

REDRESS

Ending Torture. Seeking Justice for Survivors



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

August 2012

Table of Contents

I. Introduction	3
II. Sudan’s judiciary, constitutional review and human rights	7
1. Sudan’s constitutional court in historical perspective.....	7
2. The Sudanese Constitutional Court under the INC.....	10
2.1. The Jurisdiction and Procedures the Sudanese Constitutional Court	10
2.2. The individual complaints procedure before the Sudanese Constitutional Court	11
3. The Constitutional Court’s record in respect of effective protection of human rights and legislative reforms.....	13
3.1. Jurisprudence.....	13
3.1.1. The Right to Life: Privileging the security paradigm contra legem	14
3.1.2. The prohibition of torture: Sanctioning impunity	16
3.1.3. Freedom of expression: Privileging security.....	18
3.1.4. No harm, no standing	19
3.1.5. Failing to Act.....	20
3.1.6. Notable exceptions	21
3.2. Findings	22
3.3. Other areas of concern.....	25
3.3.1. Access.....	25
3.3.2. Lack of Independence.....	27
IV. Recommendations	28

I. Introduction

Law reform is widely seen as the task of the law-maker, i.e. the legislature. Where the need for legislation or its amendment or repeal becomes apparent, the government, members of parliament or others, such as a law reform commission, may consider the issue concerned. It will then find its way into the parliamentary process and, in many if not most cases, onto the statute book or will result in an amendment or repeal. This approach is evident in Sudan's 2005 Comprehensive Peace Agreement (CPA) that set out a series of legislative reforms. Yet, as has been repeatedly highlighted, the reforms undertaken in the CPA interim period from 2005-2011 fell short of the Sudanese Bill of Rights and Sudan's international human rights obligations, and have largely failed to enhance human rights protection.¹ The failure of the legislature to sufficiently address these issues turns the focus sharply on the role of courts, namely how can their jurisprudence influence legislative reforms and how can they contribute to enhanced human rights protection in the process. In Sudan, this role falls to the Constitutional Court that has been vested with the task of upholding the constitutionality of laws and human rights protection in the 2005 Interim National Constitution (INC).

As a matter of international law and general practice, national courts are responsible for guaranteeing human rights – equally, a failure to do so may give rise to state responsibility.² Worldwide practice shows that many national courts have played a pivotal role in the protection of human rights. The experience of countries such as Colombia, Germany, India, South Africa and the United Kingdom demonstrate how the highest courts with constitutional functions can be intricately involved in the law-making process.³ This may take the form of striking down legislation, such as laws permitting corporal punishment in Namibia, South Africa, Uganda and Zimbabwe,⁴ or declaring laws incompatible with human rights obligations, such as in the United Kingdom where the House of Lords ruled that the law permitting indefinite detention of foreign nationals in the counter-terrorism context was discriminatory.⁵ It may also consist of interpreting fundamental rights in such a way as to effectively require the state to legislate, and provide guidance on what laws should look like so that they are effective in protecting human rights. In all these cases, the highest courts act as guardians of the constitution, or fundamental rights that are otherwise guaranteed. They provide a check on the abuse of power and an important corrective and guiding function to ensure that legal systems in practice live up to the

¹ See REDRESS, Sudanese Human Rights Monitor and CLRS, *Alternative Report, Comments to Sudan's 4th and 5th Periodic Report to the African Commission on Human and Peoples' Rights: The need for substantial legislative reforms to give effect to the rights, duties and freedoms enshrined in the Charter*, April 2012; REDRESS, *Promoting law reform in Sudan to enhance human rights protection, strengthen the rule of law and foster democratic processes, Parliamentary Hearing: Sudan's Comprehensive Peace Agreement*, 15 October 2009. All reports published as part of the Project on Criminal Law Reform in Sudan are available at <http://www.pclrs.org/english/resources#reports>.

² Human Rights Committee, General Comment 31, *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para.4.

³ See J. Goldsworthy (ed.), *Interpreting Constitutions: A Comparative Study*, Oxford University Press, 2006.

⁴ See REDRESS and Sudanese Human Rights Monitor, *No More Cracking of the Whip: Time to end corporal punishment in Sudan*, March 2012, 38-40.

⁵ *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* [2004] UKHL 56.

constitutional standards that constitute both the supreme law of the land and, ideally, reflect a shared ideal state of affairs.⁶

This role of national courts is complemented by the practice of regional and international human rights treaty bodies and courts. In the case of Sudan, the United Nations Human Rights Committee and the African Commission on Human and Peoples' Rights, have made a series of recommendations to change laws that were found to be incompatible with Sudan's human rights treaty obligations. This includes in particular:

- (i) **the death penalty:** Sudan is one of the countries with the highest number of capital punishments. Human rights bodies have repeatedly raised concerns over: 'The imposition in the State party of the death penalty for offences which cannot be characterized as the most serious, including embezzlement by officials, robbery with violence and drug trafficking, as well as practices which should not be criminalised such as committing a third homosexual act and illicit sex, is incompatible with article 6 of the Covenant. (arts. 6 and 7 of the Covenant)'.⁷
- (ii) **torture:** A series of legal shortcomings, including lack of a criminal offence of torture, inadequate custodial safeguards, immunities, short statutes of limitation and a lack of victims and witness protection, have facilitated a practice characterised by a large number of allegations of torture and other ill-treatment: 'The Committee notes with concern reports suggesting that torture and cruel, inhuman or degrading treatment are widespread in the State party, especially in prisons, and is concerned that such abuse is carried out in particular by law-enforcement officers. Moreover, these law enforcement officers and their accomplices reportedly very often go unpunished. The Committee regrets that there is no definition of torture in Sudan's Criminal Code. (arts. 2, 6, and 7 of the Covenant)'.⁸
- (iii) **corporal punishment:** In the case of *Doebbler v. Sudan*, the African Commission on Human and Peoples' Rights, following a review of international standards, found that lashings violated article 5 of the African Charter and requested the Government of Sudan to: 'Immediately amend the Criminal Law of 1991, in conformity with its obligations under the African Charter and other relevant international human rights instruments; Abolish the penalty of lashes; and to Take appropriate measures to ensure compensation of the victims.' The Human Rights Committee held in its 2007 Concluding Observations on Sudan's state party report that: It 'corporal punishment including flogging and amputation is inhuman and degrading...The State party should abolish all forms of punishment that are in breach of articles 7 and 10 of the Covenant.'⁹
- (iv) **security laws:** Sudan's security laws have been repeatedly criticised for their incompatibility with international human rights standards, particularly their lack

⁶ See T. Bingham, *The Rule of Law*, London, Allen Lane, 2010.

⁷ Human Rights Committee, *Concluding Observations on Sudan*, UN Doc. CCPR/C/SDN/CO/3, 29 August 2007, para.19.

⁸ *Ibid.*, para.16. See also REDRESS and SHRM, *Alternative Report*, above note 1.

⁹ *Ibid.*, para. 10.

of custodial safeguards, and Sudan's security forces are alleged to have been responsible for a series of violations that have been met with impunity. A number of states recommended in the Universal Periodic Review that Sudan abolish or amend its National Security Law in conformity with international human rights standards.¹⁰

- (v) **immunity:** The police, security forces and the army are granted immunity under Sudanese law, which entails that they can only be prosecuted where their respective superior lifts their immunity. This rarely happens in practice so that immunity has come to equate with impunity. The UN Panel of Experts on Sudan held in October 2010 that immunity 'has turned into a tool that encourages impunity, preventing the prosecution of security personnel, police and soldiers who allegedly perpetrated crimes in Darfur. The Panel is unaware of any case where victims of arbitrary arrest and detention or victims of torture and ill-treatment were accorded the right to an effective remedy. The Panel is also unaware of any case where the Government of the Sudan brought to justice an NISS perpetrator of human rights violations, or where the Government of Sudan compensated victims of human rights violations committed by the NISS.'¹¹
- (vi) **public order laws:** Public order laws grant the public order police with wide powers. There have been repeated criticisms and protests against their arbitrary and discriminatory enforcement, the practice of summary trials in violation of defence rights, and the imposition of corporal punishments. As noted by the Independent Expert on Sudan: 'In Khartoum, ongoing violations stemming from the uneven application of public order laws remain a major concern.'¹²
- (vii) **anti-terrorism legislation and emergency laws:** The anti-terrorism law and emergency laws lack adequate safeguards against violations of the right to liberty and fair trial.¹³ The anti-terrorism laws in particular have been used in death penalty cases in violation of the right to life.
- (viii) **freedom of expression, assembly and association:** Press and Publication laws, the Voluntary and Humanitarian Aid Act, and other legislative acts, such as the 1991 Criminal Procedure Act, have been used to justify censorship and other restrictions that have disproportionately interfered with the freedom of the media and others:
'A number of media organizations, non-governmental organizations and human rights defenders reported increasing harassment and censorship, particularly by the NSS.'¹⁴ 'The realization of fundamental rights and freedoms, including the freedom of expression and association, remains an enormous challenge in the Sudan as it moves into a new era. In spite of the positive steps taken in the area of

¹⁰ *Report of the Working Group of Universal Periodic Review: Sudan*, UN Doc. A/HRC/18/16, 11 July 2011.

¹¹ UN Security Council, *Report of the Panel of Experts on Sudan*, 20 September 2010, UN Doc. S/2011/11, 8 March 2011, para.159.

¹² *Report of the independent expert on the situation of human rights in the Sudan*, Mohamed Chande Othman, UN Doc. A/HRC/14/41, 26 May 2010, para.29.

¹³ See *ibid.*, para.69.

¹⁴ *Report of the independent expert on the situation of human rights in the Sudan*, Mohamed Chande Othman, A/HRC/18/40, 22 August 2011, para.22.

law reform, there is growing concern about the pervasive presence of the national security apparatus and its impact on the exercise of civil and political rights in the country. Throughout the reporting period there were widespread allegations of arbitrary arrests and detention, torture and incommunicado detention perpetrated by the NSS [National Security Services].¹⁵

- (ix) **laws to guarantee women's rights:** Personal status laws, public order laws, the 1991 Criminal Act – failing to provide adequate protection against rape and other forms of sexual violence, and other legislation, or lack thereof, have contributed to a systemic denial and violations of women's rights.¹⁶ As noted by the Independent Expert on Sudan, during the Universal Periodic Review: 'a number of concerns and issues were raised by delegations during the review, including continuing discriminatory laws against women, sexual and gender-based violence, (prevalent in the conflict areas of Darfur and southern Sudan)'.¹⁷
- (x) **laws to guarantee children's rights:** While a new Child Act was adopted in 2010, concerns persist over the application of the death penalty against persons under the age of 18: 'The Committee is seriously concerned that, despite the adoption of the Child Act (2010), which prohibits the passing of the death sentence on children, under article 36 of the Sudan Interim Constitution, the death penalty may be imposed on persons below the age of 18 years in cases of retribution or hudud. The Committee is also concerned at recent reports that the death penalty continues to be carried out on children. The Committee reminds the State party that the application of the death penalty to children is a grave violation of articles 6 and 37 (a) of the Convention.'¹⁸

With the exception of the partial implementation of recommendations on children's rights, Sudan has not heeded these recommendations to date. As a result, Sudan's legal system remains riddled with laws that are contrary to the human rights obligations it assumed under regional and international treaties.¹⁹ The limited responsiveness of the Government of Sudan to the above recommendations and the lack of adequate implementation of CPA reforms mean that Sudan's Constitutional Court is the only actor within the system that might act as counterweight to ensure effective human rights protection. This applies both to laws that had already been on the statute books in 2005 and subsequent legislation, such as the new Security Act of 2010 that is incompatible with constitutional rights and international human rights. The CPA and the INC reflect the central role of the Constitutional Court in the effective implementation of fundamental rights, making it the only court in Sudan with the power to rule on the constitutionality of law and providing that it is ultimately responsible for human rights protection. The legal framework was put in place with the Constitutional Court Act of 2005 and judges were appointed in 2005. By the end of the CPA interim period in July 2011, Sudan's Constitutional Court was widely

¹⁵ Ibid., para.57.

¹⁶ Human Rights Committee, Concluding Observations, above note 7, paras.13-15.

¹⁷ Report of the independent expert, above note 12, para.12.

¹⁸ *Committee on the Rights of the Child, Concluding Observations: Sudan*, UN Doc. CRC/C/SDN/CO/3-4, 1 October 2010, para.35.

¹⁹ See above note 1 and chapters on Sudan in Part II of Lutz Oette (ed.), *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan*, Farnham, Ashgate, 2011.

seen as having failed to act as guardian of the constitution and engine for reforms.²⁰ The end of the CPA interim period necessitated a constitutional review process to determine what the new constitution replacing the interim one should look like. This review, which is currently under way but has not resulted in any clear proposals, includes the constitutional court, particularly its independence, composition, powers and procedures.

In this context, this Report assesses the record of the Constitutional Court as guardian of human rights and seeks to identify the changes needed to make the Court more effective in fulfilling its role. The assessment focuses particularly on the Court's potential to act as a catalyst for legislative reforms where existing laws fall short of human rights standards. To this end, the Report provides a detailed review of a selected number of high profile case adjudicated by the Court. It examines the manner in which the Court dealt with the issue at hand, both in terms of approach, particularly interpretation, and outcome, i.e. whether the judgments made reflect international human rights standards that are an integral part of Sudan's Bill of Rights. The Report also includes a brief review of the history of Sudanese apex courts with the power of constitutional review. It is clear that Sudan's Constitutional Court cannot be seen in isolation from broader rule of law problems in Sudan, which will need to be addressed in the current constitutional review process. In this context, the Report aims to contribute to an informed debate about how the Court can best fulfil its role and become a beacon of human rights protection rather than a symbol of failed expectations.²¹

II. Sudan's judiciary, constitutional review and human rights

1. Sudan's constitutional court in historical perspective

The historical development of Sudan's legal system - to a large extent mirroring repeated political changes - is characterised by the lack of a durable constitution.²² As a result, the role of the judiciary was repeatedly subject to the vagaries of transitional or short-lived constitutions as well as judiciary acts introduced by the new regimes in power. From 1956-1998, the Supreme Court was the highest court of the land. However, as the following review shows, its review powers were often limited and the exercise of its jurisprudence largely deferential to the executive, also due to its lack of independence. The Self-Government Statute, which was promulgated in 1953 shortly before the independence of Sudan, provided for the establishment of the judiciary with jurisdiction to hear and determine any matter involving its interpretation or the enforcement of the fundamental rights.²³ The Supreme Court, as the guardian of the constitution, was granted unfettered jurisdiction of judicial review in the 1956 Transitional Constitution.²⁴ However, the independence of the judiciary was not tested in the immediate post-independence

²⁰ Lutz Oette, 'Law Reform in Times of Peace Process and Transitional Justice: The Sudanese Dimension', *ibid.*, 13-31, at 26-27.

²¹ We are grateful to Noha Ibrahim and Mohamed El Shareef for their valuable research assistance in writing this Report.

²² See Ali Suliman, 'Constitution-Making in the Sudan: Past Experiences 1956-2005', in UNDP, *The Republic of Sudan Constitution Making Forum*, 24-25 May 2011, 73-79.

²³ Art. 42 of the Self-Government Statute, 1953.

²⁴ Art. 102 of the Transitional Constitution of 1956.

period, also due to the lack of politically-sensitive cases brought before the Court.²⁵ Subsequently, during Abboud's military government (1958-1963), the Transitional Constitution was abrogated and the Judiciary Act of 1959 was passed, which provided that the judiciary was to be represented in the Council of Ministers (Cabinet) by the Minister of Justice. The judiciary was subordinated to the executive, i.e. the military; the Chief Justice and the judges were to be appointed by the Supreme Council of the Armed Forces on the advice of the Prime Minister who was required to consult the members of the judiciary.

Following a popular revolution in 1964, article 99 of the amended Transitional Constitution vested the Supreme Court with the power of constitutional review. In 1967, Islamist parliamentarians successfully lobbied to amend the Constitution with a view to banning the Communist Party from the Parliament. The Communist Party challenged this amendment before the Supreme Court which, in turn, declared it unconstitutional.²⁶ In 1968, the then government, namely the Sovereignty Council, dissolved Parliament by forcing ninety of its members to resign with a view to pre-empting a planned no-confidence vote that needed a two-third majority. This decision was challenged before the Supreme Court, which, however, upheld the dissolution of Parliament.²⁷

Following the coup by Nimeiri, a new Judiciary Act was passed in 1959. The Act provided for an 'independent judiciary' that was directly responsible to the Council of the Revolution for the performance of its functions and that the Minister of Justice was to represent the judiciary in the Council of Ministers.²⁸ The Judiciary, including the Chief Justice and the Grand Gadi were appointed by the Council of the Revolution on the advice of the Prime Minister. In practice, the independence of the judiciary during Nimeiri's era was severely curtailed. Following the adoption of the Constitution of 1973, which created 'a modicum of constitutionalism', the Supreme Court ruled in the Sol Nasr case that 'the trial of civilians before military tribunals, using a penal law that had retroactive effect, offended against the "letter and spirit" of that constitution'.²⁹ Shortly thereafter, constitutional amendments 'greatly enhanced[d] the powers of the president, ensure[d] the constitutionality of preventive detention and special courts'.³⁰ Nimeiri embarked on the establishment of special emergency courts that were given jurisdiction to try opposing political figures.³¹ The special courts created a parallel legal system and were composed of judges from outside the judiciary who operated without any real supervision by the Chief Justice.³² Unsurprisingly, a review of judicial practice in the period from 1973 to 1985 found that the judiciary did not nullify any legislation.³³ In 1975, the Supreme Court upheld

²⁵ Ahmed el-Tayeb el-Gaili, *The Politics of Judicial Independence in Sudan: The Equilibrium*, May 2002.

²⁶ *Joseph Garang and another v. The Supremacy Council the Constituent Assembly & the Attorney-General*, see Highlights of the Judicial System in Sudan, 2009, 14, available at www.sudanjudiciary.org/judiciarye.pdf.

²⁷ See Ahmed el-Tayeb el-Gaili, above note 25.

²⁸ Article 4 of the Judiciary Act 1969.

²⁹ Suliman, above note 22, 77.

³⁰ *Ibid.*

³¹ Mohammed Mashawi, *Grievance Law*, 1999, Khartoum, 89 (in Arabic).

³² *Ibid.*, 9.

³³ Ahmed Shawqi Mahmoud, *Constitutional Law Principles and Sudan's Experience in Politics and Governance System*, 1999, 255 (in Arabic).

constitutional amendments to allow arrests without trial.³⁴ In other cases, the Supreme Court deemed the President's declaration of emergency and the dissolution of Parliament non-justiciable sovereign acts that were not subject to judicial review, regardless of their constitutional implications.³⁵

Following the end of Nimeiri's regime, a new Transitional Constitution was enacted in 1985. Notably, its article 11 subjected all acts of the state to judicial review. Yet, in 1987, after the consolidation of power of the transitional government, the Constitution was amended to exempt certain legislation from judicial review. Shortly thereafter, a law was passed to exempt a long list of officials from criminal and civil prosecution.³⁶ The shift towards the executive was also apparent in the jurisprudence of Sudan's Supreme Court. In 1987, for example, it considered the state of emergency that had been declared a non-justiciable political matter, although the declaration of the State of emergency resulted in the suspension of constitutional rights.³⁷

For the first time in Sudan's history, the 1998 constitution established a Constitutional Court³⁸ vested with the power to decide on constitutional matters. The Administrative Act of 1998, which set out relevant procedures, empowered all courts to exercise constitutional review in the course of their adjudication and to refer cases to the constitutional court to decide on the constitutionality of laws. Notably, the 1998 Constitutional Court Act also vested the Court with the power to reconsider Supreme Court judgments.³⁹ In practice, defence lawyers brought a large number of cases before the Constitutional Court in which they challenged the constitutionality of murder convictions on the ground that they constituted a violation of the right to life. The Constitutional Court repeatedly concurred with this interpretation, with the result that those convicted were no longer subject to the death penalty, a situation that created considerable tension between the Supreme Court and the Constitutional Court. It is therefore no coincidence that the Constitutional Court Act of 2005 does not include a similar provision, thereby depriving the Constitutional Court of an important direct review function vis-à-vis the Supreme Court.

As the review demonstrates, the only periods where the Supreme Court had both a measure of independence and the power of judicial review was during the transitional periods from 1964-1969 and 1985-1989 respectively. Yet, even during these periods, where the Supreme Court did rule against the then Government on occasion, its position was fragile as evident in the curtailment of review powers in 1987. The jurisprudence of the 1998 Constitutional Court is perhaps the most remarkable in so far as its review of the jurisprudence of the Supreme Court in murder cases is concerned. However, the Constitutional Court took this position on the jurisprudence of another court; it did not likewise scrutinise executive action, which limited its overall role of providing effective human rights protection, including by compelling or prompting legislative reforms.

³⁴ Lawyers Committee for Human Rights, *Sudan: Attack on the Judiciary* 4 (1991), available at http://www.africa.upenn.edu/Urgent_Action/apic_1177.html.

³⁵ Ahmed Shawqi Mahmoud, above note 33, p. 223 (in Arabic).

³⁶ Ahmed el-Tayeb el-Gaili, above note 25.

³⁷ Ibid.

³⁸ Article 105 of Sudan Constitution of 1998.

³⁹ See on this point, Amin Medani, 'A Legacy of Institutionalised Repression: Criminal Law and Justice', in Oette (ed.), above note 19, 67-88, at 69.

2. The Sudanese Constitutional Court under the INC

2.1. The Jurisdiction and Procedures the Sudanese Constitutional Court

The INC retained the Constitutional Court which sits at the apex of a centralised judicial system.⁴⁰ The Court ‘shall be independent of Legislature and Executive and separate from the National Judiciary’.⁴¹ It consists of ‘nine members, to be appointed by the President of the Republic, upon recommendation of the National Judicial Service Commission, and approval of two-thirds of all the representatives, at the Council of States’.⁴² It exercises its control functions as highest court in constitutional matters⁴³ and has exclusive jurisdiction⁴⁴ to adjudicate cases concerning:

- protection of human rights and fundamental freedoms;⁴⁵
- resolution of disputes between the different levels of government;⁴⁶
- complaints against any act of the Presidency or the National Council of Ministers if the act involves a violation of the decentralized system of government.⁴⁷

To this end, the Constitutional Court may hear individual complaints, cases pertaining to the constitutionality of norms, jurisdictional disputes between the government organs and between the different levels of government, impeachment of the President and other state representatives, prohibition of political parties, and scrutiny as well as confirmation of elections or referenda.

In addition, article 122(1)(a) of the INC gives the Constitutional Court competence to ‘interpret constitutional and legal provisions’. In 2009, for example, it heard a petition by the then Minister of Justice Abdelbasit Sabdrat concerning article 133 of the INC and article 58 of the 1991 Criminal Procedure Act, namely the power of the Minister of Justice to stay a suit. The Court found that decisions by the Minister of Justice in this regard were final and not subject to judicial review, the only exception being Islamic punishments, i.e. hudud and quisas. Article 58(1)(i) of the INC permits the President of the Republic to ‘seek the opinion of the constitutional court on any matter in connection with the constitution’. These procedures are limited to certain

⁴⁰ Article 119(2) of the INC.

⁴¹ Ibid.

⁴² Article 4(a) INC.

⁴³ Article 122 (1)(b) and (c) of the INC. According to article 15(2) of the Constitutional Court Act 2005, ‘Notwithstanding the provisions of sub-section (1), there shall not be subject, to review of the Constitutional Court, the business of the Judiciary, the judgments, decisions, proceedings and orders passed by the courts thereof.’

⁴⁴ Article 122(b) have original jurisdiction to decide disputes that arise under [the INC] and the constitutions of Northern states at the instance of government, juridical entities or individuals; (c) decide on appeals against the decisions of Southern Sudan Supreme Court on the Interim Constitution of Southern Sudan and the constitutions of Southern Sudan states, (d) protect human rights and fundamental freedoms” and (e) “adjudicate on the constitutionality of laws or provisions in accordance with this Constitution, the Interim Constitution of Southern Sudan or the relevant state constitutions.

⁴⁵ Article 122(1) of the INC.

⁴⁶ Article 122(1)(f) of the INC.

⁴⁷ Article 61(a) and 78(a) of the INC.

applicants⁴⁸ as they essentially serve as advisory function for those participating in the political process.

The INC opted for a concentrated system of judicial review. This means that the ordinary judiciary does not have the competence to decide on the constitutionality of laws, as it is confined to adjudicating ‘disputes and render judgments in accordance with the law’.⁴⁹ The Constitutional Court is the sole court with a constitutional review function, which it can exercise either as ‘abstract’ control,⁵⁰ i.e. independence of any concrete dispute, or when hearing individual constitutional complaints.⁵¹ The INC does not set out an explicit procedure of concrete constitutional review, i.e. how the Court is to adjudicate on the constitutionality of laws pursuant to article 122(1)(e) of the INC. Unlike the Constitutional and Administrative Act of 1998, the Constitutional Court Act of 2005 is silent on this issue, and, as already noted, there is no procedure providing for the referral of cases from the lower courts to the Constitutional Court.

2.2. The individual complaints procedure before the Sudanese Constitutional Court

According to article 19(4) of the Constitutional Court Act of 2005, an individual can bring a constitutional claim before the Constitutional Court, if the constitutional complaint involves violation of rights and freedoms contained in the Bill of Rights. As a general rule, constitutional complaints must be lodged within six months time, identify the offending act, the body responsible for violating the constitutional right, and specify the constitutional right that has been violated. Articles 18(1)(b) and (d) of the Constitutional Court Act provides that a complaint need to specify

- ‘the constitutional right, which has been violated, or the freedom, which has been breached;
- the interest, which has been prejudiced, where the suit is presented by individuals, or collectively, or the injury, which has been sustained thereby’.

This provision limits standing to those who claim to have suffered a violation of their rights. It seemingly does not permit an ‘actio popularis’, i.e. a case brought in the public interest where anyone can allege that a certain act or law violates constitutional rights. A complaint must therefore demonstrate prejudice to the right(s) of the applicant(s), which may include the application of the law, or, possibly, the very existence of a law if it interferes with a right. These

⁴⁸ The INC permits a certain exhaustive number of applicants to request an abstract interpretation of the constitution, including: the President of the Republic, the National Government, the Government of Southern Sudan, any state government, the National Assembly or the Council of State. The subject of the procedure is the interpretation of constitutional provisions and not any ordinary laws or court decisions. The procedure of interpretation of constitutional provisions includes the INC, ICSS and all State constitutions.

⁴⁹ Article 123(3) of the INC.

⁵⁰ Abstract review is regulated in article 122(1)(e) of the INC and articles 18-20 of the Constitutional Court Act of 2005.

⁵¹ Article 78 and 122(1) (b), (c), (d) and (e) of the INC of the INC allow an individual to apply to the constitutional Court in the case of an infringement of a right in the Bill of Rights. Article 78 states that: ‘any person aggrieved by an act of the National Council of Ministers or a national minister may contest such act: ... before the Constitutional Court, if the alleged act involves a violation of ... the Bill of Rights [...]’.

rights are stipulated in the INC's Bill of Rights that sets out most of the rights found in the International Covenant on Civil and Political Rights (ICCPR) and the civil and political rights of the African Charter on Human and Peoples' Rights (ACHPR). Importantly, article 27(3) of the Bill of Rights provides that international treaties binding on Sudan form an integral part of the Bill, which includes all rights granted in the ICCPR, the ACHPR and other relevant treaties.⁵²

As a general rule, an applicant must exhaust all available remedies before approaching the constitutional court. This requirement, coupled with the lack of referral powers by ordinary courts, means that an applicant may have to suffer an adverse final judgment in a suit or trial first, where applicable, before he or she can approach the Court. Prohibiting the lower courts from referring constitutional questions to the Constitutional Court, as provided for in the Judicial and Administrative Act of 2005, is clearly problematic and detrimental to the promotion of a human rights culture. It prevents constitutionalism from filtering down to lower courts and taking root in the daily administration of justice. There is an evident risk that individuals are forced to conduct years of expensive litigation before they can raise what may be considered a simple constitutional issue. Moreover, its implications for the right to a fair trial are apparent, which may be adversely affected by the lack of awareness of lower courts and ability to refer cases to ensure protection of fair trial rights. Ultimately, the Judicial and Administrative Act of 2005 renders the judiciary unable to deal with the crucial legal and constitutional issues that matter in the country, which limits its role of keeping a check on executive authority. In addition, allowing lower courts to deal with constitutional matter before going to the Constitutional Court may strengthen the judiciary's accountability functions by rendering individual judges less vulnerable to political repercussions. However, as demonstrated below, the Court's jurisprudence has raised a high threshold of demonstrating harm in this regard, which limits the scope of application in practice.

As an important exception, in case of the examination of the constitutionality of laws, an applicant need not exhaust all available remedies before addressing the Constitutional Court because the exclusive jurisdiction to review the constitutionality of laws lies with the Court. In *Association of Auditors and Accountants v. Government of Sudan and Council of Accountants*, the Constitutional Court held that the precondition of the 'exhaustion of remedies' does not apply if the subject matter of the suit is a legal act itself.⁵³ However, as demonstrated below, the Court's jurisprudence has raised a high threshold of demonstrating harm where applicants alleged that legislation impacts their rights, which has limited the scope of application in practice.

A complaint has to be submitted within six months after the exhaustion of other remedies or from the date where a violation of his or her rights becomes known.⁵⁴ This is a rather short time limit which requires anyone affected to act expeditiously or face the prospect of a constitutional complaint being summarily dismissed.

⁵² See *Max Planck Compilation of International Human Rights Treaties – Sudan*, 2nd ed., 2008. Sudan has since ratified the Convention on the Rights of Persons with Disabilities on 24 April 2009.

⁵³ *Association of Auditors and Accountants v. Government of Sudan and Council of Accountants*, Case Number MD/KD/11/1999 of June 1999.

⁵⁴ Article 20(a) Constitutional Court Act 2005.

Access to the Constitutional Court is not free. A court fee of 2,200 SDG needs to be paid for a constitutional complaint to be registered. This can prove prohibitively expensive for most Sudanese or others affected by violations, also considering other costs that may be incurred for legal representation, which can only be undertaken by a representative with at least ten years experience. In addition, litigants may incur travelling costs, particularly for those who live outside Khartoum where the Court is based. The availability of legal aid in Sudan is limited to serious criminal cases and will normally not be available for Constitutional Court cases.⁵⁵ While the Court may exempt a complainant from payment of fees in case of insolvency,⁵⁶ this provision seemingly leaves no discretion to the Court in cases where a complainant is indigent but not insolvent.

The Court has broad decision making powers. It may ‘consider and adjudge and annul any law, or work, in contravention of the Constitution, and reconstitute the right, and freedom, to the aggrieved person, and compensate him [or her] for the injury’.⁵⁷ Even before its final ruling, the Court may order interim measures to avoid irreparable harm and effectively guarantee rights and freedoms.⁵⁸ Final judgments are binding on all levels of government.⁵⁹ Where the Court finds that laws or parts thereof are unconstitutional, the provisions concerned must not be applied.⁶⁰ However, neither the INC nor the Constitutional Court Act stipulate what laws should apply between the declaration of unconstitutionality and the enactment of new legislation where required to avoid a legislative gap, and this question still needs to be settled in practice. Nevertheless, it is clear that the Court can effectively abolish laws and compel the Government to enact new legislation, where applicable, which complies with the INC.

3. The Constitutional Court’s record in respect of effective protection of human rights and legislative reforms

3.1. Jurisprudence

National and international human rights reports, reports by UN human rights bodies, and cases before the African Commission on Human and Peoples’ Rights over the last twenty years bear testimony to long-standing human rights concerns in Sudan, which include several laws that are – either on their face or by way of their application – considered to be incompatible with Sudan’s international human rights obligations.⁶¹ This concerns in particular the National Security Law,

⁵⁵ See Dr. Abdel Halim Saeed, *Legal Aid Bill: Analytical Study*, October 2010, http://www.pclrs.org/downloads/1206_legal_aid_bill_oct_2010.pdf.

⁵⁶ Article 30 Constitutional Court Act 2005.

⁵⁷ 16 (1) (a) *ibid*.

⁵⁸ 16(2) *ibid*.

⁵⁹ 24(1) *ibid*.

⁶⁰ 24(2) *ibid*.

⁶¹ See in particular Human Rights Committee, Concluding Observations; Reports by the UN Special Rapporteur on Human Rights in Sudan (now Independent Expert), see www2.ohchr.org/english/countries/sd/mandate/index.htm; cases in which the African Commission found a violation of the ACHPR, available at www.achpr.org; and the findings of the ‘Mbeki’ panel, *Darfur: The Quest for Peace, Justice and Reconciliation*, Report of the African Union High-Level Panel on Darfur (AUPD), PSC/AHG/2 (CCVII), 29 October 2009.

which was earmarked for reforms in the CPA, in respect of the right to liberty and security, the right to a fair trial and the prohibition of torture.⁶² It also includes the Anti-Terrorism Law of 2001 and rules and procedures that have reportedly resulted in unfair trials – admitting confessions allegedly extracted under torture – and the death penalty.⁶³ The Criminal Act of 1991 and public order laws contain several offences that are overly vague, which raises concerns about the principle of legality, and which may be, and have been, used to unduly restrict fundamental freedoms.⁶⁴ This applies in particular to freedom of expression, with the media facing pre-censorship, prosecution and legal action for defamation or other offences.⁶⁵ Moreover, the corporal punishments provided for under these Acts are incompatible with the prohibition of torture and other inhuman, cruel and degrading treatment or punishment binding on Sudan.⁶⁶ The scope of application of the death penalty is overly broad and has given rise to a series of concerns and cases where the right to life has not been adequately respected.⁶⁷ Several substantive and procedural criminal laws, as well as the personal status law, are either discriminatory or fail to adequately protect women from gender-based violence, or both.⁶⁸ In addition, Sudanese laws do not adequately criminalise serious violations, such as torture, fail to ensure that adequate investigations are carried out followed by prosecutions where appropriate, particularly by providing immunities for officials, and do not provide victims of violations with effective remedies.⁶⁹

The following cases have been selected to illustrate how the Constitutional Court has dealt with these critical issues in its jurisprudence. The review examines in particular the extent to which the Court has taken international standards and jurisprudence, as well as comparative best practice, into consideration when interpreting the Bill of Rights, with a view to assessing its approach and the soundness of legal reasoning in each case. The analysis of the Court's jurisprudence respect of key rights is followed by an assessment of the Court's potential role as a catalyst in the law reform process.

3.1.1. The Right to Life: Privileging the security paradigm *contra legem*

The Constitutional Court has heard a series of cases in which applicants argued that they have been sentenced to death following an unfair trial but has repeatedly dismissed the applicants' allegations that evidence used in these trials had been obtained by means of torture.⁷⁰ These

⁶² See Nabil Adeeb, 'At the State's Mercy: Arrest, Detention and Trials under Sudanese Law', in Oette, above note 19, 120-138, at 133-136.

⁶³ See Medani, above note 39, 79-82.

⁶⁴ *Ibid.*, 69-73.

⁶⁵ *Ibid.*, 70-71.

⁶⁶ REDRESS and SHRM, above note 4.

⁶⁷ Human Rights Committee, Concluding Observations, above note 7; African Centre for Justice and Peace Studies, *Widening the Scope: The Expanding Use of Capital Punishment in Law and Practice in Sudan*, December 2010.

⁶⁸ See Asma Abdel Halim, 'Gendered Justice: Women and the Application of Penal Laws in the Sudan', in Oette, above note 19, 227-241.

⁶⁹ See Mohamed Abdelsalam Babiker, 'The Prosecution of International Crimes under Sudan's Criminal and Military Laws: Developments, Gaps and Limitations', in Oette, above note 19, 161-181.

⁷⁰ See *Paul John Kaw and others vs (1) Ministry of Justice; (2) Next of kin of Elreashed Mudawee*, Case No. MD/QD/51/2008, Constitutional Court, Judgment of 13 October 2009, confirming the death sentence of six men

cases would have presented an opportunity for the Constitutional Court to affirm that the imposition of the death penalty, where still used such as in Sudan, is subject to strict adherence to fair trial standards. Indeed, it is recognised that imposing the death penalty in violation of the right to a fair trial constitutes a violation of the right to life. Such an affirmation would have been particularly important in Sudan given that detainees are often held incommunicado and deprived of safeguards that undermine their defence rights and expose them to the risk of torture to extract confessions.⁷¹

*Kamal Mohamed Sabon and Other v Government of Sudan*⁷² concerned the Anti-Terrorism Act and complementary rules, which have been used by the authorities to prosecute those suspected of having engaged in rebel activities, particularly Darfurians. In the case, the applicants were from Darfur and had been sentenced to death following a trial which they alleged was unfair. They challenged the constitutionality of articles 13(2) and 21 of the Anti-Terrorism Act and Rules and measures for the implementation of Anti-Terrorism Act (hereinafter Rules and Measures, also known as Regulation 25) issued by Sudan's Chief Justice. These provisions allow for the establishment of special courts, trial in absentia, summary proceedings of the Appeal Court, and curtail defence rights as well as the right to appeal. The applicants argued that these provisions violate article 123(2) (separation of powers), article 128(1) (Independence of Judges) and article 34 (right to fair trial) of the INC.

The Constitutional Court concluded that the issuance of the Rules and Measures by the Chief Justice in consultation with the Minister of Justice did not violate the principle of separation of powers because the latter is not absolute. The Court also found that neither trial in absentia nor the establishment of a Special Court violated the right to a fair trial. While it stressed that the special court should not contravene the principles of fair trial as provided in the INC, it did not specify how this should be done, which would have been important given that the very independence of the court is at issue. Significantly, the Constitutional Court upheld the constitutionality of the Rules and Measures, i.e. subsidiary legislation, even though they contravened the provisions of the Criminal Procedures Act and Evidence Act, arguing that the special circumstances necessitated that they should take precedence. Equally, it upheld the constitutionality of limiting the time to prepare the defence and the time for appeal without examining in-depth the compatibility of these measures with the right to a fair trial as developed in international law and jurisprudence. The President of the Court offered the following astonishing reasoning in this respect:

Yes, this Court is not a political one; but it is also not an island isolated from what is happening in the Country. It cannot, in my opinion, in considering the Regulations whose

accused of murder committed in the Soba Aradi riots of May 2005. *Isahq al-Sanusi and others vs Successors of deceased Mohamed Taha Mohamed Ahmed*, Case No MD/QD/121/2008, Constitutional Court Order of 23 March 2009, confirming the death sentence of nine men convicted for the murder of the journalist Mohamed Taha.

⁷¹ See Opinion No. 38/2008 (THE SUDAN) of the Working Group on Arbitrary Detention, Communication addressed to the Government on 22 August 2008, *Concerning Messrs. Ishag Al Sanosi Juma, Abdulhai Omer Mohamed Al Kalifa, Al Taieb Abdelaziz Ishag, Mustafa Adam Mohamed Suleiman, Mohamed Abdelnabi Adam, Saber Zakaria Hasan, Hasan Adam Fadel, Adam Ibrahim Al Haj, Jamal Al Deen Issa Al Haj, and Abdulmajeed Ali Abdulmajeed*, where it, inter alia, found that Sudan had violated articles 7 and 14 of the ICCPR.

⁷² GD/60/2008/ *Kamal Mohamed Sabon and Other v Government of Sudan*.

constitutionality is contested, do so without reconciling itself with some departure from usual norms. This is not an innovation. In Nuremberg the serious loss of lives and property, and the cruelty and brutality with which the war was conducted forced those in power to disregard one of the most settled principles of law, that is the retroactivity of laws. It is quite normal in times of disaster, invasion, war and other national crises to suspend some basic rights temporarily, property may be confiscated and persons may be detained in disregard of the normal law. Therefore I refuse to decide against Regulation 25, which requires the application of its provisions, notwithstanding the provisions of the laws of Criminal Procedure and Evidence. This would no doubt be in contradiction of the principles of jurisprudence and judicial precedent, which place constitutional provisions at the top of the pyramid, followed by laws emanating from the legislative authority. Any provision in any law or subsidiary legislation which contradicts the Constitution, and any legislation which contradicts with the law becomes void. Thus I should be impelled to pronounce the illegality of Regulation 25, had it not been for the exceptional circumstances and the exceptional crimes which prompted the adoption of the said Regulations, as I explained in this paragraph.⁷³

One lone judge dissented, finding that the Anti-Terrorism Act was unconstitutional.

The Anti-Terrorism Law and Rules and Measures had been applied in several cases that resulted in the death penalty and other serious punishments, which raised concerns about their compatibility with the right to a fair trial and consequently the right to life. The nature of the Special Court, the role of the Chief Justice and the various procedural components that limited the rights of the defence are evidently problematic. This was readily apparent as the Rules and Measures were contrary to applicable Sudanese law and the Constitution, as the Constitutional Court itself recognised. Yet, the Constitutional Court, besides failing to examine the requirements of the right to a fair trial under international law and Sudanese law, proceeded to make an explicit finding *contra legem* (*contrary to the law*). Its invocation of the Nuremberg principles, which concerned the retroactive application of substantive criminal law (which is now recognised in article 15(2) ICCPR) and reference to emergency laws, which do not allow derogation from essential fair trial guarantees, particularly in death penalty cases,⁷⁴ is erroneous and displays a disregard for the rule of law bordering on contempt.

As an exception to this jurisprudence, the Constitutional Court has strengthened the right to life of children in one important case, namely *Nagmeldin Gasmalla v. Government of Sudan and the relatives of Abdelrahman Ali*, which will be considered in more detail below (3.1.6).

3.1.2. The prohibition of torture: Sanctioning impunity

Several laws, particularly the National Security Act, fail to provide adequate safeguards against torture and include obstacles to accountability and reparation, particularly in the form of immunities and statutes of limitation.⁷⁵ This inadequate legal framework has contributed to a

⁷³ Quoted in Medani, above note 39, 81-82.

⁷⁴ Human Rights Committee, General Comment 29: *States of Emergency (article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11 (31 August 2001), para.15.

⁷⁵ See REDRESS and SHRM, Alternative Report, above note 1.

practice that has been characterised by persistent allegations of widespread torture, which hark back to 1989 when the current regime came to power. The case of *Faruk Mohamed Ibrahim v. Government of Sudan and the National Legislature* in many ways captures the legacy of torture and impunity in Sudan.⁷⁶ The applicant alleged that he had been subjected to torture by members of the security forces in 1989. He had raised several complaints about this violation since, all of which had been met with inaction. At the time of his application, the crimes had become time-barred by virtue of article 38 of the Criminal Procedure Act of 1991 and the officials enjoyed immunity under article 33 (b) of the then National Security Act of 1998. The applicant argued that these provisions violated the prohibition of torture, his right to a fair trial, and the right to litigation and equality before the law, and requested the Constitutional Court to declare them unconstitutional. He also requested the Court to declare article 58 of the 1991 Criminal Procedure Act unconstitutional on the ground that it empowers the Attorney General to suspend criminal proceedings at any stage of the proceedings (the Court did not consider this point in the present case but ruled on it in the later case brought by Justice Abdelbasit Sabdrat see above 2.1.).

The Court dismissed the case, holding that the applicant had no interest which is one of the admissibility criteria for bringing a case. Furthermore, the Court concluded that the provision granting immunity for security personnel did not violate the INC because the immunity is related to their duties. The Court reasoned that the immunity was procedural because it can be waived by the Director of the National Security. Moreover, it argued that article 27(3) of the Bill of Rights incorporates only the international human rights that have been ratified by Sudan, and therefore excluded the Convention against Torture – to which Sudan is not a party – from the scope of its review.

Faruk Mohamed Ibrahim's case is emblematic. He is someone who has continued to complain about the torture he suffered and the subsequent lack of justice. His application therefore offered an opportunity to address key obstacles to accountability in torture cases, namely statutes of limitation and immunities. The Court's reasoning on immunity laws, which suggests that it is procedural only and that victims may pursue legal remedies where immunity is unduly granted or not lifted, ignores the well documented practice of virtually absolute impunity for security personnel where such immunity is rarely if ever lifted. Equally, the Court failed to consider Sudan's obligations to investigate allegations of torture promptly and effectively. Immunity provisions such as in Sudan run counter to this obligation as held repeatedly by the UN Human Rights Committee and the African Commission on Human and Peoples' Rights.⁷⁷ The Court's reasoning that the Convention against Torture is not applicable, while technically correct, falls short of basic rules of interpretation. The relevant standards pertaining to the prohibition of torture have equally been applied by the Human Rights Committee and the African Commission, and would need to be read into article 33 of the Bill of Rights, which prohibits torture. As a general principle, fundamental rights should be interpreted in a purposive manner so as to ensure their effective protection.⁷⁸ The Court's reasoning appears to have been aimed at producing the opposite effect. Moreover, the Court provided no further explanation of its approach to

⁷⁶ MD/GD/18/2007, *Faruk Mohamed Ibrahim v. Government of Sudan and the National Legislature*.

⁷⁷ Human Rights Committee, Concluding Observations, above note 7, para.9 .

⁷⁸ See Goldsworthy, above note 3.

interpretation in general, and how this would need to be applied in respect of specific rights. Instead, the Court's reasoning is formalistic, selective and devoid of any appreciation of the significance of the issues raised.

3.1.3. Freedom of expression: Privileging security

During the CPA interim period, several Sudanese newspapers and other media outlets increasingly sought to exercise their freedom of expression. Together with civil society, they have played a vital role in covering a range of often politically sensitive issues, including allegations of human rights violations, criticism of inadequate legislative and institutional reforms, and reports highlighting the lack of accountability and justice. In response, the media was repeatedly subjected to censorship and prosecutions for public nuisance or other such crimes, with the Press and Publications Act imposing a series of restrictions.⁷⁹

In *Massarat for Media Production Ltd and Others v. National Security and Intelligence Service*⁸⁰ and *Accord Company Ltd v. National Security and Intelligence Service* [NISS],⁸¹ three Sudanese newspapers Al Shaab, Ajras al Huriya and Al Maidan filed an application to the Constitutional Court in which they contended that the pre-publication censorship by security personnel constituted a violation of their freedom of expression under article 39 of the Bill of Rights. One of the complaints related to the fact that the NISS had censored several paragraphs of an article to be published in the Arjas Al-Huriya (Freedom Bells) newspaper. The article reported about an attempt by the International Criminal Court (ICC) to 'kidnap' Ahmed Haroun – against whom the ICC had issued an arrest warrant for crimes against humanity and war crimes – and stated that the ICC may do this again and that Sudan will ultimately pay the price for not being part of the ICC system.⁸²

The Court held that freedom of expression was not absolute under the Bill of Rights and international law. It also drew heavily on US jurisprudence that purportedly demonstrated that security considerations may override freedom of expression. In the case at hand, it decided that the nature of the articles and paragraphs was such as to justify their censorship on the grounds of protecting security. It also held that the applicants failed to show that they had sustained any damages as a result of the censorship. The Court referred to article 19 ICCPR, which protects freedom of expression. However, it did not in any detail engage with the jurisprudence of international human rights treaty bodies, particularly on the question of necessity and proportionality of any measures, which is hostile to pre-publication censorship.⁸³ It took a de-contextualised approach whereby it failed to consider the stifling impact of pre-publication censorship on freedom of the media, including by examining whether other measures post-publication may be sufficient to protect public security interests at stake. The Court simply

⁷⁹ See most recently Amnesty International, *Silencing Dissent: Restrictions on Freedom of Opinion and Expression Persist in Sudan*, April 2012.

⁸⁰ Case No. MD/GD/73/2008 M.

⁸¹ MD/GD/95/2008 M.

⁸² *Massarat Company for Media Production Ltd and Others v. National Security and Intelligence Service* (Case No. MD/GD/73/2008 M).

⁸³ Human Rights Committee, General Comment 34, *Article 19: Freedoms of opinion and expression*, UN Doc. CCPR/C/GC/34, 21 July 2011, para.13.

referred to the NISS' mandate to protect public security, which included pre-publication censorship, without further considering the nature of this highly intrusive practice which clearly tips the balance in favour of security considerations, which are in practice defined by the NISS with limited if any judicial supervision. It therefore ignored the jurisprudence of other constitutional courts and international human rights treaty bodies that has repeatedly stressed that freedom of expression is fundamental for the exercise of other rights and a pluralistic debate about matters of public interest.

3.1.4. No harm, no standing

The Constitutional Court has dismissed several cases where applicants alleged a violation of their rights on the grounds that they lacked standing. The interpretation of what constitutes harm in terms of article 18(1)(d) of the Constitutional Court Act (see above 2.2.) is crucial as it determines access to the Court to raise constitutional complaints. Questions of standing are critical for constitutional courts and international human rights treaty bodies as they relate to their ability to provide adequate protection.

In *Elsudani newspaper v the Ministry of Justice and the Press and Publications Prosecution Bureau*,⁸⁴ the Press and Publication Bureau had suspended, for an indefinite time, the publication of *Elsudani* Newspaper for violating article 130 of the 1991 Criminal Procedure Act concerning the prevention of public nuisance.⁸⁵ This article has been repeatedly used to control and censor the media, severely curtailing its freedom of expression. Indeed, the *Elsudani* Newspaper alleged that the application of article 130 had breached its freedom of expression. The case raised a number of issues: (a) the constitutionality of the decision of the Press and Publication Bureau, including whether the Press and Publication Bureau is empowered to suspend the publication of the newspapers; (b) under what circumstances constitutional damages can be awarded for a breach of the right to freedom of expression guaranteed in article 39 of the INC. During the court proceedings, the Attorney General repealed the decision of the Press and Publication Bureau and the newspaper continued to be published. As a result, the Court dismissed the case on the ground that the applicant no longer had an interest and therefore lacked standing and that the claim for constitutional damages was in abstract terms.

The Court's decision is problematic in so far as it amounts to a denial of appropriate relief for the applicants. It chose a narrow reading of standing instead of considering that it would have been in the interest of justice to find that the applicant had already suffered a violation for the length of its suspension. This would have enabled the Court to provide clear guidance on how to interpret article 130 of the Criminal Procedure Act, which could have acted as an important safeguard against future abuse. Moreover, the concomitant dismissal of the claim for constitutional damages set a negative precedent as it effectively deprives the applicant of the right to an effective remedy simply because the authorities had discontinued a breach during proceedings even though the applicant clearly suffered harm, which could have been quantified

⁸⁴ MD/GD/46/2007 *Elsudani newspaper v the Ministry of Justice and the Press and Publications Prosecution Bureau*.

⁸⁵ The text of the Criminal Procedure Act is available at www.pclrs.org/downloads/bills/Criminal%20Procedure%20Act/national_criminal_procedure_act_1991.pdf.

on an equitable basis. The ruling also provides an incentive for authorities to engage in acts that may breach the law as they may not face any adverse repercussions as long as they stop an ongoing violation in the course of proceedings. However, the ruling does not show any evidence that the Court considered either the policy implications or the need to provide effective vindication of rights as integral part of constitutional rights protection.

3.1.5. Failing to Act

One of the recurring complaints by lawyers is that the Constitutional Court has failed to act expeditiously in sensitive cases that raised challenges to Sudanese law and practice. A case in point is the application brought by Lubna Hussein to the Court in 2009, asking it to declare unconstitutional article 152 of the Criminal Act of 1991 which concerns ‘indecent and immoral acts’, because it violates article 7 ICCPR.⁸⁶ She also claimed that articles 175 and 177 of the Criminal Procedure Act of 1991 providing for summary trials violate the right to a fair trial. Article 152 provides for the punishment for whipping for ‘indecent and immoral acts’. It is an integral part of public order laws that are notorious for targeting women and others who do not conform to prevailing norms as interpreted by public order police, are subjected to summary trials and frequently whippings.⁸⁷ Lubna Hussein, a journalist, was tried before the Khartoum North Court in September 2009 and convicted to pay a fine for wearing trousers. While the other women who were in her company at the time of the ‘offence’ had been convicted and sentenced to whippings, Lubna Hussein was spared the punishment, ostensibly because of the level of publicity her case had generated.⁸⁸

The case would have provided an opportunity for the Constitutional Court to scrutinise the public order law regime whose arbitrariness has given rise to repeated concerns about unfair trials, discrimination and corporate punishments.⁸⁹ Domestic concerns over these practices have been echoed at the regional and international level, particularly before the African Commission on Human and Peoples’ Rights that held in *Doebbler v Sudan* that flogging pursuant to article 152 of the Criminal Act of 1991 violates article 5 ACHPR because: ‘[t]here is no right for individuals, and particularly the Government of a country to apply physical violence to

⁸⁶ Article 152 (1) Whoever commits, in a public place, an act, or conducts himself in an indecent manner, or a manner contrary to public morality, or wears an indecent, or immoral dress, which causes annoyance to public feelings, shall be punished, with whipping, not exceeding forty lashes, or with fine, or with both. (2) The act shall be deemed contrary to public morality, if it is so considered in the religion of the doer, or the custom of the country where the act occurs.

⁸⁷ Strategic Initiative on Women in the Horn of Africa (SIHA), *Beyond Trousers: The Public Order Regime and the Human Rights of Women and Girls in Sudan, A Discussion Paper*, Submission to the 46th Ordinary Session of the African Commission on Human and Peoples’ Rights, Banjul, the Gambia, 12 November 2009, available at: <http://www.pclrs.org/downloads/Miscellaneous/Public%20Order%20Submission%20Paper%20MASTER%20FINAL.pdf>

⁸⁸ See Human Rights Council, *Report of the independent expert on the situation of human rights in the Sudan*, Mohammed Chande Othman, UN Doc. A/HRC/14/41, 26 May 2010 on the application of sharia laws to non-Muslims, at para.29: ‘On 3 July 2009, the Public Order Police arrested 13 Muslim and non-Muslim women from a privately-owned restaurant and charged them with “indecent dressing”. Some of the women were allegedly slapped and harassed. A judge in a Public Order Court found most of them guilty and sentenced them to lashing and the payment of fines or, in the alternative, imprisonment. On 18 November 2009, a 16 year old non-Muslim Sudanese girl was sentenced by a Public Order Court to 50 lashes for “indecent dressing” for having worn a skirt and blouse.’

⁸⁹ See SIHA, *Beyond Trousers*, above note 87, and Asma Abdel Halim, above note 68, 238-240.

individuals for offences. Such a right would be tantamount to sanctioning State-sponsored torture under the Charter and contrary to the very nature of this human rights treaty'.⁹⁰

It is a matter of conjecture why the Constitutional Court has not ruled on the case three years after its submission but the delay itself amounts both to a denial of justice to the applicant and a failure to confront a practice, and legislation, which continues to result in frequent violations.

3.1.6. Notable exceptions

The Constitutional Court found a violation in two high profile cases that merit closer attention. In *Nagmeldin Gasmalla v. Government of Sudan and the relatives of Abdelrahman Ali*,⁹¹ a case concerning the violation of the right to life, the applicant had been sentenced to death for murder committed when he was 15 years old. The applicant lodged a complaint before the Constitutional Court challenging the constitutionality of the decision rendered by the Supreme Court, contending that the latter Court had applied the Child Act erroneously which excludes children under the age of 18 years from being sentenced to death, except in *Hudud* and *quisas* (retribution), that is *Sharia* punishments.

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

The ruling sets an important precedent for its interpretation of article 27(3) of the INC as the Constitutional Court articulated its scope and the consequences of a conflict of law. However, its value is undermined by the lack of consistent jurisprudence on this point. The outcome of the case may be explained by a greater willingness to act in the field of child rights, which witnessed one of the few substantive legislative reforms in the form of the adoption of the Child Act in 2010. In addition, the applicant had brought a case before the African Commission at the time that alleged a violation of his right to life and this may have also influenced the Constitutional Court. Yet, it is noteworthy that the Constitutional Court was divided over the case, with four judges holding that there was no infringement, *inter alia*, because *Sharia* is a source of legislation according to the Constitution. The fact that these dissenting judges are from the North is significant given the change in composition of the Constitutional Court following the independence of South Sudan.

⁹⁰ *Curtis Francis Doebbler v Sudan*, African Commission on Human and Peoples' Rights, Comm. No. 236/2000 (2003), para.42.

⁹¹ *MD/GD/18/2005/ Nagmeldin Gasmalla v. Government of Sudan and the relatives of Abdelrahman Ali*.

In *Members of the SPLM-DC v. The First Vice President of the Republic and the President of the GOSS*, the applicants brought a constitutional complaint in 2009 in which they claimed that a decision by the President of Southern Sudan (Government of South Sudan-GOSS) had violated their constitutional rights under the INC and Southern Sudan's Interim Constitution, particularly freedom of association right to equality.⁹² In his decision, the GOSS President had directed the Governors of the ten Southern States to cooperate with all the political parties except the SPLM-DC (Sudan People's Liberation Movement-Democratic Change), which had broken away from the SPLM. The Court found that the SPLM-DC was registered under the Political Parties Act of 2007 and that the GoSS President's decision discriminated against it in violation of article 31 INC. As a result, it ordered that the President's decision be cancelled. Judge Bullen Panchol Awal who had been nominated by the GoSS President dissented. He argued *inter alia* that the Court had failed to fully consider the security situation in Southern Sudan and the need to take action against the prevailing insecurity that had been triggered by the SPLM/DC break away, amongst other factors. Further, he viewed the issue as a political question that called for a political solution. Notably, his arguments largely mirror the strong emphasis that the Constitutional Court had placed on security considerations in other judgments. Unlike in the other cases, however, this challenge concerned the Government of Southern Sudan, which may explain the differences in approach taken by the Court. The dissenting judge also noted the speed with which the Constitutional Court ruled on the case, which may be indicative of a greater readiness of the Court to act in the particular case compared to others.

3.2. Findings

Beyond interpreting the Child Act and Criminal Act in conformity with the CRC in respect of the imposition of the death penalty against children and isolated rulings concerning some Supreme Court judgments and a directive by the GoSS President, the Constitutional Court has upheld a series of laws or failed to rule on their constitutionality. This includes:

- The Anti-Terrorism Act and implementing Rules and Regulations raising a series of concerns over their conformity with the right to a fair trial in death penalty cases, and consequently the right to life
- Immunities and statutes of limitation in the National Security Act and the Criminal Procedure Act respectively applicable in torture cases that have resulted in impunity
- Pre-publication censorship, the Press and Publication Act and criminal law provisions that have been used to prosecute journalists and stifle freedom of expression
- Article 152 of the Criminal Act and articles 175 and 177 of the Criminal Procedure Act that are integral to the arbitrary public order regime characterised by discrimination, on the spot prosecutions, summary trials and whippings.
- Article 58 of the Criminal Procedure Act which allows the Minister of Justice at any time to stay a suit, a decision that the Court confirmed was final and not subject to any judicial challenge.

92 Case NO: MD/G.D/172/2009 *Members of the SPLM-DC v. The First Vice President of the Republic and the President of the GOSS*.

This jurisprudence demonstrates the Court's reluctance to declare any legislation unconstitutional. Its interpretation of the Bill of Rights has lacked consistency and it has not articulated a clear approach that would provide any guidance on what to expect from the Court in its practice. Instead, the Court has taken an ad-hoc approach, characterised by deference to executive and security considerations. In so doing, it has failed to consider alleged violations in a broader context of concerns over Sudan's human rights record, including an ongoing public debate about the need for legislative reforms prompted by a number of apparent shortcomings. This has been complemented by establishing a high threshold for standing, namely the need to prove damages which ignores the fact that the interference with the exercise of a right may constitute harm to the interests protected. The Court has grappled with capacity problems at times but many lawyers consulted attribute its performance to a lack of genuine independence and willingness on the part of individual judges to challenge extant laws and practices. As a result, the Court has failed to protect rights in individual cases before it, and, more generally, to provide any impetus for legislative reforms, both by means of declaring legislation unconstitutional and by providing interpretational guidance that could be used in the law reform process.

Constitutional practice elsewhere provides ample evidence of how the difficult questions raised by constitutional complaints can be addressed in a more consistent way that is aimed at ensuring the effective protection of rights. Firstly, constitutional courts that are by and large considered to be both strong and effective, such as in South Africa and Germany, have the power to hear individual complaints as well as to undertake concrete and abstract judicial review. As a result, constitutional jurisprudence suffuses the legal system and other courts are aware of and engaged in the interpretation of fundamental rights. The legitimacy and standing of constitutional courts can be attributed to their independence, their willingness and ability to effectively protect rights and their ability to fashion a persuasive contextual interpretation of rights. Indeed, the ability to develop and apply clear and convincing theories of interpretation is often the hallmark of well known constitutional courts, such as the principle that the text of legislation – where several interpretations are possible - needs to be interpreted in such a way as to give maximum effect to constitution and fundamental rights. Some constitutions explicitly guide constitutional courts in this regard, such as section 39 of the South African Constitution:

1. When interpreting the Bill of Rights, a court, tribunal or forum
 - a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - b. must consider international law; and
 - c. may consider foreign law.
2. When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
3. The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

In other cases, apex courts, such as India's Supreme Court and high courts that are vested with the power to hear constitutional complaints, have interpreted constitutions broadly so as to enhance human rights protection. In the case of India, the apex courts have interpreted the right to life, guaranteed in article 21 of India's Constitution, broadly to include a negative obligation to refrain from violations and a positive obligation to protect life against threats, which includes the right to healthy environment. Further, even though India's Constitution does not clearly prohibit torture, the apex courts have read such a prohibition into article 21 and issued a number of important guidelines aimed at ensuring that custodial safeguards against torture and custodial deaths are in place. Equally, Indian courts have strengthened the right to a remedy, such as compensation for arbitrary arrest and detention, and ordered legislative and institutional reforms, such as police reform. This jurisprudence has formed part of the Indian courts' approach to public interest litigation where the courts relax rules of standing and may even take up issues themselves on their own motion where it becomes clear that fundamental rights are not adequately protected.

A full review of the contribution of national courts to legislative reforms is beyond the scope of this Report. However, even a brief review of the jurisprudence of several courts in Africa on issues such as the death penalty and other punishments demonstrate the potential impact of the judiciary. For example, South Africa's Constitutional Court ruled that the death penalty is unconstitutional⁹³ and Kenya's and Uganda's constitutional courts significantly narrowed the scope of application of the death penalty.⁹⁴ Courts in Namibia, Uganda, and South Africa held that corporal punishments were incompatible with fundamental rights as they violated human dignity.⁹⁵ The jurisprudence of many of the highest courts in Africa are noteworthy for their reasoning as much as their outcome, as they often show a keen awareness of the importance of protecting human rights. In *Charles Onyango Obbo and another v Attorney General*, for example, Uganda's Supreme Court found – in a case where a newspaper had been prosecuted for reporting about high level corruption - that section 50 of the Penal Code Act, which criminalises 'publication of false news', was unconstitutional. Byamugisha JA held in his separate concurring opinion that:

Uganda chose a path of democratic governance and therefore she has a duty to protect the rights regarding the free flow of information, free debate and open discussion of issues that concern the citizens of this country. In order to exercise these rights there must be an enabling regime for people to freely express their ideas and opinions as long as in enjoying these rights such people do not prejudice the rights and freedoms of others or public interest ... As long as in expressing one's opinion even if it is false, the person doing so does not prejudice the rights and freedoms of others, or the public interest there would be no harm done. In my view, section 50 is inconsistent with Article 29(1)(a) of the Constitution for criminalising every statement that is published even if that statement has not caused any prejudice

⁹³ *S v Makwanyane* 1995 (3) SA 391 (CC).

⁹⁴ See *Attorney General v Susan Kigula and 417 others* (Constitutional Appeal No.3 of 2006) [2009] UGSC 6 (21 January 2009) and *Godfrey Ngotho Mutiso v Republic*, Criminal Appeal No.17/2008, Court of Appeal judgment of 30 July 2010, see further Jamil, Ddamulira Mujuzi, 'Challenging the Ugly Face of Criminal Laws in East Africa, in Oette', above note 19, 89-114.

⁹⁵ See REDRESS and SHRM, above note 4.

to the rights of others. Even if there is a violation or prejudice of other people's rights, there is a remedy or remedies that are provided under the existing law where one can seek redress in a civil court. This means that our society must learn to accommodate a wide variety of views, beliefs etc, even if such views or beliefs are repugnant and contrary to our own.⁹⁶

In *Osman v Attorney General*, a case in which South Africa's Constitutional Court affirmed the right not to be compelled to make an admission or confession, Judge Madala noted that it:

is of particular significance having regard to our recent history, when, during the apartheid era, the fundamental rights of many citizens were violated. It is in that context that the right of arrested persons was progressively eroded. The right was honoured more in the breach than in its observance, and our courts found themselves having to adjudicate an ever increasing number of cases where coerced confessions became the order of the day. Police interrogations were often accompanied by physical brutality and by holding arrested persons in solitary confinement without access to the outside world – all in an effort to extract confessions from them. Our painful history should make us especially sensitive to unacceptable methods of extracting confessions. It is in the context of this history that the principle the State should always prove its case and not rely on statements extracted from the accused by inhuman methods should be adhered to.⁹⁷

3.3. Other areas of concern

3.3.1. Access

Effective access to justice has a dual function: it is a right of anyone whose rights have been violated and it serves as a measure of the administration of justice.⁹⁸ In this context, constitutional remedies provide an important layer for the protection of fundamental rights and a means of ensuring that legislation is in conformity with the constitution and international standards. Effective access means that a remedy is available and can be utilised without impediment. However, accessibility to an effective constitutional remedy before Sudan's Constitutional Court is hampered by several key factors, namely narrow standing, fees, qualification of lawyers, remoteness and delays, in addition to generic problems such as limited awareness. The requirement of standing, i.e. demonstrating harm, is not uncommon. However, the Court has interpreted the criterion in a narrow fashion and summarily dismissed several complaints which would have merited a substantive assessment of the claim made (see above at 3.1.4). In these cases, ensuring effective access could have been achieved through an interpretation of harm that focuses on the interference with the right and the need for effective protection. Further, access could be broadened by allowing *actio popularis*, i.e. anyone could bring a claim of a violation in the public interest. This would be an important means in a system

⁹⁶ Quoted in Mujuzi, above note 94, 105.

⁹⁷ Quoted in P.J. Schwikkard, *Some Reflections on Law Reform Pertaining to Arrested, Detained and Accused Persons in South Africa*, in Oette, above note 19, 138-153, at 144.

⁹⁸ *Report of the Special Rapporteur on the independence of judges and lawyers*, UN Doc. A/HRC/8/4 (13 May 2008), paras.15-54.

where many victims lack rights awareness or access as it enables others to bring matters to the Court's attention and enables the Court to fulfil its role as guardian of the Constitution. In India, the Supreme Court in particular embarked on a remarkable, sustained effort to protect the fundamental rights of poor, marginalised and vulnerable segments of the society by way of public interest litigation. It has done so by liberalising the *locus standi* requirements for filing writ petitions for violations of fundamental rights.⁹⁹ This approach has effectively abandoned the requirement of standing which required that litigation be carried out by an aggrieved person and permitted access to the courts by others on the behalf of the aggrieved persons. Public interest litigation has allowed the Court to act as a 'positive legislator'¹⁰⁰ and play a more visible role in the development, protection and implementation of human rights although its jurisprudence has not always been consistent and has met with resistance in some cases.

The fees payable upon bringing a complaint to the Constitutional Court are quite high, i.e. the equivalent of \$1,000, which acts as deterrent for would-be complainants. This applies in particular to members of marginalised groups who are frequently the subject of rights violations but may be least able to vindicate their constitutional rights. In the absence of legal aid except for a small number of serious crimes cases, the provision allowing the Court to waive fees in case of insolvency is clearly insufficient as many potential litigants may not be technically solvent but still lack the means to bring a case. The best possible solution would therefore be to waive fees altogether as is the practice in many other countries.

The requirement under article 29 of the Constitutional Court Act that a constitutional suit can only be conducted by a lawyer with at least ten years experience acts as a further bar. While the rationale of ensuring the quality of submissions is sound, the requirement effectively means that a litigant needs to instruct a senior lawyer. Unless, exceptionally, such a lawyer would agree to take up a case *pro bono*, anyone contemplating taking a case to the Constitutional Court therefore faces the prospect of having to pay considerable lawyers' fees, in addition to the court fees. Other constitutional courts and international human rights treaty bodies frequently allow anyone to bring a case, even without legal representation, because the ultimate goal of proceedings is the protection of the rights protected in the constitution or human rights treaty respectively. Article 29 of the Constitutional Court Act is unduly restrictive and the requirement of legal representation should be reconsidered and ideally abandoned altogether.

In a country of the size of Sudan where it can be difficult to travel, particularly from remote areas – several of which have witnessed some of the most severe violations, such as in Darfur and Southern Kordofan- Khartoum, the seat of the Constitutional Court, can be far away if not beyond physical reach altogether. It is normal that a constitutional court is located either in the capital or in one city only. However, remoteness creates a barrier where a court does not at the same time allow for simple procedures, such as writing a letter. Such practice, which is not possible before Sudan's Constitutional Court, eases access for those who cannot appear in person.

⁹⁹ See *Surya Deva*, 'Constitutional Courts as Positive Legislators: The Indian Experience', in Allan R. Brewer-Carias (ed.), *Constitutional Courts as Positive Legislators, A Comparative Law Study*, Cambridge University Press, 2011, 587-601.

¹⁰⁰ *Ibid.*

Effective access to justice requires that a decision is taken expeditiously, that is without undue delay. The length of proceedings is by their very nature relative as it depends on the complexity of the case and the conduct of the parties. In the case of the Constitutional Court, several cases have been pending for several years without noticeable progress whereas others have been disposed of quickly, at times even without conducting further hearings, such as in the Faruk case. This practice lacks consistency. While the Court has grappled with capacity problems, including the physical absence of some of its members at times, it has failed to ensure that all cases are decided within a reasonable time. This is of particular concern where a case raises fundamental questions, such as Lubna Hussein's complaint, but the Court fails to act.

3.3.2. Lack of Independence

The Constitutional Court, under the INC, consisted of nine members appointed by the President upon recommendation of the National Judicial Service Commission and approval of 2/3 of the Council of States representatives.¹⁰¹ In practice, this formula has failed to ensure effective independence of the Court,¹⁰² which refers both to the position of judges, including appointment, security of tenure and safeguards against interferences, and institutional independence from the executive and legislature.¹⁰³

The National Judicial Service Commission, which replaced the High Judicial Council, is widely seen as having failed in its role of providing effective oversight of the judiciary. It was composed along party lines and lacked a clear mandate to ensure the independence of the judiciary, having a limited mandate to adopt the budget of the judiciary and to make recommendations to the executive.¹⁰⁴ The ultimate power therefore lies with the President of the Republic and political bodies as reflected in the appointment procedure for Constitutional Court judges. Given the history of summary dismissal of judges following the 1989 coup and the legacy of a politicised judiciary the CPA procedures failed to introduce a clear break to ensure the independence of the judiciary. In addition to devising adequate appointment procedures, an independent judiciary also requires a general respect for the rule of law and institutions, which has been absent in Sudan since 1989, a situation that has not significantly changed during the CPA interim period.

The politicised nature of the judiciary was equally reflected in the composition of the Constitutional Court which mirrored the general power sharing agreement, with five 'Northern' members and four 'Southern' members who were largely appointed along party lines.¹⁰⁵ Following the separation of the country, the four Southern members of the Court left. The dominance of one party, the level of general repression against any form of dissent and the legacy of appointing judges along party lines means that ensuring the independence of the

¹⁰¹ Article 4(a) Constitutional Court Act 1995.

¹⁰² See Article 119(2) of the INC.

¹⁰³ See Human Rights Committee, General Comment 32, para.19, and *Report of the Special Rapporteur on the independence of judges and lawyers*, UN Doc. A/HRC/11/41 (24 March 2009), paras.14-84 and 95-104.

¹⁰⁴ African Centre for Justice and Peace Studies, *The Judiciary in Sudan: Its Role in the Protection of Human Rights During the Comprehensive Peace Agreement Interim Period (2005-2011)*, 2012, 7-8.

¹⁰⁵ See on the selection of judges more generally, *ibid.*, 16-18.

judiciary, including the Constitutional Court, requires a monumental shift in attitudes and a procedure where the influence of the executive is drastically limited.

IV. Recommendations

Considering the findings of this Report, it is recommended that the role of the Constitutional Court in the new Constitution and Constitutional Court Act should be defined as follows:

- **Independence:** The independence of the Constitutional Courts and its judges should benefit from a broader judicial reform, in which a reformed judicial body is responsible for the recommendation of Constitutional Court judges who should reflect Sudan's ethnic diversity, gender equality and political independence, particularly in respect of a lack of affiliations with the ruling party.
- **Power:** The Constitutional Court should be mandated to hear individual complaints and carry out abstract and concrete review of the constitutionality of bills and laws.
- **Interpretation of rights:** The new constitution should specifically stipulate that the Constitutional Court take into consideration international human rights treaties and comparative jurisprudence when interpreting the Bill of Rights. The rights enshrined in the Bill of Rights need to be aligned with Sudan's obligations under international human rights treaties, in addition to the principle enunciated in the INC according to which Sudan's international treaty obligations are an integral part of the Bill of Rights.
- **Standing:** The Constitutional Court should be empowered to hear constitutional complaints brought on behalf of individuals and groups of victims where these are unable to bring complaints themselves. The potentially adverse impact of legislation on the exercise of rights should be sufficient to give standing.
- **Access:** Applicants should not be required to pay a fee for bringing constitutional complaints. Any individual or group of persons should be able to pursue a constitutional complaint, even without any legal representation.

While it is recognised that judicial independence entails that a court develops its own approach to the protection of human rights, including by means of contributing to legislative reforms, comparative experiences provide for best practice that can and should be considered and applied to strengthen the role of the Constitutional Court, including by:

- Being more flexible in the interpretation of standing requirements so as to broaden access and allow public interest litigation with a view to strengthening effective protection of human rights
- Interpreting the Constitution and legislation purposely, drawing on comparative, regional and international standards, and contextually, namely effectively responding to human rights concerns in Sudan so as to ensure the best possible protection. To this end, it is critical to keep abreast of developments in other jurisdictions as well as regional and international human rights jurisprudence.
- Carefully scrutinising the compatibility of legislation with the Bill of Rights and international human rights standards, and providing adequate guidance concerning both the interpretation of legislation that is in conformity with Sudan's obligations

and the nature of legislation that needs to be enacted where existing law is found to be unconstitutional.

REDRESS acknowledges the EU for the support provided

