

Freedom of Expression in South Sudanese Judicial Struggle: Bought or Fought For? With Special Reference to India

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Abstract

This article examines the struggle of the South Sudanese people in the courtroom for freedom of expression with special reference to India. The aim is thus to illustrate the judicial perspective on interpretation of this fundamental right from the past to the present. This evaluation in nexus to the contemporary constitutional adjudication in the world at large and South Sudan in particular tries to draw the attention of the courts in South Sudan to adopt a progressive interpretation. It also stresses focus on interpretation adopted by judges in South Sudan. The paper seeks to reckon the concerned institutions in South Sudan to the ongoing liberal jurisprudences on the right to freedom of speech and expression on one hand and on the other hand informs the concerned institutions for a serious litigation and enforcement of Bill of Rights in

South Sudan. Indeed, the paper has invoked progressive interpretations of fundamental rights from the U.K, India, and the U.S to help in justifying the grounds as to why South Sudanese litigants and courts should scarcely claim and upheld freedom of expression as fundamental and foundational tenet of a democratic society. The article concludes that the sanctity of all rights will be meaningless if freedom of expression is not accorded an important status by the concerned institutions.

Keywords *Comparative Law, Comparative Constitution, Judiciary, Freedom of Speech & Expression, Constitutional rights*

Introduction

“The role of journalism should be service. The press is a great power, but an uncontrolled pen serves to destroy.”
— Mahatma Gandhi.

More than 200 years ago, one of the American Constitution architects, Thomas Jefferson wrote to a respected military general, Edward Carrington that *were it left to me to decide whether we should have a government without newspapers or newspapers without the government, I should not hesitate a moment to prefer the latter.*¹ This letter shows the sanctity of freedom of expression on the American soil and the rest of the world that have embraced constitutional democracy as form and foundation of their societies. It has also caused constitutional reform in US which led to the Constitution Fifth Amendment which states that:

¹ Thomas Jefferson, “Thomas Jefferson’s Letter to Edward Carrington, January 16, 1787”. In *Facts of Media Law*, as edited by Madhavi Goradia Divan, 1. Lucknow: EBC, 2018. See also Thomas Jefferson, “Letter to Edward Carrington (1787).” In Susan L. Maret and Jan Goldman (eds), *Government Secrecy: Classic and Contemporary Readings* (Connecticut, US: Greenwood Publishing, 2009).

“The Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for redress of grievances”.

Similar provisions have been postulated in various constitutional provisions such Articles 8 (religion),² 23 (religious rights),³ 24 (freedom of speech and media),⁴ 25 (freedom of assembly and association)⁵ and 32

² Religion and State shall be separate. All religions shall be treated equally, and religion or religious beliefs shall not be used for divisive purposes.

³ It states that the following religious rights are guaranteed by this Constitution:

- a) the right to worship or assemble in connection with any religion or belief and to establish and maintain places for these purposes;
- b) the right to establish and maintain appropriate faith – based, charitable or humanitarian institutions;
- c) the right to acquire, possess and own movable and/or immovable property and make, acquire and use the necessary articles and materials related to the rites or customs of religion or belief;
- d) the right to write, issue and disseminate religious publications;
- e) the right to teach religion or beliefs in places suitable for these purposes;
- f) the right to solicit and receive voluntary financial and other contributions from individuals, private and public institutions;
- g) the right to train, appoint, elect or designate by succession appropriate religious leaders called for by the requirements and standards of any religion or belief;
- h) the right to observe days of rest, celebrate holidays and ceremonies in accordance with the precepts of religious beliefs; and
- i) the right to communicate with individuals and communities in matters of religion and beliefs at national and international levels.

⁴ Every citizen shall have the right to the freedom of expression, reception and dissemination of information, publication, and access to the press without prejudice to public order, safety or morals as prescribed by law. All levels of government shall guarantee the freedom of the press and other media as shall be regulated by law in a democratic society. All media shall abide by professional ethics.

⁵ The right to peaceful assembly is recognized and guaranteed; every person shall have the right to freedom of association with others, including the right to form or join political parties, associations and trade or professional unions for the protection of his or her interests. Formation and registration of political parties, associations and trade unions shall be regulated by law as is necessary in a democratic society. No association shall function as a political party at the National or state level unless it has:

- a) its membership open to any South Sudanese irrespective of religion, gender, ethnic origin or place of birth;
- b) a programme that does not contradict the provisions of this Constitution;

(right of access to information)⁶ under the Transitional Constitution of the Republic of South Sudan, 2011 (Amended) hereinafter referred to as TCSS, 2011 or the Constitution. The above-mentioned Articles have close link in common. One may not be able to effectively enjoy any one of them without the others or at least two of them at the same time. However, it should be noted that all these freedoms are independent fundamental rights under the South Sudanese constitutional framework. Although each freedom is autonomous, they are profoundly linked to each other. They are indispensable pillars of a democratic society. Like the Indian and U.S constitutions, these rights to freedoms were embodied in a single Article in the earlier Sudanese constitutions i.e. Article 7 of the Self-Government Statute, 1953, Article 5 common to the Transitional Constitution of the Sudan, 1956 and Transitional Constitution, (Amended 1964) and even in section 4 of the Southern Province Regional Self-Government Act, 1972⁷. Freedom of expression as known may be exercised by words of mouth, printed, electronic, carton, engraved words on the walls or picture, gesture, to remain silence etc. This freedom is not just a mere freedom but a fundamental right to freedom as it is enumerated in the Bill of Rights⁸ and in form of fundamental rights under the Indian Constitution. By judicial struggle, we mean the judicial process in which litigants seek and/or draw the attention of the courts to enforce the sanctity of the right on one hand and on the other, the adherence of courts/judges thereof to the principles of judicial independence and impartiality or restraint/decline to affirm the importance and necessity of the right even in circumstance where their independence allows them or is tempered with.

Subject to the foregoing paragraph, our first aim in this paper is concerned with the freedom of expression as struggled for in the judicial battlefields. We will attempt to illustrate as a reminder to South Sudanese

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- c) a democratically elected leadership and institutions; and
 - d) disclosed and transparent sources of funding.

⁶ Every citizen has the right of access to official information and records, including electronic records in the possession of any level of government or any organ or agency thereof, except where the release of such information is likely to prejudice public security or the right to privacy of any other person.

⁷ This Act was enacted as a result of Addis Ababa Peace Agreement, 1972 to govern the Southern Provinces as Act No. 4.

⁸ The Transitional Constitution of the Republic of South Sudan, 2011, Part II.

judiciary, private and state legal professions, governments at various levels (both legislature and executive)⁹, media houses and the general public on how the journalists, practicing lawyers, judges had struggled in the past for realization of this vital fundamental freedom. In doing so, we will emphasis on the greater Sudan context where judges have stood firmly to uphold or declined to uphold the said freedom. Where the Courts in the Sudan are founded to have restrained themselves in upholding this right, some case law from India and other jurisdictions have been cited to substantiate the necessity to uphold this freedom.

The second aim is that; as South Sudan approaches a new constitutional era, it is important to embark on this freedom for it is the mother of all civil liberties and a key to constitutional and democratic transformation. The paper thus, seeks to argue the concerned institutions to establish a firm practice, promotion and protection of this right although South Sudanese political elites equate it as a threat to their political ambitions. By concerned institutions, we mean the parties in media profession. These include the journalists, the government at all levels, judiciary, legal profession,¹⁰ NGO partners and human rights defenders. Part I will discuss a substantive, theoretical and brief historical overview of judicial struggle for freedom of speech, Part II deals with the roles of the courts in enforcement of freedom of expression. Part III covers the role of Concerned institutions and the legacy of freedom of expression and part IV with criticism to the corollary of freedom of speech & expression part IV ends the paper with conclusion.

It also covers studies like case study of *Bijoe Emmanuel & Others v. State of Kerala* (1987), wherein the Supreme Court emphasized that expulsion of children who were from the Jehovah Witness Christian denomination from their school for not singing national anthem constituted infringement of their right to freedom of expression. Similarly in another studies African Centre for Justice and Peace Studies, “*The Judiciary in Sudan: Its Role in the Protection of Human Rights During Comprehensive Peace Agreement*” (2005-2011); Amin M. Medani (ed), “*The constitutional Protection of Human Rights in Sudan: Challenges and Future Perspectives*”, 2014, M. I. Khalil, “*The Legal System of the Sudan*”,

⁹ The government system or structure in South Sudan is that there is a National Legislature and State Legislature as well as National and States Executive.

¹⁰ Both private practicing lawyers and state legal counsels (Government lawyers).

1971, Zaki Mustafa, “*Opting Out of the Common Law: Recent Development in the Legal System of the Sudan*”, 1973, Abdullahi Ibrahim, “*Manichaean Delirium: Decolonizing the Judiciary and Islamic Renewal in the Sudan*”, 2008, Mark Fathi Massoud, “*Law’s Fragile State: Colonial, Authoritarian and Humanitarian Legacies in Sudan*”, 2013, and Mark Fathi Massoud, “*Do Victims of War Need International Law? Human Rights Education Programs in Authoritarian Sudan*”, 2011.

Freedom of speech is a fundamental right and core principle in many democratic societies. The study of this topic and above stated Sudanese struggle are more often and important tool of understanding human law, Constitutional Law as interpreted by American Supreme Court in *Bradenburg v. Ohio* (1969) & *New York v. Sullivan* (1964), which sets high bar for defamation claims involving public figures. Robert Dahl’s work on democracy highlights the importance of free expression for pollical participation and public debate.

These studies provide a comprehensive understanding of freedom of speech and expression, highlighting its significance, challenges and implications in various contexts. This paper utilizes the normative juridical research method, selected for its utility in comparing the judicial approaches to freedom of expression in South Sudan and India. Primary sources for this study include laws, judicial decisions, constitutional provisions, and academic writings related to the enforcement and limitations of freedom of expression in both countries. Additionally, key writings on the historical and sociopolitical contexts that have shaped the judicial stance on this right are considered primary data.

The qualitative method is applied to conduct a comprehensive and in- depth analysis of legal principles and judicial decisions in both jurisdictions. This approach facilitates a detailed exploration of the role of the judiciary in either protecting or restricting freedom of expression. Comparative legal analysis further allows for an understanding of how these two countries address similar challenges through their judicial systems, with particular attention to the socio-political landscape in South Sudan and the well-established jurisprudence in India.

Substantive, Theoretical & Historical Overview of Judicial Struggle for Freedom of Expression

The people of the Sudan¹¹ have always been the lovers of fundamental freedoms throughout their past and present lives against the invasion, colonialism and oppression. This is evidently reflective in the 1885 revolution against Gordon Pasha's government¹² whose achievement/result was hijacked and sectionalized in the process into and by the so called 'the Mahdist Revolution or Mahdist State.'¹³ In fact, it was a collective achievement of the peoples of the Sudan including the present day Bahr el Ghazal, Unity and Northern Upper Nile regions of South Sudan.¹⁴ Khalifa Abdullah Alasha when he became the successor tried to acknowledge this fact by secularising the State to accommodate everyone but ended in internal feuds between him and the so called 'Awlad Al Bilad.'¹⁵ Because of this historical quest for freedoms, the peoples of the Sudans have been known as people who always do the unexpected or impossible. For instance, they are the first people in Africa to have overthrown the foreign rulers and military regimes in 1885, 1964, 1985 and 2019 respectively. Unlike the rest of colonial territories under the British Empire or other foreign rules, the people of the Sudan were the only among the few to attained independence in less than six decades. This briefly indicates the quest of Sudanese peoples to enjoy their freedoms.

The sources of the freedom of expression under which the courts and individuals are empowered to adjudicate are captured in various instruments such as the TCRSS, 2011, African Charter on Human and

¹¹ Sudan in this context or sense is referred to include Sudan and South Sudan in the present era. Wherever it is stated as Sudan, it also includes South Sudan unless the context otherwise suggests to be Sudan in present era.

¹² Gordon Pasha was a hired British official from China to rule Sudan for and on behalf of Ottoman Empire from 1833 – 1885.

¹³ For a critique on the Mahdist State, see Mohammed Ibrahim Nugud. *Slavery in the Sudan, History, Documents and Commentary*, Edited by Sharon Barnes. Translated by Asama Mohammed Abdel Halim. Palgrave, 2013.

¹⁴ Daniel Thabo Nyibong Ding, "The Impact of Change Agents on Southern Sudan History." (PhD Thesis, Institute of African and Asian Studies, University of Khartoum, 2006), 76 – 83.

¹⁵ An Arabic phrase which literarily means "*sons of the soil*", a phrase purportedly claimed by the Arab tribe elites in the North of the Sudan.

Peoples Rights, 1986¹⁶, Universal Declaration of Human Rights, 1948¹⁷ and other international human rights instruments rectified by South Sudan like International Covenant on Civil and Political Rights, 1966¹⁸ as it appears in Article 9(3) of TCSS, 2011.¹⁹ But the last three frameworks although they are important sources of human rights, they are always referred to as by the state foreign to be resorted to only when there is national legislative or judicial pronouncements vacuum. Sometimes they are considered so; because of the heat debate between monists and dualists. But arguably, the Courts cannot merely limit their interpretations of this right based on absurd interpretation²⁰ of the provision of the Constitution or the law. This is because the right to freedom of expression or the Constitution itself as a whole was expounded by the people of South Sudan, perhaps in their founding deeds and fighting creeds which date back to the earlier years of foreign rule in the Sudan²¹, 1947 Juba Conference, the 1955 Torit mutiny, the Anya-nya and Sudan's People Liberation Movement/Army (SPLM/A) liberation wars. Thus, the interpretation and enforcement should be affected so that the agendas of these mentioned national struggles are realised and cherished in glory by the people. Although the people of South Sudan have fought for freedom of expression in the battlefields, they have equally fought the same wars in the judicial process (courtroom) since the time of Edgar Bonham Carter²² designed and drafted a unified judicial system in the Sudan under Governor—General Reginald Wingate.

¹⁶ African Charter on Human and Peoples Rights, 1986, Article 9.

¹⁷ Universal Declaration of Human Rights, 1948, Article 19.

¹⁸ International Covenant on Civil and Political Rights, 1966, Article 19.

¹⁹ The Transitional Constitution of the Republic of South Sudan, 2011, Article 9(3): "all rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified or acceded to by the Republic of South Sudan shall be an integral part of this Bill".

²⁰ For detailed discussion on the principle of absurd interpretation of statutes, see Veronica M. Doughty, "Absurdity and the limit of literalism: Defining the Absurd result principle in statutory interpretation," *American University Law Review* 127, no. 44 (1994).

²¹ Technically, Sudan was not a British colony nor Protectorate. It had its own unique system perhaps it would be better to refer to as Trusteeship as it was ruled by two countries i.e. British and Egypt under the Condominium Agreement 1899.

²² Carter was the First Colonial Legal Secretary from 1899 – 1916. The position was also known as Judicial Commissioner.

A quick review of Article 24(1) of the TCSS, 2011 makes one to conclude that this provision encompasses various facets of freedom of expression. These facets include but not limited to right to circulate/or receive information, right of the press to conduct interviews, right to dissent, to portray social/historical evils/events²³, to report court and legislative proceedings, to advertise, compelled speech²⁴, to broadcast, to remain silent,²⁵ to raise, fly and celebrate the flag, to sing the national anthem, right to entertain and be entertained, right of rebuttal²⁶, right to express opinion in election (vote) and more importantly, the right to freedom of expression is an extended right which goes beyond the boundaries of a country.²⁷ If freedom of expression beyond boundaries is not guaranteed, the government may criminalize opinions of citizens while abroad or the government may engage in illegal activities in foreign lands and debar citizens to question such activities. However, TCSS, 2011 imposes restrictions under Article 24(2) and (3) through legislative enactment unlike the Indian and U.S. Constitution²⁸ which does not prescribe restrictions but provide an absolute right. Under U.S constitution, it is left as the duty of a speaker or press to impose her/its own self-restraint or makes limit on the freedom of expression. But, the

²³ For example, negative customs, like the so called forced married, competition over a girl for marriage especially when a girl is not given opportunity to choose, sleazy, malfeasance in office, nepotism, etc.

²⁴ For example, to disclose the information about the ingredients and contents of goods.

²⁵ Emmanuel & Others v. State of Kerala, AIR 748 (1987). Indian Supreme Court held that expulsion of children who were from the Jehovah Witness Christian denomination from their school for not singing national anthem constituted infringement of their right to freedom of expression.

²⁶ For example, to respond to an allegation in the same medium it was communicated even if it means that such medium is run by the opponent or the very person who made such allegation.

²⁷ During the civil unrest in the Sudan in 2019, the South Sudan Media Authority, summoned, warned and ordered Alwatan *Arabic Daily Newspaper* to refrain from reporting or carrying any critical opinions supporting the North Sudanese civilians and peaceful revolution. The Editor-in-Chief of the said Newspaper, Michael Rial Christopher was subsequently reported to have been receiving frequent life-threatening messages regarding his publication on the same which led to his fled to Egypt. But the fact was that no force or authoritarian power that had stopped the Sudanese from staging the revolution.

²⁸ See Section I above first paragraph.

law²⁹ enacted under Article 24(2)/ (3) of TCSS, 2011 to qualify this freedom seems to be far-fetching to or overriding the constitutional intention. Thus, it is always exercised on unnecessary basis particularly the enjoyment of the right which pertains to right to dissent or portray social evils or historical events. For this, one may safely say that the legislature has defeated the Constitution intention on the Bill of Rights.

The debate as to whether the right to freedom of expression differs from or similar with the right to freedom of the press is a heated debate. In other words, should the same right be essentially and similarly accorded to an individual citizen and the journalist exercising his/her profession is an interesting debate. If freedom of expression of an individual were to be treated different from freedom of press, it will give room even for foreign nationals/journalists to claim such right. The correct position seems to be that freedom of expression is similarly applicable to both an individual and journalist or media house since the right is expressly guaranteed to every citizen and the press although it is a juristic person is not considered or accorded the rights or status of a citizen at all times. Regarding the status of a non-citizen who owns and runs a media house in a country like South Sudan and India whether entitled to this right, the possible and perhaps the right answer will depend on the wording of the provisions of the constitution and the law guaranteeing such right whether the Constitution or the law accords this fundamental right to a citizen or a person. But since Article 24 of the TCSS, 2011 stresses the phrase “every citizen”, then a foreigner owning and running a media house cannot claim freedom of expression as of right but as a privilege. This distinction is essentially needed for national integrity. In the following section, We will deal with how litigants and the courts in the Sudan and other common-law jurisdictions have invoked and upheld or imposed self-restraint for the enforcement of this right.

The Courts & The Freedom of Expression

Unlike the rest of judicial systems where “*judicial activism*”³⁰ has been adopted as a means for judicial law making and enforcement of the

²⁹ Media Authority Act, 2013: enacted to regulate the media in South Sudan.

³⁰ *Black's Law Dictionary*, at 921: Defines Judicial activism as “a philosophy of judicial decision-making whereby judges allow their personal views about public

fundamental rights, the courts in the Sudan have chosen to remain conservative or imposed unnecessary self-restraint in adjudication, interpretation and enforcement of the Bill of Rights.³¹ The judicial conservatism and self-restraint of the judges in the Sudan is clearly reflected in *Elhaj Yousuf Elhaj Mekke v. Izulldin Ahmed Mohammed*³² where the Sudan Constitutional Court declined to uphold and enforce the Bill of Rights. It was a clear defiance of Article 48³³ of the National Interim Constitution, 2005. Judicial activism and law making are necessary tools in the present era where the ruling party in parliament can happen to own majority and may abridge or back the violation of the fundamental rights by the Government. On the same note, the litigants seem inadvertently chosen not to litigate for their rights. Perhaps they

policy, among other factors, to guide their decisions, usu. with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent". See Brian. A. Garner, *Black's Law Dictionary*, 10th edition. (US: Thomson Reuters, 2014). On the other hand, Prof. U. Baxi, *Courage, Craft and Contentions: The Indian Supreme Court in the Eighties* (1st ed., Bombay, 1985) at 10: Defines judicial activism as: "judicial activism is that way of exercising judicial power which seeks fundamental re-codification of power relations among the dominant institutions of State, manned by members of the ruling classes."

³¹ African Centre for Justice and Peace Studies, "The Judiciary in Sudan: Its Role in the Protection of Human Rights During Comprehensive Peace Agreement" (2005-2011). Dr. Amin M. Medani, "The Constitutional Protection of Human Rights in Sudan: Challenges and Future Perspectives," *A Conference report* organized by Faculty of Law, University of Khartoum in collaboration with Sudanese Human Rights Monitor and REDRESS (2014). M. I. Khalil, "The Legal System of the Sudan," *International & Comparative Law Quarterly* 20, no. 4 (1971): 624-644. Zaki Mustafa, "Opting out of the common law: recent developments in the legal system of the Sudan." *Journal of African Law* 17, no. 2 (1973): 133-148. Abdullahi Ibrahim, "Manichaeism Delirium: Decolonizing the Judiciary and Islamic Renewal in the Sudan," Brill (2008). Mark Fathi Massoud, "Law's Fragile State: Colonial, Authoritarian and Humanitarian Legacies in Sudan," *Cambridge University Press* (2013). Mark Fathi Massoud, "Do Victims of War Need International Law? Human Rights Education Programs in Authoritarian Sudan," *Law & Society Review* 45, no. 1 (2011): 1-32.

³² *Elhaj Yousuf Elhaj Mekki v. Izulldin Ahmed Mohammed*, CC/CC/6 (2006).

³³ Interim National Constitution, 2005, a. 48: "Subject to Article 211 herein, no derogation from the rights and freedoms enshrined in this Bill shall be made. The Bill of Rights shall be upheld, protected and applied by the Constitutional Court and other competent courts; the Human Rights Commission shall monitor its application in the State pursuant to Article 142 herein."

have little faith in the judicial system or fear of subsequent repercussions from the State or non-state actors. In either case, the judicial power reposed in the judges by the people³⁴ to be exercised in accordance with or on their behalf and aspirations is obviously questioned or doubted. Perhaps, the indifference of the trios³⁵ in claiming and upholding the Bill of Rights has awarded the government with undesirable and undeserving power to harshly use such power to restrict or gag the freedom of expression. It is an undisputed fact that for the last 10 years alone more than five Newspapers, TV and Radio broadcasting stations and several online websites have been closed down in South Sudan without court orders.³⁶ This shows that there is something wrong even if we could agree for the sake of argument that they were shut-down on genuine or administrative grounds.

Even in countries such as India and South Africa which had achieved their independences decades ago against oppressive systems which subjected people to racial and religious discriminations and to which South Sudan shares the same historical prejudices did not shutdown such number of media outlets when the revolutionary forces took over power. This is in addition to number of detained journalists/individuals held without charges against them. There are cases of disappearances of journalists and activists with reportedly death allegations with no one being accounted for. This tells us that the history of judicial and fundamental rights crisis is not new in the Sudan but an embedded fear in the Government to freely allow and protected these rights. For instance, the case of *Sudan Government v. Paulino Dogali & Others*³⁷ is one of the reported few cases of how courts in the Sudan has interpreted the freedom of expression. As we have mentioned above in section one, the instant

³⁴ The Transitional Constitution of the Republic of South Sudan, 2011, Article 122(1): “judicial power is derived from the people and shall be exercised by the courts in accordance with the customs, norms and aspirations of the people and in conformity with this Constitution and the law”.

³⁵ The litigants, legal professions and the courts.

³⁶ For example, *The Citizen Newspaper* (2015). *The This Day Newspaper*. *The Nation Mirror Newspaper*. *Al Rai Newspaper* (2015), *The Destiny Newspaper*, *The Independence Newspaper*, some online media houses such as the *Sudan Tribune*, *Panluel Wel*, *South Sudan Nation.Com*, *South Sudan News Agency*, *Nyamelpedia*, etc. (all these online media houses cannot be accessed in South Sudan up to day). *The Citizen TV Channel*, *The Free Voice Radio and Eyes Radio*, 2015.

³⁷ *Sudan Government v. Paulino Dogali & Others*, SLJR 83 (1962).

case covers three fundamental rights, that is, freedom of expression, religious freedom and freedom of association and assembly. In 1960, the military regime in Khartoum while restricting the work of missionaries and specifically the Christians and Jewish religious activities in the Sudan declared Sunday as a working day of the week which was a resting and a religiously observed day in Southern Sudan. This provoked protests among the students, government employees and trade unionists in the then Southern Sudan. The accused in protest authored a leaflet which asked Southern Sudanese Christians of various categories i.e. students, employees and trade unionists to boycott work on Sundays. The paragraph which led to prosecution read as follows:

“The recent decree of our Government saying that Sunday, the religious holiday, becomes an ordinary working day, and that Friday, the Moslem religious day is the only resting day for all citizens of every creed, clearly states that we Christians should disregard the tenets of our Christian faith and Islam must be imposed on us by the present regime..... Since the day of our independence, different political parties have ruled us, but never such an order was given; and now what is the matter? Is it because we are now ruled by guns, and our mouths closed, that we should be made to turn our backs to Jesus Christ, being forced to give up our dear religion? . . . Let us resist, therefore, unanimously with one soul, one heart, one body, using these peaceful means. We appeal to all Christians in every walk of life and occupation, from the Assistant Governors to the last street sweeper to boycott work on Sundays as from the third week of April 1960.”

The trial Court sentenced the first accused and three other students under section 4 of the Defence of the Sudan Act, 1958 to 12 and 10 years in prison respectively. But on appeal, M.A. Abu Rannat CJ, reduced the sentences to 5 and 3 years’ imprisonment respectively. Abu Rannat CJ, in his judgement observed:

“Reading the leaflet as a whole, We have no doubt that its object is to invite opposition and bring discredit to the Government. One of its objects is clearly to provoke difference between Moslems and Christians. We are a secular State, and the object of the Council of

Ministers' resolution of Feb. 1960 was mere unification of working days in the whole country. The interpretation put by the authors of the leaflet is to show that the present Government is imposing Islam and fighting Christianity".

In *Romesh Thapper v. State of Madras*,³⁸ the government of the State of Madras through an order issued under Madras Maintenance of Public Order Act banned the entry of a journal into its territories on the ground of public order and security of the State. The Supreme Court struck down section 9(1-A) of the said Act on the ground that, only an act serious enough to constitute a danger to the foundations of the State or a threat to overthrow, could justify curtailment of the right to freedom of expression.

In *Ram Manohar Lohia v. State of Bihar*.³⁹ Ram Manohar was a socialist leader. He opposed the state government on what he saw as excessive taxes on the State's poor masses without services being rendered back to the citizens. He argued the citizens to protest and resist the payment of taxes. He was detained under the Preventive Detention Act, 1950 and charged for causing threat to public order and security of the State. The Supreme Court held the detention as mala fide and observed that:

"Public order, law and order and security of the State are not synonymous expressions. These concepts are in the nature of three concentric circles, "law and order" represents the largest circle within which lies the next circle representing "public order" and within which is the smallest circle representing "security of the State." Thus, an act which affects "law and order" may not necessarily affect "public order" and an activity which may be prejudicial to "public order" may not necessary affect "security of the State".

However, Jalal Ali Lufti P.J. (as he then was) before the *Paulino Dogali case* had upheld the right to freedom to disseminate religious information or teaching in the schools in the case of *Sudan Government*

³⁸ *Romesh Thapper v. State of Madras*, AIR SC 124 (1950).

³⁹ *Ram Manohar Lohia v. State of Bihar*, AIR SC 740 (1966).

v. Father Silvano Gottardi.⁴⁰ Father Silvano was a Catholic priest in Juba. He went and entered a Khalwa⁴¹ at Malakia. He greeted the Khalwa supervisor and asked whether it was possible for him to give instruction to catholic boys who were attending classes in the Khalwa but the supervisor said it was not possible and he left cordially. After few days the Sheikh informed the Sharia Kadi⁴² who charged the priest under the Sudan Penal Code (SPC), 1925 on the grounds inter alia; breach of peace, disturbing public tranquillity and for trespassing in a place of worship. The trial Court convicted him on all counts and sentenced him to imprisonment, fine and deportation. On appeal before the Province Court, Jalal Ali Lufti P.J found the charges implausible to the provisions of the SPC. The learned judge quashed the conviction and stated that:

“The accused did not enter the *Hosh*⁴³ of the *Khalwa* with intent to commit any offence or to intimidate, insult or annoy any person in possession. He entered to fulfil a *lawful* object, to which the Catholic boys are entitled, and there were sufficient grounds to make him believe that his entry would even be welcomed by those responsible for the *Khalwa* . . . On the other hand, neither the *Khalwa* nor its *hosh* are places for worship..... A *Khalwa*, as stated before, is a school below the elementary school where mainly the Koran is taught, together with Arabic and Arithmetic. . . Muslims never go to a *Khalwa* to pray”.

There are many other similar landmark cases where the courts in the Sudan upheld the right to freedom of expression. Some of these are *Sudan Government v. Milton Thompson*,⁴⁴ *Sudan Government v. Darius Bashir & Others*⁴⁵ and *Joseph A. Garang & Others v. The Supreme Commission & Others*.⁴⁶ The last two cases deserve our attention. In *Darius Bashir case*, Darius Bashir, Bona Malwal and Chan Malwal,

⁴⁰ Sudan Government *v.* Father Silvano Gottardi, SLJR 245 (1960).

⁴¹ Koranic or Qur’anic school.

⁴² It simply means Islamic judge.

⁴³ It is an Arabic word which literally means fence or compound.

⁴⁴ Sudan Government *v.* Milton Thompson, SLJR 56 (1963).

⁴⁵ Sudan Government *v.* Darius Bashir & Others, SLJR 99 (1966).

⁴⁶ Joseph A. Garang & Others *v.* The Supreme Commission & Others, SLJR 1 (1968).

the proprietor, editor and assistant editor of the *Vigilant Newspaper* respectively were charged under sections 105 and 106 of the SPC for arousing illegal opposition or hatred against the government and exciting hatred between the people. Prosecution was initiated because the *Vigilant Newspaper* carried a story about the reprisal killings of civilians in the towns of Juba and Wau by the army and the opinion article published by the paper under the title “*Ours is National Liberation.*” Abdal Mageed Imam J, in his judgement seems to have adopted an activist approach when he stated:

“The Government which engages in such high- handed illegal and most inhuman acts is contemptuous and any citizen who says this of it should be protected by a presumed intention to have these illegalities and inhumanities removed; for to hold otherwise would frustrate both the letter and spirit of all laws and would render them futile”.

Joseph A. Garang case came at the background when the Constituent Assembly amended Article 5(2) of the Sudan Transitional Constitution (amended 1964) to criminalize free expression of opinion and association with communism and to disqualify Communist MPs from membership in the Constituent Assembly, as provided in Article 46.⁴⁷ The amendment of Article 5(2) and (3) partly read thus:

“5(2) any person who shall perform or to seek to perform any act in furtherance of communism whether local or international, or perform or seek to perform any act in furtherance of apostasy or non-belief in heavenly religions or by way of using force or intimidation or any other unlawful means to perform or seek to perform any act to overthrow the Government;

5(3) every association whose aim or means constitute a contravention of the proviso to sub- article (2) shall be deemed to be an unlawful association; and the Constituent Assembly

⁴⁷ The Transitional Constitution of the Republic of Sudan, 1964, Article 46: provided the Conditions of Membership in the Constituent Assembly.

may enact any legislation which it shall deem to be necessary for the implementation of the provisions of that provision”.

In furtherance of this Amendment,⁴⁸ the Constituent Assembly enacted the Dissolution of the Communist Party Act, 1964 to ban the Communist Party, declared it as unlawful association and to disqualify its eleven MPs. The petitioners thus challenged the amendment and dissolution of the party on the ground that the amendment was unconstitutional and it infringes their fundamental rights to freedom of expression and freedom of assembly and association. Salah Eddin Hassan, J ruled that the Amendment and the Act were unconstitutional and violative of the said rights. He astutely observed that:

“as far as fundamental rights are concerned the Constitution makers by their silence intended that these guaranteed rights should not be subject to any abridgment by constitutional amendment during the Transitional period which is two years old. It is the paramount duty of the Constituent Assembly during these two years to make and pass the permanent constitution. It is also assumed with safety that the fundamental rights, especially those of free expression of opinion, and the right of free association and combination subject to the law should become completely inviolable even by the process of constitutional amendment until the passing of the permanent Constitution; so that every citizen whatever his political beliefs may be could have a say in the permanent Constitution, under which he and his children and maybe his children’s children shall live and survive”.

The two judgments of Darious Bashir and Joseph A. Garang show the sacrosanct of the fundamental rights in a constitutional democracy which must be protected strongly by democratic system. Unfortunately, the judgment as it is known was not enforced.⁴⁹

⁴⁸ The Transitional Constitution of the Republic of The Sudan, 1964, Article 5(3).

⁴⁹ Alier, Abel. “Too Many Agreements Dishonoured.” *ITHACA* (2003): 56.

The Indian Supreme Court in the case of *I.C. Golak Nath v. State of Punjab*⁵⁰ had almost made a similar judicial precedent which it extensively elucidated and enunciated further in the case of *Kesavananda Bharati v. State of Kerala*⁵¹ to propound ‘the doctrine of basic structure of the constitution.’ According to this doctrine, there are some basic features of a constitution which cannot be abridged and that they are kept out of reach of government even by constitutional amendment power of the legislature. These features include the sanctity of fundamental rights, social justice, supremacy of the constitution, separation of powers, rule of law, unity and integrity of the nation etc. Hence, it does not require one to be a rock scientist to prove the existence of basic structure doctrine in our Constitution.

The Concerned Institutions & The Legacy of Freedom of Expression

For legacy, we mean the state of freedom of expression in the today South Sudan and the contribution of the concerned institutions thereof. As part of the concerned and their legacies on freedom of expression, this section will briefly examine how the concerned institutions to the freedom of expression have contributed towards the realisation of the freedom. For better protection of right to freedom of expression, we think that all the concerned institutions need to come together into terms to genuinely cooperate on the enforcement of this primordial right on one hand. On the other hand, to lay down or agree on terms on how to avoid or tackle its abuse. However, it is unfortunate to mention that the work of the concerned institutions is in despair. For instance, the Media Authority has recently through its repressive and hostile regulation has become hostile/repressive towards media than media friendly.

Some members of the media house or the concerned institutions have chosen to be friendly or identify themselves as government allies for their operation. But such operation has seriously hampered the freedom of expression as media particularly the printed one tends to opt-out the dissenting opinions. It is not an exaggeration to say that freedom

⁵⁰ *I.C. Golak Nath v. State of Punjab*, AIR SC 1643 (1967).

⁵¹ *Kesavananda Bharati v. State of Kerala*, 4 SCC 225 (1973).

of expression is only lawful in the statute books but outlawed in practice.⁵² This puts the doubt on the fate and vision of nation building in South Sudan. Perhaps, Douglas J, of the U.S. Supreme Court on the freedom of press which is an essential aspect of freedom of expression had once rightly said in the case of *Terminello v. Chicago*,⁵³ that ‘*acceptance by the government of a dissent press is the measure of maturity of the nation.*’ The today’s constitutional and democratic governments are distinguished from unconstitutional and undemocratic governments by how far the freedom of expression is tolerated by the State or non-state actors,⁵⁴ how the citizens as the owners of this right seek its enjoyment and the manner in which judiciary inescapably uphold it on the other. As stated early, freedom of expression includes the right to dissent and criticize the government. This dissenting aspect of free speech is the prerequisite of a constitutional democracy. Every citizen is expected to express his or her view no matter how bitter such views may be.⁵⁵ Its absence will only attain a formal democracy where every right is restrictively guaranteed at sweet-will of the government. In such democracy, alternative views and ideas are opted out which eventually leads to standardization of ideas by the government and more likely by servile judges.⁵⁶

To put it in Justice Krishna Iyre’s⁵⁷ words, such type of democracy is a drugged, debauched and depraved democracy which attains nothing but despair our future. By and large, the state of freedom of expression today in South Sudan is not quite promising. This makes us to remind the concerned institutions with the words of great Indian eminent jurist, Nani Palkhivala that:

⁵² The Transitional Constitution of the Republic of South Sudan, 2011, a. 24: The restriction imposed by the Media Authority and the National Security Services is beyond the limitation imposed by the law.

⁵³ *Terminello v. Chicago*, 93 LEd 1131 (1949) at 334.

⁵⁴ Non-state actors are sometimes considered as protective agent of the human rights. These actors include political parties, state owned or controlled corporations.

⁵⁵ The Transitional Constitution of the Republic of South Sudan, 2011, a. 24: It includes “freedom of expression, reception and dissemination of information, publication, and access to the press”.

⁵⁶ Mill, J.S. “Considerations on the Representative Government.” *Cambridge University Press II* (2011).

⁵⁷ Iyer, Justice V. R. Krishna. “Dynamic Lawyering.” *LexisNexis* (2015): 68 - 70.

“Constitution represents the charter of power granted by liberty and not the charter of liberty granted by power. Liberty is not a gift of the state to the people; it is a people enjoying liberty as citizens of a free Republic who have granted powers to the legislature and the executive”.⁵⁸

With this observation, the concerned institutions are herein reminded that they are duty bound to protect the rights whose protective power is entrusted in the government by the people. At this point, some of the decided authorities may be illustrated to examine the state of tolerance on diversity of opinions as acceptance of freedom of expression in South Sudan. The case of *Members of SPLM-DC v. FVP, President of Government of Southern Sudan and Chairman of the SPLM*,⁵⁹ is one of the cases in issue. It was a case in which the respondent directed the Governors of the former Southern Sudan ten states to cooperate with all the political parties except the SPLM-DC in a letter written in Cabinet Ministry’s headed paper and with stamp. The petitioners approached the Constitutional Court on the grounds among others that their right to freedom of expression and media⁶⁰ and freedom of association and assembly⁶¹ under the Interim Constitution of the Republic of the Sudan, 2005 have been violated. Abdalla el Amin Bashir, President of the Constitutional Court who authored an ineffable majority judgment ruled the challenged directive/order as unconstitutional and declared it null and void. Bullen Panchol Awal J, dissenting, wrote his separate judgement. However, it is to be humbly submitted that the dissenting judgment of the learned Justice is irrelevant and extraneous to the facts and submissions of the learned Counsels for the following reasons. In our

⁵⁸ Justice HMJ Swatener Kumar, “The Roles of Courts in the Development of Law” (Speech, Indian National Law Institute, Chandigarh, 2011). https://highcourtchd.gov.in/sub_pages/top_menu/about/events_files/SKSpeech.pdf

⁵⁹ *Members of the Sudan People’s Liberation Movement – Democratic Change v. The First Vice President of the Republic, President of the Government of Southern Sudan and Chairman of the Sudan People’s Liberation Movement, and Ors.*, CC/CD/172 (2009).

⁶⁰ The Transitional Constitution of the Republic of South Sudan, 2011, Article 39.

⁶¹ The Transitional Constitution of the Republic of South Sudan, 2011, Article 40.

reading of the judgment, we failed to allocate it (judgment) within the ambits of legal theories of interpretation.⁶²

Awal J said '*we take judicial notice of Dr Lam Akol who is well known for moving between parties the court could ask the detailed report on why this particular party is target.*' We wonder how the learned justice reached his conclusion to suggest a defense ground to the respondents which they did not raise in their submission. For coherence, the learned Counsel for the respondents did only argue that the letter was a mere political administrative order of the Chairman of the Party (SPLM) not as FVP and President of Government of Southern Sudan. Regarding the motive of the letter, the respondent's Counsels stated that it was just a directive in the context of cooperation between the parties operating in Southern Sudan except the petitioners. With this, we also fail to see the ground on which the learned Justice reached his argument. More interestingly, he cited *Joseph A. Garang* authority as his illustration of why the activities of the petitioners should have been banned in Southern Sudan. The Court in the said authority did not uphold the Constitution Amendment and Dissolution of Communist Party Act, 1964 which banned the Communist Party and disqualified its MPs in the Constituent Assembly⁶³. But like *Joseph A. Garang case*, the majority decision was not enforced as it became evidently clear during the April 2010 Sudan's general elections where the activities of the petitioners were restricted and properties allegedly confiscated by the Government till 2012 when Dr Lam Akol, the Chairman of SPLM-DC reached an understanding with H.E. President Salva Kiir Mayerdit, the first respondent.

These provisions are parts and parcels of the Bill of Rights of which the Court is obliged to uphold. Mere requirement and existence for/of exhaustion of local remedies as required by this section is not a sufficient ground to dismiss the petition for the enforcement of Bill of Rights. As long as the petitioner explicitly or impliedly proves that there is a

⁶² Justice G.P. Singh, *Principles of Statutory Interpretation* (LexisNexis, 14th ed., 2016); Ian McLeod, *Legal Theory* (Palgrave MacMillan, 2013); Hanke Brunhorst, *Critical Theory of Legal Revolutions: Evolutionary Perspective* (Bloomsbury, 2014); Robert S. Summers, *Essays in Legal Theory*, (Springer Science + Business Media Dorderht, 2000).

⁶³ Precisely the Court in *Joseph A. Garang's case* did not uphold the ban of the Communist Party.

violation of his/her constitutional right, it becomes not a discretionary power of the Court but a duty to afford/maintain such petition without strict or technical adherence to the legislative requirement, otherwise the jurisprudential and constitutional intention of Articles 9(1) (4) and 20 are misread, misinterpreted and misapplied. A person challenging an action for violation of his or her constitutional rights should not be required to exhaust such daunting alternative remedies. What if that the application is the only chance before the petitioner get permanently harmed? Would it not amount to failure of the Supreme Court to enforce the Bill of Rights? The exhaustion of alternative remedies should be applied only if there is no direct or immediate infringement of constitutional rights. To put it differently, such legislative requirements should be followed in violation of legal rights than fundamental rights.

Secondly, the question of whether human rights should be enforced against the non-state actor has been debated at length by the academic lawyers, practitioners and the judges. If we examine Article 9(1) especially the part which says that “*the Bill of Rights is a covenant among the people of South Sudan and between them and their Government*,” we may get a close answer which confirms the argument for enforcement of Bill of Rights against the non-state actors. For instance, the Bill of Rights according to Article 9(1) is first a covenant among the people⁶⁴ and secondly, a covenant between the people and the Government.⁶⁵

On the other hand, Article 20 of the TCSS, 2011 guarantees two important elements of this right. It guarantees right to litigation to every person as well as right to seek redress of grievances against the Government or individual or organization. If we view further the last of this provision,⁶⁶ we may get the meaning that any person is guaranteed

⁶⁴ This means that the people of South Sudan as a political society and by having adopted Bill of Rights to be incorporated in the Constitution have reached a covenant or an agreement to have Bill of Rights among themselves and any violation of this covenant can be enforced against the violating individual (s) or organization as non-state actors. We thus, believe that this part provides enforcement of Bill of Rights against the non-state actors i.e. persons such as SPLM Chairman.

⁶⁵ This part of a Covenant is that one between the People and the Government i.e. a duty bound on the government to observe and protect the Bill of Rights and any violation of any of the rights and freedom shall be enforceable against the Government.

⁶⁶ The Transitional Constitution of the Republic of South Sudan, 2011, a. 20: which reads at the end as “..... to resort to courts of law to redress grievances whether against the Government or individual or organization”.

with right to approach court to seek redress of grievances against anyone or organisation.⁶⁷ In this case, the Chairman of the SPLM or SPLM as an organization fit the mentioning of individual or organisation provided in Article 20.

But can it be a valid requirement or test to say that having individual or organization as persons against whom redress of grievances may be sought was meant by the TCSS, 2011 drafters to fit ordinary situation in litigation i.e. civil or criminal cases other than enforcement of constitutional/Bill of Right? If such argument is to be upheld to be valid, why was this Article⁶⁸ placed in the Bill of Rights? Perhaps in our opinion, the intention of TCSS, 2011 drafters includes individuals and organizations.⁶⁹ In this case, who can disapprove the fact that the Chairman who is also the President of the Republic or the SPLM as a ruling party cannot qualify the SPLM or its Chairman as individual or organization stated in Article 20.⁷⁰ In other words, where did the Chairman or the SPLM get these powers to deprive the citizen of his rights to freedoms of expression and movement?

Criticism to the Corollary of Freedom of Speech & Expression

The freedom of the press has become deeply ingrained in the society, closely intertwined with the democratic nature of their political and social existence. Consequently, any attempt to undermine this freedom, regardless of its legal justification, is bound to be unsuccessful. After the initial assault, even the formidable power of slavocracy conceded defeat as an insurmountable outcome.⁷¹ The dimensions of the problem are

⁶⁷ This means in our submission to seek enforcement of Bill of Rights against government, individual or organization.

⁶⁸ The Transitional Constitution of the Republic of South Sudan, 2011, Article 20.

⁶⁹ Organisations are non-state actors that are controlled or influenced administratively and financially by the Government.

⁷⁰ An organization registered under the Political Parties Act, 2012 can deny it not to have been controlled or influenced administratively and financially by the Government or that it has no control or influence on the Government. At least this view in a practical aspect not in an abstract or theoretical one.

⁷¹ Holst, Von. "Constitutional History of the U. S." II, 127 (1879).

undergoing changes in the current scenario, if the government has faced criticism for its implementation of regulations that curtail freedom of speech and expression, notably via the enactment of legislations such as the Indian Unlawful Activities (Prevention) Act, 1957 (UAPA) and the Sedition laws. The creation of an environment that instilled fear and led individuals to engage in self-censorship was seen in some locations due to the enactment and enforcement of the above-mentioned laws.

In a parallel scenario, akin to the aforementioned one, Both India and South Sudan have a history of hate speech and violence. Moreover, struggling with the issue of misleading information and deception. This phenomenon can provide significant challenges in nations characterized by elevated illiteracy rates and widespread poverty, since it can impede individuals' ability to discern veracity from falsehood. The government of South Sudan has faced allegations of employing its authority over the media as a means to suppress opposing viewpoints. In the year 2022, the broadcasting license of the autonomous radio station Eye Radio in Jonglei State was suspended by the government.⁷²

As we continue at this juncture to critique the corollary of freedom of speech and expression, it is potential to provide a basis for justifying detrimental forms of communication, such as hate speech and the act of inciting violence. Nevertheless, it is imperative to acknowledge that the corollary does not afford protection to all forms of expression. Governments retain the authority to impose limitations on communication that is deemed to have a high probability of resulting in imminent damage, such as the act of inciting violence. An additional critique of the corollary is to its high cost and the inherent challenges associated with its implementation. In order to safeguard the principles of freedom of speech and expression, it is imperative for governments to allocate resources towards the development and maintenance of robust institutions, including an autonomous court and an unrestricted press. Nevertheless, it is worth noting that even within economically disadvantaged nations, governmental entities possess the capacity to foster an environment conducive to the exercise of freedom of speech and

⁷² Case, "South Sudan State Government Suspends Radio Jonglei for Five Days over Political Coverage," *Committee to Protect Journalists*, 2022, accessed September 29, 2023, <https://cpj.org/2022/06/south-sudan-state-government-suspends-radio-jonglei-for-five-days-over-political-coverage/>.

expression. This may be achieved by measures such as the cessation of violent and intimidating actions directed at journalists and activists. In general, the corollary pertaining to freedom of speech and expression constitutes a significant concept that serves to guarantee individuals' ability to freely articulate their perspectives, irrespective of their unpopularity or critical nature towards the governing authorities.

Nevertheless, it is crucial to acknowledge that the corollary does not afford protection to all forms of expression, and its implementation might pose significant financial and logistical challenges. A prevalent critique of the implication of freedom of speech and expression in South Sudan is to its frequent utilization as a rationale for the dissemination of hate speech and the instigation of ethnic bloodshed. In the period preceding the 2013 civil war, governmental authorities and media channels under state control employed hate speech as a means to vilify specific various political factions and social groups. The utilization of hate speech had a significant role in fuelling the violence that resulted in the loss of tens of thousands of lives and the forced displacement of millions of individuals. India has witnessed a notable increase in instances of religious hate speech, both on social media platforms and within the mainstream media. The correlation between hate speech and a rise in acts of violence has been established. The deliberate disruption of internet access is a common occurrence in specific geographical areas, often observed during periods characterized by social or political turmoil, notably instances of civil unrest or public demonstrations.

The aforementioned phenomenon exerts a deterrent influence on the fundamental right of freedom of speech and expression, impeding individuals from disseminating information and engaging in interpersonal communication.⁷³ In South Sudan for instance, Peter Biar Ajak and six other political activist were apprehended on July 28, 2018 and subjected to confinement for more than a year. The ground detention was due to his expression of critical views towards the government. Ajak and others after being detained in the National Security Service detention centre for months, were procedure before a

⁷³ Apar Gupta, "Apar Gupta Writes: On Manipur, Internet Shutdown is No Cure," *Indian Express*, 2023, accessed September 30, 2023, <https://indianexpress.com/article/opinion/columns/apar-gupta-writes-on-manipur-internet-shutdown-is-no-cure-8873758/>.

Special Court on March 21, 2019. they were charged of several offences under Chapter IV of the South Sudan Penal Code, 2008 and the National Security Services Act, 2014. however, after the conviction, they were pardoned by the President of the republic on January 2, 2020.⁷⁴

According to the monitoring conducted by the Human Rights Division (HRD), limitations and transgressions mostly focused on people or organizations, such as media establishments or associations, whose viewpoints or professional endeavours were targeted. Individuals who were expressing opinions on topics considered sensitive or were seen as damaging the country's reputation. There were a wide range of topics that prompted the implementation of limitations. These encompassed corruption, governmental inefficiency, the need for responsibility in cases of human rights violations, starvation, displacement, the extent of casualties resulting from military operations, and the economic crisis.⁷⁵ One prevalent manifestation of censorship is the recurrent restriction of access to social media platforms and messaging applications. These limitations are imposed not only by governmental entities but also by commercial enterprises, ostensibly in the interest of maintaining public order and countering the dissemination of incorrect information. The presence of security agents at newspaper printing plants, as mandated by the Government, has resulted in the censorship of a significant number of critical pieces in newspapers. According to the Association for Media Development in South Sudan (AMDISS), throughout the month of August 2016, the National Security Service (NSS) issued directives to have a minimum of six items removed from both the Nation Mirror and the Juba Monitor

⁷⁴ Peter Biar Ajak, "Protecting Scholars and the Freedom to Think, Question, and Share Ideas," *Scholar as Risk Network*, 2023, accessed September 30, 2023, <https://www.scholarsatrisk.org/actions/peter-biar-ajak-south-sudan/>.

⁷⁵ OHCHR/UNMISS, Report on Violations and Abuses of International Human Rights Law and Violations of International Humanitarian Law in the Context of the Fighting in Juba, South Sudan in July 2016 at 24 (2017): accessed October 02, 2023, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKewiakL_pquiBAxU5XaQEhUL8As8QFnoECAwQAQ&url=https%3A%2F%2Fwww.ohchr.org%2FDocuments%2FCountries%2FSS%2FReportJuba16Jan2017.pdf&usq=AOvVaw3meSMhQH1I_-3TEQf7zcfF&copi=89978449.

publications⁷⁶. Most of the blocked articles discussed a news statement made by opposition or criticism on government by the citizens for lack of service delivery, etc. However, we think that need for the evaluation of proportionality of censoring content in order to safeguard a legitimate objective should be conducted by a capable judicial authority or an

autonomous entity, rather by National Security Services. Nevertheless, Information Technology legislations⁷⁷ impose limitations on the exercise of freedom of speech and expression, citing reasons such as national security, public order, and morality. These laws are frequently employed as a means to suppress those who express dissent against the governing authorities. When considering this matter, it is crucial to acknowledge that the entitlement to freedom of speech and expression is not without limitations. There exist valid justifications for imposing limitations on this entitlement, such as the need to curb the propagation of violence or animosity. Nevertheless, it is crucial to ascertain that any limitations imposed on the right to freedom of speech and expression are both justified and balanced in their scope.

Conclusion

To conclude, the question which is the title of this paper may be precisely answered here. In the discussion, it appeared that the concerned institutions at some points have collectively achieved the constitutional promises. The freedom of expression is both bought and fought for with/by the freedoms of the people. Through judicial proceedings it is said to have been fought for. It is also fought for in the battlefields of all the wars that the people have leaded and endured. It is bought with the blood of all those who sacrificed themselves to attain freedoms. It is bought with the freedom of all those who were/are detained in illegal detention cells. However, much still awaits the concerned institutions. As it also becomes the fact in the foregoing sections, the judicial struggle for freedom of expression is the most commendable struggle to everyone. This type of struggle has been spearheaded by some of [South] Sudanese distinguished lawyers such as Joseph A. Garang, Abel Alier,

⁷⁶ South Sudan: AMDISS Press Release. (2016).

⁷⁷ Media Authority Act, 2013. National Communication Authority Act (South Sudan), 2013.

Hanna George to mention but few in addition to journalists like those of the vigilant, Alfred Taban and Nhial Bol Aken who stood firm to report the deadly evils of the government in the heart of Khartoum and recently *Alwatan Arabic Daily Newspaper*.

However, the South Sudanese courts need to enforce the Bill of Rights against the state including the non-state actors; otherwise, any soft interpretation of the Bill of Rights will impede the national being and presumably installed undemocratic governance contrary to the basic structure of the Constitution. The jurisdiction for Constitution adjudication which is vested in the Supreme Court⁷⁸ is one of the challenges that frustrates and reduces the chances of affording remedies for the petitioners. It is thus, believed and hoped that in the future, this jurisdiction would be vested in other courts below the Supreme Court to give room for appeals either as expected in the upcoming transitional constitution arrangement with the introduction of Constitutional Court as the provisions of R-ACRSS⁷⁹ require or as Article 9 (4)⁸⁰ of TCSS, 2011 suggests.⁸¹ This suggestion is desirable because constitutional adjudication has been the hardest point in the [South] Sudanese judicial system where the petitioners pleadings are handled in unpromising manner particularly when the matter is against or involves the government or an official. As to the prospects of the judiciary, the manner in which the learned Chief Justice reacted in *Pagan Amum case*⁸² shows that the Bill of Rights is under threat and arguably the invested

⁷⁸ The Transitional Constitution of the Republic of South Sudan, 2011, a. 9 (4), a. 126(2) (a). The Judiciary Act, 2008, s. 11(1)(a).

⁷⁹ Revitalized Agreement on Conflict Resolution in South Sudan. (2018).

⁸⁰ Organisations are non-state actors that are controlled or influenced administratively and financially by the Government. The other competent courts may be below the hierarchy of Supreme Court and their decisions may be appealed before the Supreme Court.

⁸¹ For instance, the members of the Supreme Court or Constitutional Court (if it becomes operative later) with the current questioning of judicial independence may be compromised especially knowing that they are the only final authority of constitutional adjudication forum. If their decisions are to be appealed, they would be vigilant enough in every constitutional matter knowing that their compromised or flawed decision can be discovered and overrule by the appellate jurisdiction.

⁸² This part of a Covenant is that one between the People and the Government i.e. a duty bound on the government to observe and protect the Bill of Rights and any violation of any of the rights and freedom shall be enforceable against the Government.

power in the judiciary has been subversively exercised. Constitutional rights Litigants should be celebrated, encouraged and protected as the American civil rights litigants⁸³ of *Brown v. Board of Education of Topeka*,⁸⁴ by any of the concerned institutions to peter-out the spirit of rebellion. This will support the civilized battles in the courtroom and discourage the rampant armed rebellion. By doing so, it will create constitutional strength, faith and identity for the people to see their strength in the court and the constitution than in guns. That is the constitutional system that the people of South Sudan has aspired for in the Juba Conference Hall and in the subsequent events of their liberation struggle. The South Sudanese fought the wars of liberation to achieve a constitution that can protect all of them regardless of tribes, gender, young or old, rich or poor, political opinion or regional belonging. It is in this spirit that those South Sudanese who sacrificed their lives did so knowing that those who will witness this day will be at the forefront to create vibrant institutions which shall act as cornerstone of a democratic structure that accommodates their diverse opinions. The compromised interpretation by a committed judiciary and enforcement or the ill protection of the Bill of Right by the courts is not a cry of that particular citizen who suffers the violation but a cry of the whole constitutional foundation which dates back to many years of struggles.

References

- African Centre for Justice and Peace Studies, "The Judiciary in Sudan: Its Role in the Protection of Human Rights During Comprehensive Peace Agreement" (2005-2011).
- African Union. *African Charter on Human and Peoples Rights*, 1986. Available online at https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf
- Ajak, Peter Biar. "Protecting Scholars and the Freedom to Think, Question, and Share Ideas," *Scholar as Risk Network*, 2023, accessed September 30, 2023,

⁸³ Linda Carol Brown was one of the American civil rights litigant.

⁸⁴ *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

- <https://www.scholarsatrisk.org/actions/peter-biar-ajak-south-sudan/>.
- Alier, Abel. *Too Many Agreements Dishonoured*. (Reading, UK: ITHACA Press, 2003).
- Baxi, Upendra. *Courage, Craft and Contention: The Indian Supreme Court in the Eighties* (Bombay, India: NM Tripathi, 1985).
- Brunhorst, Hanke. *Critical Theory of Legal Revolutions: Evolutionary Perspective* (London: Bloomsbury, 2014).
- Committee to Protect Journalist (CJP). "South Sudan State Government Suspends Radio Jonglei for Five Days over Political Coverage," *Case—Committee to Protect Journalists*, 2022, accessed September 29, 2023, <https://cpj.org/2022/06/south-sudan-state-government-suspends-radio-jonglei-for-five-days-over-political-coverage/>
- Ding, Daniel Thabo Nyibong. "The Impact of Change Agents on Southern Sudan History." *PhD Thesis*, (Institute of African and Asian Studies, University of Khartoum, 2006).
- Dougherty, Veronica. "Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation." *American University Law Review* 44, no. 1 (1994): 127-166.
- Emmanuel & Others v. State of Kerala, AIR 748 (1987).
- Garner, Brian. A. *Black's Law Dictionary*, 10th edition. (US: Thomson Reuters, 2014).
- Gupta, Apar. "Apar Gupta Writes: On Manipur, Internet Shutdown is No Cure," *Indian Express*, 2023, accessed September 30, 2023, <https://indianexpress.com/article/opinion/columns/apar-gupta-writes-on-manipur-internet-shutdown-is-no-cure-8873758/>.
- Ibrahim, Abdullah Ali. *Manichaeon Delirium: decolonizing the Judiciary and Islamic renewal in the Sudan, 1898-1985*. Vol. 7. (Leiden: Brill, 2008).
- Iyer, Justice V. R. Krishna. *Dynamic Lawyering*. (India: LexisNexis Universal Law Publishing Co., 2015).
- Jefferson, Thomas. "Letter to Edward Carrington (1787)." In Susan L. Maret and Jan Goldman (eds), *Government Secrecy: Classic and Contemporary Readings Government Secrecy: Classic and Contemporary Readings* (Connecticut, US: Greenwood Publishing, 2009).

- Jefferson, Thomas. *Thomas Jefferson's Letter to Edward Carrington, January 16, 1787*. In *Facts of Media Law*, as edited by Madhavi Goradia Divan. (Lucknow: EBC, 2018).
- Khalil, Mohamed I. "The legal system of the Sudan." *International & Comparative Law Quarterly* 20, no. 4 (1971): 624-644.
- Kumar, Justice HMJ Swatener. "The Roles of Courts in the Development of Law" (Speech, Indian National Law Institute, Chandigarh, 2011).
https://highcourtchd.gov.in/sub_pages/top_menu/about/events_files/SKSpeech.pdf
- Massoud, Mark Fathi. "Do victims of war need international law? Human rights education programs in authoritarian Sudan." *Law & Society Review* 45, no. 1 (2011): 1-32.
- Massoud, Mark Fathi. *Law's Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan*. (Cambridge: Cambridge University Press, 2013).
- McLeod, Ian. *Legal Theory*. (London: Palgrave MacMillan, 2013);
- Medani, Amin M. "The Constitutional Protection of Human Rights in Sudan: Challenges and Future Perspectives," *A Conference report organized by Faculty of Law, University of Khartoum in collaboration with Sudanese Human Rights Monitor and REDRESS* (2014).
- Mill, John Stuart. *Considerations on the Representative Government*. (Cambridge: Cambridge University Press, 2011).
- Mustafa, Zaki. "Opting out of the common law: recent developments in the legal system of the Sudan." *Journal of African Law* 17, no. 2 (1973): 133-148.
- Nugud, Mohammed Ibrahim. *Slavery in the Sudan, History, Documents and Commentary*, Edited by Sharon Barnes. Translated by Asama Mohammed Abdel Halim. (London: Palgrave, 2013).
- Republic of South Sudan, *Media Authority Act, 2013*.
- Republic of South Sudan, *The Transitional Constitution of the Republic of South Sudan, 2011*.
- Republic of South Sudan. *Media Authority Act, 2013. National Communication Authority Act (South Sudan), 2013*.
- Republic of South Sudan. *Revitalized Agreement on Conflict Resolution in South Sudan, 2018*.

Singh, Justice G.P. *Principles of Statutory Interpretation* (India: LexisNexis Universal Law Publishing Co., 2016).

Summers, Robert S. *Essays in Legal Theory*. (Dordrecht: Springer Science & Business Media, 2000).

The government system or structure in South Sudan is that there is a National Legislature and State Legislature as well as National and States Executive.

UN Mission to South Sudan (UNMISS), *A Report on Violations and Abuses of International Human Rights Law and Violations of International Humanitarian Law in the Context of the Fighting in Juba, South Sudan, in July 2016*, January 2017, available at: <https://www.refworld.org/docid/587e14594.html>

United Nations. *International Covenant on Civil and Political Rights*, 1966. Available online at https://treaties.un.org/doc/treaties/1976/03/19760323%2006-17%20am/ch_iv_04.pdf

Universal Declaration of Human Rights, 1948.

Von Holst, Hermann. *The Constitutional and Political History of the United States*. Vol. 1. (Chicago: Callaghan, 1879).

Cases

Brown *v.* Board of Education of Topeka, 347 U.S. 483 (1954).

Elhaj Yousuf Elhaj Mekki *v.* Izulldin Ahmed Mohammed, CC/CC/6 (2006)

Joseph A. Garang & Others *v.* The Supreme Commission & Others, SLJR 1 (1968).

Kesavananda Bharati *v.* State of Kerala, 4 SCC 225 (1973).

Members of the Sudan People's Liberation Movement—Democratic Change *v.* The First Vice President of the Republic, President of the Government of Southern Sudan and Chairman of the Sudan People's Liberation Movement, and Ors., CC/CD/172 (2009).

Ram Manohar Lohia *v.* State of Bihar, AIR SC 740 (1966).

Romesh Thapper *v.* State of Madras, AIR SC 124 (1950).

Sudan Government *v.* Darious Bashir & Others, SLJR 99 (1966).

Sudan Government *v.* Father Silvano Gottardi, SLJR 245 (1960).

Sudan Government *v.* Milton Thompson, SLJR 56 (1963).

Sudan Government *v.* Paulino Dogali & Others, SLJR 83 (1962).

Terminello *v.* Chicago, 93 LEd 1131 (1949).

"Everyone is in favor of free speech. Hardly a day passes without its being extolled, but some people's idea of it is that they are free to say what they like, but if anyone says anything back, that is an outrage."

Winston Churchill, British politician.

Acknowledgment

None

Funding Information

None

Conflicting Interest Statement

There is no conflict of interest in the publication of this article.

Publishing Ethical and Originality Statement

All authors declared that this work is original and has never been published in any form and in any media, nor is it under consideration for publication in any journal, and all sources cited in this work refer to the basic standards of scientific citation.

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