



Towards a People Centered Human Rights State in South Sudan

A collection of papers presented at
the Symposium on Human Rights in South Sudan

Juba, May 24-26, 2016



Towards a People-Centered Human Rights State in South Sudan
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List of Acronyms

ARCSS	Agreement on the Resolution of Conflict in South Sudan
CEDAW	Convention on Elimination of Discrimination Against Women
CJ	Chief Justice
COL	College of Law
CPA	Comprehensive Peace Agreement
CSO	Civil Society Organization
FBI	Faith-Based Institution
GRSS	Government of the Republic of South Sudan
HCSS	Hybrid Court for South Sudan
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant of Economic, Social and Cultural Rights
ICTR	International Criminal Tribunal for Rwanda
IDLO	International Development Law Organization
IGAD	Intergovernmental Authority on Development
INGO	International Non-Governmental Organization
INL	Bureau of International Narcotics & Law Enforcement Affairs
JMEC	Joint Monitoring and Evaluation Commission
LGBT	Lesbian, Gay, Bisexual, and Transgender
NGO	Non-Governmental Organization
NSS	National Security Service
RPA	Rwandese Patriotic Army
RPF	Rwandan Patriotic Front
SPLA	Sudan People's Liberation Army
SPLA-IO	Sudan People's Liberation Army-in Opposition
SPLM	Sudan People's Liberation Movement
TCSS	Transitional Constitution of South Sudan
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
UNMISS	United Nations Mission in South Sudan
UPR	Universal Periodic Review

Foreword

The symposium 'Towards a People-Centered Human Rights State in South Sudan' was held between 24 and 26 May 2016 in Juba, South Sudan. The symposium was organized by the College of Law (COL) at the University of Juba in collaboration with the International Development Law Organization (IDLO). The Bureau of International Narcotics & Law Enforcement Affairs (INL) of the United States Department of State provided funds for the symposium under the project 'Strengthening Legal Education at the Judiciary of South Sudan'. The symposium served as a forum to promote greater awareness and dialogue on contemporary human rights issues in South Sudan.

The symposium is part of wider endeavors by the COL to reestablish itself as an academic institute for learning and research since the relocation of the institute from Khartoum to Juba in South Sudan in 2011. During 2012 and 2013, the COL embarked on efforts to create twinning relationships and partnerships with universities in Eastern and Southern Africa. The COL also held monthly public lectures on law with support of the United Nations Mission in South Sudan (UNMISS) from January until November 2013, and organized a conference on 'Legal Education in South Sudan' in 2013.

After the mid-December 2013 crisis and during the civil war that ensued, the space available for public debate and discussion on important legal and human rights topics within South Sudan became limited. With the August 2015 signing of the Agreement on the Resolution of Conflict in South Sudan (ARCSS) and the formation of the Transitional Government of National Unity, the COL is once again seeking to become a preeminent platform for debate and discussion, and the symposium was a first step in this direction.

The three-day symposium brought together leading academics and practitioners in the field of law and human rights from South Sudan and Africa and African jurists in diasporas. The symposium was chaired by Emmanuel Joof, IDLO Legal Training Advisor, and opening remarks were given by the following distinguished speakers: Elfaki Chol Lual, Dean of the College of Law of University of Juba; Romualdo Mavedzenge, IDLO Country Director; H.E. Mary Catherine Phee, United States Ambassador to South Sudan; and Dr. John Apuruet Akec, Vice-Chancellor of the University of Juba. The conference was formally opened with a speech delivered by Hon. Peter Adwok Nyaba, Minister of Higher Education, Science & Technology.

During the symposium, a total of eleven papers were presented, each followed by a plenary discussion. In addition, two panel discussions focused on the relationship between international human rights and national constitutions, and on lessons learned for South Sudan in particular. A selection of the papers presented during the symposium is collected in this publication.

Introduction

This collection represents eight papers presented at the symposium 'Towards a People-Centered Human Rights State in South Sudan' between 24 and 26 May 2016 in Juba, South Sudan. The papers are organized in three parts:

- I) A people-centered approach to human rights in South Sudan
- II) Transitioning justice systems after conflict
- III) The role of civil society in human rights advocacy

Part I of this collection comprises two papers and focuses on a people-centered human rights approach and what implementing such an approach means in practice in South Sudan. The first paper, 'Towards a People-Centered Human Rights state in South Sudan' by Patricia Kameri-Mbote and Muriuki Muriungi, discusses the obstacles and requisites to a people-centered approach to human rights. Kameri-Mbote and Muriungi observe how there are multiple international human rights instruments and much theorizing on human rights in academic circles, but there are numerous obstacles that prevent people from enjoying these rights. One such obstacle is conflict, which has a devastating impact on human rights enjoyment. They then argue that a people-centered approach to human rights requires a pro-active approach, focused on the empowerment of marginalized persons. It also requires taking into account the context, and addressing the structures and systems that prevent equal enjoyment of rights.

In 'Equal Protection through Constitutional Guarantees – The Case of Minorities', Kuyang Harriet Logo further explores the need to address structures that prevent equal enjoyment of rights. She examines the potential of using affirmative action as a strategy to secure the rights and opportunities of marginalized groups. Adopting a broad conceptualization, she analyzes affirmative action as a measure to address inequalities caused by history or customs and provides a general discussion of affirmative action. The paper then turns to affirmative action in the context of South Sudan, and provides both a political and a constitutional history of its development. This discussion is particularly focused on gender equality, which leads the affirmative action discourse in South Sudan at present.

Part II of this collection consists of three papers that focus on transitioning justice systems after conflict, and investigate topics that characterize the context of justice and human rights in South Sudan. The contribution 'Transitioning Legal and Justice Systems in Post-Conflict/Transitional Societies' by Alphonse Muleefu looks at the transition of legal and justice systems in post-conflict societies, and is illustrative of the context in which the justice system in present-day South Sudan is situated. Drawing largely on the Rwandan experience, Muleefu argues that the justice system in such a context requires both immediate action to address emergencies and deeper reflections about longer-term goals. Immediate actions relate to the adoption of an interim constitution and dealing with the perpetrators of past violence, whereas deeper reflections relate to broader reforms of the security sector and the creation of a permanent constitution. Constitutional reform then provides a connecting link between immediate emergency measures and deeper reflections.

In 'Constitutional Governance in a Human Rights State', Elfaki Chol Lual discusses the role and importance of constitutional governance in relation to human rights, and explores the conditions that are required for a constitutional system. These requirements are essential for the development of constitutional governance and a human rights state in South Sudan, and the paper can be considered a step towards the deeper reflections that are proposed in the previous paper by Muleefu. The paper by Lual also provides insights regarding the status of constitutional governance in South Sudan.

Another characteristic of justice in South Sudan is the co-existence of traditional and statutory justice mechanisms. In 'Traditional and statutory laws in the context of human rights in post-conflict/transitional societies', John Wuol Makec examines the relationship between traditional and statutory systems and their

connections with post-conflict transitional justice processes. He examines the origin and sources of recognition of both traditional and statutory laws, and discusses the differences and relations between the two. As they complement and supplement each other, Makec argues that both mechanisms can greatly contribute to the promotion of justice and peace after conflict. He then examines roles of both traditional and statutory law in the settlement of human rights abuses after conflict.

Part III of this collection comprises three papers and focuses on the role of civil society and human rights promotion. The contribution by Taban Kiston titled 'Civil Society Organizations and Human Rights Advocacy' examines the roles and functions of civil society organizations (CSOs) in human rights advocacy. He also discusses the challenges faced by civil society in South Sudan, which include external factors such as restrictive regulatory frameworks and irregular finances, as well as internal factors such as politicization of CSOs and limited participation of South Sudanese CSOs in international fora. The paper provides a concrete set of recommendations for continued human rights advocacy, and argues for increased collaboration and coordination between civil society actors in furtherance of human rights in South Sudan.

The paper 'Paralegals as Conduits for Advocacy on Rule of Law and Human Rights' by Majok Mayen Anyang and Mori Moses Sworo, focuses on paralegalism and presents a specific and concrete case of human rights advocacy in South Sudan. Anyang and Sworo discuss what paralegalism means and how the paralegal movement developed. They relate the role of paralegals to the rule of law and human rights, and examine this role in South Sudan. The paper signals a number of challenges faced by paralegals in South Sudan, and presents practical recommendations.

Another concrete example of human rights advocacy focusing on the role of law schools and community outreach is presented in the paper 'Using Street Law to Broaden the Skills of Law Students: A South African Perspective' by Lindi Coetzee. Her paper describes how the organization of Street Law in cooperation with universities combines legal clinics for clients with academic education for law students in South Africa. She discusses the development of legal education and pedagogical studies to conclude that clinical legal education provides students with skills that they require in their legal careers and that they will not acquire through lectures alone. She argues that law schools in South Sudan should consider including clinical legal education in the curriculum, which would also place the law school in alignment with developments in legal education worldwide.

Although diverse in subject and approach, there are a number of connections between the papers in this collection. In their paper on a people-centered approach to human rights, Kameri-Mbote and Muriungi discuss the problem that equal rights do not necessarily equate to equality in contexts with long-standing imbalances caused by, for example, history or custom. This issue and the potential of affirmative action are investigated in more detail in the paper by Logo. The papers by Kameri-Mbote and Muriungi, Logo, and Kiston all stress the importance of the inclusion and support of women in human rights promotion. The papers by Kiston, Anyang and Sworo, and Coetzee all provide concrete examples of how a pro-active and empowering approach to human rights promoted by Kameri-Mbote and Muriungi can be put into practice. Where the paper by Kiston discusses the role of civil society in human rights advocacy in general, the paper by Anyang and Sworo, and the paper by Coetzee bring specific experiences from their organizations in providing paralegal and law student support. Muleefu argues for the importance of deep reflection on constitutional reform in the post-conflict process. The role of human rights and affirmative action in constitutions is discussed in more detail in the contribution by Logo, exemplifying a step towards deep reflection and debate regarding the constitutional reform process in South Sudan. With a discussion of the role of Gacaca courts in dealing with genocide-related acts in Rwanda, the paper presented by Muleefu also provides a practical example of how traditional and statutory laws can contribute to the settlement of human rights abuses after conflict, which is the topic of the contribution by Makec.

Aside from common threads and linkages, the papers also bring opposing viewpoints. For instance, examining the relationship between traditional and statutory systems, Makec argues that both systems can greatly complement as well as supplement each other. The paper by Logo brings a more critical perspective, and finds

that customary practices continue to violate equality and affirmative action provisions. In the contribution by Kameri-Mbote and Muriungi, it is observed that the plurality of norms and institutions can disadvantage vulnerable groups in society. Also presented are different views on dealing with polarization and past violence, which again exemplifies the complexity of post-conflict transitional justice processes.

In order to progress in human rights promotion and transitional justice, it is therefore crucial that debate on these topics continues. Combined, the papers bring ample foundations for fruitful debate and discussion to further both thinking and practice of a people-centered approach to human rights in South Sudan. Key topics discussed include the roles of and overlap between formal and informal law, the role of the constitution, the role of civil society, the benefits of paralegalism to enhance access to justice, ensuring equal protection of genders and minorities, and the challenges of transitioning legal and justice systems in post-conflict situations. Moving towards a people-centered approach to human rights in South Sudan requires continued attention to these topics. This collection of papers aims to further stimulate this debate, and readers are invited to actively participate and contribute.

Part I: A People-Centered Approach to Human Rights in South Sudan

Towards a People-Centered Human Rights State in South Sudan

Professor Patricia Kameri-Mbote & Muriuki Muriungi

Introduction

Human rights have been defined as rights inherent in all human beings, whatever their nationality, habitation, sex, national or ethnic origin, color, religion, language, or any other status.¹ What actually constitutes rights has been a subject of considerable and unending philosophical debate,² and there still remains discord as to what should be contained within the human rights framework. Notwithstanding the varied conceptions of human rights and doubts as to their universality,³ there is agreement on the increasing importance and indispensability of the concept in the modern day.

The increased appeal of human rights around the globe is mainly attributable to the benefits wrought by a human rights framework in countries that promote human rights. More specifically, human rights have the potential to remove unfreedoms⁴ and empower citizens, thereby uplifting their standards of living. Indeed, it is the potential of human rights in alleviating suffering and uplifting standards of living that has contributed to their development and acceptance.⁵ The horrors of the Second World War and the Holocaust pricked the conscience of the international community to develop a code – the Universal Declaration of Human Rights⁶ – to ensure the protection of human rights. Ever since the adoption of this code in 1948, human rights movements⁷ and instruments⁸ have emerged in various jurisdictions around the world. Human rights, initially considered as mainly limited to civil and political rights, have since expanded into economic rights and socio-cultural rights.⁹ Human rights talk has been animated in lecture halls,¹⁰ on the streets, in boardrooms, in government, in our homes and virtually everywhere.

In a similar vein, various territorial, international¹¹ and global actors such as the United Nations and its agencies, and regional bodies such as the African Union, are actively engaged in the promotion and enforcement of human rights. Another appeal of human rights, besides its potential to create empowerment, lies in its

¹ United Nations Human Rights Office of the High Commissioner, 'What are Human Rights?' [website] <<http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>> accessed 06 June 2016.

² For an excellent view of this see, M Shaw, *International Law* (6th edn CUP, Cambridge 2008) 265.

³ For this contrarian and popular view see, J Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn. Cornell University Press, Ithaca, NY 2013) 92; J Nickel, *Making Sense of Human Rights* (2nd edn. Blackwell Publishing, Malden MA 2007) 143.

⁴ See A Sen, *Development as freedom* (Oxford University Press, New York 2001).

⁵ *ibid.* Also see, M Nussbaum, *Creating Capabilities: The Human Development Approach* (Harvard University Press, Cambridge 2011) 19.

⁶ For an account of the origin of human rights, see E Kamenka, 'Human Rights, Peoples' Rights' *Bull. Austl. Soc. Leg. Phil* 148.

⁷ Examples of the various human rights movements that have arisen in the world over history include the French Revolution, the American Revolution, and the Civil Rights Movement in the United States. Various human rights organizations have also emerged and include the International Commission of Jurists of 1952, the Amnesty International of 1961, and the Human Rights Watch of 1971, among others.

⁸ They include: the International Convention on the Elimination of All Forms of Racial Discrimination (ICEARD), International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR).

⁹ For instance, see Article 43 of the Constitution of Kenya 2010 which provides for economic rights.

¹⁰ There are now courses in human rights law offered in nearly every reputable law school. There is also increased funding in the area through research grants and scholarships to study the course all over the world.

¹¹ For instance, the United Nations is actively engaged in human rights promotion, campaign and enforcement through its various agencies such as the UNHCR, UNDP and UNEP among others. Other global actors include Amnesty International and the Human Rights International.

pragmatic character and dynamic nature which lends applicability to various situations and different issues.¹² However, as shall be demonstrated later in this paper, the flexibility and malleability¹³ of human rights is predicated upon the particular approach employed. While the subject of human rights is flexible in its nature, the form, perspective and approach employed may and can be inflexible.

The appeal of human rights as a concept is evidenced by the increased signing by states of international human rights instruments, especially by developing countries. This is the case even with emergent states like South Sudan. While the desire to sign onto these human rights instruments may be strategic or be a means to endearing oneself to the international community, it cannot be denied that it is also a manifestation of the desire by the relevant state to improve the living standards of her people.¹⁴ The language of human rights has also become popular in literature over the years.¹⁵ This suggests that human rights are now considered an imperative, at least to the vast majority of people around the world.

Proceeding from the assumption that human rights are a necessity, this paper argues that in order for human rights to have effect, particularly in developing countries, they must be people-centered. This means that human rights must be considered alongside people's needs. This paper argues that the orthodox human rights framework at the moment takes a top-down approach and not only suffers from a historical de-contextualization, but is also ineffective in alleviating the plight of the most vulnerable in developing countries. This is especially the case in countries going through conflict or immediately after conflict. It further makes the case that by emphasizing formal equality, the orthodox human rights approach glosses over key issues such as power relations and, as a consequence, does not necessarily lead to equality of outcomes. This paper therefore calls for an intersectional approach that considers the variety of factors that militate against and impede the actual realization of human rights for the vulnerable.

This paper is divided into four main sections. Section one is the introduction that lays out the main argument. Section two contextualizes the debate by narrowing down the discussion to experiences in developing countries and particularly in South Sudan. In this part, the paper examines the challenges facing Africa in general and South Sudan in particular, and how they affect the realization of human rights. Specifically, the paper considers the impact of conflicts that have greatly affected South Sudan as a state. Section three canvasses the promise that human rights hold by exploring the reasons for, benefits of and the potential that the adoption of human rights may offer people. It also critiques the formal conceptions of human rights and the orthodox human rights framework and approach, arguing that they ignore power relations and the hierarchical and asymmetrical nature inherent in society. This section also introduces the concept of a people-centered approach. It surmises that it takes a bottom-up approach to bring out the desired benefits to the most vulnerable in South Sudan and other developing countries, and address the weaknesses in the orthodox human rights project. Section four provides conclusions and recommendations on how to achieve a people-centered human rights state.

¹² See generally, P Kameri-Mbote, 'Fallacies of Equality and Inequality: Multiple Exclusions in Law and Legal Discourses' (Professorial Inaugural Lecture delivered at the University of Nairobi, 24 January 2013) <<http://www.uonbi.ac.ke/sites/default/files/Mbote.pdf>> accessed 07 July 2016.

¹³ Ibid 16.

¹⁴ Any political leader has an incentive of endearing himself to the international community, or at the very least, to the electorate, with a view to winning at the ballot. As such, political leaders are likely to accede to and ratify various human rights instruments, if only to increase popularity with the public and the international community.

¹⁵ For instance, see S Bailey, *The UN Security Council and Human Rights* (St. Martin's Press, New York 1994); D Beetham, 'What Future for Economic and Social Rights?' (1995) *Political Studies* 43; P Alston, *Promoting Human Rights through Bills of Rights* (Oxford University Press, Oxford 1999); S Anaya, *Indigenous Peoples in International Law* (Oxford University Press, Oxford 2004); C Beitz, *The Idea of Human Rights* (Oxford University Press, Oxford 2009); E Brems, 'Human Rights: Minimum and Maximum Perspectives' (2009) 6 *Hum. Rts. L. Rev.* 343; A Buchanan, *Human Rights, Legitimacy, and the Use of Force* (Oxford University Press, Oxford 2010); P Alston & R Goodman, (eds) *International Human Rights* (Oxford University Press, Oxford 2013).

1. Human Rights in the Context of Developing Countries

This section argues that the orthodox Westernized human rights approach is inappropriate in developing countries and there is need for contextualization. The first sub-section examines the various challenges facing the African continent such as conflicts over mineral resources, heavy disease burden, and corruption, among others. The second sub-section examines the impact of conflicts in South Sudan on the achievement of human rights. Broadly put, it argues that conflicts in most developing nations, and particularly in South Sudan, impede the realization of human rights by weakening the ability of the state to promote and protect human rights, by increasing demand for human rights and by violating human rights.

The concept of statehood emphasizes effective and responsible government.¹⁶ The state is therefore a primary duty bearer with the citizen as the right holder in the Hohfeldian scheme of analysis,¹⁷ where for every right there must be a corresponding duty.¹⁸ This flows from the fact that by nature, human rights, though never granted by the state, are invariably promoted and protected by the state.¹⁹ This duty falls on the state through the social contract between the governor (state) and the governed (citizens).²⁰ This contract is an “agreement or compact among the people”²¹ where people agree on the rules of engagement with the state. What is more, the nature of rights is such that a right holder also has a duty towards enabling the enjoyment of the rights of another.²²

Within the social contract, human rights have potential to facilitate the realization of diverse agendas such as the protection of vulnerable persons in society like children, youth, women and the aged. These groups require some special forms of support,²³ because systemic and structural barriers in society place them at a disadvantage. Those whose rights are at the greatest risk require greater protection of rights. Also, human rights have provided a useful praxis in the search for a framework for the articulation of the rights of indigenous communities and the realization of environmental rights. As is discernible from this discussion, the human rights approach resonates with many persons.²⁴ This explains the increase in the formulation, adoption, ratification and accession to international human rights instruments.²⁵

¹⁶ See the concept of statehood as encompassing effective government as discussed in MN Shaw, *International Law* (CUP, Cambridge 2003) 178.

¹⁷ WN Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913) 23 *Yale L. J.* 16.

¹⁸ *Ibid.*

¹⁹ This position borrows from the natural law school of jurisprudence which holds that human rights are inherent in the people and are not granted by the state. Notably, the natural law school was the basis of the American and French Revolutions prompting positivists like Jeremy Bentham to label human rights as “nonsense upon stilts”. Article 19 of the Constitution of Kenya 2010 adopts this naturalistic view to human rights by providing that human rights are not granted by the state but inhere in the individual. Also see this reflected in The 1963 Vienna World Conference on Human Rights, which emphasized that it falls upon the state to ensure the protection and promotion of all human rights.

²⁰ See the social contract theory as discussed in J Locke, *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press, Yale 2003).

²¹ YP Ghai, ‘Reviewing the Constitution, A guide to the Kenya Constitution’ (The Constitution of Kenya Review Commission, Nairobi 2002).

²² Arguably, no right of an individual as against another would crystallize, if a fellow citizen refused to recognize and respect another’s right.

²³ For instance, see: the Convention on the Rights of a Child (CRC); Article 10 of the ICESCR which accords special protection to mothers before and after childbirth; Article 24 (1) of the ICCPR; and Article 25 (2) of the Universal Declaration of Human Rights with respect to special protection for mothers and children. Also, for example, Article 53 of the Constitution of Kenya 2010 provides for the best interests of the child. At present, there is no international convention on the rights of the elderly, although there are deliberations towards achieving the same as noted by the United Nations Human Rights Council where the then UN Human Rights Chief offered her support for a new Convention on the rights of the elderly (see <<http://www.ohchr.org/EN/NewsEvents/Pages/RightsOfOlderPersons.aspx>> accessed 13 June 2016).

²⁴ See F Megret, ‘The Human Rights of the Elderly: An Emerging Challenge’ (2010) <<http://ssrn.com/abstract=1584303>> accessed 13 June 2016.

²⁵ For instance, there are the ICCPR, ICESCR, the Universal Declaration on Human Rights (UDHR), the Convention on Elimination of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Racial Discrimination, and the Convention Against Torture.

Despite the increasing popularity of human rights and adoption of various human rights instruments, human rights remain more rhetoric than reality in developing countries.²⁶ This is particularly the case in areas characterized by limited statehood²⁷ where citizens are usually vulnerable. This is because their governments are unable to fulfill the obligations of the state-citizen contract discussed above, or may even be the cause of human rights violations.²⁸ With the rapid rise in population in Africa comprising mainly unemployed youth,²⁹ the number and nature of risks that jeopardize the articulation of human rights are likely to increase and transform into more complex situations.

1.1. Challenges in Africa

African governments have adopted a Eurocentric or Western approach to human rights, despite the marked difference in the local context and the existence of sub-national and local norms that compete with state norms for recognition and application.³⁰ Further, these countries have low levels of economic development³¹ and have economies that are heavily dependent on aid.³² Their economies are dependent on sectors that are highly susceptible to climate change.³³ Further as noted above, pressure from a burgeoning youth population that demands increased resources and employment opportunities is a challenge. This also raises the issue of inter- and intra-generational equity and makes a case for sustainable development.³⁴ The continent also suffers a huge disease burden such as malaria, HIV/AIDS and recently cancer.³⁵

Some African countries, including South Sudan, have abundant natural resources (such as oil, natural gas and minerals) that can be used to develop the country. However, oil and mineral resources have in many African

²⁶ According to a World Bank Report, Africa experienced the highest increase in poverty rate of up to 42.6 % than other regions in the year 2012. See <<http://www.worldbank.org/en/publication/global-monitoring-report/poverty-forecasts-2015>> accessed 13 June 2016.

²⁷ Statehood as defined in the Montevideo Convention and in international law connotes a state that has a defined territory, permanent population, and recognition by other states. See I Brownlie, *Principles of Public International Law* (5th edn UOP, Oxford 1998) 83, 85.

²⁸ This argument will become more evident in the later sections of this paper where it is argued that conflicts in a poor developing nation weaken the ability of the state as a duty bearer, thus impacting on its ability to deliver.

²⁹ K Beegle and others, *Poverty in a Rising Africa: Africa Poverty Report* (World Bank, Washington DC, 2016) <<https://openknowledge.worldbank.org/handle/10986/22575>> accessed 13 June 2016. Africa has been experiencing a high population growth rate of around 2.5% which has had the effect of eating away at the economic growth in the continent.

³⁰ See generally, M Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press 2008) where he argues that the human rights corpus is a Eurocentric construct that seeks to impose culturally biased norms and practices of the Western society onto other societies.

³¹ See D Clarke, 'Africa 2050: Economic revolution' *Global: the International Briefing* (Cambridge 2nd quarter 2013) 18–19. See also, PN Osakwe 'Africa and the global financial and economic crisis: Impacts, responses and opportunities' in S Dullien and others (eds), *The Financial and Economic Crisis of 2008–2009 and Developing Countries* (United Nations, New York 2010), 203–222.

³² See generally, T Mkandawire & C Soludo, *Our Continent Our Future African Perspective on Structural Adjustment* (Eritrea: Africa World Press 1999); J Njeru, 'The Impact of Foreign Aid on Public Expenditure: The Case of Kenya' AERC Research Paper 135 (Nairobi, Moi University 2003); K Derouen (Jr) & UK Heo, 'Reward, Punishment or Inducement? US Economic and Military Aid, 1946–1996' (2004) 15 *Defense and Peace Economics* 453.

³³ HP Binswanger & J McIntire, 'Behavioral and Material Determinants of Production Relations in Land-abundant Tropical Agriculture' (1987) 36 *Econ.Devel.Cult.Change* 73.

³⁴ See the Sustainable Development Goals (SDGs) and how they interface with human rights. Such a construction of the debate can enable a shift from viewing human rights from an economic dimension only to a human dimension and make a case for respect of human dignity as the basis for human rights.

³⁵ For a fuller account of this, see PJ Hotez & A Kamath, 'Neglected Tropical Diseases in Sub-Saharan Africa: Review of Their Prevalence and Disease Burden' (2009) 3 *PLoS Negl Trop Dis* 412. The World Health Organization (WHO) notes that though there has been improvement with regard to control of malaria and HIV/AIDS which both registered declines in the former decade, they still remain a huge threat. See <http://www.who.int/bulletin/africanhealth2014/disease_threats/en/> accessed 13 June 2016.

countries not transformed the lives of the citizenry³⁶ but have become a source of conflict and violence.³⁷ Many conflicts in Africa are linked to contestations over resources such as land, oil, water, poor governance and non-adherence to the rule of law exemplified by electoral irregularities, violation of the constitution and extended hold on to power.³⁸ South Sudan faces several of the problems mentioned above, including violent conflict, and this has affected the institutionalization of the state. Of these manifold challenges, violence and conflict remain the most intractable and the greatest impediment to the realization of human rights.

1.2. The Impact of Conflict on Human Rights in South Sudan

Not long after the emergence of South Sudan as a new state following its break away from the former Republic of Sudan,³⁹ an outbreak of hostilities began in December 2013. After almost two years, the disputing parties signed the Agreement on the Resolution of Conflict in South Sudan (ARCSS) negotiated by the Intergovernmental Authority on Development (IGAD) in August 2015.⁴⁰ Notably, the conflict in the relatively young nation has resulted in gross violations of both international human rights and international humanitarian law.⁴¹ The violence ensuing from the conflict has been mainly concentrated in the Greater Upper Nile Region of South Sudan consisting of Unity, Jonglei and Upper Niles states.⁴² But violence has also spread to other areas, including Central and Western Equatoria and Northern and Western Bahr el Ghazal. The conflict or hostilities has featured two main protagonists, namely the Sudan People's Liberation Army (SPLA) and the Sudan People's Liberation Army-in Opposition (SPLA-IO). Both parties have made use of militias in the conduct of their hostilities, which exacerbates the violations of human rights.⁴³ These violations have included looting, forced displacement,⁴⁴ extra-judicial killings, abduction,⁴⁵ sexual violence,⁴⁶ burning of houses, raiding of livestock, attacks against civilians, forcible recruitment of children,⁴⁷ and destruction of property.⁴⁸ The situation was further aggravated by the use of local armed youth groups joining the conflicts as they sought to defend their communities from attacks by the militias.⁴⁹

³⁶ This has been the case in Angola which has a high cost of living despite huge mineral resources. Other countries include DR Congo, Zambia, Gabon and Nigeria.

³⁷ See ML Ross, 'The Political Economy of the Resource Curse' (1999) 51 World Polit 297 discussing the resource curse theory.

³⁸ *ibid.* This has also been the case in Kenya, Nigeria, Zimbabwe, Burundi and DR Congo.

³⁹ South Sudan emerged as a state in 2011 following its secession from the former Republic of Sudan. Since independence in 1956, Sudan has experienced two main civil wars, in which the South fought for regional autonomy and proper representation. Upon a vote for secession, South Sudan became a Republic in 2011 and joined the African Union and the United Nations.

⁴⁰ See the IGAD, Agreement to resolve the crisis in South Sudan, 9 May 2014.

⁴¹ The violations of international human rights law are evident in the massive displacement, violence and sexual assaults indicated. On the other hand, violation of international humanitarian law is illustrated by combatants who have not distinguished between innocent civilians and fellow combatants as evident in the killing and maiming of civilians, particularly women and children.

⁴² See the United Nations Mission in South Sudan (UNMISS), Special Report: Attack on Bentiu, Unity State, 29 October 2014, 19 December 2014.

⁴³ See UNMISS, Flash Human Rights Report on the Escalation of Fighting in Greater Upper Nile, 29 June 2015.

⁴⁴ International Rescue Committee, Uprooted by Conflict: South Sudan's Displacement Crisis (November 2014) 7.

⁴⁵ Protection Cluster South Sudan, Protection Situation Update: Southern and Central Unity, 25 September 2015.

⁴⁶ Instances of conflict-related sexual violence led to the government signing the Joint Communiqué of the Government of South Sudan and the United Nations on Addressing Conflict-Related Sexual Violence. See also the Unilateral Communiqué on Preventing Conflict Related Sexual Violence issued in Addis Ababa by Riek Machar (leader of SPLM/A-IO).

⁴⁷ See UNSC, Report of the Secretary-General on children and armed conflict in South Sudan, 11 December 2014, S/2014/884 (2014) [22-24].

⁴⁸ Human Rights Watch, They burned it all: Destruction of Villages, Killings, and Sexual Violence in South Sudan's Unity State, 22 July 2015.

⁴⁹ *ibid.*

The violence and conflict has weakened the already fragile and nascent state institutions, and thereby hampered their ability to protect civilians and avail essential services.⁵⁰ The state itself has also been party to violations of human rights, which it has a duty to respect and protect.⁵¹ This is evident in the increasing number of arbitrary arrests by the National Security Service (NSS),⁵² prolonged detentions and detentions without trial by the state. The NSS has also been clamping down on the media by shutting down newspapers and radio stations, intimidating and harassing journalists and human rights defenders,⁵³ thus effectively limiting freedom of speech and the freedom of the media.⁵⁴ The state of human rights in South Sudan exemplifies the disconnect between rhetoric and reality. The main belligerents in the hostilities have publicly denounced violations of human rights and called for accountability of human rights violators. There have however, not been any serious steps in pursuit of these violators, notwithstanding the establishment of various committees by the government to look into human rights abuses, including the national investigation committee into human rights' abuses.

There has generally been a case of the attenuation of both the duty bearer, in this case the state, and the right holder, in this case the citizen. The latter has lost their voice owing to the conflict and has become the victim of the conflict from both the duty bearer and others.⁵⁵ Vulnerable groups, especially women and children, have borne the greatest brunt of the conflict. The conflict has also had negative economic effects on the country as a whole as investors have shifted elsewhere, while property has been destroyed, thereby creating a hostile investment climate.⁵⁶ This affects the agency of the citizenry and the state to implement human rights agendas. For instance, conflicts reduce the policy options available to the state over and above negatively affecting partnerships with the private sector and other non-governmental entities to fuel economic development.⁵⁷ These spill over to the citizenry and constrain their capacity to claim rights' entitlements.

Related to this is the impact of the conflict on the supply of basic goods and services. There is increasingly limited access to even the most basic goods and services by the people.⁵⁸ In another sense, since war is costly and is funded from the public coffers, huge expenditure of public funds on war skews use of resources in favor of military equipment and away from the protection and promotion of human rights of citizens. The subsistence of conflict provides an opportunity for the emergence and sustainability of rogue and bandit economies, plus parallel security apparatus and systems that compete with the state.⁵⁹ This leads to a situation

⁵⁰ South Sudan as a state has barely had enough capacity to administer justice, a situation that has been made worse by the conflict.

⁵¹ Statutory courts and institutions are conspicuous for their absence in large swathes of the country while the subsisting customary courts avail only limited justice, which raise concerns amongst human rights actors.

⁵² This is notwithstanding the fact that the NSS has no legal mandate to conduct arrests as per Articles 159 e and 160 (4) of the Transitional Constitution of South Sudan that limit the institution's roles to gathering and analysis of information and advising the relevant authorities.

⁵³ See UNMISS, *The State of Human Rights in the Protracted Conflict in South Sudan* (4 December 2015) 34

⁵⁴ Only the civilian police service is by law (Articles 151 (7), 155, 159, 160 of the Transitional Constitution of South Sudan) mandated with law enforcement powers.

⁵⁵ The victimization of the citizen thus hampering an ability to speak out for rights is well borne empirically in the reports hereinabove discussed. Poor living conditions do not do any better in enhancing an ability to enforce rights as against the state.

⁵⁶ DM Mugume, 'South Sudan Economy Hit Hard by Conflict', Voice of America (Juba 08 December 2014) <<http://www.voanews.com/content/South-sudan-unrest-economy-oil/2550725.html>> accessed 13 June 2016.

⁵⁷ This is so since private partners fear for loss of their investment due to insecurity. It should be noted that Public-Private Partnerships (PPPs) are the new form of innovation that is being employed to fund various large infrastructural projects by roping in private investors to provide the much needed funds especially in developing countries where public funds are in short supply.

⁵⁸ SIDA, 'South Sudan Humanitarian Crisis Analysis 2016' 4 <<http://www.sida.se/globalassets/sida/sve/sa-arbetar-vi/humanitart-bistand/South-sudan-humanitarian-crisis-2016.pdf>> accessed 13 June 2016.

⁵⁹ Bloomberg Business, 'South Sudan Says Black Market Currency Trading Fuels Inflation', Bloomberg Business (Juba October 21, 2011) <www.bloomberg.com/news/articles/2011-10-21/South-sudan-says-black-market-currency-trading-fuels-inflation> accessed 13 June 2016. Further, there have been reported cases of sugar and charcoal smuggling from South Sudan in the midst of the conflict. This creates a 'black market' or illegal economy thereby denying government much

where rogue militias enable alternative sources of income, power and livelihood, thus weakening the effectiveness of the state as the governing authority.⁶⁰

Conflicts also expose the vulnerability of a state to other actors and thus increase the chances of more threats, especially from terrorists and adverse states.⁶¹ In this sense, conflicts in South Sudan may have a multiplier effect and thereby further compromise the quality of life. In summary, the impact of conflict in South Sudan has hampered the realization of human rights in various ways: by creating a non-conducive environment for their attainment; limiting the resources for such promotion and protection; increasing the need (and thus demand) for human rights from the state; impeding the capacity of the citizenry to claim their rights; and by increasing violations of human rights.⁶²

2. The Promise of Human Rights

This section argues that human rights hold immense promise to citizens of developing nations as they have the potential to uplift their standards of living. It argues that human rights entail three key elements, namely non-discrimination, public participation and accountability on the part of the state.

Human rights are not merely a theoretical construct but can alleviate human suffering and improve people's living standards.⁶³ The very purpose of human rights is to achieve equality and non-discrimination of people in a society. Some of the main human rights instruments at the international level are hortatory of principles such as equality and non-discrimination, including the ICCPR, the ICESCR, the UDHR, and the CEDAW.⁶⁴ Besides international human rights instruments, there are also regional instruments such as the African Charter on Human and People's Rights and its Protocol on the Rights of Women, while locally there are the Constitution⁶⁵ and various sectoral laws.

Human rights, as the bulwark against discrimination and inequality, entail three critical elements. The first relates to non-discrimination with regard to access to resources and independent protection. The second element connotes the right to participate in processes of reform, management and distribution of resources. The third element is that of the establishment of accountability mechanisms to ensure that the state plays its dutiful role as the duty bearer and upholds the rule of law with respect to the right-holder (citizen).

needed revenue and further provides ammunition, in terms of funds, to illegitimate persons. These illegitimate groups thereby have every incentive to sponsor continued violence so as to benefit from the situation.

⁶⁰ Ibid. The effect of a state weak on resources through lost taxation revenue and a powerful and moneyed rogue economy is to weaken and undermine its ability as a government.

⁶¹ Just like is the case with climate change which increases the chances of conflict due to the impacts of climate change on human security and the vulnerabilities and fissures it causes. See John Barnett & W Neil Adger, 'Climate change, human security and violent conflict' (2007) 26 Polit. Geogr. 639.

⁶² UNMISS (2015), 34.

⁶³ See generally, the World Bank, 'Study on Human Rights Impact Assessments: A Review of the Literature, Differences with other Forms of Assessments and Relevance for Development' (February 2013)

<http://siteresources.worldbank.org/PROJECTS/Resources/40940-1331068268558/HRIA_Web.pdf> accessed 13 June 2016.

⁶⁴ See the core United Nations Human Rights Instruments and their monitoring bodies as listed on the United Nations Human Rights Office of the High Commissioner website

<<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>> accessed 13 June 2016.

⁶⁵ The South Sudan Constitution of 2011 in Part 2, has an expansive Bill of Rights from sections 9-34 which provide for various political, economic and cultural rights.

2.1. A Critique of Rights

Rights, including human rights as construed in the formal legal sense, have been critiqued as fueling inequalities.⁶⁶ Theorists have argued that legal rights, as appearing in statutes, fail to accomplish the objectives of these rights, since they ignore the variety of notions, hierarchies and asymmetries within society.⁶⁷ They argue that the rights discourse, therefore, barely translates into meaningful social change. They further charge that legal rights are not only indeterminate, but also incoherent,⁶⁸ that the prevalent rights discourse manifests isolated individualism, and is responsible for the lack of social progress. Indeed, if any social progress arises through progressive legal outcomes, it is only as a consequence of the surrounding social circumstances rather than the law or the rights themselves.⁶⁹ The critical race theory,⁷⁰ Marxist theory⁷¹ and the feminist movement⁷² are notable for their critiques of formal law/legal rights and the resultant outcomes.⁷³

Part of the reason that legal rights and the law alone are unable to result in substantive equality for people is because, as noted above, they leave power systems, structures and relations that constitute the biggest fodder for and forms of human rights violations intact.⁷⁴ In addition, formal legal rights often provide negative entitlements/rights as opposed to positive entitlements or rights. For instance, the constitution may provide, in the form of a Bill of Rights, the freedom from torture, yet fail to provide positive entitlements such as right to health or security. This characterization of rights and law suggests that the government is not responsible to provide citizens with the services that they require to exercise their liberties.⁷⁵

In order to give meaning to human rights for people, formal conceptions of equality are distinguished from substantive equality.⁷⁶ Failure to do this would make equality a mirage, as it would constitute treating unequals equally⁷⁷ and thus perpetuate inequalities in the name of equality. It would be akin to theorizing about human rights in the abstract when the very concept has little or no relevance, essence and applicability to people. The application of human rights cannot be divorced from the context and people form an integral part of that context. If this position is to be assumed, and we indeed urge that it should, then it becomes imperative to consider the issue of people-centered human rights.

The upshot of the foregoing is that human rights and their incorporation in the various human rights instruments and in the law, is only but a starting point. To borrow Patricia Williams' phrasing:

⁶⁶ See U Baxi, *Future of Human Rights* (Oxford University Press, Oxford 2006) 45 where he argues that the modern notion of human rights has been used to justify human suffering such as through colonization and marginalization of the vulnerable.

⁶⁷ P Westen, 'The Empty Idea of Equality' (1982) 95 Harv. L. Rev. 542.

⁶⁸ See generally, M Tushnet, 'The Critique of Rights' (1993) 47 SMU L Rev 23.

⁶⁹ Ibid.

⁷⁰ For insights into critical race theory, see R Delgado & J Stefancic, *Critical Race Theory: An Introduction* (New York University Press, New York 2001).

⁷¹ See R Schmitt, *Introduction to Marx and Engels: A Critical Reconstruction* (Westview Press, Boulder 1987) 151-159; Raymond A Belliotti, 'Marxist Jurisprudence: Historical Necessity and Radical Contingency' (1991) Can. J. L. & Jurisprudence 145.

⁷² CA Mackinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, Cambridge Massachusetts 1987) 32.

⁷³ Ibid.

⁷⁴ The flexibility of human rights is notable in their potential to facilitate the realization of diverse agendas, such as the protection of vulnerable persons in society like children, youth, women and the aged. These groups require some special forms of support.

⁷⁵ It need, however, be noted that most constitutions have begun to incorporate positive entitlements from the government as evident in the increasing constitutionalization of economic rights.

⁷⁶ J Rawls, *A theory of Justice*, (Revised Edition, Harvard University Press, Cambridge, 1999) 63. Rawls argues that formal equality would only lead to fair equality of opportunity if the persons in issue have the same conditions from the beginning.

⁷⁷ Aristotle, 'Nichomachean Ethics', in J Barnes (ed), *The Complete Works of Aristotle* (6th Edition Princeton University Press, Princeton 1984) Aristotle argued against treating unequals equally.

For the [South Sudanese people], therefore, the battle is not deconstructing rights, in a world of no rights; nor of constructing statements in a world of abundantly apparent need. Rather, the goal is to find a political mechanism that can confront the denial of [those rights].⁷⁸

The political mechanism that we propose in this paper is the people-centered approach to human rights, which is discussed extensively in the next section of this paper. The criticism against the human rights rhetoric thus, is its impoverished perception and masking of the power relations inherent in human relationships. It is this view of human rights that has perpetuated and justified various forms of oppression, colonization and the subjugation of women, children, indigenous persons, the poor and other vulnerable groups in society. The way to remedy this is to adopt a causative analysis approach as the same would help to unearth the distribution of power and avail insights into power relations in society.

2.2. A Causative Analysis of Human Rights

A causative analysis of human rights begins by identifying persons or groups of persons that are not enjoying effective rights, despite their expression in the law.⁷⁹ It further identifies the persons or groups of persons that are responsible for the denial of these human rights to others.⁸⁰ The analysis inquires into the factors contributing to such denial of rights and the vulnerability of those whose rights are denied.⁸¹ A causative analysis therefore exposes the various social and political processes and the functioning thereof and in particular provides insight into these processes influence on the most vulnerable. Put differently, a causative analysis of human rights helps to gain understanding of the root causes, challenges and other problems that hinder the development of persons, including the systematic and structural nature of societal discrimination. From the causative analysis, one may proceed to conduct a role analysis, in order to identify who has the obligation of righting the human rights wrongs and identifying the required interventions. Such an analysis invariably reveals various incapacities either in the law, institutions or the approaches adopted and may indicate weak organizational capacity, lack of proper knowledge and awareness, institutional incapacities, and the underlying power relations, among other factors. A causative analysis, we therefore urge, should be a prelude to moving towards a people-centered human rights state. This requires a grounded approach, and implies beginning with the specific right holder, being the citizen, and seeking to enhance real experience by way of an approach that translates human rights into reality.

3. People-Centered Human Rights

We have laid a basis, thus far, for a people-centered approach to human rights. It has been submitted that the orthodox human rights approach and the language of legal rights generally, fails to take stock of the hierarchies, asymmetries, and power relations in the society that militate against the rights of the vulnerable.⁸² The normal human rights framework and language is limited in scope by virtue of its historical decontextualization, and its ignorance of factors such as race, power, and ideology prevalent in a particular society. This translates to a disconnect between the human rights rhetoric and reality. This state of the human rights project is hardly surprising when one considers that the notion of human rights emerged, at least in its current modern form and substance, at a point in time when the dominant worldviews and the main assumptions and values informing human rights were Western, liberal, colonial-capitalist, patriarchal and reeking of white supremacist tendencies in some instances. In another sense, the human rights applicable to developing countries at the moment, in terms of substance and content, constitute the experiences and worldviews of Western states and their peoples. For the avoidance of doubt, as we have stated with legal rights generally, it is not that the current human rights framework based on the Western conception of human rights is without value. Its main fault,

⁷⁸ P Williams, 'Alchemical Notes: Reconstructed Ideals From Deconstructed Rights' (1987) 22 Harv. Civil Rights-Civil Liberties L. Rev. 401, 413supra note 42.

⁷⁹ P Geady & J Ensor, *Reinventing Development? Translating Rights-based Approaches from Theory to Practice* (Zed Books, London 2005) 53.

⁸⁰ Ibid 53.

⁸¹ Ibid 54.

⁸² A Gear, 'Human Rights, property and the search for 'worlds other'' (2012) 3 JHRE 173.

from a developing country's perspective, is its inability to achieve utility and tangible benefits to the marginalized, in developing countries like South Sudan. In particular, the Western or Euro-centric form of human rights framework and practice places great premium on state centrism and legislative advocacy. This practice has not worked, at least as it should, within the context of developing countries.

We argue that human rights, just like with many things of the law, ought to be applied and implemented within a context, and people form an integral part of this context. As such, there is need to make a shift towards a human rights framework and practice that is founded on the interests and perspectives of the victims of human rights violations. For this to occur, there must be a proper understanding, acceptance and appreciation that there is a need to depart from the orthodox human rights project. This requires a rethinking of human rights from the perspective of the people, a restructuring of power relations in society (or at least an attempt to do so), and capacity building of the oppressed to enable them to address power imbalances. As we stated earlier in this paper, a people-centered approach is essentially a political mechanism. As such, there is no denying the fact that the solution proposed is political in character,⁸³ and we deliberately distance ourselves from pretensions of neutrality claimed in the orthodox human rights project.

A people-centered human rights state is a state that is conscious that the content of human rights is to be defined and delineated by the people, who represent the oppressed as opposed to the elites. This is premised on an admission of the contested nature of whatever constitutes human rights. A people-centered human rights state is one that does not conceive the content of human rights as limited by law, either in form of domestic legislation or by international human rights instruments. Being a bottom-up approach, such a state recognizes the power of the people in conceiving and developing human rights law predicated upon their social-political struggles. We should not be mistaken to mean that a people-centered approach to human rights is without foundation. What we mean is that there are other foundations for human rights in a people-centered human rights state, over and above statutes and international instruments. This other foundation is the people, as expressed in political and social struggles. In making this argument, we draw on methodological construction of intersectional analysis, which premises that various factors, other than one, contrive to contribute to societal oppression.⁸⁴ For instance, in a developing nation context such as in South Sudan, a poor, black, Islamic woman faces multiple oppressions based on her economic status, race, religion and gender.⁸⁵ This plurality of factors constitutes the axes of oppression and a further violation of her human rights. In order to ensure that her human rights are properly respected and promoted, there is need for a people-centered approach whereby she is placed at the center and her interests promoted from such perspective. The solution to such oppression can only emanate from her experiences, her needs, her conditions and her perspectives. As argued by Patricia Hill, an intersectional approach necessarily demands that we recognize and confront what she calls the 'matrix of domination'.⁸⁶ This approach therefore avails a useful tool for understanding how various factors shape the experiences of a group of people across various societal contexts.

The preceding assumptions are premised on the idea that human rights are based on dignity and worth of every legal subject, equality of rights for all persons, and equal opportunities for all to participate in the socio-economic and political development of society. The nature of justice and law is to demand formal equality, which never guarantees substantive equality or equality of outcomes. Formal equality insists on equal treatment of all persons as the conception of justice.⁸⁷ This approach fails to take into account the asymmetries

⁸³ The solution is couched as political in character since the various hierarchies, asymmetries and power imbalances in society that impede the achievement of human rights in developing nations such as capitalism, patriarchy, imperialism, and neoliberalism, among others, are regarded as structural constraints to the realization of human rights.

⁸⁴ The intersectional approach to law developed out of the Black feminist movement in the United States. For an in-depth account of the approach from the case of the ideal traditional family, see PH Collins, 'It's All in the Family: Intersections of Gender, Race and Nation', (1998) 13 *Hypatia* 62.

⁸⁵ In another sense, this Muslim woman finds herself at the intersection of multifarious oppressions.

⁸⁶ See generally, Patricia H Collins, 'Black Feminist Thought in the Matrix of Domination', in PH Collins (ed) *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (Unwin Hyman, Boston 1990) 221-238.

⁸⁷ For a comprehensive treatment of the speciousness of the sameness assumption and formal equality, see Kameri-Mbote (2013) 15.

inherent in society and in particular, the economic inequalities between individuals due to historical and social reasons.⁸⁸ As such, formal equality, though appearing to be *de jure* equality (equality in law), is indeed *de facto* discrimination (actual discrimination in fact/practice).⁸⁹ An appreciation of this brings in the role of equity in righting the wrongs done by formal equality. The substantive equality brought about by equity does not serve to transplant formal equality, but rather serves to supplement it. The law must take into account the differences that exist in the society. It is indeed this theoretical framework that has founded a basis for affirmative action programs.⁹⁰ This is to say that people-centered human rights must transition from norms to processes that breathe life into such norms. People-centered human rights would therefore have several features: they serve the purpose of mitigating the negative effects of the formalistic nature of rights (preventative); they promote opportunities through affirmative action programs among others (promotive); and they focus on the underlying structural inequalities in society and seek to dismantle them (transformative). In addition, a people-centered human rights approach seeks to empower and expand the capabilities of the poor and the vulnerable.

In sum, a people-centered human rights approach has the effect of empowering the citizen who is then able to demand adherence to the set rules. This can be facilitated by access to justice, right to information, and participation in decision making.⁹¹

4. Concluding Thoughts

This paper has made a case for a people-centered human rights state in South Sudan. It has done so by demonstrating that the orthodox human rights discourse fails to take into account the hierarchies, asymmetries and power relations in society. The paper has thus called for an intersectional approach to human rights.

A people-centered approach to human rights must necessarily be borne out of the appreciation that there is a need for sustainable and integral development in society and the desire to avail access and opportunities for all. This means that there must be respect for diversity and the various differences as well as the merging of individual freedom with responsibility. There must be a tempering of commercial greed by various stakeholders in society, coupled with a concern for human dignity and the most vulnerable.

In order to attain a people-centered human rights state in South Sudan, we make the following recommendations. There is need to empower the victims of human rights violations by empowering and involving them in the process of actualizing their rights, a feat that can be achieved through knowledge creation and capacity building. As such, the first recommendation relates to the role of universities in knowledge creation and dissemination. In this respect, there is a need to appreciate the fact that law is but one of the factors that affect the enjoyment of various human rights. Universities can also achieve a people-centered approach to human rights through their mode of training and the conduct of their legal aid clinics. At present, there are legal aid clinics organized by various law schools, whereby students actively engage with clients.⁹² This in contrast to students sitting behind a desk and analyzing a particular human rights issue from books. This is one step towards mainstreaming a people-centered human rights approach. A people-centered approach to human rights advocacy basically involves an engagement with the victim. It has various elements which include: interviewing, counseling and understanding the victim's point of view. The human rights advocate and the victim explore the various legal options available, develop the case theory together, and agree on the legal remedies to pursue. While the victim may not be at par with the human rights advocate as to ably participate in this process, the advocate can engage the victim in an open-ended interview with a view to establishing the

⁸⁸ Some of these historical and social reasons include but are not limited to: apartheid, colonialism, historical injustices, slavery, and gender.

⁸⁹ See Article 4 of CEDAW which provides for temporary measures to be undertaken to accelerate the *de facto* equality of women.

⁹⁰ For a more elaborate discussion of affirmative action programs, see the contribution 'Equal Protection through Constitutional Guarantees – The Case of Minorities' by Kuyang Harriet Logo.

⁹¹ Admittedly, the content of these rights is that they are people-centered in nature.

⁹² For a more elaborate discussion on human rights clinics, see the contribution 'Using Street Law to Broaden the Skills of Law Students: A South African Perspective' by Lindi Coetzee.

victim's intended goals and desire. Another challenge that is fraught with a people-centered human rights advocacy is the identification of the victim and their limited knowledge of the human rights framework, institutions and processes. This may be overcome by the advocate engaging the victim on the various processes and institutions.

Secondly, human rights require anchoring in both normative and institutional forms. There is therefore a need to develop and create opportunities for institutional supply for marginalized persons, so as to cushion them from violations and in order to build their capacities to engage, negotiate and resist situations that cause oppression. Thirdly, rights do not come to people and people must claim them. Opportunities for enhancing the capabilities of people and removing unfreedoms so as to empower them to claim their rights would greatly facilitate and promote the realization of human rights. This essentially involves placing people at the centre and enhancing their agency to claim their rights. Fourthly, there is not a single magic bullet for ensuring that human rights are realized. It is therefore recommended that innovations that facilitate the enjoyment of human rights through the engagement of right-holders as agents of change, rather than victims, need to be identified, secured and built on. In this respect, the state should not rely solely on formal systems, but should also seek to build on the resilience of human rights compliant customary and social systems which offer flexibility and dynamism. Finally, but in no way less important, the judiciary as the vanguard of equality and non-discrimination should be supported and empowered to generate transformative and effective enforcement jurisprudence. This can be done through training and exchanges with other jurisdictions to facilitate an expansive and broad interpretation of the Bill of Rights that recognizes that human rights should be people-centered and empowers the citizenry.

Bibliography

- Alston, P & Goodman, R, (eds) *International Human Rights* (Oxford University Press, Oxford 2013)
- Alston, P, *Promoting Human Rights through Bills of Rights* (Oxford University Press, Oxford 1999)
- Anaya, S, *Indigenous Peoples in International Law* (Oxford University Press, Oxford 2004)
- Aristotle, 'Nichomachean Ethics', in J Barnes (ed), *The Complete Works of Aristotle* (6th Edition Princeton University Press, Princeton 1984)
- Bailey, S, *The UN Security Council and Human Rights* (St. Martin's Press, New York 1994)
- Barnet, J & Adger, WN, 'Climate change, human security and violent conflict' (2007) 26 *Polit. Geogr.* 639
- Baxi, U, *Future of Human Rights* (Oxford University Press, Oxford 2006) 45
- Beegle, K and others, *Poverty in a Rising Africa: Africa Poverty Report* (World Bank, Washington DC 2016) <<https://openknowledge.worldbank.org/handle/10986/22575>> accessed 13 June 2016
- Beetham, D, 'What Future for Economic and Social Rights?' (1995) *Political Studies* 43
- Beitz, C, *The Idea of Human Rights* (Oxford University Press, Oxford 2009)
- Belliotti, RA, 'Marxist Jurisprudence: Historical Necessity and Radical Contingency' (1991) *Can. J. L. & Jurisprudence* 145
- Binswanger, HP & McIntire, J, 'Behavioral and Material Determinants of Production Relations in Land-abundant Tropical Agriculture' (1987) 36 *Econ.Devel.Cult.Change* 73
- Bloomberg Business, 'South Sudan Says Black Market Currency Trading Fuels Inflation', *Bloomberg Business* (Juba October 21, 2011) <www.bloomberg.com/news/articles/2011-10-21/South-sudan-says-black-market-currency-trading-fuels-inflation> accessed 13 June 2016.
- Brems, E, 'Human Rights: Minimum and Maximum Perspectives' (2009) 6 *Hum. Rts. L. Rev.* 343
- Brownlie, I, *Principles of Public International Law* (5th edn UOP, Oxford 1998) 83
- Buchanan, A, *Human Rights, Legitimacy, and the Use of Force* (Oxford University Press, Oxford 2010)
- Clarke, D, 'Africa 2050: Economic revolution' *Global: the International Briefing* (Cambridge 2nd quarter 2013) 18-19
- Collins, PH, 'Black Feminist Thought in the Matrix of Domination', in PH Collins (ed) *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (Unwin Hyman, Boston 1990)
- Collins, PH, 'It's All in the Family: Intersections of Gender, Race and Nation', (1998) 13 *Hypatia* 62
- Delgado, R & Stefancic, J, *Critical Race Theory: An Introduction* (New York University Press, New York 2001)

- Derouen, K (Jr) & Heo, UK, 'Reward, Punishment or Inducement? US Economic and Military Aid, 1946-1996' (2004) 15 Defense and Peace Economics 453
- Donnelly, J, *Universal Human Rights in Theory and Practice* (3rd edn. Cornell University Press, Ithaca, NY 2013) 92
- Geady, P & Ensor, J, *Reinventing Development? Translating Rights-based Approaches from Theory to Practice* (Zed Books, London 2005)
- Ghai, YP 'Reviewing the Constitution, A guide to the Kenya Constitution' (The Constitution of Kenya Review Commission, Nairobi 2002)
- Grear, A, 'Human Rights, property and the search for 'worlds other'' (2012) 3 JHRE 173
- Hohfeld, WN, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale L. J. 16
- Hotez, PJ & Kamath, A, 'Neglected Tropical Diseases in Sub-Saharan Africa: Review of Their Prevalence and Disease Burden' (2009) 3PLoS Negl Trop Dis 412
- Human Rights Watch, *They burned it all: Destruction of Villages, Killings, and Sexual Violence in South Sudan's Unity State*, 22 July 2015
- International Rescue Committee, *Uprooted by Conflict: South Sudan's Displacement Crisis* (November 2014)
- Kamenka, E, 'Human Rights, Peoples' Rights' Bull. Austl. Soc. Leg. Phil 148
- Kameri-Mbote, P, 'Fallacies of Equality and Inequality: Multiple Exclusions in Law and Legal Discourses' (Professorial Inaugural Lecture delivered at the University of Nairobi, 24 January 2013) <<http://www.uonbi.ac.ke/sites/default/files/Mbote.pdf>> accessed 07 July 2016
- Locke, J, *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press, Yale 2003)
- Mackinnon, CA, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, Cambridge Massachusetts 1987)
- Megret, F, 'The Human Rights of the Elderly: An Emerging Challenge' (2010) <<http://ssrn.com/abstract=1584303>> accessed 13 June 2016
- Mkandawire, T & Soludo, C, *Our Continent Our Future African Perspective on Structural Adjustment* (Eritrea: Africa World Press 1999)
- Mugume, DM, 'South Sudan Economy Hit Hard by Conflict', Voice of America (Juba 08 December 2014) <<http://www.voanews.com/content/South-sudan-unrest-economy-oil/2550725.html>> accessed 13 June 2016
- Mutua, M, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press 2008)
- Nickel, J, *Making Sense of Human Rights* (2nd edn. Blackwell Publishing, Malden MA 2007)
- Njeru, J, 'The Impact of Foreign Aid on Public Expenditure: The Case of Kenya' AERC Research Paper 135 (Nairobi, Moi University 2003)
- Nussbaum, M, *Creating Capabilities: The Human Development Approach* (Harvard University Press, Cambridge 2011)
- Osakwe, PN, 'Africa and the global financial and economic crisis: Impacts, responses and opportunities' in S Dullien and others (eds), *The Financial and Economic Crisis of 2008-2009 and Developing Countries* (United Nations, New York 2010) 203-222.
- Protection Cluster South Sudan, *Protection Situation Update: Southern and Central Unity*, 25 September 2015
- Rawls, J, *A theory of Justice*, (Revised Edition, Harvard University Press, Cambridge, 1999)
- Ross, ML, 'The Political Economy of the Resource Curse' (1999) 51 World Polit 297
- Schmitt, R, *Introduction to Marx and Engels: A Critical Reconstruction* (Westview Press, Boulder 1987)
- Sen, A, *Development as freedom* (Oxford University Press, New York 2001)
- Shaw, MN, *International Law* (6th edn CUP, Cambridge 2008)
- Shaw, MN, *International Law* (CUP, Cambridge 2003)
- SIDA, 'South Sudan Humanitarian Crisis Analysis 2016' 4 <<http://www.sida.se/globalassets/sida/sve/sa-arbetar-vi/humanitart-bistand/South-sudan-humanitarian-crisis-2016.pdf>> accessed 13 June 2016
- Tushnet, M, 'The Critique of Rights' (1993) 47 SMU L Rev 23
- UNMISS, *Flash Human Rights Report on the Escalation of Fighting in Greater Upper Nile*, 29 June 2015
- UNMISS, *Special Report: Attack on Bentiu, Unity State*, 29 October 2014, 19 December 2014
- UNMISS, *The State of Human Rights in the Protracted Conflict in South Sudan* (4 December 2015)
- UNSC, *Report of the Secretary-General on children and armed conflict in South Sudan*, 11 December 2014, S/2014/884 (2014)

Westen, P, 'The Empty Idea of Equality' (1982) 95 Harv. L. Rev. 542

Williams, P, 'Alchemical Notes: Reconstructed Ideals From Deconstructed Rights' (1987) 22 Harv. Civil Rights-Civil Liberties L. Rev. 401

World Bank, 'Study on Human Rights Impact Assessments: A Review of the Literature, Differences with other Forms of Assessments and Relevance for Development' (February 2013)

<http://siteresources.worldbank.org/PROJECTS/Resources/40940-1331068268558/HRIA_Web.pdf>

accessed 13 June 2016

Equal Protection through Constitutional Guarantees – The Case of Minorities

Kuyang Harriet Logo

Introduction

This paper provides an analysis of affirmative action as a measure to address inequalities caused by history or customs, and adopts a broad conceptualization of affirmative action. The paper starts with an introduction to the term and discusses the inclusion of affirmative action policies in constitutions as policy measures to address rights of specific groups. Further, the drawbacks to approaching affirmative action through constitutional frameworks are discussed. The paper then reflects on the debate on whether affirmative action passes the democratic test, and whether it is a favorable approach to address imbalances in society. The assumption that affirmative action is regressive rather than progressive is also examined, to rebut the assertion that affirmative action has become a catch all phrase.

Race, ethnicity, gender, sexual orientation and gender identity (LGBT - lesbian, gay, bisexual, and transgender), and disability are advanced as subjects of affirmative action with varying levels of scrutiny and purpose of inclusion in constitutional frameworks. Drawing on this snapshot of affirmative action, this paper reviews affirmative action initiatives in South Sudan by providing both a political and a constitutional history of the development of affirmative action. While affirmative action in South Sudan was initially concentrated on traditional subjects of affirmative action such as race and ethnicity, the discussion is currently focused on gender equality, which dominates the affirmative action discourses in South Sudan. Examples from other African Countries such as South Africa, Uganda, Kenya and Tanzania are examined as good practices, but also complex processes that South Sudan could learn from.

1. Defining Affirmative Action

This section offers definitions of affirmative action from a populist point of view, adopted as policy measures and inbuilt in legislative or constitutional frameworks. The rationales for adopting affirmative action policies through constitutional provisions to address imbalances in the area of race, gender, ethnicity, disability, etc. are defined and explained. Likewise, the different stances taken by both anti- and pro-affirmative action advocates are analyzed and the different positions of advocates are highlighted as a major factor in determining both popularity and success of affirmative action policies.

Affirmative action has been equated with discrimination on the one hand and with progressiveness of rights of marginalized persons on the other. Ideally, it is a range of remedies which cast broad nets, in traditional and non- traditional quarters, for minority groups to have leveled ground to compete. On the other side of the spectrum, where spaces in workplaces and schools are reserved regardless of qualifications, it is widely opposed because the affirmative action itself becomes discriminatory. A merit-based affirmative consideration would then demand that, race, gender, disability and ethnicity are not necessarily dispositive when evaluating candidates, but are merely supportive of qualifications.¹

In defining affirmative action, authors advance a model that explores modest remedial adjustments and seeks to provide qualified members of minority or disenfranchised groups an equal opportunity, one that would not have materialized if such adjustments would not be made. The definition of affirmative action is premised on policy statements, but a holistic legal definition hardly features in scholarly articles or writing. A policy definition of affirmative action has been widely accepted as adequate. A legal depiction of the term affirmative action is

¹ JV White, 'What is Affirmative Action?' *Scholarly Works*. Paper 306. (2004) <http://scholars.law.unlv.edu/facpub/306> accessed 25 July 2016.

inherent in court cases, in situations where disputes over opportunities overlap with a surplus of qualified candidates. In the absence of rational grounds for decision-making to allocate scarce opportunities, courts have been helpful in interpreting affirmative action preferences.²

Unpredictably, the poor legal definition of affirmative action and its intentions to provide equal opportunities are somewhat perceived as discriminatory because it destroys merit driven achievements and places a stamp of inferiority on minority beneficiaries.³ The United States Supreme court has not helped much because time and again it fails to provide clarity in the area of minority preferences. The Court's most prominent affirmative action opinions: 1) rarely gain large majorities; 2) tend to alter principles from previous precedents through dicta; and 3) fail to articulate workable and standardized tests to evaluate minority preference plans.⁴

2. Affirmative Action as a Policy Measure to Address Rights of Persons Marginalized

This section explains the concept of affirmative action as a measure to address the rights of persons who have little chance of enjoying the same rights as others in any society. Further, it defines minorities and provides categories of persons considered minorities. Although the definition of minority has become significantly distinctive, this section explains that not every categorization of persons as minorities calls for affirmative action, because states usually classify groups of persons as minorities for legitimate reasons. The controversy surrounding affirmative action as a policy measure to address the rights of minority groups is elaborately projected against misconceptions that affirmative action itself constitutes discrimination and that not all minority groups are subject classifications.

A minority is a subordinate group whose members have significantly less control or power over their lives than members of a dominant or majority group. Such groups experience opportunities that are disproportionately low when compared to other members of the society.⁵ While not every distinction is discriminatory per se, distinguishing groups as minority, even for legitimate reasons, has been understood in some instances, as discriminatory. States classify people into groups for legitimate reasons in order to frame sensitive laws to outlaw individual distinctions and permit positive advancement and changes. But in an effort to right the wrongs of the past, the debate on affirmative action has been very emotional and scholars advance that this, as a consequence, has resulted in negative consequences. The common argument is that when affirmative action distinctions are devoid of a rational analytical perspective, positive attributes and intentions are lost. That is why affirmative action policies have been replaced with negative interpretations, usually taking the form of a perceived discrimination.⁶

A first approach towards enhancing decisions (both court and policy) on whether a classification is prohibited or a broad-based discrimination has occurred, is then to refer to case law. For instance, in *Hopwood v Texas*, the court's response to the question of whether the 14th Amendment permitted the University of Texas School of Law to discriminate in favor of some applicants in order to meet a substantial racial preference was a ground breaking decision. The court held that the school presented no compelling justification under the 14th Amendment or Supreme Court precedent that allowed it to continue to elevate some races over others, even for the purposes of correcting a perceived racial imbalance in the student body. Eventually, the court ordered for a reversal of the policy.⁷

A second approach is to specify a list of grounds of discrimination, but with an indication that the list is not exhaustive. One example is the Canadian Charter, which specifies that every individual has the right to equal

² Ibid.

³ CA Ciocchetti & J Holcomb, *The Frontier of Affirmative Action, Employment Preferences and Diversity in the Private Workplace*, (2010) 12 U. of Pennsylvania Journal of Business Law 238.

⁴ Ibid.

⁵ RT Schaefer, *Racial and Ethnic Groups* (13th Ed Pearson, Boston 1993).

⁶ WE Block & MA Walker (eds), *Discrimination, Affirmative Action and Equal Protection* (The Frazer Institute Publication, Vancouver BC 1981).

⁷ *Hopwood v Texas* 78 F3d 932 (5th Cir. 1996) United States Court of Appeals, Fifth Circuit, 3 Race & Ethnic Anc. L.

protection, equal benefit of the law without discrimination based on race, national or ethnic origin, color, religion, sex, age and mental or physical disability. This approach provides some discretion to extend the list according to a set of well-established principles – for instance, while the list of grounds for discrimination excludes sexual orientation, the inclusion that ‘every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability’, is sufficiently broad to capture sexual orientation. The Canadian Charter has allowed Canadian courts to extrapolate the list to include unenumerated grounds. A third approach is to specify a list of grounds which cannot be extended except by legislative amendments.⁸

Affirmative action policies have been controversial in discrimination law, because by expressly preferring an individual or group on the basis of race, gender or other status, a breach of the principle of anti-discrimination laws inadvertently occurs. However, in recognizing that equality constitutes more than just treating alike, it has fostered the understanding that such preferences, when exercised in favor of disadvantaged groups, could further equality.⁹

In determining affirmative action measures, the concept of equality is a principle that guides actions to redress imbalances caused by history, custom and other factors. While equality has become the basis for policy formations and constitutional enactments, its definition is flawed and basic. Guarantees of equality rarely elaborate on the meaning of equality or discrimination. Therefore, on many occasions, courts have defined the meaning of the two concepts and developed substantive and formal conceptualizations of equality using a range of formulations, such as disparate impact, indirect discrimination, systemic discrimination, unfair discrimination, and reasonable accommodation. Some jurisdictions have resorted to formal equality appearing in a number of cases, primarily in the context of gender discrimination.¹⁰ In some instances, courts have turned the value of dignity into an element of legal principle, but had to erect extra barriers for claimants. That said, the courts have placed emphasis on the fundamental value of human dignity to explain that:

Equality means that our society cannot tolerate legislative distinctions that treat certain people as second class citizens that demean them, that treat them as less capable for no good reason or that otherwise offend fundamental human dignity.¹¹

3. Using Constitutions to Frame Affirmative Action Interventions

This section centers on how constitutions have been used as tools to frame and advance affirmative action interventions. Constitutions are central to social transformation, which has led to the conceptualization of the needs of minority groups, and different approaches inherent in constitutions have been adopted to enhance equality for all. This section reviews the different constitutional approaches to entrenching affirmative action interventions.

Constitutions are at the heart of social transformation to advance social and economic rights and the notion of substantive equality to address social injustices. Constitutional mechanisms include bills of rights, embedded as positive enactments to bridge pasts that were characterized by inequalities in the areas of gender, ethnicity, race, disability and other substantive areas that require affirmative action. The intention of framing affirmative action clauses and embedding them into national constitutions is to promote a future characterized by dignity, social justice and equal opportunities for all persons regardless of race, ethnicity, gender or disability. Equality as

⁸ S Fredman, Comparative Study of Anti- Discrimination and Equality Laws of the US, Canada, South Africa and India, European Network of Legal Experts in the non-discrimination field (European Commission, Brussels 2012), 34.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

a founding value becomes informative to all laws and becomes the normative standard against which all laws are to be tested for constitutional consonance.¹²

The recognition of equality as one of the founding values in constitutions underlines the importance of distributive justice and transformative constitutionalism. The inclusion of affirmative action clauses in constitutions underscores the perpetual nature of constitutionalism in providing equality, and casts the constitution as an aspirational document that lays the foundation for distributive justice between different social groups. When construed appropriately, the substantive right to equality provides a wider scope for achieving equality. And when equality rights are entrenched in national constitutions or statutory enactments, the challenge is not to find solid legal grounds for developing measures which remedy existing inequalities, but to mobilize the political will to translate theoretical promises into concrete practical and transformative provisions targeted at achieving equality in society.¹³

Therefore, the inclusion of preferential treatment in constitutions designed as affirmative action clauses does benefit historically disadvantaged groups. For equal treatment between categories of persons to be justified or ethically appropriate, the idea of formal equality inherent in constitutions would demand that the same rights are extended to all according to the same neutral standards, thereby making the case that all persons are equal and any difference in treatment is irrational.¹⁴ Constitutionalism does not only provide rules of administration, but also social ethics. It provides an underlying purpose for a government to base its policies on general principles framed in written constitutions and to codify social ethics conducive to the betterment of the populace as a whole.¹⁵

The perspectives on inclusivity (social inclusion) and equality differ, but the emphasis on the subjective original intent of the framers of the American Constitution, for instance, played a fundamental role in ensuring that the 14th Amendment enabled a long list of race-conscience legislation to enhance the realization of the Amendments' promise of equality and to capture social needs of equality.¹⁶ By embracing an overarching and enduring purpose of representative governance, the principle adhered to by living constitutionalists that progress can be made through judicial precedent is nurtured – yet, such requires the judicial system to be in a position to safeguard and interpret rights of marginalized groups progressively.¹⁷

4. The Drawbacks to Framing Affirmative Action through Constitutions

This section analyzes the shortcomings that are inherent in framing affirmative action policies through constitutionalism, and discusses flaws of adopting affirmative action in such a manner. The section further notes that, as much as affirmative action is viewed as a progressive tool in addressing imbalances of the past, it has increasingly been viewed negatively.

The framing of affirmative action clauses in constitutions can attract resistance and become unpopular. When affirmative action clauses attract resistance, they become unpopular. For instance, affirmative action campaigns to eliminate gender and racial discrimination become unappreciated. Additionally, anti-affirmative action activists frame their efforts as a simple plea to return to fairer times, before affirmative action distorted and unfairly discriminated against some deserving members of the society.¹⁸

¹² A Moyo, 'Transformative constitutionalism, substantive equality and the role of the courts: Lessons from South Africa and Zimbabwe' (Twenty Years of South African Constitutionalism 14-16 November 2014) <www.nyulawreview.com/wp-content/uploads/sites/16/2014/11/Moyo.pdf> accessed 25 July 2016.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ A Tsesis, 'Maxim Constitutionalism: Liberal Equality for the Common Good' (2013) 91 Tex. L. Rev. 1608, 1609.

¹⁶ *Fisher v. University of Texas* (2013), 570 U.S.

¹⁷ Ibid.

¹⁸ KW Crenshaw, 'Framing Affirmative Action' (2007) 105 Mich. L. Rev. First Impressions 123.

Constitutional affirmative action programs and clauses are not developed through normal and democratic processes which are open, participatory, and allow for public input, debate and vote. They are usually developed through extra-legislative measures that grant exclusive constitutional powers to framers, such as the president or a constitutional review committee. Therefore, constitutional affirmative action processes do not necessarily reflect the views of a democratic majority as the country's elite finds ways around the democratic process to promote affirmative action programs.¹⁹

Elites are most likely to perceive affirmative action as a necessary tool in achieving equality of opportunity and eradicating discrimination and the effects of past discrimination. The implication inherent in framing affirmative action through a constitutional process is to develop a lasting affirmative action policy, and therefore policy makers have to ultimately let the process pass through a democratic test – that means submitting affirmative action through a democratic process and having it endorsed by the democratic majority.²⁰

In South Africa for instance, the ideals behind workplace affirmative action were understandable, but significant challenges were faced in enforcing race and gender-based affirmative action. This is illustrated in the case of *Jennila Naidoo v The Minister of Safety & Security and The National Commissioner of the South African Police Service*, where a female applicant with high scores was denied an appointment in favor of a male applicant with lower scores. The court held that the affirmative action measure was made to serve an interest, narrowly defined to the detriment of the majority, if the designated group was constituted on the basis of gender. The judge took note of the fact that the employment equity plans betrayed a systemic bias against women and vulnerable minorities, and failed to meet the purposes and numeric objectives of Employment Equity Act, 55 of 1988.²¹ The court averred that the decision to employ a black male was irrational and arbitrary and noted that the essence of affirmative action is to differentiate and to prefer a member of a designated group in order to promote and attach substantive equality.²²

Therefore, disparate tolerance of such classifications exacerbates rather than alleviates gender, ethnic and racial antagonism.²³ Affirmative action continues to be commonly used as a catch all label for all types of claims on race, gender, disability, sexual orientation and other emerging areas that require affirmative action. Scholars have argued that affirmative action is becoming “diversity management” related policies and not in line with its original intent of redressing past imbalances. Many critics also frame affirmative action as preferences for the sake of preference. Policies preferring minorities should be referred to as affirmative action policies only if they are rooted in inherent cultural and historical justifications.

Affirmative action policies potentially grant preferential treatment to a class of people, prompting opponents to begin to challenge the policies. Courts have become the battle field to evaluate whether affirmative action policies are permissible under the constitution or protection clauses. In *Fisher v University of Texas at Austin*, a petitioner alleged that she was denied admission to the University of Texas and argued that the denial violated her 14th Amendment right to equal protection. She contended that the denial was a breach of her rights because it favored other minority applicants with lesser credentials. A series of judgments were entered in favor of the University, but the case casts the fight against some affirmative action policies as intense and imminent.²⁴

Under the equal protection analysis, for instance, courts consider the constitutionality of government affirmative action in areas that need further action to redress imbalances. In doing so, three standards of review – rational basis, mid-level review and strict scrutiny – have been maintained in order to show that the decision to treat people differently is justified and is a compelling state interest. This scrutiny is explored further to

¹⁹ J Fobanjong, *Understanding the Backlash against Affirmative Action* (Nova Science Pub Inc, New York 2001).

²⁰ Ibid.

²¹ *Jennila Naidoo v The Minister of Safety & Security and The National Commissioner of the South African Police Service*, Case No: JS 566/2011.

²² Ibid.

²³ Ibid.

²⁴ *Fisher v. University of Texas* (2013), 570 U.S.

determine whether it is narrowly tailored. Essentially, additional credit is awarded based on the specific classification, but is not a deciding factor.²⁵

5. Levels of Scrutiny of Affirmative Action

In this section, the discussion focuses on the varying levels of scrutiny of affirmative action for each marginalized group. The section highlights the variance and logical arguments advanced for the levels of scrutiny for affirmative action, and finds that there are rational reasons for all the levels of scrutiny.

Fundamentally, unlike race discrimination, gender discrimination whether benign or invidious has not triggered strict scrutiny, but rather only a less rigorous immediate scrutiny test, requiring that governments prove that the classification is substantially related to the achievement of an important interest. Therefore, gender-based affirmative action is subject to less scrutiny than race-based and other forms of affirmative action, and is most likely to survive a constitutional test.²⁶

Minority integration policies have included principles of equality, freedom of choice and cooperation in some instances to further migrants' rights to equal participation. But such policies have been regarded as bad policies because, while they were considered progressive in enhancing the rights of migrants, they made the migrants very visible. Therefore, in the case of migrants, the adoption of an integration policy was deemed as most appropriate because it created a homogenous society rather than widening the "them and us" divide.²⁷

While different sets of minority groups are scrutinized differently, the outstanding consideration relates to a number of criteria such as a justifiable compelling interest or the least restrictive means of meeting the state interest. In some instances, the scrutiny is an imprecise task and courts have averred that affirmative action would be unconstitutional if there were other ways of meeting diversity. The difference in the level of scrutiny of affirmative action for minority groups has increased the debate on whether there is a legal basis and consensus that LGBT constitute a legitimate suspect classification.²⁸

Scrutiny of legislation appearing to infringe on constitutional rights is used to deter and undo prejudices against discrete and insular minorities with special conditions such as for LGBT individuals.²⁹ Sexual orientation is, in certain regions, perhaps one of the more controversial minority group classifications that has been included in equality provisions, through submissions which emphasize equality and stress that equality and non-discrimination are the most fundamental and overriding principles of constitutionalism.³⁰ However, laws relying upon classifications based on race are suspect classifications and have been subjected to strict scrutiny, because such laws can only be sustained if their suitability to serve state interests is tested.³¹

²⁵ SE Eckes, 'Affirmative action Cases in Higher Education' Law and Higher Education [website] (nd) <<http://lawhigheredu.com/9-affirmative-action.html>> accessed 25 July 2016.

²⁶ RB Levinson, 'Gender-Based Affirmative Action and Reverse Gender Bias: Beyond Gratz, Parents Involved, and Ricci' (2010) 34 Harvard Journal of Law and Gender 1.

²⁷ C Englund, 'Migrants, Minorities and Employment in Sweden Exclusion, Discrimination and Anti-discrimination.' Raxen 3 Report to the European Monitoring Center on Racism and Xenophobia (Stockholm, 2002) <http://fra.europa.eu/sites/default/files/fra_uploads/239-SW.pdf> accessed on 25 July 2016.

²⁸ B Parker, 'What Level of Legal Scrutiny Should Sexual Orientation-Based Classifications Receive?' *Stanford Politics* [website] (January 2015) <https://stanfordpolitics.com/what-level-of-legal-scrutiny-should-sexual-orientation-based-classifications-receive-e2c0eb8f09f0#_4ioa9p99b> accessed 25 July 2016.

²⁹ A Bondarenko, 'Between a Rock and a Hard Place: Why Rational Basis Scrutiny for LGBT Classifications Is Incompatible With Opposition to LGBT Affirmative Action' (2014) 79 Brook. L. Rev. 1703 <<http://brooklynworks.brooklaw.edu/blr/vol79/iss4/7>> accessed 25 July 2016.

³⁰ J Cock, 'Engendering gay and lesbian rights: the equality clause in the South African constitution' (2002) 26 Women's Studies International Forum 35.

³¹ Eckes (nd).

The classification of gays and lesbians as a suspect classification implies an acknowledgement they have suffered obvious painful discrimination, and this is a cautious step taken in many jurisdictions. Whether gays and lesbians have some obvious immutable or distinguishable characteristic is a more difficult question to answer. On the gay rights issue, some ground breaking constitutional movements have explicitly prohibited discrimination on the basis of sexual orientation. In South Africa, an attempt was made to create equality for all citizens including rights on sexual orientation. In stating that the state may not directly or indirectly discriminate against anyone on grounds including sexual orientation, legal equality was achieved.³² In later years, the legal equality for LGBTs became virtual equality because of the prevalent attitudes surrounding LGBT-orientation.³³

South Africa's 1996 Constitution certified its position as the first country in the world to explicitly outlaw discrimination based on sexual orientation and has become the African country to have some of the most liberal laws on sexual orientation. Interestingly, despite the existence of legislation permitting same-sex civil unions, it is up to individual civil servants and members of the clergy to decide whether to hold the ceremonies or not.³⁴ That denotes that even when the legal environment has significantly changed, attitudes can remain the same. This explains the high prevalence of homophobia, especially in the rural conservative and traditional areas of South Africa where the belief that LGBT is wrong is common. The South African environment is still characterized by hate crimes, even in an era of progressive constitutional and legislative enactments on LGBT issues.³⁵ It has been consistently stated that gender or race can be taken into account in programs to expand opportunities. In order to get beyond racism, race must be taken into account because the persistence of both the practice and the effects of racial discrimination against minorities is a reality and governments must act to respond to it in the same way as with gender discrimination.³⁶

Taking the prevalence of quotas into account, there is usually a requirement that some special quotas must be earmarked and a fixed percentage of slots provided for members of specific groups, without regard to qualifications. That is problematic and is usually hesitantly applied. Instead, affirmative action programs may rely on a flexible numerical goal to accomplish the process of measuring opportunities only where there is a demonstrated link between the goal and the availability of qualified members of a minority group.³⁷

Another school of thought advances that affirmative action clauses in constitutions have little to do with gender, ethnic, religious or racial equality, because equality has everything to do with cultural change. After cultural shifts, women and other minority groups have become major contributors and advanced the civility of men. Another school of thought asserts that seldom is a diversity rationale necessary to increase the number of marginalized groups within an organization of any institution. Fundamentally, institutions can look for the most qualified person in a given large pool of qualified and well prepared minorities.³⁸

Viewing disability in relation to the course charted by LGBT advocacy highlights the de-constitutionalization of modern disability law. Because LGBT and disability causes differ and operate in different political and legal spaces, the divergence presents a stark contrast. For disability causes, the development of specific thinking in the area is lacking. That is why individuals with mental disability are still on the fringes of statutory disability advocacy. Despite the advocacy to live up to the promise of upholding the rights of persons with disabilities in a

³² B Thornburg, 'Creating Closets or Communities? Homosexuality, homophobia and processes of change in Africa' (2012) 9 Undercurrent 60.

³³ Ibid.

³⁴ C Everett, 'South Africa Progressive on LGBT Rights, But Gays still Battle for Social reform' International Business Times (22 October 22 2014) <<http://www.ibtimes.co.uk/South-africa-progressive-lgbt-rights-gays-still-battle-social-reform-1471213>> accessed on 27 July 2016.

³⁵ Ibid.

³⁶ Eckes (nd).

³⁷ Ibid.

³⁸ American Bar Association, 'Affirmative Action: A Dialogue on Race, Gender, Equality and Law in America' (1998) 8(2) Focus on Law Studies

<http://www.americanbar.org/publications/focus_on_law_studies_home/publiced_focus_spr98gender.html> accessed 25 July 2016.

constitutional dispensation, there is still a gap in guaranteeing a broad spectrum of rights for disabled persons. Advocacy by LGBTs helped reveal this gap and reinforced the opinion that constitutional law is at least in part about recognizing past injustices and current prejudices against groups. But it is not being used optimally to address past injustices and current existing biases for persons with disabilities.³⁹

LGBTs have been more successful in securing favorable court decisions in both lower and higher courts. This success did not result in a constitutional renaissance of newly protected classes, but it did create a space for equal protection clause jurisprudence – and advocacy for persons with disabilities should look to adopting similar strategies.⁴⁰ Systemic constitutional litigation has in several instances led to the accomplishment of the right to appropriate treatment and special education laws for persons with disabilities, demanding that education (for instance) should be a right which must be made available to all on equal terms.⁴¹

The movement towards more egalitarian arrangements has been more rapid and complete for gender than race and perhaps LGBT rights. The legitimacy enjoyed by claims on behalf of inclusion of women is measurably greater in almost all venues that count than is the standing in other specific claims by minorities. If affirmative action is to be used as a tool to address the bedrock of issues such as life's chances, then it must go beyond addressing the issue of gender and racial discrimination to the complicated problem of deprivation. The different experiences members of minority groups bring to the fore are rooted in culture and other discriminatory actions inherent in systems of governance and institutions. It might be essential to alter culture, but that's very unlikely in the shortest time, so compensatory and distributive rationale for affirmative action will persist to redress imbalances.⁴²

6. Practical Efforts on Affirmative Action: Policy and Legal Frameworks in South Sudan

This section of the paper reviews the historical background of Sudan and South Sudan and explains how the histories of conflicts contributed to the articulation of affirmative action in both the Comprehensive Peace Agreement (CPA) of 2005 and the subsequent Interim and Transitional Constitutions of 2005 and 2011 respectively. The section discusses the very first constitutional attempts to include broad affirmative action clauses in the Transitional Constitution upon the attainment of independence, and then highlights how gender equality began to take center stage in the area of affirmative action. The latter discussions focus on affirmative action clauses enshrined in the Transitional Constitution of South Sudan that was adopted immediately after independence.

The histories of the two Sudans indicate that while the 21-year civil war (1983 – 2005), often projected as a religious war, in fact was centered on economic, cultural and economic inequalities. A deliberate policy of unequal distribution of resources resulted in a severely divided country and gaping economic disparities between North and South, exacerbating the Southern resistance and heightening the demand for regional autonomy.⁴³ Amidst significant religious and ethnic differences, the Sudan People's Liberation Movement (SPLM) began to call for a pluralistic, multi-racial, multi-ethnic, and multi-religious society. Gender equality, as one area for affirmative action, was considered one of the least important, because there was a significant need to establish a better ethnic balance amongst Southerners.⁴⁴

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Cock (2002).

⁴³ M Fahmi, 'Is Identity the Root Cause of Sudan's Civil Wars?' *E-International Relations Students* [website] 2011 <<http://www.e-ir.info/2012/04/09/is-identity-the-root-cause-of-sudans-civil-wars/>> accessed 25 July 2016.

⁴⁴ L Hajjar, 'War, Development and Identity Politics in Sudan' (1996) 26 MER200 <<http://www.merip.org/mer/mer200/war-development-identity-politics-sudan>> accessed on 12 July 2016.

However, women's informal contributions to the war effort shifted the balance towards the formal inclusion of women into both the SPLM and the Sudan People's Liberation Army (SPLA), where a women's battalion was even formed. Gender equality became the most sought after affirmative action policy, and moved from rhetoric to concrete policies of inclusion.⁴⁵

The Bill of Rights of the Transitional Constitution of South Sudan⁴⁶ (TCSS) elaborately lays down the major areas of affirmative action. While the Bill of Rights deals with affirmative action expansively, the Constitution starts with a broad declaration stating that South Sudan is multi-ethnic, multi-cultural, multi-lingual, multi-religious, and multi-racial.⁴⁷ The rights of women, children, the elderly and disabled persons are espoused individually, while religious rights and ethnic and cultural rights are laid down as areas that need special consideration as well.⁴⁸ Inadvertently, affirmative action on gender equality has become more prominent. While this paper was premised on affirmative action for all marginalized groups, in the case of South Sudan, affirmative action related to gender inequality is featured much more prominently.

South Sudan's independence provided a great platform for gender equality and respect for the rights of women. The CPA of 2005 effectively ended decades of conflict and ushered in a new era of equality and fairness. It was also the beginning of an era for women's rights. The first Constitution of Southern Sudan of 2005 entrenched affirmative action clauses for women and demanded that all levels of government accord women with equal rights and dignity and also provided women with their first platform for political participation at all levels of government.⁴⁹ The same provisions were picked up and included in the TCSS of 2011, which elaborately reaffirmed the same provisions of the 2005 Constitution.

Political will is exceptionally crucial in ensuring gender equality in South Sudan. Acknowledging the adverse effects of conflict and the marginalization of women, the SPLM has often made affirmative action for women a priority above the needs of other specific groups. Therefore, in a remarkable initiative, the SPLM moved beyond its leadership's rhetoric towards introducing a quota system in the Constitution to advance the political participation of women. The provision of 25 percent ensured that women participate in all political structures at both the national and the state governments.⁵⁰

Article 16 of the TCSS in its entirety lays down extensive rights for women. Article 16(1) sought to accord full and equal dignity of the person of women and men, and subsection 2 of the same Article elaborately specifies the right to equal pay for equal work. Public participation on an equal footing with men and political participation by at least 25 percent at all levels of government in legislative and executive organs is meant to redress imbalances created by history. Culture and tradition are captured in subsection 3 and 4. The right to own property and share in the estate of deceased relatives and spouses is further provided for in subsection 5.⁵¹ Article 123(6) specifies that a substantial representation of women in the judiciary must be realized through appointments which are cognizant of competence, integrity, credibility and impartiality.⁵²

That said, the realization of the rights of women in South Sudan continues to face significant challenges. An illustrative point is drawn from the constitutional provisions on custom and culture, which state that;

Ethnic and cultural communities shall have the right to freely enjoy and develop their particular cultures. Members of such communities shall have the right to practice their beliefs, use their

⁴⁵ C Faria, 'Gendering War and Peace in South Sudan: The Elision and Emergence of Women' *Association of Concerned African Scholars* [website] (November 2011) <<http://concernedafricascholars.org/bulletin/issue86/faria/>> accessed 25 July 2016.

⁴⁶ The Transitional Constitution of South Sudan, 2011.

⁴⁷ Art 1 (4) of the TCSS, 2011.

⁴⁸ Art 16 1- 4, art 17 1-4, art 23, art 30 and art 33.

⁴⁹ The Bill of Rights of the Interim Constitution of Southern Sudan, 2005.

⁵⁰ NM Ali, *Gender and State Building in South Sudan* (USIP, Washington DC 2011), p. 3.

⁵¹ Bill of Rights art 16 (1-5), TCSS 2011.

⁵² Art 123(6) of the TCSS 2011.

languages, observe their religions and raise their children within the context of their respective cultures and customs in accordance with this Constitution and the law.

Article 33 of the TCSS, in its entirety, became the very source of women's marginalization because of the declaration that communities have the right to enjoy their rights disregards the inherent negative attributes of South Sudan's customary law that contravene the basic tenets of women's fundamental rights. Therefore, when the adopted constitutional text made customs and cultures one of the primary sources from which the Constitution derives its power, and includes in the Bill of Rights the right for communities to enjoy their cultural rights and have the freedom to develop them further, the very tenets constituting the subordination of women is brought to the fore and thwarts the well-intended provisions on women's affirmative action. Even when communities are directed to practice their custom within the confines of the Constitution, customs are often dominant and usually override human rights principles and violate the rights of women.⁵³

The reliance on customary law leads to insecurity and causes negative consequences for women. This is because customary law is deeply patriarchal, casting men as undisputed heads of families, with women taking the bottom places in the hierarchy. Numerous customary practices continue to violate the affirmative action provisions in the Constitution. Reconciling statutory laws and customary laws is a daunting challenge for the nascent legal system. In adopting legal pluralism, South Sudan did not yet progress to filtering the negative aspects from its customary laws, which means that women will continue to bear the brunt of the customary laws and benefit minimally from the affirmative action provisions.⁵⁴

Taking an example of property rights for instance, the Constitution guarantees that women have the right to own property in their own right and have been accorded the right to share in the property of deceased relatives and spouses, but customary law differs on this aspect. Customary law demands that property remains in the family, and in a society where men are cast as the undisputed heads, women's property rights are not guaranteed.⁵⁵

7. Key African Success on Affirmative Action for Minority Groups and Major Lessons for South Sudan

The last section of this paper discusses ground breaking initiatives in Africa, where affirmative action policies have redressed imbalances created by history, customs and other structural barriers. There are key initiatives on affirmative action that South Sudan can emulate in the continuous and emerging need for affirmative action.

The South African Constitution posited equality as a fundamental idea that epitomized South Africa's constitutional transformation. The Constitution reaffirmed the recognition of human rights, democracy and peaceful co-existence irrespective of race, class, color and sex. The provisions contained an inclusive social interface in the areas of gender, race, sex, and economic and political landscapes. The apartheid period, which had rendered the concept of equality a dispensable theory and enabled structural inequalities based on race, was reversed with the adoption of a constitutional supremacy based on equality for all. The constitutional text that was adopted recognized that as diverse as South Africans are, they should unite with the understanding that all are humans and equally worthy of respect and protection. Section 9 (3) of the Constitution, places moral obligations on everyone to treat the other equally and fairly, and not to discriminate against persons based on race, gender, ethnicity, sexual orientation, or otherwise.⁵⁶

⁵³ Art 5(b) and art 33 of the TCSS 2011.

⁵⁴ Sudan Human Security Baseline Assessment (HSBA), Women's security and the law in South Sudan (Small Arms Survey, Geneva 2012) <<http://www.smallarmssurveysudan.org/fileadmin/docs/facts-figures/South-sudan/womens-security/HSBA-women-security-law.pdf>> accessed 25 July 2016.

⁵⁵ Ibid.

⁵⁶ M Rapatsa, 'The Right to Equality under South Africa's Transformative Constitutionalism: A Myth or Reality?' (2015) 11 Acta Universitatis Danubius 18.

It is evident that formal equality infers equal treatment. To counter that, the South African case ensured that the essence of substantive equality was vested in the law in order to take into account people's varied circumstances. The substantive idea of equality in the South African context documented the need to take into account the social and economic conditions of individuals and historically disadvantaged groups in society. By using (constitutional) law to mitigate the adverse effects of inherent differences, the substantive approach to equality became a tenet that underpinned the vision of South Africa's democracy as embodied in its Constitution.⁵⁷

Uganda, Kenya and Tanzania approached affirmative action to address variations in the levels of gender equality at strategic levels of education and political participation. Uganda institutionalized affirmative action by including in its 1995 Constitution provisions on gender equality, balance and fair representation. Article 32(i) provides for affirmative action in favor of marginalized groups in Uganda.⁵⁸ Tanzania has also made several attempts at gender equality in society. For instance, in addition to signing international and regional agreements related to women's rights, it has developed national policies to combat gender inequality. Tanzania's Constitution bans discrimination on all grounds and many sector policy documents make reference to gender equality. For instance, the Women Development and Gender Policy of 2000 provides guidelines to other sectors on how to attain gender equality and equity.⁵⁹ Although there is no legislation requiring universities to implement affirmative action, temporary measures have been used to increase access for female entrants to public universities. The Joint Admission Board lowered the university cut-off point by one in favor of female entrants in Tanzania. In Uganda, by introducing the 1.5 point scheme at university entry levels, the number of female students increased in all public universities.⁶⁰

A conducive legislative environment inherent in Uganda's 1995 Constitution fosters affirmative action as the only measure to increase the participation of women at the political level, and allowed for other women to compete outside of the reserved seats. This increased the number of female parliamentarians to 34 percent in the 9th Parliament. The same approach was adopted to enhance the political participation in Kenya.⁶¹

8. Conclusions and Recommendations

The need to redress imbalances caused by history, culture and other factors and to realize the rights of marginalized persons and groups is central in all areas of affirmative action. Adopted through transformative constitutional enactments, affirmative action has played the role of leveling the playing field in instances where equality could not be achieved by only eliminating discrimination. Whether stipulated through a quota system or blunt statements, affirmative action provisions that seek to enhance equality of gender, race, sexual orientation, ethnicity, disability and other marginalized groups have, measured over time, demonstrated their relevance. Affirmative action has also been criticized for lack of democratic strength because of the way it is often adopted, or because it is viewed as causing further antagonism and discrimination. That has caused variance in the levels of scrutiny in each area of affirmative action. The levels of scrutiny reveal the depth of consideration required to pass an affirmative action for a specific group as furthering state interest and having the force to redress imbalances.

That said, some emerging group interests have been treated with antagonism rather than the understanding that the group has significantly been discriminated against. Some of the foregoing reasons are advanced to explain why the bar of scrutiny is heightened for groups, like LGBT and race, while gender and disability pass the test very easily. Consequently, affirmative action is still popular because there is ample evidence to make the

⁵⁷ Ibid.

⁵⁸ J Osongo, 'Affirmative action, gender equity and university admissions – Kenya, Uganda and Tanzania' (2009) 7 London Review of Education 71.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ RA Kadaga, 'Women's political leadership in East-Africa with specific Reference to Uganda' Tenth Commonwealth Women's Affairs Ministers Meeting (Dhaka, Bangladesh, 17-19 June 2013).

case for its relevance, even for jurisdictions that are already progressive. Approached within the realm of constitutionalism, affirmative action corrects imbalances caused by either history or customs, has the resounding effect of bridging gaps and an inherent power to install substantive equality which could not have been achieved formally. The acknowledgement by elites that affirmative action is relevant is in itself a constitutional transformative aspect of societal progressiveness and the attainment of equality.

Anecdotal evidence exists to suggest that affirmative action policies have been instrumental in advancing equality for all. In the South African context, affirmative action measures entrenched in the Constitution resulted in the provision of entitlements for populations disadvantaged by unfair discrimination.⁶² Hence, for affirmative action policies to achieve their original intent, other pieces of legislation have to be amended to conform to the constitutional purpose of affirmative action.⁶³ For the effectiveness of affirmative action policies, equality should be valued as a substantive human right and past injustice would have to be recognized as a starting point to undo past discrimination and injustices.⁶⁴

The question as to whether affirmative action policies pass a democratic test would have to be addressed as a matter of priority, so that the backlash against affirmative action policies can be minimized. In 2012 in the United States, the Supreme Court heard a case that would re-examine the constitutionality of policies that consider race in admissions in public schools. The backlash in the United States emerged because affirmative action in education was declared through executive orders and failed the test of a democratic process adopted after a popular consensus.⁶⁵

For South Sudan, there are significant challenges in the practical implementation of affirmative action policies in the area of gender. Women's political participation has significantly increased, but political participation affirmative action in the absence of other affirmative action policies in the area of education and capacity development renders the current affirmative action policies ineffective, because affirmative action has only been achieved with regard to numbers, but not substantive meaningful contribution. Therefore, to achieve and translate affirmative action policies positively, the new constitutional dispensation will have to broaden the areas of affirmative action on gender equality.⁶⁶

Bibliography

- Ali, NM, Gender and State Building in South Sudan (USIP, Washington DC 2011)
- American Bar Association, 'Affirmative Action: A Dialogue on Race, Gender, Equality and Law in America' (1998) 8(2) Focus on Law Studies
<http://www.americanbar.org/publications/focus_on_law_studies_home/publiced_focus_spr98gender.html> accessed 25 July 2016
- Baron, J, 'Understanding the Backlash Against Race-Based Affirmative Action' (2014) 11 Higher Education in Review 31
- Block, WE & Walker, MA (eds), Discrimination, Affirmative Action and Equal Protection (The Frazer Institute Publication, Vancouver BC 1981)
- Bondarenko, A, 'Between a Rock and a Hard Place: Why Rational Basis Scrutiny for LGBT Classifications Is Incompatible With Opposition to LGBT Affirmative Action' (2014) 79 Brook. L. Rev. 1703
<<http://brooklynworks.brooklaw.edu/blr/vol79/iss4/7>> accessed 25 July 2016
- Ciocchetti, A & Holcomb, J, 'The Frontier of Affirmative Action: Employment Preferences and Diversity in the Private Workplace' (2010) 12 U. of Pennsylvania Journal of Business Law 238

⁶² M McGregor, 'A Legal Historical Perspective on Affirmative action in South Africa (Part 2)' (2007) 13 Fundamina 100.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ J Baron, 'Understanding the Backlash Against Race-Based Affirmative Action' (2014) 11 Higher Education in Review 31.

⁶⁶ WT Lacko, 'Women in Political Parties' Structures: The Quota Types Discourse' Ahfad University for Women, The Regional Institute of Gender, Diversity, Peace and Rights [report] (August 2013).

- Cock, J, 'Engendering gay and lesbian rights: the equality clause in the South African constitution' (2002) 26 Women's Studies International Forum 35
- Crenshaw, KW, 'Framing Affirmative Action' (2007) 105 Mich. L. Rev. First Impressions 123
- Eckes, SE, 'Affirmative action Cases in Higher Education' Law and Higher Education [website] (nd) <<http://lawhigheredu.com/9-affirmative-action.html>> accessed 25 July 2016
- Englund, C, 'Migrants, Minorities and Employment in Sweden Exclusion, Discrimination and Anti-discrimination.' Raxen 3 Report to the European Monitoring Center on Racism and Xenophobia (Stockholm, 2002) <http://fra.europa.eu/sites/default/files/fra_uploads/239-SW.pdf> accessed on 25 July 2016
- Everett, C, 'South Africa Progressive on LGBT Rights, But Gays still Battle for Social reform' International Business Times (22 October 22 2014) <<http://www.ibtimes.co.uk/South-africa-progressive-lgbt-rights-gays-still-battle-social-reform-1471213>> accessed on 27 July 2016
- Fahmi, M, 'Is Identity the Root Cause of Sudan's Civil Wars?' *E-International Relations Students* [website] 2011 <<http://www.e-ir.info/2012/04/09/is-identity-the-root-cause-of-sudans-civil-wars/>> accessed 25 July 2016
- Faria, C, 'Gendering War and Peace in South Sudan: The Elision and Emergence of Women' *Association of Concerned African Scholars* [website] (November 2011) <<http://concernedafricascholars.org/bulletin/issue86/faria/>> accessed 25 July 2016
- Fobanjong, J, Understanding the Backlash against Affirmative Action (Nova Science Pub Inc, New York 2001)
- Fredman, S, Comparative Study of Anti- Discrimination and Equality Laws of the US, Canada, South Africa and India, European Network of Legal Experts in the non-discrimination field (European Commission, Brussels 2012), 34
- Hajjar, L, 'War, Development and Identity Politics in Sudan' (1996) 26 MER200 <<http://www.merip.org/mer/mer200/war-development-identity-politics-sudan>> accessed on 12 July 2016
- Kadaga, RA, 'Women's political leadership in East Africa with specific Reference to Uganda' Tenth Commonwealth Women's Affairs Ministers Meeting (Dhaka, Bangladesh, 17-19 June 2013)
- Lacko, WT, 'Women in Political Parties' Structures: The Quota Types Discourse' Ahfad University For Women, The Regional Institute of Gender, Diversity, Peace and Rights [report] (August 2013)
- Levinson, RB, 'Gender-Based Affirmative Action and Reverse Gender Bias: Beyond Gratz, Parents involved, and Ricci' (2010) 34 Harvard Journal of Law and Gender 1
- McGregor, M, 'A Legal Historical Perspective on Affirmative action in South Africa (Part 2)' (2007) 13 Fundamina 100
- Moyo, A, 'Transformative constitutionalism, substantive equality and the role of the courts: Lessons from South Africa and Zimbabwe' (Twenty Years of South African Constitutionalism 14-16 November 2014) <www.nylawreview.com/wp-content/uploads/sites/16/2014/11/Moyo.pdf> accessed 25 July 2016
- Osongo, J, 'Affirmative action, gender equity and university admissions – Kenya, Uganda and Tanzania' (2009) 7 London Review of Education 71
- Parker, B, 'What Level of Legal Scrutiny Should Sexual Orientation-Based Classifications Receive?' *Stanford Politics* [website] (January 2015) <<https://stanfordpolitics.com/what-level-of-legal-scrutiny-should-sexual-orientation-based-classifications-receive-e2c0eb8f09f0#.4ioa9p99b>> accessed 25 July 2016
- Rapatsa, M, 'The Right to Equality under South Africa's Transformative Constitutionalism: A Myth or Reality?' (2015) 11 Acta Universitatis Danubius 18
- Schaefer, RT, Racial and Ethnic Groups (13th Ed Pearson, Boston 1993)
- Sudan Human Security Baseline Assessment (HBSA), Women's security and the law in South Sudan (Small Arms Survey, Geneva 2012) <<http://www.smallarmssurveysudan.org/fileadmin/docs/facts-figures/South-sudan/womens-security/HSBA-women-security-law.pdf>> accessed 25 July 2016
- Thornburg, B, 'Creating Closets or Communities? Homosexuality, homophobia and processes of change in Africa' (2012) 9 Undercurrent 60
- Tsesis, A, 'Maxim Constitutionalism: Liberal Equality for the Common Good' (2013) 91 Tex. L. Rev. 1608
- White, JV, 'What is Affirmative Action?' *Scholarly Works*. Paper 306. (2004)

Part II: Transitioning Justice Systems after Conflict

Transitioning Legal and Justice Systems in Post-Conflict/Transitional Societies

Alphonse Muleefu

Introduction

Political transformation that comes after the fall of a repressive regime or at the end of a conflict is often faced with a number of challenges. The post-conflict government inherits a large number of victims and abusers, and very weak legal and justice systems. Aeyal Gross notes that the new government is faced with a 'need to look backward so as not to allow human rights violations to go unnoticed; and the need to look forward, enabling all sides to participate in the new peace process or the new democracy.'¹ Various strong pressures to see the country moving towards good governance and stability, both from within and outside, result in adopting different measures, including transitioning legal and justice systems that are specifically aimed at addressing the challenges of the past.² Compromises are supposed to be reached on each of the following complicated issues: prosecutions (traditional, national, hybrid or international), amnesty (blanket/unconditional or conditional, to all perpetrators or some), truth finding (standard of evidence/proof), reconciliation, commemorations, institutional reforms and vetting, demobilization and reintegration, power-sharing, reparations (individual or collective, material or moral/symbolic or both), etc. In most cases, the intricate nature of the challenges to be resolved will overwhelm the existing resources, and how to prioritize might become another challenge. This reality often pushes the new government to adopting pragmatic measures.³ It should be understandable that in circumstances where classical mechanisms do not provide answers, decision makers ought to focus on finding alternative solutions to their specific challenges, even if such solutions would require ignoring certain internationally accepted standards. To borrow John Adam's statement, contexts like "[f]acts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence."⁴ Post-conflict countries are required to adopt different approaches due to their specific contextual and historical realities on the ground. This is why, for instance, the 1998 Belfast Good Friday Agreement, the agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland that ended the 'Troubles' in Northern Ireland, is different from the 1995 Dayton Agreement that ended the conflict in the Former Yugoslavia. Or why the 1993/94 process in South Africa of ending apartheid and the subsequent creation of the famous Truth and Reconciliation Commission which emphasized the importance of 'immunity' to remorseful offenders, is different from Rwanda's approach that came as a result of a one party's military victory (Rwandan Patriotic Front, RPF) that pursued a rigorous prosecution approach. However, the biggest challenge lies in making sure that whatever solution that will be adopted is representative – is of common interest to all members (stakeholders) of the society. The decision making process might be affected by several factors, including the role of the elite in power that might have an interest in keeping the *status quo*, or the security services (army, gendarmerie, police, secret services) who might be interested in hiding some facts. Nonetheless, the success (or failure) of transitioning legal and justice systems depends on flexibility of laws and cooperation among all law enforcing bodies (police, prosecution, courts and prisons) with other national sectors/actors.

¹ AM Gross, 'The Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel' (2004) 40 Stan. J. Intl L. 47.

² For the definition of transitional justice see the United Nations Security Council, 'Report of the Secretary General on the rule of law and transitional justice in conflict and post-conflict societies (S/2004/616 of 23 August 2004) §8 (hereafter 2004 UNSG report); The Center for Transitional Justice, 'what is transitional justice?' <<https://www.ictj.org/about/transitional-justice>> accessed 6 May 2016; RG Teitel, 'Transitional Justice Genealogy' (2003) 16 Harv. Hum. Rts. J. 69.

³ Measures/mechanisms that might not necessarily respect established 'international standards'. See also D Venema, 'Transitional Shortcuts to Justice and National Identity' (2011) 24 Ratio Juris 88.

⁴ S Straub, 'Quotes From Our Founding Fathers' <<http://thefederalistpapers.integratedmarket.netdna-cdn.com/QuotesFromOurFoundingFathersVolume1.pdf>> accessed 29 June 2016, 62.

According to the UN Secretary General's report on Rule of Law and Transitional Justice:

[T]he consolidation of peace in the immediate post-conflict period, as well as the maintenance of peace in the long term, cannot be achieved unless the population is confident that redress for grievances can be obtained through legitimate structures for the peaceful settlement of disputes and the fair administration of justice.⁵

However, just like any other sector in post conflict societies, justice administration is often among the first and most affected by the conflict. One of the major tasks of the post conflict government is to reconstruct. Using the experience of Rwanda, this paper claims that reconstructing legal and justice systems undergo at least a two steps process of development. The first major step comes in hurriedly after a conflict/repression to address emergencies, and the second major step is adopted after some deep reflections to guide the transitional society towards normalcy. However, it is very difficult to make a clear distinction between these two steps of development because the issues to be addressed are often intricate and overlapping. It is important to underline that these steps are mere author's observations on the post-genocide Rwanda's reconstruction. This paper does not purport to claim that solutions adopted in Rwanda were perfect, nor that such approaches are necessarily adaptable to the situation of South Sudan. As Roelof Haveman reminds: 'International scholars are looking for commonalities to build their theories on and scholars from countries in transition often think that their situation is exemplary for other situations too, when actually, every commonality between situations is accidental and does not help to find a response as responses are (or should be) context-driven.'⁶ Nonetheless, previous post-conflict societies can provide some general lessons to contemporary ongoing and/or post-conflicts.

In addition to this general introduction, this paper is divided into four major parts and a general conclusion. The first two sections address the two steps of transitioning legal/justice systems, the third section discusses measures that support (or create an enabling environment for) the development of legal/justice systems, and the fourth section emphasizes the importance of context. The emphasis is put on considering transitioning legal/justice systems as a broader reconstruction mandate, going beyond reconstruction of courts and adoption of liberal laws to include equity/fairness, and creating an environment conducive for the legal and justice systems to flourish. Without compromising the major points stated throughout the entire discussion on the importance of contextualization and adopting home grown solutions, the brief conclusion highlights some recommendations to consider in the case of South Sudan.

1. Step One: Transitioning Legal and Justice Systems During Emergencies

This section discusses transitional legal and justice responses that are adopted immediately after the conflict to address matters of emergency. This is a crucial period for the new government to unequivocally set the tone – clearly show the new direction – and adopt measures that are aimed at promising a different 'better' future; a future of justice, rule of law, optimism and peace.

The moment the new government gets into power, it is confronted with reality. It finds that certain quick policies and measures have to be taken as a matter of urgency. The reality is that it was neither prepared for those immediate challenges (or at least the magnitude) nor the manner in which the conflict/repression ended, and it finds virtually nothing in place other than the old policies, laws and structures, which were in some situations part of the perpetuation of the violence and discrimination, or weakened during the period of conflict. In this situation, leaders of the transition government are faced with one big question: what to do next? Both inside and outside the country, everyone is watching and waiting for the government to take action. Voices will be raised looking for solutions, initially supportive but more and more critical if the country chooses responses that do not reflect the international theory. The immediate preoccupation is to adopt some basic guiding principles to demonstrate to citizens that things have changed and to create the impression of being in charge.

⁵ 2004 UNSG report, §2.

⁶ Private exchanges with Roelof Haveman. A special thank you for his useful comments.

The first casualty is often the old constitution, which will be suspended. If the new government was a result of a negotiated settlement, it will quickly promulgate the peace agreement and proceeds to create institutions and bodies that will help in establishing the new legal and justice systems. However, not every old law and institution can be abolished because the new government needs to have some legal/justice systems in place, and as Paris and Sisk note, “[m]oving from war to peace entails continuity as well as change.”⁷

For the case of Rwanda, everything was a priority. The 1994 genocide against the Tutsi that killed over a million people and the preceding civil war that had lasted for almost four years, left the country in shambles. The challenge was to set priorities when all sectors of the country were in dire conditions. There was a huge number of displaced persons internally and in neighboring countries (mainly in Zaire, the current Democratic Republic of Congo), refugees of previous conflicts (those of 1959 and subsequent conflicts) were returning in a disorganized manner, there was lack of shelter for survivors and new returnees, solving land ownership and distribution was a challenge, there was high prevalence of trauma and suspicion among citizens, and insecurity incidents were rampant. After its military victory and stopping the genocide, the RPF adopted the declaration of 17 July 1994 “establishing inclusive Government Institutions, and renouncing sharing power with political parties and formations that organized and perpetrated the genocide.”⁸ From 1994 until 2003, Rwanda was governed under the 1994 Fundamental Laws comprised of the 1991 Constitution establishing a multi-party system, the Arusha Peace Agreement of 4 August 1993, which was aimed at ending the civil war, the aforementioned RPF declaration of July 1994, and the protocol of agreement between the RPF and political parties and organizations that had not participated in the genocide.⁹ Rwanda is not unique in having gone through a transitioning constitutional order. Before the fall of South Africa’s apartheid regime, the negotiating parties had agreed to an interim constitution that was going to be in place until the adoption of a permanent constitution in 1996.¹⁰

In 1994, Rwanda’s justice sector, already very weak during the old regime, was completely destroyed as most of its judicial personnel had either been killed or fled the country. Out of 700 magistrates (of whom just 45 had a law degree), only 244 were left in the country. Out of 70 prosecutors, only 12 were present, and out of 631 supporting staff and clerks, only 137 were remaining.¹¹ It is this insignificant and ill-equipped number of judicial personnel that was confronted with over 120.000 people arrested on suspicion of having participated in the genocide, in addition to others who were still at large, and suspects of ordinary crimes and civil disputes.¹² The new Rwandan government reacted swiftly and sought justice on both the international and national level. On the international level, Rwanda requested the international community to establish a mechanism that would try the suspected masterminds of the genocide, most of whom had fled the country. The international response came on 8 November 1994 with the United Nations Security Council Resolution 955 which established the International Criminal Tribunal for Rwanda (ICTR) “to prosecute persons responsible for the genocide and other serious violations of international humanitarian law.”¹³ On the national level, an Organic Law was adopted in 1996 establishing Specialized Chambers within Tribunals of First Instances and Military Courts responsible for prosecution of genocide and other crimes against humanity committed since 1 October 1990. The Organic Law established for the first time a guilty plea procedure in Rwanda’s legal system, and put

⁷ R Paris & TD Sisk, ‘Managing Contradictions: The Inherent Dilemmas of Postwar Statebuilding’ [2007] International Peace Institute, 4 <<https://www.ciaonet.org/catalog/16371>> accessed 11 May 2016.

⁸ W Gasamagera, ‘The Constitution Making Process in Rwanda: Lessons to be Learned’ paper presented to the 7th Global Forum for Reinventing Government, Vienna, Austria, 26–29 June 2007

<<http://unpan1.un.org/intradoc/groups/public/documents/un/unpan026620.pdf>> accessed 19 June 2016.

⁹ Ibid.

¹⁰ Gross (2004), 58–60.

¹¹ Republic of Rwanda: National Service of Gacaca Courts, ‘Gacaca Courts in Rwanda’ (Kigali, June 2012), §1.

¹² R Haveman, ‘Rule of Law Quick Scan Rwanda: Prospects and Challenges’ (2012) Hiil, 29.

<http://www.hiil.org/data/sitemanagement/media/Quickscan_RuleofLaw_Rwanda_digitaal_130812.pdf> accessed on 19 June 2016; Office of the President of the Republic of Rwanda, ‘Report on the Reflection Meetings Held in the Office of the President of the Republic from May 1998 to March 1999’ (Kigali, August 1999); Republic of Rwanda (2012).

¹³ Article 1, Statute of the International Tribunal for Rwanda (S/Res/955 (1994) of 8 November 1994).

suspects of the genocide into four categories.¹⁴ Suspects were put in categories according to the gravity of their crimes and their leadership positions within the society. The first category was comprised of ‘planners, instigators, supervisors and leaders of the crime of genocide or crimes against humanity’. The second category was for suspects of ‘intentional homicide and other serious assault against the person causing death’. The third category was for persons ‘guilty of other serious assault against persons.’ The fourth category was for those who committed property crimes.¹⁵

The restoration of a judicial system was very important, the new government recruited and gave training to different people interested in becoming prosecutors, judges and court clerks. By 2002, the number of judicial personnel had risen from 244 magistrates to 700, from 12 prosecutors to 246, from 59 court clerks to 325 and from 56 to 123 administrative assistants in the prosecution services, albeit a few of them had a law degree.¹⁶ The adoption of these new laws and recruitment of judicial personnel was combined with the restructuring of police forces from different fragmented units into a single National Police Force in 2000.¹⁷ On the education side, in December 1999, the National University of Rwanda’s School of Law graduated its first post-genocide intake with a Bachelor of Laws (LLB) degree. With these efforts, the transitional government had managed to somewhat reestablish the pre-genocide (1994) situation, but as we shall see below, this was not enough to deal with the magnitude of the awaiting workload.

2. Step Two: Transitioning Legal and Justice Systems Proper

This section explains how immediately after the conflict, there is a tendency to seek solutions through classical ‘ordinary’ mechanisms. However, as the processes take long to deliver on the anticipated solutions and stakeholders within and outside the country increasingly become impatient, the need to look for alternative solutions bursts. This requires deep reflections on how to properly transition legal and justice systems with a long-term perspective for the post-conflict society concerned. The discussion below is what happened in Rwanda.

The first genocide related case to be tried started on 27 December 1996 and completed on 3 January 1997. By 1998, it was very evident that the adopted transitional justice mechanisms were unable to resolve all the related challenges.¹⁸ By 31 December 2002, out of over 120.000 suspects in detention, only 8.000 cases had been completed.¹⁹ It was very clear that the needed justice was not possible through ordinary courts and criminal procedures. Therefore, from May 1998 to March 1999, about 200 people representing different stakeholders convened every Saturday in the President’s office called ‘Village Urugwiro’ to discuss and find solutions to critical issues of the country, including unity of Rwandans, democracy, justice, economy and security.²⁰ This was a time for the nation to critically think about what went wrong in the first place and to agree on the new direction. The outcomes of these Village Urugwiro meetings, as they became famously known, were later to become the basis for all future laws and policies in Rwanda.

During these meetings, it was determined that prosecution of genocide related cases was not possible only through ordinary courts. The process was very slow, expensive and inaccessible to ordinary citizens. It was estimated that if genocide-related cases were to be tried through ordinary courts, it would take Rwanda over 100 years to try over 120.000 suspects under preventive detention, without mentioning other suspects that

¹⁴ Articles 2 and 19 of the Organic Law n° 8/96 of 30 August 1996 (Official Gazette of the Republic of Rwanda n° 17 of 1/9/1996).

¹⁵ Article 2 of the Organic Law n° 8/96 of 30 August 1996 on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity committed since 1 October 1990, (Official Gazette of the Republic of Rwanda, n° 17 of 1 September 1996).

¹⁶ Republic of Rwanda (2012).

¹⁷ Law n° 09/2000 of 16 June 2000 on the Establishment, General Organisation and Jurisdiction of the National Police (Official Gazette of the Republic of Rwanda n° Special of 29/06/2000).

¹⁸ Office of the President of the Republic of Rwanda (1999), 47-73.

¹⁹ Republic of Rwanda (2012).

²⁰ Office of the President of the Republic of Rwanda (1999).

were still at large. In addition, despite the fact that Rwanda was insisting on prosecution instead of amnesty, Rwanda was also very preoccupied with finding ways to achieve unity and reconciliation. Therefore, participants recommended the adoption of *Inkiko-Gacaca* – a traditional mechanism where men of wisdom in communities engaged disputants, their relatives and neighbors in resolving family, land, and other minor conflicts – and adapt it to the specific circumstances of dealing with genocide-related acts and to be more inclusive to women.

Pragmatism and flexibility are very important ingredients of transitional justice mechanisms. The Transitional National Assembly adopted the initial Gacaca Law in 2000 after several deliberations, which was immediately modified in 2001 and later replaced by another Gacaca Law in 2004, which was also amended several times.²¹ This has been considered by some international scholars and human rights organizations as a weakness of the path chosen, but it much more shows the context-specificity of a response, which in a post-conflict situation is by definition not fixed, stable or foreseeable for the next couple of years. Gacaca Courts drew on the categorization of genocide suspects that was introduced by the 1996 Organic Law, but amended from four categories to three, substantially reduced sentences for perpetrators whose confessions were accepted, and introduced suspension and community services as an alternative to imprisonment. By 2012, Gacaca Courts through the use of lay judges – *Inyangamugayo*: men and, new for gacaca, women of integrity – closed their activities after completing about two million cases in a period of 10 years.²² On an international level, in addition to some trials that took place in different foreign jurisdictions, the Arusha based International Criminal Tribunal for Rwanda (ICTR) closed its offices in 2015 after completing 75 cases out of the 93 indicted individuals. Of the remaining cases, 3 individuals had died during the process, 10 others were referred to national courts, and the remaining 3 were referred to the Mechanism for International Criminal Tribunals.²³ Other possible cases that might come after the closure of Gacaca Courts or ICTR shall be handled by ordinary courts.²⁴

The creation of Gacaca Courts taking over the bulk of the genocide-related cases gave space to the reconstruction of the ordinary court system in Rwanda. In 2003, a new constitution was adopted, creating a separation of powers. Overall, law reform processes started with a restructuring of the judiciary, creating a cohesive judicial body with both administrative and financial autonomy, and separating the prosecution services from the Ministry of Justice.²⁵ Whereas the recruitment of judicial staff that happened immediately

²¹ Organic Law n° 40/2000 of January 26, 2001 setting up “Gacaca Jurisdictions” and organizing prosecutions of offences constituting the crime of genocide or crimes against humanity, committed between October 1, 1990 and December 31, 1994; Organic Law n° 33/2001 of 22/6/2001 modifying and completing Organic Law n° 40/2000 of 26 January 2001 governing the creation of Gacaca Courts and organizing the prosecution of Genocide crimes and other crimes against humanity committed between the October 1st 1990 and the December 31st 1994; Organic Law no 16/2004 of 19/6/2004 Establishing the Organization, Competence, and Functioning of Gacaca Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and other crimes against humanity committed between the October 1st 1990 and the December 31st 1994; Organic law no 28/2006 of 27/06/2006 Organic Law modifying and complementing Organic Law n° 16/2004 of 19/06/2004 establishing the organization, competence and functioning of Gacaca Courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994; Organic law n° 13/2008 of 19/05/2008 modifying and complementing Organic Law n°16/2004 of 19/6/2004 establishing the organization, competence and functioning of Gacaca Courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994 as modified and complemented to date; Organic Law No 66/2008 of 21/11/2008 Organic Law modifying and complementing the Organic Law No 31/2007 of 25/07/2007 21 November 2008.

²² Republic of Rwanda (2012).

²³ See the ICTR in brief <<http://unictr.unmict.org/en/tribunal>> accessed 12 May 2016.

²⁴ Organic Law n° 04/2012/OL of 15/06/2012 Terminating Gacaca Courts and Determining Mechanisms for solving issues which were under their jurisdiction (Official Gazette of the Republic of Rwanda n° Special of 15/06/2012); Organic Law n° 11/2007 of 16/03/2007 concerning transfer of cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from other States (Official Gazette of the Republic of Rwanda, n° special, 2007 of 19 March 2007).

²⁵ Articles 142 & 150 of the Constitution of the Republic of Rwanda of 2003 as Revised in 2015 (Official Gazette of the Republic of Rwanda, n° Special of 24/12/2015); see also Haveman (2012), 15; S Rugege, ‘Judicial Reform, Public Confidence and the Rule of Law in Rwanda’ Keynote address to the Qatar Law Forum, London, 28 Feb., 2013

<<http://www.qatarlawforum.com/wp->

after the genocide included people with no legal training, in 2008, a new law determining the organization, functioning and jurisdiction of courts was adopted and new judicial staff were recruited.²⁶ Though without practical experience, the National Public Prosecution Authority and Courts were able to recruit staff (judges and prosecutors) with at least a law degree.²⁷ In that same year, 2008, the Institute of Legal Practice and Development started providing trainings in legal practice for judges, prosecutors and lawyers.²⁸ It could be said that today Rwanda's justice sector is relatively in good condition, compared to the situation directly after, but also before, the genocide. The laws are much better streamlined and its qualified staff are delivering much fairer decisions in physical infrastructures (offices, court rooms and prisons) that are well built and equipped with tools of modern technology.²⁹

3. This is also Justice

This section highlights other aspects contributing to the development of legal/justice systems (enablers of legal/justice systems). Whereas it is important to focus on improving justice administration, there is a need to restore hope, trust and social cohesion among the affected population. Aristotle put justice into two broader categories: distributive justice and corrective justice. Distributive justice is concerned with the distribution of burdens and benefits among the members of the constitution, whereas corrective justice deals with the rectification or correction of wrongs between two parties (injured and the injurer).³⁰ Legal scholars seem sometimes to forget that there is more to the restoration of a country than the classical justice sector. The adoption of legal and justice measures should be taken as part and parcel of other aspects of human security, such as dealing with security and social welfare, resolving land disputes, providing shelter and medical services to victims, collecting (and where possible providing decent burial to) dead bodies scattered on roadsides and in shallow graves, securing health, sanitation (including drinking water), education, etc..

Whereas the majority of refugees returned after 1994, some refugees of previous conflicts were returning to Rwanda, to areas under the RPF control, even before the end of the civil war and the genocide. Those who were in neighboring countries (Burundi, Uganda, Zaire (current Democratic Republic of Congo) and Tanzania) were among the first ones to return. Some of them wanted to return to their ancestral land, which in most cases had been occupied for almost three decades by other people, whereas those who had left Rwanda when they were still very young or who were born outside Rwanda, did not know where to settle, and others had simply settled on land that belonged to those who had fled the country in 1994. The situation was basically chaotic, and it is fair to argue that in such a case, justice becomes a matter of trial and error. There was no similar situation elsewhere in the world to borrow lessons from, and the responses were like taking risks, assuming that citizens would cooperate. The new government combined different administrative approaches in implementing land sharing policies specific to each region and district, and in some parts (mainly in the East), the government distributed parts of national parks and game reserves to the new returnees.³¹

[content/uploads/2012/01/Rugege_Speech_Legal_Reforms_and_the_Rule_of_Law_in_Rwanda.pdf](#)> accessed 19 June 2016.

²⁶ Organic Law N° 51/2008 of 09/09/2008 determining the organization, functioning and jurisdiction of Courts (Official Gazette No Special of 10 September 2008 of the Republic of Rwanda); see also The Republic of Rwanda: Ministry of Public Service and Labour (MIFOTRA), 'Functional Review Report: Supreme Court' April, 2008 <[http://www.mifotra.gov.rw/fileadmin/templates/downloads/SUPREME%20COURT%20\(Eng\).pdf](http://www.mifotra.gov.rw/fileadmin/templates/downloads/SUPREME%20COURT%20(Eng).pdf)> accessed 4 July 2016.

²⁷ The Government of Rwanda: Supreme Court 'Report on the Achievement of the Judiciary of Rwanda for the past ten Years (2004-2014) (hereafter Achievements Report) August 2014; see also Haveman (2012); Rugege (2013).

²⁸ Established in 2006 by Law n° 22/2006 of 28/04/2006 establishing the Institute of Legal Practice and Development (Official Gazette of the Republic of Rwanda n° Special of 07 June 2006); see also Law n° 65/2013 of 27/08/2013 establishing the Institute of Legal Practice and Development (ILDP) and determining its mission, organization and determining the mission, organization and functioning (Official Gazette of the Republic n° 41 of 14 October 2013).

²⁹ Achievement Report.

³⁰ J. Finnis, *Natural Law and Natural Rights* (Oxford University Press 1980) 165-177; S. Walt, 'Eliminating Corrective Justice' (2006) 92 Va. L. Rev. 1311, 1311-12; S. Fleischacker, *A short History of Distributive Justice* (Harvard University Press 2004), 1.

³¹ E. Rurangwa, 'Land Tenure Reform: The Case Study of Rwanda' (Conference paper on 'Land Divided: Land and South African Society, in Comparative Perspective', University of Cape Town, in 24 - 27 March 2013)

The demobilization of ex-combatants and professionalization of the military was another challenge. Immediately after the genocide, the new government made a deliberate decision to integrate soldiers from the former government army into the Rwandese Patriotic Army (RPA) to create a new national armed force. Both sides had mobilized a large number of fighters and it was unattainable to maintain such a big force after the conflict. Moreover, some of the soldiers had participated in the commission of the genocide and other crimes, and could not be kept in the new army. This required a thorough process, and it is reported that over 50.000 former combatants have so far been successfully demobilized and reintegrated back to civilian life.³²

Legal and justice systems do not operate in vacuum; there is a need to restore hope and mutual trust among citizens through all possible social events, for instance by encouraging sports and concerts that bring ordinary people together. The government adopted different outreach initiatives encouraging all citizens, and more specifically victims and perpetrators, to reconcile. Different social events were encouraged from early on (and still are), not only functioning as entertainment, but also as platforms of social cohesion. The RPA used sports competition as one of the outreach activities, even before the end of the genocide and the civil war. The RPA had a soccer team, the *Armée Patriotique Rwandaise* Football Club (one of the best soccer teams in the country today), and other sports teams that used to organize and participate in competitions with some other local teams, especially during ceasefire periods. The spirit of outreach through sports was continued and more strengthened after the genocide. For instance, Rwanda's Rayon Sports, one of the oldest football clubs in Rwanda (founded in 1968), won the Council of East and Central Africa Football Association Club Cup Championship in 1998, just four years after the genocide. This event brought together all football fans, irrespective of their bitterness, to celebrate. Other social and economic initiatives include *Umuganda*, *Ingando*, *Itorero Ubudehe* and *Gira Inka*, which are based on Rwanda's tradition and continue to play a big role in inter-group interactions. *Umuganda* is a monthly general community cleaning exercise, where every last Saturday of the month citizens within a neighborhood come together to clean their streets, sewages and water drainage systems, repair roads and discuss issues particular to their localities. *Ingando* and *Itorero* are platforms where self-reliance, history, nationalism and moral values of integrity and taboos are taught. *Ubudehe* is an initiative that employs the most poor in public works. And *Gira Inka* is an initiative that gives livestock (mainly cows) to poor families and encourages those who are most fortunate to support the less fortunate members of their communities.

The issue of reparations still remains the biggest challenge. The aforementioned 1996 law punishing the crime of genocide, crimes against humanity and war crimes, also included provisions for victims to claim compensation – civil damages. Trials were conducted and judges awarded hefty sums of money in compensation to victims, which both the perpetrator and the state were under the obligation to pay. However, in reality, most of the perpetrators were indigent persons and unable to pay compensation, and the government tacitly refused to assume the responsibility of the predecessor government. Ever since, all succeeding laws introduced an article referring to a special law that is going to deal with issues of reparations, yet until today, that law is still to be adopted. One of the recurring arguments from some government officials is that the post-genocide government is doing a lot through the Fund for Neediest Survivors of Genocide in Rwanda. However, some victims and survivors argue that assistance directed towards the most vulnerable among them cannot replace their individual right to compensation.

http://www.landdivided2013.org.za/sites/default/files/rurangwa%20Land%20Tenure%20Reform_Rwanda%20Case.pdf accessed on June 19, 2016.

³² Rwanda Demobilization and Reintegration Commission (see demobilization statistics at <http://www.demobrwanda.org.rw/81.0.html> accessed 12 June 2016); see also Lars Waldorf, 'Transitional Justice and DDR: The Case of Rwanda' International Center for Transitional Justice (2009) 8-14 <https://www.ictj.org/sites/default/files/ICTJ-DDR-Rwanda-CaseStudy-2009-English.pdf> accessed 12 June 2016.

4. Context Matters

This section emphasizes the importance of considering context and realities in every post-conflict society. We can propose different good solutions and laws to adopt in South Sudan, but if such suggestions are not rooted in the context, culture and realities of the people of South Sudan, there is a likelihood of causing a conflict of values, because while justice is a shared value, different people experience it differently. Therefore, it is worth making some general observations on a few controversial aspects of transitional justice systems.

Prosecution versus amnesty/impunity. Rwanda's new government insisted on prosecution of all suspected perpetrators of genocide and other crimes against humanity on the grounds that previous governments had institutionalized impunity,³³ which to their conviction contributed to the perpetuation of 1994 genocide against the Tutsi. In contrast, South Africa preferred amnesty (or impunity, depending on where you stand on issues) for individuals whose confessions to political crimes were genuine.³⁴ South Africa's preference of amnesties was partly motivated by a belief that if the Africa National Congress (ANC) insisted on prosecution of 'whites', there was a likelihood of a civil war.³⁵ As Mark Evans notes, "we may not be able to punish war criminals who deserve to be punished because the violent backlash that would result is something that it is more important to avoid (...)." ³⁶ However, the choice between prosecution and amnesty is still very controversial, and it is difficult to conclude that either of the two is the best solution for a post-conflict society. While some individuals argue that there is no lasting peace without justice – which is often equated to criminal prosecution³⁷ – others argue that there is no evidence to support that claim.³⁸ International scholars too often claim that the crimes are international, and they therefore have a stake in the discussion about the response. But from a victim's point of view, it is really not an international crime at all, but a crime against him or her personally and against his or her spouse, children, siblings, friends, etc. It is therefore important that the victim understands what the response is, and we scholars should be courageous enough to accept that reality. There is a need to thoroughly look into what could bring the most benefits to the citizens of South Sudan given their context and realities. Transitional justice mechanisms should be context-driven, and should therefore first and foremost be locally owned and inspired.³⁹

The choice between amnesty and prosecution in the case of South Sudan seems to be relatively clear now, as the framework for transitional justice is well provided for in the peace agreement. The Agreement on the Resolution of Conflict in South Sudan (ARCSS) provides for the creation of three transitional justice institutions, namely: the Commission for Truth, Reconciliation and Healing; an independent hybrid judicial body, to be known as the Hybrid Court for South Sudan (HCSS); and the Compensation and Reparation Authority.⁴⁰ It is too early to make judgements on the success or failure of these institutions. However, there are some signs of frustration from within and among members of the international community about reneging on the full implementation of the agreement. On 29 January 2016, the Chairperson of the Joint Monitoring and Evaluation

³³ After every major massacre of Tutsi civilians, previous governments enacted an amnesty law : (*Loi du 06 Août 1962 portant amnistie général des infractions politiques ; Loi du mai 1963 portant amnestie générale des infractions politiques commises entre le 1er octobre et le 1er juillet 1962 ; Loi no. 54 BIS/91 Du 15 novembre 1991 portant amnestie de certaines infractions*).

³⁴ Gross (2004), 72-73.

³⁵ F Haldemann, 'Drawing the Line: Amnesty, Truth Commissions and Collective Denial' in R Letschert and other (eds), *Victimological Approaches to International Crimes: Africa*, (Intersentia, Cambridge 2011) 278-279; D Venema, 'Transitional Shortcuts to Justice and National Identity', 95.

³⁶ M Evans, 'At War's End: Time to Turn to *Jus Post Bellum*?' in C Stahn, JS Easterday, & J Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations*, (OUP, Oxford 2014) 26-42, 40.

³⁷ Human Rights Watch, 'Selling Justice Short: Why Accountability Matters for Peace' (report) (7 July 2009) <https://www.hrw.org/sites/default/files/reports/ij0709webwcover_1.pdf> accessed 12 May 2016.

³⁸ Jack Snyder and Leslie Vinjamuri, 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice' (2003)28(3) International Security.

³⁹ See also DP Thomas and R Gardner, 'Restorative Justice in Post-Conflict Northern Uganda: Exploring Reconciliation and Reconstruction through Transitional Justice Mechanisms' (2014) 3 Online J Afr Aff 95.

⁴⁰ Agreement on the Resolution of the Conflict in the Republic of South Sudan, Addis Ababa, Ethiopia, 17 August 2015, Chap. V, pp 40-45.

Commission (JMEC) for the ARCSS to the African Union Peace and Security Council reported that, “[i]mplementation of the Agreement on the Resolution of the Conflict in the Republic of South Sudan (the Agreement) is lagging far behind schedule.”⁴¹ In his report on technical assistance provided to the African Union Commission and the Transitional Government of National Unity for the implementation of Chapter V of the ARCSS, the UN Secretary General stresses the importance of the transitional government to show willingness to support and cooperate with regional and international organizations for the success of transitional justice institutions.⁴² It is fair to argue that any post-conflict society analyst should have anticipated this slow implementation. The frustration might be resulting from the fact that there is little progress, but it is also fair to argue that the period of 30 months given to the transitional government is a short period to accomplish any tangible success in a complex transitional justice process. There is a tendency to forget that parties (former enemies) forming the new government need time to build the necessary trust (heal and reconcile) to be able to work for the rest of the country. It would be pretentious to assume that the new government will provide healing and reconciliation to a nation when individuals constituting that government are still suspicious of each other, and trust is not something achievable overnight. As Roland Paris notes, “transforming war-shattered states into market democracies is a basically sound idea, but (...) pushing the process too quickly can have damaging and destabilizing effects.”⁴³ The international actors and others interested in seeing South Sudan succeed should spend more time explaining to the top leadership the importance of owning the process. Implementation will certainly be very difficult to undertake without the enforcement role of the government. But if the government fails to assume this responsibility, non-state actors will, and when it happens the government will lose the opportunity to influence the outcome.

Management of antagonistic groups. Transitioning legal and justice systems ought to reflect aspirations of the new vision – leading the post-conflict society to peaceful co-existence. Again, the choice here is context based: whereas Rwanda adopted the promotion of oneness, the South African approach is unity in diversity. If you read the preambles of the constitutions of Rwanda and South Africa, you immediately see the differences in vision between the two countries. South Africa recognizes their diversity and insists that the country “belongs to all who live in it”.⁴⁴ Rwanda emphasizes shared elements such as common language, culture and history.⁴⁵ Rwanda has been adopting different policies to achieve ‘oneness’ and encourage the concept of ‘*Ndi Umunyarwanda*’ (meaning we are all Rwandans), and different laws criminalizing genocide ideology, genocide denial, discrimination and hate speech are in place to ensure that no one goes astray.⁴⁶

Local ownership. To ensure sustainability, local support and addressing the needs of the victims, transitioning legal and justice systems should be nationally driven. External support should only be welcomed when it is intended to support local initiatives. An internationally driven process is prone to several problems, including poor knowledge of the local context, donor fatigue, adopting quick fixes and universalization of every solution.⁴⁷ This is not to say that external support is not important. Rwanda’s legal and justice systems have benefited from external support such as the ICTR, different development partners, international Non-Governmental Organizations (NGOs) and individuals. It is this author’s opinion that local actors ought to adopt

⁴¹ Report from the Chairperson of the Joint Monitoring and Evaluation Commission (JMEC) for the Agreement on the Resolution of the Conflict in the Republic of South Sudan to the African Union Peace and Security Council (PSC), Addis Ababa, 29 January 2016 (Executive report).

⁴² United Nations Security Council, ‘Report of the Secretary-General on technical assistance provided to the African Union Commission and the Transitional Government of National Unity for the implementation of chapter V of the Agreement on the Resolution of the Conflict in the Republic of South Sudan’ (S/2016/328), §24.

⁴³ R Paris, *At War’s End: Building Peace After Civil Conflict* (Cambridge University Press 2004).

⁴⁴ The Preamble of the Constitution of the Republic of South Africa, as adopted on 8 May 1996 and Amended on 11 October 1996 by the Constitutional Assembly.

⁴⁵ The Preamble (Considering) of the Constitution of the Republic of Rwanda of 2003 Revised in 2015 (Official Gazette n° Special of 24/12/2015).

⁴⁶ Law n° 84/2013 of 11/09/2013 on the crime of genocide ideology and other related offences (Official Gazette of the Republic of Rwanda n°43 bis of 28/10/2013).

⁴⁷ Paris and Sisk (2007); Rama Mani (1999) Contextualizing police reform: Security, the rule of law and post-conflict peacebuilding, 6(4) International Peacekeeping 9.

measures that are inclusive in both preparation and implementation. However, inclusion does not mean popularism or that every citizen has to participate, but it is to stress the importance of ensuring that at least every sector in the country is represented at the decision-making table.

Expect criticisms. Whatever decision or mechanisms of transitional justice you adopt, expect criticisms. There is no legal or justice system that is perfect, let alone capable of fixing all problems in a post-conflict society, and it is difficult to find a mechanism capable of addressing prosecution, forgiveness, reconciliation, reparations and truth.⁴⁸ I can think of no situation as in Rwanda, which had to deal with such horrendous crimes on such a big scale. The person who knows the better answer to the challenges Rwanda faced deserves the Nobel Peace Prize for at least the next decade. Venema notes that “[t]ransitional law is always imperfect, deficient in some way: provisional, partial, not entirely democratic (...), not entirely fair (...), and not very clear (...).”⁴⁹ and Hayner argues that prosecution of criminals is the most difficult undertaking.⁵⁰ Personally, I think that providing reparations is the most difficult aspect of all justice measures in transitional societies.⁵¹ What is important is to use criticisms to improve; after all, as Aeyal Gross notes, “societies are always in transition and these issues are never off of the social agenda.”⁵²

5. Conclusion and Recommendations

Transitioning legal/justice systems in post genocide Rwanda have been characterized by a combination of an inward interrogation and international support. To succeed, both have benefited from a strong government leadership and people’s resilience. If South Sudan is to learn some lessons from the context of Rwanda, a few things are important to consider. The process of transitional justice needs to address first things first. At the moment, demobilization and reintegration of ex-combatants should be the priority. There is a need to understand that mixing former combatants goes beyond mixing individual soldiers (numbers), and that there is a need to design approaches that touch their souls and hearts, inculcating in them shared values, the spirit of working together for one nation as opposed to working for either their commanders or communities. Certainly this is the most complicated task because it cannot be achieved without attaining political trust and reconciliation. The minimum is to ensure that political leaders on both sides understand the importance of working together to achieve peace, rule of law and good governance. This will require each political group to demonstrate to each other that the time of belligerence is over. It is after achieving political reconciliation that everything else will follow.

The new government cannot afford to ignore the need for some transitional justice initiatives. In South Sudan, like in many other post-conflict situations, the international community learned about the commission of serious human rights violations even before the conflict came to an end, either through (inter)national NGOs or other independent channels,⁵³ and most probably some actors have articulated some measures necessary to

⁴⁸ MM Kaminski & M Nalepa, ‘Judging Transitional Justice: A New Criterion For Evaluating Truth Revelation Procedures’ (2006) 50 JCR 383; FM Ndahinda & A Muleefu ‘Revisiting the Legal, Socio-Political Foundations and (Western) Criticisms of Gacaca Courts’ in T Bennett and others (eds) *African Perspectives on Tradition and Justice* (Intersentia, Morsel 2012) 18.

⁴⁹ Venema, ‘Transitional Shortcuts to Justice and National Identity’, 99-100.

⁵⁰ PB Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2nd ed., Routledge, London/New York 2011) 8-9.

⁵¹ Alphonse Muleefu, *Reparation for Victims of Collateral Damage: A Normative and Theoretical Inquiry* (Wolf Legal Publishers, Oisterwijk 2014) 208; See also the Office of the United Nations High Commissioner for Human Rights, ‘Rule of Law Tools for Post-Conflict Societies: Reparations programmes (HR/PUB/O8/1)’ (Geneva, 2008) 15-35.

<<http://www.ohchr.org/Documents/Publications/ReparationsProgrammes.pdf>> accessed 13 May 2016.

⁵² Gross (2004), 51; see also GN Fourlas, ‘No Future without Transition: A Critique of Liberal Peace’ (2015) 9 J/7/109.

⁵³ Read Human Rights Watch, ‘“We Can Die Too”: Recruitment and Use of Child Soldiers in South Sudan’ (report) (December 2015) <https://www.hrw.org/sites/default/files/report_pdf/Southsudan1215_4.pdf> accessed 1 July 2016; R Willems & DK Deng, ‘Access to Justice in South Sudan: Intersections of Truth, Justice and Reconciliation in South Sudan’ (policy brief (May 2016) <<http://www.upeace.nl/cp/uploads/downloadsprojecten/Access-to-Justice-in-South-Sudan---Policy-Brief.pdf>> accessed 1 July 2016; UNDP South Sudan, ‘New Beginnings: A Way Forward for Transitional Justice in South Sudan’ (Conference Report and Analysis) (February 2016)

<http://www.ss.undp.org/content/South_sudan/en/home/library/South-sudan--other-reports/transitional-justice-

hold perpetrators accountable. The most pressing issue now is for the transitional government to undertake some steps towards finding solutions and implement the mechanisms that were adopted in the peace agreement. Certainly, this is easier said than done because prescribing measures or providing funding is one thing and implementation is another. This is where it is required for the transitional government to contextualize those mechanisms. Let us use the metaphor of a hungry stomach; you might know for sure that you need to eat, and probably there are different types of food that other people are eating, but you cannot eat whatever that is available, you will go through the menu and select something that is not only digestible but also relative to your culture and other preferences. The same with transitional justice, the emphasis should be on finding solutions that will best respond to the interests of all victims and the general population, including perpetrators and their constituencies. Therefore, transitional justice measures need to respect the following interwoven requirements: (a) the requirement of proximity; transitional justice initiatives need to be close to the ordinary people concerned in terms of location and understanding, (b) the practicability requirement; transitional justice measures ought to be implementable considering available resources and acceptable among all stakeholders, (c) utility of the initiative; before a mechanism is adopted, proponents should first answer whether it will respond to the problems, if it will make the situation better, or whether it will exacerbate the conflict.

Bibliography

- Center for Transitional Justice, 'what is transitional justice?' <<https://www.ictj.org/about/transitional-justice>> accessed 6 May 2016
- Evans, M, 'At War's End: Time to Turn to *Jus Post Bellum*?' in C Stahn, JS Easterday, & J Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (OUP, Oxford 2014)
- Finnis, J, *Natural Law and Natural Rights* (Oxford University Press 1980)
- Fleischacker, S, *A short History of Distributive Justice* (Harvard University Press 2004)
- Fourlas, GN, 'No Future without Transition: A Critique of Liberal Peace' (2015) 9 *IJT* 109
- Gasamagera, W, 'The Constitution Making Process in Rwanda: Lessons to be Learned' paper presented to the 7th Global Forum for Reinventing Government, Vienna, Austria, 26-29 June 2007 <<http://unpan1.un.org/intradoc/groups/public/documents/un/unpan026620.pdf>> accessed 19 June 2016.
- Gross, AM, 'The Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel' (2004) 40 *Stan. J. Intl L.* 47.
- Government of Rwanda: Supreme Court, 'Report on the Achievement of the Judiciary of Rwanda for the past ten Years (2004-2014), August 2014
- Haldemann, F, 'Drawing the Line: Amnesty, Truth Commissions and Collective Denial' in R Letschert and other (eds.), *Victimological Approaches to International Crimes: Africa*, (Intersentia, Cambridge 2011)
- Hayner, PB, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2nd edn, Routledge, London/New York 2011)
- Haveman, R, 'Rule of Law Quick Scan Rwanda: Prospects and Challenges' (2012) *Hiil*, 29 <http://www.hiil.org/data/sitemanagement/media/Quickscan_RuleofLaw_Rwanda_digitaal_130812.pdf> accessed on 19 June 2016
- Human Rights Watch, "'We Can Die Too': Recruitment and Use of Child Soldiers in South Sudan', (Report) (December 2015) <https://www.hrw.org/sites/default/files/report_pdf/Southsudan1215_4.pdf> accessed 1 July 2016
- Human Rights Watch, 'Selling Justice Short: Why Accountability Matters for Peace' (report) (7 July 2009) <https://www.hrw.org/sites/default/files/reports/ij0709webwcover_1.pdf> accessed 12 May 2016
- Kaminski, MM, & Nalepa, M, 'Judging Transitional Justice: A New Criterion For Evaluating Truth Revelation Procedures' (2006) 50 *JCR* 383

<[conference-report.html](#)> accessed 1 July 2016; UN Mission in South Sudan, 'The State of Human Rights in the Protracted Conflict in South Sudan' (report) (December 2015) <http://www.ohchr.org/Documents/Countries/SS/UNMISS_HRD4December2015.pdf> accessed 1 July 2016.

- Mani, R, (1999) Contextualizing police reform: Security, the rule of law and post-conflict peacebuilding, 6:4 International Peacekeeping 9.
- Muleefu, A, *Reparation for Victims of Collateral Damage: A Normative and Theoretical Inquiry* (Wolf Legal Publishers, Oisterwijk 2014)
- Ndahinda, FM, and Muleefu, A, 'Revisiting the Legal, Socio-Political Foundations and (Western) Criticisms of Gacaca Courts' in T Bennett and others (eds) *African Perspectives on Tradition and Justice* (Intersentia, Mortsels 2012).
- Office of the President of the Republic of Rwanda, 'Report on the Reflection Meetings Held in the Office of the President of the Republic from May 1998 to March 1999', August 1999.
- Office of the United Nations High Commissioner for Human Rights, 'Rule of Law Tools for Post-Conflict Societies: Reparations programmes (HR/PUB/08/1)' (Geneva, 2008)
<<http://www.ohchr.org/Documents/Publications/ReparationsProgrammes.pdf>> accessed 13 May 2016.
- Paris, R, *At War's End: Building Peace After Civil Conflict* (Cambridge University Press 2004).
- Paris, R & Sisk, T D, 'Managing Contradictions: The Inherent Dilemmas of Postwar Statebuilding' [2007] International Peace Institute, 4 <<https://www.ciaonet.org/catalog/16371>> accessed 11 May 2016.
- Republic of Rwanda: National Service of Gacaca Courts, 'Gacaca Courts in Rwanda', Kigali June 2012
- The Republic of Rwanda: Ministry of Public Service and Labour, 'Functional Review Report. Supreme Court' (April, 2008)
<[http://www.mifotra.gov.rw/fileadmin/templates/downloads/SUPREME%20COURT%20\(Eng\).pdf](http://www.mifotra.gov.rw/fileadmin/templates/downloads/SUPREME%20COURT%20(Eng).pdf)> accessed 4 July 2016.
- Rugege, S, 'Judicial Reform, Public Confidence and the Rule of Law in Rwanda' Keynote address to the Qatar Law Forum, London, 28 Feb., 2013 <http://www.qatarlawforum.com/wp-content/uploads/2012/01/Rugege_Speech_Legal_Reforms_and_the_Rule_of_Law_in_Rwanda.pdf> accessed on June 19, 2016.
- Rurangwa, E, 'Land Tenure Reform: The Case Study of Rwanda', Conference paper on 'Land Divided: Land and South African Society, in Comparative Perspective', University of Cape Town, in 24 – 27 March 2013
http://www.landdivided2013.org.za/sites/default/files/rurangwa%20Land%20Tenure%20Reform_Rwanda%20Case.pdf accessed on June 19, 2016.
- Snyder, J & Vinjamuri, L, 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice' (2003) 28:3 International Security.
- Straub, S, 'Quotes From Our Founding Fathers' <<http://thefederalistpapers.integratedmarket.netdna-cdn.com/QuotesFromOurFoundingFathersVolume1.pdf>> accessed 29 June 2016, 62.
- Teitel, RG, 'Transitional Justice Genealogy' (2003) 16 Harv. Hum. Rts. J. 69.
- Thomas, DP & Gardner, R, 'Restorative Justice in Post-Conflict Northern Uganda: Exploring Reconciliation and Reconstruction through Transitional Justice Mechanisms' (2014) 3 Online J Afr Aff 95.
- UNDP South Sudan, 'New Beginnings: A Way Forward for Transitional Justice in South Sudan' (Conference Report and Analysis) (February 2016)
<http://www.ss.undp.org/content/South_sudan/en/home/library/South-sudan--other-reports/transitional-justice-conference-report.html> accessed 1 July 2016
- United Nations Mission in South Sudan, 'The State of Human Rights in the Protracted Conflict in South Sudan' (report) (December 2015)
<http://www.ohchr.org/Documents/Countries/SS/UNMISS_HRD4December2015.pdf> accessed 1 July 2016.
- United Nations Security Council, 'Report of the Secretary-General on technical assistance provided to the African Union Commission and the Transitional Government of National Unity for the implementation of chapter V of the Agreement on the Resolution of the Conflict in the Republic of South Sudan' (S/2016/328).
- United Nations Security Council, 'Report of the Secretary General on the rule of law and transitional justice in conflict and post-conflict societies (S/2004/616 of 23 August 2004)
- Venema, D, 'Transitional Shortcuts to Justice and National Identity' (2011) 24 Ratio Juris 88.
- Waldorf, L, 'Transitional Justice and DDR: The Case of Rwanda', International Center for Transitional Justice, (2009) <<https://www.ictj.org/sites/default/files/ICTJ-DDR-Rwanda-CaseStudy-2009-English.pdf>> accessed 12 June 2016.

Walt, S, 'Eliminating Corrective Justice' (2006) 92 Va. L. Rev. 1311

Willems, R & Deng, DK, 'Access to Justice in South Sudan: Intersections of Truth, Justice and Reconciliation in South Sudan' (policy brief (May 2016)

<<http://www.upeace.nl/cp/uploads/downloadsprojecten/Access-to-Justice-in-South-Sudan---Policy-Brief.pdf>> accessed 1 July 2016

Constitutional Governance in a Human Rights State

Elfaki Chol Lual

Introduction

Undoubtedly, the existence of the state is an essential matter in the life of human beings. The state is the custodian of a society and its order because unrest and chaos can be prevented through the state's public authorities, established according to the constitution and accepted by the people of such society. Hence, authority is the basis of any organized society, whether it is formal statutory authority or non-statutory authority. For this reason, it is not imaginable to have order of system in a given group without authority, because the purpose of such authority is to achieve and protect the interests of the individuals who compose the state.

When the state authorities are the ones who enact, enforce and implement laws, those authorities may violate the constitution by enacting or enforcing legislation which is contrary to the constitution and reflects their own interests. Subsequently, if the government acts in violation of the constitution, which is the supreme law of the state, the government may lose its legitimacy.

On the other hand, the existence of a state without a constitution from which the government derives its legitimacy is unimaginable, because government without a constitution could be considered as power without a right. A constitution is not a work of the government and it should not be imposed on the people, but it is a work of the people themselves and they must be involved in the making, formulation and promulgation of their constitution and by doing so, they form their constitutional government to keep the order and protect their rights.

To have constitutional governance, the state constitution must contain limits on the power of the government and its officials and must guarantee and protect the rights and freedoms of the people. Because a constitutional government derives its existence from the constitution, all its conducts must conform to the provisions of this constitution. Hence, the main objective of the existence of the state is to guarantee human rights with effective legal and constitutional mechanisms for their protection. In this case, the state could be described as a human rights state.

This paper, firstly, discusses the concept of constitutional governance. Secondly, it investigates the conditions or basis required for the establishment of a constitutional government or system. Finally, the paper provides conclusions on the need for constitutional governance and recommendations on how constitutional governance could be promoted in South Sudan.

1. Concept of Constitutional Governance

Before discussing the concept of constitutional governance as such, it is necessary to understand the meaning of the constitution. The constitution of a state is the system of laws, customs and conventions which define the composition and powers of the government organs. It regulates the relations between the various state branches and between the state and its citizens.

The constitution sets out the framework and the principal functions of the government organs and declares the principles governing the operations of those organs; it binds all parts of the country and the people together. It safeguards the basic rights and freedoms of the people by incorporating a Bill of Rights in the constitution, and

provides legal mechanisms for their enforcement through an independent judiciary and other institutions such as human rights commissions.

Having explained the meaning and importance of the constitution in the life of the country above, this section now turns to the concept of constitutional governance. Simply, constitutional governance implies limitations on the government to prevent arbitrary and abusive use of power, and to ensure the rule of law. The main objective of the government is to protect human rights and support democratic procedures in elections and public policy making in order to achieve the community's shared purposes. In point of fact, people grant power to the government to work effectively for the public interest: an effective government is then empowered by the people to secure their rights, but at the same time, the government's power is limited for the sake of protecting people's rights.

Further, the constitution outlines the most important matters, such as, procedures for electing, appointing and replacing government officials, as well as methods for constitutional amendments. The government, as a creature of the people's will, must observe those matters.

Moreover, the constitution is the supreme law of the country and provides for the basic rules on which the government is based, outlining the fundamental rights and freedoms for the individuals and determining the functions and responsibilities for legislative, executive and judicial authorities as it puts limits on their activities. A constitution is, therefore, considered as the most important document that organizes the relationship among different government authorities and between them and the people. For that matter, we cannot imagine the existence of a government without a constitution; if so, it would be considered as power without a right.

In that sense, a constitution is not a gift or work of the government, but of people making their government, because people in a democratic state are the main source of the power and legislation. As argued by Tom Paine, the existence of the constitution comes before the government:

A constitution is a thing antecedent to a government, and a government is only the creature of a constitution [...] A constitution is not the act of a government, but of a people constituting a government; and government without a constitution, is power without a right.¹

That is the meaning of constitutional governance, and one of the foundations of that democratic system is that, the people should govern themselves through their elected representatives, because the people are the source of power while the state, its officials and organs are the representatives of the people and exercise on their behalf. Therefore, a democratic constitution is a constitution which gives the majority a right to rule the country directly or indirectly. So, a democratic government is the best means to ensure the responsibility of the government towards the people effectively and to avoid an arbitrary government which rules the country according to its whim without considering the interests of the people.

The modern constitutional jurisprudence, unanimously, agrees that each country has a constitution; nevertheless, not all countries are constitutional countries or have constitutional governance required for a democracy. In other words, the existence of a written constitution in a country does not mean that a country has constitutional governance. Because, as mentioned above, a constitutional state is a state that limits the power of the government in favor of individuals' rights and freedoms.

This is the concept of the human rights state and it is the real constitutional democracy where the limited power prevails and where the freedoms of citizens are protected. Where checks and balances on government's powers and freedoms of its citizens prevail, the system of legal government or limited government will also prevail.

In addition, a legal government is subjected to the rule of law, which means subjection of all government branches to the law. This implies that the government must limit all its activities by the law, like any ordinary

¹ AW Bradley & KD Ewing, *Constitutional and Administrative Law* (11th edn Longman, London, 1993), 5.

individual, to achieve the doctrine of the supremacy of the rule of law to all. In a limited government, all powers are distributed to various government units according to their functions.

The government is, commonly, understood to have three main functions, which are legislative, executive and judicial. Therefore, these powers must be distributed to different independent institutions, each of them exercising one of the functions. As a result, the limited government stands on the doctrine of separation of powers, while the absolute government aims to concentrate all powers in one hand or authority under which individual rights and freedoms may not be guaranteed.

As mentioned above, a country may have a constitution to organize its powers, but a democratic government guarantees individual freedoms through a constitution that reflects the will of the people and their administrative, social, economic and cultural aspirations and respect for human rights. This system is based on a number of principles such as: a) the supremacy of the people through making laws, periodical, free, fair and transparent elections and the right of the majority to govern with respect to the right of the minority; b) the principle of equality among the people, meaning that all people are equal and have the same rights and freedoms regardless of their religions, languages, races or political affiliations; c) the doctrine of separation of powers among the main government branches; and d) peaceful change of government and political pluralism.

Based on the above, we cannot imagine the existence of constitutional governance in a country where its system of government does not match with the democratic system criteria and does not guarantee individuals their basic rights and freedoms.

The Transitional Constitution of the Republic of South Sudan of 2011 includes the concept of constitutional governance by making a separate chapter on freedoms and individual rights under the title “Bill of Rights”. It introduces different categories of rights from Article 9 to Article 34. The constitution also states that South Sudan is to be governed on the basis of a decentralized democratic system and that it is founded on justice, equality, respect for human dignity and advancement of human rights and fundamental freedoms.²

All in all, there are common characteristics that can be analyzed to compare the existence of a written constitution and its implementation, in order to find out whether there is a constitutional government or not. The following characteristics are applicable to all democratic constitutions:

1. Structure of government
2. Distribution of powers among branches of government
3. Limitations on powers of the branches of government
4. Guarantees of human rights
5. Procedures for electing, appointing and replacing government officials
6. Methods of constitutional amendments

From the above explanation, it is understandable that constitutional governance means any system of government that adopts and implements the concept and theory of democracy, since there is a difference between a country with a constitution and constitutional system or governance. So, a constitutional state needs to have a constitutional system. But that alone is not enough to describe a state as a constitutional state, as there are number of other conditions that must be satisfied in order for it to have a true democratic and constitutional system. Those conditions will be explained in the following section of this paper.

2. Requirements for Constitutional Governance

As discussed above, the existence of a written constitution in a given country does not imply that the constitution is implemented or the principle of the rule of law prevails. For a country to be described as a human rights state there must be full and complete implementation and enforcement of the constitution,

² Transitional Constitution of the Republic of South Sudan 2011, art 1(4)-(5).

which means that there are certain requirements and conditions that must be fulfilled and satisfied first. Those requirements and conditions are discussed below.

2.1. Sovereignty of the People

Sovereignty of the people means that, the people of the country are the source of power and possess the sovereignty in the country, thus, they should not be deprived from this right. The most important expression of this democratic principle is the right of the people to select and elect their representatives in the government authorities to exercise political powers on their behalf. In other words, it is a right of every citizen to participate in political life according to the constitution and procedural laws organizing the political life in the country. Therefore, people should be allowed to participate in government affairs and the laws in the country must reflect the will of the majority of the people in parliament. Accordingly, a country cannot be described as democratic unless elections are fair, free and transparent with participation of all citizens and competition among political parties or candidates.

To strengthen this principle, usually, the constitution contains a preamble to indicate the sources from which the constitution springs into existence and derives its power, often phrased in words such as “we the people of...”.³

In the Transitional Constitution of the Republic of South Sudan, 2011, for instance, it appears from the word used that, the people of South Sudan are the source of the constitution, i.e. “we, the people of South Sudan”.⁴ Consequently, the preamble declares that the people of South Sudan have adopted and given themselves this constitution in exercise of their sovereign rights. Moreover, the Constitution says that, “Sovereignty is vested in the people and shall be exercised by the State through its democratic and representative institutions established by this Constitution and the law”.⁵ In addition, the Constitution – in confirming that idea, provides that:

*This Constitution derives its authority from the will of the people and shall be the supreme law of the land. It shall have a binding force on all persons, institutions, organs and agencies of government throughout the country. The authority of government at all levels shall derive from this Constitution and the law. The state's constitutions and all laws shall conform to this Constitution.*⁶

The Constitution also considers the will of the people as one of the sources of legislation in South Sudan.⁷

Another reference to prove the sovereignty of the people was decided in an Indian case of *Motilal v. State of Undra Pradesh*.⁸ It was held that the framers of the constitution attached importance to the sovereignty of the people though the constitution was not directly voted for by the people. It is the resolve of the people of India to constitute India into a sovereign democratic republic and from the preamble it is clear that the framers of the constitution attached importance to the sovereignty of the people.⁹

As a matter of fact, laws in any society are the product of human decisions, not the gift of an all perfect deity. And because the people are the main source of legislation, all laws must reflect the will of the people. Based on this logic, it has become general principle that a constitution should not be imposed on the people by force, but the people themselves must be involved in the formulation and promulgation of their constitution. A constitution normally reflects the beliefs and political aspirations of those who have framed it and it is negotiated by all the people, including various social stakeholders, such as political parties and civil society organizations.

³ SR Myneni, *Constitutional Law I* (Asia Law House, Hyderabad 2011), 183.

⁴ Transitional Constitution of the Republic of South Sudan 2011, preamble.

⁵ Ibid, art 2.

⁶ Ibid, art 3.

⁷ Ibid, art 5.

⁸ AIR 1951 ALL 257.

⁹ SR Myneni (2011), 170.

2.2. The Existence of the Constitution and its Supremacy

As discussed above, the constitution comprises a set of legal principles that determine the structure of the government, and put in place limitations or restrictions on the government's powers to guarantee the fundamental rights and freedoms of the people. For that reason, the existence of the constitution in a country means the establishment of a political system in that country, as a constitution establishes different authorities, determines their functions and outlines how those functions shall be exercised. Also, a constitution determines the system of government in the state, how government officials are selected and the limits of their powers, as well as the rights and duties of the citizens. Consequently, through the legal restrictions outlined in it, the constitution's existence forms the basis of subjection of the government to the law. Hence, it is the first principle of the government in a human rights state.

If the governing authority, for instance, works beyond the constitution or outside the scope of the constitutional rules which were the basis for its existence, it would wipe out the basis of its legal existence; hence it will lose its legal description. In this case, it would have no legal capacity because it is unimaginable to have legal state without constitution.

As follows from the above, the constitution and its provisions must be respected and no government authority should be allowed to infringe on provisions of the constitution. Amendments can only be made using the methods provided in the constitution and those procedures must be respected.

To achieve supremacy of the constitution, the availability of the political will from the political leadership and awareness of the public are essential matters, since they are critical in the implementation of the constitution. This trend was noted in a report by the Uganda Commission of Inquiry into violations of Human Rights in Uganda, which reported that:

A country may have the best written bill of rights in the world, but if the state organs, and institutions and, leaders at all levels, and every individual in the country are not committed and do not pay serious attention to them. Human rights as so guaranteed are not worth the paper (s) they are written on.¹⁰

To that effect, the Universal Declaration of Human Rights (UDHR) of 1948 contains a provision that states:

Every individual and every organ of society shall strive by teaching and education to promote respect for human rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.

In short, the principle of supremacy of the constitution means that, no organ of the state – legislature, executive or judiciary – is supreme, but that the constitution in the country is supreme. Thus, all laws must conform to the constitutional provisions and no law issued by the parliament can contradict the constitution. Otherwise it would be considered illegal, because the constitution is the supreme law in the country and stands on the top of the legal hierarchy. To that effect, it was decided in Sudanese case of *Nasr Abdel Rahman Mohamed v. The Legislative Authority* that:

If a law is inconsistent with a constitutional provision, court shall not apply it. The constitution which emanates from the people has a special nature distinguishable from ordinary laws, which gives it superiority, supremacy and sanctity. Constitutional provisions should, therefore, in case of conflict, prevail over all legislation and not only over that preceded it.¹¹

¹⁰GW Kanyeihamba, *Constitutional and Political History of Uganda From 1894 to Present*, (2nd ed Law Africa Publishing Ltd, Nairobi 2010), 280

¹¹ S.L.J.R (1974)

In South Sudan, a clear example for that was when the President of the Republic issued a decree re- dividing South Sudan into 28 states.¹² That decree was contradicting the Constitution which states that “the territory of South Sudan is composed of ten states governed on the basis of decentralization”¹³. Subsequently, the National Legislature amended the article to incorporate the decree into the Constitution and avoid contradiction.¹⁴ That was because this principle is clearly mentioned in South Sudan’s Transitional Constitution, in which neither National Executive, National Legislature nor Judiciary is supreme, but the Constitution is supreme. The Constitution is the supreme law of the country, and no person or governmental branch is above the Constitution. Therefore, any act of any person or of any government unit which is contrary to the constitution will be invalid and null.¹⁵ The functions of the three organs of the state have been differentiated and it is expected that none of them can take over the functions of the other organs.

Interesting in this regard is a constitutional provision in the Bill of Rights, which states that: “All rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified or acceded to by the Republic of South Sudan shall be an integral part of this Bill”.¹⁶ If the constitution is to be considered as the supreme law of the land, the founding law of the nation and mother of all laws, how can it be equal with international treaties or instruments?

One may consider the existence of such provision in the constitution to undermine the supremacy of the constitution, because an international treaty should not have the same status as the constitution. In this case, an international treaty should have the same legal status as national laws, hence, its binding force will be subject to the provisions of the constitution, if it contradicts the constitution, it would be null and invalid like any other ordinary law.

Ultimately, most constitutions in the world do not have a similar provision. For instance, the Constitution of Kenya of 2010, states that, “the general rules of international law shall form part of the law of Kenya, any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution”¹⁷. Another example is the South Africa’s Constitution which states that “Customary international law is law in the Republic, unless it is inconsistent with the Constitution or an Act of Parliament”.¹⁸

With reference to that justification, the Government of South Sudan needs to review this article and give the absolute supremacy to the national constitution, which is the will of the people.

Another surprising example in South Sudan is the constitutional status of the Transitional Government of National Unity (TGNU), which has just been formed last April 2016. This Government is a result of the Compromised Peace Agreement on the Resolution of the Conflict in South Sudan (ARCSS), 2015, signed between the warring two parties, the Government and the Sudan People’s Liberation Movement/Army in Opposition (SPLM/A-IO). The ARCSS provided for positions of the President, First Vice- President and Vice-President, while the Transitional Constitution does not contain a provision for the post of First Vice- President. The parties to the ARCSS were supposed to form a committee to amend the Constitution and incorporate the agreement into the Constitution. But they failed to do so to date. So, the questions which may arise are: which one of the two documents governs the formation and functions of the TGNU? Is it a Constitution or the ARCSS or both? And in case of any conflict between the two, which one shall prevail?

It seems that there is confusion, as the parties agreed to use both, and it is not easy to answer those questions. Therefore, the parties to the ARCSS are required – as soon as possible – to incorporate the agreement into the

¹² Republican Decree No. 36/2015 (2/10/2015)

¹³ Ibid, art 162(1)

¹⁴ On 12 November 2015

¹⁵ Transitional Constitution of the Republic of South Sudan 2011, art 3

¹⁶ Ibid, art 9(3)

¹⁷ Article 2, paras (5)-(6) of the Constitution of Kenya, 2010

¹⁸ Constitution of the Republic of South Africa, 1996, art 232

Constitution and give the absolute governing authority to the Constitution to be the base of the government functions.

2.3. Separation of Powers

The doctrine of separation of powers has been considered in the Transitional Constitution of the Republic of South Sudan of 2011. The three branches of the state – which are the legislature, the executive and the judiciary – have been left free in their respective places, and it is expected that one should not interfere in the field of another. Moreover, the structure of the government and distribution of powers among the branches of government are outlined in order to avoid any conflict of jurisdiction and prevent one branch from taking over functions of the other.

It is clear that the parliament shall not interfere in the working of the judiciary, and the same is the case about the executive and the legislature. The separation of power is not an absolute separation, as there are checks and balances on the different branches by the others.

Undoubtedly, the legally limited government alone is the only government in which the concept of human rights prevails. It can be observed that the implementation of the doctrine of separation of powers is required to achieve this principle, since, its purpose is to protect human rights against violation and interference by the government. For that reason, the Constitution of South Sudan, expressly, provides for the judicial review to protect the supremacy of the Constitution.

2.4. The Constitution must provide for Human Rights

Usually, the constitution safeguards the basic rights and fundamental freedoms of the people by incorporating a Bill of Rights, and providing the machinery for their enforcement through an independent judiciary and other institutions. Furthermore, the constitution provides for limitations on the powers of the branches of government for the sake of protecting human rights.

Theoretically, the Transitional Constitution of the Republic of South Sudan, in the Bill of Rights, guarantees the fundamental rights of individuals which are necessary for the individual's personal development. These rights are highly regarded because they are so necessary for the life of the people, and without these rights, the life of the citizens will be in danger. They include, for instance, the rights to life, equality, freedom, religion, etc. These basic rights prohibit the state to enact laws that violate any of the basic rights of individuals.

If the government passes such a law violating basic rights, it may be declared unconstitutional by the Supreme Court. However, it must be understood clearly that fundamental rights of individuals are not absolute but they are subject to certain limitations outlined by the constitution in order to make a balance between the individual's rights and their national obligations.¹⁹

Habitually, constitutional governance aims at protecting individuals from the arbitrary power of the government and assumes the existence of fundamental rights of the individual, allowing people to enjoy their rights and freedoms without discrimination. However, it requires guarantees and protection and the government must respect human rights. The state constitution must provide, in a clear manner, for individual rights as recognized by democratic systems and international conventions related to human rights.

In such case, the most important guarantee for protection of human rights is the right of the people to resort to an independent, impartial and transparent court of law. In South Sudan, for instance, the Judiciary Act of 2008 provides for establishment of the Supreme Court which has a constitutional panel to determine constitutional

¹⁹ Myneni (2011), 171.

matters such as human rights, constitutionality of laws issued by the Legislative Assembly, and interpretation of laws and conflict of jurisdiction.²⁰

Based on the guarantee of resorting to the Supreme Court, the public authorities in a state must respect people's individual rights and freedoms without violation, on the ground that such rights and freedoms are agreed to be enjoyed by the people as members of an organized society. Therefore, a democratic system in any country must be based on the principle of human rights and fundamental freedoms of the people, such as freedoms of expression, association, assembly and vote.

2.5. Independence of the Judiciary

Ultimately, all countries in the world theoretically believe in an independent judiciary. This belief is usually expressed in constitutional provisions. The provisions of the Transitional Constitution of the Republic of South Sudan, for instance, clearly prescribe the independence of the judiciary, thus, they could be considered by academic readers to be among the best of their kind. Especially when the Constitution writes: "Judicial power shall be vested in an independent institution to be known as the Judiciary."²¹ The same article goes on to provide that, "all organs and institutions at all levels of government shall obey and execute the judgments and orders of the courts".²² Moreover, the Constitution provides that, "the Judiciary shall be independent of the executive and the legislature".²³ The same article goes on to state that, "the executive and legislative organs at all levels of government shall uphold, promote and respect the independence of the Judiciary".²⁴ Yet, to some members of the Executive and of the Parliament, independence of the Judiciary means nothing more than having a separate judicial building from those of the other organs of government, perhaps just to decorate the provisions of the constitution. For instance, some governors interfere in the work of the Judiciary in their respective states.

The fountain of the independence of the Judiciary in South Sudan is reflected in the Transitional Constitution which provides that "Judicial power is derived from the people and shall be exercise by the courts in accordance with the customs, values, norms and aspiration of the people and in conformity with this Constitution and the law"²⁵. The same article directs courts that, when adjudicating cases of both civil and criminal nature, they shall, subject to the law, apply the following principles:

- a) Justice shall be done to all, irrespective of their social, political or economic status, gender, religion or beliefs;
- b) Justice shall not be delayed;
- c) Adequate compensation shall be awarded to victims of wrongs;
- d) Voluntary reconciliation agreements between parties shall be recognized and enforced; and
- e) Substantive justice shall be administered without undue regard to technicalities.

In fact, the independence of the judiciary is an important matter. To secure independence and impartiality of the judiciary in the nation, South Sudan's legislation contains the following provisions:²⁶

- a) Appointment of Judges and Justices is done by the President upon the recommendation of the Judicial Service Commission.
- b) Security of tenure is guaranteed to every judge and justice.
- c) The Judicial Act of 2008 bars Justices of the Supreme Court and courts of appeal from pleading and appearing before any court in South Sudan even after their retirement for specific period.
- d) Special procedures have been laid down for the removal of Judges and Justices.

²⁰ Judiciary Act 2008, ss 10-11. See also Transitional Constitution of the Republic of South Sudan 2011, art 126.

²¹ Transitional Constitution of the Republic of South Sudan 2011, art 122.

²² Ibid.

²³ Ibid, art 124.

²⁴ Ibid.

²⁵ Ibid, art 122.

²⁶ Ibid, art 133; Judiciary Act 2008, ss 21, 40, 47, 61, 63 & 65.

These are some of the requirements for an independent judiciary that are present in South Sudan. In addition, the Constitution provides for establishment of the Supreme Court at the Judiciary to be the custodian of the constitution and rights of citizens. Therefore, the Supreme Court has power of judicial review, power to examine laws and executive acts and test their conformity with the constitution.²⁷ This is because any act made by the Parliament can be declared null and void by the Judiciary if it is unconstitutional or overrides the provisions of the constitution.²⁸

On the other hand, the judges can engage in judicial activism to advance the recognition and protection of human rights, as the laws and judicial rules give them the power to do so through interpretation of laws and setting precedents. But they may require commitment and courage to interpret human rights provisions liberally.²⁹

3. Conclusion

As explained earlier, the existence of the state is very important for the life of the people, because any organized society should have a government or authority to protect its security and stability and keep its order. But that government must be based on the supreme law from which it derives its existence and legitimacy, and must work according to this supreme law. That supreme law is the constitution which is a written or unwritten popular consensus and contains legal rules which organize the relationships between the government and the people and protect their rights and basic freedoms.

If the government must be based on constitutional grounds, that means it is impossible to have country without constitution. But existence of a constitution does not reflect the implementation of a constitutional system, and there should be – beside a constitution – a full implementation of the constitution and respect for its provisions. Otherwise you may find a country with a constitution but not a constitutional state.

To have a constitutional state, the constitutional system must be based on certain principles, such as the sovereignty of the people; that people are the main source of the power of the state; that the state must have a constitution from which it derives its existence; that all government branches must implement the doctrine of separation of powers as a guarantee to protect human rights; and finally, the constitution must provide clear guarantees of human rights and effective constitutional and legal machineries for protection. If those principles are present, we could describe that country as a constitutional state and the concept of a human rights state would be achieved.

Yet, although those noble principles could be achieved, the concept of human rights state cannot succeed unless the citizens of that state enjoy a sufficient degree of public legal awareness about their rights and freedoms. They should be ready to defend their rights by all legal means against any violation or interference, and the government officials must have genuine political will to achieve a human rights state based on constitutional provisions and the principle of the rule of law. In other words, there must be a commitment from the government to respect, protect and promote the concept of human rights in the country.

The following points are the recommendations which could be taken into consideration in order to promote and establish a human rights state in South Sudan:

1. All stakeholders including government institutions should adhere and respect the constitution and the principle of the rule of law in the country.
2. To educate citizens and enlighten them about human rights and their importance – especially the majority of the citizens that are uneducated – the Government should conduct public civic education across the

²⁷ Transitional Constitution of the Republic of South Sudan 2011, art 126.

²⁸ Ibid, art 175.

²⁹ GW Kanyeihamba, above, p. 280.

nation so that citizens participate in promotion and implementation of the principle of a human rights state.

3. It is the role of civil society and human rights organizations to advocate for human rights, and work with the government in conformity of national laws with the principles and norms of human rights according to the concerned international human rights conventions.
4. The citizens themselves, through civic education, must be ready at any time to challenge and protest by resorting to the court of law, any law issued by Parliament or any decision taken by the government which contradicts the constitution and violates their rights and fundamental freedoms.
5. The main guarantee for effective protection of rights and fundamental freedoms must start from the people themselves. It is unhelpful to set a system of guaranteeing human rights unless the people possess them and have adequate political awareness about those rights and freedoms subject to the constitution and the law.
6. The Government – as soon as possible – must restore peace and stability in the country, so that, justice and rule of law – which are the pillars of human rights state – prevail. That is because during civil war or armed conflict, human rights in general are in danger and constitutional governance is restricted as a state of emergency could be declared and subsequently the constitution may be suspended. Therefore, peace and stability are important to establish a human rights state.

Bibliography

Bradley, AW & Ewing, KD, *Constitutional and Administrative Law* (11th ed Longman, London 1993).
Kanyehamba, GW, *Constitutional and Political History of Uganda from 1894 to Present* (2nd ed LawAfrica Publishing Ltd, Nairobi 2010).
Myneni, SR, *Constitutional Law* 1 (Asia Law House, Hyderabad 2011).
The Transitional Constitution of the Republic of South Sudan, 2011.
The Judiciary Act, 2008.

Traditional and Statutory Laws in the Context of Human Rights in Post-conflict/Transitional Societies

John Wuol Makec

Introduction

As the political crisis that erupted mid-December 2013 in South Sudan caused serious and extensive human rights abuses against innocent civilians, among them children, women and old-age persons, one of the important questions that deserves an answer is: can the application of traditional law together with statutory law (specifically, in this context, the criminal law) adequately address human rights abuses, as a pre-condition to peace-making? Further, can genuine peace, unity and reconciliation be achieved without payment of compensation to the victims of human rights abuses, according to the requirements of the traditional or customary law?

The subject of this paper will be discussed under the following sub-titles:

1. *The origin and recognition of traditional and statutory laws and their binding force.* The origin or source of law determines its validity or binding force. The existence of these qualities enables the court of law or a tribunal to take judicial notice of the rules.
2. *Differences between the two laws.* The existence of differences between the two laws requires the discussion of: 1) the objectives of criminal law; and 2) the objectives of traditional or customary law. The significance of the discussion of the stated objectives is to determine whether or not the concurrent application of the two laws will, as initially expected, make contribution towards the attainment of a *genuine and durable peace* and *unity* between the parties who have been involved in a very serious armed conflict.
3. *Relations between traditional (or customary) and criminal laws.*¹ The existence of such relation, if established, is expected to create harmony between these laws and positive results towards the peacebuilding process among the two parties.
4. *Settlement of human rights abuses in post-conflict/transitional societies.* The question is then whether there can be durable peace, unity and reconciliation without punishing the culprits and without the payment of compensation.

1. The Origin and Recognition of Traditional and Statutory Laws and their Binding Force or Authority

'Apparently', both the traditional and statutory laws come into existence through different sources and origins. But practically speaking, the two legal systems initially have one origin or source, although the procedures by which they are brought into existence differ. Traditional or customary law consists of usages or practices of the society or of the people, which have been followed as law continuously for a very long time or from time immemorial. It is expected that no living person can remember or claim to remember when a specific practice started to be followed. The legitimacy of a practice depends on its immemorial antiquity.²

¹ In the discussion hereunder, "criminal law" will be used in place of "statutory law" (since the latter is general) and because of its relevance to the subject of this essay.

² JW Makec, *The Customary Law of the Dinka People of Sudan: In Comparison with aspects of Western and Islamic Laws* (Afroworld Publishers, Nairobi 1988), 31-2. See also JW Makec, 'The Teaching of Customary Law at the University of Juba' (un-published paper presented at a conference on *Legal Education in South Sudan* held in Juba, South Sudan, 6-8 Aug 2012).

Customary law or 'custom' has been given significant coverage in the subject of jurisprudence, as well as judicial precedents of some countries, like Sudan. Hence, before I proceed to discuss other issues, it is essential to make reference to some of these sources. Many jurists and some judges attempted to expound the meaning of 'custom' and reference shall be made to some of them. According to John Burke,³ "custom is a rule of conduct obligatory on those within its scope, established by long usage. A valid custom has the force of law. Custom to the society is what law is to the state (Salmond). A valid custom must be of immemorial antiquity, certain, reasonable, obligatory, not repugnant to statute law, though it may derogate from it". On the other hand, Dias in his book made a comprehensive explanation as to how 'custom' comes into existence. He states:

*When a large section of populace are in the habit of doing a thing over a very much longer period, it may become necessary for the courts to take notice of it. The reaction of the people themselves may manifest itself in mere unthinking adherence to a practice which they follow simply because it is done, or again it may show itself in conviction that a practice should continue to be observed, because they approve of it as a model of behavior ... The more people follow a practice the greater the pressure against non-conformity. But it is not the development of a practice as such, but the growth of a conviction that it ought to be followed that makes it a model of behavior.*⁴

In light of the definitions given by such jurists as to the meaning of a valid custom, two jurists, Mr. Salt and Sir Carleton Allen,⁵ summarized the features or conditions of a valid 'custom' as follows:

- i. The custom must be of immemorial antiquity. The onus of proving antiquity is bestowed on the person who asserts the application of the custom. The proof becomes easier, however, if its origin cannot be remembered. The burden of rebutting it lies with the party against whom the custom is applied.
- ii. It must have been enjoyed as of right.
- iii. It must have been enjoyed continuously.
- iv. It must be reasonable.⁶

The concept or test of the 'reasonableness' of a custom, like other concepts, is most controversial because of its vagueness and susceptibility to subjective or prejudicial interpretation. This submission may be illustrated by the following cases. These are two cases which were settled in former Southern Rhodesia (now Zimbabwe) by colonial judges. The first of these is the case of *R v Kadoza* (1912) S.R. 6. In this case, a man was indicted for the offence of bigamy, because after having married in church, he subsequently and during the life-time of his wife, married again according to native law and custom. Holding him guilty, Watermeyer J. said:

"If a man goes through a civilized form of marriage according to Christian rites then he binds himself to its consequences and he cannot hark back to the primal customary privileges which he has thus provided"(emphasis added)

A similar decision was rendered in another case by a different judge. This was the case of *Luma v Madidi* (1918) S.R. 59. As the facts were almost similar, I proceed to the judgment delivered by Russel J who stated:

"I understand these decisions lay down the principle that a native (i.e. African) who contracts a Christian marriage or civilized marriage (i.e. monogamy) loses certain rights (e.g. polygamous marriage) which were under his native law. In the cases cited the native was held to have lost respectively the right to contract a second marriage and the right to repudiate his wife. On the other hand, a native (African) does not escape the operation of the native law altogether; for example, he may under the circumstances not contemplated by Roman-Dutch law, recover 'lobola' or 'dowry' cattle. The test appears to be whether the rule of native law is or is not compatible with civilized marriage. In other words, a native who enters upon such relationship does not cease to be subject to native law but subject to rules which are not inconsistent with the status as a married man in a civilized way." (emphasis added)

³ See R Bird, *Osborn's Concise Law Dictionary* (7th ed Sweet & Maxwell Ltd, London 1983), 108. See also JW Makec (1988), 23.

⁴ RWM Dias, *Jurisprudence*, (2nd ed Butterworths, London 1964), 142. See also Makec (1988), 24-5.

⁵ Dias, *id.*

⁶ For more discussion on the test of reasonableness of the custom, see Makec (1988), 23-30.

The ideas expressed in these judgments in fact represented the general attitude of colonial judges towards the 'African custom' or cultural values. The following comments or remarks may be made:

1. In the first place, the decisions in these cases relegate the 'custom' and the African cultural values to an inferior or subordinate status, in contrast with the laws that are deemed to be civilized; and, in fact, these are the laws of the Western world countries, which are sugar-coated with biblical values.
2. In the second place, while monogamous marriage is cloaked with the prestigious word 'civilized', 'customary' marriage, which is potentially polygamous in nature, is relegated to the status of primitive or uncivilized. It goes without saying (or by implication) that 'custom' is unreasonable. But who determines, in these circumstances, what is civilized and what is primitive? Of course, the answer is obvious in these circumstances, if the person imposing his cultural values on other persons is, at the same time, the judge.
3. In the third place, the offence of bigamy is part of the western laws and is not part of African laws. The marriages, subject of the stated cases, were conducted between Africans, in Africa.

If the application of the law of bigamy (in an African country which did not have indigenous laws that made polygamous marriage an offence) was solely based on the ground that the first marriages were conducted in churches, would the prosecution of the alleged offenders and the subsequent decisions rendered by the courts really be justified? African law does not consider the form of marriage, whether it is polygamous or monogamous, but faith as a determinant of a man's religious belief or relationship with God. There are many judicial decisions in Sudan and South Sudan on this point.

In the case of *Gibril Barbare v Reen Abdel Massin Khalid*,⁷ the wife (while living in separation) sued the husband for maintenance of their children. The Province Judge awarded 12 Sudanese pounds as maintenance. But the husband appealed against this decision to the Court of Appeal in Khartoum. However, the advocate representing the wife submitted a petition to the court requesting the application of the English law to their case. The underlying reason was that both parties were Christians and the English law was being equated with Church law. The Court of Appeal rejected the request. The decision of the Province Judge was also quashed and it was directed that the Province Court should have to determine the common custom of both parties and to apply it. The Court of Appeal argued that the English law was for the English people and could not be applied in a case of Sudanese who had their own customs. It has to be emphasized here that, although both parties to case were Christians, their legal dispute had to be determined according to their common custom. Further, it has been held in many cases in Sudan that "where a marriage has been conducted according to customary law of parties who subsequently celebrate it in church, it is the customary law which governs the marriage and its consequences".⁸ The parties, after the conclusion of marriage under customary law, go to church for celebration with objective to seek God's blessing only. The promises or the undertakings that are made by the couple in the church are, strictly speaking, deemed to be purely of European origin dictated by the economic conditions of the past, which were exported to Africa by the missionaries during the period of colonialism.

To come back to the condition that requires the reasonableness of a valid custom, it has been observed that this test makes it susceptible to subjective and prejudicial interpretations. The subsequent discussion confirms this.

In a similar way, another test or concept, by which a valid custom is required to conform, is 'justice, equity and good conscience'. The negative attitudes held towards the customs by the colonial judges and administrators were, in fact, the genesis of this of this concept; 'justice, equity and good conscience'. Again, 'custom' was relegated to a subordinate status since justice, equity and good conscience was determined according to the English law. "As these concepts are vague, they had to be used by colonial judges to import the English law (i.e. through enabling legal provisions in the laws of the colonies) to the colonies, not only in the area of customary

⁷ [1966] SLJR 53.

⁸ See cases e.g. *Gadet Tuach v. Regina Ruot*, CA/CA/1275/1987 (unreported). See also in JW Makec, *Cases and Principles of Customary Law in Sudan* (2007) 35.

law, but also in all other areas of laws.”⁹ ‘Justice, equity and good conscience’ was, in fact, equated with English law. In the Sudan, this tendency of using justice, equity and good conscience *as a vehicle of receiving English law*, was later laid down as a matter of policy in 1919, in the case of *Antonious Saad v Aziz Kfour*¹⁰

According to N.O. Akolawin, “justice, equity and good conscience are indeed vague and nebulous and the section (i.e. s. 5 of Civil Justice Ordinance, 1929) does not tell us how the court should go about trying to reach its decision. Of course, a judge will try to determine the suit before him (or her) in accordance with his sense of justice. And as we shall see later, justice, equity and good conscience was equated with English law”.¹¹ Akolawin went on to state:

*“There is in each of us an underlying philosophy of life which gives coherence and direction to our thought and action. This philosophy of life is the outcome of inherited instincts, traditional beliefs and acquired convictions, and what one may consider just and equitable or in accordance with good conscience is necessarily limited by the above factors”.*¹²

What has been expressed in this philosophical statement exactly manifested itself in the judicial decisions discussed in the preceding paragraphs. The subjectivity or prejudicial interpretation of the requirement of a valid custom to conform with ‘justice, equity and good conscience’ feared by Akolawin, manifested itself in the judgment of Lindsay, the former Chief Justice (CJ) of Sudan during the Anglo-Egyptian government. Lindsay, CJ; following the subjective test or interpretation in the case of *Bamboulis v Bamboulis*,¹³ contended that “custom”, by itself, does not acquire force of law unless it has been recognized by the Sudanese court of law. In his words, he stated:

“Custom is established usage which by recognition in the Sudan court of law acquires the force of law. The section (i.e. section 5 of the Civil Justice Ordinance, 1929) which embodied the concept of justice, equity and good conscience) envisages that such custom can be altered or even abolished or declared void. The Ecclesiastical Rules of a church and civil laws of foreign countries are, in my view, incapable of being altered, abolished or declared void, and are clearly not contemplated by the wording of the section to be within the meaning of the word custom ...”(emphasis added)

Lindsay’s definition narrowed the scope of custom, as it excludes the Ecclesiastical Rules as well as the laws of foreign countries from the meaning of custom and is contrary to the established judicial precedents in Sudan. In fact, Lindsay’s decision was made *per incuriam* (i.e. in ignorance of previous decisions on the matter).¹⁴ This narrow definition of custom invited extensive criticism among the Sudanese judges. One of the cases in which Lindsay, CJ was seriously criticized, was the case of *Hannah Kattan v John Y. Kattan*,¹⁵ where the Court of Appeal held:

“We feel the occasion justifies the statement that restricted the interpretation of s 5 of the Ordinance, 1929 adopted in Bamboulis v Bamboulis is no doubt novel and certainly not the view which has always been taken by the Sudan courts with regard to this section”.

⁹ Makec (2012).

¹⁰ HC-CS-228-1917, SLR Vol. 1, 73.

¹¹ NO Akolawin, ‘The Courts and the Reception of English Law in the Sudan’ [1968] SLJR 230, 237.

¹² Ibid, 232.

¹³ Cases in the High Court and Court of Appeal (1954) p 76; see also: Makec (1988), 22.

¹⁴ In the case of *Abdulla Chercheffio v Maria Bekryrellis*, AC/APP/12/1934, Gorman J held: “It has been decided in this court (i.e. the Court of Appeal) that where the parties are domiciled in a country other than the Sudan which possesses a national law of personal status that such law is to be regarded as the body of custom applicable to the parties within the meaning of s 5, the law of domicile in these cases is adopted by law of the Sudan as their personal law (i.e. as their common custom). But where the parties are domiciled in the Sudan or in a country with no national law of personal status then, it has been held, it is the custom of the religious community to which they belong which are to be looked to and comprise their personal law”.

¹⁵ [1957] SLJR 35.

All the justices of the Court of Appeal supported the wider interpretation which includes Ecclesiastical Rules as well as the laws of foreign countries in the meaning of the word 'custom'. Chief Justice Bennet, in his words, stated:

"The section had been interpreted as to a large extent letting in the church law of the parties where there was no appropriate lex domicilii or national law".

It follows from Sudanese judicial precedent that the scope of 'custom' is (perhaps) wider in Sudan than in other countries. The discussion in the preceding pages has revealed positive and negative attributes held about custom by different jurists or lawyers since the colonial era. But, in my opinion, the negative views held by some of these scholars do not, in any way, hinder the progressive development of custom as a recognized legal system, like other laws, for example, statutory or English common law. In fact, the positive outcome of these contributions is precisely what has been expressed at the beginning under this sub-title. In other words, custom is a practice or usage which has been continuously followed and enjoyed as of right by the society or people for time immemorial. It must also be certain, in other words, it must not be vague or difficult to comprehend.

It follows from here, therefore, that the people, whose usages and practices make the law, are, in fact, the origin or the source of that law (i.e. traditional or customary law). On the other hand, statutory law has the same source, which is the people, who elect their political representatives into Assembly or Parliament with the mandate to make the constitution and laws. Precisely, both traditional (or customary) and statutory laws have the same origin or source—namely, the people or society. Further, while both laws have one source, their binding force derives from the same origin; this means the *will of the people*. However, since customary (or traditional) law also acquires constitutional and statutory recognition, some people like Lindsay CJ, believe that such recognition is the basis of its binding force. The supporting reason is that the constitution and statutory law, which give recognition to customary law, are passed by the Legislative Assembly or Parliament, whose members are elected by the people. In other words, these members have the people's authority to make binding laws. Truly, it may be admitted that such constitutional and statutory recognition provides customary law with legitimacy and the binding force of law. But strictly speaking, the binding force the customary law receives from such recognition is superfluous. It is just an added authority. To make more emphasis on this point, reference may be made to the following quotation:

"Strictly speaking, the binding force acquired by customary law, through its recognition by constitutional and statutory law, is superfluous. Both the constitution and statutory laws, on the one hand, and customary law, on the other hand, derive their authority or legitimacy from one source, namely the people. The constitution and the statutes are indirect products of the will of the people. But customary law is a direct product of the will of the people. Customary law, in fact, initially acquires its binding force of law before its constitutional and statutory recognition".¹⁶

2. The Difference Between Traditional and Criminal (Statutory) Laws

The existence of differences between the two laws is realized in their fundamental objectives. These differences, in fact, raise the question whether the concurrent application of the two laws to solve the cases of human rights abuses committed in an armed conflict between two groups of people may negatively or positively contribute towards the attainment of peace and unity between these groups. But, unexpectedly, the existence of these differences serves a useful purpose towards the administration of justice, in the sense that the two laws do not only complement but also supplement each other. This will be observed later. The objectives of the two laws are discussed under the following paragraphs:

- 2.1 The objectives of criminal law.
- 2.2 The objectives of traditional or customary law.

¹⁶ Makec (1988).

2.1. The Objectives of Criminal Law

In a nutshell, the objectives of criminal law sometimes referred to as principles or theories include: (a) retribution; and (b) deterrence. These will be discussed hereunder. But for the purposes of the subject of this paper, the discussion will be brief.

a) Retribution

Retribution in its extreme meaning underlies or reflects the ancient principle of talion. By this principle, “criminals should, as punishment, receive the same injuries and harms as they had inflicted on the victims, the principle of ‘an eye for an eye and a tooth for a tooth’ ... It is sometimes one of the purposes of punishment as satisfying the instinct of retaliation or revenge which naturally arises in a victim, but also to a considerable extent in society generally”.¹⁷ But the extreme meaning of retribution has been modified in many countries of the world, although it is retained in some countries with respect to certain types of offences.¹⁸ Despite its modification, retribution in one sense still means “vengeance”.¹⁹ In this respect, I refer to the following quotation for illustration:

*“This desire for vengeance supposedly operates at two levels; it is asserted that punishment satisfies the victim’s (or relatives’ and friends’) desire for vengeance and the State is merely exacting vengeance on their behalf to prevent further private retaliation. Secondly, it is asserted that there is a public need for vengeance ... There is an instinctive demand which is active in every human being to retaliate just as an animal strikes back with hate at those who attack it”.*²⁰

Precisely, the retributive principle, unlike the deterrence principle (subject of discussion below), does not look forward but looks back to the crime.²¹ This means that the accused must be made to suffer since the accused had made the victim to suffer.

b) Deterrence

On the other hand, the deterrence principle looks forward to the consequences of punishment. In other words, the consequences of punishment of the crime must be a reduction of the crime rate in society through fear; persons who have criminal records and potential criminals must be prevented from future commission of crimes. The deterrence principle therefore operates at two levels. First at the individual level, as the offender must be punished with the aim to prevent him from committing crime in the future. Secondly, punishment prevents potential criminals from commission of crimes, after learning that criminals suffer severe penalties. For illustration, I refer to the following:

*“The deterrence theories (in case of individual deterrence) seek to discourage crime. In the case of individual or specific deterrence, it is hoped that the experience of punishment will be so unpleasant that the offender will not reoffend. The task of the sentence is, therefore, to look to the future and select the sentence that is likely to make most impact on individual. In case of some offenders, no punishment at all may be necessary as the risk of the convicted person reoffending may be minimal. In other cases the required sentence may be so severe as to be inhumane ...”*²²

Again in the context of the general deterrence, reference is made to the following:

*“There are two aspects to this theory. First, punishment ‘at normal rate’ must be imposed in most cases to keep the threat of punishment alive. Secondly, when a specific type of crime is on the increase or has attracted much publicity, then excessively severe punishment (known as exemplary sentences) may be imposed to try to prevent that particular crime ...”*²³

¹⁷ D Walker, *The Oxford Companion to Law* (Clarendon Press, Oxford 1980), 1068.

¹⁸ See e.g. ‘gasas’ cases in Sharia law.

¹⁹ But not in the form of “an eye for an eye”.

²⁰ CMV Clarkson & HM Heating, *Criminal Law: Text and Materials* (5th ed Sweet & Maxwell, London 2003), 26.

²¹ Critics of the retribution principle argue that there is no need to repay evil with evil. But to supporters, it is more effective, than deterrence, in the fight against crime.

²² Clarkson & Heating (2003), 35.

²³ Ibid, 36.

Cases where exemplary sentences may apply appear to be on the increase today in South Sudan as a consequence of the recent conflict. According to numerous reports already rendered, cases of mass-raping of girls and women, among others, are incredibly on the increase. In order to return the state of affairs to normal in the country, that court that may try these cases will be expected to impose sentences which are likely to have more impact on perpetrators.

2.2. The Objectives of Traditional or Customary Law

It has already been observed in the preceding paragraph that, under criminal law, where a crime has been committed, punishment of the accused person (or the actor) based on retribution or deterrence theories (or objectives) serve the ends of justice. But traditional or customary law in such circumstances has different objectives. Retribution and deterrence are not parts of its objectives. Once, for example, a person has been killed or a woman is raped, the law is not concerned with how to punish the actor. It is instead concerned with how to achieve two other main objectives. In the first place, it must symbolically seek to repair or restore the loss or damage that has been caused and this is established through the payment of material compensation, in order to gratify the victim or the relatives (of the victim who is dead). In the second place, the objective of the law is to establish, where a person has been killed, how to bring together the relatives of the killer and the victim's relatives to live in peace again²⁴ through reconciliation process. In fact, these objectives are not peculiar to South Sudan's traditional or customary law alone but they are generally part of the African traditional law. In this respect, reference shall be made to the views expounded by some writers on African law. Let us see what Taslim Oluwade Elias says:

*"Let us examine the general ideas held about the aims of the law in African societies before we attempt to analyze the basis of liability for civil and criminal wrong ... It is commonplace to describe African law as positive and preoccupied with maintenance of social equilibrium of the community ... It has also been claimed for in that its chief aim is compensation for the wrong as opposed to the European idea of punishment of the wrongdoer; the aim of the African law, so the argument runs, is restitution, not retribution."*²⁵

Further, according to Driberg:

*"... African law is positive, not negative. It does not say thou shalt not, but thou shalt. Law does not create offences, it does not make criminals; it directs how individuals and communities should behave towards each other. Its whole object is to maintain an equilibrium and the penalties of African law are directed not against specific infractions but to the restoration of this equilibrium."*²⁶

Precisely, the objectives of the law can be summarized as: (a) maintenance of social equilibrium where the damage or imbalance, through the loss of life in the society, has been caused by the wrongdoer. Social equilibrium is maintained through compensation (also described as restorative justice); and (b) maintenance of peace between the communities or societies, affected by commission of a civil wrong, must be achieved.

3. Relation Between Criminal and Traditional (or Customary) Laws

The existence of the differences in the fundamental objectives of the two legal systems creates the impression that their joint operation is unlikely to promote justice, peace and unity among the parties involved in armed conflict. But despite the fact that the two laws have differences in their fundamental objectives, they incredibly complement as well as supplement each other; and accordingly, they are in many cases applied concurrently

²⁴ The killing of a person brings a blood feud between communities to which the actor and the victim belong and a fight maybe expected any time later.

²⁵ TO Elias, *The Nature of African Customary Law* (Manchester Univ Press, Manchester 1956) 130-44, 155-61. See also Makec (1988), 35.

²⁶ JH Driberg, 'The African Conception of Law' (1970) 3 *Readings in African Law* 163. See also Makec (1988), 36.

without any conflict. As will be shown below, the negative impression that the two legal systems cannot function in concurrences remains an illusion.

In fact, there is relation between the traditional and statutory laws in South Sudan. This is similar to the relationship between the (English) common law and equity. But for lack of space and purpose of this paper, the discussion hereunder will be devoted to the relationship between criminal law and customary (or traditional) law. These laws, as indicated before, do not only complement but supplement each other. For illustration, as a first example, I make the following quotation:

“Where retribution and deterrence of the law are necessary for the purposes of creating fear in minds of potential criminal actors, application of the State criminal law is suitable. However, where flexibility and restitution (or restorative justice) is necessary, or where the circumstances require the exercise of leniency in favor of the convict, application of customary law will be suitable to modify the harshness or rigor of the State criminal law. In the majority of cases, both laws are applied in one case. For example in a criminal case of murder, where death sentence is imperative under s. 206 of the Penal Code, 2008, if the relatives of the person killed (by the accused) submit a request to the court to issue an order for the payment of compensation to them, in lieu of death sentence against the accused, the court may act accordingly. The court may order the payment of compensation, in lieu of death sentence, according to the requirements of customary law of the deceased. The accused will then be sentenced to a term of imprisonment not exceeding ten years. Precisely, customary law modifies state criminal law to be less rigorous or severe.”²⁷

But in some instances, the relatives of the deceased person may request retribution instead of compensation. In such a situation, the criminal court will proceed to pass a sentence of death or life imprisonment, which is the authorized punishment by the criminal law. It must, however, be stated here that, despite the request submitted by the closest relatives of the victims for the payment of compensation, the court may decide to pass a death sentence in the circumstances where retribution or the passing of exemplary sentence is necessary, for instance, when the killing of the person was heinous or horrendous.

The second example of the relation between the two laws is set by the circumstance where it is necessary for the court to apply the rule of one law to fill the gap in the other law. Customary law, according to its objectives, lacks punitive measures for the enforcement of orders or judgments made under it. For this reason, execution or enforcement of court orders or judgments made under it may sometimes be ignored or neglected by judgment debtors. In this case, the court, by way of filling the gap in the rules which regulate the execution or enforcement of orders (that are civil in nature).²⁸ Execution of such orders is done under the Civil Procedure Act 2007. The relevant provisions carry the power of arrest, detention, reasonable use of force and attachment of the debtor's property.²⁹

A third example of the relation between the two laws is provided by the instance where a criminal court is required to determine or evaluate the standard or degree of provocation, that leads to the killing of a person; according to the cultural values or practices (or beliefs) of the society to which the killer belongs.³⁰ Provocation is a defence provided in common law and statutory law as reflected in section 210(2) of the Penal Code Act 2008. However, the standard or degree of “grave” provocation is not stipulated or defined. In the judicial precedents of The Sudan, the “gravity” of provocation and the standard by which the behavior of the accused is to be measured is that of a reasonable man from the society of the said accused. For as Osman El Tayeb J stated in *Sudan Government v Magzoub Bashir Abu Hisses*:³¹ “... cultural values of society have great impact on

²⁷ Makec (2012).

²⁸ E.g. orders involving payment of money by judgment debtor to the judgment creditor executed under the Civil Procedure Act 2007.

²⁹ See sections 234-36, etc. of the Civil Procedure Act 2007.

³⁰ From which the traditional or customary law is, in fact, derived.

³¹ [1969] SLJR 111.

the nature of what can cause the provocation. The same act is capable of causing provocation in one society while it is normal and acceptable in other society”.

In the preceding illustrations, traditional (or customary) law complements and also supplements the criminal law, which is part of the statutory law in mechanisms such as blood compensation, to mitigate the rigors of the death penalty or provide a culturally-situated standard for gravity of provocation. It follows that the two legal systems can concurrently be applied (when necessary) in cases involving murder and other forms of loss of life arising from the armed conflict which followed in the wake of the mid-December 2013 crisis. Members of the hybrid court, if formed, will be required to underscore the instances where criminal law is complemented as well as supplemented by traditional or customary law.

4. Settlement of Human Rights Abuses in Post-conflict/ Transitional Societies

As this section deals with how to settle the human rights abuses committed during the conflict and the enforcement of restorative justice, through the payment of compensation to the victims and their relatives, the question is whether or not the establishment of these requirements can lead to sustainable peace, unity and reconciliation of the parties involved in the armed conflict. Again, is the punishment of perpetrators of human rights abuses and the payment of compensation to the victims and their relatives a precondition to the attainment of peace, unity and reconciliation? Answers to these questions are discussed under the following paragraphs:

4.1. Accountability of Perpetrators of Human Rights Abuses

It is a matter of common knowledge that the killing of a human being creates bitter or serious indignation to the relatives of the victim. Further, the commission of offences such as inflicting bodily injuries on people, and mass-raping of women or girls also causes indignation to the victims and relatives. The consequences of this bitterness or indignation is the desire for vengeance on the part of the victims (if they are alive) and their relatives by taking the law into their hands. If people are not prevented from taking the law in to their hands, peace, unity and reconciliation may not be respected. However, without stating that punishment of the perpetrators of the crimes must be a precondition to making peace and unity, it may in fact be a necessary requisite to that effect. Punishment of perpetrators is not only essential for the promotion of peace, but it also achieves the following:

- a) It prevents the parties from pursuing vengeance by themselves. It must be the responsibility of the state to punish the accused persons on behalf of the parties, through the application of the law. In this way, vengeance and counter-vengeance, outside the law, by parties will be avoided and this proves why the way forward is peace and unity.
- b) It establishes deterrence by creating fear not only in the minds of the perpetrators of the human rights abuses but in the minds of other potential criminals or offenders to avoid the commission of same or similar crimes in future.

4.2. Enforcement of Restorative Justice

Although punishment of the perpetrators of human rights abuses is desired by the victims (if alive) and their relatives, as indicated before, this factor alone does not provide their full satisfaction. Punishment of the offenders may bring peace and unity. But such peace and unity are solely maintained out of fear and their sustainability poses doubt. For the parties to be fully satisfied and voluntarily accept peace and unity, punishment of the accused persons must be accompanied by the enforcement of restorative justice, through payment of compensation as a fundamental objective of customary law, which normally precedes peace and reconciliation. But this does not mean that payment of compensation is a precondition to making peace and reconciliation because there are circumstances where payment of compensation may be waived. Payment of compensation may be waived where it is practically impossible, for example, in case of war or armed conflict which has claimed lives of thousands of people, while thousands of other people are injured or raped, it will practically be impossible for the court to order compensation. Problems of identification of the actual

perpetrators and the victims, among others, will pose a serious challenge. In such circumstances, peace-makers shall proceed to do their business although no compensation has been paid. Precisely, sustainable peace, unity and reconciliation requires punishment of the accused persons to be accompanied by payment of compensation, unless it is waived, to the victims (if alive) and their relatives.

4.3. Reconciliation Process

Under the traditional legal system,³² reconciliation is always the last step, after the perpetrators of human rights abuses have been made accountable under criminal law; and after the enforcement of restorative justice has been accomplished, unless it is waived. The objective of reconciliation is to mark the end of physical conflict between the warring parties and its substitution with genuine, sustainable peace and unity. Of course, after the punishment of the accused persons and the payment of compensation, unless waived for the reasons already stated, the minds of the parties are prepared to accept peace and unity. Precisely, reconciliation process establishes the following, among others:

- a) In the first place, it is a ceremonial process attended by people and spiritual leaders, youth and women on both sides, since peace and unity must involve the persons from these categories. In other words, all these categories of persons are required to accept peace, unity and reconciliation.
- b) In the second place, it is the process of healing the wounds or bitterness caused by the consequences of the armed conflict. The healing of the wounds or bitterness is achieved where the peoples' leaders on both sides of the armed conflict sincerely admit their mistakes,³³ and make promises that such mistakes shall not be repeated in future for the sake of peace and unity. In fact, they take oath before the spiritual leaders.
- c) The role of the spiritual leaders is significant. They are not mere witnesses of peace-making process, but their presence signifies God's blessings. It follows from this that persons who, in the future, will commit breaches of the reconciliation process shall have invited the wrath of God upon themselves and there may be consequences in different forms that are not obviously noticeable.

Traditionally, a reconciliation process is conducted while bulls or goats are slaughtered. The whole ceremony is in fact solemnly led by the spiritual leaders, who are accompanied by the community leaders from both sides. The question at this juncture is: can the traditional process of reconciliation be applied to bring about sustainable peace and unity in transitional societies? 'Transitional societies' in this context, I believe, refers to those societies which are in the process of changing from traditional cultures to what may be termed by others, a mixture of traditional and modern cultural values, or political and social ideologies, such as other religious beliefs or communism. Strictly speaking, since these societies are still in the transitional stage, they cannot yet be deemed to have totally discontinued the linkage with the original or traditional values of their people.

It follows, therefore, from this submission, that the traditional process of reconciliation can be applied by peace-makers to bring about sustainable peace and unity among those post-conflict/transitional societies. The continuous existence of linkages between the traditional cultures and those transitional societies manifested itself during the mid-December 2013 crisis and subsequent armed conflict. What started as a political dispute between political leaders subsequently and rapidly extended to the traditional societies in the rural areas. The politicians quickly resorted to their tribal leaders to provide youth to do the fighting alongside the supposed national army that largely divided itself on tribal lines. It follows from here that the reconciliation based on traditional cultural values is essential and must include members or representatives of the traditional societies who largely took part in the fighting; otherwise their exclusion is likely to contribute negatively towards the peace-making.

Bibliography

Akolawin, NO, 'The Courts and the Reception of English Law in the Sudan' [1968] SLJR 230.

³² Which complements criminal law.

³³ And also on behalf of the youth who do the fighting in the battlefield.

- Bird, R, *Osborn's Concise Law Dictionary* (7th ed Sweet & Maxwell Ltd, London 1983).
- Clarkson, CMV & Heating, HM, *Criminal Law: Text and Materials* (5th ed Sweet & Maxwell, London 2003).
- Dias, RWM, *Jurisprudence*, (2nd ed Butterworths, London 1964).
- Driberg, JH, 'The African Conception of Law' (1970) 3 *Readings in African Law* 163.
- Elias, TO, *The Nature of African Customary Law* (Manchester Univ Press, Manchester 1956) 130-44
- Makec, JW, 'The Teaching of Customary Law at the University of Juba' (un-published paper presented at a conference on *Legal Education in South Sudan* held in Juba, South Sudan, 6-8 Aug 2012).
- Makec, JW, *Cases and Principles of Customary Law in Sudan* (2007)
- Makec, JW, *The Customary Law of the Dinka People of Sudan: In Comparison with aspects of Western and Islamic Laws* (Afroworld Publishers, Nairobi 1988), 31-2.
- Walker, D, *The Oxford Companion to Law* (Clarendon Press, Oxford 1980).

Part III: The Role of Civil Society in Human Rights Advocacy

Civil Society and Human Rights Advocacy: Contextual Analysis of the Role of CSOs in Human Rights Advocacy

Taban Kiston

Introduction

This paper discusses the role of civil society in human rights advocacy. The paper is premised on the notion that civil society plays an important role in monitoring, influencing and advocating for human rights protection and promotion within the domestic and international arena. Civil society organizations (CSOs) across the globe uphold human rights standards, prevent human rights violations and hold state governments accountable for their actions. By pressuring states to uphold human right standards, civil society occupies a central role in the promotion and protection of human rights. This gives civil society organizations a distinct position of importance in the legal, diplomatic and public sphere of promoting and protecting human rights.¹ The positioning of civil society at both the domestic and international level of human rights protection makes civil society organizations well positioned to support governments in protecting human rights. As the United Nations (UN) Economic and Social Commission for Western Asia stated, “an organized civil society is an imperative condition for and an expression of democracy. It is an intermediary between state and society and a key element in good governance”.²

Civil society organizations fulfill a range of functions in the protection and promotion of human rights. From a functionalist perspective they enable governments to carry out their human rights duties by supporting them with expertise and an important knowledge of contemporary human rights issues.³ At the same time, CSOs contribute greatly to human rights diplomacy and advocacy between states and with international organizations such as the UN.⁴ The presence of civil society organizations allows a much wider range of actors to be involved in human rights advocacy. This paper explores the complexities of these various roles. While nation states are the chief apparatus involved in codifying human rights standards, civil society is the primary mechanism through which human rights are advocated for.

First, in this paper, civil society refers to a globalized network of human rights defenders and other civic groups, such as trade unions, professional regulatory bodies like the bar association, academic institutions, religious institutions, and organizations, both domestic (CSOs) and international (International Non-Governmental Organizations, INGOs), that promote and protect human rights. They are “vocal, committed and influential...dedicated to the development, diffusion, and realization of universal human rights standards around the globe”.⁵ These organizations may be globally respected, such as for example Amnesty International, or exist as a domestic NGO in a single country working on a localized issue.⁶ Secondly, advocacy, according to the Concise Oxford English Dictionary, refers to “...pleading in support, supporting or speaking in favor of (someone, a cause or policy)”. The working definition of advocacy in this paper is slightly different. Advocacy refers to actions which seek to influence the policies and practices of a government (either local or national), a

¹ International Council for Human Rights Policy (ICHRP), Human Rights Organizations: Rights and Responsibilities, Final Draft Report (2009).

² UN Economic and Social Commission for Western Asia (ESCWA), ‘Enhancing Civil Society participation in public policy processes’ (2010), 17.

³ P Willetts, ‘The Cardoso Report on the UN and Civil Society: Functionalism, Global Corporatism, or Global Democracy?’ (2006) 12 Global Governance 305, 306.

⁴ Willetts (2006), 306.

⁵ G Mitoma & G Mitoma, ‘Civil Society and International Human Rights: The Commission to Study the Organization of Peace and the Origins of the UN Human Rights Regime’ (2008) 30 Human Rights Quarterly 607

⁶ A Hegarty & S Leonard (eds), Human Rights: An Agenda for the 21st Century (Cavendish Publishing, London 1999) 247.

private company, an international institution or even a single individual (if that individual has the power to effect the change being sought).

Within the sphere of human rights advocacy, civil society organizations have many important forms of engagement with state governments, including acting as catalysts for positive change, advocating for human rights, shaping the political debate, acting as partners in the policy-making process or as monitors of human rights violations and securing remedies for victims.⁷ Civil society makes an integral contribution to the work of international organizations, participating in intergovernmental conferences, speaking on human rights issues and lobbying in diplomatic forums to promote development in the promotion and protection of human rights standards.⁸

This paper first discusses the theoretical perspective on the role of CSOs in human rights advocacy, and more explicitly how realist and constructivist theories support the role of CSOs in human rights advocacy. Second, the paper analyzes the different roles of CSOs in human rights advocacy; it also presents some controversies and criticisms associated with the role of CSOs in human rights advocacy. Third, the paper discusses the challenges that CSOs in South Sudan and around the globe face in executing their role. Fourth, the paper then suggests some recommendations and finally draws conclusions on the roles of CSOs in human rights advocacy.

1. Theoretical Perspective on the Role of CSOs in Human Rights Advocacy

In assessing the role of civil society organizations, one must consider a number of competing theoretical perspectives. The realist and the constructivist perspectives are discussed below.

Realist critics of civil society maintain that states are the key actors in the human rights field and that one should only consider the relationship between governments in human rights promotion and protection.⁹ While it is true that states maintain human rights standards, a realist perspective ignores the important role of civil society within this process. Contrastingly, constructivist theorists claim that CSOs have a vital role in human rights advocacy and diplomacy, by developing discourse, spearheading the process of norm emergence, and shaping the decisions of state actors.¹⁰ The latter acknowledges the role of civil society as both a witness to the conduct of states, but also a leader in the promotion and protection of human rights.

The development of globalization has greatly enhanced the role of civil society organizations in human rights advocacy. Trans-national human rights networks of NGOs like Human Rights Watch, Amnesty International and others are able to engage millions in human rights issues, developing a commanding public presence. Civil society now has a global reach and an increasing capacity to promote and defend human rights. NGOs are considered to be credible, impartial and independent actors with a commitment to humanitarian values.¹¹ Weissbrodt and McCarthy agree stating that, “much of the fact finding and reporting of human rights violations in the world is done by NGOs”.¹² Civil society functions as the unofficial defender of human rights standards.¹³

⁷ P Hicks, ‘Human Rights Diplomacy: the NGO Role’ in O’Flaherty, M (eds), *Human Rights Diplomacy: Contemporary Perspectives* (Martinus Nijhoff, Leiden 2011), 217.

⁸ Willetts (2006), 305.

⁹ B Cammaerts, *Civil society participation in multi-stakeholder processes: in between realism and utopia. Democratic Public Sphere* (Hampton Press, New Jersey 2009), 86.

¹⁰ D Armstrong and others (eds), *Governance and Resistance in World Politics*. (Cambridge University Press, Cambridge 2004), 166.

¹¹ A Iriye (ed), *The Human Rights Revolution: An International History* (OUP, Oxford 2012), 16.

¹² D Weissbrodt & J McCarthy, ‘Fact finding by international non-governmental human rights organisations’ (1981) 22 *Virginia Journal of International Law* 1, 13.

¹³ D Weissbrodt, ‘The contribution of international non-governmental organizations to the protection of human rights’ in T Meron (ed.), *Human Rights in International Law: Legal and Policy Issues* (Clarendon, Oxford 1989), 7.

2. The Role of Civil Society in Human Rights Advocacy

Civil society is diverse in its contribution to human rights advocacy. Civil activism raises awareness of human rights issues outside of diplomatic lobbying, with human rights defenders using activism to raise awareness of human rights abuses and also securing redress for the victims of human rights violations.¹⁴ Neoliberal theorists claim that civil society now has a much more advanced role in the protection and promotion of human rights alongside state actors. With funding being channeled directly to civil society, NGOs are able to take a direct role in world development and the setting of human rights standards and agenda.¹⁵ And with states often being the main violators of human rights, the role of civil society advocacy on human rights is even more crucial, particularly when there are broader concerns about the legitimacy of the state.

In the current post-modern landscape, there is a great diversity of civil society groups, each with their own set of beliefs and practices. Civil society should therefore not be conceived of as a single cohesive group. Civil society is even broader than only advocating for human rights, it encompasses organizations that work on issues other than human rights.¹⁶

In assessing the role of civil society organizations, it is important to recognize that governments are the key actor. While the complex nature of each state's diplomatic ties often prevents it from situating human rights at the core of its policy-decisions, the state is the only agency capable of legally enforcing human rights standards.¹⁷ Civil society organizations should therefore direct their efforts at powerful states, violating states and international organizations such as the UN in order to promote human rights standards, in the knowledge that progress is only made through governments.¹⁸

The different roles played by CSOs in promoting and protecting human rights at the domestic, regional and international level is discussed below, placing particular emphasis on the roles of CSOs in human rights advocacy in South Sudan.

To begin with, civil society organizations in South Sudan play an important role in human rights monitoring, reporting and documentation. Throughout the decades of conflict in Sudan and South Sudan, human right organizations have documented human rights violations and submitted shadow reports to the Universal Periodic Review (UPR). The UPR is a UN mechanism for state parties to periodically submit reports on the human right situations in their countries. Despite the limited infrastructure and capacity within the nascent civil society in South Sudan, civil society in South Sudan nevertheless still plays a crucial role in the sphere of human rights advocacy, not only pressuring the state to respect human rights principles, but also by acting as an external check on domestic and foreign policy. What is more, from a political science perspective, it can be argued that NGOs are increasingly assuming functions previously exclusive to the state (e.g. recording state compliance and monitoring violations).¹⁹ As Rice and Ritchie state, civil society has become a "significant third force in international systems".²⁰ In South Sudan, civil society organizations are known for their outspoken reality when it comes to human rights violations. The Community Empowerment for Progress Organization and South Sudan Law Society are particularly known for their emphatic criticism of the government with the regard to the need to establish the Hybrid Court for South Sudan (HCSS) that is agreed upon in the Agreement for the

¹⁴ M Keck & K Sikkink, 'Activists Beyond Borders: Advocacy Networks in International Politics' (Cornell University Press, New York 1998) 1.

¹⁵ L Jordan & P van Tuijl, NGO Accountability: Politics, Principles and Innovations. (Earthscan, London 2006), 49.

¹⁶ ICHRP (2009), 3.

¹⁷ Brett (1995), 104.

¹⁸ Ibid. 107.

¹⁹ C Welch, NGOs and Human Rights: Promise and Performance. (Pennsylvania Press, Philadelphia 2001), 26.

²⁰ A Rice & C Ritchie, 'Relationships between international non-governmental organizations and the United Nations' (July 1995) Transnational Associations, 254.

Resolution of Conflict in South Sudan (ARCSS), but to which certain actors in the Transitional Government of National Unity are opposed.²¹

CSOs not only hold states accountable, but can also lend valuable legitimacy to the decisions states make in choosing to intervene (politically or otherwise) in a country where human rights violations are taking place. As Hick states, “international actors are able to avoid having their efforts framed as ‘foreign intervention’, and instead are able to emphasize that they are simply backing domestic civil society in raising home-grown concerns”.²² NGOs have a vital role to play in human rights advocacy as standard-setters, generating national and international awareness and mobilizing public opinion to facilitate positive change. NGOs develop standards to protect victims of human rights violations who do not have the capacity to defend themselves.²³ The human rights provisions that currently exist in the UN Charter were in part the product of the determined lobbying of civil society.²⁴ Moreover, civil society considers new human rights principles and how they can be implemented into the current framework of human rights. This includes, for instance, ensuring that human rights sensitive laws are in place. Although this is happening in South Sudan, CSO engagement in South Sudan remains minimal at the national level and more visible at the international and regional levels. It is through the legal, political and social mechanisms discussed above that civil society exists as the chief standard setter for human rights.²⁵

NGOs are respected and valued by the UN for obtaining credible intelligence on the actions of states and civil society organizations can gain essential ‘endorsement’ of their concerns from the UN when facing denial from human rights violators.²⁶ Such a relationship enables civil society organizations to have a legitimate and influential role in human rights advocacy. However, contrary to this, at the domestic and regional levels, the space for civil society participation is shrinking at lightning speed. For example, a lot less space to engage with states exists at the International Conference on the Great Lakes Region than at the Human Rights Council. And in South Sudan, there is even less space for CSO engagement with the government. Although at some levels the government may provide that space, the impact of human rights advocacy is often mediocly realized. And while CSO’s petitions, reports and statements are often quoted in INGOs and UN reports, there are still more efforts required by the CSOs in Juba and the other parts of South Sudan to demonstrate more evidenced based research that is credible.

CSOs also have a vital role in the promotion and protection of human rights as advocates for change, influencing governments and raising public awareness of human rights violations. Through monitoring the conduct of governments, civil society acts as an essential reporter of their failings and pressures state actors to take a human rights based approach.²⁷ The past thirty years have seen an explosion in civil society advocacy work and a dramatic increase in the range of their activities and the depth of influence they have with international bodies and states²⁸. The emergence of ‘transnational advocacy networks’ like Amnesty International and Human Rights Watch has not only led to civil society, states, international organizations and the media working more closely together on promoting human rights standards, but importantly, it has also provided less powerful domestic NGOs in the developing world with access to powerful partners in the global North.²⁹

²¹ S Kiir & R Machar ‘South Sudan Needs Truth, Not Trials’ New York Times [op-ed] (7 June 2016) <http://www.nytimes.com/2016/06/08/opinion/South-sudan-needs-truth-not-trials.html?_r=0> accessed 28 July 2016.

²² Hick (2011), 221.

²³ P Baehr, *Non-Governmental Human Rights Organizations in International Relations* (Palgrave, Basingstoke 2009), 77.

²⁴ Ibid. 64.

²⁵ Ibid. 76.

²⁶ Hegarty & Leonard (1999), 259.

²⁷ Hicks (2011), 218.

²⁸ M Posner, ‘Human Rights and non-governmental organizations’ (1997) 66 *Fordham Law Review* 627.

²⁹ Keck & Sikkink (1998). 13.

The value of CSOs as advocates of human rights lies in their multifaceted approach. The interaction with victims of human rights violations coupled with their diplomatic role within international bodies, often lends them far greater awareness of human rights abuses than the diplomatic representatives of states.³⁰ NGOs therefore fulfill a vital role as ‘bridging organizations’, connecting the victims of human rights violations with state actors involved in human rights diplomacy.³¹ Consequently, diplomats benefit from allowing CSOs to counsel them. In return, NGOs are able to effectively lobby for placing human rights on the political agenda.

Equally, the proficiency of civil society in utilizing mass-media platforms to increase global awareness of human rights violations has increased pressure on governments to act. This is facilitated by technological advancements in recent years, such as the spread of internet and cell phones. The change is particularly apparent in South Sudan, in that the country went from essentially zero communication infrastructure, to being almost completely networked in a short period of time. Human rights abuses are now more visible and human rights advocates are able to bring additional visibility to them by deploying modern technologies. Civil society organizations are therefore in a position that is of crucial significance to the promotion and protection of human rights as an intermediary between governments and the victims of human rights abuses.³² This is particularly true of the advocacy work of relatively small domestic NGOs in countries under repressive regimes. In often incredibly unsafe conditions, human rights defenders alert other states to abuses that would otherwise go undetected.³³ This advocacy role is invaluable.

Furthermore, although civil society does not have the authority to change state policy, it does have the capacity to act as a catalyst for change. The expertise and intimate knowledge of human rights violations that CSOs possess, provides them with the capability to expose violations and pressure governments to respond, or face damaging criticism both domestically and internationally.³⁴ According to Keck and Sikkink’s ‘boomerang model’, INGOs are able to simultaneously create pressure on a government domestically and from outside its borders.³⁵ This model shows how CSOs situated outside of a violating state are able to assist domestic civil society in pressuring a repressive regime by fostering international condemnation. As Baehr alludes to, a state government does not openly choose to admit that it commits human rights violations, but every state does to a greater or lesser extent. Civil society therefore has a vital role in denouncing the actions of a state and ‘mobilizing shame’ upon governments to make them reevaluate their conduct and respect for human rights standards.³⁶

This mobilizing of ‘shame’ by CSOs demonstrates the importance of how human rights debates are ‘framed’ in the context of human rights advocacy. A human rights issue framed effectively through mass media can define public opinion and influence the future decision-making of governments, even leading to a change in the law. Focusing a human rights issue in the correct ‘frame’ can create a political and public obligation on a government. Civil society organizations are therefore not only ‘namers and shamers’ of human rights violators, but are also ‘makers and shapers’ of public opinion, constructing new norms and human rights standards.³⁷ The separation of civil society from the state allows civil society organizations to take a firm position on the promotion of human rights.³⁸ Baehr lends support to this view, stating, “human rights organizations are the only

³⁰ A Clark, *Diplomacy of Conscience: Amnesty International and Changing Human Rights Norms*. (Princeton University Press, Princeton 2001), 129.

³¹ Hegarty & Leonard (1999), 278.

³² Clark (2001), 126.

³³ Foreign and Commonwealth Office, *Annual Report on Human Rights* (HMSO, London 2004) 78.

³⁴ Hick (2011), 217.

³⁵ M Keck & K Sikkink, *The Power of Human Rights: International Norms and Domestic Change*, (Cambridge University Press, Cambridge 1999).

³⁶ Baehr (2009) 79.

³⁷ D Davis, A Murdie & C Steinmetz, ‘Makers and Shapers’: Human Rights INGOS and Public Opinion’ (2012) 34. *Human Rights Quarterly* 199, 201.

³⁸ Hick (2011), 219.

bodies that can permit themselves to be single-minded in the pursuit of the maximization of respect for human rights”.³⁹

Civil society is also able to frame human rights discourse by educating governments on human rights issues.⁴⁰ State officials frequently rely on the expertise of CSOs to interpret current human rights issues. Through the educating and lobbying of governments, drafting of resolutions and utilization of the UN human rights procedures, civil society is able to access influential ‘political opportunity structures’, informing diplomacy between states.⁴¹ As Wiseberg alludes, without NGOs advising the UN on human rights issues, its many human rights treaty monitoring-bodies and special mechanisms would be fundamentally incapacitated.⁴² NGOs are therefore important partners in the policy process, contributing to the work of governments and international organizations through advising diplomats on the content of resolutions, statements and agreements to be made.⁴³

However, there are dangers attached to such close involvement for civil society organizations. CSOs that take too active a role in international diplomacy risk sacrificing their independence from state actors and their credibility as neutral and unbiased.⁴⁴ It is incredibly damaging for a CSO’s credibility to become too closely affiliated with a particular state and the decisions it chooses to make, because civil society has an important role to play in human rights promotion and protection precisely because of its independence from governments.

3. Challenges Faced by CSOs in Human Rights Advocacy

In principle, human rights advocacy intrinsically involves challenging the actions of those in authority. Civil society therefore exists as a significant threat to the longevity of repressive regimes which choose to dispute the authority of international organizations and their own citizen’s claims to human rights standards.⁴⁵ Consequently, the extent to which CSOs can be deemed to function effectively in monitoring and holding state actors accountable for their decision-making is significantly impacted upon by the specific circumstances in which they operate. Human rights defenders in the global South face far greater challenges to promoting and protecting a universal interpretation of human rights norms, facing hostility, harassment and physical abuse from the apparatus of the state.⁴⁶ Currently, a great disparity exists in human rights between where CSOs have made the most progress on universal human rights standards (the North) and where this influence is needed most (the South). Mutua supports this view stating, “there is a distinction between those who need norms and those who are able to lobby effectively for their formulation”.⁴⁷ Below I discuss a number of the challenges faced by CSOs in human rights advocacy in South Sudan.

3.1. Controversies Associated with CSOs

Despite the important role played by CSOs in human rights advocacy, there are also controversies regarding their role. There are a number of tremendous weaknesses of CSOs in human rights advocacy. Many critics argue that domestic CSOs rely on external and foreign funding. Indeed, South Sudanese CSOs are not exceptions, and the over-reliance on foreign funds from foreign states can cause them to prioritize foreign interest over the interests of the communities that the CSOs are serving. This is a serious concern. Also, there is a danger of CSOs usurping the state’s responsibility with regard to the promotion and protection of human rights, thereby undermining state legitimacy. This argument is often put forward by those who are against CSOs working in the service delivery sector, claiming it undermines the social contract between the state and the people.

³⁹ Baehr (2009), 99.

⁴⁰ Davis, Murdie & Steinmetz (2012), 224.

⁴¹ R Brett, *Politics and Human Rights* (Blackwell, Oxford 1995), 100.

⁴² L Wiseberg, ‘NGO self-examination is the missing link in ECOSOC Review’ (1994) 2 Human Rights Tribune 11.

⁴³ Hick (2011) 220.

⁴⁴ Brett (1995) 103.

⁴⁵ ICHRP (2009) 12.

⁴⁶ Hegarty & Leonard (1999) 272.

⁴⁷ Mutua (2007) 580.

CSOs are often criticized for their failure to meet their responsibility towards the people of their constituency. Their responsibilities towards people primarily include providing people with support. They are also accountable to respond to problems that arise with staff, volunteers, trustees, members and the people who donate funds and time, among others. They are also accountable to the government and the general people for any of their negative approaches. They should have respect for the basic rights of people and adhere to the laws of the government, among others. These issues do not only undermine the work and legitimacy of CSOs working in human rights advocacy, but also affect the credibility of CSOs in fighting corruption and advocating for transparency and accountability.

3.2. The Politicization of CSOs

The CSOs in South Sudan are highly divided along political lines. Such fragmentation is deeply rooted, and hence undermines united efforts to collectively advocate for human rights promotion and hold the government accountable for human rights violations. In the recently concluded Intergovernmental Authority on Development (IGAD) peace process, both parties initially vehemently rejected civil society participation, until IGAD forced it on them in a May 2014 agreement. The then parties responded by coopting civil society participation in June 2014 and allowing two groups representing the Government of the Republic of South Sudan (GRSS) and Sudan People's Liberation Army-In Opposition (SPLM-IO) (with the four representatives of the civil society coalition Citizens for Peace and Justice sandwiched in the middle). This clearly demonstrates the influence that the political parties have on the work of CSOs.⁴⁸ Many CSOs in South Sudan do not have a clear cut human rights advocacy strategy, but rather follow where they can easily scoop money to run their offices and pay salaries. Unlike the Western CSOs, the South Sudan CSOs are sandwich between advocating on behalf of the masses and saving the interest of political parties that may provide them support. This is one critical reality that the CSOs have to deal with and they need help to navigate through some of these issues.

3.3. Limited Participation of South Sudan CSOs at International Level

Globally, the present lack of involvement of Southern-based civil society actors in international human rights diplomacy and advocacy is detrimental to the contribution of civil society to the promotion and protection of human rights. The relatively lower presence and success of domestic CSOs in the most repressive regimes around the world is making it increasingly challenging for INGOs to promote human rights standards.⁴⁹ The 2006 Cardoso Report lends support to this standpoint, endorsing the call for a much wider participation of CSOs in the work of the UN.⁵⁰ There currently exists a clear nucleation of civil society expertise and power in large INGOs based in the global North.⁵¹ The role of civil society in protecting and promoting human rights has the potential to greatly expand if civil society actors in South Sudan are given greater assistance to develop the same expertise and influence that international human rights organizations in the West currently benefit from.⁵² In this context, more is better!

3.4. Restrictive Regulatory Framework

Unlike in the West and North, many countries in the South and East have restrictive laws that prevent CSOs from conducting rigorous human rights advocacy. In South Sudan in particular, the laws regulating CSOs are not very clear. Such ambiguity impedes the role of CSOs in the promotion and protection of human rights. For example, the NGO Act of 2016 did not mention anything about human rights advocacy, and only specifies

⁴⁸ T Jerome, 'Civil Society and the South Sudan Crisis' International Crisis Group [blogpost] (14 July 2014) <<http://blog.crisisgroup.org/africa/South-sudan/2014/07/14/civil-society-and-the-South-sudan-crisis/>> accessed on 28 July 2016.

⁴⁹ Brett (1995), 105.

⁵⁰ Willetts (2006), 305.

⁵¹ Wiseberg (1994), 12.

⁵² Hegarty & Leonard (1999), 282.

humanitarian and voluntary organizations. The law is a typical replica of laws in Ethiopia and Sudan, where the space for human rights advocacy is closed and hence makes it very difficult for activists to operate.

3.5. Legitimacy Concerns of Human Rights CSOs

The increase and development of the role of civil society in promoting and protecting human rights in recent years has been accompanied by a greater focus on CSOs and their claims of representing the people. Critics increasingly contend that because human rights CSOs and associated advocacy groups are unelected, they lack accountability and do not represent the views of any group other than themselves. This is an important issue to resolve if civil society is to continue to legitimately increase its influence and standing in the promotion of human rights principles. It is a valid point to raise that CSOs are not accountable to citizens, or universally representative in the same way that a government is, but arguably, nor should they be. As Jordan and van Tuijl explain, this separation from elected government is crucial for human rights organizations to be able to challenge the status quo and advocate for human rights victims without having to consider the political concerns of being electorally accountable.⁵³ This is especially crucial in South Sudan, which has arguably lost its credibility and legitimacy with the electorate. Civil society exists to expand the political agenda and increase pressure on elected officials to be accountable for their actions.

3.6. Funding Irregularities for Human Rights Advocacy

Civil society actors often go beyond the domestic sphere. At the international level, CSOs have a role to play in ensuring that states meet their international human rights obligations, such as the ratification of treaties and reporting on human rights compliance. South Sudan has only ratified a limited number of international treaties and conventions.⁵⁴ Although there are some efforts put forward by civil society organizations, their efforts are limited due to funding issues and limited technical capacities to provide proper human rights advocacy at the international level. Civil society actors are usually prominent players in the spread of human rights education and public awareness. However, their approach in South Sudan is fragmented, stemming from their varied interests and specializations. Such fragmented efforts weaken human rights advocacy. This is partially affected by the disjointed and uncoordinated funding for human rights advocacy.

3.7. Human Rights Agenda seen as Western Ideology

While there is some of truth to the criticism that human rights are based on a Western ideology and are being imposed on Southern states by Western organizations, it is important to acknowledge that at their core, international human rights standards are intended to be universally held.⁵⁵ Many governments of countries in the global South that most vehemently repress the activities of civil society in their jurisdiction, often have the poorest human rights records and the most to hide from the international community.⁵⁶ As Brett explains, the more repressive the regime, the harder it can be to establish a functioning civil society in that state.⁵⁷ Significantly, there are CSOs that choose to work alongside oppressive regimes, in order to improve human rights in these countries. As Bell and Carens explain, organizations such as the Ford Foundation are actively involved in human rights projects with authoritarian governments such as China, adopting an approach that it is better to achieve a degree of positive change on an issue than to simply criticize a state and ostracize it further

⁵³ Jordan & van Tuijl (2006) 48.

⁵⁴ Some of the human rights treaties signed and ratified by South Sudan include: the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. However, the two treaties under the International Bill of Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), have both been signed but not yet ratified.

⁵⁵ Welch (2001), 157.

⁵⁶ Bell & Carens (2004), 316.

⁵⁷ Brett (1995), 105.

from the human rights community.⁵⁸ Although, there are risks attached to such an approach, by working with repressive governments, civil society actors can inadvertently grant them a degree of unmerited legitimacy.

3.8. Inability of CSOs to Influence Decisions in Domestic and International Arenas

Another major challenge faced by civil society is their limited ability to ensure that their recommendations are implemented. Recommendations made by CSOs are not binding and are made in an advisory capacity. Even though they cannot make binding decisions, CSOs can put pressure on their governments to accept and implement their recommendations. Through collaboration and joint lobbying efforts with other civil society actors (local, regional or international), it can be made more difficult for a government to ignore or window-dress human rights deficiencies.⁵⁹

4. Recommendations

As this paper has described, civil society faces many challenges in effectively doing human rights advocacy in South Sudan. It is currently not equipped to play the necessary and critical role in the promotion and protection of human rights, for instance by conducting serious advocacy on basic fundamental human rights issues such as the right to health, education and food. Civil society must be developed and strengthened. To achieve this, the international community should engage CSOs in South Sudan in the following ways:

- 1 *To conduct a thorough mapping and assessment of CSOs* – International support of CSOs should begin with an assessment of the current CSO landscape, especially those working on human rights issues. What is already clear is that the capabilities and needs of CSOs vary depending on sector and location. CSOs in Juba versus those in different parts of the countryside will need targeted programming that takes into account their current capacity, their potential roles, and the limitations of their unique operating environments.⁶⁰ The mapping of CSOs should include the establishment of specific points and methods of contact that work best for each organization. A formalized collection of contact and leadership information will provide the building blocks for an eventual civil society network that can better share information and coordinate activities. While the lack of infrastructure is an obstacle, efforts by international and local communities must be geared towards enhancing the capacities of human rights organizations in South Sudan.
- 2 *Create a proper coordination mechanism especially for CSOs within the sphere of human rights advocacy*– Lack of coordination of civil society has consistently undermined its efforts. A coordinating mechanism at the national level could have a significant effect on improving capacity, reducing duplication of efforts and encouraging complementarity so that CSOs do not work at cross-purposes. Between human rights organizations in South Sudan there is no coordinated response mechanism to address human rights issues. A single initiative headed by an individual CSO leaves it vulnerable to attack, manipulation and oppression by government entities. As international actors assess the CSO landscape, developing a coordinating mechanism should be a primary priority. This mechanism should stretch across all CSO levels –from Juba, to the states, to the diaspora groups – and include those carrying any sort of advocacy whether it is human rights advocacy or constitutional reform advocacy. Such a coordination mechanism should adapt to the varied contexts, skills and technological capabilities of each CSO. It should function as a network, enabling the sharing of information among CSOs and avoiding taking on a national leadership role.
- 3 *Better and increased engagement of potential partners* – Civil society should be empowered to seek out and forge partnerships with other groups to leverage comparative advantages within the country, region or at the international level. First, the diaspora have shown a higher level of unity and organization than that of typical South Sudanese CSOs, at least while abroad. It has greater resources and access to powerful voices in the international community, and is thus well positioned to form partnerships with national CSOs.

⁵⁸ Bell & Carens (2004), 321.

⁵⁹ Asian NGOs' Network on National Human Rights Institutions, Report on the Performance and Establishment of NHRIs in Asia: Maldives (2010) <<http://www.mvdemocracynetwork.org/wp-content/uploads/2010/08/ANNI-report-2010-final.pdf>> accessed on 31 March 2011.

⁶⁰ Cairns, E, Civil Society in Fragile and Conflict-Affected States (Oxfam policy compendium note) (2013).

However, it is limited by its historical tendency to fracture into ineffective parties when taking on a more active role within South Sudan.

- 4 *Engagement of women in human rights advocacy* – Women’s groups have potential to serve as organized human rights activists. Such groups already exist in South Sudan and with women acting as important figures in every home, from rural to urban and across all ethnicities and tribes, they are naturally positioned to exercise significant reach. Furthermore, women could also be a key entry point to key government offices, as in most cases they are regarded as mothers of the nation. However, most women in South Sudan tend to be poorly educated, marginalized, under-resourced, and thus lacking in general capacity. Thus, programs must be tailored towards building the capacity of women’s organizations to effectively carry out human rights advocacy.
- 5 *The need to engage with Faith-Based Institutions (FBIs)* – FBIs are active players in human rights advocacy. In South Sudan, they play a modest role in human rights advocacy, unlike Western FBIs that can openly criticize their governments to act and protect the rights of citizens. They are key players when it comes to mass mobilization and audience gathering. FBIs are likely the best positioned to act as a bridge. They have credibility, experience, and the respect of those with political power. FBIs are arguably more far-reaching than the government itself. Given the lack of proper coordination and relationship between CSOs and FBIs, there is a need for increased collaboration or programs tailored towards building CSOs and religious organizations.
- 6 *Members of academia must participate* – Academia must not only participate, but also undertake a very active role in shaping debates around the topics of human rights advocacy. This is currently happening in academic discourse in South Sudan, but not to the extent expected. Academics possess the necessary skills, but have been largely excluded. The human rights symposium organized by the University of Juba with support from the International Development Law Organization (IDLO) should happen frequently on key emerging human rights issues. In the future, CSOs will require scholars and their knowledge to effectively advocate on matters of federalism, constitutionalism, transitional justice, judicial activism and human rights advocacy.
- 7 *United and constructive messaging* – Regardless of which CSOs take on a greater role in human rights advocacy, the message that each puts out to its constituency will be crucial, and the first priority must be to stop exacerbating the divisions in society. Consistent messaging from CSOs is key in informing and educating the citizenry on their rights and to allow them to take informed decisions. This can only be achieved if CSOs promote a historical narrative of strength in diversity and unity to their constituencies. The narrative must recast South Sudanese diversity as a prized asset, emphasizing how the commitment and bravery of a broad range of actors led to independence and, moving forward, this diversity must be channeled to strengthen the young country.
- 8 *Enable knowledge and resource sharing* – CSOs should try to sidestep a direct challenge to those in power by focusing on sharing knowledge and resources instead of taking a more aggressive advocacy role. Historically, public forums have proven useful in knowledge and resource sharing. They allow specialists in different areas (i.e. economics, public health, or education) to safely, and even temporarily, set aside other loyalties and constructively discuss the future and development of South Sudan. The international community has a critical role to play in the creation of safe spaces for these forums. This can be done by either providing the space itself or using influence to pressure the GRSS to facilitate. Providing the space itself will be more costly and less sustainable, but it will avoid allegations of government manipulation that could surface if the GRSS were to initiate the dialogue.
- 9 *Build CSOs’ expertise and capacity to engage* – CSOs do not currently have sufficient expertise or advocacy skills to engage constructively on the range of complex technical issues in the human rights field. Training in a range of skills and substantive issues is required to equip CSOs to engage with local communities, government officials, international organizations, and donors. Although they may have the skills and knowledge necessary to run effective organizations and programs, they may lack the legitimacy and representativeness to maintain a constituent base. Furthermore, training programs should be broad-based enough to be applicable across a range of CSO sectors, but adaptable enough to address the specific needs of the various types of CSOs in different operating environments and with different roles. Needs will vary between national and local CSOs. Although each organization has a unique purpose, and represents different constituencies, a baseline understanding of roles and responsibilities in engaging with

stakeholders and decision-makers is necessary to maximize their effectiveness when it comes to human rights advocacy.

- 10 *Fix faulty funding mechanisms* – International funding mechanisms for civil society programs need to be improved. The donor funding cycles are too short for initiatives that require years to develop and produce results. Human rights advocacy requires long term funding. On the onset of the 15th December 2013 conflict, international donors shifted funding for CSOs to humanitarian response efforts. This restricted the reach of CSOs at a time when they required the most support for their human rights advocacy activities, especially in the area of transitional justice. With such limited resources and capacity, restrictive time frames compound their ability to conduct advocacy.⁶¹ Funding civil society programs for 1-5 year cycles would enable a broader, longer-term reach and results.

5. Conclusion

Civil society organizations are representing citizens because they embody the identities and rights of specific groups in society that are not being adequately represented by elected governments. This form of representation is absolutely essential in the protection and promotion of human rights because it fulfils an important democratic function of holding elected state officials to account, and in the process, advocating for the rights of people who have themselves been the victims of human rights abuses and whose identities and rights are not being recognized.⁶²

Ultimately the existence of a well-functioning and global civil society is undoubtedly fundamental to the current and future success of the protection and promotion of human rights. As Baehr states, “A critical civil society as represented by international NGOs is indispensable for raising concerns about global developments affecting human rights.”⁶³ CSOs fulfill a multitude of essential responsibilities and functions, both in relation to international diplomacy and in their important role as advocates for human rights issues. They are “essential partners in the United Nations human rights system.”⁶⁴ Civil society exists to guide the conduct of state actors in how they treat human rights standards.⁶⁵

Civil society has an increasingly important role to play in human rights advocacy and continues to stand at the forefront of the human rights cause. As the world becomes increasingly globalized and inter-connected and the barriers between states disappear, it will become increasingly imperative that every section of civil society is able to develop and work together to shape human rights standards for the generations to come. As Kofi Annan, the former Secretary General of the UN proclaimed, “The United Nations once dealt only with governments. By now we know that peace and prosperity cannot be achieved without partnerships involving Governments, international organizations, the business community and civil society. In today's world, we depend on each other.”⁶⁶ The role of civil society is therefore crucial to the promotion and protection of human rights.

Bibliography

- Annan, K, Address to the World Economic Forum (Davos Switzerland, 31 Jan 1998) UN SG/SM/6448
 Armstrong, D and others (eds), *Governance and Resistance in World Politics*. (Cambridge University Press, Cambridge 2004)
 Asian NGOs' Network on National Human Rights Institutions, Report on the Performance and Establishment of NHRIs in Asia: Maldives (2010) <<http://www.mvdemocracynetwork.org/wp-content/uploads/2010/08/ANNI-report-2010-final.pdf>>accessed on 31 March 2011.

⁶¹ Saferworld Background Paper, 2011 36.

⁶² Jordan & van Tuijl (2006), 51.

⁶³ Baehr (2009) 100.

⁶⁴ UNHCR, 'Working with the UN Human Rights Programme: A Handbook for Civil Society' (Geneva 2008), 8

⁶⁵ Brett (1995), 110.

⁶⁶ K Annan, Address to the World Economic Forum (Davos Switzerland, 31 Jan 1998) UN SG/SM/6448.

- Baehr, P, *Non-Governmental Human Rights Organizations in International Relations* (Palgrave, Basingstoke 2009)
- Bell, D & Carens, J, 'The Ethical Dilemmas of International Human Rights and Humanitarian NGOs: Reflections of a Dialogue between Practitioners and Theorists' (2004) 26 *Human Rights Quarterly* 303
- Bell, D & Coicaud, J, *Ethics in Action: The Ethical Challenges of International Human Rights Non-Governmental Organizations* (Cambridge University Press, Cambridge 2007)
- Brett, R, *Politics and Human Rights* (Blackwell, Oxford 1995) 100
- Cairns, E, *Civil Society in Fragile and Conflict-Affected States* (Oxfam policy compendium note) (2013)
- Cammaerts, B, *Civil society participation in multi-stakeholder processes: in between realism and utopia. Democratic Public Sphere.* (Hampton Press, New Jersey 2009) 86
- Clark, A, *Diplomacy of Conscience: Amnesty International and Changing Human Rights Norms.* (Princeton University Press, Princeton 2001) 129
- Cohen, S, 'Government responses to human rights reports: claims, denials and counterclaims' (1996) 18 *Human Rights Quarterly* 517
- Davis, D, Murdie, A & Steinmetz, C, 'Makers and Shapers': Human Rights INGOS and Public Opinion' (2012) 34 *Human Rights Quarterly* 199
- Foreign and Commonwealth Office, *Annual Report on Human Rights* (HMSO, London 2004)
- Hegarty, A & Leonard, S (eds), *Human Rights: An Agenda for the 21st Century* (Cavendish Publishing, London 1999)
- Hicks, P, 'Human Rights Diplomacy: the NGO Role' in O'Flaherty, M (eds) *Human Rights Diplomacy: Contemporary Perspectives* (Martinus Nijhoff, Leiden 2011) 217
- International Council for Human Rights Policy (ICHRP), *Human Rights Organizations: Rights and Responsibilities, Final Draft Report* (2009)
- Iriye, A (ed), *The Human Rights Revolution: An International History* (OUP, Oxford 2012) 16
- Jerome, T, 'Civil Society and the South Sudan Crisis' International Crisis Group [blogpost] (14 July 2014) <<http://blog.crisisgroup.org/africa/South-sudan/2014/07/14/civil-society-and-the-south-sudan-crisis/>> accessed on 28 July 2016
- Jordan, L and van Tuijl, P, *NGO Accountability: Politics, Principles and Innovations.* (Earthscan, London 2006)
- Keck, M & Sikkink, K, *The Power of Human Rights: International Norms and Domestic Change,* (Cambridge University Press, Cambridge 1999)
- Keck, M and Sikkink, K, 'Activists Beyond Borders: Advocacy Networks in International Politics' (Cornell University Press, New York 1998)
- Kiir, S & Machar, R, 'South Sudan Needs Truth, Not Trials' New York Times [op-ed] (7 June 2016) <http://www.nytimes.com/2016/06/08/opinion/South-sudan-needs-truth-not-trials.html?_r=0> accessed 28 July 2016
- Mitoma, G & Mitoma, G, 'Civil Society and International Human Rights: The Commission to Study the Organization of Peace and the Origins of the UN Human Rights Regime' (2008) 30 *Human Rights Quarterly* 607
- Mutua, M, 'Standard Setting in the Human Rights: Critique and Prognosis' (2007) 29 *Human Rights Quarterly* 553
- Posner, M, 'Human Rights and non-governmental organizations' (1997) 66 *Fordham Law Review* 627
- Rice, A & Ritchie, C, 'Relationships between international non-governmental organizations and the United Nations' (July 1995) *Transnational Associations* 254
- United Nations Economic and Social Commission for Western Asia (ESCWA, 'Enhancing Civil Society participation in public policy processes' (2010)
- UNHCR, 'Working with the UN Human Rights Programme: A Handbook for Civil Society' (Geneva 2008)
- Wiseberg, L, 'NGO self-examination is the missing link in ECOSOC Review' (1994) 2 *Human Rights Tribune* 11
- Wiseberg, L, 'Protecting Human Rights Activists and NGOs' (1991) 13 *Human Rights Quarterly* 529
- Weissbrodt, D, 'The contribution of international non-governmental organizations to the protection of human rights' in Meron, T (ed.) *Human Rights in International Law: Legal and Policy Issues* (Clarendon, Oxford 1989)
- Weissbrodt, D & McCarthy, J, 'Fact finding by international non-governmental human rights organisations' (1981) 22 *Virginia Journal of International Law* 1, 13

Welch, C, NGOs and Human Rights: Promise and Performance. (Pennsylvania Press, Philadelphia 2001)
Willetts, P, 'The Cardoso Report on the UN and Civil Society: Functionalism, Global Corporatism, or Global Democracy?' (2006) 12 Global Governance 305

Paralegals as Conduits for Advocacy on Rule of Law and Human Rights¹

Majok Mayen Anyang and Mori Moses Sworo

Introduction

Around the world, billions of people suffer because they lack access to justice services. Unable to afford lawyers and ignored by authorities, their rights are routinely violated – cheated by employers, preyed upon by corrupt officials, victimized by violence. Often poor and marginalized, these individuals, and even whole communities, struggle to find means of recourse or redress for the harm done to them.² In South Sudan, legal representation and access to the court system is a constitutional right of every citizen,³ but given the high cost of these [legal] services, many people have difficulties accessing justice. In communities throughout South Sudan, people struggle with legal issues related to housing, family, debt, crime, property, and other matters that affect their well-being. Those who are poor, geographically isolated, or otherwise vulnerable often cannot access legal assistance in solving their justice problems. They may suffer under discriminatory traditional practices or lack the legal means to enforce norms that should protect them.

By providing justice services, community-based paralegals can offer a solution. Paralegal programs can help communities that lack access to the legal systems to resolve their justice issues. Particularly in post-conflict or developing countries, lawyers typically concentrate in population centers and commercial hubs and often can't meet the demand for justice services. Thus, paralegals represent a typical shift in the delivery of legal services, similar to the spread of rural public health workers in response to the formal medical profession's inability to meet community health needs. They can often resolve justice problems faster than the formal legal system. In principle, paralegals are backed by lawyers who mentor them and can engage in litigation when necessary. Community-based paralegals have a deep knowledge of the people they serve and can provide solutions not just to individuals, but to whole groups. Perhaps most importantly, community-based paralegals are able to empower their clients, help them to become aware of their legal rights and act to advance their interests. Community-based paralegal programs can provide lasting empowerment to those who are otherwise disadvantaged.

This paper investigates the contribution of paralegals in advocating for rule of law and observance of human rights in countries where beautiful laws remain mere ink in books and are not translated into practice. The paper first discusses what paralegalism is and gives an overview of the origin of the paralegal movement. It then describes the concepts of the rule of law and human rights in relation to paralegalism. Drawing on this, the paper then turns to the roles of paralegals in South Sudan and the challenges they face.

1. What is Paralegalism?

Several attempts at making the legal system work for everyone in South Sudan, especially the poor and marginalized, have been entirely focused on building government institutions, mainly the judiciary, with little or

¹ This paper has been prepared to encourage discussion on the role of *Paralegals as channels for Advocacy on Rule of Law and Human Rights*, to further research into issues of access to justice for indigent citizens in South Sudan and, in particular, to stimulate activity amongst local justice service providers including the judiciary, police, prisons and other stakeholders, toward the establishment of positive policy that recognizes the work of paralegals. Pact would like to thank the International Development Law Organization (IDLO), the United States Department of State: Bureau of International Narcotics & Law Enforcement, and the United States Agency for International Development for their generous support and funding.

² Open Society Foundations, 'Community-Based Paralegals: A Practitioner's Guide' (New York, 2010).

³ Articles 19(7) and 20 of the Transitional Constitution of the Republic of South Sudan 2011, read together with sections 10(2)(d) of the Ministry of Legal Affairs & Constitutional Development Organization Act 2008.

no attention paid to building the capacity of users of justice services who are meant to efficiently use and access these institutions. In light of this reality, poor people, especially those residing in rural areas, tend to suffer greatly from an inability to access legal services to resolve their legal problems. Given South Sudan's geography and infrastructure, it is not practical to place or station trained lawyers in all localities where people live. It is therefore necessary to facilitate acquisition of basic legal knowledge within the communities by training paralegal service providers from within these communities. The use of community-based paralegals furthermore promotes legal empowerment of communities, which can contribute to addressing the imbalances in access to justice created by conflict. This section discusses what paralegalism is and how it relates to the promotion of the rule of law and human rights.

Paralegalism involves the process of training and equipping non-lawyers with basic legal knowledge of the law and legal procedures to enable them to enlighten community members of their legal rights. As defined by the National Federation of Paralegal Associations, a paralegal is a person qualified through education, training or work experience to perform substantive legal work that requires knowledge of legal concepts and is customarily, but not exclusively, performed by a lawyer.

A paralegal is not a qualified solicitor or barrister but he or she is trained to understand different methods that can be used in dealing with disputes and legal matters, and to assist indigent and disadvantaged people in asserting their rights without necessarily engaging the services of a lawyer or resorting to litigation.⁴ He or she is a member of the community who:

- Has basic knowledge of the law, the legal system, and its procedures;
- Has skills in and knowledge of alternative dispute resolution mechanisms, including mediation, conflict resolution and negotiation;
- Is able to communicate ideas and information to community members using interactive teaching methods;
- Has good working relationships with local authorities and service delivery agencies; and
- Has good community organizing skills that can be used to empower communities to address systematic problems on their own in the future.

Paralegals have basic legal skills such as problem solving, counseling/advising and taking statements in order to assist the community members with legal advice whenever necessary, but cannot set legal fees or represent clients in court. Paralegals provide legal first aid.⁵

2. The Origin of the Paralegal Movement

This section discusses the emergence of paralegal movements in South Sudan as well as in other jurisdictions, and investigates how these paralegal movements have shaped access to justice in an attempt to promote rule of law and human rights principles.

First and foremost, laws regulate all aspects of an individual's life. Some have even aptly stated that the law governs one's life from birth to death. And it applies to all, and not just a select group of people. It is therefore important that all are aware of the law and its applications. Unfortunately, in South Sudan, like in many other developing countries, the law and its prescribed procedures are complicated both in form and content. Therefore, while the law affects everyone in all spheres of life, it remains something that is primarily accessible and understandable to a few trained specialists in the field of law (lawyers). Furthermore, the law makes it compulsory for everybody to be aware of it, as ignorance of the law is no defense in a court of law. Despite this legal requirement, the reality is that the majority of South Sudanese are not aware of the existence of many of the laws that govern their lives and regulate their conduct. The law is normally expressed in legal and technical language making it difficult for most people to understand. In addition to this is the fact that accessing legal

⁴ Pact South Sudan, 'Paralegal Training Manual' (May 2015).

⁵ Federation of Women Lawyers (FIDA-Lesotho) in collaboration with Community Legal Resource Centre (CLRAC), 'Paralegal Training Manual' (2000).

services, even the very basic ones, normally involves consulting a lawyer who must be paid professional fees for services rendered. As a result, the ordinary citizen is not able to access justice, or is even denied access to justice.⁶ Although, Article 19(7) of the South Sudan Transitional Constitution provides that any accused has the right to be represented by a lawyer and have legal aid assigned by the government when he or she cannot afford it, most citizens cannot afford a lawyer, nor is the state able to provide one for them. The state thereby does not provide for the needs of its citizens by protecting their rights and promoting the rule of law.

The community-based paralegal movement arose in response to the need to “promote and protect human rights and to provide greater access to justice in grassroots communities, particularly for marginalized, less privileged, and poor residents.”⁷ These programs work on a variety of justice issues, and target both the individual and community. In other words, paralegal programs emerged in response to the demands of marginalized communities that saw the law as an essential tool to improving their situation and stimulating lasting reform and development, but that were otherwise unable to access lawyers and the formal justice system due to financial, geographic, and cultural barriers.

The use of paralegals first developed in countries such as England, the United States, and the Netherlands, where they are used as assistants to lawyers. In the United States and Great Britain, the paralegal movement started in the 1960s. Formal programs were started in public service agencies for the purpose of training individuals to assist in making legal services available to those unable to pay for legal services. Private law firms, businesses, and governmental agencies quickly recognized the benefits of employing specially trained individuals to provide services at lower billing rates, benefiting the client and increasing efficiency. Since its inception, the paralegal profession has experienced consistent growth, both in the number of paralegals practicing and in the type and level of responsibilities.

In the early 1980s in England, the United States and the Netherlands and many other countries, courts began to recognize paralegals as separate from support staff and encouraged attorneys to provide legal services in the most efficient manner possible.

As paralegals became more integrated into the legal team and the work delegated to paralegals became more substantive in nature, attorneys began to include time for both attorney and paralegal services in fee petitions as permitted by state or federal statutes, and courts began to award fees for paralegal services.⁸

The first paralegal team in South Sudan was established in 2002 by Pact Sudan (now Pact South Sudan) in Chukudum in Southern Sudan (in Namurnyang State⁹). It was set up under its access to justice program to deliver basic legal services to citizens in the form of legal awareness in the region, in response to the wind of change in recognition of human rights principles, democratic principles, good governance and the rule of law. The program later on spread to other areas, such as Rumbek where Pact in collaboration with the SPLM Secretariat of Judicial Affairs and Secretariat of Legal Affairs and Constitutional Development trained another group of paralegals in 2004. This use of paralegals was later on adopted by other access to justice actors such as UNDP and UNICEF on the eve of South Sudan independence in 2011 in order to make justice accessible to indigent citizens. This explains the birth of paralegalism in South Sudan.

Having discussed what paralegalism is and how the practice came into being in South Sudan, the relevant question is of course who can become a paralegal? It is common practice that any member of the community can become a paralegal, but it is worth noting that education plays a vital role in the development of the

⁶ Article 14 of the Transitional Constitution of the Republic of South Sudan, 2011 stipulates that “All persons are equal before the law and are entitled to the equal protection of the law without discrimination as to race, ethnic origin, colour, sex, language, religious creed, political opinion, birth, locality or social status”.

⁷ Global Rights, ‘Paralegal Training Manual on Improving Women’s Access to Justice in Northern Nigeria’ (2010).

⁸ National Federation of Paralegal Associations, ‘A Guide to Quality Paralegal Education’ (website) <<https://www.paralegals.org/i4a/pages/index.cfm?pageid=3364>> accessed 28 October 2016.

⁹ In former Eastern Equatoria State

paralegal profession. Although on-the-job training remains an important element in developing successful paralegals, formal education has an increasingly significant role. Paralegals can be any member of a community and often include community leaders, retired teachers, civil servants, members of community-based organizations, youth leaders, activists, law-enforcement/retired law enforcement, union leaders and members, religions leaders, association representatives, students, among others.¹⁰

3. Rule of Law and Human Rights

Before proceeding, it is important to establish a working definition of both the rule of law and of human rights, as these concepts figure prominently in the discussion of their relationship to paralegalism.

3.1. Rule of Law

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.”¹¹

The World Justice Project defined rule of law as a system in which four universal principles are upheld:

- Government and its officials and agents, as well as individuals and private entities, are accountable under the law.
- Laws are clear, publicized, stable, and just, applied evenly, and protect fundamental rights, including the security of persons and property and certain core human rights.
- The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient.
- Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.¹²

3.2. Human Rights

One of the fundamental principles of human rights is that, “all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”¹³ Therefore, human rights are the basic rights and freedoms that belong to every person in the world, from birth until death. They apply regardless of where you are from, what you believe or how you choose to live your life. They can never be taken away, although they can sometimes be restricted – for example if a person breaks the law, or in the interests of national security.

These basic rights are based on values like dignity, fairness, equality, respect and independence. But human rights are not just abstract concepts – they are defined and protected by law.¹⁴ Human rights form the backbone of a just society and their protection enables individuals and collectives to pursue their desired ends. Yet human rights are too frequently disregarded or revoked when politically expedient or viewed as obstacles to political, environmental, and economic objectives. A just rule of law protects and enforces fundamental rights: the right to life and security of person; freedom of thought, religion and expression; freedom of assembly and association; fundamental labor rights; the right to privacy; equal protection of the law; and due process of law. Rule of law and human rights therefore complement one another in a democratic society.

¹⁰ Pact South Sudan (2015).

¹¹ UNSC, Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, 3 August 2004, S/2004/616 (2004).

¹² World Justice Project, ‘What is the Rule of Law?’ (website) <<http://worldjusticeproject.org/what-rule-law>> accessed 18 October 2016.

¹³ Article 1 of the Universal Declaration of Human Rights 1948

¹⁴ Equality and Human Rights Commission, ‘What are Human Rights?’ (website)

<<https://www.equalityhumanrights.com/en/human-rights/what-are-human-rights>> accessed 18 October 2016.

It should therefore be noted that a system of positive law that fails to respect core human rights established under international law is at best “rule by law”, and does not deserve to be called a rule of law system. Viewed through the human rights framework, access to justice means that: individuals and their communities need to be educated and informed about their rights; these individuals and their communities need to develop the capacity for demanding such rights; and widespread violations of human rights within a community should be addressed through long-term strategic solutions rather than solutions only for individual cases. Supporting rule of law in protection of human rights principles can also help to promote redress for past violence and human rights violations and enable societies to recover from the legacy of violence.

It is very difficult for a nation to maintain the rule of law if its citizens do not respect the law. Assume that people in a community decide that they will no longer abide by laws and begin to ignore stop signs and traffic signals; the ability of police officers to enforce the laws would be overwhelmed and the streets of the community would quickly become a chaotic and dangerous place. The rule of law functions because most of us agree that it is important to observe the law even if a police officer is not present to enforce it. Our agreement as citizens to obey the law to maintain our social order is sometimes described as an essential part of the social contract. This means that, in return for the benefits of social order, citizens agree to live according to certain laws, rules, and norms. But this can only be done if individuals know their laws and hence their rights and responsibilities as citizens.

4. Roles of Paralegals in the Context of South Sudan

Here, we discuss the role played by paralegals in South Sudan since its inception and the need to continue with the use of paralegal schemes in furtherance of access to justice by indigent citizens in promotion of the rule of law and protection of human rights principles.

In a young country like South Sudan, most disputes are still being resolved through traditional, customary structures and institutions. There are a few organizations, including Pact and its Access to Justice Partners, United Nations Development Programme (UNDP) and South Sudan Law Society (SSLS) among others, that have developed paralegal programs and trained community-based paralegals, but they face challenges with limitations to sustainability and ownership.

Working with the College of Law (COL) at the University of Juba, Pact provides a multi-dimensional strategy for COL students to acquire and apply practical skills and enhance their learning experience. Students increase their understanding of human rights issues and responsibilities in South Sudan statutes and use their knowledge to disseminate information to the public. Through this project, students also provide pro bono legal aid services to marginalized citizens, boosting legal services in underserved communities. This project builds on Pact’s recent Access to Justice programming, which provided paralegal support to underserved communities and ended in early 2016, and early work from 2002-2005 with the Sudan Peace Fund.

Paralegal practice remains un-codified in the laws of South Sudan. However, in a country with few practicing lawyers, who are mostly centered in urban areas, the formalization of paralegals or community legal workers can start to bridge a massive service delivery gap and enable access to both formal and informal justice systems. Community-based paralegals are now increasingly perceived as agents for social change and conduits for increasing citizens’ voices¹⁵. The scope of the paralegals’ role is a wide one¹⁶ and discussed in more detail in the paragraphs below.

¹⁵ UNDP, ‘Paralegals bring justice to women in South Sudan’ (website) <<http://www.undp.org/content/undp/en/home/ourwork/ourstories/paralegals-bring-justice-to-women-in-south-sudan.html>> accessed 18 October 2016.

¹⁶ J Jeffery, ‘Key note address’ (Speech at 1st National Conference on Paralegalism hosted by the Department of Law in Tshwane 2015) <www.justice.gov.za/m_speeches/2015/20150223_ParaLegal.html> accessed 18 October 2016.

Paralegals are often the first line of legal assistance. Many people who do not have resources to access private lawyers – in particular people who are poor, marginalized and vulnerable – turn to paralegals who may investigate and refer matters to lawyers or relevant bodies for them to deal with. For example, a man was unreasonably arrested in Twic State¹⁷ remaining in jail for 15 months without charges and was not produced before any court. When Pact's trained community based paralegal in Twic came across this man who would have rotted in jail, they referred his case to a Pact Community Development Officer, a lawyer by profession. He in turn applied to court for the production and trial of the suspect and was granted. Upon trial, this innocent man was finally acquitted as he had no case to answer.

Paralegals are also introduced to lobbying and advocacy techniques so that they can lobby decision makers within their communities and promote an attitude change regarding gender discrimination at all levels. Advocating for women's legal and human rights is so far an essential role of paralegals, regardless of their locality. This is evident from the experience of Pact's community-based paralegals in Kuajok in Gogrial State¹⁸. Together with the Community Development Officer, lobbied the local government authorities and as a result female chiefs were installed at the level of Court A in two bomas of the then Kuac North Payam in Kuajok.¹⁹ Thus, paralegals constitute an important component of networking with local authorities as well as other local organizations in the localities where they operate; particularly with local organizations sharing similar interests in an advance for equal rights in accessing justices for all.

Community-based paralegals can educate communities, individuals and chiefs about laws governing a particular issue and legal processes in furtherance of human rights principles and standards. The customary courts system is based on the customs and traditions of the people, some of which are in conflict with the statutory court system. Human rights issues like women's rights and children's rights are not protected under this system. Well-trained paralegals can provide many of the basic general and criminal services that clients of legal aid programs need.

Finally, community-based paralegals are appropriately located to understand the issues and the form of intervention most suitable to a specific community or case. They are therefore well-positioned to promote problem-solving and good governance at community and chiefdom level.

5. Challenges Faced by Paralegals in the Course of their Work

This section discusses challenges that community-based paralegals face when providing free legal services to the indigent citizens of their communities. Clearly identifying these challenges helps to shape policy reforms towards recognition, sustainability and motivation of the paralegal groups, in order to allow them to unconditionally provide free legal services to the rural poor. Despite the fact that paralegals play a central role in community service, they are facing numerous challenges in implementing their activities in the community. Some of these challenges are discussed below.

Lack of policy/legal framework. There is no comprehensive legal framework governing the provision of legal aid in South Sudan. Laws on legal aid and paralegals are non-existent. Article 19(7) of the Transitional Constitution of the Republic of South Sudan, 2011 read together with Section 10(2)(d) of the Ministry of Legal Affairs and Constitutional Development Organization Act, 2008, stipulates for the provision of legal aid services but does not clearly outline how it shall be regulated and implemented.

Lack of legal recognition. Paralegals are not formally recognized by the legal system nor by the government, and as a result are not always recognized as legal service providers. They face mistrust by other members of the legal community because they have limited level of awareness and knowledge of legal issues, and are often

¹⁷ In former Warrap State

¹⁸ In former Warrap State

¹⁹ Article 16 (4) of the Transitional Constitution of the Republic of South Sudan stipulates thus: All levels of Governments shall promote women participation in public life and their representation in Legislative and executive organs by at least twenty-five percent as an affirmative action to redress imbalances created by history, customs and traditions.

regarded as providing services of limited value. In South Sudan, paralegals are denied access to courts and other justice service provider institutions such as prisons and detention centres unless accompanied by a professional lawyer. This in itself shows that access to justice is constrained by public perception and policy. In Budi County of Namurnyang State²⁰, the Pact Community Development Officer was beaten up by police as the police did not clearly understand his role in providing access to justice services to the arrestees. Another Pact Community Development Officer was denied access to a detention centre at Awerial County of Eastern Lakes State²¹ on the assumption that there was no sufficient proof of him being a professional lawyer. The same scenario happened to another Pact Community Development Officer in Twic State²², who was denied access to a court file of a case in which he wanted to represent the accused pro bono, on the ground that he was not a licensed advocate and was not entitled to peruse the file in question.

Lack of sustainability. Due to limited sources of funding, paralegals depend principally on mentoring organizations for training/mentoring and material assistance for their activities.

Low morale/commitment. In South Sudan, like many other parts of the world, paralegals are volunteer community members not being paid a salary. This makes it difficult for the paralegals to fully commit themselves as they also tend to their families and primary sources of income.

Limited legal skills/knowledge. Most of the paralegals are not conversant with current legal developments due to their low level of education and lack of legal resources. The reality is that many people live in rural areas and not all South Sudanese are literate. Even for those who are literate, the law and the legal system are complex, often overwhelming, and not always easy to comprehend and/or understand.

6. Conclusion

It is pertinent to note that the legal status of paralegals in South Sudan leaves a lot to be desired. There is no law regulating the work or standard conditions of paralegals in South Sudan. To date, paralegals operate as volunteers under authority of mentoring NGOs to promote the cause of justice. Their operations depend on operational guidelines of individual organizations, and the project life time and funding limitations make it difficult to sustain paralegals once the project that supported them comes to an end. In view of the above, and taking into consideration the fundamental role played by paralegals in enhancing access to justice particularly to the poor and disadvantage citizens, there is a need to have in place a clear and sustainable policy on legal aid and paralegals' work in order to help promote the rule of law in South Sudan. It is worth adding that some of the rural communities in South Sudan have no access to court systems and law enforcement institutions. When disputes arise between community members, paralegals on the ground are able to mediate and resolve such disputes. In some instances, such interventions help mitigate the potential for a full-blown intra-communal conflict.

This paper therefore makes the following recommendations:

To the Government of South Sudan:

- *Expand the scope of paralegal services:* Paralegal services should be expanded across the states in South Sudan to provide much needed services to rural community members. Most rural communities do not have customary courts and statutory courts are limited mostly to state capitals. Expanded geographical spread of paralegal services would enhance access to justice in South Sudan.
- *Ensure legal recognition of paralegals:* Legal recognition will provide the framework to expand the scope of paralegal services in the country without encumbrances. Court accompaniment and providing advice on human rights issues in customary courts can be enhanced with such a legal framework for

²⁰ In former Eastern Equatoria State

²¹ In former Lakes State

²² In former Warrap State

paralegal services. Advocacy strategies should be developed by justice service providers towards having a legal framework for paralegal services.

To funding organizations and other stakeholders:

- *Promote recognition and networking:* It is recommended that funding and mentoring organizations join efforts to bring government institutions and other stakeholders on board and share experiences to identify common issues that are vital in promoting the role of paralegals in South Sudan as well as identifying important issues for advocacy towards promotion of their role.
- *Ensure sustainability:* Financial support needs to be put in place so that paralegals are able to focus exclusively on their work. Currently, the majority of paralegals are engaging in other economic activities to support themselves and their families, thereby neglecting the comprehensive nature of the work of paralegals.
- *Provide continued training:* In order to decrease the amount of paralegal attrition, comprehensive training and support is needed to improve their working conditions. In rural communities of South Sudan, the customary court system is still the preferred recourse for seeking legal redress. Human right issues are not adequately addressed at these courts. Therefore, well trained paralegals can play a critical role in sensitizing community members to embrace the statutory legal procedures to seek legal solution to their problems.

Bibliography

Equality and Human Rights Commission, 'What are Human Rights?' (website)

<<https://www.equalityhumanrights.com/en/human-rights/what-are-human-rights>> accessed 18 October 2016.

Federation of Women Lawyers (FIDA-Lesotho) in collaboration with Community Legal Resource Centre (CLRAC), 'Paralegal Training Manual' (2000).

Global Rights, 'Paralegal Training Manual on Improving Women's Access to Justice in Northern Nigeria' (2010).

Jeffery, J., 'Key note address' (Speech at 1st National Conference on Paralegalism hosted by the Department of Law in Tshwane 2015) <www.justice.gov.za/m_speeches/2015/20150223_ParaLegal.html> accessed 18 October 2016.

National Federation of Paralegal Associations, 'A Guide to Quality Paralegal Education' (website)

<<https://www.paralegals.org/i4a/pages/index.cfm?pageid=3364>> accessed 28 October 2016.

Open Society Foundations, 'Community-Based Paralegals: A Practitioner's Guide' (New York, 2010).

Pact South Sudan, 'Paralegal Training Manual' (May 2015).

UNDP, 'Paralegals bring justice to women in South Sudan' (website)

<<http://www.undp.org/content/undp/en/home/ourwork/ourstories/paralegals-bring-justice-to-women-in-south-sudan.html>> accessed 18 October 2016.

UNSC, Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, 3 August 2004, S/2004/616 (2004).

World Justice Project, 'What is the Rule of Law?' (website) <<http://worldjusticeproject.org/what-rule-law>> accessed 18 October 2016.

Using Street Law to Broaden the Skills of Law Students: A South African Perspective

Lindi Coetzee



Introduction

Legal education is very conservative and change comes very slowly. However, law schools worldwide are increasingly considering and including the teaching of professional skills to law students. This paper supports the view that law schools have an obligation to teach professional skills that would be required in practice in addition to teaching legal decision making. It further advocates that law schools have a responsibility to acknowledge the effect that legal work has on society and is obliged to train future lawyers to understand the relationship between law and society. The paper explains how the Street Law model of clinical legal education can be used to teach law students skills that traditional legal education cannot teach.

It is trite that traditional legal education that focusses only on the theoretical content of the law is no longer sufficient. In the past the focus was on teaching formal legal knowledge and reasoning and not on teaching legal skills. For purposes of this paper, 'teaching legal skills' does not only refer to mechanical lawyering skills but also includes teaching students the social functions of the law, factors that influence legal development, the relationship between law and ethics, social responsibility, capacity to engage with complex legal matters, making judgements in difficult circumstances, to learn from experience, to facilitate conversations, wisdom to apply legal rules practically and to prepare the students for the demands of the ever changing world.¹ It is acknowledged that law schools are not able to teach law students all the skills that they will require in practice, but should at least aim to impart those skills that will be necessary for entry into the profession.

There are a number of options available for the teaching of legal skills, but this paper will be limited to a discussion of Street Law as a clinical law program.² This paper considers how participation in a Street Law course can contribute to the professional development of law students. It motivates and explains how teaching others is an excellent tool to develop the communication skills required by lawyers in practice. The paper starts with a short explanation of the different clinical legal education models and provides an explanation of Street Law and its history in South Africa. The interactive teaching strategies used by Street Law were developed based on research that shows how humans learn most effectively. This paper provides a brief summary of this research, as well as a historical overview of the pedagogical trends in the study of law to show the gradual changes in focus in legal education. The rationale for choosing Street Law as a clinical legal education program is then presented, followed by an explanation of the structure of such a program. The paper concludes that through the introduction of Street Law as a clinical legal education program, the law school in South Sudan will not only increase the legal skills of its law students, but will also be provided with an excellent opportunity to study the current state of legal literacy of the South Sudanese. In addition to the academic benefits of Street Law, the law faculty will provide much needed legal education to improve the legal literacy levels of South Sudanese.

¹ WM Sullivan and others, *Educating Lawyers: Preparation for the Profession of Law* (Wiley, San Francisco 2007) 3; R Stuckey, *Best Practices for Legal Education* (Clinical Legal Education Association, Columbia 2007) 14; DH Floyd, 'Pedagogy and Purpose: Teaching for practical wisdom' (2012) 63 *Mercer Law Review* 943, 945.

² Very often also referred to as Clinical Legal Education.

1. Clinical Legal Education Models

Traditional legal education with a focus on lecturing and memorizing is becoming very out of date. Law faculties worldwide are including clinical legal education into law curricula to ensure that critical legal skills are taught. Clinical legal education involves students in identifying, researching and applying the law to real life situations.

There are a number of clinical legal education models.³ Even though the paper focusses on only one of the models and an extensive discussion of each of these models falls outside the ambit of this paper, below a short explanation is provided of each of the different clinical legal education models. Generally, there are five different types of clinical legal education, namely:⁴

- (i) **In-house live client law clinics** that provide legal services to clients from the communities which the university serves. It can be a general clinic that provides general legal services to indigent communities or it can be a specialized clinic that only deals with specialized cases, such as refugees or land claims. Clinical work can differ from merely giving legal advice to providing a whole spectrum of other legal services, e.g. providing legal representation in courts and providing alternative dispute resolution. Law clinics can be on campus, off campus, mobile clinics or could be situated within a community where it functions as an outreach clinic. The services that a law clinic will provide and its location must be determined by the law faculty. The live client clinic model is favored in South Africa because there are so many indigent people in need of legal services.
- (ii) **Simulated clinics** where students are provided with hypothetical situations. Students have to assume a professional role and have to provide a legal solution to the hypothetical problem. Simulated clinics do not provide legal services or advice to members of the public.⁵
- (iii) **Externships** where students are placed in advice offices or other community organizations that provide legal support to the public. Case management and day to day supervision of the student is provided by the host organization.
- (iv) **Street Law clinics** where law students are trained as trainers. The students go out into the communities and provide legal literacy workshops.
- (v) **And a combination of one or more models** where the faculty chooses to combine any of the abovementioned models.

2. What is Street Law

Street Law is a clinical law program that aims to equip law students with participatory training methods that will enable them to teach people about the law, human rights and democracy. Students are trained in the use of participatory teaching techniques that they use when teaching the law to learners from schools, prisoners that awaiting trial or are sentenced, members of community groups and clubs and the public at large. A course in Street Law offers law faculties an opportunity to integrate the teaching of knowledge, skills and values into the curriculum.⁶

Street Law specializes in presenting participatory legal, human rights and democracy education to the community at large. In addition to teaching students critical communication skills, it provides preventative legal education to learners in schools, incarcerated prisoners and members of impoverished communities. In addition to teaching communication skills and providing preventative legal education, it promotes fundamental

³ SP Sarker (ed), *Clinical legal Education in Asia: Accessing justice for the underprivileged* (Palgrave Macmillan, London 2015) 24.

⁴ D McQuoid-Mason & R Palmer, *African Law Clinicians' Manual Part I* (Institute for Professional Legal Training, Durban 2013) 20-39.

⁵ Ibid, 20-38; Stuckey (2007), 122.

⁶ PG Montana, 'Lessons from the Carnegie and Best Practices Reports: A look at St John's University School of Law's Street Law program as a model for teaching professional skills' (2009) 11 Thomas M Cooley Journal of Practical and Clinical Law Volume 97-99.

rights, freedoms, participation and democratic cultures. Its aim is to contribute to building a democratic society rooted in justice and equality through the promotion of a culture of rights, responsibilities and the rule of law.

Teaching others has considerable benefits for the law student. It increases the student's knowledge of the content and application of the law, develops presentation and communication skills, strengthens the ability to locate relevant legal sources and resources, exposes students to working as part of a group, improves understanding of community issues and promotes self-confidence.

The Street Law program also inculcates values such as the duty of lawyers to become involved in social justice issues and to display professional responsibility while practicing law. Social justice in this context is concerned with providing for the legal educational needs of the indigent and involves issues such as the fair distribution of education, health, housing, welfare and legal resources.⁷ Street Law programs provide legal advice and remedies to those that would otherwise not be able to afford the services of a lawyer. Street law workshops blend legal substance with innovative teaching strategies aimed at not only increasing understanding, but also intending to develop the values and attitudes needed in citizens living in a democratic country.

3. History of Street Law South Africa

The very first Street Law program was co-founded by Ed O'Brien at Georgetown University in Washington DC. In 1985 Professor David Mc Quoid Mason, founder of Street Law South Africa, visited the Street Law project in Washington DC and proposed to start a similar project in South Africa. The first Street Law workshops in South Africa were facilitated by David Mc Quoid Mason and Ed O'Brien in 1985, at the same time that the then President, P.W. Botha, declared a state of emergency. The South African Street Law program was the first Street Law program outside of the United States of America. In 1986, a six-month pilot Street Law project was launched at the then University of Natal. From the pilot project, it developed into a national project affiliated with all law faculties at universities across South Africa. The South African Street Law project has been instrumental in assisting with the set-up of similar projects in 45 different countries. These include countries from Africa, Asia, South East Asia, the Caribbean, Eastern and Central Europe, Central Asia and the former Soviet Union, as well as the United States and the United Kingdom.⁸

Street Law runs a variety of educational training programs, including trainings on Street Law, crimes against women and children, HIV/AIDS law and human rights, general human rights, democracy education, and children in trouble with the law. The South African Street Law program has produced valuable tools for the teaching of law, human rights and democracy to civil society, and in particular to school children, university students, school teachers, prison officials and police officers, as well as community groups.

4. How Humans Learn

The interactive teaching strategies used by Street Law are based on research that studies the most effective ways in which humans learn. When considering implementation of a Street Law program, one must be aware of the research foundations of Street Law. This paper does not purport to contain a detailed analysis and discussion of how people learn, but shares a discussion of some of the research that Street Law bases its approach to teaching on.

How law students learn and what is expected of them in practice must be the core focus of legal education.⁹ Traditional legal education focused predominantly on theoretical explanation of the content of the law to

⁷ McQuoid-Mason & Palmer (2013), 2; AM Honore, 'Social Justice' in R Summers (ed) *Essays in Legal Philosophy* (UCP, Berkeley/LA 1968) 68; PN Bhagwati, 'Human Rights as Evolved by the Jurisprudence of the Supreme Court of India' (1987) 13 *Commonwealth Legal Bulletin* 236.

⁸ The history discussion in this paper has been adapted from the preface to the third edition in D McQuoid-Mason and others (eds), *Street Law Practical law for South Africans Learners' Manual* (3rd edn Kenwyn, Juta 2015).

⁹ Stuckey (2007), 4.

students. The predominant purpose of formal legal education was to develop students' "hypothetical deductive critical reasoning skills", more commonly referred to as "thinking like a lawyer".¹⁰ However, memorizing large volumes of work and being able to regurgitate it is not an indication of the ability to apply that knowledge in the solution of a legal problem. Knowledge of the law remains important because the ability to think and solve legal problems will always depend on substantial knowledge about the particular field of law.

Three key findings of a study on how people learn are worth mentioning:¹¹

- (i) It is important to remember that people construct new knowledge from current knowledge. Students all have preconceived ideas and if their initial understanding is not tested and engaged, there is a danger that they will not understand the new concepts or information that they are being taught.
- (ii) To develop competence in an area of inquiry, students must: a) have a deep foundation of factual knowledge; b) understand facts and ideas in the context of a conceptual framework; and c) organize knowledge in ways that facilitate retrieval and application.
- (iii) A "metacognitive" approach to instruction can help students learn to take control of their own learning, by defining their learning goals and monitoring their progress in achieving them. This involves getting students to teach others (what Street Law terms "Each one Teach one") in order to share their knowledge and at the same time improve their own comprehension and understanding of the subject matter.

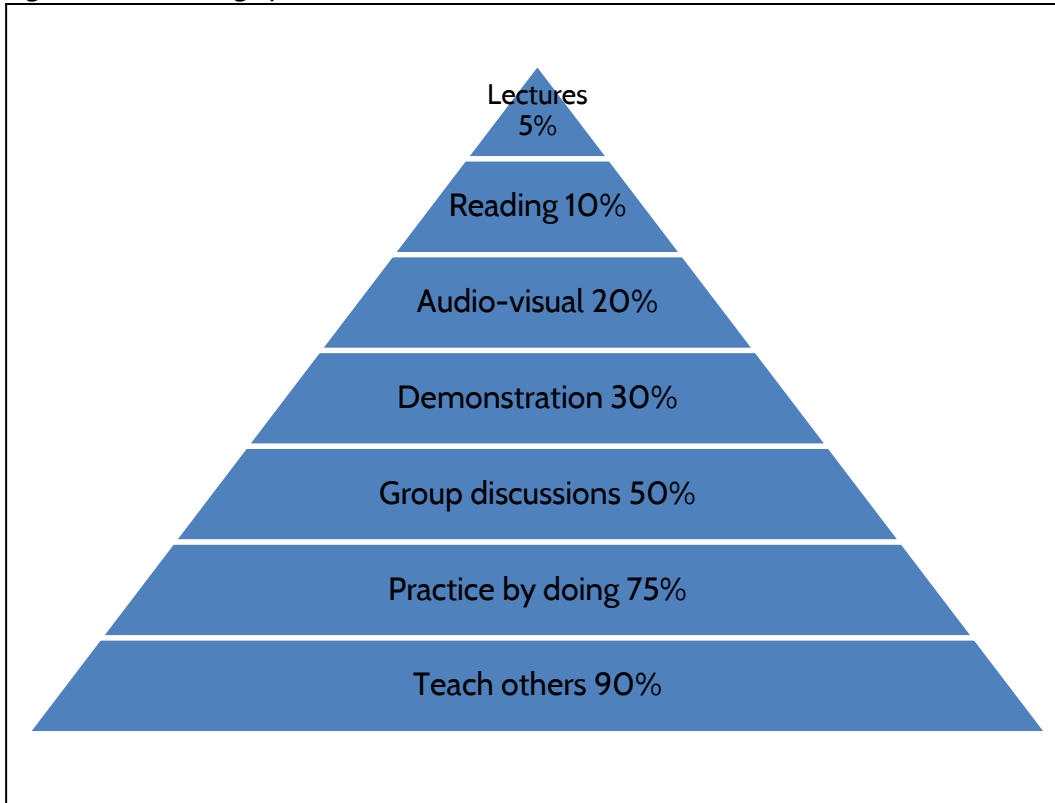
An approach to teaching that is focused on teaching skills requires a professor to approach his or her teaching from the student's perspective, which is very often difficult for an expert to do. It requires a professor to consider how to approach the subject from the perspective of someone who is exposed to the subject matter for the first time instead of from the perspective as an expert. In practice, a lawyer will be tasked with explaining the law and the lawyer's legal analysis to persons who are not familiar with the law.

Street Law bases its approach to teaching law on the learning pyramid developed by the National Training Laboratories for Applied Behavioral Science. The learning pyramid indicates the average percentage of retention by students when using different teaching methods. The learning pyramid shows that when one adopts only lecturing as a mode of instruction, the majority of the information taught (ninety percent) will be forgotten by the audience. The pyramid shows how the retention rate of a person increases if lecturing is coupled with other methods. When law students go out and teach other persons about the law, their own retention of knowledge is increased dramatically. And when those students employ participatory teaching methods, they ensure that the people they teach retain almost all of what they were taught. Getting students to teach others will increase the students' knowledge of the law taught and will allow students the opportunity to apply theoretical knowledge to everyday situations faced by communities.

¹⁰ GA Jaquish & J Ware, 'Adopting an Educator Habit of Mind: Modifying what it means to think like a lawyer' (1993) 45 Stanford Law Review 1713, 1713-1714.

¹¹ JD Bransford, AL Brown & RR Cocking, (eds), *How people learn? Brain, Mind, Experience and School* (exp edn National Academy Press, Washington DC 2000) <<http://www.csun.edu/~SB4310/How%20People%20Learn.pdf>> accessed on 30 June 2006.

Figure 1: The Learning Pyramid¹²



¹² The Learning Pyramid. (no date) [World Bank Handout]

http://siteresources.worldbank.org/DEV/MARKETPLACE/Resources/Handout_TheLearningPyramid.pdf accessed on 15 July 2016. The learning pyramid originates from the National Training Laboratories (NTL) for Applied Behavioral Science in Alexandria, Virginia, A United States. The percentages represent the average retention rate of information following teaching or activities by the method indicated. This diagram was originally developed and used by NTL in the early 1960s at NTL's Bethel, Maine campus, but the organization no longer has or can find the original research that supports the numbers given. In E Dale, Audio Visual Methods in Teaching (Dryden Press, New York 1954) a similar pyramid with slightly different numbers provides some evidence for the effectiveness of different teaching methods. See also E J Wood, 'Problem-Based Learning: Exploiting Knowledge of how People Learn to Promote Effective Learning' (2004) 3(1) Bioscience Education <<http://dx.doi.org/10.3108/beej.2004.03000006>> accessed on 28 June 2016.

5. Historical Roots of Clinical Legal Education

A historical overview of the pedagogical trends in the study of law shows the increasing demand for the inclusion of skills training in a law curriculum. The demand in skills training is a motivation for the inclusion of Street law or any other clinical legal education model into law curricula. For the sake of completeness, a brief overview of the historical development of legal education is provided below.

The origin of legal education was clinical. During the 1800s, law was not studied at universities and traditional legal education only involved practical work with no academic instruction.¹³ Law students followed what is similar to an apprenticeship or practical on the job training. They never attended universities to study law.¹⁴ The first law school at a university was started at Harvard and its students studied the law by studying cases with an emphasis on reading skills.¹⁵ The formalists, as the supporters of the case method became known, advocated that “correct legal education must be based on analyzing judicial decisions, bound by clear principles, and applied to hypothetical factual situations in a manner that allows the lawyer to predict future judicial decisions”.¹⁶ The formalist approach or the case study method was criticized as only being focused on books and merely preparing students for an exam, and not for the practice of law.¹⁷ The case method taught only legal analysis of cases as a legal skill and did not teach investigation of facts, planning, drafting, research, trial strategy, trial tactics, trial advocacy, interviewing, counselling, negotiating, communications, general emotional understanding, ethical and social responsibilities of the profession or knowledge of substantive law.¹⁸

The realists during the 1920s to 1930s criticized the formalists¹⁹ and argued that legal decision making is far more complex than a consistent set of logical legal rules based on precedent.²⁰ Realists argued that legal decision making is influenced by societal, psychological, economic, and cultural factors.²¹ Realists also argued that studying decided cases alone was insufficient and that students must be familiar with the law in all its contexts.²² The realists proposed two pedagogical methodologies, namely the inclusion of inter-disciplinary work and work in law clinics.²³ Work in clinics was limited to practical training and providing community service.²⁴ The realists were followed by the liberalists who advocated that law can be used to solve many societal problems.²⁵ At this point, law schools started establishing law clinics. These clinics initially did not focus on teaching skills, but rather focused on providing legal services to the indigent.

During 2007, the Carnegie Foundation published a report entitled ‘Educating Lawyers: Preparation for the Profession of the Law’.²⁶ The report makes findings about legal education that no law school should ignore. The report found that in order for law students to become successful in legal practice, they must be provided with

¹³ MM Qafisheh & SA Rosenbaum (eds), *Experimental Legal Education in a Globalized World: The Middle-East and Beyond* (Cambridge Scholars Publishing, Cambridge 2016) 15; R Stevens, *Law Schools: Legal Education in America from the 1850s to the 1980s* (University of North Carolina Press, Chapel Hill/London 1983); G Grossman, ‘Clinical Legal Education: History and Diagnosis’ (1974) 26 *Journal of Legal Education* 162.

¹⁴ JH Beale, ‘History of Legal Education’ in A Reppy (ed), *Law, a Century of Progress, 1835-1935* (NYUP, New York 1937) 104.

¹⁵ Grossman (1974), 163-163.

¹⁶ Qafisheh & Rosenbaum (2016), 16; M Spiegel, ‘Theory and Practice in Legal Education: An Essay on Clinical Education’ (1987) 34 *UCLA Law Review* 577.

¹⁷ Sarker (2015), 2.

¹⁸ Grossman (1974), 166.

¹⁹ Qafisheh & Rosenbaum (2016), 17.

²⁰ Grossman (1974), 167.

²¹ Qafisheh & Rosenbaum (2016), 17; Sarker (2015), 3.

²² Qafisheh & Rosenbaum (2016), 17; R Pound, ‘The Call for a Realist Jurisprudence’ (1931) 44 *Harvard Law Review* 697; B Cardozo, *The Nature of Judicial Process* (Yale University Press, New Haven 1921).

²³ Qafisheh & Rosenbaum (2016), 18; Sarker (2015), 2.

²⁴ Qafisheh & Rosenbaum (2016), 20.

²⁵ *Ibid.*

²⁶ D Ferguson, ‘What Is the Carnegie Report and Why Does it Matter?’ *Slaw*(column) 21 May 2014

<<http://www.slw.ca/2014/05/21/what-is-the-carnegie-report-and-why-does-it-matter/>> accessed on 13 July 2016.

general education, theoretical knowledge of the law and practical skills training.²⁷ Many law schools reformed their legal curriculum following the Carnegie Report.²⁸ The focus of work of law clinics started shifting towards clinical legal education. Clinical legal education, which includes Street Law, is seen as an educational forum in which students are taught to study, apply the law and internalize the values. In the next paragraph, a motivation is provided for using Street Law to teach legal skills. The law school in South Sudan must consider the history of legal education, the published research on the skills demands of the legal profession and developments elsewhere. An inclusion of clinical legal education into the South Sudanese law curriculum will put the law school in line with the developments in legal education worldwide. It is not suggested that the law school in South Sudan must transplant foreign curriculums into its law school. The benefit of comparison will assist in identifying the trends in legal education worldwide and will provide South Sudan with the opportunity to adapt its law curriculum to suit the needs of legal practice in South Sudan.

6. Rationale for Street Law

Taking into account the comments made earlier about how humans learn and the historical developments in legal education worldwide, below a motivation is provided for the use of one of the clinical legal education models within the South Sudanese law curriculum.

Ill prepared law students could potentially cause harm to clients in practice. Not all lawyers spend all their time in a court room. Many lawyers work in chambers or consult with other lawyers or clients. The most important work that lawyers will do is to explain the law and its consequences to persons who are not trained as lawyers. When a lawyer has consulted with a client, researched the law, and provides the client with legal analysis and interpretation, the lawyer is in actual fact teaching the client. It is therefore proposed that lawyers would serve their clients more effectively if they are able to explain the law in everyday language in a way that would be understood by a person not educated in law. Street Law enables law students to play an active role in the learning process and allows students to experience how the law operates in real life situations.²⁹ It provides opportunities for professional skills training, experiential learning and instills key values in law students.

A distinction must be drawn between deeper learning and surface learning. Kolb³⁰ explains the difference between the two concepts as follows:

In the deep approach, the intention to extract meaning produces active learning processes that involve relating ideas and looking for patterns and principles on the one hand and using evidence and examining the logic of the argument on the other. The approach also involves monitoring the development of one's own understanding. In the surface approach, in contrast, the intention is to just cope with the task, which sees the course as unrelated bits of information which leads to a much more restricted learning processes, in particular routine memorization.

Deeper learning increases the students understanding of legal rules and helps the student cope with the continuous changes in certain areas of the law.³¹ Explaining the law to others promotes deeper learning because it requires of students to demonstrate an understanding of the law through the teaching of others.

²⁷ AZ Reed, 'Place of Skills in Legal Education' (1945) 48 Columbia Law Review 345; Sarker (2015), 3

²⁸ D Ferguson, 'What Is the Carnegie Report and Why Does it Matter?' *Slaw* (column) 21 May 2014

<<http://www.slaw.ca/2014/05/21/what-is-the-carnegie-report-and-why-does-it-matter/>> accessed on 13 July 2016.

²⁹ H Brayne, N Duncan & R Grimes, *Clinical Legal Education: Active Learning in the Law School* (Blackstone Press, London 1998) 1; D McQuoid-Mason & R Palmer, *African Law Clinicians' Manual Part I* (Institute for Professional Legal Training, Durban 2013) 1.

³⁰ D Kolb, 'Management and the learning process' in K Starkey (ed), *How organizations Learn* (Thomson Business Press, London 1996); C Stevens, R Grimes & E Phillips, *Legal Education Simulation in Theory and Practice* (Ashgate Publishing Limited, Surrey 2014) 45.

³¹ P Baron, 'Deep and Surface Learning: Can Teachers Really Control the Student Approaches to Learning in Law' (2002) 36 *Law Teacher* Volume 123, 124.

Participation in a Street Law course provides the opportunity of introducing students to inter-disciplinary work. For example, where students are engaged in presenting a program on crimes against women and children, it is possible for them to work with social workers, psychologists and health care professionals. While the students focus on the law related to crimes against women and children, the psychologist and the social worker focus on the psychological impact of violence on women and children, and the health care practitioner focusses on the type of injuries that tend to appear when crimes are committed against women and children. Participation in such a program contributes to the student's understanding of the role played by each profession during the evidence collection cycle. Street Law has an empirical element in that students observe what is actually happening in the world outside of the law lecture room.³² Exposure to fields outside of the law will contribute to students' understanding of the societal context within which the law functions.³³

While some would argue that Street Law introduces only an advocacy component and does not include research, which is a core component of any law curriculum, in fact in a Street Law program students are exposed to both advocacy and research. Through their advocacy students will conduct research to determine the legal education needs of the communities within which they work. And, for example, when students use questionnaires to determine the levels of legal literacy within a particular community, such research will provide academics with important data to produce scientifically valid research outputs on the levels of legal literacy within a particular community. Law students working regularly in communities will also contribute to closing the gap between the university and the communities which it serves. Students are given an opportunity to reflect on the relationship between the law and society. Street Law promotes independent learning while at the same time contributing to the learning of others.

7. Structure of a Street Law Program

Street Law programs differ depending on the particular law faculty within which it is housed. Street Law could be structured as a voluntary extramural activity, a standalone credit-bearing elective, a core credit-bearing subject, or a combination of clinical work and street law. A well-structured Street Law program should aim to combine skills, service, social justice, research and advocacy. Competent staff with practical experience must be allocated the task of developing the curriculum for the Street Law course. Ideally, students must be engaged in both classroom activities and extramural activities. When establishing a Street Law program, it is recommended that it be designed to meet the needs of the community. Whatever form is chosen, Street Law must have both an academic and a service component. These components are discussed in more detail below.

7.1. Academic Component

The Street Law course can be run over one or two semesters and is normally presented during the final year of legal studies. The academic component requires students to attend weekly lectures, seminars or workshops. The course offers the opportunity to teach students different types of research methodologies and requires the students to then implement those methodologies during the service work component. Lectures or trainings need to cover a variety of topics, including both quantitative and qualitative research methodologies, interactive teaching strategies, the design and development of lesson plans and writing a narrative reflection.

Research skills are vital for a practicing lawyer and the research component is emphasized throughout the course. Prior to students presenting lessons in the community, one of the first things that the student must do is conduct a needs analysis to determine the legal education needs of the class, group or community where the student will teach. The student is required to formulate a research question, develop and formalize a hypothesis, collect data relevant to the hypothesis, analyze the data using an appropriate model, and critically interpret the results of their analysis. The research methods employed here can include the use of questionnaires, interviews, focus group discussions and observations. This list is not complete and the particular method employed must be agreed between the supervising academic and the student. The analysis is

³² Qafisheh & Rosenbaum (2016), 9.

³³ Ibid. 18.

conducted by the student under the supervision of an academic, based on which recommendations made on what appropriate legal content must be taught. Lessons are then prepared and presented on the basis of the results of the needs analysis. The advantages of this type of research are that it enables students to use a variety of empirical research methodologies, students use both deductive and inductive reasoning, it increases students' understanding of the dynamics in the communities within which they work, and it ensures that the education that is presented to the particular group meets the educational needs of the particular community.

During the lectures, students are introduced to the different interactive teaching techniques that can be used during their service work in schools, community groups or prisons. Referring to the learning pyramid diagram above, lecturing would be the least effective teaching method that can be employed. Ironically, lecturing is the one teaching method that is employed the most by legal academics. If students are not taught extensively in the use of participatory teaching methods, they will resort to using the teaching methods they have observed from their professors. Very often that would result in only using lecturing as a teaching method. Some of the teaching methods students are taught therefore include brainstorming, small group discussions, role plays, case studies, mock trials, moot courts, simulations, debates, opinion polls, fishbowls, jigsaws, question and answer sessions, and games, to name but a few. In addition to research methodologies and teaching methods, attention can be given to the theoretical knowledge that students would require when presenting their lesson.

7.2. Service component

The service component involves the students presenting Street Law lessons to the communities in which they did their needs analysis. Normally, students present lessons to scholars in high schools, prisoners awaiting trial, sentenced prisoners, and community groups. Students are required to compile a portfolio of evidence for the work that they do in the communities. During the lessons, students give practical legal advice. The advice that students give is limited and general and where a client presents a very specific legal problem, the student should refer the person to the university's law clinic. Students must be supervised when presenting the lessons to ensure that they provide accurate and correct explanations of the law. What distinguishes the Street Law clinical legal education program from the traditional law clinic is it has a strong educational focus. Preferred is the clinical model that combines law clinic, street law and lectures because each component teaches different skills that law students require.

8. Conclusion

This paper explains the foundation of the South African Street Law model as an example of a clinical legal education model. Criticisms levelled at traditional legal education suggest how including Street Law into a law curriculum help law students acquire the legal skills that they will require in practice. The interactive methodologies employed by Street Law are in line with research findings that indicate what the most effective ways are in which humans learn. Once they are in legal practice, law students will function as members of the society within which they work. Street Law helps law students to develop essential skills, namely planning, drafting, research, trial advocacy, interviewing and communication. Street Law will provide students with a general understanding of the legal issues affecting communities, make students aware of the ethical and social responsibilities they will have once in practice and will increase their knowledge of substantive law.

The fact that Street Law has been implemented in 45 different countries worldwide shows that it is possible to adapt and introduce in South Sudan. It is fairly easy to start Street Law. Existing members of staff could be allocated to run the course. A wealth of interactive training material is available worldwide that professors in South Sudan could adapt to the legal education needs of the South Sudanese. The university will not be seen as an ivory tower operating in isolation of the communities in South Sudan but as a university that is engaged with the communities within which it operates. Street Law is very easy to implement, there is no issue with students requiring the right of legal appearance in courts and no liability for malpractice can be incurred. The evidence worldwide where Street Law programs have been established have proven that it is an effective method to teach legal skills that are required in the practice of law. In addition to the benefit of skills

development in law students, it provides law faculties with an opportunity to contribute to the fight against poverty and inequality in Africa. I conclude with a quote from Nelson Rolihlahla Mandela

Overcoming poverty is not a gesture of charity; it is an act of justice. Like slavery and apartheid, poverty is not natural. It is man-made and it can be overcome and eradicated by the actions of human beings. Sometimes it falls on a generation to be great. YOU can be that great generation. Let your greatness blossom.

Bibliography

- Baron, P, 'Deep and Surface Learning: Can Teachers Really Control the Student Approaches to Learning in Law' (2002) 36 Law Teacher Volume 123
- Beale, JH, 'History of Legal Education' in A Reppy (ed), Law, a Century of Progress, 1835-1935 (NYUP, New York 1937) 104
- Bhagwati, PN, 'Human Rights as Evolved by the Jurisprudence of the Supreme Court of India' (1987) 13 Commonwealth Legal Bulletin 236.
- Bransford, JD, Brown, AL & Cocking, RR (eds), How people learn? Brain, Mind, Experience and School (exp edn National Academy Press, Washington DC 2000)
- <<http://www.csun.edu/~SB4310/How%20People%20Learn.pdf>> accessed on 30 June 2006.
- Brayne, H, Duncan, N, & Grimes, R, Clinical Legal Education: Active Learning in the Law School (Blackstone Press, London 1998)
- Cardozo, B, The Nature of Judicial Process (Yale University Press, New Haven 1921)
- Dale, E, Audio Visual Methods in Teaching (Dryden Press, New York 1954)
- Ferguson, D, 'What Is the Carnegie Report and Why Does it Matter?' *Slaw*(column) 21 May 2014
- <<http://www.slaw.ca/2014/05/21/what-is-the-carnegie-report-and-why-does-it-matter/>> accessed on 13 July 2016.
- Floyd, DH, 'Pedagogy and Purpose: Teaching for practical wisdom' (2012) 63 Mercer Law Review 943
- Grossman, G, 'Clinical Legal Education: History and Diagnosis' (1974) 26 Journal of Legal Education 162
- Honore, AM, 'Social Justice' in R Summers (ed) Essays in Legal Philosophy (UCP, Berkeley/LA 1968) 68
- Jaquish, GA & Ware, J, 'Adopting an Educator Habit of Mind: Modifying what it means to think like a lawyer' (1993) 45 Stanford Law Review 1713
- Kolb, D, 'Management and the learning process' in K Starkey (ed), How organizations Learn (Thomson Business Press, London 1996);
- McQuoid-Mason, D, and others (eds), Street Law Practical law for South Africans Learners' Manual (3rd edn Kenwyn, Juta 2015).
- McQuoid-Mason, D & Palmer, R, African Law Clinicians' Manual Part I (Institute for Professional Legal Training, Durban 2013)
- Montana, PG, 'Lessons from the Carnegie and Best Practices Reports: A look at St John's University School of Law's Street Law program as a model for teaching professional skills' (2009) 11 Thomas M Cooley Journal of Practical and Clinical Law Volume 97
- Pound, R, 'The Call for a Realist Jurisprudence' (1931) 44 Harvard Law Review 697
- Qafisheh, MM, & Rosenbaum, SA (eds), Experimental Legal Education in a Globalized World: The Middle-East and Beyond (Cambridge Scholars Publishing, Cambridge 2016)
- Reed, AZ, 'Place of Skills in Legal Education' (1945) 48 Columbia Law Review 345
- Sarker, SP (ed), Clinical legal Education in Asia: Accessing justice for the underprivileged (Palgrave Macmillan, London 2015)
- Spiegel, M, 'Theory and Practice in Legal Education: An Essay on Clinical Education' (1987) 34 UCLA Law Review 577.
- Stevens, R, Law Schools: Legal Education in America from the 1850s to the 1980s (University of North Carolina Press, Chapel Hill/London 1983)
- Stevens, C, Grimes, R, & Phillips E, Legal Education Simulation in Theory and Practice (Ashgate Publishing Limited, Surrey 2014)
- Stuckey, R, Best Practices for Legal Education (Clinical Legal Education Association, Columbia 2007)

Sullivan, WM and others, *Educating Lawyers: Preparation for the Profession of Law* (Wiley, San Francisco 2007)

Wood, EJ, 'Problem-Based Learning: Exploiting Knowledge of how People Learn to Promote Effective Learning' (2004) 3(1) *Bioscience Education*, 1<<http://dx.doi.org/10.3108/beej.2004.03000006>> accessed on 28 June 2016.

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Majok Mayen Anyang is a legal aid clinic and paralegal development expert with Pact, Inc. He graduated with a law degree from Kampala International University, Kampala Uganda in 2012 and worked as a legal aid clinic manager/coordinator in Kuajok Warrap State in South Sudan for over 14 months. From 2006 to 2008 he worked within the Ministry of Justice's Directorate of Contracts. He previously worked with the renowned law firm of Dr. W.K. Bior and Co. Global Legal Services as an advocate trainee for from 2013 to 2014 before being admitted to the South Sudan Bar Association, and is now an Advocate before all courts in South Sudan. His current work with Pact is centered on establishing a Satellite Legal Aid clinic at the Juba Civic Engagement Centre and affiliated with the University of Juba's College of Law in order to provide experiential learning opportunities to 1st and 3rd year's law students while opening avenues to access justice for disadvantaged members of the community. Mr. Anyang's interests include community service and ensuring that the most vulnerable of South Sudan's society are able to access justice.

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Lindi Coetzee is a senior lecturer at the Law faculty of the Nelson Mandela Metropolitan University. She holds the degrees of B Juris, LLB, LLM and is an advocate of the High Court. She is the national director of Street Law, a non-profit company that specializes in presenting participatory legal- human rights and democracy education to the general public. She established the Street Law outreach program of the Nelson Mandela Metropolitan University (NMMU). She was the chairperson of the Learning Area Committee for Human and Social Sciences in Port Elizabeth's Western Region. Lindi represented the Human Rights Commission on National Standards Body 09 for Health Sciences and Social Services. She has published numerous research outputs and research manuals on corporate law, insolvency law and human rights and has delivered conference papers at both national and international conferences.

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John Wuol Makec is the former Chief Justice of South Sudan and President of the Supreme Court of South Sudan. Prior to 2007, he has served as a Justice of the Supreme Court of The Sudan. In 2014, he was appointed Honorary Professor at the College of Law, University of Juba. Prior to the appointment, he was already teaching courses on Customary Law, Criminal Procedure, Civil Procedure and the Law of Evidence. He has served as a Course Trainer on Civil Procedure and Evidence in the procedural law training supported IDLO for the Judiciary of South Sudan. He holds the Bachelor of Laws (LLB) from University of Khartoum and a Master of Laws (LLM) from University of London. He chaired the Investigation Committee on Human Rights Abuses following the mid-December 2013 crisis. He has written extensively on customary law and legal systems and is the author of *The Customary Law of the Dinka People of Sudan: In Comparison with aspects of Western and Islamic Laws* (1988).

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College of Law, University of Juba

The College of Law (COL) at the University of Juba in South Sudan plays a key role in ensuring that the next generation of justice sector professionals are adequately prepared to enter the legal profession in South Sudan. Since its relocation from Khartoum to Juba in 2011, the College of Law has graduated four classes of law graduates (2012, 2013, 2014 and 2015) and currently has 250 law students registered in first and third year LL.B. programs.

International Development Law Organization

The International Development Law Organization (IDLO) is the only intergovernmental organization exclusively devoted to promoting the rule of law. IDLO works to enable governments and empower people to reform laws and strengthen institutions to promote peace, justice, sustainable development and economic opportunity. Its programs, research and policy advocacy cover the spectrum of rule of law from peace and institution building to social development and economic recovery in countries emerging from conflict and striving towards democracy.

IDLO has its headquarters in Rome, a Branch Office in The Hague, liaison offices for the United Nations in New York and Geneva, and country offices in Afghanistan, Honduras, Indonesia, Kenya, Kyrgyzstan, Liberia, Mali, Mongolia, Myanmar, Somalia, South Sudan and Tajikistan.

U.S. State Department's Bureau of International Narcotics and Law Enforcement Affairs (INL)

The mission of the U.S. State Department's Bureau of International Narcotics and Law Enforcement Affairs (INL) is to minimize the impact of international crime and illegal drugs through providing effective foreign assistance and fostering global cooperation. In South Sudan, INL's programming is focused on strengthening the statutory and customary justice systems to provide efficient and impartial justice to the citizens of South Sudan. At the same time, INL works with civil society and other groups to ensure that citizens are aware of their rights and able to access the justice system.

Since 2010, INL has supported the International Development Law Organization (IDLO) to strengthen the University of Juba College of Law as it trains the next generation of South Sudanese lawyers and judges. The project provides physical and equipment upgrades, curriculum reform, faculty development, and practical learning opportunities for students. The initiative also seeks to establish the College of Law as a thought leader to discuss issues of justice in South Sudan. This initiative will also provide training for 25 Judicial Assistants on civil and criminal procedures as well as training for 25 judges on international criminal law.