

Fundamental Rights, Objectives, and Guiding Principles

By Paolo Carozza

*as part of the South Sudan Constitutional Research Project
for Catholic Relief Services, South Sudan*

**The Center for
Civil & Human Rights**
UNIVERSITY OF NOTRE DAME

Prepared with the support of



THE PROGRAM ON
CONSTITUTIONAL STRUCTURE
of Notre Dame Law School

October 8, 2013

2150 Eck Hall of Law Notre Dame, Indiana 46556 USA
(574) 631-8555 humanrights.nd.edu

Project Coordinator: Christine Cervenak, ccervena@nd.edu

© 2013

**The Center for
Civil & Human Rights**
UNIVERSITY OF NOTRE DAME

Permission is granted to make digital or hard copies of part or all of this work for personal or educational use, provided that copies carry the proper citation and are not made or distributed for profit or commercial advantage. The author remains solely responsible for the substantive content.

FUNDAMENTAL RIGHTS, OBJECTIVES, AND GUIDING PRINCIPLES

By Paolo Carozza*

*In effect the acknowledgment of the personal dignity of every human being demands the respect, the defence and the promotion of the rights of the human person. It is a question of inherent, universal and inviolable rights.***

Part Two of the 2011 Transitional Constitution of the Republic of South Sudan (TC) contains the Bill of Rights, and Part Three on Fundamental Objectives and Guiding Principles also enumerates a number of important rights. Together, these sections of the Constitution contain many of the provisions that are the most central to the recognition and protection of human dignity and that specify the content of the common good of the South Sudanese people whom the Constitution is designed to serve. Accordingly, it is fitting and important that they be at the front of the Constitution, and that they be carefully elaborated and effective.

This memorandum focuses on a number of key provisions in these two parts, either primarily to highlight where possible weaknesses, ambiguities, or lacunae may be present. The majority of the rights mentioned in these two parts will not be the object of special attention in this paper, but that does not mean that they are not extremely important to the constitutional protection of human dignity. Rather, where not singled out for particular analysis, we take for granted that the enumeration and protection of rights as specified in the TC is currently sufficiently clear and sound. In addition, many of the rights in the TC and mentioned below are ones that will require legislative schemes, policy decisions, and international cooperation in order for them to be realized. This discussion sets aside those considerations and focuses only on the constitutional text for the right at issue, which will necessarily tend to be much more minimal than a comprehensive program for the right's effective protection and fulfillment.

1. ARTICLE 9, NATURE OF THE BILL OF RIGHTS

Two issues in this article merit careful consideration.

(a) First, what are the proper boundaries and the proper mechanisms for judicial enforcement of fundamental rights? Article 9(4) specifies that the Bill of Rights shall be upheld by the Supreme Court and other competent courts," and Article 10 then repeats that same language. This is of course appropriate and necessary, and most constitutional systems since the mid-20th century have provided for the judicial enforcement of basic constitutional rights. The more precise detailing of the means of enforcement is however left unclear in the TC; it says nothing about who has standing to bring claims of violations, for instance, or what procedure applies. This is not necessarily problematic in and of itself; many constitutional systems leave such questions to

*Paolo Carozza is a Professor of Law at Notre Dame Law School, Concurrent Professor of Political Science at the University of Notre Dame, and Director of the Center for Civil and Human Rights and the Kellogg Institute for International Studies, University of Notre Dame. The author is grateful to Professor Christine Venter for her invaluable contributions to this work on key issues relating to women's rights and affirmative action.

**Pope John Paul II, *Christifideles Laici* [1988], 38.

subsequent legislation rather than spelling it out in the Constitution itself, largely in order to preserve greater flexibility and adaptability (statutory law being easier to amend than the constitutional text). Some other constitutions do provide greater detail on the scope and means of the judicial enforcement of constitutional rights, however.¹ This is therefore a question on which the South Sudanese may wish to reflect and decide explicitly.

The enforceability of the Bill of Rights in Part Two of the TC also relates indirectly to Part Three of the TC, which details the Fundamental Objectives and Guiding Principles of the Constitution. Part Three also contains a number of very important rights – for example, relating to the family and to the environment – but because they are in a different chapter than the Bill of Rights, the clauses in Articles 9 and 10 that guarantee judicial enforceability do not apply to the rights contained in Chapter Three. It is not uncommon for constitutions (and international human rights law as well) to distinguish between justiciable rights and programmatic principles that are not judicially enforceable, so the current distinction in the TC is not necessarily a problem. However, at least some of the provisions in Part Three would certainly seem to warrant judicial enforcement. Accordingly, it will be worthwhile to examine all of the rights contained in Part Three very carefully, and to consider which of them should be moved into Part Two in order to guarantee that they will be judicially enforceable. The more detailed discussion of some of the specific articles of Part Three below will identify certain provisions that might be more appropriately moved into Part Two.

(b) The second major issue raised by Article 9 of the TC has to do with paragraph 3, which specifies that the “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.” Similar provisions are not uncommon in some other contemporary constitutions, and they do have the merit of giving more immediate and direct effect to international human rights protections within the domestic legal and political order. In particular, this is more commonly done in countries that have had experience of international norms and actors being an important support for, or control on, weak and ineffective domestic law and institutions.

Nevertheless, it is an approach that also poses certain risks. Not all international legal instruments are equally benign in their normative provisions; some contain provisions that would be objectively problematic for many actors in South Sudan. To cite the best-known example, the Maputo Protocol to the African Charter on Human and Peoples’ Rights, while addressing many important issues relating to the equality and protection of the human rights and dignity of women, also contains language mandating that African states “protect the reproductive rights of women by authorizing medical abortion” in a number of open-ended and ill-defined cases. It is the only international instrument to assert a human right to abortion. Obviously this would be highly problematic for any actors in South Sudan who regard every human life as bearing dignity and being worthy of legal protection from conception to natural death.

Even where the explicit norms of international human rights instruments may not be so explicitly unacceptable, there will be many instances in which their specific provisions will be in tension with existing language of the South Sudan constitution. Thus, a very broad and open-ended incorporation of all international instruments into the Bill of Rights, as the TC currently contains,

could quite easily create unanticipated conflicts and uncertainties in the applicable law regarding the protection of fundamental rights. This is all the more true where certain rights have been deliberately placed in Part Three of the TC instead of Part Two. As discussed above, one of the key differences between the two parts is their degree of justiciability in South Sudanese courts. Where a particular norm in Part Three is also contained in an international treaty to which South Sudan is a party, by virtue of the current Article 9(3) that international norm would also be an integral part of the Bill of Rights (i.e., Part Two), and thus would become judicially enforceable notwithstanding the initial constitutional choice to make such a provision not justiciable.

An additional, and substantial, danger in having Article 9(3) incorporate international instruments in such an unqualified way is the ambiguity that it can create regarding the authority of international human rights bodies created under any of those treaties (such as the Human Rights Committee or the Committee on the Rights of the Child, for example). Even where a treaty norm becomes incorporated into a domestic constitutional order, it need not imply that every interpretation or application of the treaty by the associated committee or commission needs to be regarded as authoritative. This is important because unfortunately at least on some occasions international human rights bodies can assert and promote interpretations of human rights that are quite at odds with the requirements of human dignity and human rights as CRS would understand them. In sum, then, if the Constitution will continue to constitutionalize international human rights treaties, then it may be helpful to specify that such a provision does not extend to the non-binding interpretations of international human rights organs.

2. ARTICLE 11, LIFE AND HUMAN DIGNITY

It is self-evident that this article is one of the cornerstones of any reasonable protection of the human person. At the same time, it is widely acknowledged that in many constitutional systems the right to life is read narrowly to exclude certain persons from its protection, especially to persons in particularly vulnerable conditions such as at very beginning of and very end of human life. Accordingly, this protection of the right to life would be stronger if it were to specify clearly that it applies to the unborn (some constitutional systems state clearly that right to life applies “from the moment of conception”), the aged, the ill and infirm, and the disabled.

3. ARTICLE 16, RIGHTS OF WOMEN

For many reasons, this article is of particular importance to the advancement of human rights under the new constitutional system of South Sudan: women are among the poorest of South Sudan’s citizens, with disproportionately low rates of literacy; they often work in the home or in the informal economy, making their work less visible and subject to the equal protection of the law; many women are Internally Displaced Persons (IDPs); and many women in South Sudan have been subjected to sexual or domestic violence. Article 16 of the TC addresses some of these vulnerabilities and reflects a commitment to the equal dignity of women, and as such is a key provision of the constitution.

In several more detailed respects, Article 16 (and related other articles affecting the rights of women) could be stronger and more comprehensive.

(a) Article 16(2) of the TC guarantees to women the “right to equal pay for equal work”. While this clause affords women a degree of protection, some constitutional and international systems provide a higher standard by using formulations such as “equal remuneration for similar work”² or “equal pay for work of equal value.”³

(b) Article 16(4)(a) of the TC provides that “All levels of government shall promote women participation in public life and their representation in the legislative and executive organs by at least twenty-five per cent as an affirmative action to redress imbalances created by history, customs, and traditions.” (A parallel requirement also applies to the State legislative and executive organs, pursuant to Article 1623(7).) Affirmative action provisions (sometimes known also as “positive action”, “positive discrimination,” or “special temporary measures”) in general are widely recognized in many constitutional and international human rights systems as necessary and useful mechanisms to assist in achieving equality for women, particularly countries where women have experienced past discrimination both in public and private life. They are often instituted in government, public life, workplaces, and educational settings to ensure that marginalized groups and minority groups within a society are included and represented in a more equitable manner in all programs. Because they are aimed at rectifying the effects of past discrimination and at achieving de facto equality, they are consistent with a recognition of the equal dignity of women and men.

Although the majority of countries do not have constitutionally-prescribed quotas on women’s representation, many experts suggest that for affirmative action to be successful, women must achieve a “critical mass” of representation, which in turn is often regarded as being 30% of an organization, whether that organization be a legislature, a court, or a workplace. Therefore some states (including in Africa) do constitutionally mandate specific quotas such as those in the TC, in some cases with higher thresholds in their constitutionally-mandated affirmative action policies than the 25% included in the TC.⁴ A revision of the TC on this point could reasonably consider increasing the percentage established in this article. In addition, some other constitutions (such as that of Zimbabwe) that codify affirmative action mandates also extend them to the judiciary, to the workplace, and to educational institutions (the Constitution of Zimbabwe is a recent example of this), while the TC here only calls for affirmative action in the context of “representation in legislative and executive organs” (although the TC also provides in Article 123(6) for “a substantial representation of women in the judiciary having regard to competence, integrity, credibility and impartiality”).

(c) Article 16(4)(b) requires the government to enact laws to combat harmful customs and traditions which undermine the dignity and status of women. This is an important provision, which will be discussed more extensively in a separate paper.

(d) Article 16(4)(c) provides for “maternity and child care and medical care for pregnant and lactating women.” In view of the extremely high rates of maternal mortality in South Sudan, this clause establishes an important constitutional requirement.

4. ARTICLE 18, FREEDOM FROM TORTURE

This article (which notwithstanding its title prohibits also cruel, inhuman, and degrading treatment or punishment that does not amount to torture) addresses one of the most undisputed protections of human dignity in contemporary constitutions and international law. Its very general formulation, however, might benefit from further specification that it also includes a governmental obligation to protect persons against violence in general, from public or private sources. Such additional language, such as exists in some other recent constitutions, could be particularly helpful in combating the pervasive reality of violence against women.⁵

5. ARTICLE 23, RELIGIOUS RIGHTS

This very comprehensive article of the TC covers nearly all of the specific ways in which religious freedom concerns typically come into play in contemporary constitutional systems, and is admirable in its broad scope – especially in its explicit recognition of the communal and institutional dimensions of freedom of religion. It does lack an explicit recognition of freedom of conscience and to conscientious objection. This is a right around which both constitutional and international systems differ significantly from one another, but many do recognize a right of conscientious objection and that does seem to be the growing trend in recent years.

Another specific, and important manifestation of religious freedom is the liberty of religious communities to establish and operate educational institutions. This is only indirectly and weakly protected in Article 23(b)'s reference to “appropriate faith-based, charitable, or humanitarian institutions.” In Part Three, Article 38(3) does more explicitly recognize the right to establish and maintain private schools, but as noted earlier the rights contained in Part Three are not required to be judicially enforceable so the TC does not at present seem to provide a strong protection of that important liberty.

6. ARTICLE 35, GUIDING OBJECTIVES AND PRINCIPLES

Generally speaking, the relationship between Parts Two and Three of the TC is clear: the former contain judicially enforceable rights while the latter contain basic principles that are intended to guide public policy and law but that are not judicially enforceable. However, in addition to guaranteeing the constitutional protection of individual rights, Part Two should be understood to consist of principles as well. Put differently, fundamental rights are best understood as particular aspects of the common good. Thus, if Part Three is intended to enumerate the basic guiding principles of the policy and law of the country, it would be best to make explicit that one of those principles is to promote the respect for and fulfillment of the rights enumerated in Part Two. In particular, two cornerstone principles that animate the rights in Part Two are absent or insufficiently acknowledged as among the objectives and guiding principles of Part Three. First, human dignity is mentioned in Article 35(2) but only in such a way as to link it to the objective of economic development and infrastructure. Second, Part Three does not mention equality as among the Constitution's guiding objectives and principles; the equality between men and women, in particular, is key to Part Two and to the full realization of fundamental human rights in the future of South Sudan. Both of these lacunae could be addressed by adding additional language to Article 35 clarifying that among the guiding objectives and principles of the

Constitution is the promotion and fulfillment at all levels of society of the requirements of human dignity, of equality (particularly the equality of women and men), and of the rights listed in Part Two.

7. ARTICLE 36, POLITICAL OBJECTIVES

Article 36(1) of the TC requires that “all levels of government ... shall be guided by the principles of decentralization and devolution of power to the people through the appropriate levels of government where they can best manage and direct their affairs.” The idea behind this language is very important, and many constitutional systems embody it, albeit in different ways. A number of constitutional systems (especially in Europe) do so by explicit acknowledgment of the principle of subsidiarity. The advantage of using the idea of subsidiarity to identify the guiding principle at issue here is that subsidiarity is recognized in political practice and law to mean more than merely a generic decentralization and devolution; it also (a) recognizes the status and importance of those intermediate associations of society (e.g., families, villages, schools, etc.) that typically mediate between the state and the individual; and (b) requires government to provide assistance, or a *subsidium*, to help those associations accomplish their ends when they are incapable of doing so by themselves.⁶

8. ARTICLE 38, EDUCATION, SCIENCE, ART AND CULTURE

Two of the clauses in this article would appear to be appropriately included in Part Two, where the enumerated rights are judicially enforceable: the guarantee of academic freedom in institutions of higher education; and the right to establish and maintain private schools in Article 38(3). The latter, in particular, is closely related to the protection of religious freedom and of the cultural integrity of minority groups. For that reason, it is often guaranteed explicitly in a number of other constitutions and in international human rights law.

9. ARTICLE 39, FAMILY

The TC’s clear and forceful affirmation of the role of the family is very consistent with a wide range of other national constitutions, and with a strong line of international human rights instruments from the Universal Declaration of Human Rights to the African Charter on Human and Peoples’ Rights. However, the last clause, protecting parents and children from being separated against their will, would typically be regarded as a right suitable for judicial enforcement and not merely a guiding principle of public policy; it could thus be moved into Part Two. In addition, a number of constitutions and international treaties also include, in relation to the protection of the family and of the essential roles and responsibilities of parents, some language similar to that of the European Convention on Human Rights (in Protocol 1): “In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”

10. ARTICLE 41, THE ENVIRONMENT

Increasingly, the obligation of human communities to respect and protect all of the created order of nature, and to care for it with stewardship that is attentive to moral demands of intergenerational solidarity, leads to constitutional and international articulation of a right to a clean and healthy environment, as Article 41 exemplifies. In addition to guiding the adoption of legislation and public policies, however, the right to a clean and healthy environment sometimes does find a judicially enforceable status in constitutional and international law. For example, the toxic wastes produced by certain extractive industries can threaten the health and life of individuals and communities in a very immediate and direct way, and warrant immediate intervention. Merely establishing the right to a clean and healthy environment as a guiding objective may not be sufficient to protect against such harms, and thus at least Article 41(1) could be considered to be a norm suitable for transferring to Part Two.

¹The South African Constitution has a section on the Application of the Bill of Rights and a section on Enforcement:

8. Application

1. The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
2. A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
3. When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court
 - (1) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
 - (2) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1). ...

Section 38 of the South African Constitution provides for the specific enforcement of rights:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are -

- a. anyone acting in their own interest;
- b. anyone acting on behalf of another person who cannot act in their own name;
- c. anyone acting as a member of, or in the interest of, a group or class of persons;
- d. anyone acting in the public interest; and
- e. an association acting in the interest of its members.

The Zimbabwean Constitution explicitly provides for the enforcement of the Bill of Rights and sets out the procedure to assert such rights as follows:

Article 85. Enforcement of fundamental human rights and freedoms

(1) Any of the following persons, namely—

- (a) any person acting in their own interests;
- (b) any person acting on behalf of another person who cannot act for themselves;
- (c) any person acting as a member, or in the interests, of a group or class of persons;
- (d) any person acting in the public interest;
- (e) any association acting in the interests of its members;

is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a declaration of rights and an award of compensation.

(2) The fact that a person has contravened a law does not debar them from approaching a court for relief under subsection (1).

(3) The rules of every court must provide for the procedure to be followed in cases where relief is sought under subsection (1), and those rules must ensure that—

- (a) the right to approach the court under subsection (1) is fully facilitated;

(b) formalities relating to the proceedings, including their commencement, are kept to a minimum;
(c) the court, while observing the rules of natural justice, is not unreasonably restricted by procedural technicalities; and

(d) a person with particular expertise may, with the leave of the court, appear as a friend of the court.

(4) The absence of rules referred to in subsection (3) does not limit the right to commence proceedings under subsection (1) and to have the case heard and determined by a court.

²Article 65(6) of the Constitution of Zimbabwe.

³Article 7 of the International Covenant on Economic, Social and Cultural Rights; Article 15 of the African Charter on Human and Peoples Rights.

⁴The 2003 Rwandan Constitution provides that “at least 30% of all posts in all decision making organs shall be reserved from women.” In South Africa’s House of Traditional Leaders, 30% of the representatives are required to be women. Article 17 of the Constitution of Zimbabwe requires that “the State must take all measures, including legislative measures, needed to ensure that... women constitute at least half the membership of all Commissions and other elective and appointed governmental bodies established by or under this Constitution or any Act of Parliament.”

⁵Section 12 of the Constitution of South Africa (Freedom and security of the person) provides that

“Everyone has the right to freedom and security of the person, which includes the right ...

(c) to be free from all forms of violence from either public or private sources.” The Zimbabwean Constitution similarly provides for protection from violence in Section 52: “Every person has the right to bodily and psychological integrity, which includes the right—(a) to freedom from all forms of violence from public or private sources.”

⁶Much more detailed discussion of these points, and how subsidiarity relates to the protection of human rights, can be found in Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 *American Journal of International Law* 38 (2003).