-determination is concerned with political decolonization, liberation of occupied territories, etc that lead to the creation of a new state. Whereas the internal aspect of the right to self-determination involves the right of peoples to govern themselves or have a say in the way their country is governed. The later is manifested in the forms of autonomous, guarantees on social, cultural and economic rights, claims for secession by the marginalized against their own government, etc.⁹³³

⁹³² See Human Rights Committee, 2007, concluding observations: Sudan. UN Doc. CCPR/c/SDN/CO/3/CRP.1, para 9(e); Report on the situation of human rights in Darfur. UN Doc. A/HRC/5/6,24, Recommendation 3.2.

⁹³³ Charles Riziki Majinge, Southern Sudan and the Struggle for Self-Determination in Contemporary Africa: Examining its Basis under International law, German Yearbook of International Law, 53, 2010, p. 543.

On the other hand, the concept to the right to self-determination is open to different interpretations. It can mean the right of individuals to determine their political destiny by choosing their own government from among competing political parties. Or, it can mean the right of groups to determine their own destiny by having their own state - an example of a country where self-determination came to be defined as rights for groups rather than for individuals is Ethiopia.⁹³⁴ In effect, the right to self-determination and the right to secession are classified as human rights in the new constitution of Ethiopia.⁹³⁵ Generally speaking, the concept of self-determination encompasses a spectrum of rights, including independent statehood, association with other groups in a federal state and other forms of autonomy that are short of full independence.⁹³⁶

Historically, the principle of the right to self-determination has been linked to the right of peoples, under colonial domination, to demand their own independence. Yet, the current internal conflicts that are triggered by reasons of ethnicity and religion extent the right to self-determination to ethnic, religious, linguistic or cultural minorities within a given state, when certain conditions are met, to secede and found a state that is based on their cultural values.⁹³⁷ Within this context, the right to the self-determination refers 'to the ability of groups, or community to assert their own ethnic or cultural identity without discrimination, etc'.⁹³⁸ This can be achieved internally within the existing state without the need for secession, if the state allows, through the devolution of powers, to the members of minorities to participate in the national politics, refrains from discriminating against members of minorities and respects their cultural identity when envisaging national policies.⁹³⁹

For instance, in Ethiopia, which under its current constitution, the country is divided into fourteen regions based on presumed ethnic demarcations, and there are nine member states in Ethiopia. Within those states, the nations, nationalities, and peoples have the right to establish

⁹³⁴ Marian Ottaway, *Democratization in Collapsed States*, p. 238.

⁹³⁵ Art. 8(1) of the Ethiopian Constitution

⁹³⁶ See *Ian Brownlie*, *Principles of Public International Law*, 5th edition, Oxford, Clarendon Press, 1998

⁹³⁷ *Abdullah A. An-Na'im* et al, *Self-Determination and Unity: The Case of Sudan*, 1996 *Law and Policy Journal*, 199(202). See *Margret Moore*, *National Self-Determination and Secession*, Oxford University Press, 1998

⁹³⁸ *Abdullah A. An-Na'im* et al, *Self-Determination and Unity: The Case of Sudan*, p. 209.

⁹³⁹ *Ibid*, p. 201.

their own states, while each region and sub-region has the right to secede.⁹⁴⁰ Some say that this approach may ingrain ethnicity by establishing a federal government based on tribal affiliation.⁹⁴¹ On one hand, some argue that the set-up of the state structure gives ethnic groups too much autonomy and undermines national unity.⁹⁴² On the other hand, some commentators argue that the use of ethnicity in this way has served a useful purpose for the nation as a whole by promoting the empowerment and effective participation of all ethnic groups.⁹⁴³ This approach allowed for the release of tension that would have built up if Ethiopia allowed too centralized or nationalistic.⁹⁴⁴

I. Recognition of the Right to Self-determination in the INC

In the case of Sudan, the INC contains an entitlement to self-government in relation to the southerners and even guarantees their right to self-determination.⁹⁴⁵ The right to self-determination has been interpreted in terms of internal constitutional arrangements for political and autonomy rights for the people of Southern Sudan. For this, the INC provides for asymmetrical federalism in respect of the Southern Sudan, and more importantly, the INC provides for the establishment of joint institutions with the participation and sharing of ministerial and senior civil service positions by the southerners.⁹⁴⁶ The institution of the Presidency, in which the south acquires the position of the First-Vice President, is a good illustration of such accommodation.⁹⁴⁷

II. Impact of Referendum of South Sudan

The Southern Sudan Referendum for self-determination, held in July 2011, clearly indicated that the absolute majority of those who participated in the referendum for the Southern Sudan favour separation of the Southern Sudan from Sudan. The secession of the South Sudan on July

⁹⁴⁰ *Abdullahi Ahmed An-Na'im*, *African Constitutionalism and the Role of Islam*, p. 66.

⁹⁴¹ *M. Haile*, 'The New Ethiopian Constitution: Its Impact upon Unity, Human Rights and Development', *Suffolk Transnational Law Review* 20 (1996), 1-84

⁹⁴² *B. Selassie*, 'Self-Determination in Principle and Practice: The Ethiopian-Eritrean Experience', *Columbia Human Rights Law Review* 29(1):91-142, 1997

⁹⁴³ *T. Twibell*, *Ethiopian Constitutional Law: The structure of the Ethiopian Government and the New Constitution's Ability to Overcome Ethiopia's Problems*. *Loyola of Los Angeles International and Comparative Law Journal* 21(2):399-465, 1999.

⁹⁴⁴ *Ibid*, pp. 399-465.

⁹⁴⁵ Art. 219 of the INC

⁹⁴⁶ Chapter II 'Power-Sharing Protocol' (Art.2.6.2)

⁹⁴⁷ Art. 51 et Esq. of the INC.

9, 2011, as a result of the referendum on self-determination provided by the CPA has created a new reality in Sudan with far reaching economic, political and social implications. Economic and financial losses related to the secession are substantial and have affected all sectors of the economy. Sudan has lost three-quarters of its largest source of foreign exchange (oil), half of its fiscal revenues and about two-thirds of its international payment capacity.⁹⁴⁸ In general, the secession of South Sudan resulted in a 36.5% structural decrease in overall government revenues.⁹⁴⁹

Conflict between Sudan and South Sudan has erupted despite the peaceful referendum on self-determination of South Sudan, as some of the outstanding provisions of the CPA are yet to be resolved, such as revenue sharing, border demarcation and the status of Abyei.⁹⁵⁰ Failure to resolve these matters contributes to fuel tensions with South Sudan, as evidenced by renewal of conflict in South Kordofan and Blue Nile States, recurring local violence and militarization of communities. Civilians along the borders are particularly vulnerable to a wide range of human insecurities. Pastoralists throughout the border areas, who historically spend the dry season in the South, are currently under extreme pressures.⁹⁵¹ The unresolved issue of Abyei constitutes a trigger for potential violent tension in the future between Sudan and South Sudan. Abyei status is yet to be decided, as both Sudan and South Sudan claiming it as part of its territory. Its final status will be decided by a Referendum for which implementation mechanisms have not yet been agreed upon by the two countries.

In July 2011, an international boarder was created between Sudan and the new state of South Sudan, however, this present a new challenge as regards the management of migration routes and natural resources, particularly that final boarder demarcation and resolution of disputed areas (such as Abyei) are yet to be concluded between the two states. The settlement of the Abyei Area and the conflict in South Kordofan and Blue Nile continue to be major stumbling

⁹⁴⁸ UNDP Sudan, Sudan Post 2015 National Consultations Report, July 2013. (on file with the author)

⁹⁴⁹ See generally Crisis Group Africa Report N 204, 18 June 2013. Available <http://www.crisisgroup.org>

⁹⁵⁰ Shifting Patterns in Conflict and peace Dynamics in the Three Areas: Challenges and Opportunities, November 2013, UNDP Crisis Prevention and Recovery Unit Document (on file with the author)

⁹⁵¹ UNDP, Sudan Post 2015 National Consultations Report, July 2013. (on file with the author)

blocks to making security and border arrangements. This has resulted in serious human rights violations.⁹⁵²

2. The Constitution-Making Process of New Constitution for Sudan

It is true that the INC made it clear that its provisions, subject to changes that will be necessitated by the decision favouring secession, shall continue in force until replaced by a new constitution. In this respect, Art. 224(10) of the INC states that “*if the outcome of the referendum on self-determination favours secession, the parts, chapters, articles, sub-articles and schedules of this Constitution that provide for southern Sudan institutions, representation, rights and obligations shall be deemed to have been duly repealed*”. It is clear that the provisions of the INC that relate to the Southern Sudan will cease to have any effect.

The end of the CPA necessitated a constitutional review process to decide on the new constitution to replace the INC. However, for a constitution to be able to win the affections of the citizens of the State, it will be necessary to involve those citizens in the constitution-making process that establishes such a constitution, so as to ensure that the process is inclusive and reflects the aspirations of the Sudanese people at large. In order for the design of a constitution and its constitution-making process to play an important role in the governance system, the design of the constitution has to be responsive to the aspirations of the ordinary people.⁹⁵³

A constitutional review process is currently under way but has not resulted in any clear proposals. The constitutional review process has not been participatory or inclusive. Lively debates on the new constitution in general, and the Bill of Rights and human rights protection in particular, have nevertheless ensued.⁹⁵⁴ These debates have been driven by a keen awareness of the importance of constitutional rights. These debates reflect traditional concerns over the protection of civil and political rights, particularly in the administration of justice. These

⁹⁵² See *Report of the Independent Expert on the situation of human rights in the Sudan*, Mashood A. Baderin, UN Doc. A/HRC/24/31, 18 September 2013,

⁹⁵³ *The Republic of Sudan Constitution Making Forum* (24-25 May 2011), Papers and Proceedings, and, further, Noha Ibrahim Abdelgabar, ‘International Law and Constitution Making Process: The Right to Public Participation in the Constitution Making Process in Post Referendum Sudan’ in *Verfassung in Recht und Übersee* (2013)2, pp. 132-151

⁹⁵⁴ UNDP, in collaboration with the Ministry of Justice, *The Republic of Sudan Constitution Making Forum* (at the national and the state level- 2011-2012).

debates include the desire for the realization of economic, social and cultural rights, and the rights of members of groups who suffer discrimination, particular women, religious and ethnic minorities and persons with disabilities.⁹⁵⁵

Currently, public debate over the new constitution is proceeding, although the Government has not yet announced a timeframe for the constitution making process, amid a polarization of views on diverse issues such as the decentralization of power and wealth sharing between the different regions of Sudan. Since 2011, the Government of Sudan, in collaboration with the UNDP and other UN agencies, initiated the forum on public participation in constitution making to facilitate open and public dialogue. This approach has been based on the need to pursue the constitutional process/review inclusively, transparently and participatory to ensure all sectors of society including civil society organizations and opposition political groups participate fully in the process.

Similar initiatives are ongoing to support the development of a new constitution. For instance, UN Women has a project entitled “Support to Gender Responsive Constitution Development in Sudan” which aims at developing a commonly agreed upon women’s agenda; ensuring the informed participation of women across the country and the strengthening of the institutional and technical capacities of relevant women’s organizations to provide leadership and sustained advocacy for a gender responsive constitution based on principles of gender equality and women’s empowerment.⁹⁵⁶

3. The Design of the Current Constitution-Making Process in Sudan

The objectives and methods for constitution-making depend on its context. Some constitutions are reviewed in order to ensure that the constitution is in line with social, economic and technological changes in the country. Sometimes a constitution is used to transform the political

⁹⁵⁵ See *Noha Ibrahim Abdelgabar*, ‘International Law and Constitution Making Process: The Right to Public Participation in the Constitution Making Process in Post Referendum Sudan’ in *Verfassung in Recht und Übersee* (2013)2, pp. 132-151

⁹⁵⁶ UN Women Project Document: Support to Gender Responsive Constitution Development in Sudan (on file with the author)

and economic system (after revolution), imposing a system and values on the people, with little need for negotiations or concessions.⁹⁵⁷

As to the current constitution-making process in Sudan. When it comes to the design of the process, it is unclear which one Sudan will adopt. In this respect, a political committee was formed and produced a draft constitution, intended as an amendment to the INC. It appears that the Ministry of Justice has not played a formal role in producing this document although members of the Legislative Department of the Ministry of Justice seem to have been involved in its compilation. Earlier attempts by GoS involved the establishment of a Constitutional Review Committee under the auspices of the Higher Council for Decentralization. Another constitutional review committee was formed at the Council of the Ministers to study recommendations on constitutional review which were produced by the Higher Council for Decentralization. The initiative of the High Council of Decentralization aimed to organise a consultation, ensuring public participation through the organisation of workshops at the state level.⁹⁵⁸

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

Recently, the GoS announced through the various media outlets that the constitution-making process will be an inclusive national constitutional review process which should involve comprehensive dialogue with all political forces and sectors of the Sudanese society, including those in the peripheral areas.⁹⁵⁹ Furthermore, the GoS plans to constitute a commission to draft the constitution. However, it appears that there is willingness on the part of the relevant state

⁹⁵⁷ Y. Ghai, ‘The Constitution Reform Process: Comparative Perspectives’ 2004 Available at: <http://www.idea.int/news/upload/Nepal%20-%20workshop%20paper%20-%20Yash%20Ghai.pdf>. Last accessed March 2012.

⁹⁵⁸ Interview with the officials of the Ministry of Justice, 2011, Khartoum, Sudan.. (on file with the author)

⁹⁵⁹ UNDP, in collaboration with the Ministry of Justice, The Republic of Sudan Constitution Making Forum (at the national and the state level- 2011-2012. (on file with the author)

bodies to actively support broad public participation initiatives, especially civic education, before the first main steps in the process begin. Currently, there are several initiatives on civic education on the constitution making process that are being spearheaded by the Ministry of Justice and the local and foreign civil society organizations.

a) Civic Education in Constitution Making Process of the Ministry of Justice

The constitution-making process has to be preceded or accompanied by civic education, to increase people's familiarity with constitutional issues and to enable them to engage actively in the process.⁹⁶⁰ As the constitution-making process requires various forms of consensus-building before the formal process of constitution-drafting can commence. For this to happen, it is critical to ensure that the public has accurate information about the constitution making process exercise and their role in the process through a programme of constitutional awareness raising and civic education.⁹⁶¹ Civic education is widely recognized as an important part of constitution-making processes as civic education helps prepare the public to participate, both before and after the constitution is prepared and adopted.

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

⁹⁶⁰ Y. Ghai, 'The Constitution Reform Process: Comparative Perspectives' 2004 Available at: <http://www.idea.int/news/upload/Nepal%20-%20workshop%20paper%20-%20Yash%20Ghai.pdf>. Last accessed March 2012.

⁹⁶¹ Ibid.

organizations, trade unions, the disabled, students, and parts of the international community, minorities, the poor and the marginalized.⁹⁶²

Civic education undertaken by state actors focuses on informing people about the process, including alerting people to the opportunities for public participation and the manner in which they may be able to participate in the process. The content of the civic education included what a constitution is, the constitution history of Sudan and democratic principles, institutions and practices to promote more democratic behaviours and attitudes, and key constitutional issues so that the public can provide thoughtful input during any public consultation. Civic education at this stage may inform the public about issues concerning the nature of a constitution and the kinds of choices that can be made when deciding a new constitution. In Rwanda, for example, a two-year of civic education programme preceded the final adoption of the constitution and intensive efforts were made to reach marginalised groups to inform them about the content of the constitution so as to help them to vote for the draft.⁹⁶³

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

On its part, the Ministry of Justice assured the participants that their inputs would inform the constitution writers of the main trends in citizen interest in the substance of the constitution.

⁹⁶²*The Republic of Sudan Constitution Making Forum* (24-25 May 2011), Papers and Proceedings

⁹⁶³ Y. Ghai *et al*, 'Constitution-making Reform: Option for the Process', Switzerland: Interpeace, 2011.

However, whether and to what extent public input would actually influence the final text of the constitution is more difficult to discern. A careful channelling of the results of public input during the forums on constitutional education is critical to maximizing the programme's potential benefits, and to instil a sense of public ownership in the final outcome.

There are still numerous challenges facing public participation in Sudan, particularly inexperience, illiteracy, impoverishment, insecurity, prejudice, and lack of resource, and lack of accessible channels of communication, especially in rural areas. In addition, the insecure circumstances, which are characterized by recurrent civil unrest, make it difficult to create a bottom-up process of public participation. However, the forums organized by the Ministry of Justice made clear that the public still needed education about the nature and the function of a constitution as well as information about constitution-making process. On the other hand, some questions were raised regarding the genuineness of the process. Critics generally viewed these forums as "controlled and that the forums had a purely decorative character", but other observers found that the discussions in the forums generally lively.

Some say that UNDP support may produce a perception of credibility and legitimacy for the work of the Ministry of Justice: that is, external assistance by the UN may confer a degree of legitimacy on the process and its outcome. Participants were clearly sceptical about the seriousness of the Ministry of Justice in calling for their involvement and the treatment their submissions would receive. In particular, some fear that the Government of Sudan may take advantage of UNDP initiative and haste to conclude these forums constituted public consultations, as the forums did not engage the majority of the population and were limited to a two-day forum per state.

Critics of external involvement in the constitution-making process think that such involvement may influence the drafting process of the constitution. On the other hand, many observe that external involvement in constitution-making positively influences the final outcome of the drafting process.⁹⁶⁴ Despite the server criticism for the foreign involvement in the constitution-making process, in general the role of the international community should be facilitative,

⁹⁶⁴ Ibid .

including provision of logistics and assisting with the experience of other countries which have faced similar problems.⁹⁶⁵

b) Recommendations of the Forums on Constitution-Making at the National and the State Levels

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

- Some of the INC provisions need to be kept intact in the new constitution, especially, the Bill of Rights, the electoral system and the national service commission,;
- The main source of legislation should be Sharia Law;
- Equality in power and wealth sharing between the central and the state administration, with emphasis on the principle of separation of powers;
- Some say that entrusting the deliberation and adoption of the draft constitution to the regular legislature would undermine the legitimacy of the process. As such, the choice of a constituent assembly reform model, with popular ratification of the adopted text via referendum, is the best option.
- Participants were unclear to what extent their inputs will seriously be taken by the designers of the constitution.⁹⁶⁶

c) The Role of the Civil Society Organizations in Civic Education

⁹⁶⁵ Y. Ghai & G. Galli, *Constitution Building Processes and Democratization*, a paper prepared for IDEA, , 2006.

⁹⁶⁶ *The Republic of Sudan Constitution Making Forum* (24-25 May 2011), Papers and Proceedings(on file with the author)

National and foreign civil society organisations run a sort of parallel process, such as civic education and mobilisation of marginalised communities. The work of civil society focuses on the design of the constitution-making process and the fundamental principles that must determine the substance of a constitution, while some academic institutions such the University of Khartoum and Ahfad University focus on the substance of the constitution. Civil society may influence the process of the constitution-making in many ways, including promoting or organizing for constitutional change, informing the people about issues related to elections, providing civic education, supporting or conducting public consultations, preparing submissions, researching, lobbying, and monitoring the process.⁹⁶⁷ In Kenya, the civil society created a group of fifty-two religious and secular organisations that set up an unofficial commission to travel the country and collect the views of the people.

In Sudan, some civil society organisations conducted constitutional discussions on their own initiative, and are playing a key role by taking the initiative to begin the constitutional dialogue and to inform and educate the people. These civil society organisations organised a number of events on constitution making at the local and the State levels in collaboration with youths and women to raise awareness on the process of making the constitution.⁹⁶⁸

Furthermore, a consortium of civil society organisations work on law reform process as a whole through the organisation of awareness-raising events, in collaboration with foreign civil society organizations, on the law reform with all those involved in the process of law reform, be it the legislature, be it the judiciary, be it the law enforcement agencies. This initiative also focuses on the impact of the implementation of the law on the people.⁹⁶⁹ The activities of these civil society organisations focus on the State and local levels. The problem is that these steps were taken on an ad hoc basis, while media coverage is rather general.

Mutawinat Civil Society Organization,⁹⁷⁰ for instance, is involved in the constitution-making process and focuses its constitutional awareness activities on citizens with little education,

⁹⁶⁷ Y. Ghai et al, 'Constitution-making Reform; Potions for the Process' Switzerland: Interpeace, , 2011.

⁹⁶⁸ Interview with Neswa Organization, February, 2012, Khartoum.

⁹⁶⁹ Ibid

⁹⁷⁰ Interview with Mutawinat Civil Society Organization, February, 2012, Khartoum.

illiterate people and people living in geographically marginalized parts in Sudan, such as IDP camps. This civil society organisation works closely with community-based organisations for information and outreach activities.⁹⁷¹ The United Nations for Women also held a similar forum addressing the gender issue in the new constitution of Sudan. In addition, a number of civil society organisations, especially Women Civil Society Organisations are active in organizing forums and workshops on issues pertaining to constitution-making, with a special focus on women issues.

In addition, a group of civil society organisations joined forces to form what is called the “Sudan Initiative on Constitution Making” to work exclusively on issues related to constitutional reform. The Initiative organised several activities on the process of constitution making, with a focus on international best practices, principles of constitution making and Sudanese experiences on constitution making. The target groups of these activities were the political parties, youth, women, and civil society organisations. The focus of the activities was at the locality and the State levels. This civil society employed a number of mechanisms to facilitate awareness-raising on constitution related issues, including education materials (such as manuals) radio program and a weekly column in the newspapers.⁹⁷²

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

It seems that the participatory aspect in the form of public education was somewhat limited. Some also call for the involvement of the civil society in drafting the constitution, and the importance of the role of the media in the process of constitution-making, as it plays a critical

⁹⁷¹ Interview with Mutawinat Civil Society Organization, February, 2012, Khartoum.

⁹⁷² Interview with *Sudan Initiative on Constitution Making*, February, 2012.

role in civic education campaign.⁹⁷³ Sudan continues to be in a state of armed conflict despite the constitution-making process, especially on the border between Sudan and Southern Sudan.

4. Main Findings of the Study

I) The Comprehensive Peace Agreement

The CPA made significant changes the prevailing governance and legal systems in Sudan by establishing a federal system, introduced a dual legal system a bill of rights, provided for the right to self-determination for the south Sudan, established institutions for the protection of human rights by establishing mechanisms such as National Human rights Commission, and distributed the wealth equally between the north and the south. However, the CPA failed to include the Sudanese people in the talks leading to the conclusion of the CPA, as the CPA was bilateral reflecting the views of the north and the south.

II) The Structure of the Governance System under the INC

The present governance system under the INC allocates the legislative powers and resources between the different levels of government. In particular:

- a) In contract with old constitutions of Sudan, the INC establishes a federal system, with four levels of government; national, south Sudan, State and local levels.⁹⁷⁴ The INC federal system guarantees the special characteristics of all ethnic and religious groups in Sudan through the creation of the Council of the States.⁹⁷⁵ However, all the States in Sudan are not treated equally,⁹⁷⁶ because (1) two States have special status (South Kordofan and Blue Nile States),⁹⁷⁷ and (2)

⁹⁷³ A two-day Worksop held at the University of Khartoum and the Institute for Peace and Development on the “Gender issue in forthcoming Constitution of the Republic of Sudan”, October, 2011, Khartoum, Sudan. (on file with the author)

⁹⁷⁴ Art. 2 of the INC describes the system as “*a decentralized system of government with significant devolution of power ...*”.

⁹⁷⁵ The Council of the States (the second chamber of the legislature) represents all the States in Sudan and influences the law making process at the national level, including amendment of the constitution.

⁹⁷⁶ Prior to the secession of South Sudan, Sudan is composed of 25 States. It should be note that Abyei Area is administrated under the institution of presidency.

⁹⁷⁷ The status of these two States are regulated as per the Protocol on the Resolution of the Conflict in Southern Kordofan and Blue Nile States

between the ten States in the South and the national level, the Government of South Sudan (GoSS) is inserted to exercise authority in respect of the ten States at South Sudan level. This means the INC creates asymmetrical/symmetrical federalism, as the South Sudan level enjoys significant autonomy and exclusive authority over ten States in South Sudan.

- b) The INC Schedules (A – C) distribute the exclusive and legislative powers to the national level (A), the GoSS level (B), and the state level (C). Schedule (D) lists the concurrent powers and Schedule (E) allocates the residual powers as per its nature. Schedule (F) is a provision to resolve conflict that might arise under Schedule (D). It should be noted that not all issues listed in the INC schedules are allocated to one level of government only. For example, several substantive issues are granted to the national level as an exclusive competence, to the South Sudan level as an exclusive competence and at the same time to all levels of government as a concurrent power, such as telecommunication. With regard to the legislative powers allocated to the ten states at the South level, the GoSS according to Schedule (B) has the competence to enact a kind of framework with regard to issues that fall under the exclusive South Sudan State competence, thereby limiting the legislative powers of the ten States in South Sudan.
- c) Finally, the INC has reinforced existing power relations and failed to provide structural changes for democratic transformation, as the INC asymmetrical federalism accommodates the demands of the South Sudan only. As the INC does not accommodate the demands of the different ethnic and cultural groups in the different regions of Sudan as demonstrated in Darfur Peace Agreement and East Sudan Agreement.

III) The Structure of the Legal System under the INC

The INC restructures the court system and provides for a comprehensive bill of rights for the promotion and protection of human rights. The final analysis of the legal system under the INC indicates that:

- a. The INC constitution making process was bilateral reflecting the views of the parties to the CPA and lacked inclusiveness, but provides for a pluralism legal system by providing for a constitution for south Sudan and 25 State constitutions.
- b. The INC introduces State judiciary and South Sudan judiciary and opted for an integrated the court system. That is: the State courts apply the State laws, the national laws and the South Sudan laws. In the North, the State courts are still organized by the national level, although the NC provides for the establishment of the State judiciary. At the South Sudan level, all State courts are organized and financed at the level. Towards the South Sudan, the National Supreme Court is the final court of on matters arising under national laws.
- c. The INC emphasizes the importance of protecting; respecting and promoting human rights through the inclusion a bill of right and incorporation via Art. 27(3) of the INC all human rights treaties that Sudan has ratified, thereby the human rights contained in the INC directly applicable before the Sudanese courts. However, several rights, as provided for in the INC bill of rights, do not mention certain aspects guaranteed, for example, by ICCPR. Also, the implementation of some human rights requires revision of the existing statutory laws. To date there has been limited legislative reforms to address human rights violations. A few laws have been reformed but fall short of Sudan international obligations, such as Criminal Act, Security Laws, Immunity Laws, etc.
- d. The INC differentiates between the north and the south regarding the sources of legislation. Art. 5 of the INC lists Sharia as one of the sources of legislation along with the consensus of the people at the national level. Art. 5(2) of the INC names popular consensus and the values and the customs of the people of Sudan as the sources of legislation in South Sudan. The INC contains special rules for national legislation if its source is religion or custom. In that case, a state where the majority of residents do not practice such religion or customs may introduce different legislation allows practices or establishes institutions in that State that are consistent

with its own religion or customs.⁹⁷⁸ The INC establishes human rights commission for the implementation of the bill of rights as well as a commission for the protection of non-Muslims in the Capital.

- e. The INC has chosen a concentrated system of judicial review and a hybrid system of judicial review with respect to the South Sudan as the Supreme Court of South Sudan acts as a constitutional court and a high court of Appeal with respect to South Sudan. The newly enacted Judicial and Administrative of 2005⁹⁷⁹ does not provide for concrete judicial review of law and bars the court from question the constitutionality of law by way of making referral to the constitutional court, thereby renders the judiciary unable to deal with crucial constitutional issues.

IV Assessment of Practice of Constitutionalism under the INC

With regard to the implementation of law reform process and the involvement of the Constitutional Court in the reform process, through the revision selected human rights jurisprudence of the constitutional court, the final analysis reflects that:

- a) The INC does not set out procedure for concrete review and access to the court is not free.
- b) The court has a broad power to consider and adjudge and annul any law in contravention with the constitution and restitute the right to the aggrieved person and compensate for the harm. The court may also order interim measures to avoid any harm. As such, the court can abolish laws and compel the government to enact new law.
- c) The constitutional court has reviewed a number of cases that alleged the violation of human rights. The court has demonstrated reluctance to declare legislation unconstitutional. Interpretation of the bill of rights and reference to international human rights lacked consistency and the court has taken deference to the executive;

⁹⁷⁸ A State may also refer a law that is not in line with its religion and custom to the Council of States. The Council of State may approve the law by 2/3 majority of all the representatives or initiate national law which will provide for alternative institution as maybe appropriate.

⁹⁷⁹ This Act repeals the Constitutional and Administrative Act 1996 which allowed for concrete review of the constitutionality of law.

- d) The constitutional, legislative and institutional changes did not acknowledge past human rights violations through mechanisms that would question the way of governance and persisting inequalities and injustices;
- e) The constitutional court has institutional weaknesses and its jurisprudence has largely upheld existing laws such as immunities laws and the constitutional court made limited reference to international human rights law;
- f) The constitutional, legal and institutional reforms failed to generate the sense of constitutionalism and the fundamental change that were to remove the causes for human rights violations and provide effective remedies. A number of laws contravening the human rights are still in force, such as, Public Order Act, Immunity of police, security and army officers, inadequate laws for the protection of women's rights.
- g) Finally, the implementation of CPA as a means of democratic transformation left an unreformed government virtually intact

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