

Constitution-making in post-conflict transitions: Towards a transformative judicial design

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Abstract

This chapter explores the role that South Sudan's judiciary could play in safeguarding the country's constitutional guarantees and transformative process. It makes the case for the parties to the Revitalized Agreement on the Resolution of Conflict in South Sudan (R-ARCSS) to accord a central place to judicial reform in the making of the 'permanent' constitution. The chapter examines the challenges that affect the performance of South Sudan's judicial system and offers suggestions for consideration in the drafting of the constitution. It argues that the current judiciary has fallen short of fulfilling its constitutional duties. The reasons for this include a lack of judicial independence, which results in interference by the executive branch,

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and the inadequate attention paid to the appointment of judges; in addition, language barriers in the judicial system undermine judges' ability to deliver quality judgments. While the R-ARCSS stresses the need for improving infrastructure and building the capacity of judges and court personnel, much work remains to be done. Overall, if the judiciary is to discharge its mandate effectively, the future constitution of South Sudan must ensure that the judiciary is designed in such a way as to enhance access to timely and impartial justice.

Key words: *transformative constitutionalism; constitution-making; judiciary; judicial independence; legal pluralism*

1 Introduction

Following the 2013 conflict that returned the newly independent South Sudan to yet another devastating civil war, the warring parties – the Sudan People's Liberation Movement (SPLM) and the Sudan People's Liberation Movement in Opposition (SPLM-IO) – entered into a peace agreement in 2015 brokered by the Intergovernmental Authority on Development (IGAD). The agreement, dubbed the Agreement on the Resolution of Conflict in South Sudan (ARCSS), halted the conflict before breaking down as a result of another civil war that erupted in 2016. Efforts were made to revive the agreement, and eventually the Revitalized Agreement on the Resolution of Conflict in South Sudan (R-ARCSS) was signed in 2018. The R-ARCSS, which for the most part contains similar provisions to its predecessor, the ARCSS, provides for a permanent constitution to be drafted during a 36-month transitional period.

The literature shows that after conflicts, many states draft new constitutions in a bid to restore stability and prevent future conflict. There are two key reasons for this. First, the new constitution can lay down firm governance structures that manage power dynamics and safeguard the rights of those who were previously oppressed. Secondly, it outlines the system of government and resource distribution to be adopted in a new political environment. However, these goals cannot be achieved without a culture of rule of law, an experienced judiciary, and the existence of constitutional safeguards around judicial independence.

The constitution-making process in South Sudan presents an opportunity for the country to adopt a constitution that not only

transforms the courts but restores public confidence in the judiciary. Recent constitutional transitions worldwide have sought to empower the judiciary by addressing key issues such as the institutional form of the judiciary in the new constitutional order, the scope of the courts' jurisdiction in constitutional matters, and the nature of access to the court. The chapter sets out to explore the roles the judiciary could play in safeguarding constitutional guarantees and an inclusive legal process; in so doing, it argues that parties to the R-ARCSS need to accord a central place to the judiciary in the process of making South Sudan's permanent constitution.

Courts with constitutional jurisdiction play an important role in ensuring that governmental actions are taken in accordance with the provisions of the law. Elsewhere, a review of country case studies reveals the different roles that courts play both as protector of rights, the rule of law and constitutionalism as well as constraints on errant government action.¹ In South Africa, Uganda, Ukraine, and Fiji, for example, courts have lived up to their constitutional mandate of upholding the constitution, going as far as ruling against the government on certain occasions.

This chapter assesses the performance of the judiciary under the Transitional Constitution of South Sudan, 2011 (TCSS) and makes suggestions for consideration in the drafting of the permanent constitution. It argues that the judiciary has failed in discharging its constitutional mandate. The reasons for this include a lack of judicial independence, which results in interference by the executive branch, and the fact that inadequate attention is paid to the appointment of judges; in addition, language barriers in the judicial system undermine judges' ability to deliver quality judgments. The inability of the judiciary to uphold constitutional guarantees not only affects the legitimacy of the courts, but erodes trust in the entire system of government and in constitutionalism itself.²

While the R-ARCSS stresses the need for improving infrastructure and building the capacity of judges and court personnel, much work

1 K Samuels & V Wyeth 'State-building and constitutional design after conflict' International Peace Academy (2006).

2 B De Villiers 'Breathing life into the constitution: The transformative role of courts to give a unique identity to a constitution' Law School, University of Johannesburg (2022).

remains to be done.³ The judiciary's main function is to settle disputes and administer justice by applying the law to cases before it.⁴ As such, for the judiciary to discharge this mandate effectively and uphold the rule of law, human rights and constitutionalism, the future permanent constitution of South Sudan must ensure that the judiciary is designed in such a way as to enhance access to timely and impartial justice.

The chapter consists of five sections. Section 1 looks at the role of the judiciary in modern constitutions and considers the South Sudanese Supreme Court in this light. Section 2 discusses the independence of judiciary and its prerequisites. In particular, it examines the adequacy of the country's constitutional guarantees and culture of respect for judicial independence. Section 3 assesses the challenges and opportunities of the current judiciary, while section 4 reflects on how this institution ought to be transformed. Here, the analysis draws on lessons provided by Kenya's Constitution of 2010 and South Africa's Constitution of 1996. Finally, section 5 concludes the chapter and makes recommendations.

2 The role of the judiciary and Supreme Court of South Sudan

The basic function of the judiciary is to settle disputes and administer justice by applying the law to cases lodged before it.⁵ Modern constitutions assign the judiciary numerous critical roles, such as guarding against government over-reach, maintaining the rule of law and constitutional integrity, and importantly, serving as a catalyst for social and political change. Recent constitutional transitions around the world have aimed to empower the judiciary by tackling essential issues such as its institutional structure in the new constitutional framework, the extent of court jurisdiction on constitutional matters, and court accessibility. For instance, Kenya's 2010 Constitution established a new Supreme Court with broader jurisdiction over constitutional and other legal issues. This new judicial framework simplifies access to the Supreme Court for both individuals and organisations by adopting rules on *locus standi* that lower the barriers to initiating court actions.⁶

3 R-ARCSS, art 1(17)(2).

4 N Hedling *A practical guide to constitution building: The design of the judicial branch* (2011).

5 Hedling (n 4).

6 Kenyan Constitution, 2010, art 48.

In regard to South Sudan's Transitional Constitution, the Supreme Court sits at the top of the hierarchy of courts and is endowed with the exclusive power of constitutional interpretation. The court is vested with original jurisdiction to adjudicate on any legal disputes arising under either under the TCSS or state constitutions.⁷ Other roles include review and cassation in respect of any criminal, civil and administrative matter.⁸

However, these roles, particularly that of constitutional interpretation, are likely to be affected by the establishment of the Constitutional Court provided for under the R-ARCSS,⁹ a document which overrides the TCSS in the event of contradiction.¹⁰ In countries with a supreme court and constitutional court model like South Africa's, the role of constitutional interpretation is vested in the constitutional court.¹¹ It is unclear what the parties to the R-ARCSS aim to achieve with the establishment of a constitutional court, given that the Supreme Court possesses elements of a constitutional court.¹² In any case, the Constitutional Court is expected to play a role in the constitution-making process, in particular by ensuring that the constitution is drafted in accordance with pre-agreed-upon principles.¹³

Akech notes that the R-ARCSS does not provide the Supreme Court with the role of certifying the final text of the 'permanent' constitution, and argues that constitutional certification gives legitimacy to the constitution.¹⁴ However, he points out that such a role is assigned to the Constitutional Court:

The Constitutional Court that is to be established in accordance with the terms of the R-ARCSS may be called upon to settle disputes arising from constitution-building process and to certify that the final text has complied with the peace pact.¹⁵

This could be a source of conflict between two courts with competing jurisdictions. The next sections discuss elements that are key to the proper

7 TCSS, art 126(2)(a)-(c).

8 TCSS, art 126(2)(e).

9 R-ARCSS, art 1(17)(7).

10 R-ARCSS, art 8(2).

11 Constitution of South Africa, 1996, sec 167(5).

12 Judiciary Act, 2008, sec 11(a).

13 R-ARCSS, art 6(2).

14 JGA Geng 'Foreign influence and the legitimacy of constitution-building in South Sudan' LLD thesis, University of Pretoria, 2022 164.

15 Geng (n 14).

functioning of the judiciary. In particular, judicial independence and its prerequisites are assessed in the light of constitutional guarantees.

3 Judicial independence under the 2011 Transitional Constitution

As noted above, the judiciary plays an important role in a constitutional democracy. This role, however, is realised only if the courts are properly set up, judges are carefully appointed to the bench, and they enjoy judicial independence. Judicial independence is inherent in the principle of separation of powers, which is the cornerstone of democracy and the rule of law. It is essential to the enforcement of human rights provisions and other constitutional guarantees, as well as to the strengthening of the judiciary's ability to engage in independent and meaningful dispute resolution and constitutional review.¹⁶ Thus, the absence of judicial independence gives rise to the abuse of power by other branches of government, deprives individuals of their rights, and opens up possibilities for corruption.¹⁷ In most African states, including South Sudan, the independence of the judiciary is guaranteed in the constitution, but its attainment remains elusive.¹⁸ In this context, Konrad Lachmayer identifies various strategies that governments use to cripple courts' independence:

The first dimension refers to courts as an institution and the institutional design of a court. By legal change or political pressure, the institutional framework is directly attacked. This creates anti-judicial damage within the court and affects the independence of judges in their daily work, changes majorities in decision-making, or limits the effectiveness of proceedings. The government limits the courts' competences and/or the court will be influenced from outside. The second dimension relates to the judges themselves. Different strategies exist to influence the judges directly. The judge as a person or his personal environment will be influenced in general or in deciding a particular case. Other aims are a greater conformity to governmental politics or at least less resistance of the judges.¹⁹

16 Geng (n 14).

17 Geng (n 14).

18 B Kabumba 'The practicability of the concept of judicial independence in East Africa: Successes, challenges and strategies' Paper given at the Conference of the East African Magistrates and Judges Association (2016) 21.

19 K Lachmayer 'Disempowering courts: The interrelationship between courts and politics in contemporary legal orders or the manifold ways of attacking judicial independence' in M Belov (ed) *Courts, politics and constitutional law* (2019) 31.

The Transitional Constitution explicitly states that the judiciary is independent of the executive and legislative branches.²⁰ It affirms that judicial power is ‘derived from the people and is exercised by the courts in accordance with the customs, values, norms and aspirations of people and in conformity with the constitution and the law’.²¹ It also provides that ‘the executive and legislative organs at all levels of government shall uphold, promote and respect the independence of the judiciary’, and that all organs and institutions of the state are bound to execute judicial decisions.²² The Constitution further states that the judiciary and its members shall be subject to the Constitution and the law, which judges are supposed to apply impartially and without fear, favour, or political interference. Moreover, judges are to be protected from reprisals as a consequence of their judicial decisions.²³

Despite these clear constitutional provisions guaranteeing the independence of judiciary, the practice shows that there have been instances of direct interference by the executive in the judiciary. In 2014, the Deputy Chief Justice was dismissed by the President upon objecting to a presidential order that expanded the constitutionally recognised ten states to 28. This was followed by the dismissal of 14 justices and judges who went on strike demanding the removal of the Chief Justice and an improvement of their working conditions.²⁴

Under the Transitional Constitution, judges can be removed only for proven gross misconduct, incompetence and incapacity and only upon the recommendation of the National Judicial Service Commission.²⁵ It should be noted no such commission has been established and that, at any event, it remains unclear how it would exercise this function. Since those events of 2014, the judiciary, in particular the Supreme Court, has witnessed a series of resignations over its lack of independence and its exposure to interference by members of the executive.²⁶

20 TCSS, art 124(1).

21 TCSS, art 122(1).

22 TCSS, art 122(7).

23 TCSS, art 124(4) and (6).

24 C Rickard ‘Sacking of 14 judges by South Sudan President unconstitutional: East African Court of Justice’ AfricanLII, 30 July 2020, <https://bit.ly/417NKTH> (accessed 25 April 2023).

25 TCSS, art 134(2).

26 P Mach ‘South Sudan Supreme Court judge quits’ aa.com, 15 November 2017, <https://www.aa.com.tr/en/africa/south-sudan-supreme-court-judge-quits/965565#> (accessed 25 April 2023).

In view of the experiences above, it is fair to say that in practice the current South Sudanese judiciary is a subset of the executive, if not a department within the Office of the President. Given that the Constitution contains explicit provisions on judicial independence, the continued occurrence of constitutional violations could be attributed to the government's lack of commitment to upholding and implementing constitutional provisions.²⁷

Ratnapala aptly observes that 'a constitution has no life of its own, and ... its words have no magical quality. It gains meaning from the way it is understood, construed, observed and enforced by officials who form the government'.²⁸ This observation can be substantiated by the well-documented fact that certain countries, such as Britain, New Zealand, and Israel, operate efficiently with independent judiciaries without any entrenched constitutional provisions.²⁹ By implication, the judiciary cannot play its role as the custodian of the constitution and the protector of rights, democracy, and the rule of law if judges are not independent in their exercise of the duties normally assigned to them by the law.

4 Prerequisites for judicial independence

4.1 Stringent selection criteria for judicial appointments

Judicial appointment is key to safeguarding judicial independence. Most constitutions worldwide contain express provisions on how judges are appointed to the bench. Under South Sudanese law, the Judiciary Act, 2008 sets out the general conditions and requirements of judicial appointments, which are made either by way of promotion from the lower courts or by means of recruitment from outside the judiciary.³⁰ The Act provides that individuals appointed to the bench must be citizens of 'sound mind' who hold the 'minimum qualification of Bachelor of Laws

27 MAW Deng 'The importance of judicial independence to the administration of justice: The case of South Sudan' *The Sudd Institute* (2016).

28 S Ratnapala 'Securing constitutional government: The perpetual challenge' (2003) 8(1) *The Independent Review* 9.

29 CM Fombad 'Constitutional reforms and constitutionalism in Africa: Reflections on some current challenges and future prospects' (2011) 59 *Buffalo Law Review* 1007.

30 See generally the Judiciary Act, secs 22-25.

(LLB)' or its equivalent from a recognised university or higher institute of law. The Act also spells out different age limits for inferior courts as compared to the Supreme Court, and disqualifies individuals from appointment if they have been convicted of an offence involving moral turpitude and dishonesty.

However, the Act is ambiguous with regard to the appointment of judicial assistants, which it says shall be by 'way of selection'.³¹ Under both the Transitional Constitution and the Judiciary Act, the President appoints all judges of the statutory courts, having regard to their competence, integrity, credibility and impartiality.³² With the exception of the Chief Justice, the President makes these appointments after screening and recommendation by the National Judicial Services Commission.³³ Pursuant to the TCSS and Judiciary Act, the appointment of the Chief Justice, Deputy Chief Justice, and justices of the Supreme Court is subject to approval by a two-thirds majority of all members of the National Legislative Assembly.³⁴

Although the Act spells out the criteria for judicial appointments, the non-existence of a judicial services council or national judicial services commission tasked with the responsibility of overseeing recruitment and making recommendations to the President for formal appointment suggests that such criteria are not heeded. Indeed, in February 2013 the first-ever judicial appointment took place when 78 judicial assistants were appointed by the Chief Justice. These appointments were not only criticised for lack of transparency, nepotism, and disregard of the appointment criteria set out in the law, but were also believed to have transgressed the basic functions of the Chief Justice.³⁵ More recently, in May 2023, the judiciary issued a second notice of judicial appointment in

31 Judiciary Act, sec 26(1).

32 TCSS, art 133(1) and Judiciary Act, sec 21(1). As a point of clarification, the Judiciary Act refers to the Judicial Services Council while the TCSS refers to a Judicial Services Commission. It should be noted that before the TCSS came into force, the Judicial Services Commission was known as the Judicial Services Council. Although its name has changed, its role remains that of recommending the appointment and removal of judges.

33 TCSS, art 133(2) and Judiciary Act, sec 21(2).

34 TCSS, art 133(3) and Judiciary Act, sec 22(1).

35 MAW Deng 'South Sudan's chief justice is overstepping his bounds: Why it matters for the rule of law' *The Conversation*, 10 May 2021, <https://theconversation.com/south-sudans-chief-justice-is-overstepping-his-bounds-why-it-matters-for-the-rule-of-law-160406> (accessed 10 May 2023).

terms of section 26 of the Judiciary Act, but it is unclear if the problems associated with the previous appointments were avoided.

In South Sudan's constitution-making process, it would be wise for the drafters to entrench provisions relating to the appointment and removal of judges and make a clean break with the flawed practices of the past. In Kenya prior to the 2010 Constitution, the judiciary faced challenges similar to those confronting the South Sudanese judiciary today. Ogari, in a study of Kenya's judicial system at the time, identified a range of maladies:

The Chief Justice had the ultimate power to hire and fire, to make transfers and promotions as he pleased, control the Judiciary's funds that were never properly accounted for and to create policies with disregard to his stakeholder's concerns, especially his internal stakeholders, whose inputs were never heeded. The institution's structure did not allow for shared responsibilities and proper delegation of duties. It was under-capacitated in leadership and management offices, where there was lack of mentorship, ethnicity, excessive centralisation, absence of consultation, privatisation and personalisation of leadership spaces, clientelism, poor attitudes and ethics, discrimination and a weak culture of professionalism in the management of the courts.³⁶

To address issues relating to the appointment of judicial officials, Kenya's 2010 Constitution, sought to transform the judiciary by introducing a host of measures, including the establishment of an independent Judicial Service Commission to oversee judicial appointments. This body consists of lawyers, judges elected by their peers, and one or two individuals nominated by Parliament. Judicial appointees are required to have a high moral character, minimum qualifications, and a specified number of years as practising lawyers; public interviews are a central part of the process.³⁷

The Kenyan Constitution also introduced a vetting process for all judicial appointments in order to assess the integrity and accountability of judges. The success of these selection criteria is evident in the leading role the country's Supreme Court played in elections in 2017 and 2022,

36 CK Ogari 'Factors influencing implementation of judiciary system projects in Kenya: A case of the Judiciary Transformation Framework' PhD thesis, University of Nairobi, 2014 38.

37 Kenyan Constitution, 2010, art 171(2).

when it became the first court in Africa – and the fourth in the world – to nullify presidential elections for fraud and irregularities.³⁸

4.2 The financial independence of the judiciary

Judicial independence is affected not only by appointments but by how the judiciary is funded, given that it requires resources in order to properly perform the functions assigned to it by law. Under the Transitional Constitution, the judiciary is self-accounting and its finances are subject to public audit.³⁹ Its budget is approved by the National Judicial Services Committee (NJSC) and drawn from the country's consolidated fund.⁴⁰ However, the fact that the budget has to be approved by the NJSC has been criticised for compromising judicial independence,⁴¹ in part because it can lead to unnecessary delays – according to Deng, 'the judiciary's budget should come directly from the consolidated fund without the bureaucratic requirement of being approved by an intermediary body'.⁴²

By contrast, under the Kenyan Constitution of 2010, the budget of the judiciary is approved by the Parliamentary Budget Committee and paid directly to the judiciary fund. The latter fund is administered by the Chief Registrar of Judiciary, who prepares yearly estimates of expenditure and submits it to Parliament for approval. This system of having the Chief Registrar manage judiciary funds has the benefit of reducing the administrative burden on the Chief Justice. Given the success it has had in Kenya, this is a further option that could be considered by the drafters of South Sudan's permanent constitution.

As mentioned, the implementation of constitutional provisions has been wanting in South Sudan. Lack of financial independence has rendered the current judiciary ineffective, if not dysfunctional. The result has been resignations by members of the Supreme Court and Court of Appeal, among them Justice Dr Geri, Justice Clement Kuch, and Justice

38 The New York Times 'Kenya Supreme Court nullifies presidential election' The New York Times, 1 September 2017, available at <https://www.nytimes.com/2017/09/01/world/africa/kenya-election-kenyatta-odinga.html> (accessed 12 May 2023).

39 TCSS, art 124(3).

40 TCSS, art 124(2).

41 MAW Deng 'Constitutional transformations: Failure and opportunity in post-independence South Sudan' PhD thesis, Queens University, Australia, 2022 86.

42 Deng (n 41).

Kukurlopita. The latter (as quoted by Deng) was particularly critical of the lack of financial independence:

The Judiciary lacks financial independence as enshrined in the Transitional Constitution. The guarantee of financial independence [entails] the promulgation of specific tools, instruments and financial measures to prevent the subjection of the judicial authority to the executive and legislative organs. The absence of these prerequisites has the Judiciary vulnerable to extortion ... The budget of the Judiciary is entirely a decision of the executive only subject to the procedural cosmetics by the Judiciary to mislead the public that the budget in fact is made by the Judiciary. The poor remuneration for judges and justices in South Sudan is a breeding ground for corruption in the Judiciary, and once corruption is exhibited, whatever justice is said to be done is a sham.⁴³

In a similar vein, in 2022 the President donated eight Land Cruisers to the judiciary, citing lack of mobility among its personnel as the reason for his largesse. Although this could be seen as an act of good-faith cooperation between two organs of state, in effect it served to compromise judicial independence, given that the judiciary is an independent institution with its own budget. The donation once again made the judiciary seem much like a mere department within the Presidency.⁴⁴

4.3 Fixed and explicit terms of judicial office

Finally, another key factor that affects judicial independence is the tenure of judges. Under the TCSS, tenure and other terms and conditions of service of judicial officers are not specified. The Constitution leaves this matter to legislators to regulate by means of enacting a law. In most constitutions, however, judicial terms of service are explicitly guaranteed. For example, under Kenya's Constitution of 2010, the chief justice holds office for a maximum of ten years unless he or she retires, whichever comes first.⁴⁵ Other judges retire from service after attaining the age of 70 but may choose to retire at 65.⁴⁶ Similarly, in South Africa, Constitutional Court judges serve for a maximum of 12 years, subject

⁴³ Fombad (n 29).

⁴⁴ Juba Echo TV 'President Kiir donates new vehicles to the judiciary of South Sudan' Juba Echo TV, 2 October 2022, <https://jubaechotv.com.ss/president-kiir-donates-new-vehicles-to-the-judiciary-of-south-sudan/> (accessed 4 May 2023).

⁴⁵ Kenyan Constitution, 2010, art 167(2).

⁴⁶ Kenyan Constitution, 2010, art 167(1).

to mandatory retirement at the age of 70,⁴⁷ while according to article 176(2) of the Constitution, '[o]ther judges hold office until they are discharged from active service in terms of an Act of Parliament'.

5 The judiciary's challenges and opportunities

This section provides an overview of key challenges facing South Sudan's current judiciary – challenges which, arguably, should be addressed by reforms during the constitution-making process. A number of factors have made the present judiciary ineffective and, indeed, the worst-performing branch of government. The main ones are deficiencies in judicial leadership; bribery; political interreference by members of the executive; lack of judicial independence; poor discipline and accountability; the limited technical capacity of judicial personnel; the complexities of a pluralistic legal system; the shift towards using the English language and the common law system; and limited infrastructure combined with limited judicial competence, which results in large case backlogs. Some of these challenges are briefly discussed below.

5.1 Deficiencies in judicial leadership

The success of any institution depends on the nature of its leadership. Under the TCSS, the Chief Justice is responsible for the administration and supervision of all courts.⁴⁸ This includes administering the judicial budget and the institution of penal to decide cases. Another administrative function of the Chief Justice is the issuance of judicial circulars, warrants of establishment, and directives to the courts necessary for the proper and efficient administration of justice.⁴⁹ It should be noted that the tenure of office of the Chief Justice is not provided for in the TCSS. As a result, the first-ever Chief Justice of independent South Sudan held prolonged tenure from 2011 until his removal in May 2025. Although long terms of service may strengthen judicial independence, they can also potentially weaken judicial accountability.

Presently, the leadership of the judiciary is centralised in the hands of the Chief Justice, who on occasion has been accused of corruption and a

47 Constitution of South Africa, 1996, art 176(1).

48 TCSS, art 127(1).

49 TCSS, art 127(2).

lack of transparency. For example, in 2013 Justice Clement Kuch, a judge of the Court of Appeal, resigned, citing 'bad administration, corruption, nepotism and favoritism' in the judiciary as reasons for his decision.⁵⁰ Other challenges relating to the administration of the judiciary include a lack of professional support services for judicial staff, weak financial and human resources policies, clientelism, and a weak culture of professionalism in the management of the courts.

These challenges are common in most African judiciaries, which points to the need for using transformational constitution-making to address judicial failures in the continent. Kenya again serves as an example. On taking office in 2011, the country's Chief Justice, Willy Mutunga, reported that

[w]e found an institution so frail in its structures; so thin in resources; so low on its confidence; so deficient in integrity; so weak in public support that to have expected it to deliver justice was to be wildly optimistic. We found a judiciary that was designed to fail.⁵¹

In 2012, the Kenyan judiciary introduced the Judiciary Transformation Framework in order to undertake comprehensive reform. This initiative stemmed from the 2010 Constitution, which clearly defines the duties and responsibilities of the Chief Justice as well as other role-players that assist him or her in leading a decentralised judiciary with a broad reach across the populace. To this end, the Constitution established, *inter alia*, the position of the Chief Registrar, who acts as the judiciary's main administrator and financial officer.⁵² To ensure the accountability of the judiciary fund, the Chief Registrar prepares annual expenditures and submits them to the National Assembly.⁵³ This new system eases the administrative burden on the Chief Justice, who now focuses on judicial matters.

50 United Nations Mission in South Sudan (UNMISS) 'Media monitoring report' UNMISS, 15 March 2013, https://www.ecoi.net/en/file/local/1001150/1226_1367851021_media-monitoring-report-15-march-2013.pdf (accessed 12 May 2023).

51 S Kang'ara et al (eds) *Beacons of judiciary transformation: Selected speeches, writings and judicial opinions of Chief Justice Mutunga* (Sheria Publishing House 2021) 14.

52 Kenyan Constitution, 2010, art 161(3).

53 Kenyan Constitution, 2010, art 173(3).

5.2 The shift towards English and the common law system

Another challenge affecting the judiciary's effectiveness is its shift from the inquisitorial system, which was used under Sudanese *Sharia'a* law, to the adversarial system. Under the TCSS, South Sudan officially adopted English as its language of law and common law as its legal system.⁵⁴ It is to be noted that the majority of the present judges and lawyers in the judiciary were trained in Arabic language under Sudan's *Sharia*-based civil law system. They therefore lack the language skills to practise in English, resulting in poor-quality judgments.⁵⁵ Problematic situations arise where two lawyers from different legal backgrounds argue a case in front of a judge who is familiar with only one of those backgrounds. This can result in misunderstandings and potentially undermine legal professionalism.

The International Commission of Jurists has noted the lack of uniform legal practice in South Sudan. According to its findings, the legal profession is fragmented between lawyers trained in Arabic and with a background in civil law and *Sharia'a*, on the one hand, and those who received legal training from foreign countries under a variety of legal systems, on the other.⁵⁶ This means that there is no functioning professional association representing the entire legal profession in the country.

5.3 The complexities of a plural legal system

Legal pluralism has numerous advantages. Many constitutions, especially those that have been developed after conflicts, incorporate legal pluralism to address conflicts stemming from diverse legal standards. By acknowledging a variety of sources of law, such as cultural norms and practices, within the constitution, community tensions can be alleviated. Moreover, legal pluralism promotes diversity in the justice system by enabling local courts, which are closer to communities and more accessible to them, to play a more significant role than otherwise.

54 TCSS, art 6(2).

55 PG Geng 'The role of international law in strengthening domestic rights institutions in South Sudan' PhD thesis, Sharda University, 2018.

56 Geng (n 55).

Yet despite the benefits of legal pluralism, it also presents challenges in administering justice, upholding the rule of law, and maintaining constitutionalism. Challenges include jurisdictional issues and constitutional conflicts, especially where certain norms contradict constitutional provisions relating to the protection of fundamental rights. It has been noted that legal pluralism threatens the basic rights of vulnerable groups, particularly women.⁵⁷

Under the TCSS, two legal systems are recognised: statutory and customary.⁵⁸ Both systems operate concurrently and in parallel in urban and rural areas. The statutory courts follow the principles laid down in statutes, while the customary courts rule according to the customs, norms, traditions and ethics of their respective communities.⁵⁹ In accordance with section 98(2) of the Local Government Act, 2009, customary courts do not have jurisdiction over criminal matters. There are, however, two exceptions: first, where a case has a ‘customary interface’ (meaning that the entire subject of dispute is a matter recognised under customary laws), and, secondly, only after having been referred by a statutory court. In practice, though, customary courts hear all kinds of cases. This may be due to the fact that the Act does not clarify what kind of criminal cases are considered to have a customary interface.

While customary courts play an increasingly important role in South Sudan’s legal system, their procedures and rulings are often inconsistent with the principles of basic human rights. For example, the principle that the accused has the right to be tried by a competent, impartial and independent tribunal is often violated by customary courts.⁶⁰ The jurisdiction of customary courts is not defined clearly, and as a result they entertain all matters, including criminal matters such as murder. Other practices that violate fundamental human rights are the compensation of murder with the exchange of a girl child, the imposition of cruel and inhuman forms of punishment such as flogging, and holding relatives or members of a clan collectively responsible for the crime of an individual.

The latter practice is common among the Dinka ethnic group. According to Justice Jok, Leitch, and Vandewint:

57 Geng (n 56).

58 TCSS, art 167(1).

59 Local Government Act, 2009, sect 98(1).

60 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, art A(1).

The reasons for assigning collective responsibility are twofold and key to understanding why customary law courts often provide a more socially acceptable (for Southern Sudanese society at least) means of dealing with homicide. Where an individual has killed another whilst involved in an interneccine dispute, the courts and the community recognize that the individual was acting as part of a family or community in carrying out the act and that the family or community bear collective responsibility. It [collective responsibility] is a clear recognition of the solidarity of the family and the responsibility the family has for the actions of one of its members.⁶¹

Although customary courts are subordinate and answerable to statutory courts, they are more closely linked to the executive branch than the judiciary, as they are established and regulated by the Local Government Act and administered by local government at the county level.⁶² This undermines the ability of the judiciary to monitor the judicial functions of customary courts. A study of local justice in South Sudan cites the concerns of a county judge:

We requested the executive that all the chiefs' courts should be under the judiciary so that we control [them] because their cases appeal for [i.e., are appealed to] the judiciary courts, not [to] local government. But the local government wants these courts because of revenues. Revenues only. But for us, we needed it because the cases which are finalized by the town courts and chiefs' courts come to [i.e., are appealed to] the county court ... We want these local courts under [the] judiciary.⁶³

The challenge posed by a complex legal structure does not seem likely to end anytime soon given the important place that customary courts occupy in the legal system of South Sudan. As one of the country's former Chief Justices, Justice Thiik, observed:

Customary law is a manifestation of our customs, social norms, beliefs and practices. It embodies much of what we have fought for these past twenty years. It is self-evident that customary law will underpin our society, its legal institutions and laws in the future.⁶⁴

In South Sudan, customary courts are important avenues for dispute resolution and regulating the conduct of individuals in society. But,

61 See AA Jok and others *Study of customary law in contemporary Southern Sudan* (2004).

62 Local Government Act, 2009, sec 99(5).

63 See C Leonardi and others *Local justice in Southern Sudan* (2010).

64 V Museke *The role of customary courts in the delivery of justice in South Sudan* (2015) 43.

as noted, there is a clear conflict between customary legal systems and fundamental human rights, particularly in the case of women and children. Despite mounting pressure for customary law to be harmonised with international law,⁶⁵ the government does not appear to be making any effort to ensure that customary courts comply with the requirements of international human rights law. If, as is highly likely, the plural legal system will be preserved under the permanent constitution, the drafters will have to be clear in delineating the scope within which customary courts operate. In particular, customary courts should not have criminal jurisdiction irrespective of customary interface.

6 Transforming the judiciary: Lessons from Kenya and South Africa

The challenges discussed in this chapter call for the adoption of a transformative constitution that enhances the courts' capacities and rebuilds public trust in South Sudan's judiciary. While the needs, contexts, and capacities of each country's judiciary are distinct, South Sudan could benefit from Kenya's experience of judicial reform, as anticipated in the R-ARCSS.⁶⁶

As in most African countries with legacies of colonial administration, the colonial system in Kenya was based on segregated justice, with the law having been designed to serve the interests of minority settlers at the expense of the black majority. At the Lameck Goma Annual Lecture in Lusaka in 2017, Kenya's former Chief Justice, Willy Mutunga, described the colonial era in Kenya as a time when there was no judicial independence, separation of powers was absent, and 'the judiciary as civil service [was] beholden to the colonial administration and very rarely minded to stand up to it. Indeed, administrative officers made many judicial decisions.'⁶⁷

After independence, Kenya adopted a liberal democratic constitution in the hope of signalling a break with its woeful past. However, the constitution followed its colonial precedents and ended up being wilfully

65 Museke (n 64).

66 R-ARCSS, art 1(17)(2).

67 W Mutunga 'Developing progressive African jurisprudence: Reflections from Kenya's 2010 transformative constitution' Lameck Goma Annual Lecture Lusaka, Zambia, 27 July 2017 (2017).

interfered with by the executive. It was amended in such fundamental ways that by 1982 Kenya had become a highly centralised unitary *de jure* one-party state, one with an ‘imperial presidency’ and institutions too weak to safeguard human rights, the rule of law, and constitutionalism.⁶⁸ In particular, there was no constitutional recognition of the judiciary as an independent arm of government, even though it fell short of being a department in the Office of the President. The first three decades of Kenya’s independence were thus an era of despair characterised by, among other things, nepotism, widespread abuse of human rights, and the state’s refusal to institute crucial land reforms.⁶⁹

Against this backdrop, Kenya adopted what is regarded as transformative constitution, with inputs from Kenyan citizens.⁷⁰ Notably, the new Constitution of 2010 positioned the judiciary as an agent of change, mandating it to carry out the broader transformation it envisaged. Article 259, for instance, stipulates that the Constitution should be interpreted, *inter alia*, in a manner that advances the rule of law, promotes the human rights and fundamental freedoms in the Bill of Rights, and contributes to good governance.

The Constitution introduced various measures to transform the judiciary, including establishing a refashioned Supreme Court with greater accessibility and adopting a process for vetting new and existing members of the judiciary modelled after the South African system. The process assesses the competence, integrity, independence, leadership and education of individuals. Another measure was the establishment of an independent and representative Judicial Service Commission that ensures accountable and transparent recruitment. In addition to its strongly worded safeguards of judicial independence,⁷¹ the Constitution created a judiciary fund, signalling financial independence of the Judiciary. Furthermore, in 2012 Kenya adopted the Judiciary Transformation Framework, which sought a complete overhaul of the judiciary.

68 E Kibet & C Fombad ‘Transformative constitutionalism and the adjudication of constitutional rights in Africa’ (2017) 17(2) *African Human Rights Law Journal* 340.

69 Ogari (n 36).

70 F Githuru ‘Transformative constitutionalism, legal culture and the judiciary under the 2010 Constitution of Kenya’ PhD thesis, University of Pretoria, 2015.

71 Kenyan Constitution, 2010, art 160.

Transformative constitutionalism is a concept that scholars have touted as an 'antidote' to past judicial failures in Africa.⁷² In the South African context, Klare defines it as follows:

By transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law.⁷³

The concept has also been advanced by the Supreme Court of Kenya through an emphasis on values associated with traditional liberalism, such as social justice, equality, devolution, human rights, the rule of law, freedom, and democracy:

Kenya's Constitution of 2010 is a transformative charter. Unlike the conventional liberal Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today's Constitution is to institute social change and reform, through values such as social justice, equality, devolution, human rights, rule of law, freedom and democracy.⁷⁴

These explanations entail that courts under a dispensation of transformative constitutionalism are able to apply constitutional provisions progressively to address issues related to inequality in society, including through the recognition and adjudication of socio-economic rights, minority rights, and environmental rights. Alluding to Africa's past constitutional failures, Kibet and Fombad assert that transformative constitutionalism 'offers for better prospects of constitutionalism and protection of fundamental rights in Africa'.⁷⁵ The authors observe too that courts in post-colonial Africa have been either 'impotent or complicit' in making decisions that do not upset the executive, particularly the President.⁷⁶

72 KE Klare 'Legal culture and transformative constitutionalism' (1998) 14(1) *South African Journal on Human Rights* 150.

73 Klare (n 72).

74 See *Speaker of the Senate v Attorney General of Kenya & another* [2013] eKLR, para 51.

75 n 72.

76 n 72.

The 2010 Kenyan Constitution and 1996 South African Constitution, which take inspiration from the 1949 Indian Constitution, are widely celebrated as transformative documents designed to move beyond previous systems and traditions. As Kibet and Fombad argue, these constitutions offer strong models that can be customised in Africa to promote constitutional values such as the rule of law, social justice, human rights, and democracy, particularly in countries undergoing political and constitutional change.⁷⁷ The lessons drawn from Kenya's experience, and by extension South Africa's, provide plenty of options for enabling the drafters of South Sudan's permanent constitution to develop a constitution that recognises the shared aspirations and values upon which the nation was founded.

7 Conclusion

This chapter has explored the role of the courts in the transformation of a country. It makes the case that South Sudan's constitution-making process presents an important opportunity for the country to address issues that for long have crippled the judiciary. It argued that although legal pluralism has benefits for the administration of justice, it can be a potential obstacle to judicial transformation in the new constitutional order. Thus, if a plural legal system is to be maintained, the constitution should clearly delineate the scope of authority of customary courts.

The chapter also considered the establishment of a Constitutional Court during the transitional period. Constitutional interpretation is, under the TCSS, vested in the Supreme Court, but ideally it should be the sole preserve of the Constitutional Court. Having two courts with competing jurisdiction could well become a source of conflict. Thus, to avoid friction between what would be the two highest courts in the country, the permanent constitution should also clearly define the scope of each court.

Drawing on Kenya's experience, the chapter showed that Kenya's judiciary has significantly transformed itself under the new constitution. Given the challenges that were identified in this chapter – ranging from incompetence and nepotism to corruption and deficient leadership – a

77 n 72.

similar approach is called for in South Sudan: namely, an overhaul of the entire judiciary.

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