The Constitutional Protection of Human Rights in Sudan: Challenges and Future Perspectives

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I. Introduction

Sudan's recent history has been characterised by long periods of armed conflict and/or authoritarian regimes and illiberal democracies. At the same time, the constitutional protection of human rights has been extremely weak, both in terms of the recognition of rights and the availability of mechanisms for their effective implementation. In the context of broader concerns over respect for the rule of law, these combined factors have contributed to a situation of systemic and serious human rights violations. A series of cases at the domestic level and before the African Commission on Human and Peoples' Rights demonstrate that victims of such violations have no effective remedies in Sudan. There is also an almost complete absence of accountability for human rights violations. The Comprehensive Peace Agreement (CPA) signed in 2005 to end the North-South conflict had promised to change this situation. It included a series of human rights commitments, which formed the basis for the Bill of Rights constituting an integral part of the Interim National Constitution of 2005. This Constitution recognises a series of rights, stipulates that all treaties to which Sudan is a party are automatically part of the Bill of Rights, and vests the newly established Constitutional Court with the power to hear complaints concerning the violation of constitutional rights. In addition, it envisages a series of institutional reforms, including of the security sector.

Many had hoped that the CPA would result in the promised democratic transformation and greater human rights protection. However, these hopes failed to materialise. Instead, South Sudan declared its independence in 2011, with armed conflict and serious human rights concerns persisting, now on both sides of the new border. The independence of South Sudan brought the CPA interim period to an end, and with it the need for a new constitutional arrangement. Since 2011, a constitutional review has been underway in Sudan. This review 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.[1] These debates have been driven by a keen awareness of the importance of constitutional rights. They also provide evidence of the need to identify and address the failure of the Interim National Constitution (INC) to ensure adequate protection against, and redress for human rights violations. These debates reflect both traditional concerns over the protection of civil and political rights, particularly in the administration of justice, and other issues that have also become a cause of acute concern. These include the desire for the realisation of economic, social and cultural rights, and the rights of members of groups who suffer discrimination, particularly women, religious and ethnic minorities and persons with disabilities. It also includes children's rights, which, exceptionally, have been recognised to a considerable degree in the recently enacted Child Act of 2010, although the operation of the law still faces challenges in terms of its actual implementation.

In the context of these ongoing debates, the Faculty of Law of the University of Khartoum, and the Sudanese Human Rights Monitor convened a conference at the University of Khartoum, Sharjah Hall, on 15 January 2014: "*The Constitutional Protection of Human Rights in Sudan: Challenges and Future Perspectives*". The conference, which formed an integral part of a broader project on criminal law

[1] See for some officially approved initiatives, UNMIS, UNDP, UN Women, WHO, UNICEF, UNHCR and UNFPA, in collaboration with the Advisory Council for Human Rights, *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; Mahjoub M. Saleh (ed.), *Studies on the constitution* (Alayam Center for Cultural Studies and Development and Friedrich Ebert Stiftung, Khartoum, 2012) (Arabic); and *Training Manual on Analysis of Constitutional Standards*, compiled by M. Saeed, Tahani Yahia and Mohamed Abdelsalam Babiker, Regional Centre for Gender Studies, Peace and Human Rights, Ahfad University for Women and USAID (2013).

reform in Sudan, [2] was attended by over one hundred academics and representatives of civil society, political parties, government ministries, foreign embassies, media, students, and others interested in the constitutional review process. Its purpose was to identify and discuss the challenges facing the constitutional protection of human rights and fundamental freedoms in Sudan, particularly the persistent gaps concerning the recognition of rights and shortcomings in their implementation. Based on these discussions, the conference sought to develop specific recommendations on how to strengthen the system of human rights protection in Sudan in the constitution-making process.

This Report contains the papers presented at the conference. It consisted of three panels that addressed both general substantive issues of constitutional rights protection and the protection of specific rights, and a brief summary of proceedings that reflected the debates on the day.[3] It also includes, as annexes, the conference programme and human rights provisions in selected Sudanese constitutional documents since 1953.

The Report focuses both on the constitutional framework of human rights protection and the protection of specific rights. Amin M. Medani, in his chapter on "The Constitutional Bill of Rights in the Sudan: Towards Substantive Guarantees and Effective Realisation of Rights" highlights the structural shortcomings of successive Sudanese constitutions, demonstrating how the failure to address questions of the political system and of identity resulted in a weak rule of law and systemic human rights violations. To address these challenges, Medani advocates an inclusive constitutional review process, a strengthening of the Bill of Rights and a series of complementary measures, including comprehensive legislative and institutional reforms as well as a transitional justice programme. Mohamed Abdelsalam Babiker's chapter "Why Constitutional Bills of Rights fail to protect civil and political rights in Sudan? Conflicting rights, gaps and arrested reception of international human rights law" questions the conventional wisdom that the Bill of Rights should be maintained in its present form. While acknowledging that it constitutes a major achievement in Sudan's constitutional history, compared to its predecessors, Babiker argues that the substantive provisions of the Bill of Rights contain gaps, which necessitates a review of many of them. He also proposes that, rather relying on the general incorporation provision of article 27(3), specific rights need to be brought into conformity with international standards. Further, there should be in an in-depth debate on the status of international human rights law and the modalities of its incorporation in Sudan's legal system, which is complicated by the normative tensions between international law, national legislation, Shari'a law and customary law.

Ahmed Abdel Gadir Ahmed's chapter on "Economic, Social and Cultural Rights under the Constitutional Bill of Rights in the Sudan", shows that these rights have been largely ignored in Sudan's constitutional history, including by democratic regimes, and were often merely given the status of principles and directives, if at all. The INC has only partially rectified this, as several relevant rights are not explicitly listed or are inadequate in scope or definition. Given the multiple economic, social and cultural challenges and deprivations faced by people in Sudan, and their link to other rights violations, Ahmed emphasises that the explicit recognition and adequate protection of economic, social and cultural rights must be seen as one of the priorities for Sudan's future constitution. Ebtisam Sanhouri Elrayh's chapter "Women's Rights in the Constitutional Bill of Rights: Issues of Status, Equality and Non-Discrimination" identifies a series of gaps in Sudan's Bill of Rights

[2] See website of the Project, which is a joint initiative of the Sudanese Human Rights Monitor and REDRESS, at www.pclrs.org.

[3] The Report has been edited by Mohamed Abdelsalam Babiker and Lutz Oette. The University of Khartoum, the Sudanese Human Rights Monitor and REDRESS wish to express their gratitude to the authors for their valuable contributions, the Dean of the faculty of law Dr. Tayeb Markaz and Dr. Abuzar Al- Gifaria who headed the panels, Azkar Al-Dirderi for preparing a report of the conference proceedings, students at the faculty of law for providing valuable organisational support and to Ms. Elizabeth Harper for her substantial assistance in the editing process.

from a women's rights perspective, and discusses the serious discrepancies between statutory law and constitutional provisions in respect of the rights of women. Elrayh calls for a fundamental paradigm shift to redress the grievances of Sudanese women and the injustices suffered, which requires overcoming outdated religious and social beliefs about women's value, and eliminating stereotypes, gender bias and religious, social, economic, political and legal constraints. She advocates a broad approach, in which any future constitutional process shall seek and include women's views and visions, not only on women's issues, but also on all outstanding questions of governance, law making, power and wealth sharing, development, as well as peace and state building. Khadeja Elsheik Mahjoub's chapter on "Children's Rights and the Forthcoming Constitutional Bill of Rights of Sudan" identifies a series of shortcomings in Sudan's constitutional framework on the protection of children's rights, notwithstanding article 35 (2) of the Bill of Rights according to which "[t]he State shall protect the rights of the child as provided in the international and regional conventions ratified by the Sudan." Mahjoub calls for an approach in which children's rights are more visible in any future Bill of Rights, taking into consideration the spirit and contents of international and regional children's rights instruments binding on Sudan such as the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.

The Report's in-depth analysis of crucial issues and rights combines legal analysis with a focus on effective implementation in the light of the realities of human rights concerns in Sudan. We hope that it will stimulate critical thinking and make a genuine contribution to framing debates, influencing policy and law-making, and enhancing human rights protection in Sudan's future constitution(s).

II. The Constitutional Protection of Human Rights in Sudan

1. The Constitutional Bill of Rights in the Sudan: Towards Substantive Guarantees and Effective Realisation of Rights (Amin M. Medani)*

1.1. Introduction

Briefly described, and in general, a Constitution (written or unwritten) refers to the principles and rules of a people's governance through regulating the relationship between and within the institutions of the State; the Executive, the Legislature and the Judiciary. Most Constitutions also include the relationship between the individual and the State, thus defining the rights of individuals, either in several separate provisions or in a Bill of Rights. Further, any laws adopted by the State must comply with the Constitution which is, sometimes, described as the "Basic" or "Supreme" Law.

This chapter focuses on the attempts of constitution-making processes in Sudan to institutionalise the efforts and experiences of the country in the realisation of human rights, and endeavours to make some proposals towards ensuring the realisation of such rights in the future.

At the outset, however, it must be admitted that Sudan's political experience since independence, almost sixty years ago, does not show either the political stability, nor the political will necessary for the institution of constitutionalism and, consequently, the necessary environment for institutionalising respect for and promotion of the principles of human rights. Since independence in 1956, Sudan has been governed by three pluralistic parliamentary (so-called democratic) and three autocratic military regimes, the former governing the country for 12 years, and the latter for the remaining 37 years. Between them, they have adopted eight Constitutions, the last being the 2005 Interim National Constitution (INC).

It could easily be said that, with some exceptions, the said Constitutions have not succeeded in building a culture of human rights, either through promoting education, or successfully implementing its principles in the law enforcement process. Such a generalisation could, however, be modified by stating that during parliamentary democracies, constitutional provisions provided for rule of law principles, such as separation of powers, independence of the Judiciary and provisions for the protection of human rights and public freedoms. However, disagreements on proper governance due to party politics led to the shortening of parliamentary rule.

Perhaps one of the most crucial shortcomings in Sudan's political history, which strikes at the very essence of the meaning of human rights, is the continual marginalisation of citizens of the periphery in all aspects of human rights: political, civil, economic, social and cultural. The so-called pluralistic political parties have manipulated these differences between the centre and the periphery, thus depriving populations of areas outside the Nile valley who, in most cases, happened not to be of the so-called "Arab" descent, or not wholly belonging to the Islamic faith, or both. Only at times of general elections would political leaders seem to pay attention to those "citizens" until the polls are over. Then, the socio-economic exclusion sets in again until the next round of general elections. Under military regimes the lawful claims of marginalised people are considered as rebellious warfare that have been suppressed by armed and security forces. One does not have to look back long to

* Dr. Amin M. Medani is a senior human rights lawyer who held a number of official posts, including that of Cabinet Minister in the Democratic Transitional Government of Sudan and as a representative of the Regional Office of the UN High Commissioner for Human Rights of the Arab Region, Beirut.

recall the North/South conflict, ending in the recent separation of the South, and one also continues to ponder what fate awaits the beleaguered Sudan - what is left of it - in Darfur, South Kordofan and Southern Blue Nile.

Going back to the extent of compliance of parliamentary (democratic) governments with the principles of human rights in non-armed conflict situations, it can be said that the struggle for political power between the political parties was a permanent feature of parliamentary democracies, as was manifested by the formation and dissolution of political parties and the changes of allegiances of MPs from one party to another. This resulted in continual changes of government, and, naturally, less attention to governance, and the inevitable successive military *coups d'etat* to replace failed democracies, i.e. totalitarian oppressive regimes, which have no respect for, let alone awareness of, what human rights is all about. Reference should perhaps be made here to the 1965 collusion between the traditional political parties, in their endeavour to adopt the so-called Islamic Constitution, to amend the Constitution to prohibit communism and, consequently, to expel from Parliament the lawfully elected members of the Communist Party. A lawsuit brought by the latter decided the illegality of the said step and the reinstatement of the ousted MPs. But alas, the then Prime Minister refused compliance with the Court's judgment, describing it as not binding and merely "declaratory", thus refusing compliance therewith; a serious blow to the principle of judicial independence! Not long after, and following a party political difference within Parliament, the Supreme Council, then the Head of State, resolved to dissolve the Constituent Assembly (Parliament). The Prime Minister rejected the decision and saw fit to resort to the same High Court for relief.

Under the three military regimes, including the present one, human rights has been an anathema to the conception of governance, which in Sudan, as elsewhere, has been based on dictatorial rule, rather than democratic laws or institutions or respect for the rule of law and human rights. One can spend hours speaking or writing about the most serious violations of human rights and values , including arbitrary laws and practices, mass executions, unfair trials and imprisonment, arrests, detention, torture, confiscation of public freedoms and liberties, the media and more, all of which have been carried out in the name of "revolution and development". Thus has been our fate since independence and remains our challenge for building a democratic society where fundamental human rights and basic freedoms would have any meaning.

1.2. The Comprehensive Peace Agreement and the Interim National Constitution

The 1989 Coup d'etat of the National Islamic Front (NIF) was not just a run of the mill takeover of power from the democratically elected government. It was a usurpation of power by an ideologically committed Islamist party, the NIF, and by its military officers and militia to replace a democratically elected government (in whose Parliament they had taken part). Imposing a state of emergency and a curfew which lasted over two years, they then committed every single violation of human rights, including execution of officers opposed to them; dissolution of all political organs of State, political parties, trades unions, the press, and civil society organisations; the arrest, detention and torture of thousands of politicians and social activists; and the forced retirement of hundreds of judges, military and police officers, and civil servants.[4]

Reports of such and other violations have filled the annals of the then UN Commission on Human Rights (now the UN Human Rights Council) through information documented by Special Rapporteurs, experts, NGOs and Governments. The Sudan Governments' position continued unabated and, in the meantime, ensured control of all means of government through programmes

[4] See Amin M. Medani, *Crimes against Humanitarian Law in Sudan: 1989-2000* (Dar El Mostaqbal El Arabi, Cairo, 2001).

of *Tamkeen* (empowerment) and by means of exercising a total grip on the army, police and security forces, and the country's economy. This economy has been mismanaged and plagued by corruption resulting in the present bankruptcy of the country and impoverishment of the population due to lack of any national or foreign resources.

All this notwithstanding, the armed conflict in the South continued unabated and both sides to the conflict began to realise that it was a no-win situation. In the meantime, the conflict in Darfur flared up at a disastrously high human and economic cost. It continues with miserable consequences until today. Since then, armed conflicts have also erupted in South Kordofan and Southern Blue Nile. Towards the end of the 1990s the humanitarian and security situation prompted serious regional and international concerns. The Government was forced to take steps to at least seek some sort of settlement with political leaders of the Southern rebel leaders (Sudan People's Liberation Movement - SPLM), leading to the conclusion of the Machakos Protocol in 2002, which paved the way for the ultimate conclusion of the Comprehensive Peace Agreement (CPA) at Naivasha in 2005. One major shortcoming of the CPA was the ruling party's (National Congress Party (NCP)) insistence that the Peace Accord be concluded only between itself and the SPLM, to the exclusion of all the other Northern political parties, represented by the National Democratic Alliance (NDA). The SPLM, it is presumed, had to give in to this, though it was criticised by the NDA for seeking to pursue the interests of the South, as such, as a priority over what could have been a national accord to resolve the overall country's future. This, however, is now behind us due to the separation of the South in 2011.

The 2005 CPA is a long document which took a long time and a lot of Sudanese (and foreign) expertise to conclude. It elaborates the respective rights and duties of both sides, confirms the right to self-determination for Southerners at the end of a five year Transitional Period, and sets out respective boundaries, power and wealth sharing, and security arrangements, in addition to several Protocols on Abyei, Southern Blue Nile and Southern Kordofan. The CPA was complemented by the Interim National Constitution, 2005, which defines the structure of government institutions at the national and regional levels; the source of legislation; the economy and defence; and the legislative, judicial and executive bodies, in addition to army and security arrangements.

1.3. A critical analysis of the Bill of Rights

In relation to human rights, Part Two of the INC is entitled "The Bill of Rights". Article 27 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 or derogate any of these rights.*[5]

[5] Emphasis added.

The following articles 28 to 48 of the Bill provide for the protection of, respectively, the right to life and human dignity, personal liberty, sanctity from slavery and forced labour, equality before the law, the rights of women and children, sanctity from torture, the right to a fair trial, the right to litigation, and restrictions on the death penalty. They also include the right to privacy, freedom of religion and worship, freedom of expression and media, freedom of assembly and association, the right to vote, freedom of movement and residence and the right to own property. Further, it protects the right to education, the rights of persons with special needs and the elderly, public health care, ethnic and cultural communities, and sanctity of rights and freedoms.

There is no doubt that the provisions of the Bill of Rights are the most elaborate and significant ever provided in any Constitutional document in the history of the Sudan. However, before commenting on the actual situation of human rights today, one should perhaps refer to the international human rights instruments to which Sudan is a party in order to ascertain the extent to which the INC, and particular its article 27, is being implemented.

Sudan has ratified the following international instruments[6]:

- International Covenant on the Elimination of All Forms of Racial Discrimination, 1965:

The Covenant defines racial discrimination to mean any distinction, restriction or preference based on race, colour, descent or ethnic origin aimed at impairing the recognition or exercise on equal footing of human rights and fundamental freedoms. Sudan is indeed a multi-ethnic and multi-cultural society, mostly rooted in the poor undeveloped African heritage in the countryside. Throughout Sudan's history there have been some inter-marriages, and migration from one part of the country to the other in search of means of livelihood, work, education, and health. Armed conflicts have erupted time and again between the North and the South and, currently, between the North and the West (Darfur, Kordofan, Blue Nile), mainly due to grievances and complaints of socio-economic marginalisation. The domination of Central Governments by citizens mainly of the Nile Valley, i.e. predominantly of Arab origin and belonging to the Islamic faith, thus undermining the role and interests of citizens of the periphery. This disparity has resulted in protests and occasional frictions with the Central Government. However, no positive serious legal or political steps seem to have been taken to address such issues. The inclusion of "tribal origin" in the National Number I.D. is another negative aspect, enhancing rather than eradicating such unnecessary discriminatory attitudes. A Sudanese national identity has yet to be recognised.

- International Covenant on Economic, Social and Cultural Rights, 1966.

This Covenant was ratified by Sudan in 1986. The Covenant covers a wide range of rights such as the right to work under favourable conditions, to form trades unions, to have a family, adequate housing, food, physical and mental health, education and so on. However, to be realistic, the Covenant requires the State to enforce these rights "to the maximum of its available resources" with a view to achieving progressively those rights by all appropriate means. This should mean that the available resources should be used in the best way possible to realise these objectives. However, as has been manifested time and again in Sudan, such rights and needs do not in fact receive the appropriate attention due to them. Priorities are normally given to such government expenditures whose priority should be secondary, such as the numerous and lavish expenses spent on government Ministers, Ministers of State, Advisors, Experts at the Central and local governments, with high salaries, cars, staff, housing, drivers, travel, security officers and so on. The number and

[6] The UN Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities as well as the African Charter on Human and Peoples' Rights, to which Sudan is a party, are not discussed further.

cost of embassies abroad is symbolic, simply as a prestigious appearance, and unnecessary expenses are incurred at celebrations of different occasions. Significantly, the cost of the security organisations to ensure the continuity of the regime and the spread of corruption at high levels dealing in billions of pounds with no accountability constitutes a serious misallocation, if not misappropriation, of resources. All of these factors beg the question of whether the government in fact puts any priority on the realisation of economic, social and cultural rights "to the maximum of its available resources". The wave of protests all over the country in September 2013, and the manner in which the Government has repressed them, stands out as adequate confirmation of this fact. The present economic situation is certainly unsustainable and the situation is likely to erupt into further mass protests and repression at any time.

- The International Covenant on Civil and Political Rights 1966 (ICCPR).

Sudan ratified this Covenant in 1986, without any reservations. One should perhaps deal with some of the more pertinent provisions of the Covenant in the light of the laws and practices prevailing in the country to assess the extent to which the principles laid down in the Covenant are complied with, taking into account the State's obligation under article 27 (3) of the INC referred to above.[7]

In this connection, several State Security Acts, including the most recent Act of 2010, have created a State Security Organisation with extremely wide powers: summoning persons for investigation, arrest, and detention for several months without charge or trial, with no real judicial supervision. Such arbitrary powers are in direct contradiction with the express provisions of both the CPA (article 2.7.2.4) and the INC (article 151(3)) which both provide that the Security Organisation shall be a professional body which should gather and analyse State security and render advice to the appropriate authorities. As such it should have no "policing" powers. But all the successive security Acts adopted so far, in clear contradiction to the CPA and the INC, give the Organisation such unlimited powers. These powers are regularly used against alleged opposition groups in suppressing freedoms of assembly, speech, opinion, and in controlling the media, travel and freedom of movement. Added to this is the erosion of the independence of the Judiciary, including the Constitutional Court, where all complaints of such violations are simply dismissed in the name of the needs of "public security".

Freedoms of assembly and of association are also curtailed under arbitrary legislation such as the Trades Unions Acts, the Press and Publications Act, the Act regulating the registration and activities of NGOs, as well as the provisions of the Criminal and Criminal Procedure Act on public assembly.

It is certainly worth mentioning that in the administration of criminal justice, article 14 of the ICCPR includes several provisions for the guarantee of a fair trial, including the right to a fair trial before a competent, impartial and independent tribunal. A recent amendment of Sudan's law enables the authorities to try civilians before military courts, a process which does not apply in any democratic system, as it 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.[8]

[7] See further Amin M. Medani, 'A Legacy of Institutionalized Repression: Criminal Law and Justice in Sudan' in Lutz Oette (ed.), *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan* (Ashgate, Farnham, 2011), pp. 67-88.

[8] See further REDRESS and Sudanese Human Rights Monitor, *Sudan: Amendment of Armed Forces Act runs counter to international standards and risks fostering human rights violations* (23 July 2013), available at http://www.pclrs.org/downloads/Submission-on-Amendment_Sudan-Armed-Forces-Act_23July2013.pdf

Finally, it should also be stated that the military law, the State Security Law and the Police law provide an unjustified immunity from prosecution (for whatever acts or omissions committed in the course of their duties), which can only proceed with the permission of their superior leaders or directors. This is a clear violation of the ordinary citizen's access to justice.

Sudan has not ratified the Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW), presumably on the basis of interpreting some of its provisions as being against the principles of Islamic *Shari'a.* Several Arab Muslim countries, including Algeria, Bahrain, Egypt, Jordan, Kuwait, Lebanon, Libya, Mauritania, Oman, Qatar, Saudi Arabia, Iraq, Tunisia, United Arab Emirates (U.A.E.), Yemen, Djibouti and Syria have become parties to the Convention, although some have made reservations to it. Supporters of CEDAW in Sudan argue that Sudan's Personal Status Act, which governs the status of women, is merely based on male chauvinism or religious fanaticism and has no basis in Islamic law. Examples of this include the age of marriage, consent thereto, naming of an agent (or *wakeel*) to give away the wife, dress code, and the capacity of giving evidence in court, especially in the proof of rape which has resulted in grave violations of women's rights in the Darfur conflict.

Sudan has also failed to sign or accede to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 1984. The reason for this is that although the Sudanese Penal Code criminalises torture as a "treatment", albeit not fully in conformity with article 1 CAT, it does not criminalise "punishments" prescribed by the Penal Code (i.e. amputation, cross-amputation, stoning to death and flogging) on the basis that such punishments are prescribed by the Quran. Although many jurists have put forward counterarguments based on Islamic *fiqh* about preconditions and socio-economic circumstances, as well as the evidence needed to prove such acts, and although many Islamic countries have done away with such punishments, Sudan still persists in maintaining them. There is confusion on the application of the Penal Code provisions on amputation. Although there seems to be an undeclared moratorium, some judges do adhere to the letter of the law and pronounce amputation decisions, although execution of such sentences is very rare, or, perhaps, undeclared. This makes a mockery of the law.

One important observation here is that whereas the CPA (article 1-6-2) expressly provides, "No one shall be subjected to torture or to cruel, inhuman or degrading <u>treatment or punishment</u>, Article 33 of the INC provides "No one shall be subject to torture or the cruel, inhuman or degrading <u>treatment</u>." Thus the word "punishment" has been deleted from the INC.

1.4. Conclusion

In conclusion, one could say that since independence of the country, successive Sudanese political regimes, whether parliamentary democracies or military regimes, have not, with varying degrees, succeeded in building a culture of human rights or fundamental freedoms, either as a culture among their citizenry, or in their endeavours to seek and maintain political power. Such a generalization should indeed be qualified by the difference between the attitudes of the two regimes. Parliamentary democracies, by nature, are more inclined to the recognition and relative respect of human rights principles, whereas to the military, human rights are by their very nature incompatible with their military culture and political orientation. Nevertheless, parliamentary Governments did not quite live up to people's expectations.

Finally, it must be emphasised that the 2005 Constitution, in particular the Bill of Rights included therein, if implemented, should have been the ultimate goal for the country to achieve since independence. The fact that neither the so-called Government of National Unity nor the NCP

government, after separation of the South, succeeded in living up to the implementation of the Bill, demonstrate that its significance as an unprecedented historic document embodying the most noble principles of human rights has not been recognised in practice.

To turn to the future, having lost the South, the country is now at the crossroads of further disintegration, as a result of the ongoing armed conflicts in Darfur, Southern Kordofan, Southern Blue Nile, Abyei, in addition to the serious violations of human rights in general and the fast-deteriorating economic situation. It would therefore seem imperative to implement the following measures as a matter of urgency:

- The adoption of a new Constitution in which all Sudanese people, without exception, shall participate;
- Free and fair elections under a new democratic law;
- The inclusion in the new Constitution of a Bill of Rights along lines similar to those in the 2005 INC, while addressing remaining gaps and inconsistencies;
- Accession to or ratification of international and regional treaties to which Sudan is not a party such as CEDAW and its Optional Protocol, CAT and its Optional Protocol and the International Criminal Court (ICC) Rome Statute;
- Implementation of a comprehensive law reform process to ensure compliance of current law with the principles of international human rights principles;
- Ensuring the independence of the judiciary, especially the recruitment, assessment of performance and termination of judges by an independent Judicial Service Council;
- Vetting the public service to ensure qualification and experience in the services rather than political affiliations and partisanship; and
- Adopting a programme of national reconciliation and transitional justice to deal with past grievance and end armed conflicts and feuds.

2. 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 (Mohamed Abdelsalam Babiker)*

2.1. Introduction[1]

This chapter addresses the critical question of why successive Sudanese Bills of Rights have to date failed to provide adequate protection and to ensure the effective exercise of civil and political rights (i.e. the rights to personal liberty and security and to be free from torture, inhumane, cruel or degrading treatment or punishment, non-discrimination and equality before the law, fair trial guarantees, freedom of expression and the media, and religious rights and freedoms).[2] In contrast to positions adopted by many stakeholders including civil society organisations, the Government of Sudan, political parties and legal scholars, this chapter argues that there is a need to completely review the Bill of Rights of Sudan's Interim National Constitution 2005 (INC) in terms of its substantive guarantees and its implementation mechanisms. It therefore focuses on the substance of the Bill of Rights from a civil and political rights perspective and develops a set of concrete proposals aimed at addressing the substantive shortcomings of some of the provisions contained in the Bill of Rights.

The chapter also address the *de facto* practice of derogations in Sudan and its "permanent" impact on suspending substantive constitutional rights and freedoms under the guise of national security or public order or due to the existing armed conflicts. Although derogation is legitimate under article 4 of the International Covenant on Civil and Political Rights (ICCPR), the imposition of permanent emergencies in Sudan is a real threat to the enjoyment of civil and political rights.

A further focus concerns an area rarely raised or addressed in Sudan's constitutional debate, namely the reception of international human rights treaties within the Sudanese legal system and the inherent conflicts between different legal norms or regimes, including international human rights treaties, constitutional Bills of Rights, Islamic or Shari'a laws and customary laws. This issue raises a fundamental question that needs to be tackled in any new agenda for constitutional reform in Sudan: Why are international human rights standards or norms not transformed or incorporated in the national legal system even though article 27 (3) INC reflects a monist approach to international law by stipulating the direct incorporation of international human rights treaties ratified by the Sudan? Article 27 (3) is hailed by many activists, civil society groups and academics as transforming all ratified international human rights law at the national level under the monist theory of international law. However, the automatic transformation of international law into the national legal system has raised and continues to raise serious difficulties in practice in terms of its actual implementation by law enforcement officials as well as courts. The pertinent question is, therefore,

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* Dr. Mohamed Abdelsalam Babiker is Associate Professor at the Faculty of Law, University of Khartoum, and Head of the Department for International and Comparative Law.

[1] Some parts of this chapter, in particular those related to the Bill of Rights criminal justice aspects are published as part of a position paper entitled 'Criminal Justice and Human Rights: An agenda for effective human rights protection in Sudan's new constitution', in February 2012. It was written by Mohamed Abdelsalam Babiker, Assistant Professor, University of Khartoum Faculty of Law, in his personal capacity and edited by REDRESS. It was also published as part of the Project for Criminal Law Reform in Sudan (www.pclrs.org), a joint initiative of REDRESS (www.redress.org) and the Sudanese Human Rights Monitor. Also, other aspects were presented at the Civil Society Conference held in Nairobi, Kenya, in May 2013 on the 'Role of civil society in constitution making in Sudan'. This chapter is further edited and includes more sections to reflect the author's strong view that substantive and institutional changes are needed for any constitutional protection of human rights in Sudan a well as any law or policy making in this country.

[2] It is outside the scope of this chapter to discuss constitutional protection of economic social and cultural rights (education, health, work, etc). On this, see in this report, Chapter 3 by A. A. Ahmed, 'Economic, Social and Cultural Rights under the Constitutional Bill of Rights in the Sudan'.

whether article 27 (3) needs to be maintained or whether the new constitution should opt for a dualist approach to international law, or even a "third way" for the sake of effective implementation of future constitutional Bills of Rights. As experience to date shows, the effective implementation of any Bill of Rights in Sudan requires a clear understanding of the nature and modalities of the reception and incorporation of international human rights law at the national level through a monist or dualist theory. There is no prospect of human rights protection in Sudan as long as the uneasy relationship between conflicting hybrid legal norms is not adequately addressed.

Resolving gaps at the "substantive" level of the Bills of Rights is not sufficient to ensure the effective protection of civil and political rights. Indeed, the constitutional debate should venture beyond the text of the Bill of Rights itself and find ways and means to advocate for two principles: "constitutionalism" and "effectiveness" of institutional mechanisms. The former calls for ensuring the rule of law while the latter addresses institutional reform and identifies the mechanisms that need to be put in place to ensure effective implementation of the Bill of Rights; if these are not available, constitutional protection will remain "ink on paper" without any teeth. In this context, the chapter examines the substantive provisions establishing constitutional bodies and the Comprehensive Peace Agreement (CPA) commissions tasked under the INC with protecting and promoting human rights (i.e. the Human Rights Commission, National Commission for the Review of the Constitution (NCRC), and the National Judicial Service Commission) and calls for review or reform.

Finally, the chapter argues that for any constitutional reform to be effective and meaningful, institutional reform is needed for important sectors such as the Police and the National Intelligence and Security Services (NISS). Any constitutional review process aimed at the effective protection of human rights in Sudan must include security sector reform (SSR) as one of its ultimate priorities. In particular, the new constitution should address the NISS's powers of arrest and detention, immunities of NISS personnel, as well as accountability and effective parliamentary and judicial oversight. The widespread practice of detentions, pre-censorship and other abuses are all caused by the absence of effective institutional mechanisms that subject such bodies to oversight and accountability and that ensure that applicable legislation is brought into conformity with international human rights standards and treaties to which Sudan is a party. In addition, the paper highlights the important role played by the judiciary, stressing the need for the courts to assume and effectively exercise their supposed role in protecting and promoting human rights. It proposes that the Constitution specifies judicial powers and vests courts with greater control over the whole process of administration of criminal justice from arrest to the post trial stage (including the right to habeas corpus) to reparation.

2.2. Civil and Political Rights in the Interim National Constitution: Substantive Shortcomings

This part critically examines the INC's Bill of Rights' substantive gaps as far as civil and political rights are concerned. It reviews thematic areas related to (i) the right of non-discrimination and equality before the law; (ii) criminal administration of justice; (iii) religious freedoms and minority rights; (iv) freedom of expression and the media; and (v) freedom of association. The following provisions of the INC 2005 are of particular relevance in this regard: the right of non-discrimination and equality before the law (article 31); fair trial guarantees, i.e. presumption of innocence, fair and public hearing, the right not to be compelled to testify or to confess guilt, prohibition on the use of evidence obtained through unlawful means (article 34); the right to liberty and security of the person (arrest, detention) (article 29); the prohibition of torture (article 33); the right to litigation including immunity (article 35); restriction on death penalty (article 36); and the rights of women (in the context of non-discrimination) (articles 31, 32). These rights are spelled out explicitly in several

articles of the Bill of Rights and form an integral part of it in so far as they are recognised in international treaties to which Sudan is a party (article 27(3)).

2.2.1. Rights to Non-Discrimination and Equality before the Law

The importance of the concepts of equality and non-discrimination cannot be overstated. It has been suggested that "equality and non-discrimination constitute the single dominant theme of the International Covenant on Civil and Political Rights (ICCPR)",[3] and this strong emphasis is entirely appropriate; discrimination is at the root of virtually all human rights abuses,[4] an experience reflected in the Sudanese context.

Article 31 of the INC states that "[a]ll 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." The grounds of non-discrimination and equality before the law under the INC are not as comprehensive as those found in articles 2(1) and 26 of the ICCPR, as article 31 omits reference to "national or social origin, property, birth, or other status". Article 31 also lacks detail and neither uses the language of "obligations" nor specifies that the State should take proactive measures to ensure realisation of this right. This is particularly important in a country such as the Sudan in which issues of non-discrimination and equality before the law are closely linked to inherent societal problems related to religion, customs and equality between men and women. The Bill of Rights should include an explicit duty of the State to respect and ensure respect of the rights guaranteed therein to all persons without discrimination. As in the case of article 26 of the ICCPR, it is imperative that the State takes proactive measures to prohibit discrimination. Therefore, article 31 should stipulate specifically that "the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground". This is an extremely important issue in any forthcoming constitutional Bill of Rights given the fact that Sudan has a hybrid legal system derived from "traditional" Shari'a law as well as customary laws which may give rise to discrimination against certain individuals and groups including religious, ethnic and linguistic minorities.

One of the serious limitations of article 31 and the Bill of Rights in general is that it does not explicitly prohibit advocacy of various forms of national, racial or religious hatred which may amount to incitement to discrimination, hostility or violence.[5] Equally, the Bill of Rights does not prohibit the dissemination of ideas or theories of superiority of one race or groups of persons as provided for in article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) to which Sudan is a party. This article requires States to enact criminal legislations to punish such acts.[6] While article 4 of the ICERD is already part of the Bill of Rights by virtue of article 27(3) INC, an express prohibition would be welcome to enhance awareness and strengthen protection. The Sudan is ethnically and religiously diverse, and is afflicted with chronic armed conflicts and

[3] Bertrand Ramcharan, 'Equality and Non-Discrimination', in Louis Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press, New York, 1981), p. 246.

[4] Sarah Joseph, Jenny Schultz, and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, 2005), p. 680.

[5] However, national, racial, religious hatred was addressed as part of article 39 of the Bill of Rights but in the context of media ethics and obligations. The Article provides that "all media shall abide by media ethics and media shall not incite religious, racial, cultural hatred or call for violence or war".

[6] Article 4 (a) of the ICERD provides that states parties "shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts against ant race or groups of persons of another colour or ethnic origin, and also the provision of assistance to racist activities, including the financing thereof".

violence in which incitement and advocacy of hatred and "ethnic criminalisation" have been used as a ground for prosecuting members of certain ethnic groups.[7]

Article 32 (1) of the Bill of Rights requires the State to guarantee equal rights of men and women in the enjoyment of all civil, political, social, cultural and economic rights, including the right to equal pay for equal work and other related benefits. The State shall also promote the rights of women through affirmative action (article 32 (2)). However, this article does not (as in the case of article 3 of the ICCPR) impose direct obligations on the State to take all necessary steps to enable women to enjoy those rights, including the removal of discriminatory laws (both direct and indirect) against women in various areas. This includes health, education, employment and labour rights, participation in political and public life, citizenship or rights of non-citizens.[8] It also comprises the right of women to autonomous access to the courts, women's rights to give evidence as witnesses on the same terms as men,[9] and laws which impose more severe penalties on women than on men for adultery and other offences that violate the requirement of equal treatment.[10] These criminal laws are applied through what is known as the public order regime which has serious adverse impacts on the lives of women and girls, particularly the poor and other members of marginalised groups.[11] The system of public order laws that adversely affect women are applied through four principal legal mechanisms: the Public order laws (i.e. Khartoum Pubic Order Act 1998),[12] the Criminal Act 1991, the Public order police and the Public order courts.[13] This regime discriminates against women and is inherently incompatible with both the Bill of Rights and Sudan's obligations under international law.[14] Hence, the right to equality before the law and freedom from discrimination (as protected by article 26 of the ICCPR) should also form an express part of article 32 of the Bill of Rights.

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[7] For example, the attacks on the city of Omdurman by the Darfur rebel forces Justice and Equality Movement (JEM) led to the arrests and detention of thousands of suspected Darfurian citizens including women and children, simply on the basis of ethnic features, colour, accent or place of living. The separation of the country has also raised the spectre of enhanced discrimination of persons of Southern Sudanese origin. The current armed conflict in South Kordofan and Blue Nile states also raise similar concerns. See UN Special Rapporteur on the Situation of Human Rights in the Sudan, Sima Samar, UN Doc. A/HRC/9/13 (2008), paras. 20-33. See Amin M. Medani, 'A legacy of Institutionalized Repression: Criminal Law and Justice in Sudan', in Lutz Oette (ed.), *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan* (Ashgate, Farnham, 2011), pp. 79-80.

[8] See *Aumeeruddy-Cziffra et al. v. Mauritius*, Communication No. 035/1978 (9 April 1981) and Human Rights Committee, *General Comment No. 28: Equality of rights between men and women (article 3), UN Doc.* CCPR/C/21/Rev.1/Add.10 (29 March 2000), para. 31.

[9] See HRC, *General Comment No. 28*, paras. 3 and 18.

[10] See section XV of the Criminal Act 1991 which includes offences such as adultery, rape, sodomy, incest, gross indecency, indecent and immoral acts, practicing prostitution, seduction. On these offences see REDRESS and KCHRED, *Reforming Sudan's Legislations on Rape, and Sexual Violence*, 2008, available at http://www.redress.org/downloads/publications/Position%20Paper%20Rape.pdf

[11] See, Report of Strategic Initiative for Women in the Horn of Africa (SIHA), *Beyond Trousers, The Public Order Regime and the Human Rights of Women and Girls in Sudan*, A Discussion Paper, Submission to the 46th Ordinary Session of the African Commission on Human and Peoples' Rights, Banjul, the Gambia (12th November 2009), p. 5.

[12] Section 26 of this Act provides for penalties including imprisonment, fine, confiscation of goods, and lashing. Section VIII of the Criminal Act 1991 entitled "Offences against Public Tranquillity" and part XV "Offences of Honour, Reputation and Public Morality". Many of the provisions are vaguely worded and leave broad discretion to law enforcement officials and the judiciary, in particular article 152.

[13] According to SIHA, *Beyond Trousers*, above note 11, pp. 14-15: "Public Order Courts (POC) were established by a decision of the Chief Justice in 1995. They are essentially parallel courts outside the central legal system, a tradition which began with the creation of emergency courts during the time of Nimeri... these parallel courts have been courts of summary jurisdiction with greatly restricted procedural safeguards." The report further states "the trial process is intended to be swift (a hearing may not take more than few minutes and the arrest, detention, imposition of penalty generally occur within 24 hours); there is no requirement to permit the accused to prepare a defence; the right to legal assistance, let alone legal aid... Once a person has been found guilty of an offence the punishment is immediately imposed."

[14] See Asma Abdel Halim 'Gendered Justice: Women and the Application of Penal Laws in Sudan', in Oette, above note 7, pp. 227-241.

2.2.2. Administration of Criminal Justice

This sub section examines the substantive provisions of the Bill of Rights from a criminal justice perspective.[15]

(i) Freedom from Arbitrary Arrest and Detention

The prohibition of arbitrary arrest and detention is affirmed in article 29 of the Bill of Rights, which stipulates that '[e]very person has the right to liberty and security of the person; no person shall be subjected to arrest, detention, deprivation or restriction of his/her liberty except for reasons and in accordance with the procedures prescribed by law.' This article is one of the most important provisions of the Bill of Rights as it deals with the rights of accused persons that are constantly violated in the Sudanese context. However, a closer analysis of this article shows that it suffers from substantive and procedural gaps.

Article 29 does not include the word "*arbitrary*" when referring to arrest, detention and deprivation of liberty. The lack of arbitrariness is central to the prohibition under international law, and includes both lawfulness and the modalities of enforcement of the law.[16] Another serious gap is the lack of *procedural guarantees* that help ensure enjoyment of its substantive guarantees. A comparison between article 29 and the procedural standards included in article 9 (2) to (5) of the ICCPR shows that the former is limited in terms of its "procedural scope". Requirements such as the right to be informed of a criminal charge; prompt presentation before a judicial officer or other person authorised by law; length of pre-trial detention; right to release pending investigation; right of habeas corpus; and the right to compensation are not included in article 29. These procedural guarantees are of utmost importance for defendants at the pre-trial stage. This applies in particular to judicial safeguards. Notably, article 29 (unlike article 9 (3) of the ICCPR) does not require that any person arrested or detained on suspicion of having committed a criminal offence be brought promptly (i.e. within a few days) before a judge or other judicial officer authorised by law to exercise judicial power.[17]

The protection against arbitrary deprivation of liberty is in practice further limited by Sudanese criminal laws, security laws and anti-terrorism legislation. Article 29 provides that persons can be deprived of their liberty "for reasons and in accordance with the procedures prescribed by law". However, the laws in question are not sufficiently specific to allow individuals to foresee the consequences of their action. They provide for wide grounds of arrest and detention and there are persistent concerns about violations of the right of suspects in criminal cases. The NISS Act 2010, in particular, allows security officers, who are evidently not judicial officers authorised by law, to arrest and detain individuals for a maximum period of four and a half months before a detained person must be brought before a judge.[18] The Criminal Procedures Act 1991 specifies a period of three days within which a person needs to be brought before a judge and provides for a number of

[15] See for a comprehensive review of key areas of Sudan's criminal law ('repressive criminal legislation, arrest, detention and fair trial, accountability for international crimes and criminal law and gender-based violence') the respective chapters by Amin Medani, Nabil Adib, Mohamed Abdelsalam Babiker and Asma Abdel Halim in Oette, above note 7.

[16] Joseph et al., above note 4, pp. 308-9. See also *Womah Mukong v. Cameroon*, Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991 (1994).

[17] See on the notion of promptness, Human Rights Committee, General Comment No. 8: *Article 9* (1982), para. 2, and Joseph et al., above note 4, pp. 324-5.

[18] See article 50 (1) (f), (c) (g), (h) on the powers of arrest and detention given to NISS members and Director under the Act.

safeguards.[19] However, pre-trial detention can be extended for a period of six months, after which any further extensions need to be approved by the Chief Justice.[20] The problem is that the Act stipulates neither a time limit for pre-trial detention nor a timeframe for trials.[21] In practice, it is for the Chief Justice to decide on the time limit in any given case, which carries the risk of arbitrary decision-making without the possibility of judicial review.[22] This lacunae in Sudanese criminal laws needs to be addressed in any constitutional review process as pre-trial detention should be an exception and as short as possible, as recognised in article 9(3) of the ICCPR.[23]

Article 29 does not include one of the most important guarantees, namely 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. Sudanese laws do not provide detainees with an effective remedy against arbitrary detention.[24] It is essential that this right be included as part of the Bill of Rights of the forthcoming constitution, together with the right of access to a lawyer of one's choice. These rights, which constitute critical safeguards against both arbitrary detention and torture, are presently not provided for in the NISS Act 2010.[25] Access to lawyers is critical to *habeas corpus*; the Human Rights Committee has clearly linked access to legal representation with enjoyment of the right in article 9(4) of the ICCPR, particularly in instances of *incommunicado* detention.[26] The right for a lawyer to be present during the pre-trial stage is of particular importance in the Sudanese context as criminal procedure laws do not explicitly state that lawyers have the right to be present during the investigation stage or be able to review the legality of detention. Even where detention is lawful under domestic law, lawfulness in article 9 (4) of the ICCPR means "lawfulness" under the Covenant. In this sense, "lawful" equates with "non arbitrariness"[27] and must include the right and opportunity to effectively challenge the legality of detention.

Finally, article 29 does not provide for the right of compensation to persons who have been unlawfully deprived of their liberty. Article 9 (5) of the ICCPR prescribes payment of compensation for unlawful detention. According to the Human Rights Committee, this includes cases where detention is 'lawful' under domestic law but contrary to the Covenant.[28] The forthcoming constitution should explicitly provide for the right to enforceable compensation in the event of unlawful deprivation of liberty as provided for in article 9 (5) of the ICCPR and other international human rights instruments.[29]

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[19] The General Principles stipulated in article 4 of the Criminal Procedure Act 1991 provide some safeguards including the rights to be informed of the reason of arrest, to prompt access to a lawyer of one's choice, to access to a doctor and to communicate with a family member.

[20] Under Article 79 of the Criminal Procedures Act 1991 the Prosecution Attorney may renew detention in police custody for a period not exceeding three days, after which the judge may order detention for a period for one week, which can be extended once. If the detained person has been charged, the judge may order to extend detention every two weeks for a total of six months.

[21] See Nabil Adib, 'At the State's Mercy: Arrest, Detention and Trials under Sudanese Law', in Oette, above note 7, pp. 121-138, at pp. 128-9.

[22] Ibid.

[23] See General Comment 28, above note 8, para. 3.

[24] REDRESS and KCHRED, *Criminal law and human rights in Sudan*, A Baseline Study (2008), p. 13.

[25] See articles 50 and 51 NISS Act 2010.

[26] In *Hammel v Madagascar* (155/1983) (3 April 1987), incommunicado detention rendered habeas corpus action impossible.

[27] See *A v Australia* (560/93), UN Doc. CCPR/C/59/D/560/1993 (30 April 1997), para. 9.5.

[28] Ibid., para. 11.

[29] Article 5 (5) of the European Convention on Human Rights provides that "[e]veryone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation." See also *B. Whyte v. Jamaica,* Communication No. 732/1997 (Views adopted on 27th July 1998), in UN Doc. *GAOR*, A/53/40 (vol. II), 200, para. 7.4. See also European Court of Human Rights*, Case of Brogan and Others v. the United Kingdom*, Judgment of 29 November 1988, Series A, No. 145-B, 35, paras. 66-7.

(ii) Fair Trial Guarantees

Fair trial guarantees are enshrined in international human rights norms and instruments to which Sudan is a party, such as the ICCPR and the African Charter on Human and Peoples' Rights.[30] Sudan's Bill of Rights guarantees the right to a fair trial under article 34 of the INC which states that "in all civil and criminal proceedings, every person shall be entitled to a fair and public hearing by an ordinary competent court of law in accordance with procedures prescribed by law". Article 34 also guarantees detainees' right to be immediately informed of the reasons of their arrest and of having charges promptly brought against them; the right of accused persons to be tried in their presence on any criminal charges without delay, as well as their right to defend themselves through a lawyer of their choice.

However, one of the structural limitations of the Bill of Rights is that articles 29 (personal liberty and security of person) and 34 (fair trial) were actually confused in terms of their logical relationship or sequence. The rights of the accused persons in both articles were not carefully drafted and do not take into consideration that criminal proceedings pass through various stages from arrest to post trial.

For example, article 34 (2) (which focuses on fair trial) provides that "every person who is *arrested* shall be informed, *at the time of arrest*, of the reasons for his/her arrest and shall be promptly informed of any charges against him/her" (emphasis added). The requirement of prompt information, however, only applies once the individual has been formally charged with a criminal offence (article 14 (3)(a) of the ICCPR). It does not apply to those remanded in custody pending the result of police investigations, which is covered by article 9 (2) of the ICCPR.[31] The language of article 34 therefore systematically belongs to article 29 (right to liberty and security). The use of the words "arrest" and "the time of arrest" indicates clearly the degree of confusion between articles 29 and 34 of the Bill of Rights; both articles guarantee human rights of the accused but these guarantees operate at different stages of criminal proceedings. This confusion should be addressed in any constitutional reform as fair trial guarantees are extremely important in the Sudanese context. These guarantees are, no doubt, linked to the preservation of other concomitant rights including the right to life and the prohibition of torture. Practice indicates that many accused persons in Sudan have been compelled to confess guilt while in custody or detention.[32]

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[30] Sudan's international obligation to provide any accused with a fair trial before Sudanese courts derives from article 14 of the ICCPR and from article 7 of the African Charter on Human and Peoples' Rights. Article 14 stipulates that "everyone is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". International standards require states to respect a number of guarantees in any criminal trial, including the right to be presumed innocent, the right to be informed promptly of the charges, the right to be represented and to communicate in confidence with legal counsel of their choice. Furthermore, defendants have the right not to be compelled to confess guilt and any evidence elicited as a result of torture or other ill-treatment must be excluded. The African Commission's Principles and Guidelines on the Rights to Fair Trial and Legal Assistance in Africa provides more instructions regarding access to legal aid, the conditions of detention and other elements such as judicial proceedings that contribute to guaranteeing the right to a fair trial.

[31] It states "anyone who is arrested shall be informed, at the time of the arrest, of the reasons for his arrest and shall be promptly informed of any charges against him."

[32] The Working Group on Arbitrary Detention issued a legal opinion in November 2008 in which it raised serious questions about the fairness of the trial of individuals accused of having committed the murder of newspaper editor Mohamed Taha Mohamed Ahmed. The opinion states: "No judicial system, and in particular, the judicial system of a country that ratified [the ICCPR…] can consider as valid a confession obtained under torture and revoked before a court, and a sentence based on such confession." See also Statement on 19 April 2009 of five UN human rights experts strongly condemning the execution of nine of the same defendants issued by the Rapporteur of the Working Group on Arbitrary Detention, Ms. Manuela Carmena Castrillo, the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr. Philip Alston, the Special Rapporteur on the independence of judges and lawyers, Mr. Leandro Despouy, the Special Rapporteur on the situation of human rights in the Sudan, Dr. Sima Samar, and the Special Rapporteur on torture and other cruel, Inhuman or degrading treatment or punishment, Mr. Manfred Nowak, at:

Furthermore, several national laws are not in harmony with international human rights treaties[33] and contradict the fair trial guarantees enshrined in article 34 (despite the substantive limitations or gaps in this article). For example, the Evidence Act 1993 does not outlaw evidence obtained through illegal means if such evidence is corroborated by other evidence.[34] In terms of judicial practice, verdicts have in some instances been based on confessions even though the defendants alleged that they had been obtained under torture.[35] Allegations raised by accused persons that they were forced to confess guilt have been routinely ignored.[36] At any stage of the case, judges should have the authority to consider allegations that the rights of the accused have been violated. Guideline 16 of the UN Guidelines on the Role of Prosecutors provides that prosecutors shall refuse evidence that has been obtained by recourse to unlawful methods.[37] It is therefore imperative that the forthcoming constitution unequivocally prohibits the use of confessions obtained by means of torture and enshrines the prohibition of self-incrimination.

The constitution should also address repressive laws affecting fair trial guarantees such as the NISS Act 2010, the Criminal Act 1991 (i.e. crimes against the State) and emergency and anti-terrorism legislation which provides the authorities with broad powers that undermine the right to fair trial, including the setting up of special courts.[38] Sudan's practice illustrates that the systematic use of these laws has undermined the rights of accused persons to have fair trial guarantees and has widened the scope of prosecutions.[39] These laws are overly broad and vague, provide grounds for arbitrary arrests and prolonged detention and violate the right to fair trial. The forthcoming constitution should provide comprehensive safeguards and fair trial guarantees, and ensure that rights such as *habeas corpus* cannot be derogated from in times of emergencies.[40]

The right to a fair trial also includes the right of access to justice, and is closely related to the right to an effective remedy, which is reflected in article 35 of the Bill of Rights. This right requires States to remove barriers to access to justice, including amnesty and immunity laws that may frustrate the right to reparation and accountability for human rights violations.[41]

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http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=9245&LangID E.

[33] See article 14(3)(g) of the ICCPR "in the determination of any criminal charge against him", every person has the right "not to be compelled to testify against himself or to confess guilt"; article 8(2)(g) of the American Convention, everyone has "the right not to be compelled to be a witness against himself or to plead guilty"; article 8(3) "a confession of guilt by the accused shall be valid only if it is made without coercion of any kind"; article 55(1)(a) of the Statute of the International Criminal Court and articles 20(4)(g) and 21(4)(g) of the respective Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia contain protection against self-incrimination.

[34] Article 20 of the Evidence Act of 1993 appears to rule out the use of evidence extracted under torture. However, article 10 of the Act gives judges discretion to admit any evidence if they determine it to be acceptable, in particular where corroborated by other evidence. See further below at (iv).

[35] See the submission of case *of Mayor Hussein Ishaq Sayo and others v. Director of North Darfur State Police and Others* lodged before the Sudanese Constitutional Court in 2007 (on file with author).

[36] See in particular the case concerning the killing of the journalist Mohamed Taha Mohamed Ahmed, *Ishaq al-Sanousi and others v successors of deceased Mohamed Taha Mohamed Ahmed*, Case No. MD/QD/121/2008 (Constitutional Court Order of 23 March 2009).

[37] See *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, 283, Chapter 7 - The Right to a Fair Trial: Part II – From Trial to Final Judgement,* Publications of the Office of the High Commissioner for Human Rights, UN, New York and Geneva (2003).

[38] The Emergency and Protection of Public Safety Act of 1997 (Act Number (1) 1998) also provides for the establishment of Special Courts without providing adequate fair trial.

[39] Similar practices have taken place in some Latin American countries and Sri Lanka. On these practices, see Medani, above note 7, pp. 59-65.

[40] For such guarantees see *Aksoy v Turkey*, 23 EHRR 533 (1996), paras. 67-87.

[41] See Mohamed Abdelsalam Babiker, 'The Prosecution of International Crimes under Sudan's Criminal and Military Laws: Developments, Gaps and Limitations', in Oette, above note 7, pp. 161-181.

(iii) The Death Penalty

Article 36 of the Bill of Rights prohibits the imposition of the death penalty on a person under the age of eighteen or a person who has attained the age of seventy and delays its imposition on pregnant or lactating women "after two years of lactation". However, the Bill of Rights does not ban the death penalty, which can be imposed in cases of retribution, *hudud*[42] or punishment for extremely serious offences. The formulation of the language of this article is vague and has created controversy in terms of its interpretation by the constitutional court, in particular with regard to the age of criminal responsibility of children under Shari'a law. The constitutional court struggled to settle the question whether children are exempted from the death penalty in *hudud* crimes.[43] National laws are also contradictory as far as the age of criminal responsibility of children is concerned.[44] In general terms it needs to be emphasised that the mandatory imposition of the death penalty is contrary to the right to life under international law.[45] In addition, the retention of the death penalty runs counter to a growing trend towards its abolition worldwide.[46]

(iv) The Prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Article 33 of the Bill of Rights (prohibition of torture) fails to prohibit cruel, inhuman or degrading punishment, such as corporal punishments, an omission that is incompatible with international standards binding on Sudan and forming part of the Bill itself by virtue of article 27(3).[47] In addition, in line with recent constitutional practice in countries such as in Morocco and Nepal,[48] the article pertaining to the right to be free from torture should stipulate a duty to criminalise torture and recognise a specific right to reparation for torture, both of which are absent in Sudan's law.[49]

In terms of judicial practice there are serious concerns that when courts address the right to a fair trial, the right not to be subjected to torture/ill-treatment, and prolonged detention without judicial oversight, Sudanese judges routinely do not order investigations into allegations of torture. In addition, evidence obtained through torture can be accepted by Sudan's courts and contribute to proof of a defendant's guilt. The Evidence Act 1993 does not outlaw evidence obtained through illegal or unlawful means. Article 10 of the Evidence Act 1993 permits evidence obtained through illegal means if corroborated by other evidence. Article 10 (1) (Evidence obtained by unlawful means) provides that "[w]ithout prejudice to the provisions on the inadmissible evidence, evidence shall not be rejected merely because it has been obtained by unlawful means whenever the Court is satisfied with the genuineness of its substance".[50] Practice indicates that many accused persons were compelled to confess guilt. When they subsequently retract their confession, Courts tend to

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[42] According to article 3 of Sudan's Criminal Act of 1991, "hudud offence" "means the offences of drinking alcohol, apostasy (ridda), adultery (zina), defamation of unchastity (quazf) armed robbery (hiraba) and capital theft".

[43] See constitutional court case, *Nagim Eldeen Gasm Elseed v (1) Government of Sudan and (2) blood heirs of Abdel Rahman Mohamed Ali*, Case no, MDG//GD/18/2005 (2/12/2008), Constitutional Court Journal, Vol. 2, 2011, pp. 399-424.

[44] See Mohamed Abdelsalam Babiker, 'Protection of Children Rights under Islamic Laws in Sudan: Conflict or Congruence with Human Rights and Humanitarian Law Norms', in Mohamed Abdelsalam Babiker, Maxence Dublain and Alexis Vahlas (eds.), *Child Soldiers and Protection of Children's Rights in Conflict and Post Conflict Environments: Realities and Challenges* (L'Armatan Publishing, Paris, November 2013).

[45] *Weerawansa v Sri Lanka*, UN Doc.CCPR/C/95/D/1406/2005 (14 May 2009), para.7.2.

[46] See http://www.amnesty.org/en/death-penalty.

[47] See REDRESS and SHRM, *No more cracking of the whip: Time to end corporal punishment in Sudan* (February 2012).

[48] See article 22 of the Constitution of Morocco, 2011, and article 26 of the Interim Constitution of Nepal of 2007.

[49] See REDRESS and SOAT, *National and International Remedies for Torture: A Handbook for Sudanese Lawyers* (2005), pp. 32-37.

[50] Article 10 (2) of the Evidence Act, however, provides that **"**a court may, whenever it deems it appropriate to achieve justice, not institute conviction by virtue of the evidence mentioned in sub-section (1) unless it is supported by further evidence."

ignore this. However, the Court may reject the evidence if it violates the principles of *Shari'a*, law, justice or public order.[51] This indicates that Sudanese laws in terms of sources of law give prominence to Islamic laws and observance of public order rather than applying international human rights law standards prohibiting torture. International human rights law dictates that the use of evidence and confessions obtained through torture is unlawful and should be expressly prohibited by national law. It is important to note in this context that the Human Rights Committee stated that "it is important for the discouragement of violations under article 7 [of the International Covenant] *that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment*" (emphasis added).[52] In this respect the Human Rights Committee has emphasised that "judges should have authority to consider any allegations made of violations of the rights of the accused during any stage of the prosecution".[53]

2.2.3. Religious Rights and Freedoms

Successive constitutions since Sudan's independence in 1956 have all stressed respect for religious rights and the principle of citizenship as the basis of equal rights and responsibilities among Sudanese irrespective of their religious affiliation. The current INC provides constitutional protection for religious rights and freedoms in the Guiding Principles. Article 6 of the INC 2005 provides that:

> [T]he State shall respect the religious rights to worship or assemble in connection with any religion or belief and to establish and maintain places for these purposes; establish and maintain appropriate charitable or humanitarian institutions; acquire and possess movable and immovable property and make, acquire and use the necessary articles and materials related to the rites or customs of a religion or belief; write, issue and disseminate religious publications; teach religion or belief in places suitable for these purposes; observe days of rest, celebrate holidays and ceremonies in accordance with the precepts of religious beliefs; communicate with individuals and communities in matters of religion and belief at national and international levels.

Article 38 of the Bill of Rights (Freedom of Creed and Worship) further guarantees religious rights and freedoms. It provides that:

> [E]very person shall have the right to the freedom of religious creed and worship, and to declare his/her religion or creed and manifest the same, by way of worship, education, practice or performance of rites or ceremonies, subject to requirements of law and public order; no person shall be coerced to adopt such faith, that he/she does not believe in, nor to practice rites or services to which he/she does not voluntarily consent.

However, it is pertinent to stress that in actual practice the Sudanese State, despite the above religious guarantees, does not take a neutral position towards all religious groups, including both Muslims and non-Muslims. In Sudan some members of minority religious groups are compelled to practice their religious rituals clandestinely, as they are systematically stigmatised and accused of heresy, particularly by some Salafists.[54] Hence the State as a neutral agent *must* treat all religious

[51] Article 9 (1) ibid. (Rejection of evidence).

[52] Human Rights Committee, General Comment No. 20: *Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment* (10 March 1992), para.12.

[53] See Human Rights Committee, General Comment No. 13: *Article 14* (1984), para. 15. See also the subsequent General Comment No. 32 on article 14, UN Doc. CCPR/C/GC/32 (2007).

[54] See Study on *Islam and Society in Sudan*', and '*Freedom of Religion and belief in Sudan*, Islamic Research project (IRP) (February 2013). The study was produced by Centre d'Etudes et de Documentation Economiques, Juridiques et Sociales–

actors equally otherwise it will be violating the principles of non-discrimination and equality before the law, discussed above as core principles in international human rights law. Also, States have the duty to refrain from discriminating against individuals or groups based on their religion and belief (obligation to respect); they are required to prevent such discrimination, including from non-State actors (obligation to protect); and must take steps to ensure that, in practice, every person in their territory enjoys all human rights without discrimination of any kind (obligation to fulfil).[55] Religious groups have the freedom to manifest their religion or belief, as enshrined in article 18 of the ICCPR.[56] The right to manifestation of religion is also problematic in Sudan, in particular with regard to some Muslim groups who adopt a liberal version of Islam. Some minority religious groups such as Shii'a, Baha'i and the Republican Brothers are restricted in their right to practice religion freely without discrimination or interference from the authorities despite the fact that the Sudanese Constitution as outlined above guarantees some of their rights. Also, the secession of South Sudan has adversely affected the freedom to worship or practice or manifest religion, as after the secession of South Sudan there is a wider perception that Sudan is a purely Muslim State and hence non-Muslims have limited space to practice and manifest their religion.[57]

Although successive Sudanese constitutions since 1956 claim to guarantee respect for religious rights irrespective of religious affiliation, and although Sudan is party to the ICCPR, in reality national laws are contradictory and do not offer protection for these rights in specific legislations. The stress on *Shari'a* as the main source of legislation enshrines limitations on the rights of non-Muslim communities while some laws impose serious penalties under criminal laws for beliefs which are unpopular, such as apostasy, while other laws do not provide protection against religious hatred, incitement of violence against religious minority groups. It is therefore apparent that Sudanese criminal laws restrict the rights to freedom of religion, including the rights of some Muslims groups. The inclusion of the crime of apostasy in the Criminal Act 1991, for example, is a clear violation of the principles of freedom of belief and, though it has been used infrequently, creates an environment of fear in *particular* among Muslim minority religious groups.

2.2.4. Freedom of Expression and Media Freedoms

Freedom of Expression is one of the key human rights according to the CPA (article 1.6.2.8) and the INC (article 39). One of the substantive gaps or deficiencies of the Bill of Rights is that it does not provide for the right of access to information and freedom of the media, particularly considering the lack of a comprehensive media law which includes a press act, as well as access to information and broadcast laws. Any constitutional review should therefore address in a comprehensive manner the freedom of the media and stipulate that national legislation should not be inconsistent with the principles enshrined in the INC and binding international human rights treaties. Access to information should be recognised as part of the Bill of Rights and regulated as a right in a separate law, setting out, in particular, areas related to restrictions on publication or obtaining of information on the grounds or the purposes of security or public health. This should only be permitted if those

Khartoum branch (CEDEJ-Khartoum) as part of the Research Programme 'Strengthening knowledge and dialogue with the Islamic/Arab world'.

[55] See *the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic Religious and Linguistic Minorities*, adopted by the UN General Assembly, 1992. It reaffirms the rights of persons belonging to minorities to enjoy all human rights and fundamental freedoms in accordance with the principles of non-discrimination and equality before the law.

[56] Human Rights Committee, General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18), Forty-eighth session (1993), para. 3.

[57] See Mohamed Abdelsalam Babiker, 'Freedom of religion, minority rights and the 'Islamization' of Laws in Sudan: From Independence to Secession of South Sudan' in Mashood Baderin (ed.), *Handbook on Human Rights and Islamic Law* (Edward Elgar Publishers, forthcoming 2014).

regulations are necessary, are exercised as in any democratic society and are clearly and specifically set out in the law.

One of the main concerns in the area of freedom of expression is the contradiction between the constitutional freedom of press guarantees and the restrictions imposed by the press and publication laws, particularly the contradiction between article 39 of the INC 2005 and the Press and Printed Materials Act 2009 (adopted on 8 June 2009 by the National Assembly). This Act is incompatible with international standards on freedom of expression provided for in article 19 of the ICCPR and does not conform to the Bill of Rights. First, the Act provides for wider restrictions of freedom of expression justified on various grounds including national security, public order and morals. The Act does not specify or define the scope of these grounds. Although article 19 (3) of the ICCPR permits freedom of expression to be limited by measures "provided by law", restrictions shall be interpreted narrowly. The excessive restriction under the Press and Printed Materials Act tends to destroy *the very existence of the right of freedom of expression*. Also, the National Press Council (the regulatory body of journalists and the printed press) is not an independent, self-regulatory or autonomous body, as it is controlled by the Presidency and supervised by the executive, represented by the Minster of Information. 11 out of 21 of its members are appointed directly by the Presidency and are members of the political parties of the National Assembly. Also, the National Press Council does not enjoy financial independence, as its budget as well as its financial auditing is controlled and supervised by the executive, which jeopardises its operational independence in contrast to independent self-regulatory bodies. The Press Council was granted unprecedented powers including imposing fines and revoking journalists' licenses, disciplinary measures against journalists, suspension of newspapers, and impositions on conditions of eligibility of journalists and chief editors. Journalists are also subjected to both tort and criminal liability and the Press Council is empowered to impose criminal sanctions for violations of the law.

The Act legitimises the licensing, confiscation and closure of newspapers and media outlets, as well as detention of journalists or publishers. Under article 24 of the Act, editors in chief are criminalised for the newspaper's editorial performance and held accountable for "whatever" is published in their newspaper. This, no doubt, restricts editors and makes them vulnerable to any sort of criminal sanctions. The right to seek, impart and receive information is not included in the Press and Printed Materials Act 2009. Article 25 (2) of the Act related to the right of journalists to obtain information from official sources according to the law is *meaningless* in the absence of Freedom of Information Act. Information related to national security, public health and other information cannot be accessed by the public as there are no substantive or procedurals laws which allow journalists to access information from government departments or official sources. Access to information should therefore be recognised as an explicit right in a separate law, and above all shall be an integral part of any forthcoming constitutional Bill of Right in Sudan.

2.3. The Reception and 'Domestication' of International Human Rights Norms through the 'Monism' or 'Dualism' Theories of International Law: A Dilemma

This section addresses the question of the relationship between international human rights law and national law and how the former law is received or incorporated at the national level. This question is critical as any effective protection of human rights in Sudan is also dependent on how it is dealt with. The fact that successive Sudanese Bills of Rights have to date failed to provide adequate protection and ensure the effective implementation of civil and political rights is due to the fact that the reception and domestication of international human rights norms in Sudan is confused. The absence of concrete legislative or judicial approaches towards international human rights law and norms explains why constitutional Bills of Rights are not "translated" into practice and incorporated at the domestic level.

Any agenda for constitutional reform in Sudan should seriously address a fundamental question: how can international human rights standards and norms be transformed or incorporated into the national legal system? If this question is not satisfactorily addressed, any positive developments in the field of rights protection will be "arrested", in particular as the reception of international human rights norms in Sudan is generally "unwelcomed" at the domestic level. The issue of the reception of international human rights norms takes place in a special context in Sudan, a hybrid legal system where the relationship between law, religion and human rights is uneasy and thorny in terms of the hierarchy of these conflicting norms. This is part of the reason why article 27 (3) of the INC, discussed further below, has not effectively transformed international human rights norms to the domestic level. In light of experiences to date, the reception of international human rights treaties within the Sudanese legal system and the conflict between the different legal regimes (international human rights treaties, constitutional Bills of Rights and Islamic or *Shari'a* laws), need to be carefully harmonised.

Article 27 (3) of the INC 2005 provides that "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". Many actors hailed this article as an important constitutional development in terms of human rights guarantees in Sudan. It was designed to transform all ratified international human rights treaties into national law. Article 27 (3) reflects the monist doctrine of international law and can therefore be invoked as a vehicle through which human rights can be guaranteed at the national level. All rights and freedoms can be applied or guided by international treaties ratified by the Sudan and international jurisprudence, rather than solely relying on national laws and courts. The monist conception advocates the superiority of international rules over national legal systems without the need of transformation of those rules into national law.[58]

The automatic transformation of international law into Sudan's national legal system has, however, raised serious difficulties in terms of the actual application of the law by law enforcement officials as well as courts. This has been particularly the case where a conflict arises between statutory law including *Shari'a* and human rights norms. This poses the question of whether article 27 (3) shall be maintained or whether any new constitution should opt for a "dualist" theory or pursue a "third way" for the sake of effective implementation of future constitutional Bills of Rights.

The incorporation of international human rights treaties into domestic law in Sudan indicates a conflicting practice by courts. As a common law country, Sudan used to follow a dualist approach which means that international law and Sudanese laws have different spheres of application; harmonisation of international treaties with national laws is achieved through the "domestication of the treaty" through an enabling legislation. The monist approach, on the other hand, is based on the principle that international and domestic laws are identical and that international law prevails in case of conflict. Hence, domestic courts can directly invoke and apply international agreements without the need for any enabling legislation. Article 27 (3) of the INC 2005 suggests that Sudan's legal system is monist. This is in theory. However, judicial practice indicates that judges in ordinary courts rarely rely on the Bill of Rights and international human rights instruments. The current practice of the Constitutional Court (as the guardian of human rights) unfortunately demonstrates that it has failed to protect the constitutional human rights of the Sudanese people and others in Sudan. The new constitution should therefore clearly stipulate that national courts must consider

[58] On the relationship between international law and municipal law and the implementation of international rules within national legal systems see Antonio Cassese, *International Law* (Oxford University Press, 2008), pp. 162-174; Ian Brownlie, *Principles of Public International Law* 7th ed. (Oxford University Press, 2008), pp.31-54; David Harris, *Cases and Materials on International Law* 7th ed. (Sweet & Maxwell, London, 2011), pp. 63-89.

international human rights law and its developed jurisprudence and, when interpreting any legislation, must promote the spirit, purpose, and objects of the Bill of Rights. Where there is a conflict between international human rights law and national law, the former law should prevail. There is no doubt that this question requires serious discussion and adoption of judicial guidelines or directives in order to inform judicial practices. Law-makers also have the responsibility to clarify the status of human rights law when applied by national courts, and above all, when constitutional human rights conflict with *Shari'a* law, particularly as *Shari'a* law is regarded as the source of legislation and as no enactments shall contradict it. Unfortunately, neither the judiciary nor the Chief Justice has issued any guidelines, directives or policies (e.g. as in the case of judicial circulars) providing direction on the application of constitutional human rights vis-à-vis national legislation since the signing of the CPA and the adoption of the Bill of Rights.

2.4. Derogations from Human Rights Treaties in Times of Emergency: Sudan's de facto Constitution

This section focuses on the application of human rights treaties ratified by the Sudan as well as the Bill of Rights in exceptional situations such as a national emergency threatening the life of the nation, crisis or armed conflict within the framework of article 4 of the ICCPR. The application of the Bill of Rights in such situations is critical as Sudan is a country afflicted by protracted armed conflicts and human rights guarantees have been constantly suspended during national emergencies. Thus, any future Bill of Rights shall consider the issue of derogation from human rights treaties and the difficulties involved in the operation of human rights treaties in such exceptional situations. No doubt, the operation of these treaties faces structural limitations. These limitations emanate from the fact that the derogation provisions allow States considerable leeway or margin of appreciation to determine the character of the public emergency and suspend the application of certain articles of human rights treaties as well as the suspension of the Bill of Rights provisions. Furthermore, the derogation regime suffers from procedural limitations in the international supervision of derogations, as States have powers to derogate and a wide margin of appreciation even if they do not follow the required procedures.[59] This untrammelled power of the State leaves human rights law in a precarious situation in the particular context of internal armed conflicts. Since the resumption of the armed conflict in southern Sudan in 1983, the protracted conflict in Darfur and recent conflicts in the Blue Nile and South Kordofan States, Sudan has been ruled by exceptional powers, at least in these areas. Many abuses justified under these powers have been amply documented by human rights organisations.[60] Successive governments (both civilian and military) have justified derogation from the ICCPR on various grounds, including the Nimeri regime (1969-1985) and the transitional government represented in the Supreme Transitional Military Council and Transitional Cabinet of Ministers. In January 2005, the state of emergency was lifted following the signing of the CPA with the Sudan People's Liberation Movement/Army (SPLM/A). However, it remains in force in certain areas affected by the armed conflict such as Darfur, Blue Nile and South Kordofan. In sum, since the beginning of the armed conflicts in 1983, the Sudan has virtually been subjected to a permanent or *de facto* emergency. Under these circumstances, it makes sense to regard emergency powers as Sudan's *de facto* constitution.[61] The practice of giving the State wide latitude to derogate or suspend human rights has been sanctioned by Sudanese courts.[62]

In terms of constitutional powers to suspend human rights, we find that the 1998 National Constitution gave the President of the Republic wide discretion to declare a state of emergency. Article 131 (1) provides that the

[59] For critical analysis see Thomas A. O'Donnell, 'The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights' 4 *HRQ* (1982) 474, pp. 493-495; Oren Gross and Fionnuala Ni Aolain, 'From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights', 23 *HRQ* (2001), pp. 625-649; Susan Marks, 'Civil Liberties at the Margin: the UK Derogation and the European Court of Human Rights', 15 *Oxford Journal of Legal Studies* (1995), pp. 69-95.

[60] See Mohamed Abdelsalam Babiker, *Application of International Humanitarian and Human Rights Law to the Armed Conflicts of the Sudan: Complementary or Mutually Exclusive Regimes* (Oxford, Antwerp, Intersentia, 2007).

[61] A. H. Abdel Salam and Alex De Waal (eds.), *The Phoenix State: Civil Society and the Future of Sudan* (The Red Sea Press, Asmara, 2002), p. 2.

[62] See *Khalid Mohamed Khair v. the Government of the Sudan*, Journal of Judicial Decisions (1987), 404, and James *Okolo v. the Government of the Sudan*, Journal of Judicial Decisions (1987), p. 15.

President "may, upon the occurrence or *approach of any emergent danger*, whether it is war, invasion, blockade, disaster or epidemics, 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 the law" (emphasis added). He can also declare war "*whenever he decides* that the country is subject to external aggression" (emphasis added).[63] The current INC of 2005 gives the President the same powers provided in the 1998 Constitution. The only exception is that the consent of the First Vice President is required before the President declares emergency or war.[64] Thus, in Sudan (and indeed other countries) the State has served more as a tool to breach human rights than as an instrument to protect the stability and safety of society. Any constitutional review process should therefore particularly tackle the powers of derogations as historically and currently applied by all Sudanese regimes to suspend constitutional human rights in times of emergency or armed conflict.

2.5. Implementation Mechanisms and Constitutional Guarantees: A Dichotomy between Law and Practice

While the current constitutional framework provides some human rights guarantees despite the substantive gaps highlighted elsewhere in this paper, in practical terms, the constitution has failed to be 'translated', particularly where the requisite legislative (statutory law) and institutional reforms and adequate judicial protection have been absent. The following sub sections focus on the institutional reforms and oversight mechanisms needed to enhance protection.

2.5.1. Institutional Security Sector Reform (SSR)

After the signing of the CPA, the interim constitution envisaged that laws governing institutions such as the national security and intelligence agencies (National Security Forces Act of 1999) should be reformed.[65] The goal was to bring the law in line with the CPA's vision of the National Security Force as an agency with a mandate to gather information and provide analysis and advice to appropriate authorities.[66] The 2010 National Security Act was passed by the National Assembly in December 2009 and came into force in February 2010. However, the new Act is not in line with the INC that envisaged the NISS to become an intelligence service without any powers of arrest and detention. Instead, the Act maintains the extensive powers of arrest and detention that were given to the NISS under the 1999 National Security Forces Act. It also maintains the immunity from prosecution that was granted to NISS members under the earlier law. The 2010 National Security Act also fails to introduce the necessary guarantees to prevent arbitrary detention, torture and other ill-treatment.[67]

Against this background, any effective constitutional review process in Sudan should include (as a priority) what is commonly referred to as security sector reform (SSR) (i.e. police, security services, military). The constitution should address existing powers of arrest and detention, and the immunities granted to the respective forces, which should be made accountable, particularly by means of parliamentary oversight and judicial oversight. Given the failure of past constitutions to effectively guarantee human rights, SSR is at the heart of constitutional reforms and needs to be explicitly addressed to ensure that law enforcement agencies respect the rule of law and individual rights in the course of the exercise of their powers.

[63] Article 135 of the INC. Although this provision refers to "external aggression", which implies that the President has such a power only in situations of armed conflict of an international character, practice indicates that it serves a different purpose. It targets neighbouring countries such as Ethiopia, Eritrea and Uganda, as the Sudan accuses them of providing territorial bases and logistical support to Sudanese armed opposition groups.
[64] See article 210 (Declaration of State of Emergency) and article 211 (Powers of the President in the State of Emergency).
[65] Article 151 INC.
[66] See for a thorough analysis, REDRESS and SORD, *Security for All: Reforming Sudan's National Security Service* (2009).
[67] Amnesty International, *Agents of Fear: National Security Service in Sudan* (Index: AFR 54/010/2010).

2.5.2. Commissions and Oversight Bodies

The CPA established several commissions to function as oversight bodies mandated with the protection of human rights. Part Eight of the Constitution (Independent Institutions and Commissions) envisages that such bodies play an effective supervisory role, in particular the National Constitution Review Commission (NCRC),[68] the Human Rights Commission[69] and the National Judicial Service Commission. The NCRC could have been an important actor with regard to law reform and harmonisation of national laws with the constitution. In practice, however, it has largely failed to address the apparent dichotomy between constitutional human rights norms and existing legislation. During the CPA implementation, the lack of a transparent process of law reform was evident and designated bodies such as the NCRC had limited capacity, powers and operational independence. Although the CPA identified specific laws that need to be reformed and provided for the establishment of the NCRC and a Law Reform Committee (LRC) at the Ministry of Justice to ensure compatibility with the CPA and the INC, there has been limited progress, particularly regarding the harmonisation of existing laws with the Bill of Rights.[70] In the post CPA era, the new constitution should therefore establish a Law Reform Commission, as in other jurisdictions such as Uganda and South Africa, which often have important roles in initiating or framing processes of law reform that are transparent and inclusive.[71]

Other Commissions such as the National Human Rights Commission (NHRC) could also play an effective role in the protection and promotion of human rights. The NHRC was created by an Act of parliament in 2009. Its members were appointed in January 2012 almost three years later. The establishment of the Commission has the potential to strengthen the system of national human rights protection if properly constituted and resourced, and if commissioners act with independence from the executive branches of government. The Act vests the Commission with a mandate to monitor the application of the rights and freedoms provided for in the Bill of Rights, as well as the powers to receive complaints of violations[72] and to ensure harmonisation of laws with the Bill of Rights.[73] However, there are a number of gaps in the Act that may hinder the ability of the Commission to carry out its mandate effectively and independently. In particular, the law could be further elaborated in relation to the Commission's quasi-judicial competence to deal with complaints and investigate human rights violations *proprio motu*, and issues relating to its accessibility. Another area of concern is the selection and appointment process for the Commission's members, which is largely controlled by the executive.[74]

Other commissions include the National Judicial Service Commission, whose main purpose is to commence the process of institutional reform of the judiciary so that it will be able to develop new

[68] Article 140 (1) INC.
[69] Article 142 INC.
[70] See REDRESS, *Promoting law reform in Sudan to enhance human rights protection, strengthen the rule of law and foster democratic processes*. Written Evidence submitted by the Redress Trust to the UK Associate Parliamentary Group on Sudan: Parliamentary Hearings, Sudan's Comprehensive Peace Agreement (15 October 2009), available at www.pclrs.org and http://www.redress.org/country_sudan.html.
[71] See Lutz Oette 'Future Perspectives: Debating Criminal Law Reform and Human Rights in Sudan', in Oette, above note 7, pp. 297-301.
[72] Article 9 (2) (h) provides that the Commission is tasked to "receive complaints from individuals and other bodies and to conduct investigations thereon and to take the necessary measures in accordance with the provisions of this Act or any other law and to recommend appropriate remedies to the relevant body".
[73] Article 9 (2) (k) provides that the Commission shall "endeavour to harmonize national legislations and practices with human rights standards".
[74] Article 6 provides that "the Commission shall be composed of fifteen members appointed by the President of the Republic after consultations at the Presidency and obtainment of the approval of the First Vice President".

roles and to accommodate the new constitutional provisions to reform the judiciary.[75] The philosophy behind the introduction of the Judicial Service Commission was for it to act as a supervisory body over the work of the judiciary. However, there are concerns that the body has not been able to perform its envisaged role and progressively achieve judicial reform and independence. First, the Commission was expected to focus on substantive issues including the promotion of the rule of law and judicial independence. Instead, the Commission has concentrated on procedural issues (i.e. removal and disciplinary of judges, conditions of service). As a result, the Commission's work has not led to genuine and tangible changes in the performance of the judiciary in terms of public confidence and accessibility. Secondly, the Commission has not acted as a real supervisory body over the judiciary: the Chief Justice is the Head of the Commission and as such, he is in a position to set the agenda of the Commission and its actual role. Thirdly, the Commission has not addressed critical issues and has adopted policies with regard to frequently raised concerns about judicial authority and independence. This includes in particular judicial competence over the judicial work and the interference of the Ministry of Justice with the work of the judiciary by staying or dismissing proceedings. Other issues include the role of the judiciary with regard to special courts and immunities granted to law enforcement officials.

2.5.3. Judicial Practice and Bill of Rights

Sudan's constitutional court has not effectively exercised its function of protecting constitutional rights. Other courts have also been reluctant to challenge the executive branches of government and adopt purposive interpretations to give effect to constitutional rights. Judicial decisions rarely consider the application of international human rights law despite the fact that courts have an obligation under article 27 (3) of the INC to apply international human rights law. This judicial practice is not confined to the CPA era. Historically, courts only rarely issued decisions when interpreting the law to ensure that the human rights of the accused are respected.[76] The current practice since the signing of the CPA and the adoption of the Bill of Rights shows that courts, in particular the Constitutional Court, have failed to protect constitutional rights. Examples abound.[77] Courts have not only failed to address core human rights related to the administration of justice and freedom of expression but judges apparently lack the expertise, training and essential knowledge when handling sensitive human rights cases. The question remains: what role can judges or the judiciary play in order to ensure that the Bill of Rights of the Constitution is effectively applied? The text of the INC provides the Constitutional Court with a clear mandate under articles 119-122 to protect human rights and fundamental freedoms[78] and the jurisdiction to "adjudicate on the constitutionality of laws".[79] In addition, the forthcoming constitution should clearly set out obligations of courts when interpreting the Bill of Rights. This includes consideration of international human rights law and its developed jurisprudence. Furthermore, when interpreting any legislation (as in the case of South African Constitution), courts must promote the spirit, purpose, and object of the Bill of Rights; they should consider international law and may also consider best practices adopted in other countries.[80] The judiciary, as an institution, must guide judges to adopt purposive

[75] Article 129 of the INC 2005 provides that the President of the Republic, after consultation within the Presidency, shall establish the National Judicial Service Commission to undertake the overall management of the National Judiciary.

[76] See Ali Suliman, *Human Rights in the Forthcoming Constitution*, Herouf Journal (Khartoum University Press, 1989) (Arabic).

[77] I.e. *Kamal Mohammed Saboon v Government of Sudan*, Constitutional Court (2009); *Faroug Mohamed Ibrahim Alnour v (1) Government of the Sudan*; Legislative Body, Final order by Justice Abdalla Aalamin Albashir President of the Constitutional Court (6 November 2008).

[78] Article 122 (1) (d) INC.

[79] Article 122 (1) (e) INC.

[80] See for example Article 39 (1) of the South African Constitution: "When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law."

or golden interpretations (as in the common law system) in order to give effect to the words and spirit of the Bill of Rights. Courts shall be instructed, when interpreting the Bill of Rights or directive principles of the constitution, to give effect to the actual purpose or intent of the legislature. The constitutional text itself should also dictate that judges should apply the spirit of the Bill of Rights.

In addition, phrases in the Bill of Rights such as "provided by law" or "established by law" or "in accordance with the law" shall be interpreted to further the purpose of human rights protection. "Limitation clauses" shall be interpreted reasonably in order to give effect to the application of the spirit and wording of the Bill of Rights. The forthcoming constitution should therefore put in place arrangements to ensure that the Bill of Rights shall be respected and is not subjected to unreasonable restrictions, particularly by means of applicable statutory law. To this end, any contradiction between the Bill of Rights and national laws shall be regarded as null and void.

The issue of constitutional interpretation leads to another related point, namely the need for judicial activism or judicial "vitalization" in order to make the constitution a living document. This requires proactive, skilled and trained judges as well as a truly independent judiciary to assume its role. Constitutional developments in other jurisdictions testify to this reality. For example, Indian apex courts have redefined the relationship between fundamental rights and directive principles (which are not justiciable under the constitution). The courts have approached the two categories in an integral manner, one result of which is to give some directive principles the status of fundamental rights.[81]

2.6. Conclusion

While acknowledging that the Bill of Rights constitutes a major achievement in Sudan's constitutional history, many gaps still exist and many rights need to be brought into conformity with international standards. Furthermore, a critical debate is needed on the status of international human rights law and the modalities of its incorporation in Sudan's legal system. The pertinent question here is whether article 27 needs to be reviewed or maintained in the forthcoming constitution. Do we need to apply the dualist approach as is the case in common law systems, where harmonisation can be worked out in order to avoid conflict between national laws and international human rights standards? Or is it feasible to keep article 27 and make it directly applicable without the need to engage in any process of harmonisation between ratified international human rights treaties and national laws? Finally, constitutional human rights protection is not confined to the substantive provisions of the Bill of Rights. The protection of civil and political rights needs to be complemented by fundamental legislative and institutional reforms, particularly security sector reform, judicial independence and reform of CPA oversight bodies entrusted with the protection of human rights.

[81] See *Olga Tellis v Bombay Municipal Corporation*, Supreme Court of India (1985), AIR (1986) Supreme Court 18, according to which the right to life under 21 of the Indian Constitution includes the right to livelihood (article 37 (a) of the Indian Constitution).

3. Economic, Social and Cultural Rights Under the Constitutional Bill of Rights in the Sudan (Ahmed Abdelgadir Ahmed)*

3.1. Introduction

Since the unanimous adoption of the Universal Declaration of Human Rights (UDHR) by the General Assembly on 10 December 1948, the international community has vigorously striven to achieve the main purposes of the United Nations (UN) relating to the promotion and encouragement of respect for human rights and fundamental freedoms.[82] This includes the adoption of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which together with the UDHR and the International Covenant on Civil and Political Rights (ICCPR) has been referred to as the "International Bill of Rights". The ICESCR, to which Sudan is a party, provides for a number of key economic, social and cultural rights, including the right to non-discrimination, the right to work, the right to just and favourable conditions of work, trade union rights, the right to social security, protection of the family, the right to an adequate standard of living, the right to health and the right to education. In addition, the African Charter on Human and Peoples' Rights (ACHPR), which has been ratified by Sudan, sets out several economic, social and cultural rights, including the right to health and the right to education. Importantly, it also recognises collective rights, such as the right to development and the right to a general satisfactory environment. The UN Convention on the Rights of the Child, which has equally been ratified by Sudan, also contains several references to economic, social and rights in relation to children.[83]

Regional and international human rights treaty bodies have raised a series of concerns regarding the implementation and effective protection of economic, social and cultural rights in Sudan. Besides issues such as the clarity of the ICESCR's status in Sudan's domestic legal framework and the divergence between constitutional and legislative provisions (pre-2005), the Committee on Economic, Social and Cultural Rights identified several areas of concern. This included in particular poor health indicators, high illiteracy rates, particularly among rural women, and the adverse impact on armed conflict on the enjoyment of rights.[84] These concerns were subsequently echoed by the Committee on the Rights of the Child, which highlighted poor health services in areas such as Darfur, inadequate standards of living, the negative impact of armed conflict on children, and the high number of street children.[85]

The African Commission on Human and Peoples' Rights commended Sudan for its efforts to improve primary health care and for making primary and secondary education free.[86] However, it also identified a series of concerns, including the "low level of literacy especially amongst the girl-child", child labour, and the lack of clarity about the "availability of anti-retrovirals for those infected with the HIV/Aids virus".[87] It also noted that the bombing campaigns in civilian areas across the Nuba

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* Mr. Ahmed Abdelgadir Ahmed is Lecturer at the Faculty of Law, University of Khartoum, and Head of the Public Law Department.

[82] See Article 1 of the United Nations Charter, 1 U.N.T.S. XVI (1945).

[83] See further, Khadeija Elsheikh Mahgoub, 'Children's Rights and the Forthcoming Constitutional Bill of Rights of Sudan', below at 5.

[84] See Concluding Observations of the Committee on Social, Economic and Cultural Rights: Sudan, UN Doc. E/C.12/1/Add.48 (1 September 2000).

[85] See Committee on the Rights of the Child, Concluding Observations: Sudan, UN Doc. CRC/C/SDN/CO/3-4 (1 October 2010).

[86] See Concluding Observations and Recommendations on the 4th and 5th Periodic Report of the Republic of Sudan (adopted at the 12th Extra-ordinary Session of the African Commission on Human and Peoples' Rights held from 29 July to 4 August 2012, Algiers, Algeria), paras. 13, 14.

[87] Ibid., paras. 37, 38 and 46.

mountains have forced "people to seek shelter in caves and in mountains, where they lack food, shelter, and access to basic needs such as water and sanitation."[88]

The challenges facing the realisation of economic, social and cultural rights are reflected in the UN Development Programme's (UNDP) Human Development Index for 2012. It places Sudan in the category of "Low Human Development", ranking 171 out of a total of 184. Life expectancy at birth is 61.8 years (with high levels of infant and child mortality), mean years of schooling are 3.1., and gross national income (GNI) per capita is $1,848.[89]

Against this background, the chapter examines to what extent economic, social and cultural rights have been recognised under the Sudanese Bill of Rights enshrined in the Interim National Constitution of the Republic of the Sudan, 2005 (INC), taking into consideration the historical development of these rights throughout successive Sudanese Constitutions as well as their actual implementation.

3.2. The Binding Effect of the Bill of Rights

Economic, social and cultural rights recognised in international treaties, to which Sudan is a party, are an integral part of the Bill of Rights by virtue of article 27(3) of the INC. In addition, pursuant to article 27(2) of the Constitution, the State is under an obligation to "protect, promote, guarantee and implement the Bill of Rights". In order to ensure the legally binding effect of the Bill of Rights and secure its direct application by the Constitutional Court and other competent courts, article 48 of the Constitution emphasises that no derogation from the rights and freedoms enshrined in the Bill shall be made, and that the Bill of Rights shall be upheld, protected and applied by the Constitutional Court and other competent courts. In addition, the INC provides for the establishment of an independent "Human Rights Commission"[90] to monitor the application of the rights and freedoms provided for in the Bill of Rights and receive complaints on violations thereof.[91] In practice, however, the Constitutional Court, due to political influence, deliberately ignored article 48 to conclude that it is not under any obligation to uphold, protect and apply the Bill of Rights. The Court is of the view that the Bill of Rights is merely 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 the Constitution.[92] This position runs counter to the wording of article 48 and Sudan's constitutional traditions.

The direct recognition and application of fundamental human rights and freedoms by Sudanese courts is not a heresy created by the INC. It is a practice deeply rooted in Sudanese constitutional heritage. Apart from the Permanent Constitution of Sudan, 1973,[93] all previous constitutions provide for the binding nature of the provisions that relate to fundamental human rights and those that provide for constitutional remedies.[94] This does not, however, apply to guiding principles and directives, as set out in the 1998 and 2005 constitutions.[95] While these principles and directives on

[88] Ibid., para. 51.
[89] See UNDP, *The Rise of the South: Human Progress in a Diverse World, Human Development Report 2013*, Table 1, p.146.
[90] Article 142(1) of the Interim National Constitution of the Republic of Sudan (INC), available at http://www.refworld.org/pdfid/4ba749762.pdf.
[91] Ibid., Article 142(3).
[92] See *Elhaj Yousuf Elhaj Mekki v. Izulldin Ahmed Mohammed* (cc/cc/6/2006-CC R Vol. 2/2011-P 228).
[93] See article 58 of the Permanent Constitution of 1973, available at http://www.righttononviolence.org/mecf/wp-content/uploads/2012/01/Constitution-Sudan-1973-+-amendment-1975.pdf.
[94] See, for example, the Constitution of the Republic of the Sudan, 1998 (1998 Constitution), available at http://www.sudanembassy.ca/Docs/THE%20CONSTITUTION%20OF%20THE%20REPUBLIC%20OF%20THE%20SUDAN%201998.pdf.
[95] Part I of the INC; Part I of the 1998 Constitution.

policies on governance, social justice and such matters are of obvious importance for a number of economic, social and cultural rights, they are not considered legally enforceable. However, the State is duty bound to use them for guidance in its policy and law making, and courts may draw on them when interpreting constitutional rights.

3.3. The Recognition of Economic, Social and Cultural Rights in Sudan's Constitutions, with particular reference to the INC

3.3.1. The Right to Equality and Non-discrimination

The fundamental tenet of all human rights is the fact that "all human beings are born free and equal in dignity and rights".[96] Article 2 of the ICESCR mandates that States parties undertake to guarantee that the rights enunciated will be exercised with no discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[97]

The right to equality and non-discrimination is deeply rooted in Sudanese constitutional history as a *de jure* or formal right. Since the Self Government Statute of 1953, this right has been guaranteed and provided for in all successive constitutions. Article 5 of the Self Government Statute 1953 and article 4 of the respective Interim Constitutions of 1956 and 1964 emphasise that all persons in the Sudan are free and equal before the law, and that no disability shall be attached to any Sudanese by reason of birth, religion, race or sex in regard to public or private employment or in the admission to or in the exercise of occupation, trade, business or profession. Similar provisions are contained in article 14 of the Permanent Constitution of the Democratic Republic of the Sudan 1973 and article 17 of the Transitional Constitution of the Sudan 1985. The 1998 Constitution recognised the fact that the Sudan is a multi-cultural and multi-racial country. According to its article 21, all people are equal before the courts of law, and all Sudanese enjoy equal rights and duties. It is not allowed to discriminate between them for reasons of race, sex or religion. They are equal in respect of eligibility for public service and the post of presidency; discrimination based on ownership of property is not allowed.

Article 7(1) of the INC regards citizenship as "the basis for equal rights and duties for all Sudanese". Within the INC's Bill of Rights, articles 31 and 32 recognise the right to equality and the rights of women and children as follows:

> 31 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.
> 32(1) The State shall guarantee equal right of men and women to the enjoyment of all civil, political, social, cultural and economic rights, including the right to equal pay for equal work and other related benefits.
> 32 (2) The State shall promote woman rights through affirmative action.

When compared with article 2 of the ICESCR, the Bill of Rights does not fully conform to international standards in relation to the right to equality and non-discrimination. Whereas

[96] Article 1 of the Universal Declaration of Human Rights (UDHR), G.A. res. 217A (III), UN Doc A/810 at 71 (1948).
[97] This right of non-discrimination shall be exercised subject to temporary special measures stated in Article 15 of the Covenant. See the Committee on Economic, Social and Cultural Rights, General Comment No. 21: *Right of everyone to take part in cultural life*, UN Doc E/C.12/GC/21 (21 December 2009), para. 24.

international standards emphasise that all economic, social and cultural rights should be exercised with no discrimination of any kind, article 31 of the Bill of Rights concentrates on equality before the law and equal protection of the law. It does not provide for a clear prohibition of all forms of differential treatment of a person or group of persons based on particular status or situation, such as race, colour, sex, language, religion, political and other opinion, national or social origin, property, birth, or other status. Equality before the law is different from guaranteeing the exercise of rights with no discrimination of any kind; in fact it is only one aspect. Article 32 of the Bill of Rights should therefore be amended to provide for a wide prohibition of all forms of differential treatment based on differences or status of persons. The scope of article 32 should include the grounds provided for in the ICESCR to ensure comprehensive protection.

3.3.2. The Right to Form Trade Unions

The ICESCR ensures the right of everyone to form trade unions and join the trade union of his or her choice, subject only to the rules of the organisation concerned. No restrictions may be placed on the exercise of this right, or on the general function of trade unions, other than those prescribed by law; such restrictions must also be "necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others".[98] Trade unions are free to establish national federations or confederations which shall have the right to form or join international trade-union organisations. Further, States parties undertake to ensure the right to strike, provided that it is exercised in conformity with the laws of the particular country.[99]

The rights to freedom of association and to form trade or professional unions were treated as a directive principle in previous constitutions. The 1998 Constitution ensured the right of association and organisation for cultural, social, economic, professional or trade union purposes which was, however, subject to restrictions "in accordance with the law".[100] According to article 40 of the INC, "every person shall have the right to freedom of association with others, including the right to form or join political parties, associations and trade or professional unions for the protection of his/her interests. Formation and registration of political parties, associations and trade unions shall be regulated by law as is necessary in a democratic society."

The Bill of Rights ensures only the right of individuals to freedom of association with others by forming or joining trade or professional unions in order to protect his or her interests. It ignores the right of trade unions to establish national federations or confederations that shall have the right to form or join international trade-union organisations, and the right to strike. This oversight places such key rights at the mercy of the executive or the will of the ruling party or parties. Such rights can only be guaranteed by constitutional provisions, from which no derogation shall be made, in order to ensure that these rights are upheld, protected and applied by the Constitutional Court or other competent courts and monitored by an independent human rights commission as well as civil society organisations. Therefore, article 8 of the Bill of Rights needs to be amended to cover the right of trade unions to establish national federations or confederations, and the right to strike.

[98] Article 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), 999 U.N.T.S. 3, *entered into force* 3 January 1976.
[99] Article 8(1)(d) of the ICESCR.
[100] Article 26(1) of the Permanent Constitution of 1973.

3.3.3. The Right to Work

The right to work has been recognised as a fundamental right of every person by the States parties to the ICESCR.[101] This right includes the right of everyone to the opportunity to gain his or her living by work which he or she freely chooses or accepts. States parties are obliged to take appropriate steps to safeguard this right, which shall include technical and vocational guidance and training programmes; policies and techniques to achieve steady economic, social and cultural development; and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.[102]

The Covenant also recognises the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

a) Remuneration which provides all workers, as a minimum, with:
i. Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
ii. A decent living for themselves and their families;
b) Safe and healthy working conditions;
c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.[103]

The right to work and the right to just and favourable conditions of work were not provided for in any Sudanese Constitutions until 1973, neither as a directive principle nor as a fundamental right. In the 1973 Constitution, this right was recognised by article 36 as one of the basic fundamentals of the Sudanese society but not as a fundamental right. Again, in the 1998 Constitution, there is no provision or directive principle recognising the right: there is only an ambiguous reference to this right in article 28(1) in relation to ensuring the right to property ("right to monetary earnings and to one's own ideas, and retains ownership over one's earnings").

The INC's Bill of Rights places an obligation on the State to ensure social justice as one of the guiding principles and directives by emphasising that the State "shall develop policies and strategies to ensure social justice among all people of the Sudan, through ensuring means of livelihood and opportunities of employment".[104] Further, the State "shall ... encourage mutual assistance, self-help, co-operation and charity".[105] In addition, "no qualified person shall be denied access to a profession or employment on the basis of disability: persons with special needs and the elderly shall have the right to participate in social, vocational, creative or recreational activities".[106] Apart from the rather general article 32(1) of the INC, there is no clear provision recognising the rights to work and to the enjoyment of just and favourable conditions of work as a fundamental right for each and every person. Article 45(1), which recognises the right to "access to suitable employment", is confined to persons with special needs. The absence of express provisions recognising such key rights

[101] Article 6. See also the Committee on Economic, Social and Cultural Rights, General Comment No. 18: *The right to work* (article 6), UN Doc E/C.12/GC/18 (6 February 2006), para. 1.
[102] Article 6(2) of the ICESCR.
[103] Article 7 ibid.
[104] Article 12(1) of the INC.
[105] Ibid.
[106] Article 12(2) of the INC.

constitutes a serious shortcoming, which needs to be rectified when drafting a new Bill of Rights for the next constitution.

3.3.4. The Right to Participate in Cultural Life

The States parties to the ICESCR recognise the right of everyone to take part in cultural life, enjoy the benefits of scientific progress and its application and to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author.[107] The State has a corresponding duty to take steps to achieve the full realisation of participation in cultural life. Historically, the right to participate in cultural life and the protection of cultural production was not considered in Sudanese Constitutions. In 1973, however, it was recognised as a fundamental basis of the society, though still not as a fundamental right.[108] Article 27 of the 1998 Constitution recognised this right for sectors or groups of citizens, but not for individuals.

The INC's Bill of Rights sets out these rights in article 47 under the heading "rights of ethnic and cultural communities" as follows:

> Ethnic and cultural communities shall have the right to freely enjoy and develop their particular culture: members of such communities shall have the right to practice their beliefs, use their languages, observe their religions and raise their children within the framework of their respective cultures and customs.

There is a wide gap between international standards and article 47 of the Bill of Rights. The Bill of Rights does not provide for the individual rights of participation and benefit, as enshrined in the ICESCR. Individual participation is only secured within collective rights to free enjoyment and development of communal cultures, which severely limits the scope of the right. This omission must be rectified in the next Bill of Rights.

3.3.5. The Right to Education

Article 13 of the ICESCR begins by recognising the right to education for everyone; education shall be directed to the full development of the human personality and the sense of its dignity; and shall strengthen the respect for human rights and fundamental freedoms.[109] Further education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace. In order to achieve full realisation of this right:

a) Primary education shall be compulsory and available free to all;
b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

[107] Article 15. See also the Committee on Economic, Social and Cultural Rights, General Comment 21, above note 15 and General Comment No. 17: *The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author*, UN Doc E/C.12/GC/17 (12 January 2006).
[108] Article 25 of the 1973 Constitution.
[109] See also the Committee on Economic, Social and Cultural Rights, General Comment No. 13: *The right to education* (article 13), UN Doc E/C.12/1999/10 (8 December 1999).

c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education.[110]

Like most of the other key rights, the right to education was ignored by all national Constitutions before 1973. In the 1973 Constitution, a considerable number of directive principles (articles 18, 19, 20 and 29) reflected a keener awareness of this right, which was also recognised as a fundamental right by article 53. The 1998 Constitution does not recognise the right to education as a fundamental right but only as a directive principle (article 12). The INC's Bill of Rights includes education as one of the directive principles of State policy (article 13) and guarantees it as a fundamental right (article 44). According to article 13, "the State shall promote education at all levels throughout Sudan and shall ensure free and compulsory education at the primary level and in illiteracy eradication programmes. Every person or group of persons shall have the right to establish and maintain private schools and other educational institutions at all levels in accordance with the conditions and standards provided by law." Further, "the State shall mobilise public, private and popular resources and capabilities for education and development of scientific research, especially research and development." The Bill of Rights provides for education as "a right of every citizen" and obliges the State "to provide access to education without discrimination as to religion, race, ethnicity, gender or disability. Primary education is compulsory and the State shall provide it free."[111] By virtue of these provisions, the Bill of Rights covers at least the minimum standard as required by the ICESCR and the ACHPR.

3.3.6. The Right to Health (Physical & Mental)

Based on the UDHR, the ICESCR imposes an obligation to recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.[112] The steps to be taken by the States parties to achieve full realisation of this right shall include those necessary for:

a) The provision for the reduction of the still birth-rate and of infant mortality and for the healthy development of the child;
b) The improvement of all aspects of environmental and industrial hygiene;
c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
c) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.[113]

It seems that the right of citizens to the enjoyment of the highest attainable standard of physical and mental health has not constituted a priority for national governments (both democratic and totalitarian) since independence. No single provision to recognise this right appeared in any of the previous constitutions with the exception of the 1973 Constitution, which emphasised that health care and medical treatment are a right of every citizen and the State shall endeavour to provide it for free (article 54).The right to health has been regarded as one of the basic guiding principles and

[110] Article 13(2)(a)-(d) of the ICESCR. See also ibid.
[111] Article 44 of the INC.
[112] Article 12 of the ICESCR. See also the Committee on Economic, Social and Cultural Rights, General Comment No. 14: *The right to the highest attainable standard of health* (article 12), UN Doc E/C.12/2000/4 (11 August 2000).
[113] Article 12(2)(a)-(d); see also ibid.

directives of the INC.[114] According to article 19 of the INC the State "shall promote public health and guarantee equal access and free primary health care to all citizens". This recognition of the right to health care as a guiding principle and directive has been followed by article 46 to the effect that the State "shall promote public health, establish, rehabilitate, develop basic medical and diagnostic institutions, and provide free primary health care and emergency services for all citizens".[115]As with other rights, the international standard is higher than the national one as provided for in article 46 of the INC. While the international standard imposes upon the States parties an obligation to recognise the right of everyone to physical and mental health, the national obligation is to promote public health. The INC does not recognise the right of everyone to the enjoyment of the highest attainable standard of health care as set out in the ICESCR and as provided for in the ACHPR, a gap that needs to be addressed in a future Bill of Rights.

3.3.7. The Right to an Adequate Standard of Living

The States parties to the ICESCR recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.[116] The States parties shall take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international co-operation based on free consent. They shall take, individually and through international co-operation, the measures, including specific programmes, which are necessary:

a) To improve methods of production, conservation and distribution of food;
b) Taking into account the problems of both food-importing and food exporting countries, to ensure an equitable distribution of world food supplies in relation to need.[117]

This right to an adequate standard of living was not recognised as a fundamental human right in previous Sudanese constitutions though it was referred to as a directive principle (e.g. articles 30 and 31 of the 1973 Constitution). According to article 10 of the INC, "the overarching aims of economic development shall be eradication of poverty, attainment of the Millennium Development Goals, guaranteeing the equitable distribution of wealth, redressing imbalances of income and achieving a decent standard of life for all citizens". However, apart from this guiding principle and the general implementation clause of articles 27(3) and 32(1) of the Bill of Rights, there is no specific provision to guarantee the right to an adequate standard of living. Since the right to an adequate standard of living constitutes one of the key ESCRs, it is imperative that a separate provision for its full realisation is included in any future Bill of Rights.

3.3.8. Protection of the Family

The States parties to the ICESCR recognise that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses;

[114] Article 22 of the INC.
[115] Special concern to women and childcare has been provided for in Article 32(4) of the INC to the effect that: "The State shall combat harmful customs and traditions which undermine the dignity and the status of women. The State shall provide maternity and child care and medical care for pregnant women."
[116] See also the Committee on Economic, Social and Cultural Rights, General Comment No. 12: The right to adequate food (article 11), UN Doc E/C.12/1999/5 (12 May 1999).
[117] Article 11 of the ICESCR.

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits;
3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.[118]

In Sudan, the protection of the family did not constitute a priority for the founders of successive national constitutions, even during democratic periods before 1973 when it was included as the foundation of society (article 15). The 1973 Constitution also provided fundamental rights to mothers and children with regard to care and attention. In the 1998 Constitution, protection of the family, facilitation of marriage, due care for children and motherhood and protection of women were recognised as basic directive principles only.[119] According to article 15 of the INC "the family is regarded as the natural and fundamental unit of society, entitled to the protection of the law; the right of man and woman to marry and to found a family shall be recognised, according to their respective family laws, and no marriage shall be entered into without the free and full consent of its parties".[120] Further, "the State shall protect motherhood and women from injustice, promote gender equality and the role of women in family, and empower them in public life". The INC does not provide adequately for the right to family life as set out in the ICESCR and the ACHPR, which therefore constitutes another area in need of amendment in any future Bill of Rights.

3.3.9. The Right to Social Security/Social Insurance

The States parties to the ICESCR recognise the right of everyone to social security, including social insurance.[121] The sole express provision guaranteeing this right can be found in article 24 of the 1973 Permanent Constitution, according to which the State shall provide a system for social security against disasters, sickness, orphanage, old age, unemployment and other causes of disability. The INC is silent on the right to social security. Due respect and concern for this key right should appear in a separate provision in the coming Constitution.

3.4. Conclusion

The examination of Sudan's constitutional history shows that economic, social and cultural rights have been largely ignored, including by democratic regimes, and were often only given the status of directive principles and directives, if at all. The INC has only partially rectified this imbalance compared to the recognition of civil and political rights. Several rights, such as the right to form trade unions and to strike, and to an adequate standard of living and social security are absent, whereas the scope of other rights is deficient or ill-defined. While article 27(3) of the INC incorporates the ICESCR and the ACHPR into the Bill of Rights, there is a lack of judicial recognition or interpretation by the Constitutional Court and a widespread disregard of these rights in administrative practice. This applies equally to the recognition of collective rights. Given the multiple economic, social and cultural challenges, deprivations and violations by people in Sudan, and their

[118] Article 10 of the ICESCR.
[119] Article 55 of the Permanent Constitution of 1973.
[120] Article 15 of the ICESCR.
[121] Article 9 ibid.

link to other rights violations, the explicit recognition and adequate protection of economic, social and cultural rights must be seen as one of the priorities for Sudan's future constitution.

4. Women's Rights in the Constitutional Bill of Rights: Issues of Status, Equality and Non-Discrimination (Ebtisam Sanhouri Elrayh)*

4.1. Introduction

Sudan is going through the most critical time since its independence. Despite the peaceful breakaway of South Sudan, war has erupted in the new south, and conflict renewed in hotbeds in the western region of Darfur and the two areas, i.e. Southern Kordofan and Blue Nile, that had been left out when the Comprehensive Peace Agreement (CPA) was negotiated and implemented. The absence of sustainable economic plans and the loss of oil revenues have pushed the majority of people below the poverty line. The confrontational attitude of the regime and its adoption of tribalism as a policy have added more fuel to the already prevalent political volatility. At present, there is a legitimate concern within the ruling party, the opposition and civil society organisations about the fate of the country. There is an urgent need to seriously address the many illnesses afflicting the body of the State, which have grown since independence and now threaten the very existence of the country. The vicious circle of the political, economic and social instability in which Sudan is trapped can only be broken through a radical makeover at the official and popular level, regarding the social and cultural foundation of Sudanese society one the one hand, and the economic and political establishment on the other.

The first step in this transformation process is to identify priority issues that concern the whole population, and to consider and debate all of these issues in a manner that is inclusive, participatory and transparent, without excluding or otherwise sidelining one of the issues or a particular group of people. Bridging the gap between different visions and viewpoints remains the most difficult challenge in this regard. Arriving at a consensus on one constitutional framework that sets out binding basic principles of good governance, peace, security, justice and equitable sustainable development is difficult but not impossible. It requires a great deal of genuine willingness of all parties concerned to participate, advocate and collaborate to conclude the task. All parties must be prepared to make concessions, demonstrate a great deal of tolerance to settle differences, and pledge to adhere to the outcome. The proposed constitution should reflect the agreement of the people on fundamental principles, basic rights, freedoms and duties, as well as detailed provisions and mechanisms that secure their implementation. A popular referendum on the proposed framework is the best means to guarantee representation, stability, durability, and citizens' respect for the constitution. It would ensure the endorsement of the constitution via democratic procedures and guarantee people's informed choices and awareness of its content.

In the course of the preparation for Sudan's forthcoming constitution, civil society organisations, media and youth groups, political parties, government agencies and research centres have launched several initiatives that articulate a range of issues as themes for debate. These issues include the question of governance; the type and structure of the State; the relation between religion and the State; sources of legislation; sharing of power and resources; human rights and fundamental freedoms; and institutions and mechanisms of implementation. In addition, some of the initiatives focus on the very process of constitution making.

The question of the rights of women in the constitution has generated considerable debate as reflected in diverging standpoints. A radical position, invoking religious and social values, believes that some of the established constitutional and legal rights of women in Sudan need to be curtailed.

* Ms. Ebtisam Elrayh is Lecturer of Constitutional Law and Human Rights, Department of Public Law, at the Faculty of Law, Khartoum University, Sudan.

Others consider the question of women's rights as trivial, time-consuming and of little importance, diverting time from focusing on more pressing issues. A third view considers women's rights as inseparable from the bulk of problems that influence the whole population and can only be resolved through a holistic reform of State institutions. Supremacy of the rule of law and ensuring human rights for all would be sufficient to address women's position in society and guarantee protection of their rights. Therefore, it should be addressed as a crosscutting issue, rather than as an isolated concern. Another group sees the issue as one of discrimination in the provision and enjoyment of the rights recognised under the constitution; women are given less rights compared to their male counterparts. To overcome the problem, the equality and non-discrimination clause within the Bill of Rights needs to be strengthened to enable women to enjoy the whole range of rights on an equal footing with others. Women's initiatives have also made economic, social and cultural rights part of the debate, calling for their recognition and their inclusion as part of the Bill of Rights. These differences in positions, at both official and societal levels, raise a number of questions. Do women have a real cause, what is their cause, is it different from other issues and therefore needs to be singled out, why it has to be tackled in the course of constitution building – are all valid questions waiting to be answered.

4.2. Women's Cause: Separate v Integrated Debate

Women face a problem regarding their status, position in society, prescribed roles, rights and duties. There are several good reasons why these should be prioritised in any debate on constitutional restructuring. First, although women constitute almost half of the population, they are in a minority-like situation.[1] They form the largest group of the population whose significant political, social and economic contribution remains undervalued. The role of women in shaping Sudan's history through their active participation in the formation of the State prior to and after independence, though under-documented, is evident. Women were in the front lines demonstrating against the colonial authority as early as 1916 and their role continued throughout the independence phase to the present. Likewise, although limited, statistics confirm women's input in Sudan's economy in different sectors, including agriculture, manufacturing and civil services.[2] Except for a few faculties where women's enrolment is barred, the number of female students in universities substantially exceeds that of males.

Secondly, despite women's equal proportion and valuable contributions in the private and public sphere, they suffer for most of their lives from discrimination, marginalisation and exclusion. Throughout the history of governance of Sudan, women have never been part of the decision-making process in the major political, social and economic spheres, but the primary casualties of each one of them. Women experience multiple forms of victimisation due to political decisions (choices) made by male-dominated governments regarding warfare and peace. They have been used as weapons in those wars, experiencing rape, displacement and loss of life. Nevertheless, they have played no or insignificant roles in peace negotiation. Due to State failure to adopt economic plans over the years, the ratio of women living below the poverty line continues to surpass that of men.[3] The deficiency of healthcare polices and plans and the failure to make good quality care available and accessible to women (rural, urban and displaced alike) continue to contribute to high pre- and

[1] According to *Sudanese Women: Facts and Figure*, published by Sudanese Women Union (without a date), (Arabic) women form 48.7% of the total population.

[2] 87, 8% in agriculture, 77.8% in civil services, 85% in the informal sector according to statistical diagrams presented by Souad I. Issa, *Women Rights between Legal Admittance and Curtailment in Practice* (2010) (Arabic), pp.113, 140 and 146.

[3] Women form 65% of the total people living below the poverty line, see 'Woman's Problems under the Interim Constitution (2005)', published by Developmental Studies and Research Institute (DSRI), Unit of Gender and Development, University of Khartoum in collaboration with the UN-Women (Sudan) (August 2011).

postnatal mortality, one of the highest ratios worldwide. Women belonging to vulnerable marginalised groups suffer from multiple discrimination based on a variety of factors, including but not limited to ethnicity, religion, displacement, refugee status, disability or other status. Recognising the profound contribution by women to the political, social and economic affairs of the State and the latter's detrimental impact on women is a requirement in any future constitutional arrangements.

The third and most important reason is the urgent need to resolve the dialectical, cultural and religious contest over women's status, rights and roles. The discrepancy between women's constitutional and legal rights on the one hand, and cultural and religious rights on the other, extends beyond the Sudanese situation to all countries with a Muslim majority. It undermines women's claim to universal rights and sustains the dilemma of *de jure/de facto* equality, public/private entitlement, and formal/informal recognition, enjoyment and implementation of women's rights. At present, there are several views on the issue. Human and women's rights advocates believe in and campaign for the substantive equality of women and their entitlement to the range of rights acknowledged at international and regional level. In contrast, the *Salafi* (radical Islamists) group seeks to restrict women's role and rights based on religious perspectives and prevalent cultural practices. In the middle stands a religiously informed human rights group, which tries to strike a balance between modern life, current needs and the religious command in its historical framework.

This debate is of critical importance, given the need, and search for a set of clear, comprehensible principles capable of withstanding possible regime change or a shift in ideologies. Adopting an unequivocal stance on women's rights will certainly bring to an end the state of uncertainty of these rights, as is presently the case in Sudan. The outcome of this debate will help to bridge the gaps between international standards and *Shari'a*, i.e. between international law and (an important element of) national law. It will also facilitate the interpretation and enforcement of rights in courts and by other concerned authorities.

The gulf between the draft constitutions presented by the different initiatives demonstrates the need to prioritise women's rights. A case in point is the initiative of the Institute of Developmental Studies and Research and that of the Islamic Constitution Front. The first initiative, titled "Forum for Engendering the Forthcoming Constitution", discusses women rights from three axes, namely (1) women's issues under the current constitution; (2) issues of gender and good governance; and (3) main features of gender-sensitive constitution. It stresses the need to involve women throughout the process of constitution making and insists that the constitution shall incorporate a gender dimension, and be responsive to women's needs and concerns. The constitution should ensure women's equal status based on citizenship and their full entitlement to civil, political, economic, social and cultural rights equivalent to men. Women shall have the right to equal representation within all government organs – legislative, executive, and judicial – by not less than 30%, to be gradually increased to reach 50%. To achieve the proposed proportion, the constitution shall sanction the use of special measures, such as positive discrimination. International and regional treaties shall be the source of women's rights, particularly the equality and non-discrimination clauses.[4]

[4] See the Series: *Sudanese women and the Upcoming Constitution*, Volumes 1, 2 and 3, published by the Institute of Developmental Studies and Research (IDSR, Unit of Gender and Development), University of Khartoum in collaboration with UN-Women, August 2011, and the Draft Constitution of the State of Sudan, issued by the Islamic Constitution Front, Ramadan 1432 H (August, 2011).

The "Draft Constitution of the State of Sudan", prepared by the Islamic Constitution Front, calls for the establishment of a unitary sovereign State under the provisions of Dar-al-Islam. The draft constitution declares Islam as the religion and law of the State and manifesto of life. It guarantees the "right to citizenship as prescribed by law." The State is assigned as the guardian of rights and duties as regulated by the provisions of Shari'a, which is built on the "principle of justice, not absolute equality". The draft requires that the candidate for the positions of president and governor be "Muslim" and "male", who must have the "needed strength" to protect the people and fight the enemy, and possess all senses and body parts. It stipulates that judges are to be chosen from the most qualified "men".[5] It is clear that the proposed constitution classifies citizens into different categories; it draws a clear distinction between Muslim men on the one hand and Muslim women, non-Muslims and persons with disabilities on the other. Only a Muslim male without any disability can run for presidency, governorship and the judiciary. Furthermore, the draft makes most of the rights subject to the provisions of the law, including through phrases such as "prescribed by law" and "in accordance with the provisions of the law", which further undermines the limited constitutional protection provided.

The debate surrounding women's rights plays out against the background of the major gulf between the *de jure* and *de facto* position of women, and the rights and freedoms guaranteed to them in successive Sudanese constitutions. Bearing in mind the variation from one constitution to another and the irregular progress in women's position, women's rights are often compromised in implementation. The inability to create a solid base for women's rights is due to a lack of formal and societal belief in these rights and a lack of goodwill and commitment to enforce them. It is still a common, deeply rooted conviction, even among some women, that women are not able to hold equal roles, shoulder similar responsibilities, and enjoy the same rights as men in public and private life. This belief is partly attributed to the limited understanding of religion, the erroneous application of certain rules, and the failure to develop a new understanding and interpretation of *Shari'a* principles that is able to accommodate current needs, including those of women. The outdated customs and traditions, which propagate women's inferiority, play a significant role in this context. Religion and some cultural beliefs and practices still generate male supremacy and dominance at home and outside it, turning equality and non-discrimination clauses into mere lip service.

The State has failed to secure women rights, notwithstanding Sudan's Interim National Constitution (INC) of 2005, which is deemed to be the best among Sudan's constitutions in terms of responding to women's issues. The official acknowledgment, eight years after the INC's adoption, that there are 26 laws not in conformity with the constitution because of their explicit or implicit discrimination against women signals a lack of prioritising law reform if not bad will.[6] A series of laws, including the Public Order Act of Khartoum State, the Muslim Personal Matters Act and the Criminal Act, enacted prior to the INC, severely affect women's rights and discriminate against them.[7] In addition, the State and local authorities have imposed a bulk of unjust regulations and orders adversely impacting the work of marginalised women.[8] Despite repeated calls for reform, the legislative gap in the area

[5] Ibid., the Draft Constitution of State of Sudan, articles 1, 2, 26, 27, 44 (1 (b), 4 and 5), 113 (b) and 174 (b), article 35, and articles 26-38 in the rights section.

[6] See Project for the Review and Reform of Women's Position in Legislation Report, prepared by Women Centre for Human Rights, Ministry of Welfare and Social Security, and presented in the 'First workshop for the Reform of Women's Position in the Criminal and Personal Status Act' (Khartoum, 2-3 March 2013).

[7] See Report of the UN Human Rights Council on Sudan, 11th session, 2-13 May 2011 (A/HRC/WG.6/11/SDN/2), pp. 1-3.

[8] See Nabil Adib, 'The State Government and Women Tea Sellers', containing an extensive analysis of the recommendations presented by the State Committee on draft legislation concerning tea selling in the streets of Khartoum, published in *Al-Sudani* (May 2010) (Arabic).

of violence against women and girls persists, which creates a sphere of fear that lessens protection and enhances the cruelty of crimes committed in this context.[9]

Women's economic conditions continue to deteriorate despite the constitutional provisions on social justice, equal distribution of wealth and power and women's right to equal participation in public life. Economic and social development plans remain insensitive to gender issues and women's needs, and barely recognise or consider women's vital contribution to the economy. The absence of legal provisions implementing the constitutional positive discrimination clause means that only a small number of women assume high rank positions. The estimated percentage of women graduates in higher education is 58.2% compared to men. However, only 26% of them find their way into the formal sector; 77% of them perform administrative work, 87.8% work in farming and 4.8% in industry.[10] At present, the majority of women have no social security cover. Statistics also confirm that of the 90% of Sudanese who live below the poverty line, 65% are women. The right to education as prescribed by the current constitution is a key tool for women's advancement, but it is obstructed by lack of qualification and political responsiveness, leaving 50.6% of women illiterate.[11] Further, the deteriorating economic situation of families has left its mark on women and girls' right to education, as males are preferred based on the religious and customary beliefs on gender roles and worth.

Building a new State rests on a just, coherent social order in which all individuals are equally valued, appreciated and treated, irrespective of their religion, ethnicity, race, gender, colour, language, age, disabilities or any other status. It also requires the establishment of a solid constitutional framework, a strong stable economy, and a conducive political environment. These conditions are not present in the case of Sudan, which reinforces the need to open the Pandora's box, i.e. to identify every outstanding issue, discuss it, take note of all viewpoints and make the necessary compromises to arrive at a consensus. The scattered data on women, quantitative and qualitative, points to a major gap between what is available and what is needed.

The debate on women's issues has two dimensions. The first concerns women's equal status, and their role, rights and responsibilities, both in theory and practice. Such a debate is vital to eliminate the discrepancies in existing socio-cultural, legal and political structures. The debate must be conducted across political parties, civil society organisations, trade unions, academics and research institutes, religious groups and concerned human and women rights bodies, with the aim of developing a shared understanding on women's role and rights. Participants shall deliberate on the problematic aspects of religious and cultural practices, and social stereotypes as the core of debate, and scrutinise their political and economic manifestations.

The second dimension concerns women's vision on outstanding questions of identity, governance, power and wealth, human rights and fundamental freedoms, as well as institutions and mechanisms. Raising women's awareness on the range of issues being discussed is a precondition in the process. Civil society groups, human rights and women's organisations and advocates play a key role in mobilising women to achieve this end by promoting transparent, broad and inclusive dialogue. Discussions shall be conducted on the premise that women are a diverse group with different abilities, capabilities and concerns. The women's forum shall identify the viewpoints expressed by women from different ethnic, religious, and minority groups, social and political backgrounds, rural and urban areas, as well as formal and informal sectors, and attempt to develop a collective vision(s) that accommodates diversity.

[9] Asma Abdel Halim, 'Gendered Justice: Women and the Application of Penal Laws in the Sudan', in Lutz Oette (ed.), *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan* (Asghate, Farnham, 2011), p. 227.
[10] Above note 2, p. 113.
[11] Above note 1.

There is no way for Sudan to survive, develop and prosper with half of its population undervalued, marginalised and/or neglected. The construction of peace, security, stability and sustainable development in a divided country such as Sudan requires the joint effort and partnership of all human forces. Ignoring women's role as a significant force of change and partners in State and nation building, if it continues, will protract the state of volatility and arrest any efforts of a meaningful transformation. To change the status quo, people must renounce outdated beliefs and practices and adopt perspectives that adequately respond to lived realities. The forthcoming constitution should outline these perspectives and guarantee their realisation. Women's status, role and rights should be defined within the constitution, backed by measures to ensure respect and enforceability. To this end, it is critical to evaluate women's experiences under previous Sudanese constitutions to measure the attention that these documents paid to women issues and visions, and the level of protection they offered.

4.3. Women's Rights in Sudan: Human Rights Conventions vis-à-vis the Constitution

4.3.1. The Evolution of Women's Constitutional Rights in Sudan prior to 2005

The status, role and rights of Sudanese women are in a state of constant change. Studies on Sudan's ancient and modern history have documented the major role of women in the State, especially in the private sphere.[12] The analysis of women's status and rights in this section is confined to the era immediately preceding the country's independence to date. It seeks to examine the range of rights and level of constitutional protection conferred upon women under Sudan's successive constitutions in view of relevant international and regional treaties.

1953-1973: From pre-independence to unstable post-independence

Women's rights have become a global issue. The United Nations (UN) Charter of 1945 (the Charter) introduced gender equality as a fundamental principle, affirming a "belief in human rights, dignity and worth of human being, and equal rights of men and women".[13] In 1948, the Universal Declaration of Human Rights (UDHR) affirmed the same principle, emphasising the inherent dignity and equality in the enjoyment of human rights and fundamental freedoms without discrimination of any kind.[14] The principles of dignity, equality and non-discrimination have since become the core of human and women's rights. In 1952, the UN adopted the Convention on the Political Rights of Women, wherein women became eligible to vote, run for election, hold public offices, and exercise all public functions on an equal footing to men, without discrimination of any kind.[15] In Sudan, that year witnessed the birth of the first women's union in the country, formed by a group of women's activists. The main goals of Sudan's women's movement at the time were to raise women's awareness of their rights and campaign for the basic rights and freedoms enjoyed by men.

Sudan adopted its first and second constitutions, the Self-Government Statute 1953 and the Interim Constitution 1956, a few years after the adoption of the abovementioned treaties. The two constitutions, however, took minimal account of the rights affirmed by these treaties, both in general and in relation to women in particular. They lacked the basic principle of equality and non-discrimination enshrined in the Charter and the UDHR and the political rights recognised by the Convention on the Political Rights of Women, which the post-independence governments did not ratify. Both constitutions included a section on fundamental rights comprised of six articles, three of

[12] Nafissa Ahmed el-Amin, *The Sudanese Woman throughout the History of her Struggle* (Government Press, Khartoum, 1972) (Arabic).
[13] Preamble and Article 55 of the UN Charter.
[14] See in particular the Preamble and Article (1), (2) of the UDHR.
[15] UN Convention on the Political Rights of Women 1952.

which related to the rule of law, independence of the judiciary and constitutional protection of rights. One of the provisions affirmed the right to "equality before the law" and the prohibition of "disability by reasons of birth, religion, race or sex in regard to employment, occupation, trade, business or profession". The other two articles singled out freedom of religion, freedom of expression, prohibition of arrest, imprisonment, as well as detention and confiscation of property except by due process of law.[16]

Both constitutions failed to live up to the broad principles of equality, inherent dignity and non-discrimination as recognised in international law, as they limited the principle to equality before the law. Moreover, the prohibition of "disabling" persons is restricted to employment and admission to occupation or profession. This limitation of the non-discrimination clause permitted the Election Committee of 1948 to deny women the right to vote or to be elected, despite their participation in the struggle against colonisation alongside their male counterparts. Educated women were given the right to vote in the parliamentary election of 1953 after leading numerous demonstrations in the streets of Khartoum. Their right to vote, however, was restricted to the graduates' constituencies and moreover confined to women who completed high school or university,[17] while their male counterparts were allowed to vote in both general and graduates' constituencies without any such restrictions.[18] Neither the 1953 nor the 1956 constitution, adopted by democratically elected governments, embraced the rights referred to in the Convention on the Political Rights of Women. The Revolutionary Command Council, which headed the first military regime in Sudan, seized power in 1958 and immediately suspended the constitution and all rights guaranteed under it. Women had no presence in the Council and took no part in ruling the country.[19]

The Interim Constitution of 1964, adopted during the second democratic rule in Sudan, was a reproduction of its predecessors, with minor modification introduced by the amendments of 1965, 1966 and 1967. It maintained the section on fundamental rights with a slight change in its article 4 to prohibit deprivation of any Sudanese from his or her rights by reasons of birth, religion, race or gender in regard to public offices, employment in the private sector, occupation or profession. Apart from this, the constitution made no effort to accommodate the international framework on women's rights or the newly adopted treaties on women's issues. The UN Convention on the Nationality of Married Women of 1957 recognises the right of a wife to retain her acquired nationality if her husband chooses to change or give up his nationality and for a foreign wife to acquire nationality of her husband upon marriage, among other rights. A second UN treaty, the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, was adopted in 1962 to protect women rights in marriage: it stipulates a minimum age for marriage, requires full, free consent of the intended spouse, conclusion of marriage in the presence of the competent authority and witnesses, and registration of the marriage contract at the official registry. None of the rights enshrined in the 1957 and 1962 UN treaties were recognised by the constitution of 1964. In practice, however, women's rights have undergone a major development, as women were permitted to vote and run for election in the second democratic election. As a result, the first Sudanese woman entered the constituent assembly in 1965 after winning the race in one of the

[16] Article 5 (1), (2) of the Self-Government Statue of 1953 and article 4(1-2) of the Interim Constitution of 1956.
[17] Very few women were eligible to vote as high schooling only started in 1945 in the capital Khartoum.
[18] According to article 33 of the Self-Government Statute of 1953, a person was qualified to vote in the general constituencies if he was a male, while in graduates' constituencies a person was qualified to vote if, among other conditions, he was a graduates of recognised secondary school, university or university college. A male elector may vote in both constituencies.
[19] The number of members of the Central Council reached 72 in 1963, all males. See Mohammed Ahmed Salim, 'Towards a distinctive role for women in the next constitution', paper presented at 'Constitution-making Forum: A Government Consultation', organised by the Advisory Council of Human Rights, UNDP and UNMIS in Khartoum (24-25 May, 2011).

graduates' colleges. However, the right to vote and to be elected was lost shortly thereafter, in 1968, due to the abolition of the graduates' colleges.[20] This marked the first regress for women, as they lost their voice and presence in the third constituent assembly.

At the international level, 1966 witnessed the adoption of the International Covenant on Civil and Political Rights (ICCPR) and the Economic, Social and Cultural Rights (ICESCR), entered into force in 1976. The two covenants introduced a wide range of political and civil, economic, social and cultural rights, basing the entitlement to these rights on two principles: equality of all individuals, including between males and females, and prohibition of discrimination on any grounds, including sex.[21] The right to life, liberty and security, equal protection of the law and recognition before the law, freedom from torture, inhumane and degrading treatment and punishment, participation in public life, freedom of movement, freedom of expression, and the rights to privacy, work, education and the highest standard of health are among the recognised rights and freedoms. The impact of the two covenants is evident in Sudan's subsequent constitutions, at least at the theoretical level, though recognition of Covenant rights has been uneven.

1973-1985: Sudan's first "permanent" constitution under the Nimeiri regime

The Permanent Constitution of Sudan 1973, enacted by the second military regime,[22] lacked the basic elements of democracy due to the concentration of powers in the hands of the president and the recognition of only one political party.[23] Unlike its predecessors, however, it considerably enlarged the list of rights, adding new civil, political, economic, social and cultural rights. It contained a preamble with numerous universally recognised principles, and included 21 rights in its section on freedoms, rights and duties, with an additional 20 rights included in the rule of law section. The preamble declared that the ultimate goal of the constitution was to create a society based on welfare, equality and justice; article 14 reaffirmed that Sudanese society is founded on the principles of national unity, solidarity, freedom, equality and justice.[24] Equality of all people before the law, equality of Sudanese in rights and duties without any discrimination due to race, gender, national origin, sex, language or religion, as well as the rights to privacy, political participation, religion, education, health, mother and childcare, and freedom from torture were all guaranteed under the constitution. However, provisions ensuring freedom of movement, expression, association and assembly were coupled with drawback clauses such as "in accordance with the law", "within the boundaries of law" and "as stipulated by law." To safeguard the stipulated rights and freedoms, article 58 provided the right to resort to court to invalidate any legislation that infringes any of the constitutional rights and freedoms. Furthermore, article 79 stated that any legislation that restricts the rights and freedoms guaranteed by the constitution must be in accordance with the constitution and can only be justified on the grounds of respect of the rights of others, public order and welfare.

Three important points concerning the 1973 constitution need to be highlighted. Given the fact that the constitution was the product of a military government, it was the first to attempt to domesticate international human rights standards in general and those of women in particular. The second unique feature was its introduction of a new set of obligations on the State; namely, economic, social and cultural development of rural areas, combating famines, water shortage and epidemics, eradication of illiteracy and promotion of adult education, institution of a social security scheme to cover events of disasters, sickness, orphanage, aging, unemployment and other similar conditions, as

[20] On women's political participation in the post-independence period, see ibid.
[21] See the preamble and article 2(1) and 3 of the ICCPR, and the preamble and article 2 (2) and 3 of the ICESCR.
[22] The military rule known as May Revolution of 1969 seized power in May 1969 and ruled until April 1985, and was initially supported by the communist party.
[23] Article 4 of the Permanent Constitution of the Democratic Republic of Sudan of 1973.
[24] Ibid., see Part II on the basic foundations of Sudanese society.

well as the protection of youth against exploitation and physical and mental neglect.[25] A third distinctive, yet controversial, feature was the novel inclusion of provisions recognising religion as part of the constitutional framework. According to article 16, "Islam is the religion of the State; society adheres to its commands and the State promotes its values, whereas Christianity is the religion of a large number of citizens and State promotes its values."[26] More importantly, article 9 established the connection between religion and the law for the first time, providing that "Islamic *Shari'a* and custom are the main sources of legislation, and the personal matters of non-Muslims are to be governed by their own law."[27]

In the first years of the regime, the position of women underwent remarkable progress under the auspices of the 1973 constitution; they assumed essential roles in public life, enjoyed more rights and received better protection compared to past constitutions. One of the reasons behind this development was the wide scope of social and economic rights incorporated in the constitution, alongside the extended list of general obligations on the State to eradicate poverty and enhance standards of living for all citizens, especially women, children, the elderly and disabled groups. Recognition of these rights can be attributed to the socialist trend proclaimed by the regime when it seized power. The second common reason, which is valid for both military and democratic rule, is the reliance of political parties on women as an active minority to come to power, legitimise it or/and sustain its existence. Further, that period witnessed a greater presence of women in government bodies at all levels. The percentage of women in the last legislative assembly reached 7% (11 MPs) compared to 0.3% (1 MP) in the first democratic parliament of 1965.[28]

The second drawback for women occurred when the regime abandoned its socialist, leftist ideology, taking a sharp turn to the extreme right and introducing the Islamic laws of 1983 (often referred to as the "September Laws"). These laws abridged most of the rights and freedoms protected by the constitution, including the right to privacy, the prohibition of inhuman treatment and punishment, and freedom of religion. For women, the laws struck at the basic principle of equality and non-discrimination, imposing numerous constraints on their movement, employment, personal freedom, legal personality and privacy. Further laws and regulations were enacted to control women in public and private life in contravention to their constitutional entitlements. This included enforcing a special dress code on women, setting specific working hours for women, and introducing the next-of-kin companionship policy in respect of movement and travelling for women.

1985-1989: Democratic transition and transitional constitution

A popular uprising overthrew the second military rule in 1985 and a transitional military council took over prior to the general election. Immediately following its assumption of power, the council issued the Transitional Constitution of Sudan of 1985 in consultation with the cabinet of ministers. It intended to fill the constitutional gap pending the formulation of a permanent constitution by the elected constituent assembly. The 1985 transitional constitution eliminated the provision on the State religion introduced by its predecessor, but retained the provision identifying *Shari'a* and custom as the main sources of legislation and allowing personal matters of non-Muslims to be regulated by their own law.[29] The third part of the constitution on human rights and freedoms elaborated a range of civil and political rights, including equality of all persons before the law and equality of citizens in holding rights and duties without discrimination because of birth, race, colour,

[25] Articles 17 to 29 ibid.
[26] Article 16 (a) and (b) ibid.
[27] Those two provisions were imported from the draft constitution of 1968, prepared by the second democratic government. They provoked intensive discussions and disagreement between parliamentarians from the south and north.
[28] See the diagram that illustrates the numbers and percentage of women MPs, above note 19, p. 9.
[29] Article 4 of the Transitional Constitution of Sudan 1985.

sex, religion or political opinion. Along with the provision on protection of constitutional rights, it prohibited curtailment of any of the rights and freedoms except by legislation from the legislative authority aimed at protecting public security, morality, public health or national economy.[30]

In contrast to the 1973 Permanent Constitution, the 1985 transitional constitution did not include any economic, social and cultural rights. Moreover, the scope of recognised civil and political rights was narrow; in particular, the basic right to life and the prohibition of torture, cruel punishment and treatment were omitted. The constitution also fell short regarding the protection of women, children and vulnerable groups, such as persons with disabilities and the elderly. Another significant limitation was the addition of a provision that acknowledged the continuity of all laws in force until repealed or amended by the competent authority.[31] This sanctioned the continuing violation of women's rights under the discriminatory laws enacted by the former regime, namely, the September Laws. Unsurprisingly, the participation of women in the transitional council amounted to 0%.

Another democratic regime assumed power in 1986. It maintained the 1985 transitional constitution while negotiating a new permanent constitution. The process of drafting the constitution, which lasted three years, came to end when the government was overthrown by the third *coup d'état* in 1989. The greatest achievement of the democratic government of 1986 is the ratification of the ICCPR, the ICESCR and the African Charter on Human and People's Rights, 1981 (the African Charter).

Regrettably, the elected government did not ratify the UN Convention of the Elimination of all forms of Discrimination against Women 1979 (CEDAW) (entered into force in 1981), or the UN Convention against Torture 1984 (CAT) (entered into force in 1987). The desire to eradicate the remains of the former military regime was the rationale for non-ratification of CAT;[32] the lack of political will to tackle pertinent women's issues and to improve their position was the only reason in the case of CEDAW. Following the catastrophic impact of measures taken by the military government under the September Laws in general, and on women in particular, and insistent calls to abolish them, the social and political forces demanded radical reforms of the legal system. Accession to CEDAW was the bare minimum that Sudanese women expected from the democratic regime that followed. Women in Sudan were, and still are, in need of the quantum leap that CEDAW intends to bring to women's lives worldwide. The limited impact of the general conventions in rectifying women's subordinate position was the principal motive for a separate convention on women's rights. It was also an admission that women's rights and freedoms need detailed recognition and protection. In Sudan, there was a critical need to domesticate the broad, inclusive definition of discrimination offered by CEDAW, as well as the rights and protective measures provided therein. The post-democratic era was full of challenges; war, famine, displacement and poverty combined with, and resulted in, socio-economic and legal instability. Women and children were the principal victims of these circumstances. Recognition of women's concerns and their contribution was greatly needed; instead, their voices were barely heard in the legislative assembly of 1986, as women represented only 0.7% (2 seats out of 301) in the graduates' constituencies.

1989-2005: From coup d'état to the 1998 constitution and beyond

The third wave of critical change in the position of women and their rights was brought about by the capture of power in the third *coup d'état* of 1989, with the new government declaring its Islamic programme shortly thereafter. The harm done by the regime in its first years is beyond repair,

[30] Articles 17-32 ibid.
[31] Article 134 ibid.
[32] Articles 32 and 33 of the 1985 Constitution restricted the enjoyment of the constitutional rights and freedoms provided under its articles 19, 20, 21, 22, 23 and 27 by persons accused of "being part of the former military regime, committing or participating in ruining economic or political life, violating or dismantling the 1964 interim constitution".

especially on women's status and rights. The military council ruled the country up to 1998 through constitutional decrees following the suspension of the constitution and the dissolution of all political parties. It imposed a radical Islamic approach, whereby rights and freedoms were subject to religious rules. Detention, torture and oppression of political opponents were widespread. A severe dress code was forced on women, along with a series of measures to restrict their movement, so as to seclude and confine them. The first days of the regime witnessed a massive dismissal of women from different sectors of government, and their deliberate exclusion from certain fields of study and work. No woman was allowed to enter the judiciary before 2005 and very few were left working in the field of foreign affairs. Women and girls became targets for police harassment and intimidation, and the main subjects of prosecution under the penal laws and public order regime.

Escalation of the war in the then-south of Sudan, the isolation of the country for alleged attempts to destabilise the region, the imposition of sanctions and the growing international pressure forced the regime to soften its radical religious ideology. One of the measures taken was the appointment of a committee to draft a new constitution. Similar to its predecessor, the 1998 constitution made no reference to economic and social rights enshrined in the ICESCR, such as the rights to education, food, shelter, adequate standard of living, health, work, social benefits and insurance. The range of civil and political rights was very narrow compared to the ICCPR, and restricted by phrases such "as regulated by law" and "in accordance to the law". In practice, it proved difficult, especially for women, to enjoy the prescribed rights in light of such open-ended legislative constraint. A further cause of the limitation of women's rights was the provision that identified Islamic *Shari'a* and the "consensus of the nation" as the only sources of legislation.[33]

As a guiding principle, the 1998 constitution provided that "the State shall care for the family, facilitate marriages, develop population policies, provide child care, care for pregnant women, liberate women from prejudice in all aspects of life, encourage women's role in the family and public life."[34] However, women's right to move freely was severely restricted in and outside the country by statutory provision; male companionship, be it a father, son or husband, was required and/or guardian approval was mandatory for travel abroad. The ban on women to assume certain positions continued despite the passage of the constitution. The major deficiency in the 1998 constitution from a woman's point of view was the provision of the "right to equality", which stated that:

> [A]ll people are equal before courts. All Sudanese are equal in rights and duties in functions of public life and it is not permissible to discriminate only because of race, sex or sect of religion, and they are equal in eligibility for work and holding public office, and are not distinguished because of wealth (emphasis added).[35]

The constitution did not provide for equality between men and women, equality before the law, or non-discrimination on all grounds in public and private spheres. Instead, it explicitly sanctioned discrimination on grounds of race, sex and religion if combined with another condition.

The 1998 constitution made two major contributions in regard to women's rights. For the first time, it gave women the right to give nationality to their children on an equal footing.[36] Secondly, its positive discrimination clause, as a measure to advance particular groups, allocated a 25% proportional representation for special, indirect election at national and State constituencies, which includes women, as well as academic and professional groups.[37] In the vein of previous military

[33] Article 65 of the Constitution of the Republic of Sudan 1998, in Part IV, the sources of legislation.
[34] Article 15 ibid., in Part I, the guiding principles.
[35] Article 21, ibid., Part II, freedoms, rights and duties.
[36] Article 22, ibid.
[37] Article 67 ibid.

regimes, the government sought women's support by appointing a percentage of 8.8% women parliamentarians in 1992, 5.1% in 1996 and 9.7% in 2001, chosen from female members of the regime's political party. However, women's contribution was minimal in practice, and women's issues were not on the agenda of the legislative or ministerial council.

A series of developments compelled the regime to agree to fundamental changes. Against the backdrop of mounting support for the Southern military opposition and the growing conflict in Darfur, the regime concluded the CPA with the Sudan People's Liberation Movement/Army (SPLM/A) and adopted the 2005 Interim National Constitution (INC) to govern the transitional period. The CPA and the INC incorporate most of the recognised international human rights principles. However, the CPA's main shortcoming was the exclusion of other political actors, civil society organisations, Darfurian groups, and mainstream Sudanese, including women, from negotiations. In the absence of these stakeholders, the legitimacy of the constitution resulting from the CPA is in question. It is therefore a valid question whether the INC has dealt with all issues of concern and ensured the basic rights and freedoms of all in equality and without discrimination of any kind.

4.3.2. *Women's Rights in Sudan's Interim National Constitution 2005*

Many human rights scholars and advocates consider the current interim constitution as the best constitutional text among the country's successive constitutions: it includes a variety of principles, directives, provisions, rights and freedoms that reflect most of the conventional international human rights standards. In the preamble, the constitution affirms the pluralistic nature of the State and the ethnic, racial, religious and cultural diversity of the population. It declares a commitment to democracy, federalism, peaceful distribution of power, and the advancement of values of justice, egalitarianism, dignity and equality of men and women in rights and in duties.[38] As directive principles, the constitution defines the comprehensive objectives of economic development to include the eradication of poverty, realisation of the millennium development goals, assurance of equitable distribution of wealth, reduction of income inequality and achievement of a decent standard of living for all citizens. Domestically, it obliges the State to adopt strategies and polices to ensure social justice for all through maintaining livelihood and employment opportunities. Internationally, the foreign policy of Sudan shall serve national interests and be administered with due independence and transparency to achieve, among other aims, international cooperation under the UN umbrella, enhance international peace, and respect of international law and commitments under international treaties. Another important identified aim is the promotion of human rights and fundamental freedoms in regional and international fora. The interim constitution incorporates a range of civil and political rights as well as economic, social and cultural rights in two different parts: the general directive principles and the Bill of Rights. Various women's rights are also found in both parts, but without a clear and explicit criterion, logic or distinction based on the nature of rights.

(i) Women's Rights as Guiding Principles and Directives

All the rights and freedoms recognised in the INC's Chapter II are general directives; they guide government in legislation- and policy-making only and are therefore not justiciable in a court of law or subject to monitoring processes.[39] While some of these rights are elaborated in the Bill of Rights, other rights of fundamental importance, such as the right to health and work, are not. Further, equality between men and women in the enjoyment of their rights is included in this part but does not apply to nationality. Chapter II further recognises social justice, prohibition of discrimination in

[38] The Preamble and articles 1-4 of the Interim National Constitution of the Republic of Sudan 2005.
[39] Article 22 ibid.

employment or work for qualified persons due to disability, and the right of elderly persons and people with special needs to participate in social, professional, creative and entertainment activities. Article 13 of the INC acknowledges the promotion of education as a general directive, whereby the obligation of the State is limited to provide compulsory primary and illiteracy education free of charge. Other conditions and entitlements provided for by article 26 of the UDHR and article 13 of the ICESCR with respect to the right to education are left out, including parents' choice concerning their children's education, the State's obligation regarding availability of technical and professional education, and equal accessibility to higher education for all based on merit.

Three provisions in this chapter are of exceptional importance to women. The first, titled 'family, marriage and women,' incorporates the right of men and women to marry and to have a family in accordance with their personal matters laws. Marriage will only be recognised if entered into with the full and free will of the two parties.[40] The significance of this provision stems from the fact that under-age marriage is still a social practice in different parts of Sudan, sanctioned by culture and endorsed by legislation. The State is required to take measures to realise this constitutional provision. This requires the repeal of the section of the Muslim Personal Matters Act 1991 that takes away women's and girls' right to freely choose and marry and allows their guardian to marry them at the age of ten.[41] A particular reference to women is found in article 15 (2) of the INC, which obliges the State, among other things, to protect women from injustice, enhance gender equality, ensure women's role within the family and empower them in public life. This provision is critical for preferential measures directed towards advancing women's position in the private and public sphere. The State is required to use this provision as guidance to enact laws and develop polices and plans. The most important of the three provisions is arguably the right to citizenship and nationality enshrined in article 7 of the Constitution. It affirms the right of men and women to grant nationality to their children, declaring citizenship as the sole basis for equal rights and duties for all Sudanese. However, women's equal right to grant nationality to their children is restricted by the Sudanese Nationality Act 1994, as discussed in section (iii) (b) below.

What remains open for debate is the repeal of the provision regarding the sources of legislation stipulated in the 1973, 1985 and 1998 constitutions. Article 5 of the INC specifies the sources of legislation as Shari'a and consensus of the people. In the absence of a uniform understanding of women's rights under Shari'a law, as argued earlier, the inclusion of such a provision generates uncertainty. Women's rights to equality and non-discrimination, freedom from torture, cruel, inhuman or degrading treatment or punishment, equality before the law, and freedom of movement and residence are all open to limitation if interpreted in light of Shari'a rules as understood in their historical context. This may lead to a conflict of norms and interpretations incompatible with international human rights law.

(ii) Women's Rights in the Bill of Rights

The Bill of Rights, incorporated as such for the first time in Sudan's constitutional history, is the biggest achievement of the current constitution. It is declared as a covenant between all the people of Sudan, and between them and their governments at all levels, and ensures a commitment to respect and protect human rights and fundamental freedoms enshrined by it as a basis for social justice, equality and democracy in Sudan. The most important feature of the Bill of Rights is the obligation on the State to promote, include and enforce it and the incorporation, as an integral part, of all rights and freedoms recognised by international treaties binding on Sudan. This entails an

[40] Article 15 (1) ibid.
[41] Article 40 of the Personal Matters Act for Muslims 1991. See further the discussion on legislative limitations and discrimination below.

enormous expansion of the range of protected rights. Another feature is the explicit elucidation of the relationship between the Bill of Rights and other laws, which is one of regulation and not elimination or curtailment of prescribed rights and freedoms.[42] A further important feature is the power given to the constitutional court and other competent courts to protect and enforce the Bill, and to the Human Rights Commission to monitor its execution by the State[43] in a pioneer move towards promotion, implementation and protection.

As citizens, women enjoy a series of civil and political rights under the Bill of Rights. This includes the right to life, dignity, protection against torture or cruel, inhumane or degrading treatment (though punishment is omitted), liberty, security and personal integrity, privacy, equality before the law, fair trial and adjudication, participation in public life as prescribed by law, and the right to vote and to be elected. Women are also entitled to the freedom of belief and worship, expression and assembly, and the right to form political parties, as well as freedom of association, movement and residence. As for economic and social rights, the constitution guarantees the right of possession and ownership, education without discrimination on the grounds of religion, race, ethnicity, gender or disability, and to primary healthcare and emergency services free of charge. It further recognises the right of ethnic and cultural groups to enjoy their distinctive cultures without restriction and the entitlement of persons with special needs to all rights and freedoms provided by the constitution, in particular respect and dignity, provision of suitable education and work, and full participation in society. Further, it obliges the State to ensure the right of the elderly, to respect their dignity and to provide the required medical care and services as regulated by law.

The Bill of Rights recognises a series of specific civil, political, economic and social rights of women. Article 32, titled "rights of the woman and child", obliges the State to "guarantee equality of men and women in enjoyment of all civil, political, social, cultural and economic rights, including the right for equal pay for equal work and other professional benefits", including by means of positive discrimination. On the societal level, the State is required "to combat harmful customs and traditions that degrade women's dignity and status. It shall provide maternity, childhood and pregnancy healthcare, and protect child rights as stipulated by international and regional conventions ratified by Sudan". Of great importance is article 31 on equality before the law, which affirms "equality of all people before the law and right to enjoy legal protection without discrimination because of race, colour, sex, language, religious belief, political opinion or ethnic origin".

(iii) Gaps and Limitations in the Bill of Rights

(a) Definitional gaps and limitations

Despite its undoubted strengths, the Bill of Rights has major gaps and a range of limitations compared to international and regional treaties on human rights ratified by Sudan. On civil and political rights, the Bill of Rights lacks the basic provision of non-discrimination set out by article 2 of the UDHR, ICCPR, ICESCR and the African Charter, which prohibit discrimination based on race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status. The prohibition of discrimination under the Bill of Rights is mentioned in connection to equality before the law only, and therefore fails to include important grounds for discrimination such as disability, wealth, gender and other reasons. The right of every human being to a legal personality as set out in article 16 of the ICCPR and article 5 of the African Charter has also not been recognised. Article 33 of the Constitution omits "punishment" from the prohibition of

[42] Article 27 INC.
[43] Article 48 INC.

torture and inhuman, cruel or degrading treatment, contrary to international treaties to which Sudan is a party. Moreover, the right to political participation enshrined by the Bill is truncated as it omits the right to hold public office stipulated by articles 21 (2) of the UDHR and 25 (c) of the ICCPR. Article 13 of the African Charter enlarges the right to political participation to include the right of every citizen to equal access to public property and services, as well as access to public service of her or his country, in strict equality of all persons before the law. In theory, these rights form an integral part of the Bill of Rights by virtue of article 27(3) that incorporates international treaties to which Sudan is a party. However, the diverging provisions of the Bill of Rights introduce an element of uncertainty and fail to unequivocally confirm and build upon international standards.

Further, the Bill of Rights does not specifically mention the basic right to work or equitable conditions of work and remuneration as recognised under article 23 and 24 of the UDHR and article 6 and 7 of the ICESCR, respectively. It also fails to expressly provide for the essential right to social security including social insurance, provided for in article 9 of the ICESCR and 22 of the UDHR. In article 25, the UDHR also further elaborates the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond one's control. The right to an adequate standard of living for oneself and the family, in particular, the right to food, to be free from hunger, clothing, housing, medical care, continuous improvement of living conditions, stipulated by article 11 of the ICESCR and 25 of the UDHR, is equally not explicitly recognised. Nevertheless, these rights are theoretically included within the Constitution by virtue of article 27(3).

The Bill of Rights replicates the general directive principle under article 19 regarding the right to health. Article 46 reads, "[T]he State undertakes to develop public health, establishes, enhances and rehabilitates basic treatment and diagnostic institutions, and provides primary healthcare and emergency services, free of charge, for all citizens." This provision differs considerably from the right to health as enshrined in article 12 of ICESCR and article 16 of the African Charter, where every individual is entitled to the enjoyment of the highest attainable standard of physical and mental health. The State is obliged to take the necessary measures to ensure such rights through the reduction of stillbirth-rate and infant mortality and, among other things, the healthy development of the child. The creation of the conditions that would assure medical services and care to all in the event of sickness is another aspect of this right.

(b) Legislative and religious limitations

Article 48 of the INC makes it inadmissible to curtail the rights and freedoms enshrined in the Bill of Rights, whereas article 27 (4) confirms that legislation regulates the prescribed rights and freedoms and does not detract or derogate from them. Despite these two guarantees, legislative provisions restrain most of the prescribed rights and freedoms, at times explicitly discriminating against women.

Article 7 of the INC provides that "every person born to a Sudanese mother or father shall have an inalienable right to enjoy Sudanese nationality and citizenship." The Sudanese Nationality Act 1994, however, makes the right of the person born of a Sudanese mother conditional on an application to the competent authorities, whereas a person born to a Sudanese father acquires it automatically.[44] Another distinction made by the Act concerns the acquisition of Sudanese nationality by residence, where nationality is granted if ancestors in the paternal line have been domiciled in Sudan since January 1956.[45] Further, the Act grants foreign women married to Sudanese men the right to apply

[44] Article 4 (3) of the Sudanese Nationality Act 1994 (amendment 2005).
[45] Article 1 (b) (ii) ibid.

for Sudanese nationality upon completion of a two-year residency in Sudan,[46] while foreigners married to Sudanese women do not enjoy the same right.

Statutory law also curtails the right of women to enjoy civil, political, economic, social and cultural rights on an equal footing with men provided under article 32 of the INC. Article 15 of the INC enhances equality between the two sexes, ensures women's role in the family, empowers them in public life, and declares the inadmissibility of any marriage unless entered with full and free choice of its two parties. However, the Muslim Personal Matters Act 1991, which derives from *Shari'a* rules, negates these constitutional guarantees. This Act deals with a range of issues pertaining to marriage, divorce, maintenance, custody, inheritance and will. According to its provisions, women have no right to conclude marriage other than through a guardian, who has to be male, Muslim, adult and of sound mind.[47] If the guardian refuses to conclude the marriage without legitimate grounds, then the woman shall request the judge to conclude her marriage contract.[48] The Act allows the guardian to wed a girl as young as the age of ten (age of puberty) with the permission of a judge if the latter believes that it serves her best interest, conditional upon the man's status as a "proper husband" and an appropriate dowry.[49] In general, marriage dissolves by the sole will of men, unless the woman retains the right to divorce in the marriage contract. Men, however, have the right to withdraw from divorce without women's consent or even knowledge.[50] Although a woman is entitled to seek divorce in court due to her husband's impotence or incurable physical or mental sickness, she has to prove her claim trough medical evidence by a Muslim doctor, and wait up to one year to acquire divorce.[51] Rights and duties within marriage are a source of discontent and debate, particularly the requirement to request a husbands' permission to leave the house to visit their family or have a job.[52] Another form of prejudice concerns the obligation on the father to provide for the son's education and not the daughter.[53] Rules of inheritance also give preference to males over females and provide females in most cases with half of the males' share.[54] Women's rights movements in several countries have attempted to update these laws to respond to social change and current needs, albeit with limited success.[55]

Another critical source of the violation of women's constitutional rights is the public order regime. Under this regime, women are explicitly discriminated against and their rights to privacy, freedom of movement, and freedom from torture, inhuman or degrading treatment or punishment, are severely restricted. Article 152 of the Criminal Act 1991 outlaws any inappropriate act or conduct as well as indecent dress in public places to the annoyance of the public. It punishes the accused with 40 lashes, fine or both, and is commonly used against women.[56] In the absence of specific criteria of what constitutes "improper" conduct or "indecent" dress, thousands of women and girls have experienced humiliation at the hands of the public order police (now known as the community order police). These women have been brought before public order courts and whipped after a summary trial where no right to counsel is afforded.[57] Women and girls are repeatedly victimised due to lack

[46] Article 8 ibid.
[47] Article 25 and 33 of the Personal Matters Act for Muslim 1991.
[48] Article 37 ibid.
[49] Article 40 ibid.
[50] Article 132-139 ibid.
[51] Articles 151-161 ibid.
[52] Article 51 and 52 ibid.
[53] Article 82, above note 44.
[54] Article 357-400 ibid.
[55] See the Personal Matters Acts of Tunisia and Syria; both of which require presence of the judge in divorce process.
[56] Articles 151 and 154 (2) of the Criminal Act 1991 share the same problem of ambiguity and are used frequently against women.
[57] Out of the thousands of cases, only two found their way to the media, referred to as the "trouser case" of a female journalist and the "scarf case" of a female lawyer.

of awareness of and official respect for constitutional guarantees, and the retention of discriminatory statutory provisions.

The Public Order Act of Khartoum State 1998 adversely impacts the dignity and freedom of women.[58] Eight out of its 25 provisions are exclusively directed to women and eight others shared between men and women. A number of sections explicitly discriminate against women, such as the section prohibiting women from dancing in front of men, and allocating a small percentage of seats in public transport that does not reflect the actual number of women using public transportation.[59] The Act also imposes limitations on employment, such as hairdressing.[60] In violation of article 86 of the Criminal Procedure Act 1991, the Act gives the police the right to enter the premises at any time to search and ensure compliance with the requirements of the Act.[61]

Further, the Criminal Act 1991 fails to provide adequate protection against rape and sexual harassment, instead exposing women to potential prosecution for adultery, contrary to the positive obligation of the State to protect women from harm and injustice, as recognised in the INC and international treaties binding on Sudan.[62]

These are some examples of legislative and religious limitations of basic constitutional rights and freedoms of women. Further examples have been presented in other studies, workshops and forums, in relation to women's right to movement, residence and travel, nationality and citizenship as well as matrimonial and family matters.[63] These violations are in principle subject to review by the Constitutional Court. However, the lack of effective access to courts and the jurisprudence of the Constitutional Court, which has been reluctant to strike down laws, have resulted in a persistent discrepancy between constitutional rights and national legislation.

4.4. Women's Status, Role and Rights in Forthcoming Constitutions: Areas of Concern

Any debate concerning women's status, role and rights in Sudan's forthcoming constitution needs to be mindful of Sudan's constitutional history and the reality of women's lives in Sudan. This requires a frank assessment and an acknowledgment of the violations suffered by women in public and private life. To overcome this situation, a comprehensive approach is needed that will examine the socio-cultural, economic and political causes of inequality, discrimination and marginalisation, and will develop adequate provisions for constitutional protection against the same.

4.4.1. The disentanglement of the question of women's rights

The question of women's rights must be decoupled from the situation of other marginalised groups such as children, persons with disabilities, the elderly, internally displaced persons, refugees, as well as religious or ethnic minorities. Inequality and discrimination is a shared factor. However, women are not a minority group and experience distinctive forms of discrimination, though they may intersect with experiences of being a member of a marginalised group. It is high time to document

[58] See Nabil Adib, 'Al-Nizam Al-Aam ka Adah Listikhdam Al-aunf Zhid Al-Marah' (Public Order Act as Means for the Use of Violence against Women), *Al-Sudani* (2010).
[59] Articles 7 and 9 of the Public Order Act 1998.
[60] Articles 14, 15, and 16 ibid.
[61] Article 17 ibid.
[62] REDRESS and KCHRED, *Time for Change: Reforming Sudan's Legislation on Rape and Sexual Violence* (2008).
[63] See Mohamed A. Babiker, 'Gender and Migration in Sudan', CARIM-AS 2011, European University Institute (2011); Nasreldeen Abdulbari, 'Citizenship Rules in Sudan and Post Session Problems' (2010), available at http://www.cmi/no/sudan/doc/id=1284; and Sudanese Organization for Research and Development (SORD), 'Towards Gender Equity in Sudan: Draft Legislation of Family Law for Muslim' (2011).

women's life stories, experiences and conditions in the context of the community and environment they live in and to uncover the reasons for subordination and inferiority.[64] To this end, the preamble of the upcoming constitution should acknowledge the prejudices, stereotypes, and subordination of women and affirm their equal status, critical role and equal rights.

4.4.2. The Challenge of Cultural and Religious Rules and Human Rights Treaties

There is no doubt that the religious and cultural controversy over women's status, role and rights is a real limitation to their enjoyment of basic human rights. Sudanese courts have in different cases disregarded the established constitutional rights and relied on *Shari'a*-based justifications. A good illustration is the age of liability of the child. The Constitution, the Child Act 2010 and the Convention on the Rights of the Child 1989 (CRC), to which Sudan is a State party, define a child as a person under the age of 18 but there is also an undefined age of puberty according to the Muslim Personal Matters Act 1991. Accordingly, the courts tried several girls under the age of 18 and above the age of ten as adults for adultery in rape cases. *Shari'a* rules need to be re-examined in light of the rapid transformation of Muslim communities and the gradual change of individuals' roles occasioned by political, economic and social developments. However, the mainstream religious view still interprets and applies most of the Islamic jurisprudence and rules, especially those pertinent to women, in their historical context with no or little consideration of current realities in general, and of women in particular. Yet, to take one example, the religious rule that supports a preferential position for males based on knowledge and provision for the family is under scrutiny today as a considerable number of women are, either by choice or necessity, the sole breadwinners or major contributors in providing for the family, and at the very least for themselves.[65] There is therefore an indisputable, urgent need to revisit various aspects of *Shari'a* law, and to interpret and understand its teaching in the present context to remove the confusion and discrepancy surrounding it, including in respect of women.

Resolving the conflict between religious rules and international treaties on women's status and rights is fundamental for the forthcoming constitution to be legitimate and respected, not only by women's rights' advocates but also by those who believe in human rights to be universal, indivisible, and derived from the inherent dignity of the human person without distinction on any ground. Incorporation of two potentially conflicting provisions in the same document – namely, article 5 of the INC, which stipulates Islamic *Shari'a* and consensus as sources of legislation, and article 27 (3) which refers to all rights and freedoms protected by international treaties ratified by Sudan – generates scope for uncertainty and interpretation that is incompatible with internationally recognised women's rights. In this regard, a recent debate has focused on the meaning of "*Shari'a*", according to which it should be interpreted as general, directive principles, including spiritual values and social ideals of justice, freedom, *Shura* (deliberation) and public interest, as well as internationally affirmed rights and freedoms.[66]

4.4.3. Equality and Non-discrimination Clause

All Sudanese constitutions have failed to incorporate comprehensive equality and non-discrimination clauses comparable to the ones found in international and regional human rights instruments. Some constitutions lack both provisions, some include the equality principle only, and

[64] Sondra Hale, *Gender Politics in Sudan: Islamism, Socialism and the State* (Westview Press, Boulder: Colo., 1997).
[65] The 'al-Giwama' principle in Shari'a gives men the upper hand in the family with certain conditions, the Holy Qur'an, su'ra Al-Ni'saa (4:33).
[66] Mohamed I. Khalil, 'Religion and state in the Sudanese constitutions', and Al-Tayeb Zain El-Abdeen, 'The relationship of religion and state in the Constitution', in Mahjoub M. Saleh (ed.), Studies on the constitution (Alayam Center for Cultural Studies and Development, Khartoum, 2012) (Arabic).

others contain inadequate clauses. International and regional treaties ratified by Sudan,[67] with no exception, incorporate, alongside the preamble, two provisions that guarantee equal rights of men and women and prohibit any form of discrimination in the enjoyment of prescribed rights on the grounds of race, sex, colour, language, religion, political or other opinion, national or social origin, disability, gender, wealth, birth or other status. The provision on the equality of all people before the law is an additional guarantee. States parties to a treaty are obliged to implement their duties and guarantee the enjoyment of rights. The upcoming constitution shall incorporate equality and non-discrimination provisions in line with international standards. The constitution should take note of the elaborate definition of discrimination stipulated in the two conventions on women rights not yet ratified by Sudan; that is CEDAW and the Protocol on Women's Rights in Africa (2003). The former has extended the meaning of discrimination to include "any exclusion or restriction based on sex that has the effect or purpose of impairing or nullifying recognition of women's human rights or fundamental freedoms in the political, economic, social, cultural, civil or any other field, regardless of their marital status and in equality with men".[68] The latter expands the definition further to include "any discriminatory treatment on basis of sex directed or resulted in weakening or annulment of recognition of women's human rights and fundamental freedoms in all fields of life regardless of their social status".[69] These detailed definitions are helpful in elaborating the scope of equality and non-discrimination and enhance their utility as a tool to guide State practice and implementation.

4.4.4. Integration of Economic, Social and Cultural Rights

Economic, social and cultural rights are inadequately recognised in the INC.[70] The Bill of Rights has made strong reference to international standards within article 27 (3), which incorporates all rights and freedoms enshrined by ICESCR. Notwithstanding such recognition, the Bill of Rights fails to detail the rights in a way to facilitate reference, implementation and adjudication. This is particularly important for women. Women are the primary victims of poverty, hunger, sickness, displacement, illiteracy and unemployment, and as such, are the main beneficiaries of this category of rights.

Economic, social and cultural rights are not subordinate to civil and political rights; they are interconnected, interdependent and mutually reinforcing, which should be recognised as one of the fundamental principles in the future constitution. Catering for the basic needs of all citizens, the constitution shall emphasise the importance of this class of rights through the integration of social and economic rights as part of the Bill of Rights and ensure the State's commitment to guarantee them. Articles 13 to 24 of the Protocol on Women's Rights in Africa are a good model to follow in the provision of economic and social rights.

4.4.5. The Special Measures and Quota Regime

Positive discrimination is a special tool endorsed by the INC under article 32 (2) to enhance women's rights. It is a step forward towards realising equality and bridging the gender gap in the State system. However, eight years after its incorporation, the impact of the provision on women's position is negligible due to a lack of effective measures taken in this regard. To illustrate, article 136 of the INC provides general directives for recruitment in the civil service, one of which is aimed at addressing the imbalance and inequity in recruitment, non-discrimination at any level of government against any qualified Sudanese based on religion ethnicity, region or gender, and to employ positive

[67] Namely, UDHR, ICESCR, ICCPR, the International Convention on the Rights of Persons with Disabilities (ICRPD) and the African Charter.
[68] Article 1 CEDAW.
[69] Article 1 (f) of the African Protocol on Women Rights to the African Charter of Human and Peoples Rights, 2003.
[70] Articles 11, 12 and 13, above note 35.

discrimination measures and professional training to achieve equitable employment within a specific timeframe. However, the participation of women in the public and private sector remains far behind that of men even with legislation in place. [71]

Concerning the right to political participation, the quota system proposed by the National Election Act 2008 as a positive discrimination measure is limited in scope and discriminates between women. Article 29 of the Act provides that "twenty five percent of women members of the legislative assembly shall be elected on the basis of proportional representation at the State level from separate and closed party lists." Only women members of political parties benefit from the special measures, as independent and professional women candidates are not eligible to compete in the women's list. The 25% is a proportion only applied at the legislative body and not the States' and local legislative assemblies. A broader provision is needed in the forthcoming constitution, which specifies that special measures apply to all government institutions and to the private sector. It shall impose a direct obligation on the State to enact legislation and policies required to implement it. The proportion shall match the suggestion by women's and civil society organisations, i.e., 30 to 33% initially, to be incrementally increased over time to 50%.

4.4.6. Legislative Limitations

Article 27 (4) of the INC provides that "legislation shall regulate the rights and freedoms enshrined in this Bill and shall not detract from or derogate any of these rights." Further, article 48 states that "no derogation from the rights and freedoms enshrined in this Bill shall be made." These two provisions confirm the general principle of supremacy of the constitution under article 3 and sufficiently guarantee that all laws shall conform to the constitutional provisions. However, many of the rights provided by the general directives and the Bill of Rights include phrases such as "the law shall regulate" and "as prescribed by law". This applies in particular to women's rights, including in relation to nationality and citizenship; property; marriage rights; movement and residence; privacy; and personal freedoms, which are curtailed by existing legislation as set out above. To protect women, the forthcoming constitution shall explicitly declare any legislation invalid that is not in conformity with the constitution.

4.4.7. Implementation

Implementation can be an uphill task; it requires good will and commitment not only from the political authorities but also from social forces. The social and political commitment can be built-up through education and awareness raising campaigns on human rights and fundamental freedoms. It is of great importance to take a bottom-up approach within the family, society and the State. To secure implementation of the constitution and human rights, including women's rights, it is important to consider all layers of government, i.e. the national, State and local levels. To begin with, the legislative institutions shall ensure the translation of human rights provisions into States' constitutions and local laws, regulations, and policies. Legislation that contradicts constitutional guarantees shall be amended or repealed within a specific timeframe. The judiciary is another key body whose task is to interpret and enforce constitutional rights. Judicial independence needs to be strengthened, and knowledge of the constitutional bill of rights and international human rights standards enhanced. Any restrictions on the mandate of the constitutional court should be lifted to allow it to examine all matters relating to breaches of constitutional human rights.

[71] Souad I. Issa, *Higoog Almarah Bein Aligrar Alganoni wal-Tatfeef fi Almomarasah* (Women's rights between legal recognition and non-observance in practice) (2010).

Another important measure is the establishment of an independent commission for women. Such a commission should have a comprehensive mandate and the power to monitor application of human rights in relation to women. This includes monitoring State practice and compliance with its obligations to take required measures; reviewing State measures; and advising stakeholders at the legislative, executive and societal level on relevant human rights issues, as well as receiving individual and collective complaints on violations of human rights and fundamental freedoms. It shall assist and coordinate with other national institutions and commissions on human rights matters under their jurisdiction, namely, the Human Rights Commission, National Civil Services Commission, National Employment Justice Chamber, and the Public Grievances Chamber. A very important task of the proposed commission would be to conduct public campaigns to educate people at the grassroots level about human rights and the rights of women.

4.5. Conclusion

The question of women's status and rights is complex and challenging due to a series of socio-cultural, economic and political factors. To redress the grievances of Sudanese women and the injustices suffered, there is a need for a fundamental paradigm shift to overcome outdated religious and social beliefs about women's value and to eliminate stereotypes, gender bias and religious, social, economic, political and legal barriers. Women's status and role in society should be one of equality in life and decision-making. Any future constitutional process shall seek and include women's views and visions, not only on women's issues, but also on all outstanding questions of governance, law making, power and wealth sharing, development, peace and state building. Women's initiatives shall continue their effort to bring women together and facilitate their internal dialogue, and campaign at the level of government, political parties, civil society and the community at large. Politicians in government and opposition should respect and acknowledge women's rights and needs. Both democratic and military rule has failed women since independence. None was prepared to consider joining any of the international women's treaties, such as CEDAW and the Maputo Protocol. Women are looking ahead, more than ever, for an end to the state of insecurity concerning their position in society, and their rights in Sudan's legal order and reality.

5. Children's Rights and the Forthcoming Constitutional Bill of Rights of Sudan (Khadeija Elsheikh Mahgoub)*

5.1. Introduction

In its 2010 concluding observations on Sudan's State party report under the Convention on the Rights of the Child (CRC), the Committee on the Rights of the Child, while welcoming measures such as the adoption of a new Child Act, expressed a number of concerns, both regarding the lack of an effective framework for implementation and a series of specific issues.[1] These include the lack of consistency concerning the definition of the child, pronounced inequalities and discrimination, insufficient consideration given to the views of children, the retention of the death penalty that may be imposed on persons under the age of 18 for certain crimes, the continued use of corporal punishment, shortcomings in the administration of juvenile justice, and harmful traditional practices, such as female genital mutilation. The Committee also highlighted poor health services, particularly in areas such as Darfur, poor standards of living, the adverse impact of armed conflict on children, the high number of street children, as well as economic and sexual exploitation and abuse.

When a State becomes a party to an international treaty it is obliged to bring its national laws into conformity with the treaty under question. Since Sudan's ratification of the CRC in 1990, Sudan has undertaken numerous legislative changes in order to incorporate some of the international standards on children's rights though, as highlighted by the Committee on the Rights of the Child, a number of shortcomings still remain.[2] After the secession of South Sudan, a new constitution is expected to be adopted in Sudan. In this context, this chapter discusses children's constitutional rights and the incorporation of children's rights in the various Sudanese constitutions, with a particular focus on the 2005 Interim National Constitution (INC).

International children's rights in the Sudanese context have often been discussed with reference to Islamic *Shari'a*. In case of any assumed conflicts between the two bodies of law, the government has refrained from implementing international norms. With this background, this chapter identifies Sudan's position and the arguments raised in this regard. It also highlights children's rights as provided for in the constitution and the areas of conflict between constitutional norms and national laws. In addition, the paper identifies best practices of other countries that might form the basis for provisions that can be suggested for inclusion in the forthcoming constitution. Finally, the chapter develops some recommendations as to the status of children's rights in the forthcoming constitution with the aim of enhancing the effective implementation of children's rights in Sudan.

5.2. International Law and National Constitutions

States are obliged to implement their treaty obligations in good faith, including by means of incorporating the rights and duties concerned into their national legal order.[3] One important question is whether the CRC requires States parties to include children's rights in their constitutions. The Convention does not make explicit reference to the constitutional inclusion of the rights

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* Dr. Khadeija Elsheikh Mahgoub is Assistant Professor, International & Comparative Law Department, at the Faculty of Law, University of Khartoum.

[1] See Committee on the Rights of the Child, Concluding Observations: Sudan, UN Doc. CRC/C/SDN/CO/3-4 (1 October 2010). See also the Committee's, Consideration of reports submitted by States parties under article 8 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, Concluding observation: Sudan, UN Doc. CRC/C/OPACT/SDN/CO/1 (6 October 2010).

[2] Ibid.

[3] Vienna Convention on the Law of Treaties, U.N.T.S. 1155 (1969) 331, Article 26. See also, for example, Article 2(2) of the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1969).

included therein. Article 4 on the general measures of implementation mentions that "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention". The *travaux préparatoires* reveal that the issue of "other measures" is open-ended.[4] R. Hodgkin and P. Newell also support the idea of incorporating children's rights in the constitution by mentioning that:

> …The Convention, like other human rights instruments, does not require States to have a constitution. But where there is a constitution, its provisions must be consistent with the Convention, or, in the terms of article 41, must be more conducive to the realization of the rights of the child.[5]

In this context, the crucial question concerns the methods of including children's rights in the constitution. Particularly, is an explicit reference to children necessary? In addition, does the constitution reflect the main principles of the CRC with particular reference to children?[6] To this end, a constitution should reflect the general principles of non-discrimination, the best interests of the child, children's participation, life survival and development and the evolving capacity of the child.[7] Taking such principles into consideration provides for specific recognition of children's rights within a constitution, which results in the provision of a strong claim for justice that cannot be easily ignored.[8]

As mentioned in article 4 of the CRC, States must take "all appropriate legislative, administrative, and other measures". The concept of "other measures" leaves the door open for the types of measures taken. The adoption of children's rights in the constitution could fit within this category. For many countries treaty norms form the basis of constitutional human rights provisions, included in the bills and charters of rights:[9]

> This method of internalising treaty norms into the domestic legal system, especially when the constitutional human rights provisions are justiciable, constitutes one of the most powerful ways in which treaty norms could be enforced on the local level. … In some instances… the treaties have impacted on the bills of rights even when they had not been ratified at the time (eg CRC in Brazil, CESCR in South Africa)…[10]

Tobin has identified three broad categories of methods or approaches with regards to the inclusion, treatment and status of children within States' national constitutions, which will be considered further below in the Sudanese context:

> … the 'invisible child' constitution in which children are neither seen nor heard and are accorded no special treatment or recognition… the 'special protection' constitution' in which children are given special recognition within the text because of their vulnerability and need for care and special protection, and … the 'children's rights' constitution in which the special recognition of children is addressed in terms of

[4] See Office of the United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child ,* Volume 1 (United Nations, New York, 2007), p. 353.
[5] Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child* (UNICEF, Geneva, 2007), p. 21.
[6] Ibid, p. 72.
[7] Ibid, p. 53. See also Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers, The Hague, 1998), p. 45.
[8] John Tobin, 'Increasingly Seen and Heard: The Constitutional Recognition of Children's Rights' (2005) 21 *SAJHR,* p. 104 (footnotes omitted).
[9] Philip Alston and Ryan Goodman, *International Human Rights* (Oxford University Press, 2013), p.1051.
[10] Ibid.

> children's rights rather than the welfare approach that characterises their treatment under 'special protection' constitutions.[11]

5.3. Sudanese Constitutions and Children's Rights

Before discussing the inclusion of children's rights in Sudanese constitutions, it is worth highlighting the significance of the term "everyone" in a State's constitution. Is the term "everyone" in a constitution inclusive enough to ensure respect for children's rights? The response of the Committee on the Rights of the Child is that the test should consider whether the applicable rights are "… truly realized for children and can be directly invoked before the courts".[12] The Committee stated that it:

> Welcomes the inclusion of sections on the rights of the child in national constitutions, reflecting key principles in the Convention, which helps to underline the key message of the Convention - that children alongside adults are holders of human rights.[13]

While the term "everyone" covers children's rights, it is important to point out that "historical experience is not uniformly positive in this regard and children's rights often remain neglected or subsumed within the rights of parents."[14] This led the Committee on the Rights of the Child to question the bona fides of claims that the constitutional guarantees of the right of "everyone" is sufficient to adequately ensure respect for the rights of children.[15]

Children's rights were invisible in the Sudanese Constitutions before 1973 and subsequently only recognised to the extent that they formed part of general provisions on rights and liberties. The 1973 Permanent Constitution of Sudan included some provisions that directly or indirectly addressed the rights of children and the rights of parents in relation to children. Article 15 for instance, under the heading "General and Social Fundamentals", provides that the family is the foundation of the society and that it shall be protected by the State against the causes of weakness and disintegration. Other general provisions that make indirect reference to children include article 38, which provides that all people in the Democratic Republic of the Sudan are equal and article 53, which specifies that education is a right of every citizen and that the State shall endeavour to spread and provide it for free in all stages. Other articles of the 1973 Constitution that have more specific reference to children include article 45, which excludes children under the age of eighteen years from the right to vote and article 55, which states that mother and children should be accorded care and attention and that the State should ensure adequate guarantees for mothers and for working women. Moreover, article 75 provides that no person under eighteen years of age shall be sentenced to death and such sentence shall not be executed on women who are pregnant or suckling their babies unless two years of suckling have lapsed. Article 77 stipulates that juveniles accused of offences shall be kept separate from adults and be brought for trial as soon as possible. Further, article 78 provides that rehabilitation and reform of the prisoners shall be the underlying principle of their treatment. In addition, juveniles detained in reformatories or prisons shall be kept separate from adult prisoners and shall be accorded treatment compatible with their legal status and age.

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[11] Above note 8.
[12] Committee on the Rights of the Child, 'General Comment No. 5: *General measures of implementation for the Convention on the Rights of the Child* (arts. 4, 42 and 44, para. 6)', UN Doc. No. CRC/GC/2003/5 (27 November 2003), para. 21.
[13] Ibid. See also above note 5, p. 54.
[14] Above note 8.
[15] Ibid.

While this was the first time the word "children" appeared in any of the modern Sudanese constitutions, the approach taken emphasises protection and welfare rather than children as rights-holders. The 1998 Constitution of the Republic of Sudan also included some direct and indirect provisions on children's rights. Article 14, for example, provides that the State should care for children and youth, should protect them from physical and spiritual exploitation and neglect, and shall implement policies for moral care, national education and religious values to ensure good future generations. Article 15 on family and women provides that the State shall care for the family, facilitate marriages, develop population policies, and provide child care and care for pregnant women. Article 33(2) on the death penalty largely replicates article 75 of the 1973 Constitution, though it introduces an exception for the *Shari'a* crimes of *qisas* or *hudud*. Indirect provisions on children's rights that are applicable to everyone include article 21 on the equality of all people before the law, article 22 which provides that everyone born of a Sudanese mother or father has the inalienable right to Sudanese nationality, article 24 that everyone has the right to freedom of conscience and religion, and article 105(2) on constitutional remedies. According to Tobin's classifications,[16] the 1998 constitution could be regarded as a "'special protection' constitution", in which children are given special recognition because of their vulnerability and need for care and special protection. It does not reflect the fact that in 1998 Sudan was already a member of the CRC, and therefore failed to reflect the spirit of the Convention.

The 2005 Interim National Constitution of Sudan (INC) sets out general policies in relation to children and youth welfare in articles 14(1) and (2). The Bill of Rights is included in part two of the constitution. Article 27(1) defines the bill of rights as a covenant among the Sudanese people, between them and their government. Paragraph 2 of the same article sets out the responsibility of the State so as to protect, promote, guarantee and implement the bill of rights. Article 27(4) is concerned with the relationship between the State legislation and the bill of rights. It emphasizes that the legislation shall regulate the rights and freedoms enshrined in the bill of rights and that it shall not detract from or derogate from any of the rights. This indicates that according to article 27(4), State legislation should not detract from the CRC. Of great significance, however, is article 27(3), which reads: "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." This indicates that the CRC, the African Charter on the Rights and Welfare of the Child (ACRWC) and other relevant human rights instruments pertaining to children's rights, to which Sudan is a member, are part of the bill of rights. This has been confirmed by the Constitutional Court of Sudan in *Nagmeldin Gasmalla v. Government of Sudan and the relatives of Abdelrahman Ali* when it ruled that the CRC is part of the INC by virtue of its article 27(3).[17]

The 2005 constitution enumerates various general rights, referring to "every human being" or "every person". In addition article 44(2) provides that primary education is compulsory and the State shall provide it for free. Arguably, children are included in such terms. Furthermore, article 36(3) provides that the death penalty shall not be executed upon pregnant or lactating women, save after two years of lactation. This implies the protection of the unborn child as well. Chapter II of the 2005 Interim National Constitution contains numerous rights provisions that explicitly set out children's rights. When compared to previous Sudanese constitutions, it is probably fair to emphasise that the 2005 constitution has moved a step forward towards the enhancement and realisation of children's rights. In this regard article 32(5) is of great significance as it is solely designated to children's rights. It reads: "The State shall protect the rights of the child as provided in the international and regional conventions ratified by the Sudan." The text is wide enough to include all international and regional

[16] See above note 8.

[17] REDRESS, *Arrested Development: Sudan's Constitutional Court, Access to Justice and the Effective Protection of Human Rights* (REDRESS, London, August 2012), p. 21, available at: http://www.refworld.org/docid/50641ad82.html.

children's rights instruments ratified by Sudan such as the CRC and the ACRWC, though it lacks detail of how this is to be done. Moreover, the paragraph is part of the overall article on women and children's rights. Arguably, this does not fit with the overall general understanding of children's rights that views children as individuals who are capable of holding rights separate from any other category such as women's rights or parental rights. The inclusion of one article within women's rights undermines both women's and children's rights. Article 32(4), for instance, reads: "The State shall provide maternity and child care and medical care for pregnant women". This provision is viewed from the perspective of women's rights only, while the children's rights perspective has been totally overlooked.

When applying Tobin's three methods of constitutional integration of children's rights, it is possible to argue that the 2005 constitution fits within the "the 'special protection' constitution in which children are given special recognition within the text because of their vulnerability and need for care and special protection" rather than "the 'children's rights' constitution in which the special recognition of children is addressed in terms of children's rights …"[18] Nevertheless, articles 27(3) and 32(5) could fit within the category of a "'children's rights' constitution". However, to this end, article 32(5) in particular would need to be turned into a separate article on children's rights and complemented with a set of detailed rights of the child, or at least reference to key guiding principles.

5.4. The Status of Children's Rights in the National Laws of Sudan

Sudan's ratification of the CRC has led to numerous legislative changes some of which were specific to children, particularly the adoption of the substantive Child Act 2004, which was later replaced by the substantive Child Act 2010. Other laws are general in nature but include some provisions on children's rights such as the Armed Forces Act 2007, which sets the minimum age of recruitment into the armed forces at eighteen years of age and penalises some war crimes such as child recruitment.
The Committee on the Rights of the Child, however, pointed out some discrepancies between the 2005 Interim National Constitution and Sudan's 2010 Child Act. In relation to the right of the child to life, survival and development, the Committee expressed its serious concern that:

> [D]espite the adoption of the Child Act (2010), which prohibits the passing of the death sentence on children, under article 36 of the Sudan Interim Constitution, the death penalty may be imposed on persons below the age of 18 years in cases of retribution or *hudud.* The Committee is also concerned at recent reports that the death penalty continues to be carried out on children. The Committee reminds the State party that the application of the death penalty to children is a grave violation of articles 6 and 37 (a) of the Convention.
>
> … The Committee urges the State party to ensure that the death penalty is not carried out on children, including in cases of retribution or *hudud,* and to replace any death sentences already passed on persons under 18 with an appropriate alternative sanction.[19]

This issue highlights the presumed tension between international norms on the rights of children as included in article 27(3) of the INC, and *Shari'a* (Islamic law), referred to as a source of law in article

[18] Above note 8.
[19] Committee on the Rights of the Child, Concluding Observations: Sudan, UN Doc. No. CRC/C/SDN/CO/3-4, (1 October 2010), paras. 35-36.

5(1) of the INC, upon which Sudan relies in order to measure and justify its implementation of the international and regional human rights instruments.

5.5. Sudan, Shari'a and Children's rights

Sudan was one of the first States that ratified the Convention on the Rights of the Child in August 1990. Unlike some other States such as Afghanistan, Brunei Dar Alsalam and Saudi Arabia, for instance, which will not apply the Convention if it is contrary to Shari'a, Sudan did not enter any general reservation when doing so. However, Sudan's implementation of the CRC shows that it has been influenced by Shari'a. For example, the Committee on the Rights of the Child, in its concluding observations to Sudan's third and fourth periodic reports, pointed out some discrepancies between Islamic Shari'a and the CRC with regards to the definition of the child,

> While welcoming the definition of a child as any person under the age of 18 years under the Child Act (2010), the Committee is concerned at the lack of consistency in the State party's legislation and practice with regard to the definition of the child. In particular, the Committee is concerned that adulthood is, in practice, determined by reference*, inter alia,* to the attainment of puberty in conformity with *sharia* law in the northern part of the State party,…. The Committee emphasises that the incorrect determination of childhood has serious implications for the protection of children's rights, particularly in relation to juvenile justice and early marriage.
>
> The Committee recommends that the State party implement the Child Act (2010) in all parts of its territory. It also recommends that the State party harmonise its legislation and practice with the Convention in this area.[20]

This ongoing debate brings to the surface the relationship between international and domestic law, and the issue of the interpretation of international human rights treaties, particularly the authority to interpret and the methods of interpretation. States are to implement their treaty obligations in good faith whereby international treaty provisions take precedence over conflicting national laws unless a valid reservation has been entered. As regards the authority of any party to interpret a treaty, international human rights bodies have a *de facto* interpretative role in order to fulfil their duty to monitor the implementation of the human rights instrument under consideration.[21]

As regards the CRC, for instance, while it is a standard-setting document, this should not interfere with the fact that it applies to almost all the countries in the world with a multitude of different cultural and religious backgrounds. In its general comment no. 17, which is concerned with the rights of the child, the Human Rights Committee also stated that the State party could take into consideration social and cultural conditions when speaking about the age at which a child attains majority.[22] However, this comment should not be read as defeating the concept of the universality of human rights. The Vienna Declaration and Programme of Action, in fact, responds to this argument and recognises the individuality of the State and regional differences:

> All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national

[20] Ibid., paras. 27-28.

[21] However, this is disputed by some states. See further discussion in Henry J. Steiner, and Philip Alston, *International Human Rights in Context: Law, Politics, Morals,* 2nd edition (Oxford University Press, 2000), p. 1047.

[22] Human Rights Committee, General Comment No. 17: Rights of the Child (Article 24), UN Doc HRI/GEN/1/Rev.1 at 23 (1994), para. 3.

> and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.[23]

Shari'a will continue to be raised as an important feature of Sudan's implementation of international and regional children's rights standards. In this context, it is worth finding common ground between the two legal regimes. Generally speaking, in some instances the government of Sudan needs to broaden its understanding towards a particular holy text and make consideration to the fact that within Islamic jurisprudence a number of recognised interpretations might be available for one particular matter. This is the work of specialist jurisprudential bodies (*Mujammat Fiqhiyya*) or specialist scholars. The State should not confine itself to a single strict or rigid interpretation. As Mashood Baderin points out, in some instances human rights bodies may adopt "the margin of appreciation doctrine because of its utility for resolving cases involving public sensibility and moral issues confronted by States Parties to the Covenant."[24]

5.6. Effectiveness of Constitutional Norms on Children's Rights

Children have a right to an effective remedy and should therefore be able to invoke their rights in the constitution before the courts and as applied by national authorities.[25] However, the possibility of bringing children's rights before the courts needs more elucidation as to whether they are justiciable, especially with regards to children's economic, social and cultural rights.

In relation to the right to life, however, the Constitutional Court in Sudan provided an important interpretation in favour of children's rights in *Nagmeldin Gasmalla v. Government of Sudan and the relatives of Abdelrahman Ali*. The case concerned the violation of the right to life of a child. The applicant was sentenced to death for a crime of murder which he committed when he was 15 years old. He challenged the constitutionality of the decision given by the Supreme Court and contended that it had erred in its application of the Child Act, which excludes children under the age of 18 years from being sentenced to death, except in *hudud* and *qisas*:[26]

> The Constitutional Court held that the provisions of the Criminal Act upon which the Supreme Court based its decision violated the Convention on the Rights of the Child (CRC) and the INC because the CRC is part of the INC by virtue of its article 27(3). Consequently, it found that the decision of the Supreme Court was unconstitutional as it violated the applicant's right to life. The Constitutional Court interpreted the Child Act which does not impose the death penalty on children under the age of 18 years, and found that the Child Act conflicted with the Criminal Act which, while not imposing the death penalty on those below 18, permits it in case of *hudd* and quisas (retribution). The Court interpreted the Child Act as a specific act that should prevail over the general law (Criminal Act). The Court referred extensively to international human rights law and concluded that article 27(3) made human rights treaties part and parcel of the domestic law that should prevail over domestic law.

[23] 'Vienna Declaration and Programme of Action', (12 July 1993) A/CONF. 157/24, Para. 5. See also Manfred Nowak, *Introduction to the International Human Rights Regime* (Martinus Nijhoff Publishers, Leiden, 2003), pp. 26-27.
[24] Mashood Baderin, *International Human Rights Law and Islamic Law* (Oxford University Press, 2003), pp.117-118.
[25] Above note 12, para. 20.
[26] Above note 12.

This decision is important as it is considered a precedent in relation to the interpretation of article 27(3) of the 2005 constitution. However, in order to keep the value of this ruling, subsequent cases should follow the same interpretation.[27]

5.7. Other Constitutions and Best Practices

The INC, while recognising several rights of the child, leaves gaps and would therefore benefit from more detailed provisions. The detailed inclusion of children's rights in the South African Bill of Rights is considered one of the best practices that could possibly provide guidance for the forthcoming constitution. Article 28 of South Africa's Bill of Rights, which is included in chapter 2 of the 1996 South African Constitution, is dedicated to the rights of the child and refers to numerous civil and political rights in addition to other economic, social and cultural rights. The article provides for the rights of children with regards to the definition of a child; name and nationality of the child; family and alternative care; neglect, abuse and degradation; exploitative labour practices; child labour; detention of children; legal assistance for children; armed conflict; and the child's best interests.[28] The South African Constitution also includes a large number of provisions that apply to everyone regardless of age, and also other provisions that are directly concerned with children's rights, such as article 29, which sets out education rights, including: the right of everyone to basic education; the right to education in a language of their choice; and a right to establish and maintain independent educational institutions. Additionally, article 37 includes a number of children's rights within those that are non-derogable in a state of emergency, specifically in relation to maltreatment, abuse, neglect or degradation; exploitative labour practices; child labour; detention; and armed conflict. Finally, Schedules 4 and 5 set out the areas of competence of national and provincial legislatures, including in relation to education and childcare facilities.[29] It has, however, been noted that:

> [T]here are certainly shortcomings in the provision's coverage of children's rights. One obvious weakness of Section 28 is that it provides no express, detailed guarantee of the child's right to express her or his views freely in all matters affecting her/him (as required by Article 12 CRC) other than in limited circumstances in civil proceedings (Section 28(1)(h)).[30]

Other constitutions, such as article 18(2) of the Timor-Leste Constitution, which states, "Children shall enjoy all rights that are universally recognised, as well as all those that are enshrined in international conventions commonly ratified or approved by the State" follow a general approach similar to article 32(5) of the INC. This is a positive approach that provides the potential to guarantee children a very wide range of rights.[31] However, it is potentially problematic as it places a great deal of emphasis on the ability of courts to give effect to these rights in practice:

> Under Section 18(2) [of the Timor-Lest Constitution], judges would be required to devise a framework for resolving conflicts arising between different rights of the child, between the rights of different children, or between the rights of children and non-children. While this provides for flexibility, it leaves much to judicial discretion in terms of establishing the relative priority of rights. This could prove problematic should courts

[27] Ibid.
[28] Constitution of the Republic of South Africa (1996), available at http://www.info.gov.za/documents/constitution/.
[29] Ibid.
[30] Aoife Nolan, 'Submission to the Joint Committee on the Constitutional Amendment on Children', available at http://www.oireachtas.ie/documents/committees30thdail/j-conamendchildren/submissions/list_of_submissions/65Nolan.pdf.
[31] Ibid.

> show a preference for enforcing particular rights of the child at the expense of other rights (whether those of the child itself, other children or non-children).[32]

A positive aspect of article 18(2) is that it is part of an overall article on children, which reads:

> 1. Children shall be entitled to special protection by the family, the community and the State, particularly against all forms of abandonment, discrimination, violence, oppression, sexual abuse and exploitation.
> 2. Children shall enjoy all rights that are universally recognised, as well as all those that are enshrined in international conventions commonly ratified or approved by the State.
> 3. Every child born inside or outside wedlock shall enjoy the same rights and social protection.

5.8. Conclusion

While the enumeration of children's rights in the State constitution is not *per se* sufficient,[33] it is undoubtedly a step towards the enhancement and realisation of children's rights. The detailed inclusion of children's rights within the forthcoming constitution of Sudan is an essential step that will certainly fall within this understanding. The proposed constitution should take into consideration the spirit and contents of international and regional children's rights instruments that are ratified by Sudan such as the CRC and the ACRWC. In this respect the focus should be on the nature of the rights to be included and the methods of their inclusion. The forthcoming constitution should recognise children as rights holders. For instance, it should reflect the right of all children to participate and be heard, which is considered one of the fundamental values of the CRC.[34] All the guiding principles of the CRC need to be reflected in the forthcoming constitution as rights in themselves and in relation to other rights.[35] Children's rights should be more visible in the forthcoming constitution. The inclusion of a separate and specifically designated article on children's rights that includes article 32(5) of the Interim National Constitution plus additional detailed rights is one step towards achieving this. Similar to the South African Constitution, the inclusion of some non-derogable rights for children in the forthcoming constitution will be an asset.

Finally, in the context of Sudan the issue of *Shari'a* will invariably be raised with regards to constitutional and legislative norms. Sometimes, the Islamic jurisprudence (*fiqh*) is broad enough to include numerous and variant recognised interpretations. Identifying these recognised interpretations is the work of specialist jurisprudential bodies (*Mujammat Fiqhiyya*) or specialist scholars. It is the duty of the State, however, to adhere to these recognised interpretations that reflect the true evolving and dynamic nature of Islamic jurisprudence, which does not conflict with international and universal human rights. International and regional human rights bodies are also required to consider the wider context of issues and apply the margin of appreciation in matters where appropriate. Finally, incorporation requires effective access to courts so that children as rights-holders can effectively vindicate their rights and obtain adequate forms of reparation in case of violations.[36]

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[32] Ibid.
[33] Above note 5, p. 49.
[34] Committee on the Rights of the Child, General Comment No. 12: *The Right of the Child to be Heard*, UN Doc. No. CRC/C/GC/12 (1 July 2009), para. 2.
[35] Ibid.
[36] Above note 12, para. 20.

6. Summary of Conference Proceedings

The conference was opened by Dr. Mohamed Abdelsalam Babiker, Associate Professor, Faculty of Law, University of Khartoum and Head of the Training, Scientific and External Relations Unit and Mr. Nabil Adib, the Sudanese Human Rights Monitor representative. The three conference panels were chaired by Dr. Tayeb Murkaz, Associate Professor, Acting Dean, Faculty of Law, University of Khartoum and Dr. Abuzer El Gifari Bashir, Head of the Commercial Law Department. The proceedings in the first panel highlighted the grave violations of human rights and fundamental freedoms in Sudan and the need for the protection of these rights in the forthcoming constitution. The expert panel unanimously agreed that most of the previous constitutions failed to adequately include even the most basic of human rights and fundamental freedoms. While the Interim National Constitution of 2005 (INC) constitutes considerable progress in this regard, gaps remain in terms of recognition, adequacy of substantive provisions and implementation of constitutional rights. In addition, there is the risk of regressive developments, i.e. the adoption of a constitution that falls behind the standard of recognition and protection set out in the INC's Bill of Rights. Participants therefore stressed the importance of critically analysing the current constitution to identify its limitations, and to determine what needs to be addressed in order to achieve the goal of fully recognising human rights in the forthcoming constitution. There was a shared understanding among the experts and participants that political regimes throughout Sudan's history have failed to foster, and legally enshrine, a culture of human rights. Participants emphasised the need to instil human rights values and create general societal awareness of rights. In this regard, it was made clear that the constitutional debate is not only the prerogative of legal scholars but a process that should involve civil society and all sectors of society. It is evident that the constitution-making process, if sufficiently inclusive, transparent and participatory, can play an important role. However, participants questioned the feasibility of successfully undertaking such a process in the current unstable and polarised situation in Sudan where the space for debate is rather limited.

The conference underscored the fact that the INC, and in particular the Bill of Rights, embodied many human rights principles. However, in practice, the Bill of Rights only plays a marginal role and has not provided an effective framework for rights protection, including effective remedies, in Sudan. The experts emphasised the country's failure to implement numerous binding human rights treaties, such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples' Rights (in addition to not becoming a party to several other major international treaties, such as the UN Convention on the Elimination of All Forms of Discrimination and the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment). This failure contradicts article 27 of the INC. This article, which lies at the core of the Bill of Rights, provides that the State is bound to protect, promote, guarantee and implement the fundamental rights and freedoms enshrined in the international human rights treaties ratified by the Republic of Sudan, and that these instruments constitute an integral part of the Sudanese Bill of Rights. The lack of actual implementation raised serious debate among participants who highlighted the need to address the real impediments of why international human rights norms have not been incorporated in practice. Participants questioned whether the inclusion of international instruments in the constitution is sufficient, or can be relied upon in the absence of any additional measures. Article 27 (3) raised conflicting opinions among scholars; while some argued for direct implementation of international norms others stressed that there is a real need to engage in a process of harmonisation between international norms and national norms, without, however, limiting the operation of human rights treaties at the national level. There was broad consensus that the constitutional recognition of international human rights standards is important but would need to be complemented with a more rigorous focus on effective implementation through legislative reforms, administrative measures and application by an independent judiciary.

The panel experts and discussants highlighted serious gaps in the constitutional protection of economic, social and cultural rights. The discussion focused, in particular, on a comparison between the 1973 constitution and other constitutions. In this context, some participants argued that the 1973 constitution was a good document at the normative and substantive level. It was, however, not implemented due to the political context during the Nimeiri regime when the atmosphere for the protection of rights and freedoms was not conducive. There was consensus that the explicit recognition and adequate protection of economic, social and cultural rights must be seen as one of the priorities for any future Bill of Rights.

The experts underscored the manifold forms of inequality and discrimination faced by women in Sudan on a daily basis on both religious and social grounds. Recognising the importance of women in public and private life, including in the constitution-making process, was seen as a prerequisite for strengthening women's societal status and rights. Conceptually, this approach requires an understanding of the problems that women face in their lives. It was stressed that the question of women's rights should be viewed as separate, though linked, to other forms of discrimination and marginalisation. In particular, women's rights should not necessarily be seen as being intrinsically liked with children's rights, as there are considerable differences between the two and as this approach risks defining women primarily in their role as mothers (as well as being vulnerable and potential victims of abuse). Discussions focused heavily on the relationship between women's rights and *Shari'a* law, with some participants regarding the two as incompatible while others insisted that they are complementary. *Shari'a* law is a sensitive area for discussion in Sudan, however, most of the participants and experts agreed that it needs to be debated fearlessly and objectively in order to better address the issues relating to women's rights in Sudan.

The experts highlighted the lack of an explicit obligation and clear guidance on how best to enshrine children's rights in a constitution, and identified the shortcomings of Sudan's constitutions in this regard. Discussions focused on the serious violations of the rights of the child in Sudan that range from female genital mutilation to capital punishment and the need to explicitly adopt the rights of the child in the upcoming constitution and to ensure their effective protection. Participants also discussed the question of how *Shari'a* law impacts children's rights, such as ascertaining the age of majority in *Shari'a law* vis-à-vis international standards and emphasised the need for clarification to uphold children's rights throughout. The speaker in this session argued that despite the impact of *Shari'a* law on children, there is an ongoing debate between Sudan and international and regional human rights bodies, particularly with regard to female genital mutilation and child marriage, in which it should be possible to find a common ground.

The final panel focused on the Sudanese Constitutional Court and the Sudanese Bill of Rights. It found that the current constitution remains in force, without the articles relevant to South Sudan that no longer constitute part of the INC following its independence/secession. The panel also revisited other issues such as monism and dualism, particularly which approach is most suitable in the Sudanese context. The expert speaker stressed that international human rights treaties ratified by the Sudan are already an integral part of the constitution and that it is the duty of courts to apply the provisions of such treaties. Consequently, there is no need to re-open this discussion of the status of human rights treaties in Sudan's legal order. Some participants expressed their concern that a discussion concerning the status of international human rights treaties may open the door for the government to restrict human rights rather than to enhance its protection. The panel agreed that the inclusion of international human rights instruments in the laws of Sudan is a necessary first step in the constitution-making process to facilitate future implementation. The Constitutional Court is critical in this regard but was seen to have largely failed to fulfil its role to date. The panel expert critically examined a number of cases that the Constitutional Court had rejected in relation to important areas such as freedom of expression and administration of criminal justice despite the

merits of such cases. Participants further discussed the question of the independence of the Constitutional Court and were critical of the fact that its judges are appointed rather than chosen by means of fair elections. The panel as well as participants also critically analysed the history of constitution-making in Sudan. They underscored the fact that the previous constitution-making processes were flawed, which resulted in short-lived constitutions. The panel added that the 2005 INC was an exception. The INC included a number of important provisions including the Bill of Rights and other provisions that provided for the establishment of commissions such as the Human Rights Commission and the Commission on the Treatment of non-Muslims in the Capital. However, most of the commissions' mandate remains unimplemented. Finally, the panel emphasised that the INC provides a good foundation for advocacy that shall promote, protect and advance the fundamental rights of citizens, and as such the burden of protecting these rights lies on the citizens and their advocates. Citizens and other right-holders must therefore be aware of their rights and play an active role in ensuring their advancement.

III. Conclusion

Proposals made throughout the Report reflect the need for a participatory constitutional review process that is mindful of the causes of persistent human rights violations and of the specific grievances suffered by members of certain groups, particularly those experiencing discrimination. The INC's Bill of Rights combine wholesale incorporation of international human rights standards binding on Sudan (article 27(3)) with a selective and limited explicit recognition of rights. In addition, several of the rights explicitly recognised in the Bill of Rights are not defined in conformity with international standards. The contributions to this Report demonstrate the shortcomings of this approach. It has created ambiguity as to the scope of protected rights and a potential conflict between article 27(3) and the rights specifically set out in the Bill of Rights, which has not been satisfactorily addressed in the Constitutional Court's jurisprudence. The normative tension between the Bill of Rights and *Shari'a* as a source of the law, and the question of the role of customary law remains equally unaddressed.

The Bill of Rights does not reflect in sufficient detail the rights of members of certain groups, such as children and women, as well as other marginalised groups, such as persons with disabilities, minorities, including religious minorities, internally displaced persons and migrants that have not been addressed in separate chapters in this Report. The protection of their rights, including by means of a non-discrimination clause reflecting international standards, is critical for an inclusive and comprehensive approach to equality and non-discrimination that recognises Sudan's diversity.

Constitutional human rights protection is not confined to a Bill of Rights. As highlighted by several authors in this Report, any Bill of Rights needs to be complemented by fundamental legislative and institutional reforms, particularly of the security sector (SSR) (including the police, the army and the security forces), the CPA Commissions (i.e. Human Rights Commission, Judicial Service Commission, National Constitutional Review Commission) and the judiciary, including the Constitutional Court. Equally, there is a need to strengthen the system of national institutions tasked with promoting and protecting human rights. In that context, the constitutional definition of freedom of expression, association and assembly, as well as provisions pertaining to the administration of criminal justice, must be brought into conformity with international standards, rather than being made subject to national law (which, in Sudan, has unduly curtailed these rights), so as to enable civil society to effectively exercise its critical role in the promotion and protection of human rights. A further complementary measure to be considered in the context of the new constitution should be processes dealing with the legacy of human rights violations, which are also referred to as transitional justice measures. This is particularly important as the right of victims to different forms of reparation is largely absent from both the Bill of Rights and national legislation.

In respect of the broader constitutional framework, any arrangements, such as on the structure of the State (unitary or federal), the political system and the separation of power, should be cognisant of the causes of violations, abuse of power and conflict, particularly the centre-periphery divide and marginalisation and discrimination experienced throughout Sudan's history to the present day. At this stage, it is critical that these issues are brought out into an open, genuine and participatory debate that fosters a constitution-making process capable of resulting in laying the foundation for a lasting constitutional framework in Sudan. If achieved, this may finally break the cycle of adopting fundamental laws that are flawed and/or fail to effectively deliver the human rights protection promised on paper.

IV. Recommendations

The conference's panel experts expressed their concerns over the significant gap between the high aspirations of the international human rights system and the sobering reality of the failure of adequate protection in Sudan. The experts made the following recommendations in respect of the five themes discussed:

1. **The Constitutional Bill of Rights in the Sudan: Towards Substantive Guarantees and Effective Realisation of Rights:**

- The adoption of a new Constitution in the process of which all Sudanese people, without exception, may participate;
- The creation or maintaining of a Bill of Rights along lines similar to that enshrined in the 2005 INC;
- Accession to or ratification of the relevant international and regional treaties to which Sudan is not a party; such as the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the UN Convention on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- The implementation of a comprehensive law reform process to ensure the compliance of domestic laws with international human rights standards;
- Vetting the public service to ensure that qualifications and experiences form the basis of the appointments in the services rather than political affiliations and partisanship;
- Adopting a programme of national reconciliation and transitional justice to deal with past grievances.

2. **Why Constitutional Bills of Rights Fail to Protect Civil and Political Rights in Sudan? Conflicting Rights, Gaps and "Arrested" Reception of International Human Rights Law:**

- The adoption of a constitution that is inclusive of civil and political rights recognised in the International Covenant on Civil and Political Rights in order to cover the substantive gaps in the Bill of Rights;
- The strengthening of national mechanisms with a view to better ensuring implementation of human rights obligations and respect for the rule of law through legal and institutional reform;
- The recognition of Sudan's international human rights obligations by effectively incorporating the human rights instruments in the constitution through a monist or a dualist approach;
- Review of the CPA commissions entrusted with the protection of human rights such as the NCRC (the Commission for the review of the constitution), which may be replaced by a law reform commission; the Human Rights Commission (i.e. selection of commissioners); and the Judicial Service Commission);
- Carefully review the provisions in relation to the permanent or de facto state of emergency declared due to armed conflict or other crises to address the derogation regime with a view to ensuring effective protection of human rights.

3. **Economic, Social and Cultural Rights under the Constitutional Bill of Rights in the Sudan:**

- The adoption of a constitution that is inclusive of economic, social and cultural rights recognised in the International Covenant on Economic, Social and Cultural Rights; this requires a comprehensive review of the economic, social and cultural rights contained in the 2005 Interim National Constitution;

- The need for the Constitutional Court and other courts to recognise the binding effect of the constitution in their jurisprudence; and also liberally interpret the directive principles in the constitution as integrally related to the Bill of Rights.

4. Women's Rights in the Constitutional Bill of Rights: Issues of Status, Equality and Non-Discrimination:

- The constitution-making process should seek and include women's views and visions, not only in issues relevant to them, but also in all outstanding questions of governance, law making, power and wealth sharing, development, peace and state and nation building;
- Women's initiatives shall continue their efforts to bring women together and facilitate their internal dialogue, and campaign at the level of government, political parties, civil society and the community at large. To be equal in dignity and worth, religious, social, economic, political and legal impediments to equality must be removed;
- Politicians in the government and the opposition should respect the value and acknowledge women's wishes and needs;
- Accession to or ratification of international treaties relating to women's rights, i.e. CEDAW and the African Maputo Protocol;
- Ensuring the explicit and adequate integration of women's rights in the constitution in line with recognised international standards.

5. Children's Rights and the Forthcoming Constitutional Bill of Rights of Sudan:

- The proposed constitution should conceive of, and recognise, children as right holders;
- The proposed constitution should take into consideration the spirit and specifically set out the contents of international and regional children's rights treaties to which Sudan is a party, such as the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.

V. Annexes

V.1.: Conference Programme

كلية القانون - جامعة الخرطوم
FACULTY OF LAW - UNIVERSITY OF KHARTOUM

Faculty of Law, *Training, Scientific & External Relations Unit,* University of Khartoum
In Collaboration with the *Sudan Human Rights Monitor*
Seminar
The Constitutional Protection of Human Rights in Sudan:
Challenges and Future Perspectives
Sharjah Hall, 15 January 2014, 10am-5pm

وحدة التدريب والبحث العلمى والعلاقات الخارجية بكلية القانون جامعة الخرطوم
بالتعاون مع المرصد السودانى لحقوق الأنسان
سمنار
الحماية الدستورية لحقوق الأنسان فى السودان: تحديات وروى مستقبلية
قاعة الشارقة، 15 يناير 2014، الساعة العاشرة صباحآ حتى الخامسة مساءاً

Programme

9:30-100 am	Registration
10:00- **10:15** am	**Opening Remarks** Representative of Human Rights Monitor Representative of the Faculty of Law, University of Khartoum
10:15- 12:00 am	**First Panel:** Chair: Dr. Abuzer El Gifari Bashir Associate professor, Head Commercial Law Department
10:15- 10:45 am	**Sudanese constitutions and Constitutionalism, the Protection of Rights and Rule of Law** Dr. Amin Mekki Medani, Lawyer and Former Representative of the UN Office of the High Commissioners for Human Rights
10:45- 11: 15 am	**Why Constitutional Bills of Rights fail to protect Civil and Political Rights in Sudan? Conflicting**

	Rights, Gaps and 'Arrested' Reception of International Human Rights Law Dr. Mohamed Abdelsalam Babiker , Associate Professor of Law, Head, International & Comparative Law Department, Faculty of Law, University of Khartoum
11:15- 12:00 noon	**Discussion**
12:00- 12:30 pm	**Lunch Break**
12:30- 13:30	**Second Panel:** Chair, Dr. Tayeb Murkaz Ali, Associate Professor Acting Dean, Faculty of Law, University of Khartoum
12:00- 12:30 am	**Economic, Social and Cultural Rights under the Constitutional Bill of Rights in the Sudan Interim National Constitution, 2005** Mr. Ahmed Abdel Gadir Ahmed Lecturer, Head, Public Law Department
13:00:13:30 pm	**Women's Rights in the Constitutional Bill of Rights: Issues of Status, Equality and Non-Discrimination** Ebtisam Sanhouri Elrayh Lecturer of Constitutional Law and Human Rights Faculty of Law, Khartoum University, Public Law Department
13:00: 14: 00 pm	**Discussion**

14: 00: 14: 15 pm Break	**Tea**
14:15-16:00 pm	**Third Panel:** Chair, Dr. Tayeb Murkaz Ali, Associate Professor Dean, Faculty of Law, University of Khartoum
14:15- 14:45 am	**Children's Rights and the Forthcoming Constitutional Bill of Rights of Sudan** Dr. Khadeija Elsheik Mahjoub Assistant Professor, International & Comparative Law Department, Faculty of Law University of Khartoum
14:45: 15:15 am	**The Sudanese Constitutional Court and the International Bill of Rights** Dr. Ali Suliman Fadlalla, Associate Professor of Law, Former Dean, Fellow, Faculty of Law, University of Khartoum
15: 15: 16:00 pm	**Discussion**
16:00- 16:15 pm	**Recommendations /Concluding Session**

V.2.: Human rights provisions in selected Constitutions of Sudan

1. The Self-Government Statute (1953)

Chapter II: Fundamental Rights
(note: the provisions contained in Chapter II were copied verbatim in the 1956 and 1964 constitutions)

Article 5: Right to freedom and equality
(1) All persons in the Sudan are free and are equal before the law
(2) No disability shall attach to any Sudanese by reason of birth, religion, race or sex in regard to public or private employment or in the admission to or in the exercise of any occupation, trade, business or profession.

Article 6: Freedom from arrests and confiscations
No person may be arrested, detained, imprisoned or deprived of the use or ownership of his property accept by due process of law.

Article 7: Freedom of religion and association
(1) All persons shall enjoy freedom of conscience and the right freely to profess their religion, subject only to such conditions relating to morality, public order or health as may be imposed by law.
(2) All persons shall have the right of free expression of opinion, and combination, subject to the law.

Article 8: The rule of law
All persons and associations of persons, official or otherwise, are subject to the law as administered by the Courts of Justice, saying only the established privileges of Parliament.

Article 9: Independence of judiciary
The Judiciary shall be independent and free from interference or control by any organ of the Government, executive or legislative.

Article 10: Right to Constitutional Remedy
Any person may apply to the High Court for protection or enforcement of any of the rights conferred by this Chapter and the High Court shall have power to make all such orders as may be necessary and appropriate to secure to the applicant the enjoyment of any of the said rights.

2. The Permanent Constitution of the Sudan (1973)

Part III: Freedoms, Rights and Duties

Article 38
All persons in the Democratic Republic of the Sudan are equal before Courts of law. The Sudanese have equal rights and duties, irrespective of origin, race, locality, sex, language or religion.

Article 39
Punishment is person provided that blood-money (Dia), compensation or collective fine may be imposed in accordance with custom or local social order.

Article 40
No Sudanese shall be deported from Sudanese lands or be prevented from entering them.

Article 41
Freedom of movement and residence shall be guaranteed for all citizens, except for reasons of security and public health as prescribed by law, provided that the period and extent of any restriction thereon shall be fixed.

Article 42
The private life of citizens is inviolable. The State shall guarantee the freedom and secrecy of postal, telegraphic and telephonic communications in accordance with the law.

Article 43
Dwellings are inviolable and they shall not be entered or searched without the permission of their occupants, except in the cases, and in the manner, prescribed by law.

Article 44
Political refugees in the Democratic Republic of the Sudan shall not be extradited to another State, except within the limits permitted by the principles of International law and laws of the Sudan.

Article 45
Every citizen shall have the right to participate in elections and referendums when he attains eighteen years of age and fulfils conditions of eligibility as prescribed by law.

Article 46
The right of citizens to participate in public life and in nomination of themselves for public posts and office, in accordance with the provisions of the Constitution and the law, is guaranteed.

Article 47
Freedom of belief, prayer and performance of religious practices, without infringement of public order or morals, is guaranteed.

Article 48
Freedom of opinion is guaranteed. Every Sudanese shall have the right to express his opinion in writing or verbally or by other means of expression in accordance with the law.

Article 49
The press shall be free within the limits of the law, as a means to educate and enlighten the people, and it shall be directed to serve the objectives of the people.

Article 50
The Sudanese shall the right to hold peaceful meetings and to take part in quiet and peaceful processions in accordance with the provisions of the law.

Article 51
The right to form trade unions, associations and societies is guaranteed for Sudanese, in accordance with the provisions of the law.

Article 52
The State shall prohibit conscript labour. Forced labour shall only be allowed for a military or civil necessity, or in execution of a criminal penalty in accordance with the provisions of the law.

Article 53
Education is a right of every citizen and the State shall endeavour to spread and prove it free in all stages.

Article 54
Health care and medical treatment are a right of every citizen and the State shall endeavour to spread and provide it free.

Article 55
Mothers and children shall be accorded care and attention and the State shall ensure adequate guarantees for mothers and the working women.

Article 56
The State shall ensure equality of opportunities for all Sudanese and prohibit any discrimination in work opportunities or conditions or play on the grounds of origin, sex, or geographical affiliations.

Article 57
The defence of the country, upholding of the Constitution and protection of the revolutionary achievements shall be a sacred duty of every citizen.

Article 58
Subject to Article 111 hereof, any person aggrieved by any law passed by any legislative authority may institute a civil suit before the Supreme Court to declare such law void on the ground of its violation of the freedoms and rights guaranteed by this Constitution.

3. Constitution of the Republic of Sudan (1998)

Chapter I: Freedoms, Sanctities and Rights

Article 20: Freedom and sanctity of life
Every human being shall have the right to life, freedom, safety of person and dignity of honour save by right in accordance with the law; and he is free of subjection to slavery, forced labour, humiliation or torture.

Article 21: Right to equality
All people are equal before the courts of law. Sudanese are equal in rights and duties as regards to functions of public life; and there shall be no discrimination only by reason of race, sex or religious creed. They are equal in eligibility for public posts and offices not being discriminated on the basis of wealth.

Article 22: Sanctity of nationality
Every person born to a Sudanese mother or father shall have a non-alienable right to enjoy the country's nationality and its rights and bear its obligations. Whoever is brought up or is resident in the Sudan for several years shall have the right to nationality as regulated by law.

Article 23: Freedom and right of movement
Every citizen shall have the right of freedom of movement, residence in, exit from and entry into the country; and his freedom shall not be restricted save under safeguards of the law.

Article 24: Freedom of creed and worship
Every human being shall have the right of freedom of conscience and religious creed, and he shall have the right to declare his religion or creed, and manifest the same by way of worship, education, practice or performance of rites or ceremonies; and no one shall be coerced to adopt such faith, as he does not believe in, nor to practice rites or services he does not voluntarily consent to; and that is without prejudice to the right of choice of religion, injury to the feelings of others, or to public order, all as may be regulated by law.

Article 25: Freedom of thought and expression
There shall be guaranteed for citizens the freedom of pursuing any science or adopting any doctrine of opinion or thought without coercion by authority; and there shall be guaranteed the freedom of expression, reception of information, publication and the press without prejudice security, order, safety and public morals, all as regulated by law.

26: Freedom of association and organization
(1) Citizens shall have the right of association and organization for cultural social, economic, professional or trade union purposes without restriction save in accordance with the law.
(2) There shall be guaranteed for citizens the right to organize political association; and shall not be restricted save by the condition of consultative decision making and democracy in the leadership of the organization, and use of propagation not material force in competition and abiding by the fundamentals of the Constitution, that as regulated by law.

Article 27: Sanctity of cultural communities
There shall be guaranteed for every community or group of citizens the right to preserve their particular culture, language or religion, and rear children freely within the framework of their particularity, and the same shall not by coercion be effaced.

Article 28: Sanctity of earning and property
(1) Every person shall have his right to acquire property and knowledge, and shall enjoy the privacy of his earning; and there shall be no expropriation of whatever he has gained of livelihood, property, land, invention, or manual, scientific, literary or artistic production, save by such law as may charge him with the tax of contribution for public need or public interest in consideration of just compensation.
(2) No taxes, fees, or other fiscal dues shall be levied save by law.

Article 29: Inviolability of communication and privacy
(1) There shall be guaranteed for citizens the freedom and secrecy of communication and correspondence; and the same shall neither be tapped nor perused save upon controls provided by law.
(2) All privacies of a human being in residence, livings, effects and family shall be inviolabilities not to be infringed save upon permission or by law.

Article 30: Immunity against detention
A human being is free. He shall neither be arrested, detained, nor confined, save by such law that shall require stating the charge, the duration of detention, facilitation of release and respect for dignity in treatment.

Article 31: Right and sanctity in litigation
The right to litigate shall be guaranteed for all persons and no one shall be denied the right to sue or shall be involved in a criminal or civil litigation save in accordance to the procedures and rules of law.

Article 32: Right of innocence and defense
No person shall be incriminated or punished for an act save in accordance with a prior law incriminating the act and punishing therefor. A person accused of an offence shall be innocent until his conviction is judicially proved; and he shall have the right to a prompt and fair trial and to defend himself and choose whoever may represent him in defense.

Article 33: Sanctity from death save in justice
(1) No death penalty shall be inflicted, save as retribution or punishment for extremely serious offences by law.
(2) No death penalty shall be inflicted for offences committed by a person under eighteen years of age; and such penalty shall be executed upon neither pregnant nor suckling women, save after two years of lactation; nor shall the same be inflicted upon a person who passed seventy years of age other than in retribution and prescribed penalties (*hudud*).

Article 34: Protection of freedoms, sanctities and rights
Every aggrieved person who has exhausted means of grievance and complaint to the executive and administrative organs, shall have the right of access to the Constitutional Court to protect the freedoms, sanctities and rights set out in this Chapter; and the Constitutional Court may according to due process exercise the power to annul any law or order that contravenes the Constitution and restore the right to the aggrieved or compensate him for damage sustained.

4. The Interim National Constitution of the Republic of the Sudan (2005)

Part Two: BILL OF RIGHTS

Article 27: Nature of the Bill of Rights
(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.

Article 28: Life and Human Dignity
Every human being has the inherent right to life, dignity and the integrity of his/her person, which shall be protected by law; no one shall arbitrarily be deprived of his/her life.

Article 29: Personal Liberty
Every person has the right to liberty and security of person; no person shall be subjected to arrest, detention, deprivation or restriction of his/her liberty except for reasons and in accordance with procedures prescribed by law.

Article 30: Sanctity from Slavery and Forced Labour:
(1) Slavery and slave trade in every form is prohibited. No person shall be held in slavery or servitude.
(2) No person shall be required to perform forced or compulsory labour except as a penalty upon conviction by a competent court of law.

Article 31: Equality before the Law:
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.

Article 32: Rights of Women and Children:
(1) The State shall guarantee equal right of men and women to the enjoyment of all civil, political, social, cultural and economic rights, including the right to equal pay for equal work and other related benefits.
(2) The State shall promote woman rights through affirmative action.
(3) The State shall combat harmful customs and traditions which undermine the dignity and the status of women.
(4) The State shall provide maternity and child care and medical care for pregnant women.
(5) The State shall protect the rights of the child as provided in the international and regional conventions ratified by the Sudan.

Article 33: Sanctity from Torture
No person shall be subjected to torture or to cruel, inhuman or degrading treatment.

Article 34: Fair Trial
(1) An accused is presumed to be innocent until his/her guilt is proved according to the law.
(2) Every person who is arrested shall be informed, at the time of arrest, of the reasons for his/her arrest and shall be promptly informed of any charges against him/her .
(3) In all civil and criminal proceedings, every person shall be entitled to a fair and public hearing by an ordinary competent court of law in accordance with procedures prescribed by law.
(4) No person shall be charged of any act or omission which did not constitute an offence at the time of its commission.
(5) Any person shall be entitled to be tried in his/her presence in any criminal charge without undue delay; the law shall regulate trial in absentia.
(6) Any accused person has the right to defend himself/herself in person or through a lawyer of his/her own choice and to have legal aid assigned to him/her by the State where he/she is unable to defend himself/herself in serious offences.

Article 35: Right to Litigation
The right to litigation shall be guaranteed for all persons; no person shall be denied the right to resort to justice.

Article 36: Restriction on Death Penalty
(1) No death penalty shall be imposed, save as retribution, hudud or punishment for extremely serious offences in accordance with the law.
(2) The death penalty shall not be imposed on a person under the age of eighteen or a person who has attained the age of seventy except in cases of retribution or hudud.
(3) No death penalty shall be executed upon pregnant or lactating women, save after two years of lactation.

Article 37: Privacy
The privacy of all persons shall be inviolable; no person shall be subjected to interference with his/her private life, family, home or correspondence, save in accordance with the law.

Article 38: Freedom of Creed and Worship
Every person shall have the right to the freedom of religious creed and worship, and to declare his/her religion or creed and manifest the same, by way of worship, education, practice or performance of rites or ceremonies, subject to requirements of law and public order; no person shall be coerced to adopt such faith, that he/she does not believe in, nor to practice rites or services to which he/she does not voluntarily consent.

Article 39: Freedom of Expression and Media
(1) Every 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 order, safety or public morals as determined by law.
(2) The State shall guarantee the freedom of the press and other media as shall be regulated by law in a democratic society.
(3) 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.

Article 40: Freedom of Assembly and Association
(1)The right to peaceful assembly shall be guaranteed; every person shall have the right to freedom of association with others, including the right to form or join political parties, associations and trade or professional unions for the protection of his/her interests.

(2) Formation and registration of political parties, associations and trade unions shall be regulated by law as is necessary in a democratic society.
(3) No association shall function as a political party at national, Southern Sudan or state level unless it has:-
(a) its membership open to any Sudanese irrespective of religion, ethnic origin or place of birth,
(b) a programme that does not contradict the provisions of this Constitution,
(c) democratically elected leadership and institutions,
(d) disclosed and transparent sources of funding.

Article 41: Right to Vote
(1) Every citizen shall have the right to take part in the conduct of public affairs, through voting as shall be regulated by law.
(2) Every citizen who has attained the age specified by this Constitution or the law, shall have the right to elect and be elected in periodic elections, through universal adult suffrage in secret ballot, which shall guarantee the free expression of the will of the electorate.

Article 42: Freedom of Movement and Residence
(1) 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.
(2) Every citizen shall have the right to leave the country as shall be regulated by law and shall have the right of return.

Article 43: Right to Own Property
(1) Every citizen shall have the right to acquire or own property as regulated by law.
(2) No private property may be expropriated save by law in the public interest and in consideration for prompt and fair compensation. No private property shall be confiscated save by an order of a court of law.

Article 44: Right to Education
(1) Education is a right for every citizen and the State shall provide access to education without discrimination as to religion, race, ethnicity, gender or disability.
(2) Primary education is compulsory and the State shall provide it free.

Article 45: Rights of Persons with Special Needs and the Elderly
(1) The State shall guarantee to persons with special needs the enjoyment of all the rights and freedoms set out in this Constitution; especially respect for their human dignity, access to suitable education, employment and full participation in society.
(2) The elderly shall have the right to the respect of their dignity. The State shall provide them with the necessary care and medical services as shall be regulated by law.

Article 46: Public Health Care
The State shall promote public health, establish, rehabilitate, develop basic medical and diagnostic institutions, provide free primary health care and emergency services for all citizens.

Article 47: Ethnic and Cultural Communities
Ethnic and cultural communities shall have the right to freely enjoy and develop their particular cultures; members of such communities shall have the right to practice their beliefs, use their languages, observe their religions and raise their children within the framework of their respective cultures and customs.

Article 48: Sanctity of Rights and Freedoms

Subject to Article 211 herein, no derogation from the rights and freedoms enshrined in this Bill shall be made. The Bill of Rights shall be upheld, protected and applied by the Constitutional Court and other competent courts; the Human Rights Commission shall monitor its application in the State pursuant to Article 142 herein.