

3. THE LEGAL AND POLICY FRAMEWORK RELATED TO EQUALITY

This part of the report describes and analyses the legal and policy framework related to equality in Sudan, in order to assess its adequacy to address the patterns of inequality and discrimination highlighted in the preceding part. It discusses both the international legal obligations of the state and the domestic legal and policy framework which protects the rights to equality and non-discrimination. In respect of domestic law, it examines the Interim National Constitution, specific anti-discrimination laws, and non-discrimination provisions in other areas of law. It also examines government policies which have an impact on inequality, before turning to an assessment of the enforcement and implementation of existing laws and policies aimed at ensuring equality. The report reviews existing judicial practice related to discrimination, as well as the practice of specialised bodies whose functions are relevant to equality.

In order to assess the full picture of the Sudanese legal and policy framework as it relates to equality, this part should be read together with, and in the context of, the previous part, which contains an appraisal of laws that discriminate overtly or are subject to discriminatory application.

3.1 International and Regional Law

Since gaining independence in 1956, Sudan has signed and ratified a number of international treaties. Through their ratification, Sudan has committed to respect, protect and fulfil the rights contained in these instruments, and to be bound by the legal obligations contained therein.

3.1.1 Major United Nations Treaties Relevant to Equality

Sudan has a poor record of participation in the major UN human rights treaties. It has ratified or acceded to only five of the nine core UN human rights treaties: the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the International Convention on the Elimination of Racial Discrimination (ICERD); the Convention on the Rights of the Child (CRC); and the Convention on the Rights of Persons with Disabilities (CRPD).

Instrument	Signed	Ratified / Acceded
International Covenant on Civil and Political Rights (1966)	n/a	18/03/1986 (Acceded)
Optional Protocol I to the International Covenant on Civil and Political Rights (1966)	No	No
Optional Protocol II to the International Covenant on Civil and Political Rights (1989)	No	No
International Covenant on Economic, Social and Cultural Rights (1966)	n/a	18/03/1986 (Acceded)
Optional Protocol to the International Covenant on Economic, Social and Cultural Rights	No	No
International Convention on the Elimination of All Forms of Racial Discrimination (1965)	n/a	27/03/1977 (Acceded)
Declaration under Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination (allowing individual complaints)	No	No
Convention on the Elimination of All Forms of Discrimination against Women (1979)	No	No
Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999)	No	No
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)	04/06/1986	No
Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2002)	No	No
Convention on the Rights of the Child (1989)	24/07/1990	03/08/1990 (Ratified)
Optional Protocol I to the Convention on the Rights of the Child (2000) (involvement of children in armed conflict)	09/05/2002	26/07/2005 (Ratified)
Optional Protocol II to the Convention on the Rights of the Child (2000) (sale of children, child prostitution and child pornography)	n/a	02/11/2004 (Acceded)

Optional Protocol III to the Convention on the Rights of the Child (2011) (communicative procedure)	No	No
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)	No	No
Convention on the Rights of Persons with Disabilities (2006)	20/03/2007	24/04/2009 (Ratified)
Optional Protocol to the Convention on the Rights of Persons with Disabilities (2006)	n/a	24/04/2009 (Acceded)
International Convention for the Protection of All Persons from Enforced Disappearances (2006)	No	No

The failure to sign or ratify the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) represents arguably the most significant gap in Sudan’s international legal obligations related to equality. At the first Universal Periodic Review (UPR) of Sudan at the UN Human Rights Council in 2011, a number of states made recommendations to Sudan that it ratify those core UN human rights treaties to which it was not party. Eleven states made recommendations in relation to CEDAW,⁴²¹ a treaty to which all but seven member states of the United Nations are party. Sudan rejected recommendations calling on it to ratify or accede to CEDAW, though it did accept those recommendations asking it to “consider” ratification or accession, stating that:

*The Government has subjected the Convention on the Elimination of All Forms of Discrimination against Women to a wide consultative process with a view to bring on board the view points of the different sects of the society.*⁴²²

Despite signing the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1986, Sudan has not yet ratified it. At

421 Australia, Belgium, Brazil, Ecuador, Finland, France, Malaysia, Norway, South Korea, Spain and Uruguay.

422 United Nations Human Rights Council, Universal Periodic Review, *Report of the Working Group on the Universal Periodic Review: Sudan: Addendum*, UN Doc. A/HRC/18/16/Add.1, 16 September 2011, Para 12.

the UPR in 2011, four states called upon Sudan to ratify the treaty,⁴²³ but these recommendations were all rejected by Sudan, as were recommendations to ratify the International Convention for the Protection of All Persons from Enforced Disappearance.

In addition to failing to ratify or accede to important UN human rights conventions, Sudan has a poor record in ratifying those optional protocols which permit individuals to lodge claims of rights violations with the relevant UN treaty bodies. As a result of the failure to ratify the Optional Protocol to the ICESCR and Optional Protocol 1 to the ICCPR, individual victims of discrimination in Sudan are unable to bring complaints to the treaty bodies which monitor the implementation and enforcement of the instruments. This problem is exacerbated by the limited opportunities for individuals to seek redress for violations of Covenant rights at the domestic level. As detailed below, Article 27(3) of the Interim National Constitution provides for international human rights treaties to which Sudan is party to constitute part of the Bill of Rights. However, the UN Human Rights Committee (HRC) has criticised Sudan for failing to incorporate the rights provided in the ICCPR into domestic law and publicising it sufficiently so that it can be easily invoked before the courts and administrative authorities.⁴²⁴

Similarly, whilst Sudan has acceded to ICERD, it has not made a declaration under Article 14 of the Convention which would allow individual complaints. The Committee on the Elimination of Racial Discrimination (CERD) has noted this failure and recommended that Sudan consider making a declaration under Article 14 when it reviewed Sudan in 2001.⁴²⁵

423 Australia, Brazil, Ecuador and Spain.

424 See United Nations Human Rights Committee, *Concluding Observations on the third periodic report of the Sudan*, UN Doc. CCPR/C/SDN/CO/3, 29 August 2007, Para 8: "The Committee notes that pursuant to article 27 of the Interim National Constitution of 2005, the Covenant is binding and may be invoked as a constitutional text. It regrets, however, that the rights protected by the Covenant have not been fully incorporated into domestic law, and that the Covenant has not been sufficiently well publicized to be easily invoked before the courts and administrative authorities. The State party should ensure that its legislation gives full effect to the rights recognized in the Covenant. It should in particular ensure that remedies are available to safeguard the exercise of those rights. The Covenant should be made known to the general public, and in particular to law enforcement personnel."

425 United Nations Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, Concluding Observations of the Committee on the Elimination of Racial Discrimination: Sudan*, UN Doc. CERD/C/304/Add.116, 27 April 2001, Para 18.

The only treaty which Sudan has both ratified and permitted individual complaints to be made is the CRPD, though no individual complaints have yet been lodged against Sudan with the Committee on the Rights of Persons with Disabilities.

In 1991, Sudan notified the Secretary General of a derogation from the IC-CPR, having declared a state of emergency.⁴²⁶ Under Article 4(1) of the ICCPR, where a state of public emergency has been declared, a state party:

[M]ay take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Article 4(2) states that no derogation may be made from Articles 6, 7, 8(1) and 8(2), 11, 15, 16 and 18 of the Covenant. Article 4(3) sets out the process by which a state may avail itself of the right of derogation: it requires that the state immediately inform other state parties, through the intermediary of the Secretary General, of the provisions which it has derogated from, and the reasons for the derogation. On its face, the derogation by Sudan complied with these requirements of Article 4, and was not challenged by any of the other state parties to the ICCPR.

The notification of derogation indicated that Sudan derogated from Articles 2 (non-discrimination) and 22(1) (freedom of association) of the Covenant. Article 2(1) of the ICCPR requires that state parties respect and ensure all rights in the Covenant, “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. Thus, the derogation had the effect of

426 Government of Sudan, *Derogations: Notifications under Article 4 (3) of the International Covenant on Civil and Political Rights*, UN Treaty Collection, 21 August 1991. The Derogation reads: “The state of emergency was declared all over the Sudan on June 30, 1989, when the Revolution for National Salvation took over the power, in order to ensure security and safety of the country. [The articles of the Covenant which are being derogated from are articles 2 and 22 (1) as subsequently indicated by the Government of the Sudan.]” (Emphasis in original.)

suspending Sudan's obligations to ensure non-discrimination in the enjoyment of all civil and political rights provided by the Covenant. However, the extent of this derogation was limited by the explicit prohibition on discrimination based on "race, colour, sex, language, religion or social origin" in the implementation of derogation measures which is provided for by Article 4(1). The UN HRC has stressed the importance of ensuring that derogations from the Covenant do not themselves involve discrimination, stating as follows:

Even though article 26 or the other Covenant provisions related to non-discrimination (articles 2, 3, 14, paragraph 1, 23, paragraph 4, 24, paragraph 1, and 25) have not been listed among the non-derogable provisions in article 4, paragraph 2, there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances. In particular, this provision of article 4, paragraph 1, must be complied with if any distinctions between persons are made when resorting to measures that derogate from the Covenant.⁴²⁷

In August 2001 and again in December 2001, the Government of Sudan informed the Secretary General that the state of emergency had been extended until 31 December 2002. No subsequent notice was filed with the Secretary General of Sudan's intention to extend the state of emergency. The state of emergency was lifted in 2005, on the signing of the Comprehensive Peace Agreement (CPA) between the Sudanese authorities and the Sudan People's Liberation Movement. However, it should be noted that Sudan has not, as required by Article 4(3), notified the Secretary General of the date of the termination of its derogation. Moreover, the state of emergency is still in force in certain areas of the country. According to Sudanese lawyer Dr Mohammed Babiker:

In January 2005, the state of emergency was lifted following the signing of the CPA with the Sudan People's Liberation Movement/Army (SPLM/A). However, it re-

427 United Nations Human Rights Committee, *General Comment 29, States of Emergency (article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11, 2001, Para 8.

*mains in force in certain areas affected by the armed conflict such as Darfur, Blue Nile and South Kordofan. In sum, since the beginning of the armed conflicts in 1983, the Sudan has virtually been subjected to a permanent or de facto emergency. Under these circumstances, it makes sense to regard emergency powers as Sudan's de facto constitution.*⁴²⁸

Sudan's position regarding its obligations under the UN human rights system cannot be properly appreciated without an understanding of the state's history of criticism of the system itself. Sudan is one a number of countries, together with Iran and Saudi Arabia, which have criticised the Universal Declaration of Human Rights – and implicitly therefore the international bill of human rights of which it forms a part – as a partisan text reflecting a secular interpretation of the Judeo-Christian tradition. Indeed, in 1994, Sudanese representatives to the UN Human Rights Commission were involved in a very public conflict over the relationship between the state's obligations under international human rights law and sharia law.⁴²⁹ Responding to a recommendation by the then Special Rapporteur on Sudan that it should bring its legislation into line with its international law obligations, the Sudanese delegation strongly expressed the view that sharia law superseded its international human rights obligations. In its official response to the Special Rapporteur's report, Sudan stated:

*All Muslims are ordained by God to subject themselves to sharia Laws and that matter could not be contested or challenged by a Special Rapporteur or other UN agencies or representatives.*⁴³⁰

428 Babiker, M. A., "Why Constitutional Bills of Rights Fail to Protect Civil and Political Rights in Sudan: Substantive Gaps, Conflicting Rights, and 'Arrested' Reception of International Human Rights Law", *The Constitutional Protection of Human Rights in Sudan: Challenges and Future Perspectives*, REDRESS, Faculty of Law, University of Khartoum and the Sudan Human Rights Monitor, 2014, p. 27.

429 See discussion in Littman, D., *The Ideology of Jihad, Dhimmitude and Human Rights*, The Hoya, 2002.

430 Government of Sudan, *Comments by the Government of the Sudan on the report of the Special Rapporteur, Mr Gaspar Biro*, E/CN.4/1994/133, 1994.

3.1.2 Other International Treaties Relevant to Equality

Sudan has a mixed record in relation to other international treaties which have a bearing on the rights to equality and non-discrimination. Sudan ratified the 1951 Convention relating to the Status of Refugees in 1974, which is of particular importance given the high number of refugees in the country: according to United Nations High Commissioner for Refugees planning figures, a total of 215,810 refugees, people in refugee-like situations, asylum seekers and other persons of concern resided in the country in 2014.⁴³¹

Sudan has also ratified a number of key International Labour Organisation (ILO) Conventions including the Equal Remuneration Convention and the Discrimination (Employment and Occupation) Convention.

In light of the problems regarding the citizenship of persons of South Sudanese origin which are discussed in section 2.2 above, it is a cause of concern that Sudan has failed to ratify the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. Sudan does not recognise the jurisdiction of the International Criminal Court. In response to the charges of genocide, crimes against humanity and war crimes in Darfur, which the prosecutor of the International Criminal Court pressed against President Omar al-Bashir, Sudan stated that it would not ratify the Rome Statute of the International Criminal Court, despite having signed it in 2000.⁴³²

Instrument	Signed	Ratified / Acceded
Convention relating to the Status of Refugees (1951)	n/a	22/02/1974 (Ratified)
Convention relating to the Status of Stateless Persons (1954)	No	No
Convention on the Reduction of Statelessness (1961)	No	No

431 United Nations High Commissioner for Refugees, *2014 UNHRC country operations profile – Sudan*.

432 In a communication received on 26 August 2008, the Government of Sudan informed the Secretary-General of the following: “Sudan does not intend to become a party to the Rome Statute. Accordingly, Sudan has no legal obligation arising from its signature on 8 September 2000.”

Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956)	07/09/1956	09/09/1957 (Ratified)
UN Convention against Transnational Organized Crime (2000)	15/12/2000	10/12/2004 (Ratified)
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000)	No	No
Rome Statute of the International Criminal Court (1998)	08/09/2000	No
United Nations Educational, Scientific and Cultural Organisation Convention against Discrimination in Education (1960)	No	No
Forced Labour Convention (ILO Convention No. 29) (1930)	n/a	18/06/1957 (Ratified)
Equal Remuneration Convention (ILO Convention No. 100) (1951)	n/a	22/10/1970 (Ratified)
Discrimination (Employment and Occupation) Convention (ILO Convention No. 111) (1958)	n/a	22/10/1970 (Ratified)
Indigenous and Tribal Peoples Convention (ILO Convention No. 169) (1989)	No	No
Worst Forms of Child Labour Convention (ILO Convention No. 182) (1999)	n/a	07/03/2003 (Ratified)

3.1.3 Regional Instruments

Sudan has ratified the African Charter on Human and Peoples' Rights, but has not ratified the Protocol which establishes the African Court on Human and Peoples' Rights. As a result, individuals and other member states of the African Union are unable to bring proceedings against Sudan. Also disappointing is the failure of Sudan to ratify the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, particularly given its failure to sign and ratify CEDAW. Sudan has, however, ratified the African Charter on the Rights and Welfare of the Child.

Despite being a member of the League of Arab Nations, Sudan has not signed or ratified the Arab Charter on Human Rights, which entered into force in

2008. It should be noted that when the Charter entered into force, it was severely criticised by the then UN High Commissioner for Human Rights, Louise Arbour, who expressed concerns about “the approach to the death penalty for children and the rights of women and non-citizens [...and the...] extent that it equates Zionism with racism”.⁴³³

Instrument	Signed	Ratified / Acceded
African Charter on Human and Peoples’ Rights (1981)	03/09/1982	18/02/1986 (Ratified)
Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Court on Human and Peoples’ Rights (1998)	09/06/1998	No
Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (2005)	30/06/2008	No
African Charter on the Rights and Welfare of the Child (1990)	24/01/2003	30/07/2005
African Union Convention Governing Specific Aspects of Refugee Problems in Africa (1969)	10/09/1969	24/12/1972 (Ratified)
African Charter on Democracy, Elections and Governance (2011)	30/06/2008	No
Arab Charter on Human Rights (1994)	No	No

Cairo Declaration on Human Rights in Islam

As one of the 45 members of the Organisation of Islamic Cooperation, Sudan is a signatory to the Cairo Declaration on Human Rights in Islam, which was adopted in 1990 by the 19th Islamic Conference of Foreign Ministers. The Cairo Declaration was strongly criticised on its adoption, largely for the attempt to establish an alternative to the Universal Declaration of Human Rights, and for the apparent elevation of Islam and sharia law to a position of primacy over human rights. In a statement to the UN Commission on Human Rights

⁴³³ United Nations High Commissioner for Human Rights, *Statement by UN High Commissioner for Human Rights on the Entry into Force of the Arab Charter on Human Rights*, Office of UN High Commissioner for Human Rights, 30 January 2008.

in February 1992, the Secretary General of the International Commission of Jurists (ICJ), speaking on behalf of the ICJ and the International Federation for Human Rights urged the rejection of the Declaration on the basis that:

1. *It gravely threatens the inter-cultural consensus on which the international human rights instruments are based;*
2. *It introduces, in the name of the defence of human rights, an intolerable discrimination against both non-Muslims and women;*
3. *It reveals a deliberately restrictive character in regard to certain fundamental rights and freedoms, to the point that certain essential provisions are below the legal standard in effect in a number of Muslim countries;*
4. *It confirms under cover of the "Islamic sharia (Law)" the legitimacy of practices, such as corporal punishment, that attack the integrity and dignity of the human being.*⁴³⁴

Article 1(a) of the Cairo Declaration provides a basic guarantee of equality and non-discrimination. It states:

*All men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the basis of race, colour, language, belief, sex, religion, political affiliation, social status or other considerations. The true religion is the guarantee for enhancing such dignity along the path to human integrity.*⁴³⁵

The scope and impact of this provision is limited in a number of ways. First, as a declaration, the Cairo Declaration has no legal force, and is not legally binding on the states which have signed it; victims of discrimination cannot

434 Cited in: Association for World Education, *Report of the UN High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights – Written Statement submitted by a non-governmental organisation on the roster*, E/CN.4/2003/NGO/225, 2003, pp. 3–4, available at: [http://www.unhchr.ch/huridocda/huridoca.nsf/AllSymbols/4BFEBE8DA116E9EE C1256CF00031CE80/\\$File/G0311990.doc?OpenElement](http://www.unhchr.ch/huridocda/huridoca.nsf/AllSymbols/4BFEBE8DA116E9EE C1256CF00031CE80/$File/G0311990.doc?OpenElement).

435 Cairo Declaration on Human Rights in Islam, Organisation of Islamic Cooperation, Article 1(a).

bring a claim against the state or any other actor for violation of Article 1. By extension, the Declaration provides for no complaint mechanism and establishes no monitoring body equivalent to the treaty bodies established by the various UN instruments.

Second, the scope of the right provided by Article 1(a) is limited: the application of the protection from discrimination is restricted in scope to that necessary to ensure equality in basic human dignity, obligations and responsibilities. This does not meet the obligation to provide protection from discrimination in the enjoyment of other human rights which is imposed by Article 2(1) of the ICCPR and Article 2(2) of the ICESCR. Moreover, it falls far short of the obligation to provide protection from discrimination in all areas of life governed by law, which is provided for by Article 26 of the ICCPR.

Third, the right – as with all other rights in the Declaration – is subject to restrictions based on Islamic law. The final clause of Article 1(a) states that “the true religion is the guarantee for enhancing (...) dignity”, thus reserving a special status for Islam and calling into question the effect on the protection for non-Muslims.

More importantly, the Declaration explicitly places the Islamic sharia in a position of supremacy over other bases for human rights, and indeed over human rights themselves. Article 24 of the Declaration states that: “[a]ll the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari’ah”. Article 25 goes on to state that sharia is the “only source of reference for the explanation or clarification of any of the articles of this Declaration”.

3.1.4 Status of International Instruments in Domestic Law

Articles 27(3) of the Interim National Constitution provides for the direct application of international human rights law in Sudan. It represents a key provision insofar as it demonstrates the comprehensive approach adopted by the Constitution in relation to human rights protections. Article 27(3) states:

All rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of the Sudan shall be an integral part of this Bill.

This provision has generally been interpreted by academics to mean that such treaties are now an integral part of Sudanese law and thereby constitutionally and legally binding on the Sudanese courts.⁴³⁶ The Sudanese authorities recently reconfirmed this position, stating in a report to the UN HRC that international instruments which the state has signed and ratified:

*[A]re regarded as an integral part of the Bill of Rights set forth in the Constitution, pursuant to article 27(3) thereof, and of the practical application of all legal measures, as will be later explained in this report, thereby settling any debate on this matter.*⁴³⁷

As such, for the first time in Sudanese legal history, in 2005 several international treaties containing provisions prohibiting discrimination became part of Sudanese domestic law. Article 27(3) has the potential to have a significant impact on the extent of protection from discrimination provided under Sudanese law. As noted above, Sudan is party to a number of key international treaties providing protection from discrimination, including the ICCPR and the ICESCR, as well as the ICERD, CRC and the CRPD. Under Article 2 of the two Covenants, Sudan is obligated to ensure the enjoyment of all civil, political, economic, social and cultural rights without discrimination on a list of grounds.⁴³⁸ Moreover, under Article 26 of the ICCPR, Sudan is obligated to guarantee the right to non-discrimination as a free-standing right, applicable in all areas of life regulated by law. The direct effect of these instruments, together with the ICERD, CRC and CRPD, provides important potential protection for victims of discrimination in Sudan.

Nonetheless, there is significant concern over the extent to which Article 27(3) is effective in practice. In its 2007 Concluding Observations on Sudan's compliance with its obligations under the ICCPR, the UN HRC noted the effect of Article 27(3), but regretted that:

436 See, for example, above, note 428, p. 16.

437 United Nations Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant, Fourth periodic reports of States parties: Sudan*, UN Doc. CCPR/C/SDN/4, 16 October 2012, Para 14.

438 International Covenant on Civil and Political Rights, Article 2(1) and International Covenant on Economic, Social and Cultural Rights, Article 2(2).

[T]he rights protected by the Covenant have not been fully incorporated into domestic law, and that the Covenant has not been sufficiently well publicized to be easily invoked before the courts and administrative authorities.⁴³⁹

M. Babiker has argued that the monist approach enshrined by Article 27(3) is unworkable in the Sudanese legal and political context:

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

(...) Article 27 (3) of the INC [Interim National Constitution] 2005 suggests that Sudan's legal system is monist. This is in theory. However, judicial practice indicates that judges in ordinary courts rarely rely on the Bill of Rights and international human rights instruments. The current practice of the Constitutional Court (as the guardian of human rights) unfortunately demonstrates that it has failed to protect the constitutional human rights of the Sudanese people and others in Sudan.⁴⁴⁰

The Equal Rights Trust's consultation with civil society actors, legal academics and practicing lawyers identified a number of cases where the claimant had relied upon international human rights law when claiming discrimination. However, as yet, the Sudanese courts have appeared reluctant to directly

439 See above, note 424, Para 8.

440 See above, note 428, p. 26.

enforce international human rights law. We believe that the reason is a combination of a lack of political will, a weak understanding of equality in international human rights, as well as the apparent discrepancy between the monist assumption of the Constitutional provision and the dualist character of the Sudanese legal system which has its origins in British common law from the colonial era. In any case, Sudan is undoubtedly under an obligation to give effect to the provisions guaranteeing the rights to equality and non-discrimination enshrined in international law, whether through their direct application or incorporation in the national law.

3.2 National Law

3.2.1 The Constitution

Sudan's constitutional development since 1956 reflects the country's turbulent recent history: in the 58 years since independence, the country has had eight different constitutions. The current Interim National Constitution was adopted in the immediate aftermath of the Comprehensive Peace Agreement (CPA) signed in Naivasha, Kenya in 2005 between the Sudanese government and the Sudan People's Liberation Movement. The CPA provided for the development of a new constitution for the country.⁴⁴¹ Pursuant to this agreement, an Interim National Constitution was drafted and ratified in October 2005. Notwithstanding the secession of South Sudan in 2011, the Constitution remains in force in the Republic of Sudan.

Part One: The State, the Constitution and Guiding Principles

A number of the provisions in Chapter One of Part One of the Constitution, which sets out its guiding principles, reflect a commitment to equality and non-discrimination. Article 1(1) states that Sudan is a "democratic, decentralised, multi-cultural, multilingual, multi-racial, multi-ethnic, and multi-religious country where such diversities co-exist", while Article 1(2) states that Sudan is "founded on justice, equality and the advancement of human rights and fundamental freedoms". According to the Sudanese authorities, Article 1(2) "affirms the State's commitment to justice and equality, with no form of discrimination on any ground, such as race, ethnicity, colour, sex, language,

441 Comprehensive Peace Agreement, Chapter 1: Machakos Protocol, July 2002, Article 2(1)(f).

religion or political opinion”.⁴⁴² Article 4, which sets out the fundamental bases of the Constitution, refers to equality, respect and justice for all citizens and the cultural and social diversity of the Sudanese people as guiding principles.

Articles 6, 7 and 8 provide important guarantees in respect of religious freedom, nationality and citizenship, and language, in each case incorporating relevant provisions of the Comprehensive Peace Agreement on these issues. While in general these provisions do not refer explicitly to the rights to equality or non-discrimination, each is significant in providing a legal guarantee necessary for the equal participation of all groups in society, and for addressing some of the underlying causes of the North-South conflict. It is notable that, while Article 22 of the Constitution specifically states that the provisions in Chapter Two of Part One of the Constitution “are not by themselves enforceable in a court of law”, no similar savings clause exists in Chapter One, and indeed, the courts have not drawn a distinction between the rights provided in Articles 6, 7 and 8, and those contained in the Bill of Rights itself.

Article 6 states that Sudan shall respect religious rights, including the right to worship, to write, issue and disseminate religious publications, to provide religious education and to celebrate religious holidays and ceremonies. These are undoubtedly important guarantees given the role which religion played in causing and perpetuating the conflict between North and South Sudan.

Article 7(1) states that “[c]itizenship shall be the basis for equal rights and duties for all Sudanese”. In its recent reports to UN treaty bodies, the Sudanese government has stressed the importance of this provision. In its 2013 report to the UN Committee on Economic, Social and Cultural Rights (CESCR), Sudan stated that the Article “guarantees the right of equality, without discrimination on any basis, and in fact makes citizenship the sole criterion for the enjoyment of rights and freedoms”.⁴⁴³ In its 2012 report to the UN HRC, the state stressed that “citizenship – not religion, ethnicity or colour – is the basis for rights and duties in the Sudan”.⁴⁴⁴

442 United Nations Committee on Economic, Social and Cultural Rights, *Consideration of reports submitted by States parties under Articles 16 and 1 of the Covenant, Second periodic reports of State parties: Sudan*, UN Doc. E/C.12/SDN/2, 18 September 2013, Para 95.

443 *Ibid.*, Para 96.

444 See above, note 437, Para 141.

However, Article 7(1) – and the interpretation of the provision by the state in its reports to the UN treaty bodies – is problematic, in that it appears to limit the enjoyment of rights and freedoms to citizens alone. International human rights law is clear that the obligation of states to protect and guarantee the rights to equality and non-discrimination – and indeed almost all human rights – extends to all persons within the territory and subject to the jurisdiction of the state, though this is subject to a number of important caveats. Article 2(1) of the ICCPR, for example, requires states parties to undertake “to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognised in the present Covenant, without distinction of any kind” (emphasis added). Similarly, Article 26 states that “*all persons* are equal before the law and are entitled without any discrimination to the equal protection of the law” (emphasis added) rather than, for example, using the words, “all nationals” or “all citizens”. The HRC has, in its Communications, found that distinctions made on the basis of citizenship may violate Article 26.⁴⁴⁵

Two limitations to the general principle that human rights should be enjoyed by all persons, not only citizens, are provided in ICESCR and ICERD. Article 2(3) of ICESCR provides that:

Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

Notwithstanding this general exception, CESCR has stated in its General Comment No. 20 that:

The ground of nationality should not bar access to Covenant rights, e.g. all children within a State, including those with an undocumented status, have a right to receive education and access to adequate food and affordable health care. The Covenant rights apply to everyone

⁴⁴⁵ See, for example, *Adam v Czech Republic* (Application No. 586/1994), U.N. Doc. CCPR/C/57/D/586/1994 (1996); and *Karakurt v Austria* (Application No. 965/2000), U.N. Doc. CCPR/C/74/D/965/2000 (2002).

*including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.*⁴⁴⁶

Article 1(2) of ICERD states that the Convention “shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens”. In its General Recommendation No. 30, CERD limited this general exception by clarifying where distinctions between citizens and non-citizens would, despite Article 1(2), contravene the Convention:

2. Article 1, paragraph 2, must be construed so as to avoid undermining the basic prohibition of discrimination; hence, it should not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in particular in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights;

3. Article 5 of the Convention incorporates the obligation of States parties to prohibit and eliminate racial discrimination in the enjoyment of civil, political, economic, social and cultural rights. Although some of these rights, such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law;

4. Under the Convention, differential treatment based on citizenship or immigration status will constitute

⁴⁴⁶ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/20, 2 July 2009, Para 30.

*discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim. Differentiation within the scope of article 1, paragraph 4, of the Convention relating to special measures is not considered discriminatory...*⁴⁴⁷

Article 7(2) of the Constitution provides that “every person born to a Sudanese mother or father” has the inalienable right to Sudanese citizenship. This provision is significant in two respects. First, it establishes the principle that persons should be equally able to acquire Sudanese citizenship by birth by virtue of their father’s or mother’s nationality. Unfortunately however, this principle is not consistent with the Sudanese Nationality Act 1994, which instead establishes a hierarchy whereby it is easier to acquire citizenship by the paternal line than the maternal line.⁴⁴⁸ The second important aspect of Article 7(2) is that it establishes the “inalienability” of citizenship acquired by birth. Again however, the Sudanese Nationality Act, as amended in 2011, appears to directly contradict this principle: section 10(2) of the Nationality Act provides that: “Sudanese nationality shall automatically be revoked if the person has acquired, de jure or de facto, the nationality of South Sudan.” Article 7(3) of the Constitution provides that “no naturalised Sudanese shall be deprived of his/her acquired citizenship except in accordance with the law”.

Article 8 deals with the question of national and official languages. It states that all indigenous languages are national languages which shall be respected, developed and promoted, and recognises that both Arabic and English shall be official working languages of the government. Article 8(5) explicitly prohibits discrimination on the basis of the use of either Arabic or English at any level of government or education. Given the patterns of discrimination on the basis of language which are documented in Part 2 of this report, Article 8(5) provides a potentially important avenue for legal redress.

447 United Nations Committee on the Elimination of Racial Discrimination, *General Recommendation 30: Discrimination against Non-citizens*, UN Doc. CERD/C/64/Misc.11/rev.3, 2004, Paras 2–4.

448 See discussion above, at Section 2.4.

A number of provisions in Chapter Two of Part One of the Constitution are also potentially significant for the realisation of the rights to equality and non-discrimination in the areas of economic development, employment and education. Article 10(1) provides that the overarching aims of economic development in the country shall be:

[E]radication of poverty, attainment of the Millennium Development Goals, guaranteeing the equitable distribution of wealth, redressing imbalances of income and achieving a decent standard of life for all citizens.

Article 12(1) provides that the state will develop policies and strategies to ensure social justice. Article 12(2) states that no qualified person shall be denied access to a profession or employment on the basis of disability and that persons with special needs and the elderly “have the right to participate in social, vocational, creative or recreational activities”. Article 13(4) requires the state to recognise the cultural diversity of the country and to encourage diverse cultures. Article 15 deals with “Family, Women and Marriage”: significantly, Article 15(2) requires the state to “protect motherhood and women from injustice, promote gender equality and the role of women in family, and empower them in public life”.

However, although the provisions in Chapter Two provide welcome guidance on the development of legislation and state policy, they are not directly enforceable in the Sudanese courts, by virtue of Article 22, which states that:

Unless this Constitution otherwise provides, or a duly enacted law guarantees the rights and liberties described in this Chapter, the provisions contained in this Chapter are not by themselves enforceable in a court of law; however, the principles expressed herein are basic to governance and the State is duty-bound to be guided by them, especially in making policies and laws.

Part Two: Bill of Rights

Part Two of the Interim National Constitution – the Bill of Rights – is the most significant part of the Constitution in respect of the protection of the rights

to equality and non-discrimination. The Bill of Rights in the Constitution has been welcomed by commentators as going further than any previous constitution in attempting to ensure comprehensive protection of human rights and basic freedoms in line with Sudan's international legal obligations.⁴⁴⁹ As Dr Amin M. Medani concludes in a January 2014 paper: "[t]here is no doubt that the provisions of the Bill of Rights are the most elaborate and significant ever provided in any Constitutional document in the history of the Sudan."⁴⁵⁰

Article 27(1) provides that the Bill of Rights is:

[A] Covenant among the Sudanese people and between them and their governments at every level (...) it is the cornerstone of social justice, equality and democracy in Sudan.

Article 27(2) provides that the state shall "protect, promote, guarantee and implement" the Bill of Rights. As noted above, Article 27(3) provides that international human rights instruments ratified by Sudan form an "integral part" of the Bill of Rights. Significantly, Article 27(4) reinforces the supremacy of the Constitution as guaranteed by Article 3, stating that: "[l]egislation shall regulate the rights and freedoms enshrined in this Bill and shall not detract from or derogate any of these rights".

Article 31 of the Constitution concerns the rights to equality and non-discrimination, though providing only limited protection of both. It states:

All persons are equal before the law and are entitled without discrimination, as to race, colour, sex, language, religious creed, political opinion, or ethnic origin, to the equal protection of the law.

449 See, for example, Sulieman Fadallah, A., *The Citizen and The Constitution: Series 2*, Al-Ayam Centre, p. 22; and Sanhoury Elrayh, E., "Women's Rights in the Constitutional Bill of Rights: Issues of Status, Equality and Non-Discrimination", *The Constitutional Protection of Human Rights in Sudan: Challenges and Future Perspectives*, REDRESS, Faculty of Law, University of Khartoum and the Sudan Human Rights Monitor, 2014, p. 54.

450 Medani, A. M., "The Constitutional Bill of Rights in the Sudan: Towards Substantive Guarantees and Effective Realisation of Rights", *The Constitutional Protection of Human Rights in Sudan: Challenges and Future Perspectives*, REDRESS, Faculty of Law, University of Khartoum and the Sudan Human Rights Monitor, 2014, p. 10.

It is notable that Article 31 bears at least a superficial similarity to Article 26 of the ICCPR, which states that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Two key differences are obvious. First, while Article 26 of the ICCPR states simply that all persons are entitled to equal protection “without any discrimination” (emphasis added), Article 31 of the Constitution enumerates a short closed list of grounds on which such discrimination is prohibited. Thus, the guarantee of equal protection of the law provided by the Constitution is limited by reference to a specific group of characteristics, restricting the ability of an individual to challenge any denial of equal protection which arises on another basis, such as disability, age or sexual orientation.

Second, Article 31 entirely omits the second sentence of Article 26, which provides an autonomous right to non-discrimination. In its General Comment No. 18 on non-discrimination, the UN HRC has emphasised the three distinct strands of protection provided by Article 26 of the ICCPR, highlighting the importance of the separate prohibition on discrimination:

*Article 26 not only entitles all persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*⁴⁵¹

451 United Nations Human Rights Committee, *General Comment 18: Non-discrimination*, UN Doc. HRI/GEN/1/Rev.1 at 26, 1989, Para 1.

Through the omission of the second sentence of Article 26 of the ICCPR, the Constitution provides only very limited protection from discrimination: a person is only entitled to enjoy equal protection of the law without discrimination. Thus, Article 31 provides a lower degree of protection from discrimination than that provided by the international instruments to which Sudan is party. Discriminatory acts impinging on the enjoyment of a person's civil, political, economic, social and cultural rights may occur in a wide range of contexts and situations, and protection from discrimination in all areas of life regulated by law is by far a broader concept than equal protection of the law. For example, the law can give equal protection to a man and a woman while sanctioning rules that treat the woman less favourably. In this case, the law would merely ensure that the man and the woman have an equal opportunity to the enforcement of the discriminatory rule.

A central problem in understanding the scope of protection provided by Article 31 is the lack of clarity about what the phrase "equal protection of the law" means, in the Sudanese legal context. To date, this question has not been considered by the courts in Sudan, leaving significant room for speculation about the extent to which different actors, and different actions, are subject to an obligation of non-discrimination. Nevertheless, it seems reasonable to assume that Article 31 falls short of the far-reaching obligation arising under Article 26 of the ICCPR to "prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination". As the HRC has noted, Article 26 creates an "autonomous right", which is far broader in its scope than "equality before the law" and "equal protection of the law", and also broader than the right to be free from discrimination in the enjoyment of other human rights provided by Article 2(1). In its General Comment No. 18, the Committee noted that Article 26:

*[P]rohibits discrimination in law or in fact in any field regulated and protected by public authorities (...) In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.*⁴⁵²

452 *Ibid.*, Para 12.

Consonant with Article 26 ICCPR, the Declaration of Principles on Equality states that the right to equality and the right to non-discrimination which is subsumed in it⁴⁵³ apply “in all areas of activity regulated by law”.⁴⁵⁴ Article 31 of the Constitution does not explicitly prohibit discrimination in all fields regulated and protected by public authorities, or all areas of activity regulated by law. Rather, it states that all persons are entitled to enjoy equal protection of the law without discrimination. In the absence of judicial interpretation of the phrase “equal protection of the law” in Sudanese jurisprudence, there is a risk that the scope of Article 31 would be construed narrowly, falling below the standard of protection from discrimination required by Article 26 of the ICCPR or Principle 8 of the Declaration of Principles on Equality.

Another cause for concern is that, while the Bill of Rights in the Constitution provides arguably the best protection for fundamental human rights of any of Sudan’s constitutions, Article 31 has a narrower material scope than a number of its predecessors. For example, the 1973 Constitution provided that “Sudanese have equal rights and duties, irrespective of origin, race, locality, sex, language and religion” and that “the State shall ensure equality of opportunities for all Sudanese and prohibit any discrimination in work opportunities or conditions or pay on the grounds of origin, sex, or geographical affiliations”.⁴⁵⁵ The 1998 Constitution provided that:

*All people are equal before the courts of law. Sudanese are equal in rights and duties as regards to functions of public life; and there shall be no discrimination only by reason of race, sex or religious creed. They are equal in eligibility for public posts and offices not being discriminated on the basis of wealth.*⁴⁵⁶

A further potential problem may be created from the lack of explicit prohibition in Article 31 of both direct and indirect discrimination. The UN CESCR has stated that the prohibition on discrimination in Article 2(2) of ICESCR includes both direct and indirect discrimination, and both are also included in

453 *Declaration of Principles on Equality*, The Equal Rights Trust, London, 2008, Principle 4.

454 *Ibid.*, Principle 8.

455 Constitution of Sudan 1973, Article 38 and Article 56.

456 Constitution of Sudan 1998, Article 21.

the definition of discrimination in the Declaration of Principles on Equality.⁴⁵⁷ In the absence of jurisprudence or clear state practice indicating that Article 31 does effectively prohibit both forms of discrimination, there is ground for concern that the Constitution would only extend protection to acts of direct discrimination. In addition, the Constitution does not explicitly prohibit harassment or failure to make reasonable accommodation, though the latter is partly compensated for, in respect to disability, by limited provisions in the National Disability Act 2009.

The personal scope of protection provided by Article 31 is also severely limited. The Article provides protection from discrimination only on the basis of the characteristics or grounds which are explicitly referred to in the text: race, colour, sex, language, religious creed, political opinion and ethnic origin. While this list includes six of the grounds which are listed in Articles 2(1) and 26 of the ICCPR and Article 2(2) of the ICESCR, it omits several others which are well-recognised under international law. The list omits five characteristics which are explicitly listed in both the ICCPR and the ICESCR: national or social origin, other opinion (apart from political), property and birth. Moreover, it omits all those grounds which the HRC and the CESCR, in interpreting the ICCPR and the ICESCR respectively, have recognised as falling under “other status”, within the meaning of Article 2 of the relevant Covenants: civil and family status, nationality, economic status, sexual orientation, gender identity, age, disability and health status.⁴⁵⁸ Article 31 also omits pregnancy and maternity, both of which are protected under Article 11 of the CEDAW (though these may be construed as being covered under the protected characteristic of “sex”). All of these omitted grounds are also recognised in Principle 5 of the Declaration of Principles on Equality.

In addition to the problems posed by the use of a limited list of explicitly protected grounds, the scope of protection provided by Article 31 is limited by virtue of the fact that the list is exhaustive, rather than indicative. Both the ICCPR and the ICESCR state that the rights therein should be enjoyed without distinction on an explicit list of characteristics and “any other status”; the same phrase is also used in the broader right to non-discrimination found in Article 26 of the ICCPR. In its General Comment No. 20, the CESCR stressed the importance of the phrase “other status”, finding that:

457 See above, note 446, Para 10; see above, note 453, Principle 5.

458 See, for example, above, note 446, Paras 28–35.

A flexible approach to the ground of 'other status' is thus needed in order to capture other forms of differential treatment that cannot be reasonably and objectively justified and are of comparable nature to the express recognized grounds in article 2, paragraph 2.⁴⁵⁹

As the Committee has indicated, the use of an indicative, open-ended list of protected grounds is important if the scope of protection is to recognise emerging forms of discrimination. As noted above, both the HRC and the CESCR have recognised a number of additional characteristics – ranging from age and disability to sexual orientation – as forms of other status. By omitting “other status”, Article 31 does not help Sudanese courts to extend the protection from discrimination to grounds which were not specified when the Constitution was first adopted.

The personal scope of Article 31 is also severely limited in other ways. Notably, the construction of the Article is likely to make it difficult for a person to claim discrimination where they experience unfavourable treatment by reason of a perception, whether true or false, of having a particular protected characteristic, or by reason of an association with someone who possesses a protected characteristic. The CESCR has stated that: “membership [of a protected group] also includes association with a group characterised by one of the prohibited grounds (...) or perception by others that an individual is part of such a group”.⁴⁶⁰ Similarly, the Declaration of Principles on Equality states that:

Discrimination must also be prohibited when it is on the ground of the association of a person with other persons to whom a prohibited ground applies or the perception, whether accurate or otherwise, of a person as having a characteristic associated with a prohibited ground.⁴⁶¹

Finally, the personal scope of the protection provided by Article 31 is limited by the failure to prohibit discrimination on multiple grounds, including both cumulative and intersectional discrimination. The CESCR has noted that

459 See above, note 446, Para 27.

460 *Ibid.*, Para 16.

461 See above, note 453, Principle 5.

some individuals or groups of individuals, such as women with disabilities, face multiple discrimination on two or more protected grounds,⁴⁶² and has stressed that “such cumulative discrimination has a unique and specific impact on individuals and merits particular consideration and remedying.”⁴⁶³ The Declaration of Principles on Equality also recommends that states provide protection from multiple discrimination.⁴⁶⁴

In addition to the general equality provision in Article 31, three other Articles of the Constitution either provide protection from discrimination, or require measures to be taken to improve the position of groups exposed to discrimination. Article 32 is directed towards the rights of women and children. Article 32(1) proclaims that:

The State shall guarantee equal right of men and women to the enjoyment of all civil, political, social, cultural and economic rights, including the right to equal pay for equal work and other related benefits.

Thus, in respect of gender, the Constitution complies with the requirements of Article 2(1) of the ICCPR and Article 2(2) of the ICESCR, which require that the state guarantees the enjoyment of the rights contained therein without distinction on certain grounds including gender. Yet here also, the provision falls short of the standard required by Article 26 of the ICCPR, which the HRC has stated is “an autonomous right” which “prohibits discrimination in law or in fact in any field regulated and protected by public authorities.”⁴⁶⁵ This ensures a broader material scope: all areas regulated by law, including where the discrimination at issue is not attached to the enjoyment of another human right. Moreover, while the provision reflects the language of Article 3 of both the ICCPR and the ICESCR, Sudan lacks the constitutional or legislative provisions required to meet the obligations which are implicit in this Article. As the HRC has stated, Article 3 requires that:

462 See above, note 446, Para 17.

463 See above, note 446, Para 17. On the difference between cumulative and intersectional discrimination, see Uccellari, P. “Multiple Discrimination: How Law Can Reflect Reality”, *The Equal Rights Review*, Vol. 1 (March 2008).

464 See above, note 453, Principle 5.

465 See above, note 451, Para 12.

[S]tate parties take all necessary steps to enable every person to enjoy those rights. These steps include the removal of obstacles to the equal enjoyment of such rights, the education of the population and of state officials in human rights and the adjustment of domestic legislation so as to give effect to the undertakings set forth in the Covenant.⁴⁶⁶

As noted in Section 2.4 above, Sudan retains a significant number of laws which directly or indirectly discriminate against women,⁴⁶⁷ while many obstacles continue to limit the equal enjoyment of rights by women. Moreover, as discussed in more detail in Section 3.2.2 below, Sudan has not adopted legislation which prohibits discrimination against women. Thus, the government is failing to fulfil its obligations under Article 32 of the Constitution, particularly to ensure equality before the law in the area of “personal status” and criminal matters; to take positive action measures in favour of women; and to combat harmful customs and practices against women. In an important sense therefore, Article 32 represents an unfulfilled commitment: the Article recognises that the state shall guarantee equal rights for men and women, but little has been done to achieve this.

In addition to the prohibition on discrimination in the enjoyment of other human rights, Article 32(1) also explicitly guarantees equal pay for work of equal value, thus going some way to meeting Sudan’s obligations as a party to the ILO Equal Remuneration Convention.⁴⁶⁸ Article 32(2) provides that “[t]he State shall promote women’s rights through affirmative action”. As with

466 United Nations Human Rights Committee, *General Comment 28, Equality of rights between men and women (article 3)*, UN Doc. CCPR/C/21/Rev.1/Add.10, 2000, Para 3.

467 See also Sanhoury Elrayh, E., “Women’s Rights in the Constitutional Bill of Rights: Issues of Status, Equality and Non-Discrimination”, *The Constitutional Protection of Human Rights in Sudan: Challenges and Future Perspectives*, REDRESS, Faculty of Law, University of Khartoum and the Sudan Human Rights Monitor, 2014, p. 45, where the author states that: “there are 26 laws not in conformity with the constitution because of their explicit or implicit discrimination against women”.

468 International Labour Organisation Equal Remuneration Convention (ILO Convention No. 100), 1951. Article 2(1) of the Convention states: “Each Member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.”

Article 32(1) however, this provision remains an unfulfilled commitment. According to Prof Sanhoury Elrayh:

[E]ight years after its incorporation, the impact of the provision on women's position is negligible due to a lack of effective measures taken in this regard. To illustrate, article 136 of the INC [Interim National Constitution] provides general directives for recruitment in the civil service, one of which is aimed at addressing the imbalance and inequity in recruitment, non-discrimination at any level of government against any qualified Sudanese based on religion, ethnicity, region or gender, and to employ positive discrimination measures and professional training to achieve equitable employment within a specific timeframe. However, the participation of women in the public and private sector remains far behind that of men even with legislation in place.⁴⁶⁹

Articles 32(3) and (4) provide for further specific obligations upon the state in relation to women's rights. Article 32(3) requires the state to "combat harmful customs and traditions which undermine the dignity and status of women", and Article 32(4) requires the state to "provide maternity and child care and medical care for pregnant women". These provisions reflect, in part, certain provisions in the CEDAW, the most important international instrument on women's equality which Sudan has not yet signed or ratified. Article 2(f) of the Convention, for example, requires states parties to "take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women". Articles 11 and 12 of the Convention include provisions on support for women during pregnancy and maternity.

Article 32(5) requires the state to "protect the rights of the child as provided in the international and regional conventions ratified by the Sudan". Thus, Article 32(5) reinforces Sudan's existing obligations under international law. As noted above, Sudan has ratified the CRC and the first two Optional Protocols (on the involvement of children in armed conflict and the sale of children, child prostitution and child pornography respectively).

⁴⁶⁹ See above, note 467 pp. 60–61.

Article 45 provides specific protections for persons with “special needs” and the elderly. Article 45(1) states that:

The State shall guarantee to persons with special needs the enjoyment of all the rights and freedoms set out in this Constitution; especially respect for their human dignity, access to suitable education, employment and full participation in society.

Article 45(1) is problematic in two important respects. First, the phrase “special needs” is not defined, either in the Article itself or elsewhere in the Constitution. This creates a serious lack of certainty about the scope of the provision’s application, leading to potential problems for those seeking the benefit of the provision, and those responsible for ensuring its implementation and enforcement. Secondly, if an assumption is made that “persons with special needs” includes some or all of those considered to be persons with disabilities, as defined in the CRPD,⁴⁷⁰ the Article provides no detail on how the “enjoyment of all rights and freedoms” and “full participation in society” is to be achieved. In this regard, it is notable that neither Article 31 nor Article 45(1) prohibits discrimination on the basis of disability, nor requires that reasonable accommodation measures to ensure the equal participation of persons with disability in all areas of life be adopted, as required by the CRPD.⁴⁷¹ While such omissions could be compensated for in legislation, the National Disability Act, adopted four years after the Constitution, in 2009, also omits both a prohibition on discrimination and a general requirement to make reasonable accommodation.

Article 45(2) guarantees to the elderly “the right to the respect of their dignity” and obliges the state to “provide them with the necessary care and medical services as shall be regulated by law”. The term “elderly” is not defined in the Article or elsewhere in the Constitution.

Finally, Article 47 provides specific rights for ethnic and cultural minorities:

470 Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, 2006, Article 1: “Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”

471 *Ibid.*, Articles 5(2) and 5(3).

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

This compares favourably with Article 27 of the ICCPR, which requires, in states with ethnic, religious or linguistic minorities, that persons belonging to such minorities have the right to “enjoy their own culture, to profess and practise their own religion, or to use their own language”. As with Article 32, however, the practice of the state provides numerous examples of flagrant, systematic and consistent violation of Article 47.

The provisions of the Constitution examined above provide, in theory at least, for some degree of protection from discrimination. However, no real effort has been made to translate the provisions in the Bill of Rights into legislation, with the exception of the National Disability Act 2009 and limited provisions in some other areas of law. There has also been no effort made to review legislation which pre-dates the Constitution in order to determine its compliance with the latter. Although a special committee was expected to be formed for this purpose, there is no indication that it has been established.

One significant shortcoming of the Bill of Rights, which has been highlighted by Dr Babiker, is the absence of a general prohibition on “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”,⁴⁷² as required by Article 20 of the ICCPR.⁴⁷³ A similar obligation also arises under Article 4 of the ICERD, which Sudan became a party to in 1977.⁴⁷⁴ While the Constitution does, at Article 39, require that all media “shall refrain from inciting religious, ethnic, racial or cultural hatred and shall

472 See above, note 428, p. 16.

473 International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 1966, Article 20(2).

474 International Convention on the Elimination of all forms of Racial Discrimination, G.A. Res. 2106 (XX), 1965. Article 4(a) requires that states “declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof”.

not agitate for violence or war”, this is clearly a narrower prohibition than that envisaged by either the ICCPR or the ICERD. Given the well-documented history of racially and religiously motivated violence and conflict in Sudan,⁴⁷⁵ and the role of hate speech by the country’s political leaders in perpetuating such violence, this is a serious omission.

3.2.2 Specific Equality and Anti-discrimination Legislation

As a party to the ICCPR and the ICESCR, Sudan has an obligation to provide protection from discrimination by state and non-state actors through the adoption of equality legislation. The UN HRC has stated that under Article 26 of the ICCPR, all states parties have an obligation to ensure that the “law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds”.⁴⁷⁶ It has also noted that Article 2 “requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations”.⁴⁷⁷ The CESCR has stated that “[s]tates parties are therefore encouraged to adopt specific legislation that prohibits discrimination in the field of economic, social and cultural rights”.⁴⁷⁸

Thus, Sudan has an obligation to ensure that its legislation prohibits discrimination on all grounds which are explicitly listed in Articles 2 and 26 of the ICCPR and Article 2 of the ICESCR, together with those characteristics recognised by the relevant Committees as covered by “other status”. Therefore, the list of grounds on which Sudan should provide protection from discrimination includes: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, family status, nationality, economic status, sexual orientation, gender identity, age, disability and health status.⁴⁷⁹ In order to ensure consistency with the Covenants, such legislation should also provide protection from discrimination which arises on the basis of “oth-

475 See discussion above, at Sections 2.1 and 2.2.

476 See above, note 451, Para 12.

477 United Nations Human Rights Committee, *General Comment 31: The nature of the general legal obligation imposed on states parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add. 13, 2004, Para 7.

478 See above, note 446, Para 37.

479 *Ibid.*, Paras 18–35.

er status". Moreover, in order to ensure consistency with the Covenants as interpreted by the relevant Committees, such legislation should prohibit discrimination by association and perception,⁴⁸⁰ and multiple discrimination.⁴⁸¹

Anti-discrimination law should, as explained by the CESCR, prohibit both direct and indirect discrimination,⁴⁸² incitement to discriminate and harassment.⁴⁸³ The CESCR has also stressed that legislation and other instruments should "provide for mechanisms and institutions that effectively address the individual and structural nature of the harm caused by discrimination in the field of economic, social and cultural rights".⁴⁸⁴ Similarly, the HRC, when discussing the general obligations of states arising under Article 2 of the ICCPR, has stated that they "must ensure that individuals also have accessible and effective remedies to vindicate those rights", and that "the Covenant generally entails appropriate compensation" for breaches of rights.⁴⁸⁵

In addition to the general obligations arising under the ICCPR and ICESCR, as a party to ICERD and CRPD, Sudan has specific obligations to prohibit discrimination against racial or ethnic groups and against persons with disabilities by public and private actors in all areas of activity covered by these treaties.⁴⁸⁶

Sudan has made little progress towards discharging its obligations to provide effective protection from discrimination in its legal system. Indeed, beyond the constitutional provisions discussed above, there is very limited legal protection from discrimination. Sudan lacks comprehensive anti-discrimination law or equality enforcement bodies. It also lacks specific laws prohibiting discrimination on grounds such as race, sex or disability. In its 2014 review of Sudan's compliance with its obligations under the ICCPR, the HRC expressed concern at the "lack of comprehensive anti-discrimination legislation pro-

480 *Ibid.*, Para 16.

481 *Ibid.*, Para 17.

482 *Ibid.*, Para 10.

483 *Ibid.*, Para 7.

484 *Ibid.*, Para 40.

485 See above, note 477, Paras 15 and 16.

486 International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), 1965, Article 2(1); Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, 2006, Article 5(2).

hibiting discrimination on grounds such as age, sexual orientation, gender identity and health status” and stated that Sudan should “consider adopting comprehensive anti-discrimination legislation”.⁴⁸⁷

While Sudan adopted a National Disability Act in 2009, the Act does not prohibit discrimination on the grounds of disability, or create a general requirement of reasonable accommodation to ensure that persons with disability are able to participate in life on an equal basis with others. Instead, as is discussed below, the Act sets out a series of benefits which should be available to persons with disabilities.

National Disability Act 2009

The National Disability Act 2009 is the only piece of legislation in Sudan which specifically and explicitly regulates the situation of a group exposed to discrimination. Its existence is particularly welcome given the absence of disability from the list of protected characteristics in Article 31 of the Constitution. Nevertheless, the Act suffers from some serious deficiencies, including notably that it does not prohibit discrimination on the grounds of disability. Moreover, despite being enacted two years after Sudan signed the CRPD, and in the same year in which it was ratified, the Act falls well short of meeting Sudan’s obligations under the Convention.

Section 3 defines a disabled person as “every person born with a disability or who became physically or mentally or sensory disabled permanently and that it affects him totally or partially”.⁴⁸⁸ This definition is narrower than that provided in the CRPD, which makes reference to “physical, mental, intellectual or sensory impairments”.⁴⁸⁹ It also implies a medical, as opposed to a social, understanding of disability. The social framework on disability reflected in the CRPD requires that disability is defined not merely as a medical condition affecting the person “totally or partially”, but that such impairments, “in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”.⁴⁹⁰

487 United Nations Human Rights Committee, *Concluding Observations on the fourth periodic report of the Sudan*, UN Doc. CCPR/C/SDN/CO/4, 22 July 2014, Para 11.

488 National Disability Act, section 3.

489 See above, note 470, Article 1.

490 *Ibid.*

The Act does not define or prohibit discrimination on the basis of disability. This means that the Act falls short of the obligation, established by the CRPD, to “prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds”.⁴⁹¹ The Act also omits a general obligation to make reasonable accommodation, though a specific obligation on the competent authorities to enforce the provision of reasonable accommodation in the workplace is provided under section 4(2).⁴⁹² Under the CRPD, “denial of reasonable accommodation” is included as a form of discrimination on the basis of disability. Reasonable accommodation itself is defined as:

*[N]ecessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.*⁴⁹³

Only one section of the Act – section 4 – concerns the “rights, privileges, facilities and exemptions” provided to persons with disabilities; the remainder of the Act relates to the establishment and operation of the National Council for Disabled Persons. Section 4(1) provides that:

[T]he competent authorities shall enforce all the rights enshrined in the Transitional Constitution of the Republic of Sudan for the year 2005 and conventions for the disabled to which Sudan is a party.

The first part of this subsection is largely superfluous: as noted, the Constitution does not provide any specific protection from discrimination for persons with disabilities, as disability is omitted from Article 31, which itself provides only a limited degree of protection. The second part has greater potential: by requiring that the “competent authorities shall enforce” international instruments, the section gives the potential for persons with disabilities to claim violations of their rights under the CRPD. To date, however, this provision has not been tested in the Sudanese courts.

491 *Ibid.*, Article 5(2).

492 See above, note 488, section 4(2)(H).

493 See above, note 470, Article 1.

Section 4(2) of the Act provides an extensive list of specific rights, privileges and exemptions which the “competent authorities are committed to enforce”, “without prejudice to the generality” of section 4(1). The section requires the competent authorities to:

- A. Provide exemptions from tuition fees at all stages of education, from primary to tertiary;
- B. Develop an education curriculum which includes persons with disabilities, and provide translators to help in the proper understanding of lessons and exams;
- C. Facilitate the teaching of Braille, sign language and the use of alternative script and provide technical aids and necessary educational tools;
- D. Encourage outstanding and talented persons with disabilities;
- E. Preserve the rights of persons with disabilities in state employment;
- F. Determine the proportion of disabled persons to be trained each year, in coordination with the institutes of technical and professional training;
- G. Provide for the rehabilitation of workers, whose disabilities occur at work, and transfer such persons to alternative jobs if necessary;
- H. Provide reasonable accommodation in the workplace;
- I. Include persons with disabilities in the social insurance system;
- J. Provide exemptions for facilitative health aids;
- K. Conduct early checks to detect signs of disability in children and pregnant women, to reduce and prevent disability;
- L. Allocate special programmes for persons with disability;
- M. Use sign language in all programmes where this is possible;
- N. Provide special access to sport stadiums and cultural activities for persons with disabilities;
- O. Organise cultural and sports festivals to highlight the capabilities and talents of persons with disabilities;
- P. Take the necessary measures to facilitate the access for disabled persons to buildings and roads, transportation and other facilities;
- Q. In the design of buildings, provide for facilitative means to ensure movement for persons with disabilities;
- R. Allocate a percentage of land in the public housing plan and in public housing for persons with disabilities;
- S. Allocate designated parking for persons with disabilities in public utilities;
- T. Introduce traffic signs for persons with disabilities on driving license exams;

- U. Erect signs which use sign language;
- V. Provide exemption from ID fees for those persons with disabilities who cannot pay; and
- W. Provide exemption from customs duties for prosthetic devices, work facilities, mobility aids and education for persons with disabilities.⁴⁹⁴

This list creates obligations on the state to make specific provision for persons with disabilities in many areas of life which are the subject of specific articles of the CRPD. However, in many areas, the provisions of the Act do not reflect the values or approach which underpin the CRPD. In the area of education, which is the subject of paragraphs A, B, C and D, the Act's provisions reflect some but not all of the requirements of Article 24 of the CRPD. Section 4(2) (A) exempts persons with disabilities from tuition fee payment for primary and secondary education, giving effect to the requirement in the CRPD that persons with disabilities can access free primary and secondary education.⁴⁹⁵ Section 4(2)(B) requires the development of an educational curriculum which includes persons with disabilities, reflecting the CRPD's requirement that persons with disabilities "are not excluded from the general education system" and that they "can access an inclusive (...) primary and secondary education".⁴⁹⁶ Section 4(2)(C) builds on this, requiring the provision of technical aids and necessary educational tools. However, it should be noted that the Act does not create a general requirement of reasonable accommodation in education, or create obligations regarding individualised support measures, as required by Article 24(2) of the CRPD.⁴⁹⁷ Similarly, while Article 4(2)(C) of the Act reflects the requirements of Article 24(3)(a) and (b) regarding the facilitation of learning of Braille, alternative script and sign language, the Act is more limited than the CRPD, omitting any reference to augmentative and alternative modes of communication, for example, which are essential for accommodating persons with intellectual disabilities. It is also noteworthy that the Act creates obligations which are not contained in the CRPD, notably the general requirement to "[e]ncourage outstanding and talented persons with disabilities" created by section 4(2)(D).

494 The list provided here is a précis of the provisions contained in paragraphs A-W of section 4(2), not a direct quote.

495 See above, note 470, Article 24(2)(b).

496 *Ibid.*, Article 24(2)(a) and (b).

497 *Ibid.*, Article 24(2)(c), (d) and (e).

Paragraphs E, F, G and H relate to participation in employment, and again reflect some but not all of the relevant provision – Article 27 – of the CRPD. Paragraph E requires the state to “preserve the rights of person with disabilities in state employment”, a significantly narrower protection than that provided by Article 27(1)(b) of the CRPD, which requires that the state take appropriate steps to:

Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances.

Thus, where the Act creates a limited obligation which applies only in public employment, the CRPD requires far-reaching protection of all labour rights in all types of employment. Moreover, the Act completely omits a prohibition of discrimination on the basis of disability in all aspects of employment, as required by Article 27(1)(a), and a requirement to ensure that “persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others”, as required by Article 27(1)(c).

Paragraph F closely reflects the Convention language in respect of technical and vocational programmes,⁴⁹⁸ though the requirement is limited in its scope, in that it only requires the state to determine the proportion of persons who should benefit from training, rather than creating a general requirement to provide such training. Paragraph G creates an obligation which partially reflects the requirements of Article 27(1)(k) of the Convention, in that it relates only to the rehabilitation of persons whose disabilities were acquired at work, whereas the Convention creates a general obligation regardless of the way in which a disability occurred.

As previously noted, paragraph H creates an obligation to provide reasonable accommodation in the workplace, closely reflecting the requirements of Article 27(1)(i) of the Convention. It is noteworthy that the Act does not reflect the requirements in Article 27(1)(e), (f), (g), (h) and (j) of the Convention,

498 *Ibid.*, Article 27(1)(d).

and thus provides a lower standard of protection in the area of employment than that required by the CRPD. The Act also omits a stand-alone requirement relating to slavery, servitude and forced labour, as required by Article 27(2) of the CRPD.

Some provisions in section 4(2) of the Act give effect to the requirements to ensure an adequate standard of living for persons with disabilities which correspond to rights under Article 28 of the CRPD. Paragraph I requires the state to include persons with disabilities in the social insurance system, which would contribute toward meeting the obligations created by Article 28(2)(b) which requires that the state ensures access to social protection and poverty reduction programmes. Similarly, Paragraph R requires the state to allocate a proportion of land and public housing to persons with disabilities, reflecting the requirements to ensure access to public housing programmes which is established by Article 28(2)(d) of the Convention. Again however, the Act omits provisions relating to access to clean water, assistance for persons living in poverty and access to retirement benefits and programmes, which are provided for in the CRPD.⁴⁹⁹

In the area of healthcare, the Act falls well short of the requirements created by the CRPD. Paragraph J requires that the state provide exemptions for “facilitative health aids”. Paragraph K requires the state to take steps to detect, reduce and prevent disability, reflecting part of the obligation created by Article 25(b) of the Convention, which requires *inter alia* that the state provide health services “including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children and older persons”. However, the Act does not explicitly require that persons with disabilities are provided with the same range, quality and standard of health care as others; nor does it prohibit discrimination in the provision of health insurance, or the discriminatory denial of health services.⁵⁰⁰

Section 4(2)N and section 4(2)O of the Act relate to participation in cultural life, recreation, leisure and sport, and again reflect some, but not all, of the requirements of the CRPD in this area. Paragraph N provides that persons with disabilities should have special access to sports stadiums and cultural

499 *Ibid.*, Article 28(2)(a), (c) and (e).

500 *Ibid.*, Article 25(a), (e) and (f).

activities, as required by Article 30(1)(c) and 30(5)(c) of the Convention. Paragraph O specifies that the state shall organise cultural and sports festivals to “highlight the capabilities and talents of persons with disabilities”, reflecting in part the requirements of Article 30(2) and 30(5)(b). Again however, the Act is limited, omitting in particular any reference to the inclusion of persons with disabilities in mainstream cultural and sporting activities.

Paragraphs P and Q relate to accessibility for persons with disabilities. Paragraph P closely reflects the requirement of Article 9(1)(a), that the state shall take

[A]ppropriate measures to ensure to persons with disabilities access, on an equal basis with others to (...) buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces.

Paragraph Q goes further, requiring that building design takes account of the access needs of persons with disabilities. It is notable, however, that the Act makes no reference to the more detailed requirements, provided in Article 9(2) of the Convention, which set out a series of state obligations to ensure equality of access for persons with disabilities.

Aside from section 4, the National Disability Act is silent on the rights of persons with disabilities, and the obligations of the state or other actors towards them. Crucial rights enshrined in the CRPD, such as rights related to legal capacity (Article 12) or independent living (Article 19) are thus unrecognised. Instead, the remainder of the Act focuses on the establishment (in section 5) and operation of the National Council for Persons with Disabilities. Section 6 requires that the Council consists of a Minister appointed by the President, with the remaining members being 50% persons with disabilities and 50% those active in integrating persons with disabilities into the community. Section 7 sets out the Council’s three aims, which are as follows:

- A. To address issues facing persons with disabilities and to work to resolve them;
- B. To work on the integration of persons with disabilities and make them a powerful force in the community; and

- C. To take action to enforce the rights of persons with disabilities with the competent authorities.

Section 8 of the Act, entitled “Responsibilities of the Council”, states that the body shall “develop public policies, plans and programs for the disabled persons”.

3.2.3 Non-discrimination Provisions in Other Legal Fields

As noted in section 3.2.2 above, Sudan is required, as a state party to the IC-CPR and ICESCR, to adopt legislation prohibiting discrimination. While this obligation is best discharged by the enactment of what the CESCR has called “specific legislation prohibiting discrimination”, protections in legislation governing other areas of law can be an alternative, particularly in countries, such as Sudan, where specific legislation is weak or absent.

There are a number of provisions in Sudanese legislation governing particular fields which prohibit discrimination or provide for equal rights. Notably, the National Civil Service Act, the Criminal Law Act and the Child Act all contain some equality-relevant provisions. Unfortunately however, these provisions are limited in scope.

Nationality, Citizenship and Immigration Law

The Sudanese Nationality Act 1994 contained no non-discrimination or equality provisions, and none were introduced by the Sudanese Nationality Act (Amendment) 2011. On the contrary, as discussed above in sections 2.2 and 2.4, the law contains a number of provisions which discriminate against persons of South Sudanese ethnic origin and against women.

Family Law

There are no non-discrimination provisions in the Muslim Personal Status Act 1991, or in any other legislation governing aspects of family law. As discussed above in section 2.4, the Muslim Personal Status Act 1991 enshrines legal inequality between men and women and directly discriminates against women in entering into marriage, during marriage itself and in the dissolution of marriage.

Criminal Law

Article 4(a) of ICERD requires states parties to:

[D]eclare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.

This obligation is met, in part, through section 64 of the Criminal Law Act 1991 (provoking hatred against or amongst sects) which states that:

Whoever provokes hatred, contempt or animosity, against any sect, or between sects, by reason of ethnic, colour, or language differences, in a manner which exposes the public peace to danger, shall be punished, with imprisonment, for a term, not exceeding two years, or with fine, or with both.

According to Sudan's state report to the CERD in 2000, the Advisory Council on Human Rights had proposed, in 1994, that section 64 be amended in order to prohibit racial discrimination as a discrete offence and to bring section 64 in line with the requirements of Article 4(a) of ICERD.⁵⁰¹ The proposed Criminal Act (Amendment) 1998 would have created a new offence as Section 64(2) of the Criminal Law Act 1991 in the following terms:

Whoever calls for or abets the dissemination of ideas based on racial discrimination whether by way of violence or any other way or provides assistance for racial activities including the financing thereof shall be deemed to have committed an offence and shall, upon

501 United Nations Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Eleventh Periodic Report of Sudan*, CERD/C/334/Add.2, 30 May 2000, Para 197.

conviction, be punished with imprisonment for a term not exceeding two years or with a fine or with both.

“Racial discrimination” would have been defined largely in line with the definition provided in Article 1(1) of ICERD. Whilst the Committee welcomed the proposed amendment,⁵⁰² the proposed legislation was never passed.

Employment Law

Employment in Sudan is largely governed by two pieces of legislation: the Labour Act 1997 for employment in the private sector (with some important exclusions, notably related to domestic workers, casual workers and agricultural workers) and the National Civil Service Act 2007 for employment in the public sector.

The **Labour Act 1997** does not provide protection from discrimination in the field of employment. There are two provisions, however, which provide some support for women workers. Section 46 governs maternity leave. Section 46(1) provides that female workers, once they have completed six months of service, are entitled to maternity leave with full pay for four weeks prior to confinement and four weeks after confinement (or two weeks and six weeks respectively if they prefer). Section 46(2) prohibits terminating the employment contract of a female worker during pregnancy or confinement. Provisions to support women during mourning (*idda*) leave are contained within Section 48. A female worker is entitled to leave with pay upon the death of her husband for four months and ten days if she was not pregnant and until the end of her confinement (plus a further eight weeks of maternity leave after childbirth) if she was pregnant.

Section 28 of the **National Civil Service Act 2007** includes a provision on equal pay for equal work. Section 28(1) states that the principle of equal pay for equal work must be taken into account when determining wages on the basis of the nature of the work and the difficulty for the individual of undertaking his duties and responsibilities.

502 United Nations Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Concluding Observations: Sudan*, CERD/C/304/Add.116, 27 April 2001.

Section 24, which governs appointment and re-appointment within the civil service, contains a positive action measure for persons with disabilities. Section 24(7) states that “all units of the states shall allocate not less than 2% of the approved announced vacancies for persons with disabilities, taking into account the nature and requirements of the work and the nature of the disability”. Although section 24(7) uses the term “not less than 2%”, attempts to enforce regulations which provide for higher quotas have been unsuccessful. As noted below in section 3.4.2, in the case of *Alsier Mustafa Khalfalah and others v Civil Service Recruitment Committee of Khartoum State*,⁵⁰³ the High Court (Administrative Circuit) dismissed a claim by the applicants who were persons with disabilities following the Civil Service Recruitment Committee of Khartoum State’s decision to recruit only 1.8% of persons with disabilities as teachers in the region. The Committee made the decision despite an Order issued by the Governor of the State of Khartoum instructing it to ensure that 5% of the vacancies were filled by persons with disabilities. The High Court upheld the decision of the lower court which had rejected the claim on the basis that the Governor’s Order was inconsistent with the 2% quota in the National Civil Service Act 2007 and that the Recruitment Committee was not bound by the 5% quota in the Governor’s Order.

Education Law

The **Planning and Organisation of Public Education Act 2001** does not provide a right to non-discrimination or equality. However, section 13 stipulates that *all* children of eligible school age (i.e. from six to fourteen) have the right to education, thus implicitly providing for equality of access to education.

Section 5(2)(c) of the **Child Act 2010** states that “the child’s right to protection from all forms of unjust discrimination” is a basic rule for the application of the provisions of the law, however it provides no mechanism by which this right can be enforced and no definition of “unjust discrimination”.

Health Law

Health law in Sudan, largely found within the **National Public Health Act 2008**, contains no specific clause prohibiting discrimination in the provision

503 Citation in the court register: *High Court, Administrative Appeal No. 127/2012*. Case not among those selected for report in the law reports.

of healthcare. Chapter IV is entitled “Maternal and Child Health”; however, it contains only two provisions which state that, starting immediately after birth, children should be vaccinated against diseases.

Section 28 sets out the situations whereby citizens have the right to free medical treatment which includes the treatment of children up to the age of five and pregnant women during childbirth, caesarean sections and follow up care after birth.

Section 32 provides that abortions cannot be performed except in hospitals and can only be undertaken for medical reasons as specified in regulations provided by the Ministry. It should be noted that measures which prohibit abortion or unduly restrict women’s access to it violate a number of international human rights provisions, including the right to non-discrimination on grounds of sex in access to healthcare.⁵⁰⁴

Other Areas of Law

The **Council for Promotion and Development of National Languages Act** was passed in 2008 in accordance with the CPA. Its objectives include to: (i) protect national languages and their codification; (ii) develop national languages; and (iii) promote initiatives of native speakers.

While the Act does not explicitly prohibit discrimination, the existence of a law which guarantees and protects the full range of national languages is a progressive step. It is significant in light of the recent aggressive promotion of the Arabic language in government, the administration of law and other areas of life, and the discriminatory impact felt by persons who are not fluent Arabic speakers.

3.3 National Policies Impacting on Discrimination and Inequality

The government does not have a current comprehensive national policy on equality or non-discrimination and has no specific national or regional poli-

504 For a detailed discussion of the international human rights framework as it relates to restrictions on abortion, see Part 1 of: Knox, V., “Abortion in the Americas: Non-discrimination and Equality as Tools for Advocacy and Litigation”, *The Equal Rights Review*, Volume 9, pp. 25–33.

cies to promote the right to equality of certain disadvantaged groups. Within educational policy, there is neither any active promotion of equality nor any initiatives to raise awareness about the right to equality. However, Sudan does have a national plan for the protection and promotion of human rights.

National Plan for the Protection and Promotion of Human Rights in the Sudan, 2013

The National Plan for the Protection and Promotion of Human Rights was adopted in 2013.⁵⁰⁵ The Plan was developed and published under the auspices of the Advisory Council for Human Rights, a government agency which brings together representatives of all government ministries and which is hosted and chaired by the Ministry of Justice. Section 2 of the Plan sets out its mission as being:

[T]o develop and consolidate human rights in legislation and practice, to apply the principles of equality and non-discrimination in the enjoyment of all rights, to disseminate awareness of human rights and to conduct legal reforms, and review national legislation for the purpose of being in conformity with the Sudan's international and regional commitments.

Section 7 of the Plan provides detail on its "scope", setting out proposed activities in each of eight areas: human rights education; civil and political rights; economic, social and cultural rights; review of national legislation; relations with regional and international bodies; knowledge dissemination; partnerships with civil society; and cooperation and coordination with law enforcement authorities. However, the Plan does not set out targets in any of these areas. Instead, the Plan is framed in non-specific and largely aspirational terms, with reference to areas of focus and examples of activities which could be undertaken.

It is notable that the Plan does not include either a general priority on equality and non-discrimination, or separate sections on combating discrimination against and promoting equality for particular groups such as women or per-

505 Advisory Council on Human Rights, *National Plan for the Protection and Promotion of Human Rights in the Sudan*, 2013.

sons with disabilities. Moreover, none of the objectives or proposed activities in the priority areas make direct or explicit reference to the rights to equality or non-discrimination as such.

Nevertheless, the Plan does provide some guidance in areas where activity by the state could be expected to improve protection of the rights to equality and non-discrimination. Thus, for example, the section on review and reform of national legislation states that the implementation of the Plan shall include “study of national legislation (...) to secure compatibility of the same with the Sudan’s international and regional commitments”.⁵⁰⁶ Properly interpreted, this would require the state to review its legislation to ensure that it does not discriminate on protected grounds, in compliance with *inter alia* Article 26 of the ICCPR. Similarly, the section on knowledge dissemination outlines the need for “a series of workshops on civil and political rights” which would, of necessity, include training on the rights to non-discrimination and equality if these were to be complete, coherent and comprehensive. The same section sets out the need for specific training workshops on gender-based violence and the status of women, and on the rights of “handicapped persons”.

Thus, the Plan offers some grounds for hope, not least in that it sets out aspirations or plans which civil society actors can use to hold the state to account. The UN Independent Expert on the situation of human rights in the Sudan welcomed the adoption of the Plan as a major step forward, stating, in his September 2013 report, that it “marks a positive step and provides a clear strategy for the improvement of human rights in the country”.⁵⁰⁷ He called on the Government to expedite the implementation of the Plan, to establish a body to oversee its implementation and to publish annual reports on its implementation.

National Policy for Internally Displaced Persons, 2009

Between 1989 and 2009, the government did not have a consistent policy response to the problem of internally displaced persons (IDPs). In 1989, the government established a Ministry for Relief and Displaced Affairs. A few

⁵⁰⁶ *Ibid.*, section 7.

⁵⁰⁷ United Nations Human Rights Council, *Report of the Independent Expert on the situation of human rights in the Sudan, Mashood A. Baderin*, 18 September 2013, A/HRC/24/31, Para 32.

months later, the Ministry was reorganised, adding to it the Commission of Refugees and the Relief and Rehabilitation Commission. It was renamed the Ministry of Relief, Rehabilitation and the Displaced and Refugees' Affairs before being dissolved in 1993. The different commissions were then attached to different ministries: the Relief and Rehabilitation Commission was attached to the Ministry of Planning, while the Commission of Refugees became part of the Ministry of Interior. Some of the responsibilities for IDPs were also transferred to the newly established states. This resulted in the compartmentalisation of IDP and refugees issues, and led to a lack of coordination between the different bodies.

Apart from these fragmented policy measures, the use of force in dealing with IDPs was one of the main elements in the government policy during the 1990s. Over time, the manner in which the government dealt with relocating IDPs to camps resulted in a national and international outcry, also drawing the attention of the international community to the plight of IDPs in Sudan. In addition, the beginning of peace negotiations in July 2002 provided an impetus for the government to re-engage with the question of IDPs. Prior to this, the government had established the Humanitarian Aid Commission (HAC), within whose mandate lies protection and assistance for IDPs. In 2003, the Ministry of Humanitarian Affairs was established, and HAC was appended to it. In 2009, the Ministry published its most recent National Policy for Internally Displaced Persons.⁵⁰⁸

The Preamble to the Policy recognises that IDPs are entitled “without discrimination to all the rights, privileges and obligations enshrined in the constitution”.⁵⁰⁹ The Policy also sets out a series of principles on (a) the rights of IDPs before displacement, during displacement, and during the settlement and transitional stages; and (b) relations between partners. The principles include a requirement that aid be provided to the most vulnerable IDPs with special consideration given to women and children, and that this should be provided “without discrimination or division considering host communities”.⁵¹⁰ During the transitional stage, the various levels of government must endeavor-

508 Ministry of Humanitarian Affairs, *National Policy for Internally Displaced Persons (IDPs) 2009*, available at: http://www.carim.org/public/legaltxts/LE3SUD1646_1375.pdf.

509 *Ibid.*, p. 2.

510 *Ibid.*, p. 5.

our to ensure that IDPs who have returned to their places of origin or settled elsewhere “are not subject to discrimination from host communities and (...) have the full rights to equal participation in public affairs”.⁵¹¹ Partners providing assistance to IDPs must ensure that such assistance is provided “without discrimination due to religion, ethnicity or affiliation and should be provided on the basis of rights and needs”.⁵¹² Provision of assistance should not be “conditioned or interfaced with political and ideological interest or any other un-declared conditions”.⁵¹³

Unfortunately, the benefits of the Policy have been limited due to a lack of effective implementation mechanisms. The United Nations Special Rapporteur on the human rights of internally displaced persons has stated that:

*[I]mplementation of the policy has been slow, in part due to the lack of fully functional Government monitoring mechanisms, such as the High Committee on IDPs. With regard to implementation of the policy, relevant stakeholders noted a lack of due recognition and attention to IDPs outside of camps and settlements. Non-camp IDPs, especially in urban and semi-urban areas, have become virtually “invisible”, with no standard registration or other procedure to identify them and respond to their protection or assistance needs. In relation to durable solutions, while the national IDP policy provides for return and local integration or resettlement, the emphasis has generally been placed on returns, for which it has been important to establish joint verification mechanisms with the Government, in order to confirm voluntariness.*⁵¹⁴

The above remarks concerning IDPs outside camps are very pertinent. It should be recalled that, as explained in section 2.2 of this report, since the

511 *Ibid.*, p. 6.

512 *Ibid.*, p. 7.

513 *Ibid.*

514 United Nations Human Rights Council, *Report of the Special Rapporteur on the human rights of internally displaced persons, Chaloka Beyani: Addendum, Mission to Sudan*, UN Doc. A/HRC/23/44/Add.2, 25 June 2013, Para 19.

1990s the government has consistently obstructed the creation of IDP camps in the Khartoum area and other urban areas in the North, in a manifest denial of the scale of displacement of people from the periphery by armed conflict. It has also neglected IDPs in informal settings and actively discriminated against them in a number of ways which were discussed in Part 2 of this report. The Special Rapporteur called on Sudan to:

*Develop a comprehensive national framework on internal displacement, including national legislation, in line with the relevant Great Lakes Protocols, the Guiding Principles on Internal Displacement and the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), and ratify the latter at the earliest opportunity.*⁵¹⁵

In addition, the Special Rapporteur also called on Sudan to “review the national IDP policy with a view to making any necessary changes and provide the required institutional resources for effective implementation of the policy and legislative frameworks.”⁵¹⁶

National Policy for the Empowerment of Women, 2007

In March 2007, the Government endorsed a National Policy for the Empowerment of Women⁵¹⁷ in order to accomplish the visions of its National Strategic Development Plan. The Policy, which was formulated by the Ministry of Social Welfare, Women and Children, focuses on women’s capacity building in health and education, strengthening women’s capabilities and participation in peace building and conflict resolution. It includes six focus areas for the advancement of the status and capabilities of women through policy development:

Health and Environment: to include policies focused on the improvement of life expectancy among women, contain the spread of HIV/AIDS and other Sexually Transmitted Diseases, end the practices of female genital mutilation and

515 *Ibid.*, Para 65(a).

516 See above, note 514.

517 Ministry of Social Welfare, Women and Children, *National Policy for the Empowerment of Women*, 2007.

improve environmental and nutritional awareness among women. Among the programmes envisaged are a Programme for Safe Motherhood and a Programme for Women's Campaign against AIDS.

Education Policies: to include policies aimed at creating societal awareness on the importance of education for girls, especially among the rural communities and providing more places for women in technical education.

Economic Empowerment: to include policies with the primary aim of consolidating women's leadership and providing capacity-building to enable women to acquire skills, knowledge and technology.

Human Rights and Legal Knowledge: to include policies to provide for equal participation of all women in legislation formulation processes at all levels.

Political Participation and Decision Making: to include policies aimed at promoting political awareness of women and follow-up of political issues. The Policy also states that laws and regulations that prevent women from promotion to leading positions and decision-making posts would be revised and that the formation and activation of Women Unions and Women NGOs would be encouraged.

Field of Peace and Conflict Resolutions: The Policy states that consolidation of women's participation in peace building and peace sustainability will be part of the policy in the fields of peace and conflict resolution. In this aspect, the Policy states that the economic stability of the family will be given more emphasis, and legislation that protects women in conflict areas will be introduced and enforced.

Referring to the National Policy in its October 2012 report to the UN HRC, Sudan stated that "the Ministry [of Welfare and Social Security] has implemented a number of projects in line with the strategy and in order to put it into practice on the ground".⁵¹⁸ In respect of political participation, the state was keen to stress to the Committee that "the minimum quota preserved for

518 United Nations Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant, Fourth periodic reports of States parties: Sudan*, UN Doc. CCPR/C/SDN/4, 16 October 2012, Para 239.

women in the legislative body is 25%, and it has been implemented by 100% in the Council of States (the first chamber of the parliament) as well as in the National Assembly (the second chamber of the parliament).⁵¹⁹

In respect of the other priority areas in the Policy, the state referred the Committee to its report to the CESCR.⁵²⁰ Unfortunately, Sudan's report to the CESCR makes no direct reference to the National Policy for the Empowerment of Women and provides little information on policy measures adopted pursuant to it: the sections of the report dealing with the rights to work, to health and to education make no reference to specific measures taken in these areas in respect of women.⁵²¹

That said, in respect of health, the report highlights a number of measures taken to end practices of female genital mutilation, including the adoption of a national strategy for the elimination of female circumcision (2008–2018) and a fatwa, issued by the Fatwa Council, prohibiting infibulation.⁵²² In respect of education, the report states that “Sudanese women have accomplished significant successes in the field of education, the biggest of which perhaps occurred in the 1990s during the higher education revolution”,⁵²³ but provides no detail on measures taken to increase women's participation in education. Finally, in respect of women's economic empowerment, the state highlights that a financing scheme established by the Central Bank of Sudan has a 30% reservation for women's projects and stresses efforts made to encourage women to enter the formal employment sector, though without detail as to the nature of these efforts.⁵²⁴

The assessment of other stakeholders of Sudan's achievements in empowering women is mixed. A 2009 Annual Ministerial Review produced by the United Nations Economic and Social Council examined the efficacy of the National Policy in accelerating progress towards Millennium Development Goals. It found that:

519 See above, note 437, Para 8.

520 *Ibid.*

521 See above, note 442.

522 *Ibid.*, Para 134.

523 *Ibid.*, Para 144.

524 *Ibid.*, Paras 145–146.

Using the MDG indicators to evaluate gender policies, significant progress has been achieved to promote gender equality and women's empowerment. The ratio of girls to boys in primary and secondary education (gender parity index) has improved from 0.85 and 0.90 in 2000 to 0.93 and 1.0 in 2006. The share of women in wage employment in non-agricultural salary increased from 26.6 in 2000 to 30% in 2005, and proportion of seats held by women in National Parliament increased from 10% in 2000 to 18.3% in 2005 and to 25% in 2006, which are good ratios compared to regional levels.⁵²⁵

Conversely, the Development Centre of the Organisation for Economic Co-operation and Development rated Sudan as 85th out of 86 in its 2012 Social Institutions and Gender Index (SIGI).⁵²⁶ The SIGI aims to present information on “discriminatory social institutions, such as early marriage, discriminatory inheritance practices, violence against women, son preference, restricted access to public space and restricted access to land and credit”.⁵²⁷ Sudan's poor rating is based on the range of discriminatory social institutions which persist in the country, including discriminatory laws governing family life, restricted access to resources and restricted civil liberties for women.⁵²⁸

While it is difficult to assess the impact of a wide-ranging policy such as the National Policy for the Empowerment of Women by reference to a small number of indicators, it nevertheless seems clear that Sudan has not made strong enough efforts to implement the Policy. Despite the multiple opportunities to highlight its efforts to implement the Policy which were provided by Sudan's participation in reviews by both the HRC and CESC, the state was either un-

525 United Nations Economic and Social Council Annual Ministerial Review, *National Policy for the Empowerment of Women: Sudan*, 2009.

526 Organisation for Economic Co-operation and Development Development Centre, *Social Institutions and Gender Index: Rankings*, 2012, available at: <http://genderindex.org/ranking>.

527 Organisation for Economic Co-operation and Development Development Centre, *Social Institutions and Gender Index: What is the Social Institutions and Gender Index?*, 2012, available at: <http://genderindex.org/content/team>.

528 Organisation for Economic Co-operation and Development Development Centre, *Social Institutions and Gender Index: Sudan*, 2012, available at: <http://genderindex.org/country/sudan>.

willing or unable to illustrate the steps it had taken. Moreover, as section 2.4 of this report – and other measures, such as the SIGI – illustrate, women continue to experience significant disadvantages in almost all of the priority areas identified in the Policy and there is little sign of government success in achieving gender equality in these areas.

National Policy on HIV/AIDS, 2004

The National Policy on HIV/AIDS was published by the Office of the Minister of Health in 2004.⁵²⁹ The Policy was designed, in part, to support the National Strategic Plan for HIV/AIDS prevention and control for the period 2003–2007 which had been developed by a task force set up by the Sudan National AIDS Program (SNAP). The National Strategic Plan had four objectives:

- 1. to curb the transmission of HIV/AIDS infection through appropriate strategies and interventions;*
- 2. to reduce morbidity and mortality due to HIV/AIDS and to improve the quality of life for persons living with HIV/AIDS;*
- 3. to build the capacity of the different partners involved in the prevention and control of HIV/AIDS; and*
- 4. to mobilise and coordinate national and international resources for the prevention and control of HIV/AIDS.*

The overall objective of the Policy is:

[T]o provide a framework for leadership, coordination and implementation of a National multisectoral response to the HIV/AIDS epidemic. This includes formulation, by all sectors and stakeholders of appropriate interventions which will be effective in preventing transmission of HIV/AIDS and other sexually transmitted infections, protecting and supporting vulnerable groups, mitigating the social and economic impact of HIV/AIDS. It also provides for the framework for strengthening the

529 Office of the Minister of Health, *National Policy on HIV/AIDS, 2004*.

*capacity of institutions, communities and individuals in all sectors to arrest the spread of the epidemic.*⁵³⁰

The Policy sets out twenty specific policy areas and issues to address, a number of which are relevant to equality and non-discrimination. Most importantly in this context, priority area two relates to “[s]tigma, discrimination and rights of people living with HIV/AIDS”. The Policy notes that stigma and discrimination associated with HIV/AIDS are “the greatest barriers to preventing further infections, providing adequate care, support, treatment and alleviating impact”.⁵³¹ The Policy therefore calls for safeguarding the rights of people living with HIV/AIDS so as “to improve the quality of their lives and minimize stigma”⁵³² through the observance of the United Nations Guidelines on Human Rights and HIV/AIDS.

Other relevant priority areas include priority nine, covering legislation and legal issues, priority ten, which covers gender, and priority fourteen, which discusses transmission prevention. In respect of priority nine, the Policy calls for future legislation and law reform relating to HIV/AIDS to protect and safeguard the rights of persons living with HIV and AIDS, while also enhancing efforts towards their community mobilisation. Priority ten notes that gender roles and relations “powerfully influence the course and impact of the HIV/AIDS epidemic”⁵³³ and that women are more likely to become infected, and are more often adversely affected by HIV/AIDS. The Policy envisages a gender-based response to HIV/AIDS, addressing the vulnerability of girls and women, and gender sensitivity in the provision of care and services.

Priority fourteen deals with prevention of transmission, with a sub-section focused specifically on special risk groups, defined as sex workers, injecting drug users and homosexuals. The Policy notes that there is a lack of data on HIV/AIDS in certain groups considered to be “fuelling the epidemic”,⁵³⁴ with a main obstacle being stigma against persons in those groups. The Policy there-

530 *Ibid.*, p. 16.

531 *Ibid.*, p. 17.

532 *Ibid.*, p. 17.

533 *Ibid.*, p. 29.

534 *Ibid.*, p. 36.

fore considers that the response should be comprehensive and recognise and involve working with such groups. This is a potentially important provision, given the extreme vulnerability of such groups.

Unfortunately, despite the promise evidenced by the inclusion of these four priorities in the National Policy – and the steps which Sudan has taken in responding to HIV/AIDs generally – there is little apparent progress in any of these key areas. A 2012–2013 Progress Report published by SNAP in 2014 finds that “[s]ince 2011, Sudan has made marked strides in the AIDS response in HIV prevention and working with populations that drive the HIV epidemic”⁵³⁵ but shows little evidence of progress in respect of priorities 2, 9, 10 and 14 of the National Policy.

In respect of priority area two, the report states that “HIV stigma reduction activities have been a cross cutting component in all HIV activities”, but makes no reference to policy measures designed to address discrimination.⁵³⁶ In respect of the priority concerning legislation, the report notes that “the existing draft legislation for PLHIV [people living with HIV] protection is yet to be endorsed by the Cabinet”.⁵³⁷ The Progress Report is largely silent on priority area 10, which envisages a gender-based response to HIV/AIDs, with the exception of the issue of prevention of mother to child transmission, where the state has made good progress.⁵³⁸ Finally, in respect of most at risk populations – one of the focal points of priority 14 of the Policy – the report indicates that the government is taking measures to reach these communities for testing and preventative purposes, in particular through work with civil society organisations.⁵³⁹ However, the report notes that: “[p]revention of HIV among key populations continues to be challenging with existent criminalising laws and HIV stigma among decision makers”.⁵⁴⁰

535 Sudan National AIDS Control Programme, *Global AIDS Response Progress Reporting 2012–2013: Sudan*, 2014, p. 4.

536 *Ibid.*, p. 17.

537 *Ibid.*, p. 18.

538 *Ibid.*, p. 15.

539 *Ibid.*, p. 20.

540 *Ibid.*, p. 22.

3.4 Enforcement and Implementation

3.4.1 Enforcement

States do not meet their obligation to protect people from discrimination by simply prohibiting discrimination in the law. They must also ensure that the rights to equality and non-discrimination are effectively enforced in practice. This means that, in addition to improving legal protection from discrimination, Sudan must also put in place mechanisms which guarantee victims of discrimination effective access to justice and appropriate remedies. According to Principle 18 of the Declaration of Principles on Equality:

*Persons who have been subjected to discrimination have a right to seek legal redress and an effective remedy. They must have effective access to judicial and/or administrative procedures, and appropriate legal aid for this purpose. States must not create or permit undue obstacles, including financial obstacles or restrictions on the representation of victims, to the effective enforcement of the right to equality.*⁵⁴¹

Access to Justice

Access to justice will only be effective where victims of discrimination are able to seek redress unhindered by undue procedural burdens or costs. Remedies must be “accessible and effective”⁵⁴² and legal aid must be provided where necessary. Rules on standing which allow organisations to act on behalf, or in support, of victims of discrimination are particularly important in overcoming the disadvantages faced by individuals in the justice system. It is also important to allow groups of victims who have experienced similar discriminatory treatment to bring claims on behalf of a group, if the systemic nature of discrimination is to be effectively addressed.

Articles 78 and 122 of the Constitution provide individuals with a right to bring cases to the Constitutional Court. Under Article 122(1)(b), the Constitutional

541 See above, note 453, Principle 18, p. 12.

542 See above, note 477, Para 15.

Court has “original jurisdiction to decide disputes that arise under this Constitution and the constitutions of Northern states at the instance of government, juridical entities or *individuals*” (emphasis added). Under Article 78:

Any person aggrieved by an act of the National Council of Ministers or a national minister may contest such act (a) before the Constitutional Court, if the alleged act involves a violation of this Constitution, the Bill of Rights (...)

The Constitution does not, however, set out precisely how a person can bring a claim alleging a violation of a constitutional right such as the right to equality before the law (Article 31). This process is instead set out in the **Constitutional Court Act 2005**. Section 18 of the Constitutional Court Act sets out what must be included in any petition to the Constitutional Court: (a) the claimant’s name and address; (b) the constitutional right or freedom which it is claimed has been violated; (c) details on who allegedly violated the constitutional right(s); and (d) details on the interest which has been prejudiced, where the suit is presented by individuals or collectively, or the injury which has been sustained.

These requirements appear to limit standing to bring a claim more narrowly than international best practice would suggest. Principle 20 of the Declaration of Principles on Equality states that:

States should ensure that associations, organisations or other legal entities, which have a legitimate interest in the realisation of the right to equality, may engage, either on behalf or in support of the persons seeking redress, with their approval, or on their own behalf, in any judicial and/or administrative procedure provided for the enforcement of the right to equality.⁵⁴³

Section 18 of the Constitutional Court Act, however, limits standing only to those individuals who have themselves suffered a violation of their right to equality and does not permit “public interest” claims to be brought on behalf of victims by associations or non-governmental organisations who have not

543 See above, note 453, Principle 20, pp. 12–13.

themselves been harmed. Section 18(1)(d) does, however, make reference to group actions, thereby permitting class actions where the individuals involved have suffered similar violations.

Various limitations are set down in sections 19 and 20 of the Constitutional Court Act. Under section 19(4), a person must prove that they have exhausted all other means of adjudication set down in law or that a period of 30 days has elapsed since they submitted an appeal of a decision or act alleged to be unconstitutional. Significantly however, this requirement does not apply to claims involving the rights and freedoms contained within the Bill of Rights. Under section 19(6), a person must pay a fee unless this is waived by the court (section 30 provides that the court may exempt a person if they are insolvent). Under section 20(a), the court may dismiss the claim summarily if the claimant has no right or interest in the claim or if six months have elapsed since they first became aware of that right or interest having been engaged.

Section 20(d) repeats the condition that the claimant has exhausted all other means of adjudication prior to bringing the claim. The requirement under section 20(d) that all other means of adjudication have been exhausted before a claim can be brought has been strongly criticised by some, particularly given the inability of lower courts to address questions of constitutionality:

This requirement [to exhaust all other available means of adjudication], 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.*⁵⁴⁴

One exception which, to some extent, mitigates this problem is in those cases where it is legislation itself which is being challenged. In the case of *Association of Auditors and Accountants v Government of Sudan and Council of Accountants*,⁵⁴⁵ the Constitutional Court held that the requirement that all other means of adjudication be exhausted first does not apply if the subject matter of the claim is legislation itself.

The independence of the Constitutional Court has been questioned by critics. Under the Constitution, the Constitutional Court comprises nine justices, one being the President of the Constitutional Court.⁵⁴⁶ Justices are appointed by the President upon recommendation of the National Judicial Service Commission and approval by two thirds of the Council of States representatives.⁵⁴⁷ REDRESS has commented that, in practice:

*[T]his formula has failed to ensure effective independence of the Court, 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.*⁵⁴⁸

Additionally, the National Judicial Service Commission “is widely seen as having failed in its role of providing effective oversight of the judiciary”, as it has been composed along party lines and with no clear mandate to ensure the independence of the judiciary.⁵⁴⁹

544 REDRESS, *Arrested Development: Sudan’s Constitutional Court, Access to Justice and the Effective Protection of Human Rights*, August 2012, p. 12.

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

546 Interim National Constitution, Article 119(1).

547 *Ibid.*, Article 121(1).

548 See above, note 544, p. 27.

549 *Ibid.*

Legal Aid System

Article 34(6) of the Constitution states that:

Any accused person has the right to defend himself/herself in person or through a lawyer of his/her own choice and to have legal aid assigned to him/her by the State where he/she is unable to defend himself/herself in serious offences.

This provision, however, only applies to criminal proceedings, and within these only to “serious offences”. It does not apply to civil proceedings or constitutional claims alleging violation of the right to equality before the law in Article 31. Although a Legal Aid Bill was prepared in 2009, with the assistance of the United Nations Development Programme, no law has yet been passed.

Given the lack of state assistance, individuals who are unable to afford to bring a claim involving discrimination must instead rely on universities and civil society organisations for assistance. The first university legal aid clinic was established in the 1970s at the Faculty of Law at the University of Khartoum. This clinic provides legal aid in all areas of law and is run by students under the supervision of university staff. Large law firms with graduates of the Faculty take some cases from the clinic on a *pro bono* basis. Other legal aid clinics have opened in different universities’ law departments, but their resources are limited and they rely heavily on donations from international organisations.

Outside of universities, there are several non-governmental organisations which provide legal aid, including, for example, Mutawunat (for women who are victims of crime), Sema (for women and girls who are victims of violence), Place (for victims of violence and persons living with HIV), Amel (for cases involving torture) and Isnad (for criminal cases), all of which are in Khartoum State. There are some more recently established non-governmental organisations which provide legal aid in the eastern and western parts of Sudan, funded almost entirely by international donors.

Evidence and Proof

International law recognises that it can be difficult for a person to prove that discrimination has occurred, and thus requires that legal rules on evidence

and proof are adapted to ensure that victims can obtain redress. Principle 21 of the Declaration of Principles on Equality states that:

Legal rules related to evidence and proof must be adapted to ensure that victims of discrimination are not unduly inhibited in obtaining redress. In particular, the rules on proof in civil proceedings should be adapted to ensure that when persons who allege that they have been subjected to discrimination establish, before a court or other competent authority, facts from which it may be presumed that there has been discrimination (prima facie case), it shall be for the respondent to prove that there has been no breach of the right to equality.

As this principle indicates, international law requires that the “burden of proof” in cases of discrimination be transferred to the defendant, once a *prima facie* case that discrimination has occurred has been made. The CESCR has stated in its General Comment No. 20 that:

Where the facts and events at issue lie wholly, or in part, within the exclusive knowledge of the authorities or other respondent, the burden of proof should be regarded as resting on the authorities, or the other respondent, respectively.⁵⁵⁰

As Sudan has neither comprehensive nor specific anti-discrimination law, there is no legal instrument which makes specific provision for the rules on the burden of proof in cases of discrimination. Instead, cases of discrimination are subject to the rules set out in the Civil Procedures Act 1983 and the Evidence Act 1994, with mandatory reference to the principles included in the Sources of Judicial Decisions Act 1983 and the Interpretation of Laws and General Clauses Act 1974. Section 5 of the Evidence Act states that in civil matters, the burden of proof is on the claimant, while in criminal matters, “the presumption is the innocence of the accused unless proven guilty beyond reasonable doubt”. The Act makes no provision for the shift of the burden of proof in discrimination cases.

550 See above, note 446, para. 40.

As with the burden of proof, the rules regarding evidence in discrimination cases are the same as those governing all other civil cases, being found in the Sources of Judicial Decisions Act 1983.

Remedies and Sanctions

The HRC has stated that remedies must be “accessible and effective”⁵⁵¹ while the CESCR has said that “effective” remedies include compensation, reparation, restitution, rehabilitation, guarantees of non-repetition and public apologies.⁵⁵²

Under section 16(1)(a) of the Constitutional Court Act, the Court is able to

[C]onsider and adjudge and annul any law, or work, in contravention of the Constitution, and restitute the right, and freedom, to the aggrieved person, and compensate him [or her] for the injury.

The Court may also order interim measures to avoid irreparable harm and effectively guarantee rights and freedoms under section 16(2). In addition to making declarations as to the constitutionality of a particular law or action, the Constitutional Court is able to provide compensation as a remedy as per the general rules on civil proceedings.⁵⁵³

The Sudan Human Rights Commission

Principle 23 of the Declaration of Principles on Equality highlights the important role of specialised bodies in the protection of the right to equality:

States must establish and maintain a body or a system of coordinated bodies for the protection and promotion of the right to equality. States must ensure the independent status and competences of such bodies in line with the UN Paris Principles, as well as adequate funding and

551 See above, note 477, Para 15.

552 See above, note 446, Para 40.

553 Email correspondence from Ebtisam Sanhoury Elrayh, received 12 March 2014.

*transparent procedures for the appointment and removal of their members.*⁵⁵⁴

While Sudan has not established a specialised body focussed on the protection and promotion of the right to equality, it does have a National Human Rights Commission (NHRC) established by Parliament under the **National Human Rights Commission Act 2009**. The creation of a NHRC was stipulated both in the CPA and the Constitution. However, the establishment of the Commission was significantly delayed and it was not until January 2012 that the 15 Commissioners were appointed by presidential decree.⁵⁵⁵

The general competence of the NHRC is to “protect and strengthen human rights, create awareness of human rights, publish the same and monitor the application of the rights and freedoms enshrined in the Bill of Rights provided for in the Constitution”.⁵⁵⁶ The specific functions of the NHRC include:

- a. To operate as reference for information to government, different States organs concerned and civil society organisations working in the field of human rights;*
- b. To enlighten the public on human rights and the necessity to respect them and to apply them by all bodies;*
- c. The preparation of human rights studies and researches;*
- d. To study national matters relating to human rights referred to by Government/state organs/civil society organisations and make recommendations on the same;*
- e. To provide advice to government on matters relating to human rights whether referred to by government/initiated on its own motion;*
- f. To prepare studies and initiate, through bodies concerned, bills, legislations or decisions relating to human rights and prepare reports and submit recommendations on the same to the bodies concerned;*

554 See above, note 453, Principle 23, p. 13.

555 Bennett, K., “Sudan rights commission admits existence of human rights violations”, *Jurist*, 22 November 2013.

556 National Human Rights Commission Act 2009, section 9(1).

- g. To submit recommendations, proposals and reports to the government or to the National Assembly or to any other body concerning any matter relating to human rights, including request to review legislative provisions or administrative decisions to be in conformity with the basic principles of human rights;*
- h. To receive complaints from individuals and other bodies and to conduct investigations thereon and take necessary measures in accordance with provisions of the Act or any other law and to recommend appropriate remedies to the relevant body;*
- i. To address competent authorities regarding any matter relating to any violation of human rights and request them to end such violation;*
- j. To encourage government to join international treaties, conventions and agreements on human rights;*
- k. To endeavour to harmonise national legislations and practices with human rights standards;*
- l. To prepare annual reports on the situation of human rights in the Sudan;*
- m. To spread awareness of human rights among different sectors of the people of the Sudan, through media, seminars, publications and any other means of information;*
- n. To cooperate with the United nations and specialised agencies, regional organisations, human rights centres, non-governmental organisations and any other similar organisations working in the field of human rights;*
- o. To establish close relations with organisations which are active in the field of human rights outside and inside the Sudan;*
- p. To submit reports to the National Assembly on any specific matter concerning human rights (...)⁵⁵⁷*

The NHRC is further empowered to: (a) look into complaints of human rights violations raised with it by individuals or civil society organisations or by any

557 *Ibid.*, section 9(2).

other body to ascertain whether or not there is violation of human rights and take appropriate measures; (b) form committees or task force groups or seek help of any person or any entity on a permanent or temporary basis, to assist in the discharge of its responsibilities; (c) investigate with full freedom any matter falling within its competence, whether referred to it by government, undertaken on its own motion, or referred to it by some other body concerned with human rights causes; (d) address the public directly or through available means of information in order to disseminate its opinions and recommendations, to all sectors of the society; (e) coordinate with the Human Rights Commission in Southern Sudan and other states on matters pertaining to fulfilling constitutional commitments in relation to human rights; and (f) make internal regulations for the conduct of its business and procedure of its meetings.⁵⁵⁸

If the Commission decides that there has been a violation of human rights by any public servant, any government or non-government organisations or any other body, it may: (a) recommend to the relevant government authorities to take appropriate measures for prompt reparations of the aggrieved person, or publish its findings, or take any other appropriate measures as it deems appropriate; and (b) provide the complainant or his representative, if they so request, with a copy of the summary of the report of the investigation. The relevant government organs are required to inform the Commission within 60 days of the measures taken concerning the recommendations submitted to it.⁵⁵⁹

Additionally, the NHRC may request all governmental and non-governmental institutions to provide any information concerning the extent of implementation of the Bill of Rights and to report on any derogation or deprivation of these rights.⁵⁶⁰

The NHRC has not yet submitted an application for accreditation to the Subcommittee on Accreditation of the International Coordinating Committee of National Human Rights Institutions. Since the NHRC has not been accredited or ranked, it is difficult to fully assess its compatibility with the Principles re-

558 *Ibid.*, section 10(1).

559 *Ibid.*, sections 11(1) and (2).

560 *Ibid.*, section 11(3).

lating to the Status of National Institutions (the Paris Principles).⁵⁶¹ However, it is possible to make a preliminary assessment, based solely on the provisions of the National Human Rights Commission Act.

Principle 2 of the Paris Principles states that national human rights institutions should have “as broad a mandate as possible” which should be set out in the text establishing the institution. Section 9(1) of the Act provides the Commission with a broad sphere of competence, covering protection and strengthening of human rights, creating awareness, publishing reports and monitoring application. Principle 3 of the Paris Principles sets out a list of responsibilities which a national institution should have. Section 9(2) lists seventeen different functions of the Commission, which together cover almost all of the responsibilities set out in Principle 3.

In addition to Principles 2 and 3, the Paris Principles contains a section dedicated to “additional principles concerning the status of commissions with quasi-jurisdictional competence”. The section states that:

*A national institution may be authorised to hear and consider complaints and petitions concerning individual situations. Cases may be brought before it by individuals, their representatives, third parties, non-governmental organisations, associations of trade unions or any other representative organisations.*⁵⁶²

The section then goes on to set out four principles which should govern the exercise of such quasi-judicial functions. In this respect, the Act is strong, with sections 9(2)(h) and 9(2)(i) reflecting closely the language of the Principles, and establishing a system for the hearing of individual complaints which appears largely consistent with the Principles.

However, while the functions and powers of the Commission, as provided in the Act, appear to be largely consistent with the requirements of the Paris Princi-

561 United Nations General Assembly, *Principles relating to the Status of National Institutions (the Paris Principles)*, adopted by General Assembly resolution 48/134 of 20 December 1993.

562 *Ibid.*, Additional principles concerning the status of commissions with quasi-jurisdictional competence.

ples, the Act falls far short in respect of the guarantees of independence and pluralism which the Principles require. Paragraph 1 of the Principle entitled “Composition and guarantees of independence and pluralism” states that the process for appointment of commissioners should afford “all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society)”. The Act fails to meet this requirement, in a number of ways. Section 6(1) provides that the Commission’s fifteen members are to be appointed by the President, calling into question both the independence of commissioners and the plurality of their views. Section 6(1) also establishes a number of criteria for appointments to the Commission, including that appointees “be of sound mind” and “be of not less than twenty one (21) years of age”; these provisions may be applied in ways which discriminate on the basis of mental disability and age.

Paragraph 2 of the Principle relating to the independence of national institutions states that such an institution should have:

[I]nfrastructure which is suited to the smooth conduct of its activities, in particular adequate funding (...) in order to be independent of the Government and not be subject to financial control which might affect its independence.

The financial independence of the Commission, as established by the Act, is severely limited. Section 20(1) of the Act states that the Commission shall have an independent budget, but goes on to state that this should be submitted to the Presidency for endorsement, and to the National Assembly for approval as part of the state budget. This risks significantly undermining the Commission’s financial independence. In addition, section 15 states that the emoluments and entitlements of the commissioners themselves are to be determined by the President, placing a further question mark over their independence in practice.

Since it began operations in 2012, the NHRC has conducted a number of activities indicating adherence to its statutory purposes. In April 2012, its chairperson, Miss Amal Hassan Babiker al-Tinay, visited Darfur to meet people affected by the conflict and to raise awareness about the protection of human rights under Sudanese law.⁵⁶³ With the assistance of the United Nations

⁵⁶³ United Nations – African Union Mission in Darfur, *National human rights commission begins visit to Darfur*.

Development Programme, the Commission has organised a series of human rights awareness workshops in South Darfur, South Kordofan, Blue Nile and Red Sea states to raise public awareness about human rights and to educate the public about the Commission's role and mandate. This awareness raising campaign resulted in a Human Rights Forum, held on 24-25 November 2013, entitled "Protection and Promotion of Human Rights is our Collective Responsibility", in Khartoum, with participants from all states of Sudan representing the Sudanese government, civil society organisations, police, judiciary, media, political parties and universities.⁵⁶⁴ In addition, seven commissioners completed a study tour at the National Human Rights Council in Morocco to gain experience and learn best practices.⁵⁶⁵

According to media reports, the NHRC complaints committee received 42 complaints of human rights abuses in 2012 and a further 83 in 2013. The majority of complaints involved "cases of security and freedoms abuses" with others relating to land disputes.⁵⁶⁶ The deputy chair of the NHRC noted that few complaints had been brought alleging violations committed by the police.⁵⁶⁷ All of the complaints were examined and recommendations submitted to the presidency, the Parliament and the Minister of Justice on the necessary action to be taken.⁵⁶⁸ In January 2014, the NHRC chairperson, Ms al-Tinay, reportedly said that two thirds of the 125 complaints brought to the Commission in 2012-2013 had been against security services. She also stated that of the complaints filed, only 53 had been settled.⁵⁶⁹

In addition to the study tour to Morocco, the NHRC has received training from, *inter alia*, human rights trainers from Egypt, Palestine and the United King-

564 United Nations Development Programme, *Strengthening the Capacity of the Sudan National Human Rights Commission – About the project*, available at: http://www.sd.undp.org/content/sudan/en/home/operations/projects/democratic_governance/strengthening-the-capacity-of-the-sudan-national-human-rights-co/.

565 *Ibid.*

566 Sudan Tribune, "Sudan's rights body admits existence of human rights violations", *sudantribune.com*, 22 November 2013.

567 *Ibid.*

568 *Ibid.*

569 Al-Samm, A., "Human Rights in Sudan...Who Saves them?!", *The Citizen*, 20 January 2014.

dom.⁵⁷⁰ However, members of the NHRC have admitted that the Commission faces “numerous problems including lack of a specific budget and experienced cadres”.⁵⁷¹ The UN Independent Expert on the situation of human rights in the Sudan, Mashood A. Baderin, stated in 2013 that the NHRC had made “some good operational progress, but needs to deliver on its substantive mandate of ensuring improvement in the human rights situation in the Sudan”.⁵⁷²

The effectiveness of the NHRC has been impeded by the power exercised by the National Intelligence and Security Services (NISS). For example, on 30 December 2012, the Confederation of Sudanese Civil Society Organisations attempted to submit a petition to the NHRC condemning restrictions on non-governmental organisations by the government. Although the Commission’s chair was willing to receive the memorandum, plain-clothed NISS agents surrounded the building and prevented the petitioners from entering. The NHRC condemned the actions of the NISS as “a flagrant violation of the Interim Constitution of 2005 and the National Human Rights Commission Act of 2009” and “an attack on the integrity of the Commission and on its immunity”.⁵⁷³

3.4.2 Jurisprudence on Equality and Non-Discrimination

Judicial practice related to discrimination and equality has been affected heavily by the major shift from common law to sharia law, with the corollary that the courts have to apply laws plagued with pervasive gender and religiously-based discrimination. All legislation adopted by parliament after 1983 has been influenced by sharia principles, and, while courts are secular, they are expected to make judgments based on sharia principles. Prior to 1983, the rules of judicial interpretation were the same as in other common law systems, with judges required to refer to statute, and if the issue had not been regulated by statute then to consider juridical consensus followed by case law, customary law and the principles of justice. However, in 1983, the

570 Foreign and Commonwealth Office, *UK-funded training for the Sudan National Human Rights Commission*, gov.uk, 27 January 2013.

571 See above, note 566.

572 See above, note 507, Para 58.

573 Sudan Tribune, “Police brutally prevent Sudanese activists from reaching rights commission”, *sudantribune.com*, 30 December 2012.

Nimeiry regime adopted the Sources of Judicial Decisions Act 1983, which introduced principles of sharia into the judicial process. According to Ebtisam Sanhoury Elrayh, Lecturer of Constitutional Law and Human Rights at Faculty of Law, University of Khartoum:

This Act is a source of unprecedented confusion and uncertainty. Section 2 provides inter alia that in the interpretation of legislative provisions, the court shall assume that the legislature does not intend to run counter to the sharia and that such provisions and any discretion thereby vested are intended to be consistent with its spirit and principles. Section 3 provides that where there is no enactment governing the issue, the court shall apply the express provisions of the Qur'an and the Sunna and also seek guidance from such Sudanese decisions as are consistent with the sharia and if no relevant rule is found therein it shall strive to form an opinion, having regard to the principles of the promotion of benefit and the avoidance of harm.⁵⁷⁴

Given this environment, it is quite remarkable that courts have nonetheless referred to international human rights law in some cases, for example to the CRC on matters of a child's criminal responsibility, or age of consent. It is also noteworthy that there is some, albeit very limited, constitutional jurisprudence on discrimination.

Case Law under the Interim National Constitution 2005

Jurisprudence on the interpretation of the rights to equality and non-discrimination to the extent that they are protected under the Constitution is relatively limited. Of the cases that have been decided by the Constitutional Court, three, all concerning the issue of nationality, provide some indication of how provisions in the Constitution relevant to equality and non-discrimination are interpreted in practice.

574 Email correspondence from Ebtisam Sanhoury Elrayh, received 25 March 2014.

In *Dario Ivan Klocan and another v Sudan Football Association*,⁵⁷⁵ two football players who had acquired Sudanese nationality by naturalisation challenged Article 14 of the “Regulation for Premier League Competition for the Year 2008”, issued by the Sudan Football Association, which provided that:

[N]o club is allowed to involve more than one ‘naturalised player’ during the premier league games. The club that intends to involve one shall provide the name of the naturalised player and his number to the organising committee before commencement of the tournament.

The claimants had acquired their Sudanese nationality on 2 and 13 January 2008, shortly before the Regulation was issued on 14 January 2008. They argued that Article 14 of the Regulation was unconstitutional in that it discriminated between Sudanese citizens who had acquired their nationality by birth and those who had acquired it by naturalisation. Specifically, the claimants also argued that Article 14 violated Article 7(1) of the Constitution, which states that “[c]itizenship shall be the basis for equal rights and duties for all Sudanese”, and the right to equality before the law guaranteed under Article 31. They also argued that Article 14 of the Regulation violated Article 12(1) of the Constitution, which requires the state to “develop policies and strategies to ensure social justice among all people of the Sudan, through ensuring means of livelihood and opportunities of employment”. The defendant refuted the claims and argued that the Constitution permits distinctions between those who acquire Sudanese nationality by birth and those who acquire it through naturalisation via Articles 53 and 62(2) which require candidates for the office of President and the two Vice-Presidents to be Sudanese by birth.

By a majority of four to three, the Constitutional Court found in favour of the claimants and found Article 14 of the Regulation to be unconstitutional in that it discriminated between Sudanese nationals in violation of Articles 7(1) and 31 of the Constitution. A majority of the Constitutional Court rejected the argument put forward by the defendant. Both the Constitution and the Nationality Act had to be considered in light of the UN Charter and Articles 2, 25 and 26 of the ICCPR, which form part of the Constitution by virtue of Article 27(3). The Court disputed the authority of the defendant to issue a regulation

575 *Constitutional Court Journal*, Vol. 2, 2011, pp. 528–549.

which contradicts constitutional and legislative provisions and enforce it retrospectively in a way which harmed the claimants and the club for which they played. The Court reached the same decision in a similar case, *Al-Hilal Club for Fitness v Sudan Football Association* (2009).⁵⁷⁶

In a third case, *Albushra Abdulhameed Mahmoud and others v Government of Sudan*,⁵⁷⁷ a group of 14 Sudanese nationals living abroad in various countries challenged section 22(3) of the National Election Act 2008 which stated that:

A Sudanese who resides outside of Sudan, possesses a Sudanese passport and valid residence permit in the country where they reside, and satisfies the conditions provided for under Section 21 of the Election Act, shall have the right to apply for registration or inclusion in the electoral register for the election of the President of the Republic or the Referendum, in accordance with the regulations set by the Rules.

Section 21 of the National Election Act 2008 sets out a number of conditions for individuals to be eligible to vote, namely that they be: (i) Sudanese; (ii) registered; (iii) at least 18 years old; and (iv) of sound mind. The claimants argued that although section 22(3) of the Act secured the right to participate in elections for the President and in referenda, it prohibited them from voting in elections for the President of South Sudan, state governors and the national and state legislative assemblies. They argued that the prohibition constituted a violation of Article 7(1) of the Constitution which states that “[c]itizenship shall be the basis for *equal rights and duties* for all Sudanese” (emphasis added) and was also a violation of Article 23(2)(f), which states that every Sudanese citizen shall “take part in the general elections and referenda as stipulated in this Constitution and the law”. They also argued that the prohibition was in violation of Article 27, which states that the Bill of Rights is integral to the Constitution, and Article 41(2) which guarantees the right of every citizen “to elect and be elected in periodic elections”. As section 22(3) restricted Sudanese nationals residing abroad from voting in elections (other than for the President) or in referenda, the claimants also argued that section

⁵⁷⁶ *Constitutional Court Journal*, Vol. 2, 2011, pp. 528–549.

⁵⁷⁷ *Constitutional Court Journal*, Vol. 3, 2012, pp. 49–63.

22(3) was unconstitutional as it infringed on the right to equality in discriminating against citizens based on their residency.

The Constitutional Court unanimously dismissed the claim on the basis that it had not been brought within six months of the alleged violation, as required by Section 20 of the Constitutional Court Act 2005. However, the Court nevertheless discussed the substantive issues raised and, although not binding, its comments are of interest. In considering Article 41 of the Constitution, the Court stated that the right of citizens to participate in elections and referendums was secured by the Constitution, but regulated by statutory legislation. Regulations on the eligibility of voters fall within the discretionary power of the legislature on the basis of public interest.

The Court also stated that section 22(3) of the National Election Act 2008 did not expressly restrict the appellants' rights to participate in the election of state governors, members of the national parliament and legislative bodies, but also that there was no provision specifically guaranteeing the right. Sections 21 and 22(2) of the Act required registration in the general election register, which in turn required the citizen to be a resident of a particular geographical area for specific periods of time; citizens living abroad could only enjoy their right to vote when they resumed their residence in Sudan. One justice noted that Sudanese citizens living abroad could not represent those living inside Sudan, and therefore should not be allowed to participate in elections. A comparison was drawn between a similar restriction on the right to vote in specific geographic constituencies by those living outside the constituency. The Court took the view that the section did not contradict the Constitution, concluding that on the contrary, it put its objective into effect.

The Court's decisions in both *Dario Ivan Klocan* and *Al-Hilal Club for Fitness* are, to some extent, in contrast to the tone of its comments in *Albushra Abdulhameed Mahmoud*. In all three cases, the issue was discrimination between different classes of citizens of Sudan: in the first two cases, between citizens who had obtained their nationality by birth and those who had obtained it by naturalisation; and in the third case, between citizens resident in the country and citizens resident outside of the country. While in the first two cases the Regulation was found to have distinguished between two classes of citizens in a way which was discriminatory, in the third, the court took the view that the

denial of voting rights based on the residency of a particular class of citizen was consistent with the Constitution.

In *Sudan People's Liberation Movement (SPLM-Democratic Change) v First Vice-President of Government of Southern Sudan (President of Sudan People's Liberation Movement) and others*,⁵⁷⁸ the defendant, the First Vice-President of the government of South Sudan, had issued a Resolution requesting the governors of the 10 southern states to cooperate with all political parties except the Sudan People's Liberation Movement – Democratic Change (SPLM-Democratic Change). The claimant, SPLM–Democratic Change, appealed to the Constitutional Court requesting that the Resolution be annulled on the grounds that it violated their rights under Article 29 (on personal liberty), Article 31 (on equality before the law), Article 39 (on freedom of expression) and Article 40 (on freedom of association and assembly) of the Constitution. The claimant also argued that the Resolution breached the Political Parties Act of 2007, as the SPLM–Democratic Change party was registered and carrying out its work according to Articles 1 and 4 of that Act, and was not suspended under Article 19.

The Constitutional Court found, by a majority, that there had been a violation of Article 31 of the Constitution and annulled the Resolution on the grounds that it infringed upon the right of SPLM–Democratic Change, which was lawfully registered on good standing and was therefore entitled to engage in all political activities without discrimination. Instructing governors of states to cooperate with all parties except for a single specified party amounted to unequal treatment before the law on grounds of political opinion, and was a violation of Article 31.

Other cases brought before the Constitutional Court have been dismissed on procedural grounds, despite otherwise raising an arguable claim of discrimination. In *Alhadi Hasshim Mohammed v 1. Kenana Sugar Company and 2. Government of Sudan (National Security Services)*,⁵⁷⁹ the claimant, Alhadi Hasshim Mohammed, was one of a number of employees who had been dismissed from their employment by the first defendant, the Kenana Sugar Company, in the period between December 1989 and February 1990. In October

578 *Constitutional Court Journal*, Vol. 2, 2011, pp. 599–611.

579 *Constitutional Court Journal*, Vol. 2, 2011, pp. 357–381.

2007, the claimant brought a claim before the Constitutional Court challenging the dismissal which had been based upon a recommendation from the National Security Services, the second defendant. He had also been arrested alongside other employees for holding political opinions which differed from those of the government.

The Constitutional Court dismissed Mohammed's claim on the basis that a Committee formed by the Cabinet of Ministers to rule on cases of arbitrary dismissal had not issued a decision on the case. The Court also pointed out that the claimant had not included any documents indicating that he had submitted an appeal to the Committee and so had not proved that he had exhausted all other domestic remedies before bringing a claim to the Constitutional Court.

In November 2007, the claimant submitted a modified claim arguing that a dispute on an administrative decision did not require exhaustion of all available means of adjudication. Moreover, he argued that there had been a violation of a number of constitutional rights which justified the claimant bringing a claim to the Constitutional Court, in particular Article 27 (the Bill of Rights), Article 28 (right to life and human dignity), Article 29 (personal liberty), Article 34 (fair trial), Article 43(1) and (2) (right to own property) and Article 48 (sanctity of rights and freedoms). Additionally, he brought a claim, under Article 122 of the Constitution, on the competence and jurisdiction of the Constitutional Court to hear the case. He further argued that he was dismissed from his employment on the basis of his political opinions at the order of the security services and not due to his performance. He also argued that one of the Board of Directors of the Kenana Sugar Company was a member of the Cabinet of Ministers, which compromised the objectivity of the Committee.

In August 2008, the Constitutional Court dismissed the claim, holding that the claimant's relationship with the first respondent was a contractual one governed by the Labour Act. The Labour Act specified the compensation available to employees who had been dismissed arbitrarily and the Court held that it could not adjudicate on that question. Concerning the reason behind the dismissal, the Court held that the Kenana Sugar Company had no alternative but to act pursuant to the recommendation of the security service, as it had no power to challenge it, irrespective of the fact that one of the Board of Directors was a Minister. The Court held that it was obliged to dismiss the claim

against both respondents, due to the temporal limit of six months provided in Section 20(1) of the Constitutional Court Act 2005. In addition, on the claim against the second respondent, the Court held that it was not qualified to rule or provide an opinion on the matter, as there was already a special Committee established to handle cases of arbitrary dismissal.

Case Law under Pre-2005 Constitutions

Prior to the introduction of the Interim National Constitution in 2005, the Sudanese courts made a number of decisions related to the protection of the rights to equality and non-discrimination under earlier Constitutions. As these earlier Constitutions contained different definitions of the rights to equality and non-discrimination, the precedential value of these cases is likely to be limited. Nevertheless, the findings of the courts in these cases may be of some interest.

Constitution of 1998

In *Mohamed Mamoun Yahia Monwr v Minister of Higher Education and Scientific Research*,⁵⁸⁰ the claimant, Mohammed Mamoun Monwr, challenged an Order issued by the Minister of Higher Education and Scientific Research, which stated that high school students who had acquired International General Certificates of Secondary Education (IGCSEs) from schools within Sudan were not entitled to study at Sudanese institutions of higher education. However, students of parents working abroad who had acquired such IGCSEs from schools outside Sudan were allowed to apply to Sudanese institutions of higher education upon proof that they had stayed abroad for a minimum of one year before being awarded their certificates.

The claimant was a student living with his parents in Khartoum. He had studied at Unity High School in Khartoum, which had adopted the British curriculum and awarded IGCSEs. The claimant had successfully passed his exams at the school. When he attempted to apply to universities in Sudan, he faced obstacles due to the Order, which meant that his applications were automatically declined as his IGCSEs had been acquired in Sudan. He brought his claim before the court challenging the constitutionality of the Order, on the grounds

580 *Constitutional Court Journal*, Vol. 1, 1999–2003, pp. 169–173.

that it discriminated between students holding the same type of certificate. Citing Article 21 of the 1998 Constitution, the claimant argued that the Order infringed on the right to equal treatment before the Higher Education Admission Board and deprived him of opportunities available to others, based on an irrational distinction.

The Constitutional Court dismissed the claim, holding that the Order was intended to oblige schools operating in Sudan to apply the Sudanese curriculum. The Order had been issued in 1996 and communicated to parents by the school in 1998, giving the claimant time to contest it at an earlier stage in accordance with section 21(1) of the Constitutional and Administrative Law Act 1996. Additionally, the Court held that the Order did not give preferential treatment to those coming from abroad, as argued by the claimant, but was intended to regulate education within Sudan. The Court concluded by stating that the “the door is open for the appellant to apply to universities outside of Sudan”.

In *Sudanese Women General Union v the Governor of Khartoum State*, the Governor of Khartoum State had issued a Provincial Order, in 2000, prohibiting women from working in certain sectors, namely hotels, restaurants and petrol stations. According to the Order, working in such sectors would harm women’s health and women’s dignity. The Sudanese Women General Union brought a claim to the Constitutional Court challenging the constitutionality of the Order under Article 34 of the 1998 Constitution (right to resort to the Constitutional Court to protect the rights contained in the Constitution). The Union argued that the Order violated Article 21 of the 1998 Constitution, which stated that:

All people are equal before the courts, and all Sudanese are equal in rights and duties as regards to functions in public life; it is impermissible to discriminate only due to race, sex or religious creed. They are equal in eligibility for public posts and offices and shall not be privileged based on wealth.

The Union argued that the Order also violated Article 15, which obliged the state to “care for the institution of the family (...) and emancipate women from injustice in all aspects and pursuits of life and encourage the role thereof in

family and public life". The claim was upheld by the Constitutional Court which declared the Order unconstitutional on the basis that it violated the right to equality under Article 21 of the Constitution and explicitly discriminated against women by limiting their right to work.

Permanent Constitution of 1973

Prior to the Constitution of 1998, at least one case was brought alleging violation of the rights to equality and non-discrimination under the Permanent Constitution of 1973.

In *President of Sunni Supporters' Group v Government of Sudan*,⁵⁸¹ a case was brought by the Sunni Supporters' Group challenging an Order issued by the Governor of the Province of Khartoum. The Order prohibited celebration and festivities organised every year for the birthday of Prophet Muhammad. In their claim, the claimants requested that the High Court invalidate the Order as it prevented them, and other Islamic groups and associations, from enjoying their right to freedom of belief and worship under Article 47 of the Permanent Constitution.

The claimants argued that celebrating the birthday of the Prophet was a part of their religious traditions and that the ban violated Article 38 which provided:

[A]ll people are equal before the court and all Sudanese are equal in rights and duties without discrimination between them by reason of ethnicity, race, local origin, sex, language or religion.

In response, the Attorney General of Sudan agreed with the claimants' interpretation of the Order as a clear violation of the right to freedom of belief and worship, as guaranteed by the Constitution under Article 47. Based on that reasoning, the High Court issued a decision invalidating the Order.

581 See Henry Reyaad Sakla, *The Most Famous Constitutional Cases in Sudan*, 1983.

Case Law under the National Civil Service Act 2007

In *Alsier Mustafa Khalfalah and others v Civil Service Recruitment Committee of Khartoum State*,⁵⁸² the claimant argued that the Civil Service Recruitment Committee of the State of Khartoum had failed to discharge its obligations under the National Civil Service Act 2007. In 2010, the Committee announced a number of vacancies for teachers at the Ministry of General Education. This was followed shortly afterwards by an Order issued by the Governor of the State of Khartoum, also published in newspapers, instructing the Recruitment Committee to ensure that 5% of the vacancies were filled by persons with disabilities who were otherwise qualified and who met the conditions of recruitment. The Recruitment Committee selected 18 persons with disabilities out of 1,050 persons recruited in total. The claimants, who were unsuccessful in their applications, appealed against the decision of the Recruitment Committee to reject their applications despite the fact that persons with disabilities were allotted 5% of vacancies in the Governor's Order. They argued that the 1.8% of selected candidates with disabilities was far less than the 5% required by the Order.

The claimants' case was dismissed at first instance and on appeal by the High Court (Administrative Circuit). The High Court upheld the decision of the lower court on the basis that the Governor's Order contradicted the National Civil Service Act 2007 which only requires a quota of 2% for persons with disabilities. Thus, the defendant was not bound by the 5% quota set out in the Governor's Order.

Some have argued that the court wrongly interpreted the National Civil Service Act 2007, which states that "all units of the states shall allocate *not less* than 2% of the approved announced vacancies for persons with disabilities" (emphasis added). The 2% figure in the 2007 Act was therefore a minimum and the Governor's Order was not inconsistent with the Act, but instead an attempt to implement the positive action clause in the Act. Additionally, neither the claimants, nor the court, made reference to Article 136 of the Constitution, which concerns inclusiveness in the civil service and, in particular, the requirement, set down in Article 136(e) of the "application of affirmative

⁵⁸² Citation in the court register: *High Court, Administrative Appeal No. 127/2012*. Case not among those selected for report in the law reports.

action and job training to achieve targets for equitable representation within a specified time frame”.

In *Wissal M. Ibrahim v Federal Ministry of Health*,⁵⁸³ the claimant was a statistics technician at the Federal Ministry of Health in Khartoum. After giving birth, she took delivery leave of 8 weeks and thereafter requested annual leave, in accordance with her legal entitlement. After having given birth, she applied for unpaid maternity leave, on the basis that she needed to look after her children, as she had difficulties in finding a nursery and lived far from her workplace. The Ministry refused to provide her with unpaid leave, stating that she had already exhausted her delivery leave and annual leave and that there was no one who could take her position as an alternative.

The claimant challenged the decision of the Federal Ministry at the Justice Chamber for Civil Service Employees, repeating the reasons for her request. The Chamber dismissed her complaint on the grounds that, under Section 102 of the Civil Service Regulation for the State of Khartoum 2009, it is within the sole discretion of the head of the unit or department to decide on leave. It was not an absolute right for an employee to take leave. Therefore, if the head of the unit believed that to approve an individual's request for maternity leave would affect their work, and there was no replacement to fill their position, their decision could stand.

Although the court's decision was in accordance with the relevant legislation, it is arguably inconsistent with the relevant constitutional requirements. Legislation on employees' leave is, for the most part, governed by the Labour Act 1997 for employees in the private sector and the National Civil Service Act 2007 for employees in the public sector, with some exceptions. Section 45 of the National Civil Service Act 2007 leaves the issue of leave to be governed by Regulations. Section 102 of the Civil Service Regulation of the State of Khartoum 2009 provides a working mother with the right to 8 weeks of delivery leave and up to 2 years of maternity leave, subject to the approval of the relevant Minister. Approval is only granted if the work will not be affected by the mother's leave. However, Article 15(2) of the Constitution states that “the state shall protect motherhood and women from injustice, promote

583 Complaint No 25/2011, *Justice Magazine*, No. 6, Chapter 2 (2011), pp. 32–34, lodged before the Justice Chamber for Civil Service Employees, Khartoum State.

gender equality and the role of women in the family, and empower them in public life". Article 136(1)(c) provides that "no level of government shall discriminate against any qualified Sudanese citizen on the ground of religion, ethnicity, region or gender". Despite these provisions, the state has done little to accommodate the needs of working mothers.

3.5 Conclusion: a Weak Legal and Policy Framework

The report finds that Sudan's legal and policy framework is manifestly inadequate to address the patterns of discrimination and inequality identified in part 2. Sudan has a **poor record of participation in international instruments**, having acceded to only five of the nine core UN human rights treaties. Sudan has not ratified either the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, or the Convention on the Elimination of Discrimination against Women. Similarly, Sudan has refused to accede to calls to ratify the optional protocols which allow individual complaints under the international instruments to which it is party. Article 27(3) of the Interim National Constitution, which provides for the direct effect of international human rights instruments to which Sudan is party, has not been applied in practice.

Despite providing arguably the best level of human rights protection of any of Sudan's eight constitutions since independence, the **Interim National Constitution provides weak protection for the rights to equality and non-discrimination**. Article 31 of the Constitution does not prohibit discrimination either in the enjoyment of human rights, as required by both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights, nor does it provide a general prohibition on discrimination in all areas of life governed by law, as required by Article 26 of the ICCPR. Instead, Article 31 guarantees equal protection of the law without discrimination on a strictly limited list of grounds. The personal scope of protection from discrimination is limited, omitting grounds such as disability, sexual orientation and health status. Article 32, which prohibits discrimination against women, is broader in scope than Article 31, but is effectively negated by the large number of gender-discriminatory laws that remain in force today and have not been found unconstitutional.

Beyond the Constitution, **Sudanese legislation provides very little protection from discrimination.** Sudan has neither comprehensive anti-discrimination legislation, nor any specific anti-discrimination laws. The National Disability Act does not prohibit discrimination on grounds of disability, and falls far short of the standard required by the Convention on the Rights of Persons with Disabilities, a treaty to which Sudan became party in 2009. Legislation governing education, healthcare and other important areas of life contains no guarantees of non-discrimination. Government policies do not fill the gaps in protection which result from the absence of an effective legislative framework: a National Human Rights Action Plan, adopted in 2013, does not set out concrete targets and provides no mechanism to allow civil society, the media or the public to hold state actors accountable.

The absence of effective constitutional and legislative protections for the rights to equality and non-discrimination are exacerbated by a **weak and ineffective system of implementation and enforcement.** The Constitutional Court, which is empowered to receive complaints of discrimination under the Constitution, has a weak record. Members of the National Human Rights Commission were not appointed until 2012, despite the Commission having been established by statute in 2009. At the time of writing, the Commission has not been rated by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights. The Commission has been widely criticised by civil society actors as ineffective, although on account of its very young age, it should be given the benefit of the doubt.