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Inclusion by exclusion? An assessment of the justiciability of socio-economic rights under the 2005 Interim National Constitution of Sudan

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Summary

Section 22 of the Interim Constitution of Sudan states that socio-economic rights provided for under the Guiding Principles and Directives section are not justiciable. However, section 27(3) of the same Constitution states that every right and freedom provided for in international human rights instruments to which Sudan is a party forms an integral part of the Sudan Bill of Rights. Sudan is a party to, inter alia*, the International Covenant on Economic, Social and Cultural Rights, the United Nations Convention on the Rights of the Child, the African Charter on Human and Peoples' Rights and the African Charter on the Rights and Welfare of the Child. Each of these international human rights instruments provides for socio-economic rights. This article is an attempt to establish that, even though socio-economic rights are provided for under the Guiding Principles*

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and Directives section of the Interim Constitution of Sudan, they are nonetheless justiciable. This is because socio-economic rights, excluded from the jurisdiction of the courts via section 22, have in fact been included by virtue of section 27(3). This paper argues that section 22 has been rendered redundant by section 27(3).

1 Introduction

> It cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by the bill of rights ...[1]

To characterise the last three decades as marking a socio-economic rights renaissance for the African continent would not be an exaggeration. Almost all constitutions in Africa provide for socio-economic rights in one form or another.[2] There are at least two discernible methods of constitutionalising socio-economic rights in Africa. The majority of countries that have constitutionalised socio-economic rights in Africa have provided for them under the Directive Principles of State Policy (DPSP).[3] Others have selectively constitutionalised them and render those selected few justiciable.[4]

The values and virtues of constitutionalising socio-economic rights as DPSP lie in the fact that, in addition to providing interpretative guidance to the legislature, the executive and the judiciary in law and policy making, socio-economic rights could directly or indirectly, through the implied doctrine, benefit social litigants, without necessarily overburdening the country economically or destabilising its democratic institutions and principles. One of the limitations of this mode of constitutionalising socio-economic rights is that their effectiveness as human rights instruments is determined and dependant on the ingenuity and whims and caprices of a given bar and bench at a given time.

Consequently, for countries whose stability is dependent on the certainty of radical social transformation, the preferred route is that of rendering socio-economic rights directly justiciable. In this case, carefully-crafted constitutional and other legal frameworks are provided for the adjudication of socio-economic rights. Countries have to be careful because socio-economic rights adjudication could have serious budgetary, policy and other polycentric effects with harmful counter-majoritarian implications for smooth democratic governance.[5]

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1 *Ex parte Chairperson of Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 4 SA 744 (CC), 1996 10 BCLR 77.

2 See generally F Viljoen *International human rights law in Africa* (2007).

3 The Nigerian and Lesotho Constitutions provide examples for this method.

4 The South African Constitution is a good example.

5 E Mureinik 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31.

Politics is about power and resource distribution. Politicians are voted in or out of power depending on how they promise to deal with the distribution of power or resources or how they have failed to deal with them. Consequently, only elected representatives have the legitimacy to decide on resource allocation and need prioritisation.[6] Those against the justiciability of socio-economic rights argue that, allowing unelected judges to adjudicate on socio-economic rights cases, in addition to the danger that these judges could replace their values for that of the elected representatives, adjudicating socio-economic rights will amount to courts legislating and deciding on policy issues and unavoidably raise counter-majoritarian tensions between the representative elected by the majority of the population and judges nominated by the executive and confirmed by parliament.[7]

Sudan has constitutionalised socio-economic rights in a manner that combines the features of a DPSP approach and the directly-justiciable method. This approach of combining the attributes of the two methods of constitutionalising socio-economic rights benefits from their positive features but is burdened by negative aspects. Therefore, as a hybrid method, the Sudanese approach, in addition to providing new benefits for the struggle for the realisation of socio-economic rights, equally brings with it new challenges. This paper investigates the prospects and challenges that attend this innovative approach to constitutionalising and enforcing socio-economic rights.

On 9 July 2005, Sudan ushered in an Interim National Constitution (Constitution). The Constitution was a part of a Comprehensive Peace Agreement (CPA) which was concluded between the government of Sudan and the Sudanese People's Liberation Movement (SPLM) in Naivasha, Kenya, on 5 January 2005. The agreement brought to an end one of Africa's longest and most brutal civil wars. The Constitution is in force in the interim period, which began on 9 July 2005 and ends in January 2011.

Part I of the Constitution deals with the nature of the state and the Constitution. This part has two chapters. Chapter one is entitled 'The state and the Constitution'. Chapter two is entitled the 'Guiding Principles and Directives' (GPD) section. This section deals with a range of issues, including socio-economic rights, such as the right to a clean environment;[8] employment;[9] the right of physically disabled persons to participate in social, vocational, creative or recreational

6 P Brest 'The fundamental rights controversy: The essential contradiction of normative constitutional scholarship' (1981) 90 *Yale Law Journal* 1063.

7 M Pieterse 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *South African Journal on Human Rights* 383.

8 Sec 11.

9 Sec 12(1).

activities;[10] the right to establish educational institutions;[11] the rights of children to welfare and protection from abuse and abandonment;[12] the right to culture;[13] the right to language;[14] the right to marry and found a family;[15] gender equality;[16] and access to primary health care.[17]

Section 22, the last section of chapter two, contains a 'saving' clause which provides:[18]

> 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 therein are basic to governance and the state is duty-bound to be guided by them, especially in making policies and laws.

Part II of the Constitution contains a Bill of Rights. The Bill of Rights has 22 sections. It provides for civil and political rights and some socio-economic rights. Section 27, which is the first and founding section of the Bill of Rights, provides:

1 The Bill of Rights is a covenant among the Sudanese people and between them and their governments at every level and a commitment to respect and promote human rights and fundamental freedoms enshrined in this Constitution; it is the cornerstone of social justice, equality and democracy in the Sudan.
2 The State shall protect, promote, guarantee and implement this Bill.
3 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.
4 Legislation shall regulate the rights and freedoms enshrined in this Bill and shall not detract from or derogate any of these rights.

Section 48 is the last provision in the part dealing with the Bill of Rights, and provides for the 'Sanctity of the Rights and Freedoms' as follows:

> No derogation from the rights and freedoms enshrined in this Bill shall be made except in accordance with the provisions of this Constitution and only with the approval of the National Legislature. The Bill of Rights shall be upheld, protected and applied by the Constitutional Court and other competent courts; the Human Rights Commission shall monitor its application in the state.

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10 Sec 12(2).
11 Sec 13(1)(a).
12 Sec 14.
13 Sec 13.
14 Sec 8.
15 Sec 15(1).
16 Sec 15(2).
17 Sec 19.
18 My emphasis. The intention is to show later on that sec 27(3) is already anticipated here.

Section 27(3) has been the subject of an ongoing scholarly exchange with scholars lining up on both sides of the debate.[19] There are at least two issues that can be distilled from this academic discourse: The first relates to what the Constitution means when it directs that '[a]ll 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'.

Does it mean that 'all the rights and freedoms' provided for in all human rights instruments ratified by Sudan form substantive provisions of the Constitution which are thereby actionable before courts in the Sudan? Or should this sub-section be construed to mean that those human rights instruments referred to do not form substantive provisions, but interpretative tools for construing the meaning of the 20 rights and freedoms expressly provided for in the Bill of Rights?

The second debate relates to the meaning of the word 'ratified' as used in this sub-section. Does it refer to human rights instruments that were ratified before the Constitution came into force or only those ratified after the Constitution entered into force?

Arising from the first issue are other conceptual concerns. If all the international human rights instruments are a substantive part of the Constitution, what are the legal implications? What in essence is constitutionalised? The instruments themselves? Would this include the standards as well as decisions and General Comments of their monitoring bodies? Or do only the substantive provisions of these instruments form an integral part of the Constitution?

Even though Sudan has ratified many international human rights instruments, the International Covenant on Economic, Social and Cultural Rights (CESCR)[20] will be the focus of this work. This is primarily because it is relevant to the subject matter of the investigation:[21] that is the justiciability and enforceability of socio-economic rights in the Sudan. Central to this enquiry is the relationship between sections 27(3) and 22 of the Constitution. This is because there exists a tension between these two provisions in the opinion of the author.

This tension arises from the fact that, whereas CESCR forms an *integral part* of a justiciable and enforceable bill of rights, the provisions of the GPD are merely 'codes of conduct' for the state, and are not enforceable.[22] Consequently, even though the socio-economic rights

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19 See generally the Max Plank Institute of Public and International Law report of series of seminars they organised for scholars and jurists on the Sudanese Interim Constitution to discuss these provisions; http://www.mpil.de/shared/data/pdf/manualpapersandproceedingsoftheheidelberg seminarson (accessed 31 March 2009).

20 Sudan has *inter alia* ratified the African Charter on Human and Peoples' Rights and the United Nations Convention on the Rights of the Child, all of which provide for socio-economic rights.

21 Any conclusion reached as it is likely to be valid for all other instruments.

22 B de Villiers 'Directive principles of state policy and fundamental rights: The Indian experience' (1992) 8 *South African Journal on Human Rights* 29.

provided for under GPD are equally contained in CESCR, section 22 provides that they cannot be subjects of adjudication by the courts. Can section 22 limit the extent of Sudan's obligations under CESCR or its operation as part of the Constitution? On the other hand, can CESCR 'trump' section 22 with respect to mutually-shared socio-economic rights?

2 The concept of justiciability

Justiciability relates to the power of courts to review and determine compliance or non-compliance with the terms of an agreed legal regime.[23] Accompanying this power is the right of courts to identify entitlements and duties created by such a legal regime and to ensure that they are executed and maintained. Rendering socio-economic rights justiciable, therefore, is tantamount to creating individual as well as collective entitlements to socio-economic benefits. This possibility has enraged many scholars who cannot reconcile their understanding of the institution of rights with socio-economic entitlements.[24]

To these scholars, economic, social and cultural rights are 'choice-sensitive',[25] 'ideologically loaded',[26] 'vague',[27] 'indeterminate',[28] expensive to realise and merely 'programmatic',[29] in the sense that they need to be 'realised progressively'[30] depending upon 'availability'

23 As above.

24 M Cranston 'Human rights real or supposed' in D Raphael (ed) *Political theory and the rights of man* (1967) 43. See also C Sunstein 'Against positive rights: Why social and economic rights don't belong in the new constitutions of post-communist Europe' (1993) 1 *East European Constitutional Review* 35; D Beatty 'The last generation: When rights lose their meaning' in D Beatty (ed) *Human rights and judicial review: A comparative perspective* (1994) 321; D Davis 'The case against inclusion of socio-economic rights in a bill of rights except as directive principles' (1992) 8 *South African Journal on Human Rights* 476.

25 N Haysom 'Constitutionalism, majoritarian democracy and socio-economic rights' (1992) 8 *South African Journal on Human Rights* 451.

26 C Scott & P Macklem 'Constitutional ropes of sand or justiciable guarantees? Social rights in a new South African Constitution' (1992) 141 *University of Pennsylvania Law Review* 1.

27 As above.

28 W Nickel 'How human rights generate duties to protect and provide' (1993) 15 *Human Rights Quarterly* 76.

29 D Bilchitz 'Towards a reasonable approach to the minimum core obligation: Laying the foundations for the future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 1.

30 H Ram 'Negative rights vs positive entitlements: A comparative study of judicial interpretation of rights in emerging neo-liberal economic order' (2000) 22 *Human Rights Quarterly* 1060.

of resources.[31] Unlike civil and political rights, socio-economic rights impose positive obligations on the state.

In addition, it is believed that socio-economic rights are conceptually ill-suited for judicial review and that courts are politically poorly-positioned and institutionally ill-equipped to decide matters of social and economic justice.[32] The polycentric[33] nature of socio-economic rights inevitably renders them to be not amenable to the tri-partite process of judicial decision making, and drags the judiciary into the muddy waters of politics.[34] Socio-economic rights, it is maintained, thus 'politicise justice and judicialise politics'.[35] They allow the courts, by enforcing socio-economic rights, to stray onto the political terrain,[36] at the expense of the democratic process — and 'political life is inevitably impoverished'.[37] By constitutionalising socio-economic rights, it is argued, one forces the judiciary into an uncomfortable choice between usurpation and abdication from which there is no escape without embarrassment or discredit.

These arguments have been widely discredited. The division of human rights into watertight categories cannot serve the purpose of conceptual clarity, nor enhance the justiciability of either group of rights.[38] It has been argued, and rightly so, that 'the rights in both purported categories are indivisible and interdependent, collectively as well as individually, simply because they are all essential for the wellbeing and dignity of every person as a whole being'.[39] In addition, the two categories of rights impose positive as well as negative obligations

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31 S Fredman 'Providing equality: Substantive equality and the positive duty to provide' (2005) 21 *South African Journal on Human Rights* 163.

32 M Wesson '*Grootboom* and beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court' (2004) 20 *South African Journal on Human Rights* 284.

33 This word was used by Lon Fuller to describe decisions that have potential implications for many interested parties and that have many complex and unpredictable social and economic repercussions, which inevitably vary for every subtle difference in the decision. See Pieterse (n 7 above) 383.

34 N Udombana 'Interpreting rights globally: Courts and constitutional rights in emerging democracies' (2005) 5 *South African Journal on Human Rights* 47.

35 J Ferejohn 'Judicialising politics, politicising law' (2002) 65 *Law and Contemporary Problems* 41.

36 As above.

37 E de Wet *Constitutional enforceability of economic and social rights: The meaning of the German constitutional model for South Africa (*1996).

38 C Mbazira 'Translating socio-economic rights from abstract paper rights to fully-fledged individual rights: Lessons from South Africa' (2006) 12 *East African Journal of Peace and Human Rights* 183.

39 M Scheinin 'Economic and social rights as legal rights' in A Eide *et al* (eds) *Economic, social and cultural rights: A textbook* (2005) 41.

on the state;[40] they are both progressive in a sense;[41] and both have an immediate component for realisation.[42] Adjudicating socio-economic rights does not place on the judiciary any greater responsibility than they already have adjudicating civil and political rights, it is argued.

Even though it is conceded that socio-economic rights are different in content and in the nature of some of the duties they impose, the difference is not that of kind, but of degree. Socio-economic rights are human rights. They are vested with all the qualities of rights and suffer from the same challenges as other rights. Human rights are universal, interdependent and interrelated. Therefore, divorcing one side of the human rights equation from justiciability will inevitably impact negatively on the realisation of other rights.

Ultimately, the concern with the judicial enforcement of socio-economic rights is that of legitimacy, meaning the ability of people to 'accept judicial decisions, even those they bitterly oppose, because they view courts as appropriate institutions for making such decisions'.[43] The belief is that, by ruling on non-justiciable socio-economic rights, courts risk losing this legitimacy. However, it is equally true that courts risk losing their legitimacy when socio-economic rights appear side by side with civil and political rights in a constitution and they fail to protect both.[44]

Having said that, one cannot but concede that socio-economic rights adjudication involve hard and complex choices with far-reaching social and economic ramifications. As a result, it is submitted that socio-economic rights should be constitutionalised and rendered justiciable in such a way that maximises their potential and guards against their violation. The next section investigates whether or not Sudan's model of constitutionalising socio-economic rights has benefited from such a careful balancing.

3 The justiciability of socio-economic rights under the Interim National Constitution

The inclusion of a comprehensive Bill of Rights in the Constitution represents a 'remarkable divergence in Sudanese constitutional making'.[45]

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40 M Pieterse 'Possibilities and pitfalls in the domestic enforcement of social rights: Contemplating the South African experience' (2004) 26 *Human Rights Quarterly* 882.

41 J Nickel 'How human rights generate duties to protect and provide' (1993) 14 *Human Rights Quarterly* 76.

42 R Gittleman, as quoted in CA Odinkalu ' Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice 1986-2000* (2002) 137.

43 J Gibson & G Caldiera 'Defenders of democracy? Legitimacy, popular acceptance, and the South African Constitutional Court' (2003) 2 *The Journal of Politics* 65.

44 As above.

45 N Ibrahim 'The Sudanese Bill of Rights' (2008) 4 *International Journal of Human Rights* 613.

This is so in more than one way. Since independence, Sudan has had three transitional Constitutions, two permanent Constitutions and a series of constitutional decrees regarding constitutional issues. Even though these Constitutions made provision for human rights, none of these documents contained a comprehensive bill of rights so ambitious as to incorporate all rights and freedoms enshrined in international human rights treaties. [46]

Second, the Constitution introduced an overhaul of the governance structure of Sudan reflecting the rights-based approach of the Constitution. First, it created a 'decentralised' or an asymmetrical federation with four levels of government: the national government, the government of Southern Sudan, state governments and local governments.[47] In addition, the Constitution creates a Kelsenian model of judicial review. This model concentrates the powers of constitutional review within a single judicial system called the Constitutional Court and situates that court outside the traditional structure of the judicial branch.[48] Defining with exactitude, however, what constitutes this Bill of Rights in Sudan will likely engage scholars and human rights activists for a long time to come.

The Sudanese Bill of Rights explicitly provides for 20 civil and political rights as well as some socio-economic rights. In addition to this, the Constitution states that any right or freedom contained in any international human rights instrument Sudan is a party to automatically forms 'an integral part of this Bill'. The question of what constitutes the Bill of Rights in Sudan, therefore, depends on what is meant by the phrase 'integral part'. Scholars are not agreed on the purport of these words. There are two groups of scholars: those who consider these international human rights instruments as forming a substantive part of the Bill of Rights and those who consider them as interpretative tools to it.[49]

Both positions have implications for the justiciability of socio-economic rights in the Sudan. If these international human rights instruments are interpretative tools, then the socio-economic rights explicitly mentioned in the Bill of Rights should be interpreted along the lines of the jurisprudence of the ESCR Committee. However, the problem with this position is that the definition of socio-economic rights in the Bill of Rights is different from those in CESCR. For example, article 12 of CESCR provides for the 'right of everyone to the enjoyment

46 As above. C Murray & C Maywald 'Subnational constitution making in Southern Sudan (2006) 37 *Rutgers Law Journal* 1203.

47 Murray & Maywald (n 46 above).

48 L Garlicki 'Constitutional courts versus supreme courts' (2007) 5 *International Journal of Constitutional Law* 44.

49 See, generally, Max Planck Institute (n 19 above). See also J Sloth-Nielson 'Measures to strengthen children's rights in the Constitution of Sudan' (2005), report for Save the Children Sweden Kenya and South Sudan Office. A copy of the report can be obtained from Anna Lindenfors at office@swedsave-ke.org.

of the highest attainable standard of physical and mental health', while section 46 of the Constitution states that 'the state shall promote public health ... provide free primary health care and emergency services for all citizens'. Which substance of the right prevails? This is important because, while the former provision is comprehensive, the latter is not. It is the proposition of this paper that the former should prevail because a country cannot escape its international obligations by virtue of its constitutional provisions.

Second, since section 27(3) of the Constitution incorporates all the provisions of CESCR, it can reasonably be presumed that it was the intention of the drafters to implement CESCR using the same language. Consequently, it could be inferred that the drafters intended to import into the Constitution provisions that have the same effect as the corresponding provisions of CESCR. In this, it is submitted that the socio-economic rights provisions in the Constitution should be construed in the same manner by courts in the Sudan, in accordance with the meaning attributed to CESCR in international law. This is because attributing a different meaning would be to defeat the intention of the drafters and to invalidate in part or in whole CESCR.[50]

If they form a substantive part of the Constitution, this has even wider implications for Bill of Rights adjudication in general and socio-economic rights justiciability in particular. What forms part of the Bill: the rights and freedoms, the decisions and interpretations of the monitoring bodies? In the event of a conflict, which one has the final say? The Constitution is silent on the question of the legal status of these international human rights instruments as well as on their relationship to it or with it. The nature, scope, application and limitation of the Bill of Rights can only be ascertained by constructive interpretation of the Constitution. It is the thesis of this article that Sudan has not only provided for justiciable and enforceable socio-economic rights in the Constitution, but that the scope of justiciable socio-economic rights has been widened to incorporate all socio-economic rights in all international human rights instruments that Sudan is a party to.

4 The nature, scope and limitation of the Sudanese Bill of Rights

Section 27, the first and founding provision of the Bill of Rights, is the starting point in answering the question of what constitutes the Bill of Rights in the Sudan. In addition to the 20 rights and freedoms provided for in the Bill of Rights,[51] section (27)(3) provides that 'all rights and freedoms enshrined in international human rights treaties, covenants

50 N Jayawickrama *The judicial application of human rights law: National, regional and international jurisprudence* (2002) 159.

51 Secs 28-47 of Interim National Constitution (INC).

and instruments ratified by the Republic of Sudan shall be an integral part of this Bill'. The words 'ratified' and 'integral part' are decisive to answering this question.

The word 'ratified' as used in section 27(3) has generated controversy among jurists.[52] The concern has been with what 'ratified' means. Does it mean exactly what it means in public international law? Does it refer to treaties ratified before the Constitution or those that will be ratified after it came into effect? Will it mean the same thing as accession, adherence, adhesion or acceptance of an international treaty? When does a ratified instrument become an integral part of the Bill of Rights, when Sudan ratifies it or when it comes into force after the requisite number of ratifications at the international level?[53]

There are no final answers to these concerns until the Constitutional Court pronounces on them. However, the sanctity of the Bill of Rights and the sanity of the right-holders, to a large extent, depend on the kind of answers that are provided to these questions. Section 27(3) will be analysed in two parts: the meaning and effect of ratification and the meaning and effect of 'integral part'.

4.1 'Ratified by' Sudan: Meaning and effects

The word 'ratification' appears four times in the Constitution. Its use tends to suggest different meanings. The Constitution uses the verb form of the word 'to ratify' three times, first in section 58(1)(k), assigning to the President of the Republic the power to 'ratify treaties and international agreements with the approval of the National Legislature'. However, section 91(3)(d) empowers the National Assembly 'to ratify international treaties, conventions and agreements'. Section 109(4) goes on to say that the National Assembly may delegate to the President the 'power to ratify international conventions and agreements' while it is not in session. The attempt by sections 58(1)(k) and 91(3)(d) to assign one competency to two organs of the government is confusing and needs further interpretation. The possibility that the word 'ratification' could have more than one meaning within the Constitution suggests that its use in section 27(3) could mean that more than one method of becoming a party to an international treaty is contemplated.

The Vienna Convention on the Law of Treaties 1969 is the main international instrument regulating the law of treaties. It provides for different ways of becoming a party to an international treaty. A state could express its intention to be bound through a 'signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession or by any other means if it so agrees'.[54]

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52 As above.

53 For a detailed discussion of these various positions, see Max Planck Institute (n 19 above).

54 Art 11 of the Vienna Convention on the Law of Treaties 1969.

In a bilateral treaty, ratification is effected when the instruments of ratification are exchanged between the state parties, while in a multilateral treaty this is effected when the instrument of ratification is deposited with the depository. States which were not parties to the negotiation of a treaty can express their consent by accession, which has the combined effect of signing and ratification. Sometimes the words 'acceptance' and 'approval' could be used instead of accession.[55]

It is submitted, therefore, that the word 'ratified' in article 27(3) should be interpreted to encompass all the methods of assuming legal obligations in a treaty. This interpretation is consistent with paragraph 1.6.1 of the Protocol on Power Sharing between the government of Sudan and the SPLM, which is an integral part of CPA and is incorporated into the Constitution by virtue of section 225. According to this paragraph:

> The Republic of the Sudan, including all levels of government throughout the country, shall comply fully with all its obligations under the international human rights treaties to which it is or becomes a party.

The word 'ratification' is not mentioned here. The emphasis is, therefore, not on how Sudan becomes a state party to the treaty, but on its membership and compliance with its obligations under a treaty. Even though the word 'ratified' is used in its past tense in section 27(3) of the Constitution, it does not refer only to the treaties that Sudan ratified before the Constitution entered into force, as some scholars have suggested. Neither does it refer only to those it will ratify after the Constitution has entered into force.[56] Instead, it refers to both types of treaties that are ratified by Sudan.

4.2 '[A]n integral part of this Bill': Meaning and effects

The *Oxford English dictionary* defines the word 'integral' to mean 'of or pertaining to a whole'; 'a constituent, component necessary to the completeness or integrity of the whole'; 'forming portion or element, as distinguished from an adjunct or appendage'.[57] Saying that all international human rights instruments ratified by Sudan form an integral part of the Constitution is therefore the same thing as stating that these instruments form substantive provisions of the Constitution. If the drafters of the Constitution intended these international human rights instruments to be mere interpretative tools, it is submitted that this intention is not communicated in section 27(3).

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55 Max Planck Report (n 19 above).

56 Judge Abdallah Ya'qoub of the Constitutional Court of Sudan is of the opinion that only post-INC treaties are referred to in art 27(3). See his submission at page 49 of the report (n 19 above).

57 *Oxford English dictionary* (2008) http://www.dictionary.oed.com (accessed 1 November 2008).

What is conveyed in section 27(3) is what the Committee on the International Covenant on Civil and Political Rights (CCPR) rightly observed in its concluding observation on Sudan. According to the Committee; 'pursuant to section 27 of the Interim National Constitution of 2005, the Covenant is binding and may be invoked as a constitutional text'.[58] This is even more so, when the government of Sudan, in its state report of 2006 to the African Commission on Human and Peoples' Rights (African Commission), stated that:[59]

> The Sudan has ratified numerous covenants and chapters [instruments] relating to human rights and considered to be part and parcel [integral] of the National Legislation [Constitution] under the provision of section 27(3) of the Constitution. These include the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights and the Convention on the Rights of the Child.

In its state report to the African Commission in 2008, Sudan repeated that the rights and freedoms which are not expressly stated in the Constitution 'form part and parcel of the Constitution'.[60] The government went on to state that 'the Constitution commits the state to protect, promote, guarantee and implement all the freedoms provided for in this chapter (article 27)'.

It is difficult to avoid the conclusion that all rights and freedoms provided for in the international human rights instruments to which Sudan is a party are 'fully-fledged constitutional provisions'[61] and, therefore, actionable before the courts in Sudan in their own right.

It would appear that everyone living in the Sudan is not only entitled to the protection provided by the Bill of Rights and those in all the international human rights instruments Sudan has ratified, but also has the choice (depending on which instrument offers higher protection) of which instrument to invoke before the Constitutional Court.

This submission raises another question: What, in essence, are the substantive parts of the Constitution? Are they just the rights and freedoms or also the decisions and procedures given or provided for under these instruments? The author submits that the provision of article 27(3) is explicit on the issue. The section refers to 'rights and freedoms' and not CCPR or CESCR, for example. What is, therefore, binding on Sudan, within this context, is the content of these instruments, that is, the rights and freedoms and not the procedures provided for under them. The decisions of the monitoring bodies of these instruments, it

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58 The CPPR Committee Concluding Observations for 2007 http://www2.ohchr.org/english/bodies/ hrc/docs/AdvanceDocs/CCPR.C.SDN.CO.3.CRP.1.pdf (accessed 4 September 2008) para 8.

59 The report is available at http://www.achpr.org/english/state_reports/sudan/sudan%2550_3_ Rrport.pdf (accessed 1 November 2008) para 70.

60 See the full report at http://www.achpr.org/english/state_reports/Sudan/Sudan%20_3_Report.pdf (accessed 1 November 2008) para 13.

61 Ibrahim (n 45 above).

is submitted, are not binding on Sudan or its courts, but, nonetheless, are persuasive authorities before the Sudanese courts.

What is the legal implication of this on the socio-economic rights which are provided for both in CESCR and the GPD? The relationship between sections 27(3) and 22 needs to be clarified.

5 The relationship between sections 22 and 27(3) and the justiciability of socio-economic rights

Different constitutions adopt varying methods of constitutionalising socio-economic rights. Some constitutions restrictively select thematic items of socio-economic rights and render only those specifically mentioned socio-economic rights justiciable and enforceable. Socio-economic rights so constitutionalised are further subjected to internal modifiers or 'claw-back clauses'. A good example of this approach is the 1996 Constitution of South Africa.[62] Sections 26, 27 and 28 of the South African Constitution provide for three clusters of socio-economic rights and the terms and conditions of their justiciability. These clusters are:

1 qualified socio-economic rights: the right of 'everyone' to 'have access to';[63] with respect to these rights the state is expected 'to take reasonable legislative and other measures, within its available resources to achieve progressive realisation of each of these rights'.[64]
2 unqualified socio-economic rights: These are basic socio-economic rights of children,[65] basic education, adult education, socio-economic rights of detained persons and sentenced prisoners.[66]
3 socio-economic rights that prohibit certain state action: These are rights prohibiting arbitrary evictions[67] and the right to emergency medical treatment'.

In some other constitutions, socio-economic rights are provided for as Directive Principles of State Policy (DPSP). Traditionally, Guiding and Directive Principles are merely 'code of conducts' for the state, which are justiciable, but not enforceable. The only sanctions attached to GDP are therefore moral, political and judicial to the extent only that they provide the framework in which fundamental rights are to be inter-

62 Secs 26, 27& 28 of the 1996 Constitution of South Africa provides an example.
63 Secs 26(1) & 27(1).
64 Secs 26(2) & 27(2).
65 Sec 28.
66 Secs 28(1)(c); 29(1)(a) & 35(2)(e). It is difficult to sustain this categorisation after the decision in *Grootboom* which is discussed below.
67 Secs 26(3) & 27(3).

preted and understood.[68] An example is the Nigerian Constitution of 1999. After providing for an extensive list of socio-economic rights and sternly admonishing organs of government to 'conform to, observe and apply'[69] these socio-economic rights, the Constitution summersaults by stipulating that the courts have no jurisdiction to inquire if conduct or legislation confirms with the provisions of the DPSP.[70]

The approach of the Interim National Constitution of Sudan appears to be an attempt to incorporate both approaches of constitutionalising socio-economic rights. It will be recalled that, after listing some socio-economic rights, section 22 contains a 'saving' clause.[71]

The Bill of Rights proceeds to selectively and restrictively provide for socio-economic rights. Without section 27(3), the Sudanese constitutional format with respect to socio-economic rights would have followed, for instance, the Nigerian Constitution; in which case section 22 would have been consistent with the rest of the constitutional provision. However, having incorporated CESCR via section 27(3) and making it an integral part of the Bill of Rights, to which section 22 does not apply; it is difficult to see how the DPSP approach argument can be maintained without the danger of inconsistency. Such inconsistency arises from the fact that almost all the socio-economic rights in Part I of the Constitution are provided for in CESCR which, through section 27(3), is part and parcel of the Bill of Rights.

In most constitutions that provide for a bill of rights, those constitutions usually provide in explicit terms whether the provisions of the bill of rights are enforceable in a court of law or not. The drafters of the Sudanese Bill of Rights did not provide in explicit terms whether or not the Bill of Rights is justiciable and enforceable in a court of law.[72] It is therefore important to establish first if the provisions of the Bill of Rights are justiciable and only after such a finding to determine which provisions are justiciable and which are not justiciable.

This paper is predicated on the assumption that the Constitution provides for a bill of rights that is justiciable and enforceable notwithstanding the fact that it does not explicitly provides so. This presumption is based on the fact that section 22 of the Constitution is the only provision in the Constitution ousting the jurisdiction of the courts with respect to human rights. An *argumentum e contrario* will suggest that, for the rest of the Constitution, the binding effect of the Constitution is accompanied by justiciability and enforceability by courts. Therefore,

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68 De Villiers (n 22 above) 29.

69 Art 13 of the 1999 Constitution.

70 Art 6(6)(c).

71 n 18 above.

72 Except that sec 48 provides that 'the Bill of Rights shall be upheld, protected and applied by the Constitutional Court and other competent courts; the Human Rights Commission shall monitor its application in the state.' This provision could be interpreted to mean justiciability and enforceability of the provisions of the Bill of Rights.

since the Bill of Rights is not accompanied by such a saving clause, it is enforceable by the courts of law. It follows that, CESCR having been incorporated into the Bill of Rights, which is justiciable, the rights and freedoms contained in it are equally justiciable and enforceable before the Constitutional Court.

The picture, however, is not that simple. Section 22 of the Constitution must be there for a purpose. As a constitutional provision, it places a limitation or provides an exception, limiting or directing the application and binding effects of the Constitution. What section 22 of the Constitution attempts to do is to break the connection between the rights and freedoms before it and those that follow it. The legal consequence could be that, while the provisions under the GPD bind the legislature and the executive, judicial oversight is ousted.[73] It would mean, then, that the courts in the Sudan cannot hold the executive or the legislature accountable for a violation of the socio-economic rights provided for in the GPD.

It is the contention of this article that, first, section 22 of the Constitution applies only to that chapter and consequently has no effect on the provisions of the Bill of Rights. Second, by incorporating CESCR, the socio-economic rights provided for under part I of the Constitution, which at the same time are equally provided for in CESCR, are justiciable and enforceable as part of the Bill of Rights. As a result, section 27(3) of the Constitution provides the bridge connecting socio-economic rights under the GDP with those under the Bill of Rights. This submission is predicated on the following premises:

First, there is no intention in section 27(3) to limit the extent to which these instruments will take effect in the domestic legal system. The section rather provides for the incorporation of 'all the rights' in these instruments. Having provided for international human rights instruments as self-executing norms, the only acceptable legal process under international law available to Sudan to limit the effect of these instruments is a reservation or declaration to that effect. It is submitted that section 22 cannot replace this.

It is important to note that a similar intention is conveyed in section 32(5), which provides that 'the state shall protect the rights of the child as provided for in the international and regional conventions ratified by the Sudan'. What can be seen from these provisions is that the intention of the drafters of the Constitution was to extend the protection offered by the Bill of Rights to the international level and not to limit international protection to the domestic provision.

Secondly, the wording of section 22 supports this submission. The Constitution, where it intends to limit or prejudice the provision of another section, has used phrases such as 'notwithstanding section ...

[73] Viljoen (n 2 above) 573.

below';[74] or 'without prejudice to'.[75] Unlike these provisions, section 22 rather provides 'unless this Constitution otherwise provides', making section 22 a self-limiting provision. This, it is submitted, implies that section 22 anticipates section 27(3), rather than limiting it. Consequently, by incorporating 'all the rights' in CESCR, section 27(3) has already provided otherwise.

This article has successfully demonstrated that the scope of the Bill of Rights has been extended by section 27(3) to include all the rights and freedoms in all international human rights instruments ratified by Sudan. In addition, by incorporating CESCR, the African Charter on Human and Peoples' Rights (African Charter), the African Charter on the Rights and Welfare of the Child (African Children's Charter) and the Convention on the Rights of the Child (CRC), for example, all socio-economic rights which are provided for both in these instruments and the GDP are justiciable and enforceable in the Sudan. Since all the socio-economic rights provided for in the GDP are also provided for in these international human rights instruments, section 22 is redundant to the extent that it purports to exclude socio-economic rights from judicial enforcement.

6 Application and obligations under the Bill of Rights

Section 27(1) provides that 'the Bill of Rights is a covenant among the Sudanese people and between them and their government at every level ...' The words 'among' and 'between' would suggest a vertical and horizontal application of the Bill of Rights in the Sudan. In other words, as much as the provisions of the Bill of Rights are binding on all organs of government, it is equally binding on private individuals as well.

Traditionally, a bill of rights regulates the relationship between the individual and the state. It confers rights on individuals and imposes duties on the state. This was premised on the realisation that the state is far more powerful than individuals.[76] This is what scholars refer to as the vertical application of the bill of rights.

However, over time, it was recognised that private entities or individuals may abuse the human rights of others, especially the weak and the marginalised sectors of society. The scope of bills of rights was gradually extended to cover their activities as well. This is what is often called the horizontal application of the bill of rights which, essentially, means that individuals are conferred rights by the bill of rights, but

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74 See eg arts 58(2), 60(2), 66(e) & 79 where this expression is used.

75 Arts 91(2), 93(2) & 132.

76 *Jimson* v *Botswana Building Society* (2005) AHRLR 86 (BwIC 2003).

also, in certain circumstances, have duties imposed on them by the bill of rights to respect the rights and freedoms of other individuals.[77] Whether or not a bill of rights should apply to private parties is hotly contested.[78]

At the centre of the debate is the obligation of non-state actors for human rights violations. Some scholars maintain that applying human rights duties to non-state actors may undermine efforts to build indigenous social capacity and to make governments more responsible to their own citizenry.[79] Clapham has summarised the motivations for this position in the following words:[80]

> All of the arguments outlined above [against imposing human rights obligations on non-state actors] boil down to two claims: first, that an application of human rights obligations to non-state actors trivialises, dilutes and distracts from the great concept of human rights. Second, that such an application bestows inappropriate power and legitimacy on such actors. The counter-argument is that we can legitimately reverse the presumption that human rights are inevitably a contract between individuals and the state; we can presume that human rights are entitlements enjoyed by everyone to be respected by everyone.

These contestations have not been limited to scholars. The courts also have their share. For instance, in *Retail, Wholesale and Department Store Union Local 580 v Dolphin Delivery Ltd*,[81] the Supreme Court of Canada held that the Bill of Rights provisions did not apply, as the case was between individuals without any government involvement. This decision has been severely criticised as offering a screen behind which private power could flourish on human rights abuses.[82]

To minimise these debates, some countries have opted to clearly stipulate the scope of the application of their bill of rights and under what circumstances a non-state actor can incur human rights obligations. A good example will be section 8 of the 1996 Constitution of South Africa which stipulates as follows:

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77 As discussed in the above case.

78 See, generally, A Clapham *Human rights in the private sphere* (1996); A Clapham *Human rights obligations of non-state actors* (2006); D Betz 'Holding multinational corporations responsible for human rights abuses committed by security forces in conflict-ridden nations: An argument against exporting federal jurisdiction for the purpose of regulating corporate behaviour abroad' (2001) 14 *DePaul Business Law Journal* 176; A Ramasastry 'Corporate complicity: From Nuremberg to Rangoon — An examination of forced labour cases and their impact on the liability of multinational corporations' (2002) 20 *Berkeley Journal of International Law* 109; A Clapham 'The question of jurisdiction under criminal law over legal persons: Lessons from the Rome Conference on an International Criminal Court' in MT Kamminga & S Zia-Zarifi *Liability of multinational corporations under international law* (2000) 178.

79 J-M Henckaerts & L Doswald-Beck *Customary international humanitarian law* (2005).

80 Clapham (2006) (n 78 above) 58.

81 (1987) 33 DLR (4th) 174.

82 D Beatty 'Constitutional conceits: The coercive authority of courts' (1987) 37 *The University of Toronto Law Journal* 186.

> (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of the state.
> (2) A provision of the Bill of Rights binds a natural or jurisdiction person, if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

In the world of today, in which private entities exercise so much power relative to the individual, excluding them from the ambit of a bill of rights, cannot make a human rights protection sense. As a Botswana High Court held:[83]

> In today's world there are private organisations that wield so much power relative to the individuals under them that to exclude those entities from the scope of the bill of rights would in effect amount to a blanket licence for them to abuse human rights.

The position under the Interim Constitution of Sudan is not as clear as it seems under the South African Constitution. It is the opinion of this writer that, in light of the current trend towards holding non-state actors liable for human rights violations, the words 'among' and 'between' Sudanese and their governments should be purposively interpreted to extend the scope of the Sudanese Bill of Rights to non-state actors in the meantime. Ultimately, however, this provision should, when debating a permanent Constitution for Sudan, clearly stipulate this position. This extension cannot, however, incorporate all the typologies of obligations enumerated under the Constitution of Sudan. Unlike most human rights instruments, the Constitution seems to provide for additional obligations which non-state actors cannot reasonably be made to discharge.

CESCR provides for three typologies of obligations, which are the obligation to respect, protect and promote.[84] The South African Constitution adds the obligation to fulfil. The African Commission seems to have incorporated the obligation to fulfil in its list of duties. According to the African Commission:[85]

> [A]ll rights — both civil and political rights and social and economic — generate at least four levels of duties for a state that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfil these rights. These obligations universally apply to all rights and entail a combination of negative and positive duties.

Unlike the foregoing instruments, the Sudanese Constitution provides for five typologies of obligations. Section 27(1) of the Constitution binds all duty bearers to a commitment to 'respect and promote human rights and fundamental freedoms enshrined in this Constitution'. Sub-section (2) provides further for the duty to 'guarantee,

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83 n 76 above.

84 *Social and Economic Rights Action Centre & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (*SERAC* case).

85 *SERAC* case (n 84 above) para 44.

protect and implement this Bill'. Therefore, the Constitution imposes a novel obligation to 'guarantee' to the list under CESCR and the African Charter, it is submitted. In order to appreciate the importance of these obligations, it is expedient to determine what they entail.

The duty to respect requires the state to refrain from interfering with the enjoyment of socio-economic rights.[86] Interference could be explicit or implicit. Therefore, the duty to respect imposes a negative obligation upon the state, but it could, nevertheless, require the state to take proactive measures, for example, to prevent state agents from acting in certain ways, or to provide reparation if a duty has been breached.[87]

With respect to the duty to protect, the state is required to prevent third parties from unduly interfering with the right-holder's enjoyment of a particular freedom or entitlement. The state is expected to act in such a way that is necessary to prevent, stop, or obtain redress or punishment for third party interference.[88] In *Commission Nationale des Droits de l'Homme et des Libertés v Chad,*[89] the African Commission held that the failure by Chad to protect its citizens against rebel attacks was a breach of its obligation to protect under the African Charter.

The duty to 'fulfil' and 'promote' imposes obligations on a state to 'facilitate, provide and promote access to rights. This is particularly the case when such access is limited or non-existent.'[90] It is positive in nature and requires great resources. It requires the state to adopt legislative, judicial or administrative and budgetary measures towards the fulfilment or full realisation of these rights.[91] In *People's Union for Civil Liberties v Union of India and Others*,[92] the Supreme Court of India found the government of India in violation of its obligation to fulfil when it failed to provide emergency grains from its reserves for the inhabitants of Rajasthan where many people were dying of starvation.

The word 'guarantee' means a formal assurance that certain conditions will be fulfilled; it is a promise with certainty.[93] Therefore, Sudan, as a guarantor of the Bill of Rights by virtue of this obligation, undertakes formally to ensure that every person living within its jurisdiction will benefit from the provisions of the Bill of Rights. But is this not what the justiciability of a bill of rights is all about? What new value is added? It is suggested that some value is added: As a surety of the Bill of Rights, Sudan must ensure its implementation and can offer no excuse

86 Maastricht Guidelines (1998) 20 *Human Rights Quarterly* 693 para 6.

87 *SERAC* case (n 84 above).

88 *SERAC* case (n 84 above) para 15.

89 (2000) AHRLR 66 (ACHPR 1995).

90 International Commission of Jurists Report on Socio-Economic Rights 2008, http://www.icj.org/publi_multi.php3?lang=en (accessed 31 March 2009).

91 Committee on ESC General Comment 14E/C 12/2000/4, CESCR para 33.

92 2004 3 SCC 363.

93 *Compact Oxford English dictionary* http://www.askoxford.com/concise_oed/guarantee?view=uk (accessed 1 September 2008).

in defence of why it could not. It is also making a formal and legal undertaking that it will certainly ensure that no third party violates the provisions of the Bill of Rights. Its value, therefore, is not in its content, but the certainty it brings to bear on the realisation of its obligations.

Implementation refers to the 'putting in effect'[94] of the provisions of the Bill of Rights. It is submitted that this obligation mandates the government to design programmes and policies to give effect to the provisions of the Bill of Rights. This obligation ensures that the government plays a purposive and proactive role in giving effect to provisions of the Bill of Rights.

Therefore, the government of Sudan not only has obligations under the Bill of Rights to respect, promote, protect, guarantee, fulfil and implement the provisions of the rights, but the government has a positive obligation to prevent, investigate and punish violations against individuals, whether that violence is committed by non-state actors or government officials.

Judicial review is a *sine quo non* to the realisation of the rights and liberties provided for in the Bill of Rights. In this regard, the Constitution establishes a concentrated court system. There are two systems of courts under the Constitution: the national judiciary, made up of the Supreme Court, the Court of Appeal, and any other court that may be established;[95] and the Constitutional Court.[96] Thus, Sudan has adopted the Kelsenian model of judicial review. This model concentrates the power of constitutional review within a single judicial system called the Constitutional Court and situates that Court outside the traditional structure of the judicial branch.[97] The national judicial system is then left to deal with non-constitutional issues.

There are problems with this model. The delineation of jurisdiction in which the resolution of all cases with a constitutional dimension is monopolised by the Constitutional Court and those arising from ordinary laws by the national judiciary is simple, but problematic in a transitional society with an infant judiciary.[98] In modern constitutional states, each and every judge must first establish the content of the relevant norm, which in some cases requires the simultaneous application of statutory, constitutional and sometimes supra-national norms.[99] A complete separation of constitutional jurisdiction and ordinary jurisdiction is not possible in practice.[100] Thus, in many jurisdictions today, even though they give the Constitutional Court the last word

94 As above.
95 Arts 123, 124, 125, 126 & 127.
96 Art 119.
97 Garlicki (n 48 above) 44.
98 As above.
99 As above.
100 As above.

in constitutional disputes, the Constitutional Courts no longer claim a monopoly of the system, but act as co-ordinators of that process.[101]

Having provided for justiciable socio-economic rights that are very extensive and complicated, the Constitution does not provide adequate guidance to the judiciary on how to adjudicate these rights. The only reference the Constitution makes in this regard is in section 122(d)(4) where it provides that the Constitutional Court shall protect the rights and liberties provided for under the Bill of Rights. The Constitutional Court Act of 2005 and the Rules of Procedures of the Court neither provide for an ascertainable framework for adjudicating socio-economic rights, nor capture in its entirety the complexities and challenges presented by justiciable socio-economic rights. It is, therefore, necessary to examine in detail the court system established by the Constitution.

7 The national judiciary

According to the Constitution, it does seem that the national judiciary has no competency to adjudicate on constitutional and human rights issues. Section 125 of the Constitution, which spells out the function of the national Supreme Court, determines that it shall be a court of cassation and review in criminal and civil matters arising under national laws and personal matters. The national judiciary has 'competency to adjudicate on disputes and render judgement in accordance with law', meaning that it cannot declare a law null or void.[102] The national Supreme Court is the court of last instance for all non-constitutional matters arising in respect of national laws.

The Constitution — while taking away from the national Supreme Court jurisdiction over constitutional issues — fails to provide for whether or not, if a constitutional matter arises in the course of a trial, the Supreme Court should defer to the Constitutional Court. This failure has serious implications for constitutionalism as well as for individual litigants. Thus:[103]

> Referring constitutional questions to the Constitutional Court is clearly problematic. This will prevent constitutionalism from filtering down to lower courts, to take root and to operate effectively — which is essential. Also, there is the danger that people are forced to go through years of expensive litigation, and only thereafter can they show that the point could be disposed of on a simple constitutional issue. A more worrying aspect of such a procedure is its implication for the right to a fair trial. One would wonder how the lower courts are supposed to apply the criminal law, if they cannot test its constitutionality.

[101] As above.
[102] Sec 123(3).
[103] Ibrahim (n 45 above) 630.

This has particular implications for the Bill of Rights. Excluding the jurisdiction of the national judiciary on human rights issues presupposes that there are cases that are purely civil or criminal and others human rights cases. As stated earlier, there is no such watertight division in practice.

It is submitted that, since section 48 of Constitution provides that 'the Bill of Rights shall be upheld, protected and applied by the Constitutional Court and other competent courts', an interpretation that excludes the national judiciary is unconstitutional. The national judiciary is bound and constitutionally competent to adjudicate on and apply the Bill of Rights. Given its widespread presence and its lax accessibility provisions, excluding the Bill of Rights from its jurisdiction is tantamount to excluding the majority of people from the protection of the Bill of Rights.

8 The Constitutional Court

The Constitutional Court was first established under the 1998 Constitution. It has nine justices of 'proven competency, integrity, credibility and impartiality' who are appointed by the President of the Republic upon recommendation of the newly-founded National Judicial Services Commission and the approval of the Council of States by a two-thirds majority.[104] The Constitutional Court is the custodian of the Constitution.[105] It controls the actions of the government with respect to individuals.[106] It is the only court with the power to repeal and quash unconstitutional laws, to declare null and void and its decisions are binding *erga omnes*.[107] It is 'independent and separate from the national judiciary'.[108] The Constitutional Court is not a court of appeal, except from the Southern Sudan Supreme Court.[109] Consequently, it lacks supervisory jurisdiction over the decisions of the highest state courts. With no appellate jurisdiction from the national judiciary and insulated from adjudicating on the ordinary law of the land, it would seem that for alleged violations of national or state laws, the Constitutional Court has no jurisdiction.[110]

8.1 The Constitutional Court and human rights

Section 122(1)(d) of the Constitution provides that the Constitutional Court shall 'protect human rights and fundamental freedoms'. Furthermore, section 78 states:

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104 Secs 120 & 121.
105 Sec 122.
106 Sec 122(1)(b)(d).
107 Sec 122 & para 2.11.32 of the Power Sharing Agreement (Component of CPA).
108 Sec 119.
109 Sec 122 (c).
110 Sec 122.

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

The combined effect of sections 78(a) and 122(1) (b), (c), (d) and (e) of the Constitution is that an individual can apply to the Constitutional Court if his or her right in the Bill of Rights is infringed.

These rights and freedoms include those provided for in the Bill of Rights and all rights and freedoms enshrined in international human rights instruments to which Sudan is a party.[111] How an individual or group of individuals could access the Court and how the Court conducts it procedures are scantly provided for in the Constitution. The Constitutional Court Act of 2005 (CCA) was passed to regulate these issues. The analysis of the Constitutional Court Act below is limited to questions of the constitutional review of laws and individual complaints procedures which fall within the scope of this work.

8.2 Constitutional review of laws

There are usually two types of constitutional review of laws:[112] the abstract constitutional review process in which the applicant approaches a court directly for it to scrutinise a piece of legislation, and the concrete constitutional review of laws in which the constitutionality of a law is scrutinised in a legal suit in which the constitutionality of the law is decisive. There is no clear provision in the Constitution to identify from which type is anticipated. Section 122(1)(e) only empowers the Constitutional Court to 'adjudicate on the constitutionality of laws', which could mean both the abstract and the concrete review of laws. However, while the CCA provides for the abstract review,[113] it omits completely the concrete review.

The Constitution is equally silent as to whether an individual can initiate an application for the constitutional review of laws. It has been suggested that the word 'disputes' in sections 122(1)(b) and (c) and 174(b) of the Constitution is a broad term which includes individuals.[114] The CCA provides for individual procedures in section 18 of the CCA. The combined effect of sections 18(b) and (d) of the CCA is that if an individual's interest is affected by any law, he or she has the requisite standing to approach the Constitutional Court for a review. Since the executive or the legislature does not need an interest to approach the

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111 Sec 27(3).

112 For a comprehensive review of the different methods of judicial review, see M Mohammed 'The emergence of constitutional courts and the protection of individual and human rights: A comparative study' in E Cotran & A Sharif (eds) *The role of the judiciary in the protection of human rights* (1997) 283.

113 Secs 18-20 CCA.

114 http://www.mpil.de/shared/data/pdf/manual_papers_and_proceedings_of_the_heidelberg_seminars_on_potential_disputes_before_the_sudanese_constitutional_court.pd (accessed 31 March 2009).

Constitutional Court, it is submitted that the condition that an individual must claim the violation of a constitutional right and a prejudice of an interest is extremely strict.

8.3 Admissibility

The question of admissibility of an application is also not clear under the Constitution. Since it provides that the Constitutional Court shall 'adjudicate on the constitutionality of laws or provisions in accordance with the Constitution', it could mean that there is no standing requirement. Section 18 of the CCA only stipulates the requirement of interest in respect to individual or group suits.[115] An *argumentum e contrario* would yield that other applicants not mentioned are admitted in this procedure.

The subject matters of a possible application before the Constitutional Court are 'laws and provisions'. Law generally here might mean acts of the legislature. But what 'provisions' are referred to that might need interpretation? It is presumed that it could not mean provisions of law, because that could just be a tautology, and therefore, it could refer to other legal norms other than those enacted by the legislature.

What is not certain is whether the individual applicant must complain of a violation of his own constitutional rights and must be affected negatively by the contested act. Does it mean that any provision of the Constitution can be challenged as long as one is affected by the act in contention? Or even that one could challenge any provision of the Constitution even if one is not negatively affected? It does seem that only an individual or group of individuals who have their constitutional rights violated and have suffered actual injury as a result are allowed to approach the Constitutional Court.[116] It is submitted that this interpretation is too restrictive and a teleological interpretation should be adopted to make room for public interest litigation.

Access to the Constitutional Court is further limited because a constitutional suit may not be conducted except by a counsel who has practised the legal profession for 20 years.[117] In addition, it is not clear whether or not an applicant must exhaust judicial remedies before approaching the Constitutional Court. Section 19(4) of the CCA provides:[118]

> Saving the rights and freedoms contained in the Bill of Rights, set out in the [Constitution], where the decision, or work, which is constitutionality contested is from such, as the law may empower a higher authority to review it, the plaintiff shall produce such, as may prove his exhaustion of the ways of

[115] Secs 18(1)(a) & (d) CCA.
[116] Sec 18 CCA.
[117] Sec 29 CCA.
[118] Constitutional Court Act 2005.

grievances or the expiry of thirty days, of the date of receipt by the higher authority, of the grievance.

With respect to the decisions and acts of the executive and that of the judiciary, approaching the appropriate body for review is probably what is anticipated here. It is practically difficult to imagine how an individual complaining of an infringement of rights on the basis that the law is unconstitutional can exhaust all remedies, given that only the Constitutional Court can hear constitutional issues. It is therefore submitted that there is no constitutional need for the exhaustion of remedies with respect to constitutional law review cases.

8.4 Remedial powers of the Constitutional Court and human rights cases

It is trite law that where there is a wrong, there must be a remedy. However, section 122, dealing with the competency of the Constitutional Court, does not provide for a remedy other than in section 122(d), where it provides for the protection of human rights and fundamental freedoms. What this means in concrete terms will be a matter of interpretation by the Constitutional Court itself. It is submitted, however, that the Constitution places on the Court an obligation to protect.

As a standing paragraph, the drafters of this Constitution wanted to emphasise this obligation. It is submitted that this obligation confers upon the Constitutional Court, in addition to ensuring that the government does not interfere with the rights of its people, a proactive jurisdiction to ensure in all its decisions and pronouncements that all human rights are respected. It is submitted that the duty to protect should enable the Constitutional Court to dispense with any rule of standing that prejudices a right, when a human right has been violated. As stated earlier, this obligation has negative as well as positive components.

9 Conclusion

The Interim Constitution of Sudan is a complex legal document. A complex feature is the way in which it attempts to constitutionalise economic and social rights. A brief reading of the Constitution may reveal that socio-economic rights are not justiciable and enforceable since section 22 of the Constitution has ousted the jurisdiction of the courts. This work has demonstrated that such an interpretation is unconstitutional and has convincingly established that socio-economic rights, not only those mentioned in the GPD, but those provided for in all international human rights instruments, are indeed justiciable and enforceable by the Constitutional Court.

It has also been proven that section 22 is not only redundant, but that section 27(3) has rendered international human rights instruments self-executing and therefore takes precedent over domestic norms. In order to effectively adjudicate on these international human rights instruments, it has been recommended that the Kelsenian model of judicial review is deficient. A model that allows courts at all levels to adjudicate on the Bill of Rights that falls within their jurisdiction has been suggested.