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The role of the Bar in the defence and promotion of the rule of law: Lessons for South Sudan

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Abstract

This chapter examines the significant role that the South Sudan Bar Association ('the Bar') plays in defending and promoting the rule of law in the country. As a professional body of independent advocates, the Bar is vested with the responsibility for regulating legal practice in the public interest as well as for performing a variety of functions within the country's jurisdictional orbit. The chapter engages with issues that underpin the Bar's commitment to the defence and promotion of the rule of law. This entails a critical examination of legal mechanisms that have been hard-pressed in circumstances that, to a large extent, are ill-disposed to the dispensation of justice and, indeed, oblivious to civil and political discourse. Comparatively, the chapter explores the experiences of regional legal frameworks and the parameters of their

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advocacy in promoting the rule of law and constitutionalism. On this basis, it identifies options for local consideration that hold the potential to aid in the growth of the South Sudanese legal system. The chapter calls in particular for administrative effectiveness in safeguarding the rule of law and enhancing democratic governance in South Sudan.

Key words: *bar associations; rule of law; foreign mechanisms; democracy*

1 Introduction

South Sudan, having been born of a protracted war and the consolidation of military control that laid the foundation of statehood,[1] has been struggling since independence to address the burden of post-conflict settlement and deal with the numerous challenges associated with state-formation. A closer look at these challenges reveals that pronounced state fragility is coupled with a general breakdown in the rule of law. This chapter argues that state fragility is a consequence of the failure of rule of law and that restoring the rule of law demands efforts that go beyond trivial inter-party political commitments.

Defending constitutionalism is never an easy task in any post-conflict arrangement, but in South Sudan the need for material, technical and diplomatic support in this regard is especially critical; it is, in other words, not merely optional but necessary for securing a pathway towards a successful constitutional order and ensuring the coherence and legitimacy of post-conflict constitutional transformation. Although South Sudan has received considerable international assistance in charting its way forward to a constitutional order,[2] local capacity deficits continue to hinder the state's constitution-making efforts. This creates challenges in that existing laws are not implemented effectively, given that government institutions remain enfeebled since office-holders are

1 See M D'Agot 'Understanding the colossus: The dominant gun class and state formation in South Sudan' (2021) *Journal of Political and Military Sociology* 138. Agot maintains that the foundations of South Sudan lie in state monopoly of the means of violence and that this has created a legacy of fluid social strata, elite dominance, and cycles of violence.

2 See JG Akech 'Re-thinking approaches to the international constitutional assistance in South Sudan' The Sudd Institute (2022).

either reluctant or outrightly resistant to meeting their obligations under the relevant legal and regulatory frameworks.

A common position adopted by the international community is that establishing the rule of law after violent internal conflict is an essential prerequisite for the transition from war to peace; conversely, failure in this regard leads to what Sannerholm calls the 'problem of crisis states':

> The crisis states ... share the general problems of severely constrained human and material resources; politicisation of justice system; several laws that are not applied; lack of educated and adequately trained legal professionals; and low levels of access to justice. In times of conflict and prolonged insecurity, these characteristics become more acute problems. A low access to justice becomes no access to justice, several laws not applied turn to into laws not applied at all, and a politicisation of justice system, rule *by* law and not rule *of* law, eventually becomes rule by the gun.[3]

To inculcate a culture of constitutionalism in public institutions, professional legal bodies such as the South Sudan Bar Association ('the Bar') have a crucial role to play. In the case of the Bar, its neutrality of status gives it the leverage to persuade South Sudan's political actors to recognise that the rule of law is essential for post-conflict national recovery. The rule of law, in turn, is upheld not only by implementing existing legislation but by adopting international best practices that are generally necessary for its defence and promotion.

With these concerns in mind, section 2 of this chapter examines the Bar in closer detail by looking at, among other things, its configuration and constitutional mandate. Section 3 explores the existing justice system in South Sudan and the legal environment in which it operates, with particular attention paid to local and international efforts aimed at the effective realisation of the rule of law. Section 4 undertakes a comparative analysis by examining legal practice in neighbouring countries and considering if these country models should be adopted locally in South Sudan or avoided. Section 5 dissects linkages between the rule of law and democracy and offers policy recommendations for the Bar and the Government of South Sudan.

3 R Sannerholm 'Legal, judicial and administrative reforms in post-conflict societies: Beyond the rule of law template' (2007) 12(1) *Journal of Conflict and Security Law* 73.

2 The rule of law and the Bar Association

2.1 Defining the rule of law

There is no universally accepted definition of the rule of law, and this chapter does not seek to engage in detail with the prevailing definitions of it; rather, it presents the rule of law as a major source of legitimation for governments in the modern world, given that it is a concept which enjoys considerable international acceptance and has evolved into 'the dominant paradigm for state governance in the international arena'.[4] According to the United Nations, the rule of law

> [is] a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[5]

Legal philosophers such as John Rawls have their own view of what the rule of law entails. According to Rawls, it means that 'the system of law [is] sincerely and not unreasonably believed to be guided by a common good conception of justice. It takes into account people's essential interests and imposes moral duties and obligations on all members of society.'[6] Those who, like Rawls, define the rule of law in terms of the broad ends that it serves usually stress that, under the rule of law, the state is subordinate to the law (thus preventing arbitrariness) and that, by implication, the government abides by standing laws and respects human rights (which in turn implies that the state has a duty to protect its citizens). Tamanaha offers a succinct version of this, to the effect that the rule of law means that government officials and citizens are bound by, and abide by, the law.[7]

4 L Greenfell *Promoting the rule of law in post-conflict states* (2013) 15.
5 United Nations Secretary General 'The rule of law and transitional justice in conflict and post-conflict societies' UN SC, UN Doc. S/2004/616 (2004).
6 J Rawls 'The law of peoples' in Freeman, S (ed) *Collected papers* (1999) 529.
7 BZ Tamanaha 'The history of the rule of law' (2012) *Singapore Journal of Legal Studies* 232.

While this definition might seem rudimentary, there is practical value in understanding the rule of law in its most basic form, especially so in the context of South Sudan, which is among the countries in the world that are struggling with a 'rule-of-law problem' and where efforts to reform relevant national institutions have remained futile. As Winters has observed,

> [W]hen we say a country has a 'rule of law' problem, we are not referring to lawlessness on a mass level. Rather, it refers to states where the legal system is bent or distorted by the powerful because they have the capacities, resources, or connections to influence or intimidate the legal apparatus from police to investigators up to prosecutors and judges.[8]

2.2 Understanding the Bar and its mandate

Besides their primary function of regulating the legal practice in the public interest, bar associations perform several other functions within a country's legal system.[9] In collaboration with law schools, whose function it is to train law students, bar associations influence the quality of the legal profession through the standards they set for law school accreditation via curriculum requirements, professional licensing or certification, and disciplinary regimes. These measures establish quality standards for membership of the association.[10] In addition, bar associations are often providers of continuing education for practising lawyers.[11] In post-conflict and developing societies, however, law school training is usually inadequate, making it hard to ensure robust legal education and in turn making progress arduous and challenging.

With respect to the independence of bar associations, external factors often limit their scope of activity. These factors can include legal restrictions and obligations, state-imposed regulations, and limits imposed by constitutions. Nevertheless, Daniels and Trebilcock maintain that 'the legal profession plays a role in safeguarding liberties

8 J Winters 'Reflections on oligarchy, democracy, and the rule of law in Indonesia' (2021).
9 RJ Daniels & M Trebilcock 'Political economy of rule of law reform in developing countries' *Michigan Journal of International Law* 26(1) 2004.
10 Advocates Act, 2013, sec 43.
11 Q Johnstone 'Bar associations: Policies and performance' (1996) 15 *Yale Law and Policy Review* 206.

against incursions by the state, which may give rise to conflict between lawyers and members of the judicial and political branches'.

Since there is no single globally accepted mode of legal practice under international legal norms, existing domestic legal regimes determine how countries train their lawyers. In the case of South Sudan, it has mandated the Bar Association to devise policies and regulations for fulfilling that regulatory responsibility.[12]

In terms of sections 12 and 43 of the Advocates Act, 2013, the Bar has two components: the Bar Council and the Bar Association. The former comprises senior members of the judiciary and Ministry of Justice and is chaired by the head of the Bar Association as its president. The Bar Council is entrusted with, among other things, the power to regulate the operation of the Bar Association. However, since the Bar Council does little in respect of the defence and promotion of the rule of law, the focus of this chapter is on the Bar Association, which is involved in day-to-day activities regarding general legal practice as well as a variety of other activities aimed at defending civil rights and promoting the rule of law.

The Bar Association comprises independent advocates whose main roles include general legal practice and handling minor civil matters. A lawyer in South Sudan trains for at least a year before being accredited with a license to practise and appear before any court of law independently under his or her own name. Some countries engage their students from the outset by offering them the privilege of acquiring legal training and developing corresponding skills and abilities while studying. These skills include the ability to solve problems, strategise, conduct legal research and factual investigation, think logically, and write and speak well. Putting these skills to work for the benefit of others is precisely what the Bar Association's role should be. Once such training is complete and the necessary documentation is in hand, the trainee lawyer automatically becomes an advocate.

To uphold their professional integrity and as a matter of ethics, members of the Bar Association find it morally obligatory to provide legal services free (pro bono) to indigent or vulnerable citizens who cannot afford legal fees or whose cases serve the public interest. This is typically seen in matters involving human rights violations. An example

12 Advocates Act, 2013, sec 7.

is that of a young female journalist who was arbitrarily arrested while covering a citizens' protest in Juba against high food prices.[13] A group of practising advocates (Advocates without Borders) took up her case and successfully defended her in court.

3 The legal environment in South Sudan

3.1 Key players promoting the rule of law in South Sudan

Generally, post-conflict governments and donors prioritise rebuilding the justice sector through state-delivered rule of law and access-to-justice programmes.[14] In South Sudan, the reformation of the sector into an adversarial legal system has not yet permeated the judiciary's day-to-day operations. It is, however, no surprise that the sector is disorganised, given the country's move away from its past legal tradition, its history of conflict, and its legacy of military justice.

To describe in overview what the government is doing to strengthen the rule of law, it is the case, to begin with, that the Ministry of Justice and Constitutional Affairs has the mandate to train and deploy prosecutors to various law enforcement institutions.[15] Since it is mandated to address a host of legal shortcomings through its directorates, its efforts to administer justice at the national and state levels remain severely limited due to lack of financial resources and other factors. In addition, counsels from the Ministry are expected to provide legal assistance at all levels of government on matters such as human rights, criminal procedure, civil administration, contracts and the emerging concerns of affirmative action. The need for human and financial resources to establish institutions such as a legal training institute is particularly acute.

13 VOA News 'Journalist Diing Magot detained on August 7, 2022', https://www.voanews.com/amp/south-sudanese-jounrnalist-released-after-8-days-in-detention/6702437 (accessed 12 March 2023).

14 B Baker & E Scheye 'Access to justice in post-conflict state: Donor-supported multidimensional peacekeeping in Southern Sudan' (2009) 16(2) *International Peacekeeping* 171.

15 The Legal Training Institute Act, 2012.

3.2 Compromising courts with legal complexity

South Sudan's judicial system has an intricate form inherited from the country's past when it was part of Sudan. Attempts to organise this system have faced considerable challenges ever since the early days of state formation in 2005. One of the major problems that the negotiators of the Comprehensive Peace Agreement (CPA) encountered was the question of how to create a legal system that embraces the cultural identities enshrined in co-existing bodies of law while providing the stability necessary for reducing ethnic tensions and fostering investment and development.[16]

The Machakos Protocol, which explicitly acknowledged that 'religion, customs and traditions are a source of moral strength and inspiration for the Sudanese people', thus provided that 'all personal and family matters, including marriage, divorce, inheritance, succession and affiliation may be determined by the personal laws (including *Sharia'a* or other religious laws, customs or traditions) of those concerned'.[17] Under the Transitional Constitution of 2011, sources of law are identified from a range of areas: (1) the Transitional Constitution; (2) written law; (3) the customs and traditions of the people; (4) the will of the people; and (5) any other relevant source.[18] These provisions have led to conflict in laws, especially in the light of South Sudan independence and subsequent accession to a variety of regional and international treaties and conventions whose provisions contradict domestic law and legislation.

What is especially challenging, however, is that most of the country's judges and lawyers were educated in Sudan under the *Sharia'a* legal system and find it difficult indeed to interpret and apply international legal instruments in their proceedings (as examined further below).

3.3 The shift towards English language and common law system

South Sudan inherited almost the entirety of its legal system from Sudan but took an about-turn in which it embraced the common law system

16 International Commission of Jurists (ICJ) 'South Sudan: An independent judiciary in an independent state?' (2013) 20.
17 Machakos Protocol, sec 1(4).
18 Transitional Constitution, 2011, art 5.

and adopted English as its *lingua franca*.[19] Having relegated English to a minor status shortly after independence, the Sudanese legal system maintained common law as the basis for its jurisprudential theory. Most advocates, magistrate, judges and senior justices came to South Sudan with Arabic as their first language.

Moreover, the Sudanese criminal law system, which operated mainly in the north, was a fusion of British colonial penal law, the Egyptian civil code, and the 1983 September Laws (under which penalties were prescribed by Islamic law). Religious laws governed personal matters, while civil matters were formally governed by statute, although individuals outside Khartoum more often resorted to unwritten rules and traditional community justice mechanisms.[20] In 1998, the Government of Sudan adopted a new constitution that designated *Sharia'a* as the primary source of Sudanese law.[21] This direct reference to the religious code as the interpretative source of the law had a great impact on the courts, as judges infused their rulings with Islamic principles in order to interpret and apply religiously neutral laws in accordance with *Sharia'a* principles.[22]

The breakaway of South Sudan from Sudan in July 2011 came with the demand to establish a new and genuine administrative order. Under the Interim Constitution, English and Arabic were the two official working languages of the Government of Southern Sudan, and any discrimination against the use of either English or Arabic was prohibited. With the coming into force of the Transitional Constitution in 2011, it was determined that only English would be the official working language in South Sudan.[23] Nearly a decade and a half later, this key constitutional endorsement remains far from being realised. With courts highly incapacitated, the ability of Arabic-patterned judges and court officials to interpret legislation, decipher complex judgments and apply common law precedents originally written in English remains wanting. This has

19 ICJ (n 16) 21-26.
20 S Parmar 'An overview of the Sudanese legal system and legal research' NYU Law, January 2007, http://www.nyulawglobal.org/globalex/sudan.htm (accessed 1 April 2023).
21 Constitution of the Republic of Sudan, 1998, sec 65.
22 ICJ (n 16) 14-15.
23 Transitional Constitution, 2011, art 6(2).

greatly debilitated the justice system and impeded the attainment of the rule of law.

During the mission of the International Commission of Jurists (ICJ) delegation to South Sudan in 2013, the Commission was left with the clear impression that many trials were still conducted through inquisitorial means. The ICJ reported that it repeatedly heard that the switch from Arabic to English as the language for the administration of justice had caused significant practical problems, as many judges, prosecutors and legal practitioners who received their legal and professional training in Khartoum were not familiar with legal terminology in English. In the courts, the use of English led to misunderstanding on the part of judges about the meaning of submissions made by the parties. The mission learnt that, even in the case of advocates, some lawyers would submit written pleadings and other documentation in Arabic, either due to the lack of the necessary linguistic skills or with a view to ensuring that the other lawyers and judge involved all understood the submissions.[24] This practice has left South Sudan's legal system in a shambles, as questions of interpretation and fair application of law always emerge in the settlement of cases from courts of first instance to appellate courts.

As the judiciary struggles to reorganise itself, there is little evidence of the government having made efforts to rectify the general legal ailment this has caused. Indeed, the situation has been exploited by certain government officials. Since courts remain exposed to technical, political and economic vulnerability, some officials have acted with open impunity and discretion. In South Sudan, just as in other post-conflict situations, administrative legal frameworks tend to be unclear, with overlapping jurisdictions between various agencies leaving room for discretion or creating inertia.[25]

Winters argues that 'rule of law exists when the laws and legal institutions are reliably more powerful than all persons who govern or are governed ... the essence of the rule of law is that people bend to the law, never the law bending to persons.' He further observes that the 'rule of law requires a strict and complete depersonalization of the rules and their enforcement, which is the meaning of *non sub homine, sed sub lege* (not under man, but under laws)'. South Sudan, however, has yet to

24 ICJ (n 16) 15-16.
25 Sannerholm (n 3).

meet this threshold, as 'the first dimension of depersonalization is with reference to officials within the state'.[26]

Since most members of the current Bar and judiciary were educated and trained in Khartoum in Arabic, efforts to address challenges posed by incoherence in judiciary language have been fruitless, as lack of co-operation from these judges and advocates has hindered policy realisation to that effect. The Bar has the mandate to rise above this limitation by ensuring that its members adhere to the constitutional requirement of English as the official working language of the court, hence enabling legal and administrative coherence and improved rule of law in the country.

3.4 The role of customary justice in promoting the rule of law

Customary law provides an unchallenged foundation for the rule of law in South Sudan. In other words, recognising customary law in the national context is essential to understanding the conditions under which the rule of the law could prevail. Even if one wanted to take an imperialistic approach – by imposing a more 'sophisticated' legal regime on the country – completely replacing the customary court system in South Sudan is a practical impossibility.[27] This is due not only to its antiquity but its wide acceptance among local communities as the basis of their moral, cultural, administrative, and social organisation.

Those involved in rule-of-law reform must find a way to retain cultural concepts, constructs, and practices without undermining the pursuit of the rule of law in general. Because cultural sensitivities can come into conflict with rule-of-law objectives, a line must be drawn, and a balance struck, between these competing interests. Colonial powers, of course, engaged in the same kind of line-drawing. For example, the British accepted customary law except where it was 'repugnant to natural justice, equity, and good conscience'.[28] Such a test would be offensive today, and time has proven that indigenous legal systems still maintain their vitality and relevance. Yet if they are to have a place in the global community,

26 Winters (n 8).

27 D Pimentel 'Rule of law reform without cultural imperialism? Reinforcing customary justice through collateral review in Southern Sudan' (2010).

28 OH Okoth 'The imposition of property law in Kenya' in SB Burman & BE Harrell-Bond (eds) *The imposition of law* (1979) 160; see also S Merry 'Legal pluralism' (1998) 22 *Law & Society Review* 869.

they will need to resist pressure to simply import or impose Western law and instead adapt to minimum international norms on their own terms.[29] This would be unlike early attempts to accommodate customary, which were aimed at simply at gaining administrative control – according to Johnson, the value of this approach 'was first briefly appreciated as a means of obtaining the effective submission of the people to government authority'.[30]

When we consider the role that customary law and customary court adjudication can play in a modern justice system, some fundamental questions need to be addressed. For instance, would customary law have to be argued before the court of law where it is not codified? Some have advocated for the codification of customary law, as this would make it ostensibly more transparent and controllable; once codified, any aspect of it that offends larger principles of law could be easily amended out of existence. If customary law is codified, however, it becomes, for all meaningful purposes, the property of the state. The legislature might adopt such codes, but then only the legislature would be fully empowered to amend them. In this scenario, the tribal communities that produced that law, and the community elders that apply it, would be deprived of their role in shaping it – and at this point, the customary law would cease to be a living law that adapts to suit the community it serves.[31]

The first distinctive feature of good law is that it is derived from the will of the people. Any argument that aims to limit the rule of law to what is codified, on the grounds that this is the basis for the law's rational applicability, is not only misplaced but incongruous. In other words, it is a position which replicates earlier notions that customary law is repugnant simply because it does not easily submit to some form or another of an English social character. In the South Sudanese context, by contrast, lawyers, advocates, scholars and members of the judiciary have referred to customary law in assertively positive terms. Aleu Akecak, one of the country's most distinguished judges, describes it as 'the body of customs and tradition that is utilized by, and unites, the majority of

29 D Pimentel 'Legal pluralism and the rule of law: Can indigenous justice survive?' (2010) 32(2) *Harvard International Review* 32.

30 DH Johnson 'Judicial regulation and administrative control: Customary law and the Nuer, 1898-1954' (1986) 27(1) *Journal of African History*.

31 Pimentel (n 29).

citizens in ... [a] jurisdiction'.[32] In the light of this view and others,[33] we should be reminded that even areas that lie beyond the reach of the state are nevertheless not ungoverned. Traditional chiefs, along with the rich tapestry of tribal norms and rules they apply in resolving disputes, play an invaluable role in holding communities together.[34]

In this regard, practising advocates have used customary law principles as court evidence where applicable to settle contentious legal matters related to marriage, homicide, property rights, theft, and a vast array of cases of a civil or criminal nature.

3.5 International actors and law reform in South Sudan

The notion of the rule of law can no longer be restricted to its classic domain, namely, controlling state power and ensuring the predictability and procedural fairness of governmental actions. Apart from the government, other players perform critical roles in supporting rule-of-law reform efforts in South Sudan. In today's world, the role-players shaping the emergent rule of law include civil society, non-governmental organisations, corporations and business associations, as well as bilateral and multilateral development partners and donor organisations.

Recognising that there are multiple role-players within and across the confines of the nation- state implies that efforts to ensure the rule of law are no longer limited to a national agenda. As such, building and sustaining the rule of law has become a collective process, one that takes place at each step of the way from the local to the national level and entails the provision of assistance at each point where the interests of different constituencies come into conflict.[35] In South Sudan, international actors have engaged with the government through a variety of mechanisms aimed at enabling constitutional governance and developing a rule-based system at different levels. To say that such engagement has not led to

32 AA Jok and others *Study of customary law in contemporary Southern Sudan* (2004) 54-57.

33 F Deng 'Customary law in the cross-fire of Sudan's war of identities' Prepared for the United States Institute of Peace (2006) 29.

34 G Musila 'The rule of law and the role of customary courts in stabilizing South Sudan' African Centre for Strategic Studies, 29 May 2018, https://africacenter.org/spotlight/the-rule-of-law-and-the-role-of-customary-courts-in-stabilizing-south-sudan/ (accessed 17 April 2023).

35 K Pistor 'Advancing the rule of law: Report on the international rule of law symposium convened by the American Bar Association' (2005).

any progress is to diminish the critical role that international assistance has played in promoting the rule of law locally.[36] This role has often been evident in matters relating to human rights violations, and has highlighted the need for public institutions and officials to act within a conventional human rights ethos.

The Universal Declaration of Human Rights (Universal Declaration) of 1948 was the first international instrument to set the standard – albeit one not legally binding – that all persons are entitled to equal protection of the law and the right to a fair trial.[37] Additional binding international instruments were developed in the wake of the Universal Declaration to elaborate on concepts related to equal access to legal protection, especially for marginalised and vulnerable groups. These rights have been enshrined in the International Covenant on Civil and Political Rights (ICCPR) and Covenant on Economic, Social and Cultural Rights (ICESCR), both of which have been ratified by South Sudan.[38]

International humanitarian agencies have often given credence to the idea that obtaining full legal protection is essential for populations affected by humanitarian crises. The need for legal aid in post-conflict contexts stems from a host of challenges: the prevalence of sexual and gender-based violence; people's lack of legal documentation; the denial of rights or access to services; lengthy, expensive and unclear procedures related to status in host countries; the risk of being illegally detained or deported with no due process; and many more. Unfortunately, legal aid is usually overlooked as an aspect of humanitarian work. The need to respond to new emergencies all the time means that efforts to develop legal aid services tend to get put on the backburner, even though the lack of legal aid stands to reduce the effectiveness of assistance interventions.[39] A number of organisations operating in South Sudan provide legal services within their suite of services, but instead of providing these

36 SL Schmidt 'Emerging rule of law priorities for a post-conflict South Sudan' *Yale Journal of International Affairs*, 24 June 2015, https://www.yalejournal.org/publications/emerging-rule-of-law-priorities-for-a-post-conflict-south-sudan (accessed 17 April 2023).

37 These rights, which now form an important part of South Sudan's Bill of Rights, are also protected under the Universal Declaration, to which the country is a party.

38 On 17 June 2019, the Transitional National Legislative Assembly unanimously voted to ratify the ICCPR, ICESCR and their respective first optional protocols.

39 INTERSOS 'Provision of legal aid in humanitarian settings: Lessons learned' (2021).

services as a standalone measure, they resort to adding them to their overall protection service so as to offer a holistic package.

In South Sudan, agencies such as the United Nations Development Programme (UNDP), United Nations Mission in South Sudan (UNMISS), International Development Law Organization, and Max Planck Foundation have played an important role in promoting the rule of law. A humanitarian organisation (INTERSOS) reports that such international assistance from NGOs 'creates better acceptance in communities and by local authorities, since they know and trust the organization already through its other services'.[40]

Some organisations may use the services of lawyers belonging to the bar associations in their localities. While it is important to evaluate the capacity of legal staff, it is equally imperative for organisations to make better use of advocates who are actively engaged in the day-to-day activities of the courts, as this would be of more value in resolving criminal or human rights cases.

3.6 Challenges in providing legal assistance

In conflict-affected situations, there are many challenges, constraints and risks specific to the provision of legal services. As with all humanitarian work, access can be blocked, particularly for legal projects monitoring places of detention and offering legal services to detainees.[41] In South Sudan, international humanitarian agencies have regularly complained of difficulties in accessing detainees.[42]

While most international agencies find it difficult to address the access-to-justice dilemmas caused by arbitrary arrest and detention,[43] assisting clients to obtain civil documentation can also be politically sensitive, given that obtaining a legal document can be seen as 'taking a side' when communities do not know who will end up in control of their area. If agencies are seen as supporting those affiliated with a particular faction or armed group, they face risks to their reputations, programmes,

40 INTERSOS (n 39).
41 INTERSOS (n 39).
42 United Nations Mission in South Sudan (UNMISS) 'The state of human rights in the protracted conflict in South Sudan' (2015).
43 P Turay 'Prolonged and arbitrary arrest and detention: An access to justice dilemma in South Sudan' PhD thesis, University of Cape Town, 2022.

and the security of their lawyers. Both legal staff and beneficiaries may be exposed to threats of violence or actual retaliation, especially in legal disputes between families involving allegations of gender-based violence. More generally, the staff members of humanitarian agencies have been victimised or found themselves in legal battles with locals over trust issues.[44]

Furthermore, national policies can make it extremely difficult for humanitarian actors to operate effectively. In situations like these, there are significant limitations to what lawyers can achieve for their clients. Since corruption can pose a serious security threat to lawyers, this is another factor that can derail efforts aimed at stabilising the justice system. Short-term humanitarian funding cycles are another source of complication: it takes time to set up quality legal aid projects in complex settings, but where projects are linked to short-term humanitarian contracts, they are often shorter in duration than the legal cases they are attempting to support. To mitigate these problems, some humanitarian agencies have formed regular working relationships with members of the Bar Association, in addition to which they establish legal aid clinics to engage communities and emphasise adherence to humanitarian principles.[45]

In overall terms, then, local efforts to improve the rule of law remain vulnerable to factors that threaten to negate them. These factors also include the high levels of discretion found among institutional front-runners and the existence of over-riding pressures from political actors in government. Professional legal authorities such as the Bar should use this as an opportunity to enable collaborative effort with international actors not only in spreading the rule of law but in advocating for humanitarian access to those in need of legal assistance throughout the country.

44 R Freedman 'UN immunity or impunity? A human right-based challenge' (2014) 25(1) *European Journal of International Law* 239.

45 The South Sudan Law Society, with the assistance of numerous international organisations, has been running legal aid projects for nearly a decade. Local civil society organisations have taken a similar approach to issues concerning children, gender-based violence, land rights, and human rights.

4 Rule-of-law lessons from the region

The extent to which the rule of law exists varies from country to country, so the nature of the government in each case necessarily cannot be overlooked; moreover, advocates and lawyers also contribute to strengthening the rule of law and constitutionalism. This section turns to look at foreign legal practice; in particular, it examines how bar associations in a selection of South Sudan's neighbouring countries push their respective legislative authorities to review statutes or constitutions or statutes in the interests of democratic objectives. The intention is to see what lessons could be applied in South Sudan.

4.1 The Sudanese Bar Association

Although many changes have occurred since the British established the legal system of the Anglo-Egyptian Sudan, the current legal system in South Sudan remains, to a greater extent, an offshoot of the Sudanese justice system.[46] This context is relevant when considering efforts the South Sudanese Bar Association might have made to ensure the effective administration of justice in its jurisdiction. However, such an examination cannot be made without exploring the legacy of state-centric repression, coupled with limited law enforcement in the periphery, as laws like *Shari'a* (Islamic Law, 1983) which constituted an alternative for the governing of criminal justice in the Sudan, present a mixed history.[47]

In 1981, during the celebration of the silver jubilee of Sudan's independence, the council of the Bar Association organised a series of seminars to discuss issues related to the administration of justice; the independence of the judiciary; the promotion of the legal profession; human rights and basic freedoms; and the rule of law. In those seminars, lawyers presented research on various laws and made innovative suggestions. Those seminars in effect marked the first time that law reform was given detailed consideration in Sudan.[48]

The 1983 Islamic Laws (*Shari'a*), commonly known as the September Laws, led to heated debate. Many opposed them on the ground of their

46 A Hassan 'History of law reform in the Sudan' REDRESS (2008) 2-5.
47 AM Medani & A Hassan 'Criminal justice reform and human rights in African and Muslim countries with particular reference to Sudan' (2016).
48 Hassan (n 46).

incompatibility with basic rights and freedoms. Some considered it as a deviation from the true provisions of Islam. One of those was Al-Sadiq Al-Mahdi, the leader of the Ummah Party, who described them as not worthy of the ink in which they were written. However, the fact that the September Laws were not abolished during his premiership (1986-1989) proved that his views were based on political expediency rather than a sincere aspiration for justice, human rights and inclusive governance in Sudan. Conversely, Medani and Hassan note that there was great support for the abolition of the Islamic Laws among civil society organisations, left-wing political forces, and the political representatives of marginalised peoples.[49]

Although these forces were supported by elements in the two major parties – the Ummah Party and Democratic Unionist Party – they failed to change the September Laws. Consequently, the parliamentary majority of *Sharia'a* law supporters were not able to achieve their aims. They failed to pass a penal code based on *Sharia'a* known as Turabi's law due to a strong campaign led by the Bar Association and other parts of civil society.[50]

However, it is equally revealing that the Sudanese Bar Association, with all these attempts, did not succeed in addressing the social injustices experienced by the masses of Sudanese people as a result of the imposition of *Sharia'a* law by the Nimeiri regime. The suffering that *Sharia'a* law caused even for Muslims themselves was observed in the case of Ustadh Mahmoud, whose execution had significant implications for universal human rights and civil liberties.[51]

The *Sharia'a* principle of apostasy deepened the tension between faith- and rule-based governance. The recognition of this element of religious intolerance in *Sharia'a* is an essential prerequisite for the success of any attempt to secure full respect for freedom of religion.[52] Freedom

49 Hassan (n 46).
50 Hassan (n 46).
51 On 5 January 1985, Taha was arrested for distributing pamphlets calling for an end to *Sharia'a* law in Sudan. Brought to trial on 7 January, he was charged with crimes 'amounting to apostasy, which carried the death penalty'. Though Taha refused to recognise the legitimacy of the court under *Sharia'a*, he was later sentenced and executed, but the Supeme Court would declare his execution illegal and unconstitutional a year after later. See https://www.alfikra.org/page_view_e.php?page_id=2.
52 A An-Na'im 'The Islamic law of apostasy and its modern applicability: A case from the Sudan' in MA Baderin (ed) *Islam and human rights* (Routledge 1986).

of religion, in this case, did not mean the freedom of an individual practising the religion. While the application of *Sharia'a* served a wide range of political, religious, social and economic interests[53] that even some members of the Bar Association found beneficial to pursue, Sudanese judges were habitually less considerate about observing any distinction between Muslims and Non-Muslims. In cases involving the two faiths, Southern Sudanese, who constituted the non-Muslim majority in the North, would object to any application of *Sharia'a* law as unjustifiable and unconstitutional.

The foregoing account would establish that the rule of law in the Sudan was an intermittent government practice, especially when taking into consideration political specificities. Bogged down with fear, the Sudanese government initiated 'repressive legislation' by developing a series of laws that were 'either ideologically motived or dictated by security considerations'.[54] These repressive acts were, by default, bequeathed to successive Sudanese governments, which were less attentive to their political, social and human rights implications.

The National Islamic Front gave way to military government under the National Congress Party (NCP), which went so far to as to introduce the strategy of 'institutional contradiction', dubbed 'parallelism', which encouraged internal division, chaos, and contradictions within organised social groups. The NCP would go about imposing its cadres in both the judiciary and Bar Association as well as other bodies, all of which suppressed dissenting voices against the state and danced to its tune. This interference was meant to infantilise professional bodies, and it succeeded in weakening them to such an extent that discussion of human rights and democracy came to seen as rebellion against the NCP leadership. Under such conditions, submissiveness is idealised and 'open debate and freedom of expression are not abundant virtues'.[55]

It is all the worse when this happens in the judiciary, as it is the main protector of the rule of law and democratic principles. Belton makes the telling observation that 'reformers would be naïve not to expect recalcitrance and evasion of reforms meant to achieve this end from

53 A An-Na'im 'Constitutionalism and Islamization in the Sudan' (1988) 7 *Third World Legal Studies.*

54 AM Medani 'A legacy of institutionalized repression: Criminal law and justice in Sudan' in L Oette (ed) *Criminal law reform and transitional justice* (2011).

55 D'Agot (n 1) 138.

those who stand to lose power'; she adds that 'real powers are being taken away from powerful individuals when judiciaries are strengthened and procedural laws that bind the executive are passed'.[56] Progressive legal scholars believe that the rule of law exists when officials in the government are constrained to follow the law and when powerful actors in society are arrested, tried, convicted, and punished as a matter of routine in spite of their individual resources. Because the NCP saw the independence of the judiciary and professional associations as a threat to its existence, it capitalised on its infiltration of institutions and strategy of 'internal contradiction', thereby devitalising the justice system and weakening the Bar's ability to challenge its authoritarian decisions. Equally importantly, some members of the Sudanese Bar became religiously and politically inclined in the process, paving the way for the NCP elite to implement its repressively interventionist policies.

4.2 The Uganda Law Society

Rule-of-law reform in the East Africa Community has been a gradual process. One can obtain evidence of what states do in this regard from numerous sources. These include administrative acts, legislation, court decisions, and activities on the international stage, for example treaty-making.[57] In the case of Uganda, its efforts to promote the rule of law included the enactment in 1965 of legislation establishing the Uganda Law Society (ULS).

The main purpose in forming the ULS was 'to develop a skilled and empowered legal profession in execution of its statutory mandate to foster and improve access to and administration of justice as well as good governance in Uganda'.[58] The ULS aims to promote members' professional development and ethical conduct; to promote access to justice for indigent, marginalised and vulnerable persons; to contribute to upholding and promoting the rule of law in Uganda; and to strengthen its own institutional capacity as a modern bar association. To these ends, the ULS, with assistance from the Norwegian Bar Association,

56 R Belton 'Competing definitinos of the rule of law: Implications for practitioners' *Carnegie Papers* No 55 (2005).
57 M Shaw M *International law* (2008) 82.
58 The Uganda Law Society Act (ULS), 1956.

established the Legal Aid Project in 1992. This project was borne out of the realisation that apart from the state brief system, which handles only capital offences, there was no statutory free legal aid in Uganda, even though a large part of the population lives below the poverty line and otherwise has little to no means of accessing justice.[59]

According to the country's National Development Plan, the key barriers to accessing justice include growing caseloads, physical distance to service institutions, technical barriers, and poverty. It notes that women face greater barriers in accessing justice than other groups due to their higher levels of illiteracy and their lack of information about their legal rights. In response, the ULS initiated a pilot pro bono scheme in 2008 in conjunction with the Ministry of Justice and Constitutional Affairs. The project currently covers the greater part of Uganda and has provided significant assistance to Ugandan citizens. From a democracy standpoint, the ULS partnered with Advocats Sans Frontieres on an advocacy project focused on 'mobilizing lawyers for [the] rights of Ugandans'.[60] Despite these initiatives, Ugandans still crave the political freedoms enshrined in the country's constitution.

Be that as it may, members of the ULS have fewer political restrictions on them than their peers in neighbouring countries, in particular the Democratic Republic of Congo and South Sudan. The ULS has also stood up for citizens on many an occasion, earning itself a good reputation over the decades. This is not to say that there have not been instances when some of its members have been compromised into silence in politically motivated cases, such as has occurred during arbitrary arrests of political dissidents, among them the opposition leader, Kizza Besigye.[61] On balance, though, the Bar Association in South Sudan could learn a thing or two from this fellow association in its neighbouring country; in particular, it could strategise on how best to create working relationships with international legal bodies and lawyers in the furtherance of its local advocacy programmes.

59 See the Uganda Law Society website at https://uls.or.ug.
60 ULS (n 58).
61 The Ugandan opposition leader has been held in prison several times. In 2016, local and international news media drew attention to his arbitrary arrest.

4.3 The Law Society of Kenya

In 1970, an East African law school laid out an ambitious agenda for legal education in East Africa, one equal to the enormity of the demands of the day. The question now, as Kirsten Dauphinais asks, is: '[T]o what extent has that agenda been met, that promise been fulfilled?' Kenya, as she notes, has made 'attempts to answer and offer solutions to the challenges arising out of the best practices of the pedagogy of lawyering skills and the scholarship of teaching and learning as it applies to legal education'.[62] This can be seen in the commendable reputation advocates have earned over the years, with most of them challenging government positions before the courts and upholding democratic, rule-based principles in Kenyan constitutionalism. This endeavour has helped erase the negative impression that various scholars have had of lawyers' independence in sub-Saharan countries.

The establishment of the Law Society of Kenya (LSK)[63] was a milestone in Kenya's struggle for independence. The LSK is mandated to, among other things, maintain and improve the standard of conduct and learning of the legal professionals in Kenya; facilitate the acquisition of legal knowledge by the members of legal profession and others; assist the government and courts in all matters affecting legislation and the administration and practice of law in Kenya; represent, protect and assist members of the legal profession in Kenya in respect of condition of practice and otherwise; and protect, and assist the public in Kenya on all matters touching, ancillary or incidental to the law.

Since the LSK's establishment, its founding instrument has been repealed twice – in 1992 and 2014 – to meet the developmental needs of the time. The current law in force recognises new structures that were introduced to enhance commitment to rule-of-law advocacy and efficient client care in legal practice. The current powers and principles enshrined in section 14 of the LSK's Act aim to '(i) assist the government and the courts in matters related to legislation, the administration of

62 KA Dauphinais 'Training a countervailing elite: The necessity of an effective lawyering, skills pedagogy for a sustainable rule of law revival in East Africa' (2009) 85 *North Dakota Law Review* 54.

63 The Law Society of Kenya was established by section 3 of the Law Society of Kenya Ordinance, 1949. The Ordinance was later repealed by the current Law Society of Kenya Act in 1992

justice and practice of law in Kenya (ii) uphold the Constitution of Kenya and advance the rule of law and the administration of justice and (iii) to protect and promote the interest of consumer of legal service and the public interest generally by providing a fair, effective, efficient and transparent procedures for the resolutions of complaints against legal practitioners'.[64]

The combination of judicial independence and the freedom of members of the LKS has enabled advocates to go beyond the usual court cases and establish a noticeable voice for civil and democratic pursuits in the country. The landmark victory in the case of Building Bridges Initiative (BBI) on 13 May 2021 serves as a good example.[65] The bold steps taken by the Kenyan legal fraternity support the view that the country is undergoing laudable political and institutional transformation and that it serves as a good example for the region.

Indeed, recent landmark decisions by the Kenyan Supreme Court during presidential electoral disputes have set a notable precedent even beyond sub-Saharan Africa, and perhaps challenged most liberal democracies to wonder if they would have fared as well in the same circumstances. This could never have happened without the fusion of a competent, professional law society, an independent judiciary, and a distinct separation of powers in the 2010 Constitution.[66]

The Kenyan experience should remind the South Sudan Bar Association that it has an obligation to improve itself, adopt admirable models of legal practice, and ensure that its goals extend beyond conduct in courtrooms to encompass transformative legal education, expansive legal aid, and the defence of human rights, the rule of law, and democratic accountability.

5 The rule of law and democracy: Dissecting the correlation

There has been extensive scholarly debate as to whether the rule of law and democracy should be treated as different theories in the governance

64 Section 4, Law Society of Kenya.
65 On 5 April 2022, the Supreme Court of Kenya issued a landmark ruling in the *Building Bridges Initiative* (BBI) case. The case concerned the constitutional validity of the BBI Bill, which had proposed an omnibus package of 74 amendments to the Constitution of Kenya, 2010.
66 Constitution of Kenya, 2010, arts 94, 130 & 160.

context. Tamanaha argues that there is no interrelationship between the rule of law and democracy; neither is there any correlation between democracy and human rights. According to him, the definition of the rule of law 'should not include democracy and human rights'.[67] He describes the 'rule of law as 'an ideal principle that relates to legality' and democracy as 'a system of governance'. This viewpoint has been advanced by some authoritarian governments that seek to expand state control in ways that serve their individual interests.

However, Tamanaha's view have not gone without criticism. Shaw observes that

> it is clear there can never be a complete separation between law and policy and that no matter what theory of law or political philosophy is professed, the inextricable bonds linking law and politics must be recognised. Within developed societies, a distinction is made between the formulation of policy and the method of its enforcement. In the United Kingdom, the parliament legislates while the courts adjudicate; a similar division is maintained in the United States between the Congress and the court system.[68]

Shaw further observes that 'the purpose of such divisions, of course, is to prevent a concentration of too much power within one branch of government'.[69]

Fukuyama shares this position, taking the view that a state's political fragility adversely affects the rule of law and entrenches institutional weakness, which in turn constrains efforts to build rule-of-law organs: 'of all the components of contemporary states, effective legal institutions are perhaps the most difficult to construct'.[70] This is especially true in a post-conflict setting like South Sudan. Fukuyama's observation that 'military organization and trucing authority arise naturally out of people's basic predatory instincts' cannot be ruled out. To address this policy predicament, he recommends that

> legal institutions ... must be spread throughout the entire country and maintained on an ongoing basis; they require physical facilities as well as huge investments in

67 BZ Tamanaha 'The history and elements of the rule of law' (2012) *Singapore Journal of Legal Studies* 232.
68 Shaw (n 57) 11.
69 Shaw (n 57) 11.
70 F Fukuyama *Political order and political decay: From the industrial revolution to the globalization of democracy* (2011) 247.

> the training of lawyers, judges, and other officers of the court, including the police who will ultimately enforce the law.[71]

For judges to be independent in their verdicts and lawyers to defend legislative roles without threat, they need to be protected by the relevant institutions of government. It is this protection that makes the government win the trust of its citizens. Arguing that the consequences of unrestrained power range from uncertainty to fear, Diamand maintains that 'what saves citizens from the knock on the door in the dead of night' – and, of course, from the fear that expressing their thoughts will lead to arbitrary arrest – 'is a constitution, a robust body of laws, and an independent judiciary to enforce them'.[72]

6 Conclusion

This chapter is not exhaustive enough to suggest conclusive remedies for addressing the limitations of the rule of law in South Sudan. While rule-of-law institutions with professional and resource deficits may always lack the capacity to focus on challenges that arise in civil, criminal, political, and economic matters, their desire to exercise influence in upholding constitutional governance and protecting human rights can be thwarted by circumstances beyond their control. Is it even more challenging when such efforts are exercised in a post-settlement context.

To deal with post-conflict rule-of-law challenges, the Bar needs to develop sufficient, forward-looking policies that could, from a justiciable standpoint, permeate national and local judicial, legal and administrative systems. Effecting the desired reforms would require an in-built level of professionalism among practising lawyers and the development of a strategic approach to addressing rule-of-law discrepancies. Lessons from successful neighbouring countries could be drawn upon and employed to achieve the desired end. As part of its national transformation agenda, the Government of South Sudan, in particular the Ministry of Justice and Constitutional Affairs, should prioritise proper legal training for lawyers as well as initiate transformative policies in legal administration and

71 Fukuyama (n 65) 247-256.
72 L Diamond *Ill winds: Saving democracy from Russian rage, Chinese ambition and American complacency* (2019) 14.

private legal practice to ensure the robust development of the country's entire justice system.

Nevertheless, whether destined for legal counsels in the Ministry of Justice, judicial assistants of the judiciary, or advocates in private practice, a coordinated curriculum (with English as sole language of instruction), with training procedures derived from the common law system, should be considered a prerequisite for all fresh law graduates to join the legal profession in South Sudan.

Inasmuch as this exercise calls for some form of international assistance, it requires South Sudan to reach out with well-meaning policy options which, at best, reflect the normative principles of the rule of law, respect for human rights, and democratic governance. This would perhaps not only inspire timely intervention but also pave the way towards developing a rule-of-law tradition, improving institutional capacity, and promoting constitutionalism.

As significant as international involvement may be, it would be pertinent to warn that South Sudan's legal sector cannot be sustained by international aid and assistance. However, since it takes time to establish sound, credible legal aid projects and institutions in a challenging environment like South Sudan's, humanitarian agencies that provide legal aid services should build stronger relationships with the Bar Association as well as national and local rule-of-law institutions. The aim would be to help establish common standards for judicial and legal aid work and, moreover, support language training and capacity-building among Arabic-patterned lawyers and judges so as to effectively assist national and grassroots legal aid efforts. This would help boost local knowledge, build local capacities, and prepare South Sudan's legal institutions to continue the journey to a fair justice system and constitutionalism on their own.

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