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The Rule of Law

and Human Rights in Sudan: challenges and prospects for reform

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The rule of law and human rights in Sudan: challenges and prospects for reform

I. (The) Understanding of the rule of law

The notion of the rule of law is both notoriously ambiguous and politically charged. Any discussion of the rule of law therefore needs to begin with clarifying its understanding. The United Nations has provided a generic definition that includes many recognized elements

For the United Nations, the rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.¹

This definition reflects the “thick”, substantive version of the rule of law, which includes justice and respect for human rights. Thin, formal versions focus on the nature of the law – “open, stable, clear and general rules” and its administration, particularly independence of the judiciary, fairness and access to justice. The rule of law essentially aims at preventing arbitrariness, particularly the abuse of power. Respect for the rule of law also serves to create an environment conducive to peace, security, equality, development and the exercise of liberties.

The rule of law discourse has been criticised for promoting “western”, formal models of the law, which has been mainstreamed in development and rule of law promotion projects that have often failed to address systemic problems and may have even helped authoritarian rulers to legitimise their rule. As Upendra Baxi emphasised, the rule of law concerns both the rule of “law” and “men” (people). It is

Always and everywhere a terrain of peoples’ struggle incrementally to make power *accountable, governance just, and state ethical.*²

In the Sudanese context, the “law” has been repeatedly instrumentalised to serve power interests. Any reforms aimed at strengthening the rule of law must therefore be mindful of the role that law has played in the governance of Sudan, particularly its potential to be captured by elite interests. The reform process should therefore be “participatory” and inclusive, building on local visions and experiences of the law, including both those tasked with administering justice and the public at large across the country. This must include marginalised members of society (including women, minority groups (religious, cultural, linguistic, ethnic, persons with disabilities) so as to avoid that the discourse on law and the role of the law is captured by elite interests. A participatory approach may create potential conflict with international standards and principles, which are part of an “international rule of law”. Any such conflict would need to be addressed further in debates to reach solutions that marry local experiences with international standards in a way that does justice to Baxi’s goals of the rule of law.³ The issue of the conflicting norms of Shari’a and customary law which are an

¹ Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, S/2004/616 (2004), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement>

² Upendra Baxi, *Rule of Law in India*, 2007, http://socialsciences.scielo.org/pdf/s_sur/v3nse/scs_a01.pdf (unpaginated).

³ See in this context also the work of Abdullahi An’Naim, <http://aannaim.law.emory.edu/>.

integral part of the Sudan's legal hybrid system would need to be part and parcel of such debate particularly considering that these conflicting norms have proved to be a serious obstacle in the realisation of the rule of law and effective incorporation of international human rights norms.

Points for further reflection:

How best to develop a participatory/inclusive approach – identify constituencies and modalities – to clarify understanding of law and the rule of law in Sudan.

How best to undertake further empirical research, including by means of surveys and in-depth interviews, to elucidate historical development and contemporary understanding of rule of law in Sudan.

II. Background: Experiences with the “rule of law” in Sudan

The recognised rule of law principles seek to establish the supremacy of the law. This is as a system of binding rules, as a means to ensure security and justice, and to avoid the arbitrary exercise of power. The rules should therefore be clear, precise and everyone should be bound by it. The risk of an overbearing executive abusing the law is to be countered by a system of checks and balances, particularly an independent and impartial judiciary, and substantive limits, namely respect for human rights.

In Sudan, the “law” is highly ambivalent, vague and stratified. Formal laws are the outcome of the interplay of a series of political processes (colonialism, Egypt's influence, Islamisation) that have resulted in a hybrid legal system lacking clarity. In this system, law plays very different roles, ranging from relatively well functioning civil laws, to highly charged Shari'a rules (particularly in the criminal sphere) and laws aimed at establishing security and order as defined by the government in power. The status of Shari'a as a source of law in particular lacks clarity and has given rise to concerns about its influence on Sudan's legal system, particularly in respect of the justification of measures with (broad/vague) reference to Shari'a. Formal laws have been both of limited reach (geographically, acceptance and accessibility), resulting in unequal enforcement, and have often been seen as oppressive and discriminatory. The main problem has therefore been the instrumentalisation of the law to legitimise and entrench power, which has characterised both the colonial power and most regimes in post-independence Sudan. The formal legal system is therefore widely experienced and seen as alien if not hostile. Customary laws are said to have enjoyed local legitimacy and to have been more accessible. However, their scope of application is limited and undermined by the formal legal system because of its limited recognition of customary law. Further, customary laws have suffered from politicisation and raised concerns about gender bias and arbitrariness. These developments and experiences raise broader questions as to what “law” means in Sudan and “whose” law it is. This is particularly pertinent given the limited democratic experience to date, which has excluded large parts of the population from law-making, i.e. playing an active role in the processes resulting in laws and their reforms, including public debates. In most situations the philosophy of law-making and its jurisprudence in Sudan has reflected the ideology of those ideologues who have used laws as a tool of repression to control society. The philosophy of “moulding” the mind of the nation and indoctrinate the hearts of many Sudanese into “the civilisational project” during the past three decades of “Islamisation” of the legal system is a prime example of this. Such a utilitarian approach is frequently used by politicians and others to subordinate rights to collective goals at the expense of individual rights, minority rights and the rights of vulnerable groups.

The overall weakness of the rule of law is also reflected in the lack of constitutionalism. Sudan has had a number of constitutions but has experienced neither democratic processes of constitution-making nor respect for constitutions in force. Governance has, with few short-lived exceptions, been characterised by a system of

executive hegemony insufficiently checked by the judiciary. This development became even more pronounced after 1989 when the judiciary was first systematically dismantled, i.e. “purged”, and then rebuilt in a fashion largely subservient to government interests. The legal system is riddled with laws that enshrine deep seated power imbalances (e.g. system of immunities and special courts resulting in impunity), discrimination, particularly based on gender (personal status law, criminal law, evidence) and lack of human rights protection (multiple). Legal procedures fail to adhere to minimum standards of justice (e.g. anti-terrorism law and criminal laws and procedures, public order laws) and sanctions are harsh (corporal punishments including stoning for zina, amputations for theft, lashing and death penalty for apostasy) as well as being applied against the weakest in the society, including with a gender bias. Institutions tasked with the criminal justice system are both overly powerful (e.g. immunities, special courts, punishments) and weak, with large swathes of the country lacking adequate law enforcement (infrastructure, capacity, corruption, security). Lack of clarity in the law, particularly land law, and shortcomings in the system of local and native administration have, among other factors, contributed to armed conflict such as in Darfur. In the absence of systems responsive to victims’ rights and communities’ demands for justice, the lack of effective “transitional justice” measures, such as on truth, justice, reparation and guarantees of non-recurrence,⁴ has deepened grievances and serves to perpetuate conflict. The law also had a detrimental impact on development. Commercial laws lack transparency and the inadequate regulatory regime facilitates a parallel economy and corruption. The informal economy is not regulated and the majority of the Sudanese lack protection of the law in many aspects which are essential to their daily survival including, among other things, social security, fundamental rights at work and the right to health. Further, there is limited recognition of economic, social and cultural rights both in the interim constitution (where they are mainly referred to under non-binding guiding principles), and in statutory law.⁵ This includes the prohibition of gender-based discrimination in the economic, social and cultural field,⁶ and the absence of laws and social dialogue between stakeholders that would allow unions and other civil society actors to function freely. Economic and social rights are not reflected in policy making, including gender sensitive budgeting, and are not seen as justiciable, thereby undermining the prospects for their adequate protection.

The legal profession itself suffers from the consequences of the profound changes that have been implemented since 1989, including mass dismissal of judges, exile of a number of senior lawyers, change in curricula and language of instruction and a perceived lowering of standards.

Amin M. Medani, in reflecting on the development of Sudan’s legal system and the need for reform, concludes that

the Sudanese Law is passing through a state of haziness, contradiction and ambiguity. The confusion emanates from the conflicting legal texts, from contradicting orientations and from the divergent legal cultures of members of the legal profession. This makes the lawyer, let alone the citizen, doubtful about the applicable law in any particular situation. This is the case in all sorts and levels of courts. There is no doubt that this state of affairs will not accomplish either justice or equity and will not facilitate the protection of citizens’ rights. Nor will it facilitate the safety and stability of society.⁷

⁴ See in this regard the work of the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Mr. Pablo de Greiff, <http://www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/Index.aspx>.

⁵ See Ahmed Abdelgadir Ahmed, ‘Economic, Social and Cultural Rights Under the Constitutional Bill of Rights in the Sudan’, REDRESS, University of Khartoum- Faculty of Law and Sudanese Human Rights Monitor, *The Constitutional Protection of Human Rights in Sudan: Challenges and Future Perspectives*, January 2014, 32-41, <http://www.redress.org/downloads/publications/140127FINAL%20Sudan%20UoK%20Report.pdf>

⁶ See Ebtisam Sanhoury Elrayh, *Women’s Rights in the Constitutional Bill of Rights: Issues of Status, Equality and Non-Discrimination*, *ibid.* 42-62.

⁷ Amin M. Medani, *Law Reform in the Sudan*, published as occasional paper on the website of the project for criminal law reform in Sudan, October 2009, 5, http://www.pclrs.org/downloads/Miscellaneous/Amin_Paper_Law_Reform_in_the_Sudan_Oct_09%20Final.pdf.

While concerted efforts have been made to raise rights awareness, in particular during the Comprehensive Peace Agreement (CPA) implementation, individuals and communities have limited scope to effectively engage with the system, and civil society remains too weak and constrained to substantially contribute to strengthening the rule of law. Efforts by international agencies, particularly the various UN bodies, UNMIS, UNAMID and UNDP, the AU High-Level Panel on Darfur, and international NGOs have provided valuable space for engagement. However, they have, at least in the short term, had limited impact due to a lack of vision in many instances, being compromised and being mainly occupied with making sure that the referendum takes place as planned. This came at the expense of the rule of law and true democratic transformation in both Sudans. The recommendations of regional and international bodies, such as the UN Independent Expert on human rights in Sudan, UN treaty and charter bodies and the African Commission on Human and Peoples' Rights have – with few exceptions – not been complied with.⁸ The resulting arbitrariness and impunity has contributed to a lack of trust in Sudan's justice system, particularly in cases that touch on issues seen as sensitive by the regime. This applies particularly to marginalised members of society, including those living in the periphery of Sudan (which includes the majority), women, and those politically opposed to the regime. It is therefore clear that respect for the rule of law in Sudan requires a fundamental transformation. This includes acknowledgment of the abuse of power, accountability and reparation for such abuse, and profound legislative and institutional reforms.

III. Legal reforms

1. Constitution

Constitutions are pivotal for any legal system; the lack of respect for successive constitutions in Sudan therefore reflects a broader disregard for the rule of law. Nonetheless, the Interim National Constitution of 2005 (INC 2005) endorsed a number of important principles emanating from the CPA. The new constitution will be an important site to express visions, principles and modalities of and for the rule of law in Sudan. This is not confined to the administration of justice. It also includes the law-making process, including questions such as the powers of the president, regionalism and federalism including fiscal federalism, local government, as well as the status, powers and role of various institutions.

The constitutional review process is an important opportunity to discuss a range of constitutional matters and gauge public preferences in Sudan on how to address fundamental questions about the nature of Sudan's state and legal system. This requires a participatory process, however:

the [Human Rights] Committee is concerned by reports that it has not been conducted with full inclusiveness nor under conditions allowing full freedom of debate (such as media freedom, freedom of assembly and freedom from arbitrary detention and ill-treatment).⁹

Sudan's experience indicates that constitutional reform has to go hand in hand with institutional reform; agreeing on the "substantive" norms of a new constitution is not sufficient to ensure the effective protection of rights. The constitutional debate should therefore venture beyond the text of the constitution and find ways and means to advocate for two principles: "*constitutionalism*" and "*effectiveness*" of institutional mechanisms for the effective protection of human rights and the rule of law; if these mechanisms are not in place,

⁸ REDRESS and Sudanese Human Rights Monitor, *Human Rights Concerns and Barriers to Justice in Sudan: National, Regional and International Perspectives, A compilation of Sudan Law Reform Advocacy Briefings*, February 2014, 26-39, <http://www.redress.org/downloads/publications/140228HumanRightsConcernFINAL.pdf>

⁹ UN Human Rights Committee, *Concluding Observations: Sudan*, Advanced Unedited Version, 2014, para.6.

“constitutional protection will remain ‘ink on paper’ without any teeth”.¹⁰ For any constitutional reform to be effective and meaningful, institutional reform is needed for important sectors such as the Police and the National Intelligence and Security Services (NISS). Such reform should address the NISS’s powers of arrest and detention, immunities of NISS personnel, as well as accountability and effective parliamentary and judicial oversight.

The constitutional review process is a priority because it provides an opportunity to develop a substantive vision for the rule of law and bodies tasked with law reform. From a rule of law perspective, this includes:

- Enshrining the supremacy of the constitution, including by clarifying the status of Shari’a and of customary law vis-à-vis international human rights norms;
- Circumscribing the powers of the President, including law making powers;
- Control of emergency powers;
- Enhancing parliamentary oversight (while in place to some degree, it is not effective because of the current political constellation);
- Establishing an independent law reform commission (there has been a proliferation of bodies that have remained weak due to mandate and capacity constraints (i.e. NCRC), however, if these issues were adequately addressed, a law reform commission might be able to play an important role as experiences in other countries show).

Strengthening civil and political rights (civil society advocacy, media scrutiny), women’s rights and economic, social and cultural rights. Two important principles may be enshrined here: public interest litigation (*locus standi*) and “justiciability” of economic, social and cultural rights and not only as part of the “Guiding Principles” of the Constitution.

2. Legislation

A number of Sudanese laws are incompatible with the Constitution and international standards, particularly international human rights law. Binding obligations under international human rights treaties are an integral part of Sudan’s Bill of Rights under article 27 (3) of the Constitution. On the face of it, article 27 (3) marked the transition from a dualist system (requiring implementing legislation) to a monist system (international law applies directly). It was therefore hailed by civil society groups and academics as transforming all ratified international human rights law at the national level. However, this automatic transformation of international law continues to raise serious difficulties in terms of its *actual* implementation by law enforcement institutions. The incorporation of international law, and its status in Sudan’s legal system lacks clarity due to several ambiguities. This includes how to resolve discrepancies between the international human rights treaty provisions and the definition of rights in the Bill of Rights and how to resolve questions of hierarchy between Shari’a and international law in case of conflict. The Constitutional Court has not satisfactorily addressed these issues to date. Hence, the reception of international human rights treaties within the Sudanese legal system and the inherent conflicts between different legal norms or regimes are fundamental questions that need to be tackled in any new agenda for constitutional and institutional reform in Sudan.

Sudan has recently undertaken some limited reforms that partially reflect recognised international legal standards. This includes enactment of the Persons with Disabilities Act (2009), Child Act (2010), Asylum

¹⁰ See Mohamed Abdelsalam Babiker, ‘Why Constitutional Bills of Rights fail to protect Civil and Political Rights in Sudan: Substantive Gaps, Conflicting Rights, and ‘Arrested’ Reception of International Human Rights Law’ in REDRESS, University of Khartoum- Faculty of Law and Sudanese Human Rights Monitor, *The Constitutional Protection of Human Rights in Sudan: Challenges and Future Perspectives*, January 2014, 14-31, at 15.

Regulation Act (2014) and Combatting of Trafficking Act (2014). However, detailed scrutiny of Sudan's laws over the last decade has identified a series of shortcomings.

Substantive concerns over Sudan's laws include:

1. Repression:

- (i) Repressive laws: broad and vague offences; laws criminalising what should not be criminal under international human rights norms, e.g. adultery, apostasy; emergency laws; anti-terrorism law; press and publication act; making civilians subject to military law; detaining individuals for indefinite periods for not being able to honour contractual and commercial obligations (article 11 of the ICCPR);
- (ii) Overly broad executive powers: arrest and detention, particularly national security act; lack of custodial safeguards and limited judicial review; prison laws;
- (iii) Procedural deficiencies in the administration of justice: rights of the defence; release on bail, prevalence of summary trials, in particular public order courts.; trials before anti-terrorism courts; limited legal aid;
- (iv) Inhuman and disproportionate punishments: corporal punishments (including lashing and cross-amputation) and the death penalty.

2. Discrimination

- (i) Gender-based discrimination: personal status law; evidentiary rules; public order laws; laws on rape and sexual violence, including female genital mutilation (FGM) (lack of protection);
- (ii) Nationality and immigration laws: creating statelessness due to deliberate denationalization of South Sudanese after secession and rendering many individuals and groups as de facto or de jure stateless (in situ populations in their own country (women, children, mixed marriages, pastoralists, border tribes)); lack of adequate recognition of minorities; deportation of migratory populations, refugees, human trafficking and lack of due process of law protecting those vulnerable groups in the society.

3. Impunity

- (i) Lack of, or inadequate criminalisation: no offence of torture, or enforced disappearance in conformity with internationally recognised definitions; definitions of international crimes differ in the Armed Forces Act (2007) and Criminal Act (2009) amendments and are not fully in line with internationally recognised definitions;
- (ii) Liability: particularly lack of recognition of command/superior responsibility;
- (iii) Immunity: army, police, security and other officials enjoy immunity from prosecution;
- (iv) Statutes of limitation: limitation periods are short, entrenching impunity for crimes that have not been prosecuted;
- (v) Special Courts: police, army and security operate special courts that raise concerns about lack of transparency and accountability; and due process of law;
- (vi) Victims' rights: lack of recognition of victims' rights (participation, protection, right to be informed, lawyer, etc)
- (vii) Monitoring: lack of freedom of information act and media freedoms (broadcasting laws).

4. Lack of reparation

- (i) Constitutional right to litigation not matched by explicit right to reparation for human rights violations;
- (ii) Immunity: see above (3 ii), immunity extends to civil cases;
- (iii) Short statutes of limitation;

- (iv) Limited rights of victims hampering access to justice.

5. Limited recognition of economic, social and cultural rights

- (i) Weak constitutional status of ESCR rights is matched by limited recognition in statutory law.
- (ii) Laws crucial for the respect for ESCR rights and development are deficient, including employment laws, trade union law, land law and lack of effective anti-corruption law.
- (iii) Lack of laws regulating the informal sector, which predominantly include vulnerable groups in the society (i.e. women, persons with disabilities, ethnic minorities) and other groups such as pastoralists, seasonal farmers and domestic workers and labourers.

Legislative reforms are closely linked to security sector reform. Priorities in this regard comprise a clear mandate, limiting resort to emergency laws and removing of broad powers from forces, particularly the National Intelligence and Security Services (NISS), which should not have the power to search, arrest and detain individuals, focusing on intelligence only instead. Further, immunities for law enforcement agencies, the NISS and the army should be removed and special courts abolished; to be replaced with clear code of conducts for the respective forces and effective complaints procedures and accountability mechanisms.

3. Law-making process

Law has been used as an instrument for ideological or political purposes, as a means of control and repression and as part of the “civilization project”. This applies particularly to the use of Shari’a as part of the process of Islamisation, first initiated in 1983, and then reactivated with varying degrees of intensity since 1989. Law reform initiatives failed in the late 1980s due to a combination of factors (lack of receptiveness, political weakness). In hindsight, while more could have been done to initiate reforms, it is unclear whether a repeal of the 1983 September laws would have succeeded given that serious moves to do so were cut short by the 1989 military coup. The CPA sets out a blueprint for major constitutional, legislative and institutional reforms. However, the bodies tasked with undertaking the reforms, such as the National Constitutional Review Commission (NCRC), were weak, in addition to the failure of other Commissions such as the National Judicial Service Commission, and the National Human Rights Commission (NHRC), which could play a role in institutional reform. Due to the failure of democratic transformation envisaged in the CPA, there were no fundamental changes in the law-making and reform process and most of the newly enacted legislations during the CPA are repressive (i.e. National Security Act 2010, Trade Unions Act 2010, Press and Printed Materials Act 2009, NGO Act 2006). Reforms undertaken were haphazard and incoherent, with limited political engagement on the part of opposition parties and, initially, civil society. As a result, substantive concerns over the incompatibility of a number of laws with Sudan’s constitution and international human rights standards remained largely unaddressed. This system has not changed since the 2010 election and South Sudan’s independence in 2011, with law making in the hands of an NCP dominated parliament and the President (decree making power), and emergency powers and the ongoing armed conflicts affecting the operation of the rule of law and governance.

There is a need for civil society to broaden its advocacy on the constitutional review and legislative reform processes, effectively engaging various local constituencies and political opposition that have to date paid limited attention to relevant issues and processes. This engagement should reach beyond specific matters and raise issues of principles and governance, such as what a democratic and participatory constitutional review and law reform process should look like and how it can be implemented in the Sudanese context. This includes the role of law in governance and its actual or possible abuse, including the role of Shari’a, the discussion of

which has been limited to date. Current debates surrounding the political dialogue and forthcoming elections provide possible openings despite the risks that this process will be utilised to legitimise existing power structures.

Commitment to substantial law reform should be made a condition for meaningful political transition and any meaningful, credible elections, which require a conducive environment where the law reform process may have some impact. If and when such transition is under way, a body should be established (ensuring independence of its members) to undertake a comprehensive review and propose detailed reforms.

Law reform should be integral to any transitional justice initiative, including peace agreements. Ideally, this would entail detailed scrutiny of how various actors have used the law and the role of lawyers in drafting laws that lend themselves to abuse. Any such scrutiny should be participatory, i.e. built on the lived experiences of those who have been subject to the law, and should take into consideration best practices of legislative reforms elsewhere.

Points for further reflection:

What should be the priorities for the law reform and law-making process?

How best to engage political actors and the public at large?

IV. Access to Justice

Notwithstanding the constitutional guarantee of the right to litigation, there is scant recognition of victims' rights (standing, participation, protection, information), which has contributed to limited access to justice. Victims of wrongs can have recourse to diya under Shari'a where applicable (wounds, murder)—though they will have to choose between compensation and punishment. Victims of other wrongs can use tort law though its utility is limited by a number of legal challenges, including standing (particularly collective), immunities (for officials) and statutes of limitation.¹¹

There are also numerous practical barriers to access justice in Sudan, particularly physical access (lack of geographical coverage, breakdown of institutions in conflict areas)¹², security concerns, fees (particularly before the Constitutional Court), lack of or inadequate legal aid, corruption, and delays. Members of marginalised communities (language, racism) and women (discriminatory laws, inability to independently pursue case, bias) face additional obstacles. Many Sudanese have limited awareness of the formal system and/or limited trust in accessing justice institutions. This is also due to the perceived lack of independence of the judiciary, which equally applies to the Constitutional Court that has largely failed to act as strong guarantor of human rights.

In the field of administrative law, one of the key obstacles is the lack of effective judicial review of executive decisions issued by various branches of both federal government and localities which enjoy broad powers derived from bylaws which, in many cases, contradict the laws and the constitution. These laws are barely known to the public and are used as one of the means of oppression, such as imposing more taxation targeting the poor and vulnerable who work in the informal sector or economy. The public order regime is an obvious

¹¹ See also Mohamed Abdelsalam Babiker, 'The Prosecution of International Crimes under Sudan's Criminal and Military Laws: Developments, Gaps and Limitations', in Lutz Oette (ed), *Criminal law reform and transitional justice: Human rights perspectives for Sudan*, Ashgate, Farnham, 2011, 161-181, at 178-9.

¹² In Darfur for example, currently prosecutors operate solely in the five state capitals of Darfur with no presence in rural areas which prevents the proper administration of justice. See *2013-2019 Developing Darfur: A Recovery and Reconstruction Strategy*, Report issued pursuant to Article 31 of the Doha Document for the Peace in Darfur, Darfur Joint Assessment Mission, Darfur Regional Authority, 2013, 74-83.

example of how administrative decisions result in the repression of many, in particular women and are also used to generate income for a repressive state through its administrative orders, decisions and procedures. Judicial review has, however, been used – with mixed results - in many cases to challenge government decisions including abuse of power by ministers to close some human rights organizations and other civil society groups. Other administrative decisions are also employed in the area of the right to nationality after the secession of South Sudan but failed due to lack of access to justice and the hegemony of executive branches of government. In some situations where courts issued decisions in favour of the victims, these have not been implemented.

Customary courts or traditional justice mechanisms recognised by communities in the Sudan such as the “Judia” system in Darfur or “Gald” in Eastern Sudan can play a complementary role in ensuring access to justice. Unlike the repressive formal justice system, customary laws and courts with their established substantive norms and procedures can play an effective role in social peace and also provide redress. Customary laws as one of the traditional African justice systems can address the dilemma of realising communal peace and reconciliation from a traditional justice perspective and provide a viable option for the victims, in particular in armed conflict areas. However, the pertinent question is: in the absence of a viable legal system, i.e. effective formal rule of law institutions, can traditional justice fill the vacuum in terms of providing communal peace, redress violations and provide victims of crimes with some sort of reparation through restorative justice and traditional justice mechanisms?

Beyond formal courts and customary law mechanisms, a number of commissions tasked with the monitoring of grievances and/or protection have been put in place, including the NHRC and Advisory Council for Human Rights. However, these bodies have been seen as not having the level of effective independence, calibre of staff needed, as well as being under-resourced and lacking capacity. A lot of hope was placed in the NHRC and it is important to engage with it to test it and help it build capacity. However, tasking bodies with human rights protection in a system that is repressive and where courts lack independence puts a lot of burden on them and has frequently proved ineffectual.

As a result, victims of human rights violations in particular have – with few exceptions – not received any reparation for the harm suffered. This includes reparation for violations related to armed conflicts, including North-South (the CPA was silent on reparation) and Darfur, though limited measures have been taken in the latter context to provide at least some reparation through various commissions under the Doha Document for Peace in Darfur (DDPD) which also remain ineffective (i.e. Truth, Justice and Reconciliation Commission, Property Claims Commission, Compensation Commission). Efforts towards reparation for mass victimisation in the context of so-called transitional justice initiatives are important and should not be viewed in isolation; they play a potentially important role in establishing principles, and can provide avenues to introduce systemic changes to strengthen victims’ rights and access to justice.

Further, at the supranational level, the African Commission on Human and Peoples’ Rights has issued a number of decisions against Sudan, with several other cases pending. However, none of its decisions have been implemented. There is reportedly a newly established unit within the Ministry of Justice to handle implementation but little is known about its work.

Ultimately, improving access to justice requires a substantial overhaul of the current system, which includes legislative, institutional and practical measures to enhance access in line with international standards and best practices.

Points for further reflection:

Undertake empirical research on experiences with access to justice across the country.

Identify “transitional justice” priorities of victims of serious human rights violations by means of extensive consultation.

Bring together like-minded judges and officials to advocate changes concerning administration of justice and/or encourage judges to engage in judicial activism.

V. Justice and accountability

Lack of justice and criminal accountability for human rights violations, international crimes and abuse of office more generally is deeply engrained in Sudan’s legal system. There is an almost complete impunity for such crimes. Most notably, both parties to the CPA reportedly agreed not to prosecute any crimes committed, reflecting the primacy of the political over the law. The CPA also does not include any specific provision on accountability or transitional justice. Subsequent efforts towards ensuring accountability in the Darfur context have equally failed. Numerous justice initiatives, from the International Criminal Court to the African Union High Level Panel on Darfur, have been ignored.¹³

Of the legislative shortcomings identified above (III (2)), which are central to security sector reform, i.e. immunities are the most symbolic expression of impunity. However, even if there were substantial legal reforms, which have been set out in some detail by the AU High Level Panel on Darfur in its 2009 report, there are still a series of institutional shortcomings to be addressed. This includes the institutional independence and capacity of law enforcement bodies and the independence of the judiciary. Investigations of crimes are often deficient, failing to use internationally recognised investigative methods. For example, form 8 used for rape cases is inadequate and the Istanbul Protocol is not used in cases of alleged torture or other ill-treatment. Further, the prosecutor “is part of the Ministry of Justice, which is comprised of officials of the executive, with the inherent risk of bias in favour of his or her employer, the government.”¹⁴ Even were officials accused of having committed crimes are prosecuted, this is done before special courts whose proceedings lack transparency, lack a system of witness protection and may shield the accused from full accountability. In contrast to this strong executive bias, victims have virtually no rights in proceedings, such as the right to participate, to be protected, and to be kept informed of developments. Special courts also use the criminal procedures in the context of normal crimes committed in peace time and hence lack rules of procedures and evidence as in the case of international tribunals.

In light of these experiences, there are two apparent scenarios how to break the culture of impunity. The first option would be a committed, sufficiently high-profile undertaking to bring perpetrators of human rights and international humanitarian law violations and international crimes to justice (in Sudan or elsewhere). There is no realistic prospect of this happening in the present circumstances though individual cases may be successfully pursued in third countries. A culture of accountability can also be developed in a more incremental fashion by: (i) exposing crimes and calling for investigations and prosecutions – this has happened in a number of cases, and has helped to document cases and highlight shortcomings; (ii) engaging in a discourse aimed at a principled way of dealing with wrongdoing where everyone is subject to the law irrespective of his or her identity; and (iii) using opportunities to instil such a culture through teaching and advocacy.

¹³ See African Union High-Level Panel Report on Darfur (AUPD), 29 October 2009, PSC/AHG/2(CCVII).

¹⁴ Amin M. Medani, ‘A Legacy of Institutionalized Repression: Criminal Law and Justice in Sudan’, in Lutz Oette (ed), *Criminal law reform and transitional justice: Human rights perspectives for Sudan*, Ashgate, Farnham, 2011, 67-88, at 85.

In addition to the legislative reforms set out above, there is a need for a substantial overhaul of the system of investigating and prosecuting alleged crimes committed by or with the involvement of officials. This would include: (i) a prosecution service answerable to an independent Attorney General; (ii) special investigative units that are institutionally independent from the alleged perpetrators; (iii) use of recognised investigative methods, including changes to form 8, introduction of Istanbul Protocol and Minnesota Protocol to guide investigations into torture and extrajudicial killings respectively; (iv) abolition of special courts for the police, the NISS and the army; and (v) strengthening victims' rights (see above).

These reforms are predicated on the recognition that the current system has perpetuated impunity. This means, by definition, that at least some of the personnel involved in running the system has been implicated in serious failings if not violations. Reforms would therefore require addressing the legal and institutional legacy of impunity, which realistically would need to take some form of transitional justice initiative. Besides legislative and institutional reforms, this would also need to entail a process for lustration (removing someone from office for past wrongdoing) and vetting (assessing whether someone is fit for office), which would itself need to adhere to due process.

Ultimately, a wholesale change of political, legal and institutional culture is needed. This will require a public process and debate that would not only focus on laws and institutions but also on power imbalances and inequality, particularly on how marginalisation and discrimination results in victimisation and impunity. A genuine culture of accountability therefore needs to reach beyond specific initiatives and change perceptions of what is acceptable behaviour, including why accountability to the law is in the public interest.

Points for further reflection:

Undertake research/surveys (in Sudan and abroad) on people's understandings of, and expectations of what should be done in regards to accountability and justice.

VI. Institutions, with a particular focus on the judiciary

While there has been considerable investment into some parts of the system, there are systemic problems in the administration of justice characterised by inadequate infrastructure, limited capacity and maladministration.

While several efforts have been made to build the capacity of criminal justice institutions, there are still concerns about corruption and recourse to arbitrary detention, as well as torture and ill-treatment in investigating cases. This persistence is partly due to the weakness of the judiciary's supervisory role and lack of access to justice but needs to be addressed also by means of police reforms, including by putting in place a better disciplinary system and training the police in using appropriate investigation methods.

The judiciary has undergone fundamental change since 1989. Following the mass dismissal of judges, many of whom were trained in the common law system, a new generation of judges have grown up in the present system where the legal system is confusing and hybrid (common law, continental, Shari'a). Many if not most of them have been trained in Shari'a and must show at least outward loyalty to the regime while others do not have proper exposure and lack education in other legal systems. The judiciary has been politicised in high profile cases, particularly in relation to counter-terrorism, corruption and political crimes. The courts have a poor record in applying international human rights law and there are hardly any cases in which courts, including the Constitutional Court, have ruled against the interests of the government.

The constitution guarantees the independence of the judiciary and a national judicial service commission was appointed. However, the Commission, which has been dominated by NCP members, has focused on technical issues rather than substantive aspects in order to preserve autonomy of the judiciary and avoid the hegemony of the Presidency. This includes the adoption of the budget of the judiciary, making “recommendations” to the executive on the appointment of judges to the Constitutional Court, the Chief Justice and his deputies, judges of the High Court and other judges. It has not taken any measures with regard to frequently raised concerns relating to the independence of the judiciary. This includes – besides interference in particular cases - judicial competence over judicial work, the interference of the Ministry of Justice in the work of the judiciary in staying or dismissing legal proceedings and the role of the judiciary with regard to special courts and immunities granted to law enforcement officials. One of the lessons learned from the work of these CPA Commissions is that they failed to make an impact on rule of law issues. Also, the executive carefully manipulated the appointment or selection of its members (as in the case of other commissions) and their operational independence were compromised.

In addition to fundamental questions surrounding the independence of the judiciary, there are also concerns relating to infrastructure and capacity, particularly in remote or conflict areas that have resulted in a lack of coverage and lawlessness, as well as limited resources and corruption.

Ultimately, substantial reforms are needed, addressing the shortcomings of the national judicial service commission appointed as part of the CPA implementation process. This includes in particular a reform of the court system, measures to guarantee independence, lustration and vetting of judges, as well as training and case allocation.

Points for further reflection:

Undertake empirical research on administration of justice, particularly insider views on problems experienced and reforms needed/possible.

Bring together like-minded judges and officials to work on/ advocate changes concerning administration of justice.

VII. Legal Profession

There are a number of concerns relating to the legal profession. While there has been an increase in the number of law schools and lawyers, there are a number of critical issues: (i) Lack of independence of the Bar Association undermining lawyers’ freedom of association as a professional group; (ii) shift towards teaching of Islamic law (as the main source of legislation) resulting in lack of knowledge of other legal systems, including international law; (iii) use of Arabic as a medium of instruction has resulted in limited capacity to read and write English texts and cases from other jurisdictions; (iv) falling standards (quality of drafting, analysis, ethical conduct) resulting from proliferation of schools and lack of quality teaching in several of them. Some universities run successful courses, including on human rights, and legal training has been provided, however, these activities have been too piecemeal to offset the general trend.

Ultimately, the system of legal education should be substantially overhauled based on a careful examination of the objectives of legal education and how they can be best achieved in the Sudanese context. There is a need for legal education to be “transformative” rather than only disseminating knowledge in the sense that it shall target and engage justice sector institutions in order to transform society towards enshrining the principles of justice, equity and legal ethics. However, this process requires high level of commitment and what may be

called “educational” or “academic activism”. For the legal profession, the main goal will be to re-establish its independence, particularly that of the Bar Association.

Points for further reflection:

Undertake empirical, participatory research on legal education in Sudan, identifying strengths and weaknesses and areas for reform

Bibliography (reverse chronology):

UN Human Rights Committee, *Concluding Observations: Sudan*, Advanced Unedited Version, 2014

REDRESS and Sudanese Human Rights Monitor, *Human Rights Concerns and Barriers to Justice in Sudan: National, Regional and International Perspectives*, A compilation of Sudan Law Reform Advocacy Briefings, February 2014

REDRESS, Faculty of Law – University of Khartoum, Sudanese Human Rights Monitor, *The Constitutional Protection of Human Rights in Sudan: Challenges and Future Perspectives*, January 2014

Mark Fathi Massoud, *Law's Fragile State: Colonial, Authoritarian and Humanitarian Legacies in Sudan*, Cambridge University Press, 2013

Report of the Independent Expert on the situation of human rights in the Sudan, Mashood A. Baderin, UN Doc. A/HRC/24/31, 18 September 2013

REDRESS and Sudanese Human Rights Monitor, *Arrested Development: Sudan's Constitutional Court, Access to Justice and the Effective Protection of Human Rights*, August 2012

African Centre for Justice and Peace Studies, *The Judiciary in Sudan: Its Role in the Protection of Human Rights During the Comprehensive Peace Agreement Interim Period (2005-2011)*, April 2012

REDRESS and Sudanese Human Rights Monitor, *Comments to Sudan's 4th and 5th Periodic Report to the African Commission on Human and Peoples' Rights: The need for substantial legislative reforms to give effect to the rights, duties and freedoms enshrined in the Charter*, April 2012

Lutz Oette (ed), *Criminal law reform and transitional justice: Human rights perspectives for Sudan*, Ashgate, Farnham, 2011

Ali Suleiman Fadlalla, *Constitution making in the Sudan – Past Experiences*, A paper presented at the Constitution-making Forum: A Government of Sudan Consultation, 24-25 May 2011, Khartoum, Sudan

Akolda M. Tir and Balghis Badri, *Law Reform in Sudan*, Ahfad University for Women, 2008

Materials available at www.pclrs.com