Implementing the Comprehensive Peace Agreement and the National Interim Constitution?

An empirical assessment of the law reform process in Sudan: Challenges and prospects

December 2009

TABLE OF CONTENTS

ACKNOWLEDGMENTS

The report was written by N.I. Abdelgabar in her personal capacity for the Project for Criminal Law Reform in Sudan (www.pclrs.org), a joint project of REDRESS (www.redress.org) and SORD. The report was edited by REDRESS. We are grateful to the range of individuals, organisations and institutions in Sudan who spent time and effort to share their expertise and experience on various aspects of the law reform process.

We are also extremely grateful to DfiD for funding this initiative.

EXECUTIVE SUMMARY

The conclusion of the Comprehensive Peace Agreement (CPA) and adoption of the Interim National Constitution (INC) in 2005 have fundamentally changed the Sudanese legal system. The INC introduced a dual legal system (a *Shari a*-based system in the North and a secular-based system in the South), a federal governance system (a decentralised system of governance that bears the characteristics of asymmetric federalism) and a comprehensive Bill of Rights. The Bill of Rights incorporates all international human rights treaties that Sudan has ratified into constitutional law; thereby rendering directly applicable before national courts a number of international human rights treaties.[1] This development necessitated comprehensive law reform so as to bring the existing legislation in line with the provisions of the INC and the CPA. To this end, the CPA provides for the establishment of a National Constitutional Review Commission (NCRC) and mandates it, *inter alia*, with the preparation of "other legal instruments as is required to give effect to the Peace Agreement."

This Report focuses on the process of law reform itself rather than on the substance of the reform of particular pieces of legislation. Its purpose is to provide a better understanding of the legal framework and the actual practice of law reform in Sudan. This is with a view to identifying what changes are needed within the system to make the process more transparent, participatory and efficient and to ensure that reforms undertaken contribute to greater protection of human rights as laid down in the CPA and the INC.

The Report is based on a thorough examination of the law reform process and the role played by various participants in the process, both state officials and civil society, as well as other Sudanese and international actors. It benefits from a series of interviews carried out in the course of 2009 with a cross-section of officials, experts and activists.

It identifies a number of obstacles pertaining to the law reform process in Sudan. These include lack of transparency, limited public debate, delays in the law reform process and the lack of mechanisms that ensure the conformity of reformed legislation with the provisions of the INC and the CPA. The Report finds that the normative framework is incomplete. There is no clear guidance on policy development and the drafting of legislation. This includes consultation

[1] See article 27(3) of the INC.

with stakeholders, which tends to be ad hoc and inadequate. The institutions and individuals tasked with drafting legislative proposals suffer from a lack of resources and familiarity with relevant international norms and standards. Compatibility studies ought to be undertaken when drafting legislation so as to ensure conformity with international treaty obligations but there is little evidence of a consistent practice to that effect. This can at least partly be attributed to the nature of the drafting process and the involvement of various ministries, which pursue their own policy objectives. This, in turn, contributes to inconsistencies in the early stages of law-making. One solution that has been suggested by several interlocutors is to establish a standing law reform commission as a focal point for reforms that has the necessary expertise and resources and would replace the current plethora of largely ineffective bodies.

The Report recommends that the Government of Sudan should undertake a thorough internal review based on the findings presented, and develop a policy and action plan as to how to make the law reform process more transparent, inclusive and effective. This includes consultation, adoption of legislation and provision of funds for training purposes. The Ministry of Justice for its part should contribute to clarifying the legal framework applying to the legislative reform process in the form of instructions and/or directives. The Report also proposes that the Ministry of Justice develops the capacity of its personnel to draft legislation. In addition, there is a need to better coordinate the work between the various ministries and the Council of Ministers. The Report recognises the vital role played by all political parties, the media and civil society in the law reform process and suggests that they strengthen their capacity and seek to develop a more coherent approach when working on or advocating for legislative reforms. It also calls on the United Nations agencies and the international community present in Sudan to pursue a coherent policy on law reform and human rights, and support civil society initiatives to this end.

INTRODUCTION

1. Background to the Study

The Comprehensive Peace Agreement (CPA) of 2005, which ended Sudan's north-south conflict, committed the parties to introducing certain constitutional amendments and structural reforms so as to end the conflict and restore a stable political environment in Sudan. Constitutional amendments that followed the conclusion of the CPA included, *inter alia*, the adoption of an Interim National Constitution (INC), the interim constitution for Southern Sudan (ICSS), 26 State constitutions and the introduction of a bicameral legislature. A number of laws directly affecting the fundamental freedoms and rights of individuals, such as the Bill of Rights, have also been adopted.

The implementation of the CPA and the INC requires a comprehensive law reform process. This entails bringing existing laws in line with the CPA/INC provisions and enacting new laws, a process that is seen as a prerequisite for democratic reform in Sudan. Given its time-bound nature (2005-2011), expeditious law reform is of paramount importance in ensuring timely implementation of the CPA. To this end, a law reform process has already begun, in effect, with the establishment of the National Constitutional Review Commission (NCRC) in 2005 to draft new statutes as stipulated in the CPA. In parallel, and in order to give effect to the CPA, the Ministry of Justice formed a Law Review Committee (LRC) with a view to reviewing the existing legislation and preparing recommendations for the law reform process (to be submitted to the other ministries/entities).[2] The NCRC and the LRC are *ad hoc* committees with specific mandates whose rules and procedures are stipulated in the INC, the CPA and the existing statutory laws. There is no permanent law reform commission or committee in Sudan at present.

Almost five years have now passed since the signing of the CPA but the process of law reform is moving very slowly. In addition, several of the newly enacted and/or amended laws do not fully conform to the provisions of the CPA and the INC. This impacts negatively on the implementation of the CPA and the INC and constitutes a serious impediment to the process of democratic transition in

[2] Interview with government official and a former member of the Law Review Committee of the Ministry of Justice, Khartoum, February 2009.

Sudan. The perceptions of different actors as to why the law reform process is lagging behind schedule vary greatly. Some say that the delays result from the fact that the law reform process lacks public participation and transparency, and that the capacity of those carrying out the process is weak. Others insist that the process of law reform is being carried out in a consultative and participatory manner and that its outcomes are reflective of this.

It is within this context that this Report seeks to clarify the legal framework that regulates the process of law reform in Sudan. It also seeks to identify gaps within the existing legal framework and to develop specific recommendations for government officials and other actors engaged in the law reform process. This is with a view to strengthening the institutional framework of the law reform mechanisms, and enhancing transparency, consultation and public debate throughout the law reform process. It is also with a view to expediting the process of law reform and ensuring that reforms carried out are in conformity with the CPA and the INC.

2. Methodology

In the absence of detailed legislation or studies on the subject, the primary methodology used for this Report included interviews with government officials and other relevant actors involved in the law reform process as a means of drawing on the experiences and perceptions of key participants. 29 structured interviews were conducted from February to October 2009 to obtain an overview and insight of the law reform process and to examine the various aspects of the law reform process. This focused especially on concerns related to transparency, capacity, professionalism, consultation, public debate and the compatibility of the process with the CPA and the INC. These interviews were complemented with an analysis of both the Sudanese legal framework that governs the law reform process and its practical application as well as the published literature on law reform in Sudan. This analysis comprised the following elements:

(i) The legal framework pertaining to legislative reform as set out in the CPA, the INC and other legislation;
(ii) The mandate, procedures and practice of the various law reform bodies;
(iii) The practical application in relation to law reform that has been undertaken to date; and

(iv) The strengths and weaknesses of the law reform process judged by indicators that are based on best practice and lessons learned.

PART 1: The Legal Framework of Law Reform Process in Sudan

Law reform is a mechanism through which governments and parliaments may respond to the emerging needs of their societies.[3] It is a process that involves a number of actors, in particular the governmental bodies tasked with law reform (*i.e.*, the various ministries such as the Ministry of Justice, as well as the Parliament) and the judicial system through its jurisprudence, especially the Constitutional Court. In a broader sense, political parties, civil society and the media also play a crucial role in influencing law reform though they may not be directly engaged in the technical process of drafting and passing legislation.

A fundamental distinction needs to be made between the process of ***law revision*** and ***law reform***. ***Law revision*** is not concerned with the substance of the law as such. Instead, it focuses on the organizational aspects of a given act relating to issues such as simplification, modification, format, style, structure and terminology. The normative framework that regulates the law revision process is set out in the Ministry of Justice Organization Act of 1983, which empowers the Ministry of Justice to undertake such a task.[4] Following the enactment of the INC, the Ministry of Justice commenced a comprehensive law revision project with a view to revising existing legislation. As a result, a complete set of the revised laws has now been published in a number of volumes that contain laws from 1901 to 2008.[5]

The ***Law reform*** process is concerned with the identification and reform of specific legislative acts. It defines new laws and creates new regulatory frameworks to respond to challenges that have been identified and, at times, to fill gaps in the existing legal framework. Legal reform can take the form of repealing the legislation in force, enacting new legislation, or amending the existing legislation, and may also be undertaken through a combination of the

[3] *Keith Patchett*, Preparation, Drafting and Management of Legislative Projects, UNDP Lebanon, 2003, available at: *www.arabparliaments.org/publications/legislature/legdraft/kpe.pd.*

[4] See article 5(2) (c) of the Ministry of Justice Organization Act of 1983.

[5] Interview with a former member of the Law Reform Committee of the Ministry of Justice, Khartoum, February 2009.

three.[6] The amendment process can be important in addressing urgent needs without having to embark on the time-consuming process of reforming the entire legal framework. In Sudan, it is understood that if an existing legislation requires extensive amendments, for example, if more than a third of the legislation needs to be amended, existing legislation will be repealed completely and an entirely new legislation will be drafted.[7]

Under the INC, the authority to enact laws is divided between the national level, the level of the Government of Southern Sudan and the State level.[8] The National Assembly enacts national laws applied throughout Sudan, the Legislature of South Sudan enacts laws of the Government of Southern Sudan and the Legislature of the 26 States enacts State law. The body concerned has to establish whether the subject matter in question falls within its field of legislative competence. Schedule A-E of the INC specifies exclusive, concurrent and residual powers.[9]

The normative framework that governs the national law-making process 'law reform' is stipulated in article 106 of the INC 'Tabling of Bills',[10] and scattered in a number of statutes, including: the Directive of the Ministry of Justice (the 1996 Circular),[11] the Ministry of Justice Organization Act of 1983, the Rules and Procedures of the Council of Ministers of 2005, and the National Assembly Rules and Procedures.

The right to initiate the process of law making is shared between the executive and the legislative branches of the government, namely the President of the

---

[6] See *REDRESS Trust*, A concept paper on the law reform process, 2008, available at: http://www.redress.org/publications/Options_Paper_Law_Reform%20FinalEngl.pdf.

[7] Interview with the Legislation Department of the Ministry of Justice, Khartoum, February 2009.

[8] See Interim National Constitution Schedules A-E.

[9] See INC. National Laws: Exclusive Powers: Schedule (A), Concurrent Powers: Schedule (B), Residual Power: Schedule (C). Laws of the Government of Southern Sudan: Exclusive Powers: Schedule (B), Concurrent Powers: Schedule (B). States Laws: Concurrent Powers: Schedule (D), Exclusive Powers: Schedule (C).

[10] See article 106 of the INC 'The President of the Republic, the Presidency, the National Council of Ministers, a national minister or a committee of the National Legislature may table a bill before either Chamber of the National Legislature subject to their respective competences. (2) a member of the National Legislature may table a private bill before the Chamber to which he/she belongs on a matter that falls within the competence of that Chamber. (3) a private member bill shall not be tabled before the appropriate Chamber save after being referred to the concerned committee to determine whether it involves an issue of important public interest'

[11] The Directive of the Ministry of Justice (the 1996 Circular).

Republic, the institution of the Presidency and the Council of Ministers pursuant to article 106 of the INC. In addition, the right of legislative initiative may be exercised by a private member of the National Assembly ('private bills') if such an initiative involves an issue of important public interest and the development of the legislative proposal and its drafting are undertaken by a committee within the legislature.[12] However, in practice, most legislative proposals are initiated by the executive, that is, by the various ministries.[13]

There are also other mechanisms that may trigger the process of law reform. This includes article 5(2)(c) of the Ministry of Justice Organization Act of 1983. This law empowers the Minister of Justice, *inter alia*, to amend any legislation so as to bring it in line with the Constitution, or any other statutory law(s) so as to address the urgent needs of the society, while taking into consideration the values of the Sudanese society.[14] Other individual ministries and competent bodies are also empowered to initiate law reform proposals by forming an *ad hoc* 'Law Reform Committee' to reform and/or amend laws that fall within their area of competence, for example, the Ministry of Education may initiate law reform proposals to amend legislation that pertains to a particular policy on education.[15]

For its part, the Ministry of Justice is concerned with the initiation of law reform proposals relating to public law, including criminal law. The Ministry of Justice does not have a standing law reform committee to undertake such a law reform process, but when the need arises the Minister of Justice usually forms a law reform committee on an *ad hoc* basis.[16] This practice differs from many other systems, in which the development of law reform proposals and the drafting of the legislative texts are entrusted to a formally instituted law reform committee.[17]

1. The Stages of the Law Reform Process

[12] Patchett, above n.3, p. 4.
[13] Interview with member of National Assembly, Khartoum, May 2009.
[14] See the Ministry of Justice Organization Act of 1983 (in Arabic).
[15] Interview with a member of the NCRC, Khartoum, February 2009.
[16] See article 5 of the Ministry of Justice Organization Act of 1983.
[17] Patchett, above n.3.

a) Preparation of Legislative Proposals for Law Reform

The preparation of legislative proposals by individual ministries is commonly undertaken by specially constituted committees. The latter consist of civil servants from the relevant ministry, academic specialists, representatives from other competent bodies, and, at times, representatives from different stakeholders. In principle, the preparation of legislation (development of any legislative law reform proposal) entails two stages: policy formulation and law drafting to give effect to the policy adopted.

b) Policy Formulation

The policy formulation is a purely political decision that rests primarily with the competent ministry/authority that initiates the legislative law reform proposal. During the policy formulation, policy-makers focus on key issues as to how best to meet the identified needs by considering the following issues:

- What is the precise nature of the problem to be resolved, and what are the policy objectives for its resolution?
- What are the possible options for giving effect to the desired policy and which of these is to be preferred?
- The type of instrument (legislative or non-legislative measure) to give effect to the new policy needs to be considered; as well as the approach that the legislation should adopt and the implementation mechanisms needed to make the new policy operational.[18]

Answering these policy related questions is the responsibility of policy-makers-usually the officials in the competent ministry (i.e. the Minister).

The standard procedure for the formulation of a new policy for the purpose of preparing a legislative proposal is provided for in the Directive of the Ministry of Justice (1996 Circular).[19] This procedure entails the setting up of an *ad hoc* committee within the competent ministry to prepare a comprehensive study regarding the proposed new policy. All relevant bodies are to be consulted on the technical aspects and any other issue concerning the proposed policy. Article A (1) of the Directive of the Ministry of Justice deals with the composition and

[18] Patchett, above n.3.

[19] See article A (1). The Circular of the Ministry of Justice regulates the procedures concerning the issuance of laws, and subsidiary regulations by other entities, such as sub-national units, public corporations and institutions (in Arabic).

the mandate of the committee to be established by the relevant ministry to undertake the task of policy formulation. However, the Directive does not elaborate further on the types of key issues that the committee is to consider during the formulation of a new policy. Furthermore, it does not provide for a system of checks to be applied at the stage of policy formulation and/or at the stage of drafting.

Checks concerning policy formulation include, for instance, adequate mechanisms to ensure that the following has been considered and is in place: administrative requirements, costs and economic impact, efficiency, practicability and implementation.

Checks of legislative drafts include adequate mechanisms to ensure constitutional and legal compliance, compliance with international treaties, as well as conformity with secondary law-making powers and adherence to legal form, clarity and comprehensibility.

In practice, it is understood that the various ministries/authorities attempt, at the stage of policy formulation, to draw on the appropriate expertise available in relation to the particular subject-matter, including legal expertise. In some instances, the concerned committee invites a representative from the National Assembly.[20] A legal drafter from the Department of Legislation of the Ministry of Justice may be invited but this is not standard practice.[21] Consideration is given to professionalism, expertise and competence while selecting the members of the committee that formulates the policy options within a given ministry.[22] The committee undertakes a thorough appraisal of the problem, provides an adequate justification for initiating any legislative proposal,[23] and deliberates on whether the proposed legislation will achieve its intended purposes. It also considers its impact on the society and the local needs and circumstances.[24] Once a legislative proposal has been prepared, the concerned ministry/authority submits it to the Council of Ministers (CoM) for approval. The submission comes with a memorandum that summarises the proposal and provides information on,

[20] Inviting a representative from the National Assembly is a standard practice that is adopted by the National Council of Press and Publication during the policy formulation; Interview with government official, Khartoum, February 2009.
[21] Interview with government official, Khartoum, February 2009.
[22] Interview with government official, Khartoum, February 2009.
[23] In Sudan, the rationale put forward for a legislative proposal is known as "explanatory notes".
[24] Interview with journalist, Khartoum, February 2009.

inter alia, policy options, recommendations as well as the justification for the initiation of the legislative proposal.

It is unclear, however, to what extent other issues are given due consideration during the policy formulation stage. These might include the implementation mechanisms that are required to secure compliance with the legislative proposal and other organisational structures and administrative procedures needed to make the legislative proposal operational. The implications of a proposal on the financial and human resources of the government are considered in some instances only, in particular where the legislative proposals are concerned with subject-matters such as health, education, transportation, etc.[25] However, it appears that the competent ministries do not have a clear procedure in place to systematically develop a policy, in particular through a proper evaluation of policy alternatives and impact assessment. Some laws are evidently not based on a proper policy development process, as there is a tendency to develop legislative proposals without a sufficient prior development of the policy. On the other hand, members of the committee concerned with the policy formulation normally scrutinise proposals to ensure that the policy is compatible with other legislation, especially the constitution and the international treaties to which Sudan is a party.

Against this background, governmental bodies increasingly recognise that procedures in the form of "a Regulatory Framework" need to be put in place to provide for the requisite systematic checks to ensure adequate implementation. Current practice is informal or unsystematic, and with little standardisation in the procedures applied by the various ministries. The Ministry of Justice may want to consider, as a recommendation (best practice), issuing a detailed instrument that spells out clearly the steps and issues to be considered by the policy developers during the stage of policy formulation. Insufficient consideration of the administrative, organisational, financial and implementation aspects of a legislative proposal may result in producing defective legislation that may not bring about the desired changes in society. Guidance should be developed to improve policy formulation, that is: the regulatory directives of the Ministry of Justice should be made clear and prior to the adoption of a legislative proposal, a study ought to be carried out into such matters as the need for legislation, the reasons for adopting a new law, its objectives, and the anticipated results.

[25] Interview with government official, Khartoum, February 2009.

Consultation during the Policy Formulation

Ideally, all groups and communities should have the opportunity to engage in the law reform process to voice their views and concerns based on their rights and needs and formulate priorities accordingly. This is critical to ensure that their rights are adequately safeguarded and taken into account. One of the main benefits to be gained from consultation may consist of broadening the range of policy alternatives and making the law-making process more transparent to affected groups. It may also result in more informed choices as to the appropriate legal mechanisms and may encourage a greater degree of compliance.[26]

The form in which consultation takes place during the policy formulation varies. Where the legislation is expected to have wide-ranging consequences affecting substantial sections of the population, an invitation to the general public may be called for. Ministries may use standing advisory or *ad hoc* focus groups of experienced or expert persons whom they can engage in the discussion of options and impact of the policy. In this regard, article A (1) of the Directive of the Ministry of Justice (1996 Circular) obliges the policy formulation committee in a given ministry to consult all the relevant bodies and entities during the stage of policy formulation. Yet, article A (1) of the Directive does not mention the procedures that should be adopted by a given committee for obtaining the relevant data, that is, the consultation modalities for soliciting the views and opinions of the relevant bodies. It is also silent on timing. Consultation is likely to have its greatest impact if conducted while policy development is still under way. Once a legislative proposal is in an advanced stage of preparation, it is often too late to review the policy premises on which it has been structured.

Inter-ministerial consultation on legislative proposals has been a long standing practice in Sudan. In practice, the committee in a given ministry/authority, usually seeks inputs from different sectors, such as representatives of entities/ groups that are directly affected or particularly concerned with the legislative proposal, with a view to soliciting their experience and knowledge on the subject matter.[27] The modalities of consultation vary but the general method involves the organisation of workshops with the relevant actors. In some instances, the competent ministry draws on the appropriate expertise in the particular subject-matter, including legal expertise, or consults with umbrella bodies representing

[26] Law Drafting and Regulatory Management in Central and Eastern Europe, SIGMA Papers: No. 18, OCDE/GD (97)176.

[27] Interview with journalist, Khartoum, February 2009.

affected interests. For example, this modality was employed by the Advisory Council for Human Rights when debating the draft Human Rights Commission Act.

Non-governmental bodies were rarely consulted in the past but recently, in some instances a change of direction has become apparent. This is evidenced by the participation of civil society in the debate leading up to the reform of the Press Act, the Child Act and the Human Rights Commission Act. Civil society groups are increasingly demanding consultation in the law reform process, and this is likely to continue as the population becomes more politically aware. For example, the Advisory Council for Human Rights organised a number of workshops with human rights organisations, international community (UNMIS) and civil society organisations during the process of preparing the Human Rights Commission Act. The National Council for Press and Publication also undertook a similar approach when it organised a number of workshops with the Journalists Union and university students while considering the revision of the Press Act of 2004.[28] However, critical observers question the validity of such consultative workshops as they were largely confined to certain stakeholders and did not result in any substantive modification of the Press Act.

There is no uniform consultative process followed by the various ministries, which makes consultation selective if not random. For example, the Ministry of Interior, while preparing the legislative proposal of the newly enacted Police Act of 2008, did not engage in any consultations to solicit the views of public or civil society on the draft Police Act.[29] The Ministry of Interior seemingly does not have in place a practice that employs any kind of consultation procedure when planning any new legislative proposals. This reflects a more general criticism about the lack of public debate and consultation during the stage of policy formulation of any new legislation.[30] Consultation with other ministries, typically those that have an immediate interest in the subject matter or in some aspects of the legislative proposal, is now a widespread practice. However, consultation with non-governmental organisations and other interest groups outside the government is far less common according to several interlocutors. Too little use appears to be made as yet of consultation with standing or *ad hoc* advisory

[28] Interviews with government officials and the Advisory Council for Human Rights, Khartoum, February 2009.

[29] Interview with government officials, Khartoum, February 2009.

[30] Interview with senior human rights lawyer, Khartoum, February 2009; Interview with the NCRC, Khartoum, February 2009.

groups or with a representative group of those principally affected, in particular vulnerable or marginalised groups.

The importance of consultation cannot be overemphasised. It ensures that the legislative process is transparent.[31] It would inevitably prolong the preparation process, thereby delaying the process of legislative law reform and have financial implications as well. Nevertheless, it is the openness of the process that goes to the heart of the legitimacy of the final product.[32] In practice, consultation with stakeholders, especially the public at large is poor. Overall consultation is lacking as regards when consultation is expected, how those consulted should be selected and the types and mode of consultation and procedures to be followed. Consultation with the interested groups and the public at large has a vital part to play in improving the quality of the legislation but it seems that such consultation is not practised as a matter of routine. The Ministry of Justice may wish to develop, as a recommendation (best practice), a consultation policy so as to provide guidance on the modalities of consultation to be employed at the stage of policy formulation. Also, consultation would be strengthened if it were based on a statutory footing. This should involve a clear stipulation that the relevant ministries and/or authorities must conduct consultations during the policy formulation, especially when certain legislation has a real impact on a particular group, for example, penal code and procedures. Other countries use the so-called 'Methodology on Policy Analysis and Coordination' which includes, among the key principles for policy-making, the principle that policies and legislation should be developed by 'transparent and consultative procedures'.[33] This approach may hold some useful lessons in the Sudanese context.

c) Drafting of Legislative Proposals

This section examines the work of the Legislation Department of the Ministry of Justice in drafting legislative proposals.

The Drafting Personnel

In some systems, *i.e.*, in continental Europe, the functions of policy formulation and drafting are undertaken by the same officials in the competent ministry. In

[31] Hassen Ebrahim, *Southern Africa – Challenges for the New Millennium*, 2002, Harvard University.
[32] Ibid.
[33] Law Drafting and regulatory Management in former Yugoslavia: the Republic of Macedonia, An Assessment, November, 2007, available at www.legislationonline.org.

other systems, such as in Sudan, the task of drafting legislation is distinct from policy formation and is entrusted to a centralised drafting service: that is, the Department of Legislation which is situated within the Ministry of Justice and is responsible for the drafting of all legislative proposals coming from the various ministries.[34] In general, the responsibility of drafting the legislative texts is shared between the Ministry of Justice (the Legislation Department) and the Legislation and Justice Committee of the National Assembly, a specialist unit in its secretariat, when the legislative proposal has been fully scrutinised and debated by the National Assembly. The Legislation and Justice Committee re-drafts the legislative proposal as a result of the debate at the National Assembly- it carries out any drafting amendments if and when necessary.

The Legislation Department within the Ministry of Justice is specifically designated for legal drafting. Legal officers of this Department regularly undertake drafting tasks as one of their functions. However, there are concerns that the Legislation Department lacks experienced legal officers with specialised drafting skills.[35] The staff of Parliament, *i.e.*, the Legislation and Justice Committee of the National Assembly, also lacks adequate training and skills.[36] In addition, legal officers of the Legislation Department are frequently rotated between the different departments within the Ministry of Justice. This approach impedes the development of expert knowledge in various subject matters of legal drafting. As a recommendation (best practice), the Ministry of Justice should select an adequate number of persons to be assigned permanently to the Legislation Department and provide adequate and systematic training on legal drafting.[37] Currently, such courses are not available and are not offered as part of university law modules.[38] The Ministry of Justice provides short workshops on legislative drafting in collaboration with some international institutions.[39] However, these activities are of an *ad hoc* nature and are not organised with the specific objective of enabling law drafters to improve their expertise. The Department of Legislation expressed a desire for more training on legal drafting. The Ministry of Justice currently has articulated a 5-year strategic plan (the Ministry of Justice Strategic Plan 2007-2012 that has been prepared by a consultancy firm) which aims at mainstreaming human rights within the

[34] See article A (5) of the Directive of the Ministry of Justice (the 1996 Circular).
[35] Interview with senior human rights lawyer, Khartoum, February 2009.
[36] Interview with members of the National Assembly, Khartoum, February 2009.
[37] Interview with government officials, Khartoum, February 2009.
[38] Interview with senior human rights lawyer, Khartoum, February 2009.
[39] See trainings provided by the Max Planck Institute, available at http://www.mpil.de/ww/en/pub/research/details/know_transfer/sudan_peace_project.cfm.

Ministry by means of reviewing all processes and procedures, creating new policies and procedures as appropriate, and the training of all Ministry staff.[40]

Requirements for Scrutinising the Legislative Law Reform Proposals

The Directive of the Ministry of Justice (1996 Circular) does not provide any guidance on the standards to be considered in drafting legislation. In practice, the legal officers attached to the various ministries follow a certain conventional method of checking the text with a view to ensuring the following: compatibility with Constitutional law; existing legislation; international treaties and conventions to which Sudan is a party; extent to which the legislative proposal impinges upon matters already governed by existing legislation; and whether some of the existing legislation needs repeal or amendment when there is incompatibility with the new legislation.[41] Moreover, although by no means obligatory, reference is usually made to some foreign and regional laws, as well as to comparative law and best practices, especially from Arab countries. For example, the Egyptian Press Act has been heavily relied upon as a model by the National Council of Press and Publications when considering the amendment of the current Press Act.[42] In addition, attention is given to legislative precedents, that is, systematic revision of the old laws that had been repealed as well as any other relevant laws that may affect the effective application of the legislative proposal.[43] Such an approach results in drafts that draw heavily upon legislative precedents, including those from other countries, especially Arab countries. While reference to comparative law should arguably be used to draw upon best practices from other countries, observers point to a practise of drawing only on those models that serve the predetermined objectives of the government.[44] Such an approach results in drafts with little consideration for their suitability for local conditions.

Successful legislative drafting requires the right institutional framework, namely ensuring that the necessary organisational structures and administrative procedures within the responsible legislative drafting body are in place. The Legislation Department follows a standard procedure in relation to the legislative proposals that reach the Department from the various ministries. The

[40] The Strategic Plan 2007-2012 of the Ministry of Justice, on file with the author.
[41] Interview with government officials, Khartoum, February 2009.
[42] Interview with government officials, Khartoum, February 2009.
[43] Interview with the NCRC, Khartoum, February 2009; interview with government official, Khartoum, February 2009.
[44] Interview with journalist, Khartoum, May 2009.

Legislative Department is divided into two sections: one section prepares a study on the technical aspects of the proposed legislation that it receives from the various ministries, whereas the other section is concerned with legislative drafting- that is, converting the policy into normative rules.[45]

However, it is unclear to what extent the Legislation Department scrutinises the operational, implementation and enforcement features of a given legislation. As such, the Ministry of Justice may want to develop, as a recommendation (best practice), a check list that gives guidance to the legal officers as to the steps that should be taken while scrutinising the legislative proposal. The objective of applying common standards could be achieved through officially approved instructions and regulations. Constraints for legal officers derive from the fact that article 225 of the INC incorporates those provisions of the CPA as part of the INC even though the latter does not expressly stipulate them. The same is true for all human rights treaties ratified by Sudan, as provided in article. 27 (3) of the INC, and may partly also apply for other international treaties ratified by Sudan as well as customary international law. Hence, the legal officers have to be aware of the content of such documents. To this end, continuous training on relevant issues is of paramount importance with a view to developing and retaining expertise.[46]

PART 2: Law Reform Institutions

There are two sets of legislative reform actors within the current framework, namely bodies established by the CPA and other actors normally tasked with legislative reform, in particular the Ministry of Justice as well as individual ministries as explained above. The CPA provides for the establishment of a National Constitutional Review Commission (NCRC) and mandates it, *inter alia*, with preparing "other legal instruments as is required to give effect to the Peace Agreement".[47]

[45] Interview with the Legislation Department, Ministry of Justice, Khartoum, February 2009.
[46] Interview with members of the National Assembly, Khartoum, February 2009.
[47] See article 2.12.9 of the Power Sharing Protocol of the CPA.

1. Law Review Committee of the Ministry of Justice

The Law Review Committee of the Ministry of justice (LRC) was established by the Minister of Justice in 2005 following the conclusion of the CPA. The LRC was largely responsible for reviewing national legislation with a view to identifying laws that did not comply with the provisions of the INC and the CPA. It was set up as an ad hoc law review committee composed of legal advisors from the Ministry of Justice tasked with preparing recommendations and advising the relevant ministries and/or entities on how to align the existing legislation with the provisions of the INC.[48] The mandate of the LRC included the task of ensuring the compatibility of the sub-national constitutions, including the Interim Constitution of Southern Sudan, with the INC.

The LRC had identified over 61 laws which needed reform. These included the Criminal Procedure Act of 1991, the Criminal Act of 1991, the Prison Act of 1986, the National Security Forces Act of 1999, the Police Act of 1986, the Judiciary Act of 1986. Little is known about the working methods of the LRC. It apparently did not follow a consultative procedure when reviewing existing legislation. The LRC was dissolved following the completion of its task to ensure the compatibility of the Interim Constitution of Southern Sudan and State Constitutions with the INC. Its mandate of revising laws in need for reform has been transferred to the Legislation Department of the National Ministry of Justice. The Government has acted upon some of the recommendations of the LRC that related to the reform of 61 laws referred to above but many of the laws identified are still to be reformed. Officials of the Ministry of Justice are of the view that the LRC's role in carrying out the constitutional compatibility exercise was crucial in moving forward the process of law reform as it enabled the establishment of the various state legislatures.[49]

a) The Legislation Department of the Ministry of Justice

The Legislation Department is currently engaged in a comprehensive law review process aimed at bringing the entire national legal system in line with the provisions of the INC.[50] At present, the Legislation Department is tasked with incorporating all international treaties that Sudan has ratified into national legislation, for instance, the International Covenant on Civil and Political Rights

[48] Interview with a former member of the Law Review Committee, Khartoum, February 2009.
[49] Opening remarks by the Advocate General of the Ministry of Justice in UNDP-Ministry of Justice Workshop, Khartoum, August 2009.
[50] Interview with the Legislation Department of the Ministry of Justice, Khartoum, February 2009.

and the International Covenant on Economic, Social and Cultural Rights.[51] The amendment to the Criminal Act 2009, signed into law in July 2009, was drafted by a special committee formed in the Ministry of Justice in 2008. The amendments added a whole chapter to the Criminal Act of 1991 (total of 7 articles) on crimes against humanity, genocide and war crimes. The amendments entail the inclusion of rape and other acts of sexual violence as war crimes and crimes against humanity. However, the definition of rape as an ordinary offence (article 149 of the Criminal Act) is at variance with the one for rape as a war crime or crime against humanity.[52]

The INC places an obligation on the legislative drafters to observe international norms and standards.[53] There is no similar obligation in respect of foreign laws. In principle, legislative drafters may refer to foreign law as a source of new ideas, especially as a means to find a solution to a given problem.[54] However, it appears that it is mainly comparative foreign law of Arab countries that plays a role in guiding the process of law reform, as explained above.

The Ministry of Justice is planning to merge the International Law and Treaties Department with the Department of Legislation.[55] Such a new unit has the potential to serve as a source of knowledge that may assist in developing a special legislative competence, including by increasing the appreciation of international norms and standards.

This Department advises the government on the ratification, accession or other means of becoming a party to international treaties. This includes the compatibility of legislation with an international treaty that Sudan intends to ratify. In practice, the Department carries out a "Compatibility Study" before Sudan becomes a party to a treaty.[56] New legislation ought to be drafted in such a way that any incompatibility of its provisions with existing international treaties obligations is avoided. However, this is rarely followed in practice, as some of

[51] Sustaining Peace through Development, 2008-2011, Prepared for the Third Sudan Consortium, May 2008, on file with the author.
[52] REDRESS and KCHRED, *Comments on the proposed amendment of the Sudanese Criminal Act*, Position Paper, September 2008, available at http://www.redress.org/reports/Penal_Code_Amendment_Position%20Paper%20_2_.pdf.
[53] See article 27 of the INC.
[54] See Jan M. Smits, *Comparative Law and its influence on National Legal Systems*, Oxford Handbook on Comparative Law, 2008.
[55] Interview with the Legislation Department of the Ministry of Justice, Khartoum, February 2009.
[56] Interview with International Law and Treaties Department of the Ministry of Justice, Khartoum, August 2009.

the drafters are not always aware of the existing international treaties that Sudan has ratified. As a result, some of the newly amended laws are not entirely in compliance with the provisions of some of the international treaties to which Sudan is a party.[57]

Some progress, albeit rather limited, has been made by the Ministry of Justice in engaging in civic education in relation to the law reform process.[58] Officials of the Legislation Department point to consultation with civil society organisations, interest groups and the media in the process of the reform of the Child Act of 2009. This triggered reform proposals for other laws, such as the Evidence Act of 1994 in relation to the witness of the child as admissible evidence in cases of sexual violence.[59] The envisaged amendment would likely entail lowering the age of those who could appear before the court as witnesses.[60] However, the newly enacted Child Act fails to fully criminalise female genital mutilation as originally envisaged and called for by a coalition of women's groups, civil society organisations and others.

b) The National Constitutional Review Commission

The CPA provides for the establishment of a National Constitutional Review Commission (NCRC) to expedite the process of law reform.[61] The Power Sharing Protocol of the CPA spells out clearly the composition and mandate of the Commission. This include, *inter alia*, the preparation of legal instruments required to give effect to the CPA, such as the preparation of draft statutes of the National Electoral Commission, the Human Rights Commission, the National Judicial Service Commission, and the National Civil Service Commission.[62] It is clear that the mandate of the NCRC is very specific as far as the law reform process is concerned. The NCRC is an *ad hoc* law reform commission that is tasked with the preparation of certain Acts with a view to implementing the CPA and the INC.

The Commission is comprised of representatives from the parties to the CPA, meaning the NCP and the SPLM and representatives from other political parties

[57] Ibid.
[58] Interview with the Legislation Department of the Ministry of Justice, Khartoum, February 2009.
[59] See the Evidence Act of 1994.
[60] Interview with the Legislation Department, Ministry of Justice, Khartoum, February 2009.
[61] Article 140 of the INC provides that the National Constitutional Review Commission 'shall continue to perform its functions as prescribed by the Comprehensive Peace Agreement'.
[62] See article 2 seq. of the Power Sharing Protocol of the CPA.

and civil society, as agreed by the parties to the CPA. Neither the CPA nor the INC provides for specific rules and procedures for the Commission, apart from stipulating that the Commission "shall be responsible for organizing an inclusive constitutional review process [and that] the process must provide for political inclusiveness and public participation."[63]

In practice, the Commission adopts a process that includes:

- firstly, consideration of the subject-matter in a plenary session by the Commission;
- secondly, the Commission forms a number of sub-committees to prepare a comprehensive study on the subject-matter and solicit views and inputs from various bodies;
- thirdly, another committee prepares the drafts;
- finally, the proposed draft text is presented before the Commission in a plenary session for approval and submission to the concerned entity/authority.[64]

It is clear that the Commission follows, to some extent, the same procedures on policy formulation as specified in the Directive of the Ministry of Justice (1996 Circular of the Ministry of Justice). The fact that the Commission is responsible for both the policy formulation and the drafting of the legislative text distinguishes it from other *ad hoc* law reform commissions.[65]

The Commission endeavours to adopt a transparent process by employing a number of consultative modalities, such as organisation of workshops, public debate and consideration of submissions from the public.[66] Submissions were considered in the preparation of election laws. In addition, the NCRC has indicated that it invites international experts and considers foreign comparative law during the drafting process.[67]

The Commission attempts to reach consensus when preparing the draft statutes. However, some observers have argued that the composition of the Commission, being dominated by the NCP and the SPLM/A, does not allow it to reach out to the public and conduct an inclusive consultative process. The Commission has

[63] Ibid.
[64] Interview with the NCRC, Khartoum, February 2009.
[65] Interview with government officials, Khartoum, February 2009.
[66] Interview with the NCRC, Khartoum, February 2009.
[67] Ibid.

attempted to solicit the views of other political parties that are not presented by way of forming an *ad hoc* committee. This has been the case during the preparation of the Election Act.[68] At present, the Commission is preparing a number of statutes such as the Referendum Act, the National Security Act and the Referendum Act for the Southern Sudan. The Commission usually prepares the draft statutes based on consensus,[69] which are then submitted to the CoM for consideration and input. But, it is understood that feedback provided by the CoM on the draft of the statutes is usually rejected by the Commission.[70] And, as such, this blocks the CoM from debating further statutes prepared by NCRC, thereby limiting the effectiveness of consultations. It is understood that the Rule of Law and Judicial Affairs Section of the United Nations Mission in Sudan (UNMIS) provides advisory services to the NCRC as to the substance of the various statutes but it is not clear to what extent the inputs of UNMIS are considered by the NCRC while preparing the different statutes.[71] The Commission does not widely disseminate information about the legislative reform process, including drafts, to the public, representatives and members of the relevant bodies. This hampers transparency and broad public participation in the law reform process.

c) A standing law reform commission

In the seventies, there was a standing law reform commission as a division within the Legislation Department of the Ministry of Justice.[72] Members of the Sudanese legal community, [73] including members of the NCRC, believe that the law reform process can be greatly enhanced, if an independent law reform committee would be re-established. Such a body could keep the law under review and make recommendations for reforms, either on its own motion or upon recommendation of the government. It could also work on the consolidation and revision of statutes and research.

[68] Interview with members of the National Assembly, Khartoum, February 2009.
[69] Interview with lawyer, Khartoum, July 2009.
[70] Interview with lawyer, Khartoum, July 2009.
[71] Rule of Law and Judicial Affairs Section of UNMIS, October 2009.
[72] Interview with a former member of the law reform committee of the Ministry of Justice, Khartoum, February 2009.
[73] Mohamed Eltahir, *Law Reform in the Light of the Comprehensive Peace Agreement*, available with the author; Interview with the School of Law, University of Khartoum, February 2009.

PART 3: The role of executive and legislative bodies in the law-making process

1. The Council of Ministers

The Directive of the Ministry of Justice (the 1996 Circular) provides that each individual ministry submits its legislative proposal[74] to the CoM. The Rules of the Council of Ministers of 2005 set out the procedures for scrutinising and approving legislative proposals before they reach the National Assembly. Legislative proposals are commonly placed before the CoM for the first reading. Thereafter, the proposal is referred to a technical committee for a general evaluation as to whether the CoM approves (agrees to table the bill) the proposal in principle.[75] The legislative proposal is then submitted to the appropriate sector within the CoM.[76]

The evaluation of the legislative proposal focuses on policy rather than the technical aspects. The technical committee may seek expert opinion on the rationale and viability of the legislative proposal. The committee determines the nature of consultations, which may entail inviting interested groups to convey their views within a given timeframe. The committee may rely on outside experts or request an external impact assessment, information or data relevant to the evaluation of the legislative proposal.[77] However, according to some observers, the appropriate committee within the CoM rarely gets involved in any consultative process while considering the legislative proposal.[78] Little use appears to be made of consultation with, for instance, the representatives of those principally affected.

If the committee deems that there is a gap in the legislative proposal, it may organise workshops to solicit the views of those concerned, or return the

[74] For the purpose of repealing, enacting, or amending of legislation.
[75] Interview with government officials and the NCRC, Khartoum, February 2009.
[76] There are a number of sectors within the CoM in which all ministers are represented and these include committees, such as the social sector, the service sector and the sovereignty sector.
[77] See article 50(3) (a) of the Rule for the Organization of the Functions of the Council of Ministers (in Arabic).
[78] Interview with government officials, Khartoum, February 2009.

legislative proposal to the concerned ministry/entity.[79] This procedure may result in delays, which could be avoided if the Ministry of Justice liaises with the concerned ministry in the drafting process from the very beginning and before the concerned ministry/entity submits the legislative proposal to the CoM.

As a final step, the CoM submits the legislative proposal to the Ministry of Justice, which is tasked with converting it into normative rules and issuing a certificate to the effect that the draft legislation has been formally scrutinised.[80] In practice, the concerned ministry at times submits the legislative proposal directly to the Ministry of Justice for converting it into legal language before submitting it to the CoM. This practice has caused problems in the past, however.[81] The present procedure of proposals passing from the ministries concerned to the CoM (and several committees within the CoM) to the Ministry of Justice is cumbersome and time-consuming.

As a recommendation, the Ministry of Justice may want to amend the Directive of the Ministry of Justice (1996 Circular) so as to oblige the concerned ministries to present the legislative proposal to the Ministry of Justice before submission to the CoM with a view to speeding up the process. The Legislation Department of the Ministry of Justice needs to cooperate with the concerned ministries that initiate legislative proposals. The legal drafters can help the policy-makers to develop a sound policy and to make informed decisions by advising on the framework within which legislative reform takes place.

There is no clear regulatory framework for the Ministry of Justice to determine which of the legislative proposals coming from the CoM should be given priority for final drafting. The timetable for considering different legislative proposals is largely dictated by the agenda of the CoM and the National Assembly.[82] Prioritising legislative proposals according to the degree of urgency is a matter of policy making, which should be decided by the CoM. As a recommendation, the policy-makers (ideally the CoM) may want to establish a central committee on legislation with a view to prioritising legislative proposals coming from different ministries.

---

[79] Interview with government officials, Khartoum, February 2009.

[80] See article A (5) of the Directive of the Ministry of Justice (1996 Circular) (in Arabic).

[81] Interview with a former member of the Law Reform Committee of the Ministry of Justice, Khartoum, February 2009.

[82] Interview with senior human rights lawyer, the NCRC, and government officials, Khartoum, February 2009.

In addition, the CoM may institute a process that enables such committee to decide on legislative priorities, i.e. which of the possible legislative proposals are to be part of the CoM's next agenda. This may be done in accordance with a set of criteria, such as the number of persons affected by the intended legislation or its special urgency. A mechanism, ideally within the executive branch, to decide on prioritisation of the different legislative proposals[83] may take the form of a Committee on Legislation situated within the CoM, as a body in which all the ministries are represented.[84]

a) Coordination with the Ministry of Justice

When a legislative proposal reaches the Ministry of Justice, the Legislation Department forms a committee to study the technical aspects of the legislative proposal. This committee considers such matters as consistency with the constitutional law, Sudan's international treaty obligations and compliance with existing legislation. The Legislation Department also receives draft statutes coming from the National Constitutional Review Commission. However, it does not perform any kind of scrutiny to ascertain the quality of the legal drafting and the compatibility of the draft statute with the Constitution or Sudan's international treaty obligations. Some interlocutors claimed that the Legislation Department is barred from undertaking such an exercise because most of the draft statues prepared by the NCRC are based on consensus of the parties to the CPA.[85] The revision of such statutes may therefore reopen the door for a new front of political confrontation, especially between the NCP and SPLM. Here, the role of the Legislation Department is confined to issuing a certificate to the effect that the draft legislation, prepared by the Commission, has been formally scrutinised, without, in fact, carrying out such a scrutiny exercise.[86] It is understood that this law reform process is linked to the transitional period. The Ministry of Justice considers such draft statutes as a matter of urgency without undertaking any substantive revision.

There is no mechanism within the Legislation Department for the prioritisation of the different legislative proposals coming from the CoM. In practice, the Minister of Justice decides upon which legislative proposal should be considered first. Thus, it appears that the prioritisation process is a purely political decision:

[83] Interview with the NCRC, Khartoum, February 2009.
[84] See Law Drafting and Regulatory Management in Central and Eastern Europe SIGMA PAPERS: No. 18, OCDE/GD (97)176.
[85] Interview with officials of the Ministry of Justice, Khartoum, June2009.
[86] Interview with government officials, Khartoum, February 2009.

political imperatives lead to the quick completion of the drafting process by the Ministry of Justice so that the draft text can be put promptly before the CoM, and, thereafter, be submitted to the National Assembly.[87] Discussions with the Ministry of Justice and officials of the relevant ministries show that prioritising the drafting of different legislative proposals falls within the discretion of the Ministry of Justice. According to some observers, the Ministry increasingly prioritises draft on the basis of special urgency, such as where the existing legislation or lack of such legislation has a detrimental impact on the application of certain legislation, for example the lack of a National Security Act on the application of the Election Act.[88]

Officials of the Ministry of Justice are aware that these factors impede an expeditious and coherent law reform process. A regulatory framework is badly needed. This is to establish clarity on the applicable procedure and, in particular, to ensure adequate legal scrutiny by the Ministry of Justice. These requirements may include such issues as: how to prioritise potential legislative proposals, how to timetable the preparation of such proposals, and how to co-ordinate the progress of the legislative proposals at the government level in order to fit in with parliamentary timetables.

The Ministry of Justice is considering steps to achieve these objectives. Some of these procedures were already operational, although not in a systematic way. For example, a commission had been established within the Department of Legislation, upon the recommendations of the CoM, which is composed of legal advisors from the International Treaties Department, Advisory Council for Human Rights and Legislation Department. It was tasked with studying the various legislative proposals that were to be part of the CoM's next agenda.[89] However, this mechanism has now been dismantled for unknown reason even though the mechanism had the potential to be an effective means to prioritise legislative proposals at the Ministry of Justice level.

According to officials of the Department of Legislation of the Ministry of Justice, the prioritisation process takes place to a certain extent through the development of an annual timetable (plan).[90] This plan outlines on a broad scale what legislative proposals are planned within a specified time period. However, this

[87] Interview with the Legislation Department of the Ministry of Justice and the NCRC, Khartoum, February 2009.
[88] Interview with members of the National Assembly, Khartoum, February 2009.
[89] Interview with government officials, Khartoum, February 2009.
[90] Ibid.

schedule does not address the question of priority. There are no regulations according to which criteria those decisions should be taken. It is understood that there is a well-established practice that the Ministry of Justice used to follow throughout the law reform process, the so-called 'Hard and Fast Rules.'[91] That process required that the concerned ministry seeks the advice of the Ministry of Justice as to whether any newly proposed law is required in light of existing legislation, and whether the latter must remain in force, be amended or repealed.[92] This can be a useful process to ensure economy and consistency of existing legislation.

The capacity within the Ministry of Justice is seen as weak, especially with respect to the drafting of legislation and examining of compatibility, that is, international law, statutory law and constitutional law.[93] In some instances, incompatibility with international law may result as a consequence of ignorance of the relevant laws, such as international treaties that Sudan has ratified.[94]

The process of law reform is to a large degree confined to the parties to the CPA to the exclusion of others, resulting in a lack of participation and transparency. Some of the crucial acts were drafted by the National Constitutional Review Commission in which the parties of the CPA are dominant. More importantly, these draft acts are not subject to scrutiny by the Ministry of Justice or the CoM. As such, the law reform process at times does not follow the standard procedures as provided for in the Directive of the Ministry of Justice (the 1996 Circular), setting the stage for drafts that may fall short of the requirements set out in the CPA and the INC.

b) Coordination with the National Parliament: Consultative Process at the National Assembly

Although most primary legislation is prepared by or for the Government, the Parliament has constitutional powers to introduce its own legislation and to make amendments to Government bills. These initiatives may be taken by Parliamentary committees or individual members of Parliament. Indeed, if the Parliament is dissatisfied with the legislation presented by the government, it

[91] Interview with lawyer, Khartoum, July 2009.
[92] Ibid.
[93] Interview with lawyer, Khartoum, July 2009.
[94] Ibid.

may bring forward a bill containing its own approaches to the matter in question. This means that legislative preparation is in the hands of both the governmental ministries and the Parliament. However, in practice, the National Assembly does not utilise its mandate to initiate legislative proposals. [95] Nevertheless, there are a number of committees that play a proactive role in both initiating reforms and in reviewing bills pending in the Parliament, such as the Legislative Standing Committee.[96] The Legislative Standing Committee has identified 12 laws as priority areas, including the Criminal Act, Criminal Procedure Act, the National Security Forces Act, the Police Forces Act, the Armed Forces Act, the Evidence Act and the Press and Publication Act.

This following section briefly outlines the composition of the National Assembly, its power to initiate legislative proposals as well as the stages of debating and passing of the legislative proposals before legislation enters into force.

The Composition of the National Assembly:

The National Legislature has two chambers: the National Assembly, the upper house, has 450 members with a ratio of 70% northern and 30% southern. The Council of States, the lower house, has 50 members.[97] The legislature is endowed with the powers of law-making and, *inter alia*, approval of the national budget, allocation of resources, involvement in the constitutional amendments and ratification of international treaties.

The Procedure of Debating Legislative Proposals at the National Assembly:

Once a bill is introduced in the National Assembly it goes through the following stages:

- First reading of the bill. After the first reading, the bill is referred to the appropriate committee, which discusses the bill in detail and prepares a general evaluation report for the second reading.[98]

[95] Interview with Committee of Labour, Administration and Grievances at the National Assembly, Khartoum, June 2009.
[96] The Legislative Standing Committee has identified 12 laws as priority areas, including the Criminal Act, Criminal Procedure Act, the National Security Forces Act, the Police Forces Act, the Armed Forces Act, the Evidence Act and the Press and Publication Act.
[97] Article 83 of the INC.
[98] Interview with members of the National Assembly, Khartoum, February 2009.

- The bill is then returned to the plenary assembly for debate in a second reading.
- Finally, there is a third reading before the National Assembly either passes or dismisses the bill.

The legislative proposal reaching the National Assembly is referred to one of the committees according to the subject-matter. There are a number of committees within the National Assembly, including the Human Rights Committee and the Humanitarian Committee. The concerned committee, after scrutinising the legislative proposal, refers the legislative proposal to the Legislation and Justice Committee for the final drafting. Usually, the appropriate committee organises a session for a general debate in which it may seek input on the rationale and viability of the bill from the relevant ministries.

Other ministers are also invited to give their comments and any interested bodies may also be invited to present their views on the rationale of the bill.[99] Although the legal text is worked out by the law drafters at the Ministry of Justice, detailed policy and legal inputs on substantive matters continues to be given by the policy-developers through a process of consultation at the National Assembly. Some commentators pointed to an over-emphasis on legal aspects of drafting at the expense of a thorough consideration of policy. Such an approach can produce a draft that incorporates the policy choices of some experts which are conditioned by their personal knowledge or experience rather than being based upon a thorough appraisal of the true problem and of local needs and circumstances of the society.[100]

In practice, the relevant ministries are consulted on the implementation and operational aspects of a given legislative proposal.[101] Consultation with other ministries, typically those that have an immediate interest in the subject matter or in some aspect of the legislative proposal, is also common practice. In contrast, non-governmental interest groups outside the parliament are rarely consulted during the debate of the legislative proposals at the National Assembly. In practice, there is no separation of powers as the executive appears to exercise unfettered influence over the legislature, with key decisions tending to be made between the CPA parties behind closed doors before they come to parliament.[102]

[99] Ibid.
[100] Interview with Committee of Labour, Administration and Grievances at the National Assembly, Khartoum, June 2009.
[101] Interview with members of the National Assembly, Khartoum, February 2009.
[102] Interview with civil society representative, Khartoum, July 2009.

Consultation Process within the Various National Assembly Committees

The Committee concerned has the power to invite concerned groups to submit their observations pursuant to parliamentary procedures. This practice was followed during the deliberation on the Organization of Humanitarian and Voluntary Work Act, 2006, and resulted in some amendments to the bill following NGO interventions.[103] After the final reading, the bill has to be referred to a standing Inter-Chamber Committee for scrutiny and a determination on whether it affects the interests of the states. If the Inter-Chamber Committee decides that it does, the bill has to be referred to the Council of States. The Council of States may introduce any amendments in the referred bill by a 2/3 majority of the representatives (or pass it as it is). The (amended) bill is then sent to the President for his/her assent without being returned to the National Assembly.[104]

The Committee of Justice and Legislation at the National Assembly is responsible for ascertaining the accuracy of the legal drafting. The Committee suffers from limited capacity and there is a need for continuous training to enhance the quality of legal drafting.[105] Poor capacity of the members of parliament impacts greatly on the quality of debate during the parliamentary sessions and on the participation of the different parliamentarians in the law reform process.[106] Training on issues related to internal rules and regulations of the Parliament are a crucial prerequisite to enhance the quality of parliamentary debate.[107]

External participation in the parliamentary law reform process is confined to the invitation of experts to provide technical expertise.[108] Public participation is minimal and is usually sought for legislation that regulates to issues such as the health sector.[109] Some parliamentarians think that the preparation of legislation is best conducted by encouraging parliamentarians to hold sessions at the grassroots level: that is, at the state, local and community levels with a view to incorporating the views of their constituencies in the law reform process,

[103] Interview with civil society representative, Khartoum, July 2009.
[104] Article 107 of the INC 'Procedures for Presentation and Consideration of Bills.'
[105] Interview with members of the National Assembly, Khartoum, February 2009.
[106] Interview with Committee of Labour, Administration and Grievances at the National Assembly, Khartoum, June 2009.
[107] Ibid.
[108] Ibid.
[109] Ibid.

especially in areas related to administrative legislation (secondary legislation).[110] Such mechanism may contribute to the restoration and preservation of peace through the promotion of dialogue, reconciliation, consultation and delivery of enhanced basic services at a community level. Such a proposed mechanism may enhance public participation in the law reform process but may not be feasible due to time- and financial constraints.

Lack of participation is related to the fact that the public are not aware of the laws that are being debated in parliament.[111] This is compounded by a general lack of dissemination of laws and legal awareness of the public at large.[112] Access to bills and legislation is limited. Full collection of legislation in force must be readily available and legal professionals should be able to acquire copies easily. Steps that have been taken to address this problem with the help of the international community, for instance, a UNDP Sudan Judiciary Project has assisted the Sudan Judiciary to re-print a complete set of Sudan law journals and reports dating back to 1900. These publications will be provided to all judges in north Sudan as well as other courts.[113] In addition, the long history of dictatorships and political instability in Sudan has significantly weakened the legal system and undermined belief in law reforms that benefit the population at large, rather than the ruling party in power.[114]

PART 4: Examination of the Role of other Actors in the Law Reform Process

1. The Role of Government Bodies: The Advisory Council for Human Rights

The Advisory Council of Human Rights (ACHR) is a department within the Ministry of Justice. Its mandate is, *inter alia*, to provide advice to the government

[110] Interview with Committee of Labour, Administration and Grievances at the National Assembly, Khartoum, June 2009.
[111] Interview with civil society representative, Khartoum, July 2009.
[112] Ibid.
[113] Interview with UN, Khartoum, July 2009.
[114] Interview with journalist, Khartoum, May 2009.

on the compatibility of legislation with international human rights treaties obligations. It monitors the application of international human rights to which Sudan is a party and assists the government to report back to the international treaty bodies, such as the UN Human Rights Committee. A newly created division within the ACHR, the Criminal Justice Division, provides advisory services to the criminal justice sector institutions (the Police, the Prosecutors, lawyers and judges) on the compatibility of the criminal law with the INC and international human rights law, with a special focus on the principles of fair trial.[115] To date, the ACHR has, in cooperation with international agencies, conducted a number of training sessions for criminal justice institutions that dealt substantially with a set of procedural issues related to the right of arrested persons during the pre-trial stage. A training manual has been prepared in collaboration with the United Nations Mission in Sudan (UNMIS) and the police. The police is understood to be in the process of endorsing the training manual with a view to incorporating it in the official training curriculum of the police.[116]

The ACHR has taken some steps in the law reform process. It has organised a number of workshops with different stakeholders, such as academics, lawyers, civil society organisations and human rights NGOs to solicit their inputs with a view to reaching a broader consensus on the draft of the Human Rights Commission Act. In addition to ensuring the incorporation of the Paris Principles, lessons learnt and best practices from different jurisdictions have also been considered during the drafting process. The Act came into force in April 2009. The draft which had been tabled before the National Assembly granted the Human Rights Commission the power to summons individuals, information and documents for hearings, but amendments were made that removed such powers from the mandate of the Human Rights Commission.[117]

According to the ACHR, the impact of the various training sessions on criminal procedure has resulted in a marked improvement in the practice and the application, by the police and the prosecutors, of certain aspects of procedural safeguards regarding the protection of individuals' rights, especially as regards the rights of arrested and accused persons during the pre-trial process. In addition, the establishment of a Human Rights Unit within the Ministry of Interior constitutes another institutional reform that has been put in place to regulate the performance of the police on human rights related issues. While the

[115] Interview with Advisory Council for Human Rights, Khartoum, February 2009.
[116] Ibid.
[117] Legislative Track Sheet prepared by UNMIS, September 2009. On file with the author.

ACHR has certainly sought to use its mandate to provide a forum and to contribute positively to the law reform process, its room for manoeuvre and its overall actual impact has been rather limited.

a) The Role of Political Parties

Members of some political parties lament the lack of public participation and transparency during the law reform process, especially when the bill is being debated within the different committees of the National Assembly.[118] The parties are inadequately represented in the various committees of the National Assembly: that is, the NCP and the SPLM dominate all the committees of the National Assembly, thereby depriving other parties from a meaningful participation in debating bills tabled before the National Assembly. In addition, representatives in Parliament are appointed and not elected. As such, the Parliament is not a true representative of the population at large.[119]

The domination of the National Assembly by the parties of the CPA might be explained on the grounds that the composition and the mandate of the National Assembly itself was inextricably connected to, and derived from the CPA; and the CPA in itself, was strictly bilateral, including only the parties to the north-south conflict: the National Congress Party, in the north, and SPLM/A, in the south. The CPA also played a decisive role in determining the general features of the INC in that the CPA dictated the text of the INC,[120] that is, the INC reflects the contents of certain principles as stipulated in the text of the CPA.[121] Most political parties also suffer from a lack of legal capacity and have only recently paid attention, particularly in the context of elections, to the importance of law reform as a key element in the broader process of democratic transformation.

b) The Role of Civil Society

The post-CPA period has witnessed a marked increase in the number of civil society organizations that are involved in various types of human rights and developmental activities, such as the provision of legal aid services to the poor and vulnerable people through the enhanced role of paralegals, and human

[118] Interview with parliamentarian, Khartoum, March 2009.
[119] Ibid; Interview with Legal Expert, University of Khartoum, March 2009.
[120] Articles 2.12.5 & 2.12.9 of the Power Sharing Protocol of the CPA.
[121] Christina Murray and Catherine Maywald, 'Constitution-Making in Southern Sudan', *Rutgers Law Journal*, 37 (2006), pp.1203-1234, at p.1203.

rights awareness.[122] UNDP Sudan has started a programme aimed at strengthening national human rights groups and their capacity in raising awareness of human rights amongst the population. However, it remains unclear what effect building the capacity of human rights advocacy groups will have in the long-term. A new NGO Act, enacted in 2007, restricts the activities of civil society organizations and allows the government to regulate and intervene in the activities of civil society organizations, which has, together with other measures of repression in late 2008 and throughout 2009, restricted the work and efficacy of civil society organizations.

There is limited civil society participation in the law reform process, mostly in relation to certain laws and due to political pressure.[123] Official consultation with non-governmental groups is resorted to rather reluctantly. A marked change of direction can be seen to be taking place in this respect, as some civil society organisations and political parties have had a role in the reform of a number of laws, namely, the Elections Act and the Child Act.[124] Poor capacity of the civil society organisations hampered the level of participation in the law reform process but efforts are under way to build a network and strengthen the capacity of civil society to effectively engage in law reform.[125] Civil society has also used strategic litigation to strengthen human rights protection and adherence to international standards.[126] For instance, the Constitutional Court has recently stated, in a case related to child rights, that international law prevails over the Sudanese statutory laws. However, the Constitutional Court has on several occasions failed to apply international norms, leaving legislation, such as immunity provisions for officials, in place that is incompatible with international human rights treaty standards. Some of the civil society organisations have participated in the process of reforming some of the laws, such as the Child Act, Human Rights Commission Act, Criminal Act and the Press Act. Several civil society organisations joined forces to constitute a consortium to lobby against the promulgation of a Decree for the Organization of the Work of Voluntary Organizations in 2005, which would have curtailed the activities of civil society had it been passed by the National Assembly.[127] This consortium was successful in lobbying against the Decree through the organisation of several seminars,

[122] Interview with civil society representative, Khartoum, July 2009.
[123] Interview with civil society representative, Khartoum, June 2009.
[124] Ibid.
[125] www.pclrs.org.
[126] Interview with lawyer, Khartoum, July 2009.
[127] Interview with lawyer, Khartoum, July 2009.

together with the National Assembly.[128] In general, the different committees within the National Assembly have been cooperative when it comes to law reform consultation, especially the Human Rights committee.[129] However, any engagement is due to the engagement of civil society and there are no consultation procedures within the National Assembly, which makes civil society participation highly contingent on circumstance.

c) The Role of the Media

Newspapers, radio and television play an important part in the process of consultation in the law reform process. In many countries, the electronic media are the means by which most people receive news and information and consider topics of public interest and concern.[130] In Sudan, the role of the media in covering the law reform process is very limited. There are only few newspapers that cover legal issues.[131] The way that the media tackles these issues needs to take into consideration the literacy level of the general public: that is, the media needs to address law reform related-issues using an easy-to-read language or other media so as to reach the ordinary public.[132] Some journalists believe that the involvement of the media in covering the process of law reform is contingent on whether or not the relevant ministry is engaged in a consultation process through public debate and organisation of workshops.[133] For instance, the new Press Act is strongly opposed, including by the Journalists' Union.[134] In response to the criticism that has been levelled against the Press Act, a committee was formed within the National Assembly so as to reach consensus by bringing together people from across different political spectrums.[135]

The Sudanese media have now been more critical in terms of discussing politics and other sensitive issues, such as domestic violence. Media representatives are allowed to follow the proceedings of the National Assembly. Nonetheless, media coverage of issues related to debate of bills before the National Assembly has been impaired if not prevented altogether by censorship measures that were

[128] Ibid.
[129] Ibid.
[130] Michael Zander, *The Law-Making Process*, 6th ed., Cambridge University Press, 2004.
[131] Interview with government officials, Khartoum, February 2009.
[132] Interview with journalist, Khartoum, February2009.
[133] Ibid.
[134] Interview with journalist, Khartoum, May 2009.
[135] Ibid.

imposed by the National Council of Press.[136] The long history of military rule, the protracted civil wars and the banning of the political parties have significantly impoverished Sudan's political and media landscape, both in terms of capacity and quality of coverage.

The draft of the amended Press Act was prepared by the National Council for Press and Publications in consultation with relevant entities, including civil society organisations, Journalists' Union, academics, legal advisors, representatives from the Parliament and university students.[137] However, according to some journalists, the general public and journalists were excluded from debating the reform of the Press Act and censorship has restricted media outlets to voice any concerns regarding the new Press Act.[138] While the new Press Act to some extent allows freedom of expression, it is not free from ambiguities. In the eyes of its critics, the Act is repressive, curtails the freedom of journalists and permits censorship.[139]

In essence, the new Press Act falls short of international norms and standards, such as freedom of expression. It also gives the National Council for Press a monopoly and does not regulate the issue of censorship, thereby leaving room for the National Council for Press to assume such a role. While it constitutes an improvement over previous legislation, other laws may impact negatively on the implementation of the new Press Act. The newly revised Criminal Procedure Law, for example, gives the Governor of the State excessive power to curtail the freedom of assembly.[140]

d) The Role of the Legal Experts and Lawyers

The law reform process related to civil liberties and security laws is moving very slowly for laws such as the National Security Act and other laws concerning trade unions.[141] Publication of draft laws as a means to solicit the views of the public takes place to some degree.[142] However, proposed legislation is not published as a matter of course in the daily newspapers or other easily accessible media. At the time of the deliberation of the Police Forces Act in 2007, two

[136] Interview with parliamentarian, Khartoum, March 2009.
[137] Interview with government officials, Khartoum, February 2009.
[138] Interview with journalist, Khartoum, May 2009.
[139] Ibid.
[140] Interview with diplomat, Khartoum, June 2009.
[141] Interview with legal expert, University of Khartoum, March 2009.
[142] Ibid.

separate draft bills were in circulation, indicating a lack of coordination. The process of public participation tends to comes to a halt when the legislative proposals reach the CoM and the National Assembly. The lack of transparency and expert consultation not only limits public scrutiny, it also fails to utilise the much needed legal expertise to ensure both quality drafting and compatibility of legislation with the CPA and INC. This could be done as part of the work of existing committees, or as members of a newly established law reform committee or commission.

e) The Role of the International Community

Law reform has been one of the top priorities in the reconstruction of justice systems in post-war states. It entails the provision of technical assistance and legal advisory services to governmental institutions (justice sector), assistance in ratifying or acceding to international conventions, and in drafting new legislation. Predominately, the reform efforts relate to criminal law reform, criminal procedure law reform, the legal framework for the judiciary and constitution making.[143] This signifies an expanding role of the international community in the reform of domestic systems. In Sudan, the UN, especially UNDP and UNMIS, particularly in fulfilment of their mandate in relation to the implementation of the CPA, has engaged in rule of law related tasks as well as in a whole range of activities such as trainings of criminal justice actors and institution building.

UNDP

The UNDP has advocated for specific reforms in the Darfur region, which has resulted in the issuance of a number of circulars by the State Governors to relax the rules related to the requirement of filling the so called 'Form (8)' by rape survivors as a prerequisite for receiving medical treatment.[144] Through its Rule of Law Programme in Darfur, the UNDP has initiated a strategy on Form (8)[145] that aims at increasing the number of survivors who receive justice in Darfur. The strategy focuses on redefining the common understanding of the rights of sexual and gender based violence survivors under domestic law.[146] Emphasis is on

[143] Richard Sannerholm, 'Legal, Judicial and Administrative Reforms in Post-Conflict: Beyond the Rule of Law Template', in *Journal of Conflict & Security Law*, Vol. 12 (2007) No. 1, pp. 65-94.
[144] Interview with UN, Khartoum, July 2009.
[145] Form 8 is a reporting document produced by the Ministry of Justice to record physical injuries related to criminal acts.
[146] Interview with UN, July 2009.

access to justice for survivors of gender based violence and domestic violence. In an effort led by UNFPA, UNDP, UNIFEM, UNAMID and UNHCR amongst others, there is now a common strategy to clarify the meaning and implementation of Form (8) in order to remove impediments to reporting by provision of training to government officials, including the police, clinics and hospitals and awareness raising for communities.

UNDP is also in the process of lobbying for the passage of legal aid legislation, in collaboration with UNMIS, civil society organisations and the Ministry of Justice and the University of Khartoum. This draft seeks to expand the provision of legal aid legislation through the institutionalisation of the concept of paralegals and the establishment of a legal aid bureau. UNDP is currently focusing on citizen participation and democratization which includes support for free and fair elections, and capacity development for civil society organisations, including organisations for the poor, women, IDPs and other marginalised groups to strengthen their engagement with government and their political representatives at all levels.[147] It also focuses on strengthening access to justice and promoting the rule of law through human rights awareness raising, legal information for communities and representation to individuals aimed at improving legal literacy and increasing access to remedies for rights violations.[148] UNDP intends to assist the government in developing capacities and passing pro-poor legislation such as the legal aid legislation.[149]

UNMIS

UNMIS was established by the UN Security Council to support the implementation the CPA. In this regard, UNMIS monitors and reports on the process of law reform through consultations with the Ministry of Justice, the National Assembly, the National Constitutional Review Commission, the Advisory Council for Human Rights and other national and international stakeholders. It has provided substantive inputs in the process of law reform, especially: the Political Parties Act 2007, Armed Forces Act 2007, Press and Printed Materials Act 2009, National Child Bill 2008, Khartoum State Child Bill 2006, Legal Aid Bill 2009 and amendments to the Criminal and Criminal Procedural Laws 1991. It also provides technical assistance through facilitation of open forums for both government constituencies and civil society to bring them

[147] UNDP Sudan, Governance and Rule of Law Medium-term Policy Focus and Program Framework, June 2009-June 2012, North Sudan.
[148] Ibid.
[149] Ibid.

together to discuss their needs and perceptions as related to transitional justice and the reconciliation process in Sudan. In this context, it has collaborated with the National Assembly Peace and Reconciliation Committee, in particular in the form of joint workshops. In addition, UNMIS has also prepared a comprehensive analysis on the applicability of transitional justice in the Sudanese context, as well as legal analysis in the area of juvenile and gender justice.

Other international organizations

The African Union/United Nations Hybrid operation in Darfur (UNAMID) was established by Security Council resolution 1769 on 31 July 2007. In addition to its core mandate, namely to protect the civilian population, UNAMID has also been tasked with contributing to promoting human rights and the rule of law, monitoring the implementation of the DPA and facilitating humanitarian access across Darfur.[150] The UNAMID Mission had formally taken over from AMIS on 31 December 2007. [151] The United Nations Development Fund for Women is in the process of conducting a comparative law review study on all the domestic laws of Sudan.

The international community has made an effort to engage in the law reform process, especially laws touching on freedoms and fundamental rights. However, it is questionable how sustainable these activities are. They are often stand-alone ones and not part of a long process, and, as such there is a lack of follow through of the process that is contingent on the priorities of the donors.[152] Moreover, the contribution of UN agencies has been hampered by capacity and other constraints that have arguably limited their role in contributing to a more effective law reform process.

[150] Under chapter VII of the UN Charter, the SG authorized the establishment of the African Union/UN Hybrid operation in Darfur, referred to by its acronym UNAMID for an initial period of 12 months. UNAMID mandate was extended on 31 July 2008 with the adoption of the SCR1828 for a further 12 months ended on 31 July 2009.

[151] AMIS was initially deployed as a contingent of (unarmed) military observers (MILOBS) to monitor the N'djamena Ceasefire Agreement signed in April 2004. Its mandate and structure were significantly changed, transforming it into a major military operation with the aim to actively contribute to the improvement of the overall security situation and enhance protection of civilians in October 2004.

[152] Interview with civil society representative, Khartoum, June 2009.

PART 5: Assessment of the Law Reform Process in Sudan

1. Compliance with the Provisions of the CPA and the lNC and the Status of Criminal Law Reform

Chapter II article 1.6 of the Power Sharing Protocol of the CPA obliges Sudan to comply fully with its international human rights treaty obligations and lists a series of human rights and fundamental freedoms. In this context, article 2.4.3 of the PSP stipulates that the "human rights and fundamental freedoms as specified in the Machakos Protocol, and in the Agreement herein, including respect for all religions, beliefs, and customs, shall be guaranteed and enforced in the National Capital, as well as throughout the whole of Sudan, and shall be enshrined in the Interim National Constitution."

Article 225 of the INC provides that the CPA is deemed to have been duly incorporated in this Constitution and that any of its provisions which are not expressly incorporated herein shall be considered as part of this Constitution. Hence, although large parts of the CPA have been translated into provisions of the INC, legal drafters have to examine any proposed bills with respect to their compatibility with all provisions of the CPA.

The INC provides for a catalogue of rights for citizens, including equality, liberty, public trial, freedom from torture, rights to counsel, freedom of thought and expression and freedom of assembly. In essence, the INC Bill of Rights features the characteristics of international human rights treaties, especially the ICCPR, albeit with some variations.[153] All of these rights are subject to specific limits as determined by law. Article 27(4) of the INC prohibits the State from making a law which either takes away totally or abrogates in part a fundamental right. Legislative reforms, especially the criminal law reform process, should ensure compliance with fundamental rights and freedoms and the rule of law. Attention should also be given to the guiding principles of the INC, although these principles are not enforceable before a court of law.

Several laws have been reformed, resulting in amendments to the substantive provisions of the Armed Forces Act and the Police Act. The incorporation of international crimes in the Criminal Code in May 2009 is based on the Model

[153] Noha Ibrahim, 'The Sudanese Bill of Rights,' *International Human Rights Journal*, Vol. 12 (September 2008), 4, pp.613-635.

Code of the Arab League.[154] However, it is questionable whether these changes can result in effective application. Deficient provisions related to the immunity for officials suspected of having committed crimes have been retained,[155] with the amendments falling short of what is laid down in the INC Bill of Rights.[156]

There is an urgent need to incorporate the international norms and standards in the preparation of legislation.[157] For example, the definition and the interpretation of 'Public Interest' as provided for in the existing statutory laws must be in line with the UN norms and standards, and should not be confined only to protect the monopoly of the ruling party.[158] The fragmentation of legislation is another problem. For instance, one subject-matter may be regulated in a number of statutory laws (family law and criminal law) as well as customary law, thereby producing conflicting interpretation and/or implementation. This is clearly manifested in laws that regulate issues related to children and women rights, which, in turn, impacts on the process of law reform and slows its progress.[159]

The letter of the INC is based on a vision that seeks to guarantee political rights, equality and civil liberties.[160] As such, the INC calls for and encourages public participation, amongst other, in the law reform process. However, the law reform process is excruciatingly slow. The INC is a transitional constitution and the law reform framework as stipulated in the CPA also calls for transitional laws that will last until the elections have been held. In the interim, the ruling party is seen as attempting to control the process, at the expense of transparency and public participation.[161]

A number of key laws that are necessary for an environment conducive to free and fair elections include the Political Parties Act (2007), the Election Act (2008), National Commission Act (2008), and Political Parties Affairs Council (2008). The drafting and adoption of a Referendum Act is underway though the details are subject of fierce controversy. There are still important areas in which extensive

[155] Interview with senior human rights lawyer, Khartoum, February 2009.
[156] REDRESS and KCHRED, *Comments on the proposed amendment of the Sudanese Criminal Act*, above n.52.
[157] Interview with Committee of Labour, Administration and Grievances at the National Assembly, Khartoum, June 2009.
[158] Ibid.
[159] Ibid.
[160] Interview with Journalist, Khartoum, May 2009.
[161] Ibid.

reform of domestic legislation is required to bring the existing laws in line with the INC and international standards. Long-awaited reforms of certain acts have not yet been made, such as the National Security Act of 1991, which contains several provisions that confer immunity to the security personnel and allow prolonged preventive (*incommunicado*) detention.[162] A bill has been prepared by the parties to the CPA and is being discussed at the time of writing.

Most of the newly enacted law fall short of international norms and standards, which is often attributed to a lack of political will.[163] The proposed National Security Act, the Criminal Procedure Act and the Family Act are cases in point. [164]

a) The Practice and Application of the Law Reform Process

Efforts that have been made to date to bring the practice and the application of criminal procedure laws in line with international norms have been hampered by gaps and a lack of clarity. For example, there are no provisions in the present criminal procedure code that determine the threshold of the duration of pre-trial detention. The provision on the right to a fair trial is not as comprehensive as stipulated in article 14 of the ICCPR. This situation is further exacerbated by deficiencies in the capacity of those responsible for the implementation of the law. For want of effective enforcement bodies, there is a need for training to strengthen the capacity of those bodies responsible for the functioning of the national human rights protection system.

Criminal justice institutions lack overall awareness and knowledge of international law, its relationship with domestic law and its implementation at the national level, and this is a matter of concern. This is problematic, not least because international standards are directly applicable by virtue of article 27 (3) INC. Most judges have had limited experience in the application of international human rights treaties in domestic cases and there is little jurisprudence to provide guidance on this matter.

Another important area is the making of secondary legislation in form of local directives or regulations. Individual ministries usually have constitutional power

[162] REDRESS and SORD, *Security for All: Reforming Sudan's National Security Services*, September 2009, pp.6 et seq., available at http://www.pclrs.org/Resources/Security%20for%20all%20FinalENG.pdf.
[163] Interview with lawyer, Khartoum, July 2009.
[164] Ibid.

to make secondary normative acts to implement primary legislation in their area of competence. However, little guidance is given as to the limits within which that power may be exercised as well as to the principles to be followed in determining which matters should be dealt with by secondary legislation. Misuse by government of these powers goes beyond implementation. This gives rise to serious deficits as concerns mechanisms and administrative arrangements essential to implementation. Some governmental agencies have issued directives that do not fall within their authorities, such as the Police. Affected groups should always be part of the law reform process and the process should not be left alone to the government.[165] As such, the Parliament may set more precise limits in bills to secondary law-making powers.

The federalism introduced by the INC has led to an increase in the number of the legislatures in Sudan, that is, every State now has its own legislature and other localities with legislative power. The CPA prescribes three levels of governance: central, state and local government; that is, States are granted legislative, judicial and executive authority.[166] This, in turn, may result in poor drafting quality because of lack of training. Poor drafting quality leads to poor quality of legislation.

RECOMMENDATIONS

Bodies engaged in law reform should regard the public as its most important strategic partner and therefore place a very high premium on public communication and consultation as an indispensable component of the law reform process. The need for wide public participation in the law reform process is an essential part of the bigger democratic transformation envisaged by the CPA. Part of the government's immediate action plan should be the enhancement of its public communication and consultation capability.

1. Government of Sudan

- Undertake a comprehensive internal review of the law reform process with respect to its transparency, participatory nature, efficiency, efficacy

[165] Interview with senior lawyer, August 2009, Khartoum.
[166] See articles 24 and 178(1) of the INC.

and quality of legislation drafted, taking into consideration the findings of this Report

- Develop a policy and action plan with a particular view to enhancing public debate and consultation of a broad range of stakeholders in the law reform process

- Remove obstacles to public debate and political participation in the law reform process, including by means of reforms of the Press and Publication Act and the National Security Act

- Adopt legislation that stipulates a duty of bodies concerned with law reform to publish drafts and to consult with stakeholders at various stages in the reform process

- Establish a central committee on legislation with a view to prioritising legislative projects coming from different ministries and ensuring that the outcome of policy formulation and reviews undertaken by the Council of Ministers is in line with relevant Sudanese laws and international treaties

- Consider setting up a standing law reform committee tasked with a comprehensive reform and revision of legislation in consultation with stakeholders' concerned, possibly drawing on experiences of other countries, such as South Africa

- Set aside funds to build the capacity of those concerned with developing and drafting legislation through training and other measures

- Make bills publicly available as soon as possible.

a) Ministry of Justice

- Consider issuing a detailed instrument, for example, in the form of instructions and/or directives, which spell out clearly the steps and issues that should be considered by policy makers during the stage of policy analysis with a view to producing a legislative proposal that best deals with the problem at hand.

- Develop a consultation policy to provide guidance on the modalities of consultation to be employed at the stage of policy formulation.

- Select an adequate numbers of persons to be assigned permanently to the Legislation Department and provide adequate and systematic training on legal drafting. It should also formulate official directions and practice guides on these matters.

- Provide guidance to the legal officers on the steps that should be taken while scrutinising the legislative proposals.

b) Parliamentary and governmental bodies

- Increase capacity to initiate and engage in the law reform process, and coordinate with other official bodies and stakeholders as appropriate

- Enhance transparency of work and consult with stakeholders and public throughout the law reform process.

c) Political Parties

- Make law reform a priority in the process of democratic transformation

- Enhance capacity to initiate and engage in law reform and to use existing avenues with a view to ensuring that legislation conforms to the CPA, INC and international standards

- Seek expert advice and consult with range of stakeholders so as to foster a broad-based and inclusive law reform process.

d) Media

- Increase quality coverage of law reform issues and providing public with information necessary for an informed debate

- Critically comment on law reform process with a view to holding bodies involved to account with respect to their roles as envisaged in the CPA and the INC.

e) NGOs

- Make law reform an integral part and a priority in advocating for human rights protection

- Raise awareness of the importance of law reform as a means of protection human rights and enhancing the rule of law

- Engage with stakeholders, including at the grassroots level, with a view to developing positions and campaigns reflective of the rights and needs of a broad cross section of society

- Enhance capacity to initiate and engage in law reform, including by means of public advocacy and provision of expert advice.

2. To UNMIS/UNDP

- Develop and implement a coherent policy on law reform and human rights

- Support law reform processes through the building of capacity and expert advice

- Ensure that proposals made are in conformity with the CPA, INC and international legal standards

- Engage with, and support, NGOs and other stakeholders with a view to raising awareness and promoting reforms, focusing on particular on those needed to ensure respect for human rights.

SOURCES AND BIBLIOGRAPHY

1. Legal Documents

The Directive of the Ministry of Justice (the 1996 Circular)

The Interim National Constitution of Sudan, 2005

The Interim Constitution of Southern Sudan, 2005

The Comprehensive Peace Agreement, 2005

The Ministry of Justice Organization Act of 1983 (in Arabic)

Law Drafting and Regulatory Management in Central and Eastern Europe, SIGMA Papers: No. 18, OCDE/GD (97)176.

The Strategic Plan 2007-2012 of the Ministry of Justice

2. Publications

Hassen Ebrahim, *Southern Africa – Challenges for the New Millennium*, 2002, Harvard University

Mohamed Eltahir, *Law Reform in the Light of the Comprehensive Peace Agreement*, on file with the author

Noha Ibrahim, 'The Sudanese Bill of Rights,' *International Human Rights Journal*, Vol. 12 (September 2008), 4, pp.613-635

Christina Murray and Catherine Maywald, 'Constitution-Making in Southern Sudan', *Rutgers Law Journal*, 37 (2006), pp.1203-1234

Keith Patchett, *Preparation, Drafting and Management of Legislative Projects*, UNDP Lebanon, 2003

REDRESS Trust, *A concept paper on the Law Reform Process*, 2008, available at http://www.redress.org/publications/Options_Paper_Law_Reform%20FinalEngl.pdf

REDRESS and KCHRED, *Comments on the proposed amendment of the Sudanese Criminal Act*, Position Paper, September 2008, available at http://www.redress.org/reports/Penal_Code_Amendment_Position%20Paper%20_2_.pdf

REDRESS and SORD, *Security for All: Reforming Sudan's National Security Services*, September 2009, available at http://www.pclrs.org/Resources/Security%20for%20all%20FinalENG.pdf

Richard Sannerholm, 'Legal, Judicial and Administrative Reforms in Post-Conflict: Beyond the Rule of Law Template', in *Journal of Conflict & Security Law*, Vol. 12 (2007) No. 1, pp. 65-94

Jan M. Smits, *Comparative Law and its influence on National Legal Systems*, Oxford Handbook on Comparative Law, 2008

Sustaining Peace through Development, 2008-2011, Prepared for the Third Sudan Consortium, May 2008, on file with the authors.

UNDP Sudan, *Governance and Rule of Law Medium-term Policy Focus and Program Framework*, June 2009-June 2012, North Sudan

UNMIS, Legislative Track Sheet, September 2009

Michael Zander, *The Law-Making Process*, 6th ed., Cambridge University Press, 2004