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THE COMMENTARY ON SELECTED CHINESE COURT DECISIONS OF ARBITRAL JURISDICTION

By Li Hu*

Abstract

The Doctrine of Separability confers the power of the arbitral tribunal to decide on its own jurisdiction over the case. Under the most domestic arbitration legislation and international practice, the dual track approach is adopted where besides the arbitral tribunal the competent court at seat of arbitration may ultimately decide the jurisdiction issue. The Chinese law expressly confirms the separability of arbitration agreement but vests the power to decide on jurisdiction to the arbitration institution and the power of supervision to the competent courts. After observation of the Chinese legal framework on arbitral jurisdiction, the author contributes comprehensive comments on 6 selected Chinese court decisions on arbitral jurisdiction, to showcase the Chinese judicial practice in this field and its efforts to implement the pro-arbitration policy.

I. INTRODUCTION

The arbitral tribunal derives its jurisdiction from the arbitration agreement of the parties (submission agreement or arbitration clause in the contract). On the other hand, one of the parties may also challenge the jurisdiction of the arbitral tribunal on the grounds that some of claims do not fall within the scope of the arbitration

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agreement or the agreement is void.

Parties in most of the jurisdictions may, by relying on domestic arbitration legislation which provides a dual-track approach, either raise the challenge to the arbitral tribunal who is considered competent to decide on its own jurisdiction subject to the final review of the competent domestic court at the seat of arbitration; or, they may also wish to raise the challenge directly before the competent domestic court for a final ruling.

This article observes the Chinese legal framework on arbitral jurisdiction and contributes comprehensive comments on 6 selected Chinese court decisions on arbitral jurisdiction, to showcase the Chinese judicial practice in this field and its efforts to implement the pro-arbitration policy.

II. THE CHINESE LEGAL FRAMEWORK ON ARBITRAL JURISDICTION

A. GENERALLY

The arbitral tribunal derives its jurisdiction from the arbitration agreement (submission agreement or arbitration clause) between the parties and must not exceed its jurisdiction entrusted to it by the parties. The parties may challenge the jurisdiction of the arbitral tribunal partially or totally. A partial challenge raises the question of whether certain of the claims or counterclaims referred to arbitration fall within the scope of the arbitration agreement. A total challenge usually triggers the issue of whether there exists a valid arbitration agreement at all.

Under the Doctrine of Separability, the autonomous arbitration clause, as a secondary contract, provides the legal basis for the appointment of the arbitral tribunal who decides on its own jurisdiction (Kompetenz-kompetenz) and for the resolution of any disputes arising from the main contract. In the well-established dual-

track approach, besides the arbitral tribunal, the domestic court may review the issue of arbitral jurisdiction before the arbitral tribunal renders a final award on the merits. The challenging party may apply directly to the competent domestic court at the seat of arbitration to resolve the jurisdictional issue. On the other hand, the decision of the arbitral tribunal on its jurisdiction may still be subject to subsequent final review of the national court. The award made by an arbitral tribunal which lacks jurisdiction shall be set aside or may not be enforced under national laws and international conventions.

The power of the arbitral tribunal to rule on its jurisdiction may also be limited by the public policy of the arbitral seat. The arbitration agreement can confer only powers that are permissible under the law applicable to it or under the *lex arbitri*.

B. THE CHINESE LEGAL FRAMEWORK

1. Provisions of the CAL

Under the Chinese Arbitration Law (the CAL),[1] a valid arbitration agreement is the prerequisite for the arbitration institution to accept case[2] with the effect to exclude the jurisdiction of the courts.[3] The arbitration agreement includes the arbitration clause in the contract and submission agreement concluded after the disputes arise, and shall contain such elements as the intention for arbitration, subject matter capable of being resolved by arbitration and the arbitration institution chosen by the parties.[4] The parties may update the arbitration agreement which does not contain the parties' consensus on the arbitration institution or subject matter; without such update the agreement shall be invalid.[5] The arbitration agreement shall also be invalid if the subject matter agreed for arbitration is beyond the

[1] The Arbitration Law of the People's Republic of China was enacted on 31 August 1994 by the National People's Congress and came into force on 1 September 1995
[2] The CAL, Art.4.
[3] Ibid., Art. 5.
[4] Ibid., Art. 16.
[5] Ibid., Art. 18.

statutory scope, or if the parties to the agreement are under some incapacity, or if the agreement is concluded under duress.[6] The disputes which are not capable of being settled by arbitration (no arbitrability) include those over marriage, adoption, guardianship, child maintenance and inheritance as well as the administrative disputes which shall be settled by the relevant administrative authorities according to relevant laws.[7] The CAL has confirmed the separability of arbitration agreement[8] and dual-track approach, but vested the power of deciding the jurisdiction to the arbitration institution. It is not the arbitral tribunal but the arbitration institution that decides the challenge on jurisdiction. The challenge shall be raised before the first oral hearing to be held by the arbitral tribunal. If one party applies to the arbitration institution but the other party to the competent domestic court for the decision on the challenge, the decision shall be made by the court.[9]

2. Provisions of the CALFCLR

As to the proper law governing the arbitration agreement, the Applicable Law on Foreign-related Civil legal Relations of the People's Republic of China (the CALFCLR)[10] provides that, the parties may agree upon the law applicable to the arbitration agreement. In the absence of the parties' agreement, the law at the seat of the arbitration institution or the seat of arbitration shall apply.[11]

3. Provisions of the SPC judicial interpretations

In practice, the Supreme People's Court of the People's Republic of China (the SPC) has issued the relevant judicial interpretations to

[6] Ibid., Art. 17.
[7] Ibid., Art. 3.
[8] Ibid., Art. 19. Article 19 of the CAL reads: "The arbitration agreement exists independently. The modification, rescission, termination or invalidity shall not affect the validity of the arbitration agreement. The arbitral tribunal has the right to rule on the validity of a contract."
[9] Ibid., Art. 20.
[10] The Applicable Law on Foreign-related Civil Legal Relations of the People's Republic of China was promulgated on 28 October 2010 by the National People's Congress and came into force as of 1 April 2011.
[11] The CALFCLR, Art. 18.

safeguard the implementation of the CAL and the CALFCLR.[12] In accordance with *the Supreme People's Court Judicial Interpretation on the application of the Applicable Law on Foreign-related Civil legal Relations of the People's Republic of China* dated 28 December 2012 (the SPC Judicial Interpretation on the Application of the CALFCLR 2012), if the parties don't agree on the arbitration institution or the seat of arbitration, or if the agreement is ambiguous, the court may determine the validity of the arbitration agreement in accordance with the law of the people's Republic of China.[13]

Under *the Supreme People's Court Regulation on relevant Issues concerning Judicial Review on Arbitration* dated 26 December 2017 (the SPC Regulation on Arbitral Judicial Review 2017), the law as agreed to be applicable to the main contract shall not be invoked as the applicable law to determine the validity of the foreign-related arbitration clause, unless otherwise agreed by the parties.[14] When deciding the law applicable to the arbitration agreement according to the CALFCLR, in case of no agreement of the parties, if the law at the seat of the arbitration institution and the law at the seat of arbitration have different positions over the validity of the arbitration agreement, the court shall apply the law which favors the validity of the arbitration agreement.[15] The competent domestic court for determining the validity of the arbitration agreement is the Intermediate People's Court or Special People's Court at the seat where the arbitration institution, the claimant's domicile or the respondent's domicile is located or where the arbitration agreement is concluded.[16] In case of disputes among the courts, the court which accepted the case first has the jurisdiction.[17]

[12] Under Chinese Law, the SPC is vested the power to issue judicial interpretations with regard to the law enforcement in China. The SPC judicial interpretations are binding on different level people's courts and playing an important role in law enforcement.
[13] The SPC Judicial Interpretation on the Application of the CALFCLR 2011, Art. 14.
[14] The SPC Regulation on Arbitral Judicial Review 2017, Art. 13.
[15] Ibid., Art. 14.
[16] Ibid., Art. 2.
[17] Ibid., Art. 4.

III. THE COMMENTARY ON SELECTED CHINESE COURT DECISIONS

A. SEPARABILITY

1. The *Jiang Jianjun* case

(a) The basic facts

In the case of *Jiang Jianjun (China) v. Wang Jinshi (USA)* (the *Jiang Jianjun* case),[18] the Plaintiff Jiang Jianjun, as the party C, on 10 July 2015, signed the Debt Compensation Agreement with the party B, the Defendant Wang Jinshi, to deal with the debt compensation arrangement together with the party A, who did not actually sign the Agreement. The arbitration clause of the Agreement provides that, the relevant disputes arising from or in connection with the Agreement shall be submitted to CIETAC for arbitration in Shenzhen (China). In accordance with the provisions of the Agreement, the Agreement "shall become effective since the date the three parties have signed it".

The Defendant initiated the arbitration at CIETAC against the Plaintiff, who during the arbitration proceedings applied to the Beijing No. 4 Intermediate People's Court for seeking confirmation of the arbitration clause in the Agreement to be invalid to the Plaintiff on the ground that the Plaintiff and the Defendant had not concluded the arbitration agreement (arbitration clause) since the full Agreement had not matured in the absence of the Party A's signature.

(b) The Court's decision

On 16 November 2018, the Court made the decision to dismiss the Plaintiff's application on the following main grounds. The arbitration clause read, "the relevant disputes arising from or in connection with the Agreement" … "shall be submitted to CIETAC for arbitration"... The term "relevant disputes" should be hereby interpreted as the disputes arising from the conclusion, validity, modification, transfer, performance, breach, interpretation or cancellation of the Agreement

[18] See Beijing No.4 Intermediate People's Court's Civil Decision, [(2018) jing 04 minte No.379].

as provided in Article 2 of *the Supreme People's Court Judicial Interpretation on relevant Issues concerning the Application of the Arbitration Law of the People's Republic of China* dated 8 September 2006 (the SPC Judicial Interpretation on the Application of the CAL 2006)[19]. Whether or not the full Agreement had been concluded or become effective was not the prerequisite to determine the validity of the arbitration agreement. In addition, in accordance with Article 19 of the CAL, "the arbitration agreement exists independently (from the full contract). The modification, rescission, termination or invalidity of the contract shall not affect the validity of the arbitration agreement in it." The Court's ruling on the validity of the arbitration agreement was without prejudice to the validity of the full agreement, but rather, such ruling shall be based on the statutory provision on the validity of arbitration agreement which was provided in Article 16 of the CAL. The Court found that, the arbitration clause of the Agreement had met the requirements of a valid arbitration agreement according to the CAL and did not trigger any other statutory circumstances where the arbitration clause shall be regarded as invalid. The Court therefore ruled that the arbitration clause of the Agreement was valid and the Plaintiff's application was dismissed.

(c) The commentary

In the *Jiang Jianjun* case, both the Plaintiff and the Defendant confirmed that they had signed the full Agreement containing the arbitration clause, but the Plaintiff argued that the Agreement did not become effective as per the provision in the Agreement since the party A did not sign the Agreement and the arbitration clause in it also had not become effective yet hence was not binding on the Plaintiff. The Court correctly applied the Doctrine of Separability provision in the CAL to confirm the validity of the arbitration clause, albeit the full agreement was not mature. It is commonly accepted that the

[19] Article 2 of the SPC Judicial Interpretation on the Application of the CAL 2006 reads: "Where the parties have reached the general agreement that the subject matter capable of being settled by arbitration shall be the disputes arising from the contract, all disputes arising from the conclusion, validity, modification, transfer, performance, breach, interpretation or cancellation of the contract may be determined as the subject matter."

arbitration clause will survive even if the main contract proves to be null and void, but on a case-by-case scenario we ought also to be aware of the reason that renders the main contract null and void. That is to say, if that reason will also "affect" the separate arbitration agreement, the arbitration agreement may still be invalid. In another word, the separability of the arbitration agreement is circumstantial.

However, the Doctrine of the Separability provides legitimacy for the appointment of the arbitral tribunal to rule on its own jurisdiction. Obviously, in the *Jiang Jianjun* case, the arbitration clause is valid between the Plaintiff and the Defendant but is not binding on the party A. The party A did not sign or confirm the Agreement containing the arbitration clause at all, which means there exists no arbitration agreement between party A and the Plaintiff, or between party A and the Defendant. The arbitral tribunal cannot exercise jurisdiction over the party A.

Under a different circumstance, the arbitration clause in the Agreement would be invalid if the full agreement was found to be concluded under duress. In such circumstances, the arbitral tribunal shall decide to dismiss the case for lack of jurisdiction. Under the CAL, the arbitral tribunal has the right to rule on the validity of a contract.[20] Such situation is also reflected in CIETAC arbitration practice. According to the CIETAC Arbitration Rules (effective as of 1 January 2015), where CIETAC is satisfied by *prima facie* evidence that a valid arbitration agreement exists, it may make a decision based on such evidence that it has jurisdiction over the case and the arbitration shall proceed. However, such a decision shall not prevent CIETAC from making a new decision on jurisdiction based on facts and evidence found by the arbitral tribunal during the arbitral proceedings that are inconsistent with the *prima facie* evidence.[21]

As mentioned earlier, the CAL recognizes the Doctrine of

[20] The CAL, Art. 19.
[21] The CIETAC Arbitration Rules 2015, Art. 6 (2).

Separability of the arbitration agreement,[22] but takes the power to decide the jurisdiction away from the arbitral tribunal and vests it in the arbitration institution. In practice, the CIETAC, as the leading Chinese arbitration institution, often delegates this power to the arbitral tribunal in return. In accordance with Article 6 (1) of the CIETAC Arbitration Rules 2015, "CIETAC has the power to determine the existence and validity of an arbitration agreement and its jurisdiction over an arbitration case. CIETAC may, where necessary, delegate such power to the arbitral tribunal." The Article 6 (3) of the Rules further stipulates that, "where CIETAC has delegated the power to determine jurisdiction to the arbitral tribunal, the arbitral tribunal may either make a separate decision on jurisdiction during the arbitral proceedings or incorporate the decision in the final arbitral award." Such provision is adopted so that the CIETAC practice on jurisdiction is in line with the usual practice of international commercial arbitration (*Kompetenz-kompetenz*). The rationale is that the decision on jurisdiction is often concerned with the merits of the case, which shall be looked into by the arbitral tribunal. By such observation, it is very desirable that the doctrine of *Kompetenz-kompetenz* should be adopted by the CAL in the future.

2. The *Huajian Energy* case

(a) The basic facts

In the case *Jiangsu Huajian Energy (Group) Limited (Huajian Energy, China) v. Yantai Tongli Shipping Co., Ltd. (with its English name as Tongli Shipping Co., Ltd., Yantai Tongli, Samoa)* (the *Huajian Energy* case),[23] the Plaintiff Huajian Energy concluded a Voyage Charter Party on 8 October 2010 with Tongli Shipping Co., Ltd. (Tongli

[22] The separability of the arbitration agreement is confirmed and adopted by the CIETAC Arbitration Rules 2015. The Article 5 (4) of the Rules reads: "An arbitration clause contained in an contract shall be treated as a clause independent and separate from all other clauses of the contract, and an arbitration agreement attached to a contract shall also be treated as independent and separate from all other clauses of the contract. The validity of an arbitration clause or an arbitration agreement shall not be affected by any modification, cancellation, termination, transfer, expiry, invalidity, ineffectiveness, rescission or non-existence of the contract."

[23] See Tianjin Maritime Court's Civil Decision, [(2013) jinhaifaquezi No.1].

Shipping), agreeing that Tongli Shipping was responsible for carrying the Plaintiff's goods from Indonesia to the Chinese mainland, and any dispute shall be submitted to Maritime Arbitration Commission of Beijing with Chinese law to be applied. Disputes arose from the performance of the Charter Party, and the Defendant Yantai Tongli started the arbitration on 30 October 2012 at China Maritime Arbitration Commission (CMAC), claiming damages from the Plaintiff out of shipwreck. On 27 March 2013, the Plaintiff applied to the Tianjin Maritime Court for confirmation of non-existence of a valid arbitration agreement between the Defendant and the Plaintiff.

The Plaintiff alleged that, the Charter Party was concluded by and between the Plaintiff and Tongli Shipping but not the Defendant, and therefore, the CMAC did not have jurisdiction over the case. The Plaintiff requested the Court to confirm the Defendant was not one of the parties of the Charter Party that contained the arbitration clause. Alternatively, the Plaintiff argued that even if the Court determined the Plaintiff and the Defendant had reached the arbitration agreement, the same should also be decided as invalid because of the fraudulent misrepresentation. The Defendant argued that the case did not fall into the scope of the Court's jurisdiction. Firstly, the judicial review on the validity of the arbitration agreement was only related to whether the dispute should be settled by arbitration or litigation but not to the review on the merits of the case. Secondly, the Plaintiff raised objection to the Defendant's standing to participate in the arbitration and requested the Court to confirm the Defendant was not a party of the arbitration agreement (clause) of the Charter Party, which was substantive issue of the case and should fall within the authority of the arbitral tribunal. Lastly, there was no fraudulent misrepresentation involved in the process of concluding the Charter Party where the Defendant, as a common practice in international transportation business, put its name as Tongli Shipping in order to demonstrate it was a cooperation registered in Samoa.

(b) The Court's decision

In the Court's decision dated 20 November 2013, the Court verified that, according to Article 17 and Article 18 of the CAL, the Court's duty was to conduct the procedural review on whether or not the arbitration agreement was legally valid on the precondition that there existed the arbitration agreement between the parties. In the present case, the Plaintiff requested the Court to confirm the Defendant was not one of the parties of the Charter Party that contained the arbitration clause rather than to review the validity of the arbitration clause by itself. Whether the Defendant was a party to the Charter Party related to the merits of the CMAC arbitration, which was beyond the scope of review by the Court. The Plaintiff's application was dismissed by the Court.

(c) The commentary

Obviously, in the *Huajian Energy* case, the Court made the right decision to dismiss the Plaintiff's application on the ground that the application was beyond the scope of review by the Court. In the first place, the Court pointed out that there was arbitration clause in the Charter Party but the Plaintiff did not request to confirm the validity of the arbitration clause itself. Instead, the Plaintiff requested the Court to confirm the Defendant was not one of the parties of the Charter Party that contained the arbitration clause, which fell into the scope of substantive matters which ought to be resolved by CMAC arbitration. The separate and independent arbitration clause of the Charter Party vested the arbitral tribunal of the CMAC arbitration the power to examine such merits and make the corresponding decision.

The above practice is also reflected in CIETAC arbitration. In accordance with Article 6 (6) of CIETAC Arbitration Rules 2015, the objections to and /or decisions on jurisdiction by CIETAC shall include objections to and /or decisions on a party's standing to participate in the arbitration. In such circumstances, CIETAC will delegate the power to determine the objection to the arbitral tribunal that may either make a separate decision during the proceedings or

incorporate the decision in the final arbitral award.[24]

3. The *Runfeng Electronic* case

(a) The basic facts

In the case *Shandong Runfeng Electronic Technology Co. Ltd. (Runfeng Electronic, Shandong, China) v. Inter-Mongolia Sanxin Industrial Co. Ltd. (Sanxin Industrial, Inter-Mongolia, China)* (the *Runfeng Electronic* case),[25] the Plaintiff Runfeng Electronic and the Defendant Sanxin Industrial on 3 September 2012 concluded a General Contract containing the arbitration clause which stipulated that, one of the parties might, in case no settlement could be reached through friendly negotiation by the parties with regard to any dispute in connection with this contract, apply for arbitration to the Beijing Sub-commission of China International Economic and Trade Arbitration Commission (CIETAC).

On 15 June 2012, both parties entered into a Cooperation Agreement about the construction project under the General Contract and agreed that the disputes arising from the performance of the Cooperation Agreement should be handled with through friendly negotiation; otherwise, one of the parties may initiate litigation before the court of the place where the construction project was located (local court). On 1 September 2013, both parties concluded the Cancellation Agreement to cancel the General Contract and terminated the performance of the contract with no agreement about the dispute resolution at all.

The dispute arose during the performance of the Cancellation Agreement, and the Defendant instituted the litigation in the local court. The Plaintiff challenged the local court's jurisdiction and argued that both parties' dispute should be arbitrated at CIETAC in accordance with the arbitration clause of the General Contract. The

[24] The CIETAC Arbitration Rules 2015, Art. 6 (3).
[25] See Beijing No. 2 intermediate People's Court's Civil Decision, [(2014) erzhongmintezi No.5737].

local court ruled that, by concluding the Cancellation Agreement, both parties had cancelled the General Contract and the arbitration agreement in it had also been cancelled accordingly. The local court's jurisdiction over the disputes should be determined as per the dispute resolution clause of the Cooperation Agreement (choice of local court).

On 29 April 2014, the Plaintiff commenced the arbitration at CIETAC, requesting to confirm the Cancellation Agreement was a supplement to the General Contract, and further applied to the Beijing No.2 Intermediate People's Court (the Court) on 9 May of 2014 to confirm the validity of the arbitration agreement in the General Contract.

(b) The Court decision

The Court on 13 June 2014 confirmed the validity of the arbitration clause in the General Contract. It held, according to Article 19 of the CAL, the arbitration agreement is independent and its validity shall not be affected by the modification, rescission, termination or invalidity of the main contract. Therefore, the fact that the General Contract had been canceled by the Plaintiff and the Defendant did not affect the validity of the arbitration clause in it.

(c) The commentary

The *Runfeng Electronic* case demonstrates that the local court lacks the understanding of the Doctrine of Separability in determining it has jurisdiction. Further, the local court is also wrong in invoking the dispute resolution clause in the Cooperation Agreement. The Defendant initiated the litigation in the local court to resolve the disputes arising from the performance of the Cancellation Agreement which was covered by the General Contract. Given no dispute resolution agreement is provided in the Cancellation Agreement, it is reasonable to refer the disputes to arbitration in accordance with the arbitration agreement in the General Contract. That explains why the Plaintiff commenced arbitration at CIETAC and applied to the Court

for confirmation of the validity of the arbitration agreement of the General Contract.

B. DESIGNATED AGREEMENT OVER ARBITRATION INSTITUTION

1. The *Runfeng Electronic* case [as mentioned above]

(a) The basic facts

In the case, the Plaintiff also alleged that, as per the arbitration clause of the General Contract, both parties had chosen CIETAC as the arbitration institution with the seat in Beijing, and requested the Court to confirm the validity of the arbitration clause. The Defendant argued that, the agreed "CIETAC Beijing Sub-commission" did not exist, and both parties' agreement about the arbitration institution was "ambiguous", hence there was no agreed arbitration institution between the parties.

(b) The Court decision

The Court ruled that, although the agreed "CIETAC Beijing Sub-commission" did not exist, it was clear both parties had agreed upon CIETAC, a permanent commercial arbitration institution, as the chosen arbitration commission. CIETAC established in accordance with the demands of its business development the sub-commissions which constituted one unified arbitration commission of CIETAC. It was more reasonable to interpret "CIETAC Beijing Sub-commission" as "CIETAC" with the seat of arbitration in "Beijing".

(c) The commentary

Needless to say, in the case, the Court has correctly determined the arbitration institution which has been agreed by the parties. The relationship between CIETAC and its sub-commissions shall be examined by the provisions of the Constitution of CIETAC, which states expressly that the sub-commissions or arbitration centers are branch offices of CIETAC.[26] From the angle of the parties' intention,

[26] The CIETAC Constitution 2015, Art. 21. The same relationship between CIETAC and its sub-

it is based on the recognition of CIETAC that they have chosen one of CIETAC sub-commissions or arbitration centers for arbitration; as such, CIETAC is the arbitration institution mutually agreed upon by both parties. CIETAC Arbitration Rules 2015 further state that, the sub-commissions or arbitration centers are CIETAC's branches, which accept arbitration applications and administer arbitration cases with CIETAC's authorization. Where the sub-commission or arbitration center agreed upon by the parties does not exist or its authorization has been terminated, or where the agreement is ambiguous, CIETAC (its Arbitration Court) shall accept the arbitration application and administer the case. In the event of any dispute, a decision shall be made by CIETAC.[27]

2. The *Youmai Technology* case

(a) The basic facts

In the case of *Hangzhou Youmai Technology Co. Ltd. (Youmai Technology, Zhejiang, China) v. Lin Haitang (Lin Haitang, Guangdong, China)* (the *Youmai Technology* case)[28], the Plaintiff Youmai Technology and the Defendant Lin Haitang entered into *Wangyi Koala Haigou Service Agreement* (the Purchase Agreement), Article 7 of which provided that, the disputes arising from the Agreement shall be submitted to CIETAC for arbitration in accordance with its arbitration rules in case of no successful negotiation between both parties.

The Defendant brought the disputes to Guangzhou Haizhu District People's Court (the Lower Court) against the Plaintiff. The Plaintiff argued that, based on the arbitration clause in the Purchase Agreement, the Lower Court lacked jurisdiction over the case. The Lower Court made the decision in 2015 to dismiss the challenge of the Plaintiff. The case was appealed to Guangzhou Intermediate People's Court (the Intermediate Court), which rendered the final

commissions or arbitration centers had also been adopted by the former edition of its institution.
[27] CIETAC Arbitration Rules 2015, Art.2(3) and (6).
[28] See Guangdong High People's Court's Civil Decision, [(2017) yueminzai No.398].

decision in August of 2016 to uphold the Lower Court's decision, confirming the Lower Court's jurisdiction over the case. The Guangdong Higher People's Court (the Higher Court) decided in June of 2017 to re-examine the case and made its decision on 23 October 2017 to set aside the decisions of the lower and intermediate courts, and to refer the parties to apply for arbitration at CIETAC.

(b) The Court's decisions

The Intermediate Court held that, according to Article 7 of the Purchase Agreement, the dispute resolution seat (rather than seat of arbitration) should be deemed as CIETAC. Under the SPC Judicial Interpretation on the Application of the CAL 2006, it should be deemed that the parties had not designated the arbitration institution if the arbitration clause only indicated the arbitration rules to be applied, unless the parties could reach supplementary agreement over the arbitration institution or the arbitration institution could be determined as per the agreed arbitration rules (Article 4); if the parties had agreed on more than one arbitration institutions in the arbitration agreement, they may negotiate to choose one of the agreed institutions for arbitration; otherwise, the arbitration agreement was void (Article 5). CIETAC, agreed by the parties in the arbitration clause of the Purchase Agreement, had actually established more than one sub-commission. Agreeing on arbitration at CIETAC should be deemed that the parties had not agreed on a specific arbitration institution. Since the specific arbitration institution had not been chosen by the parties, the arbitration clause should be deemed as invalid.

The Higher Court ruled that, the arbitration clause of the Purchase Agreement had met the conditions of a valid arbitration agreement as provided by Article 16 of the CAL, indicating the arbitration intention of both parties, the subject matter for arbitration and the designated arbitration commission. As to the relationship between CIETAC and its sub-commissions, Article 2(3) of CIETAC Arbitration Rules 2015 stipulated that, "CIETAC is based in Beijing.

It has sub-commissions or arbitration centers. The sub-commissions/arbitration centers are CIETAC's branches, which accept arbitration applications and administer arbitration cases with CIETAC's authorization." Obviously, CIETAC was an arbitration institution, with the sub-commissions or arbitration centers as its branches, which administered arbitration cases only after approval of CIETAC. The parties had chosen the arbitration commission by agreeing upon CIETAC arbitration under its arbitration rules. The wrong decision of the Intermediate Court should be corrected, and the parties might go to CIETAC for arbitrating their disputes arising from the Purchase Agreement.

(c) The commentary

One point worth mentioning here is that, as the branches of CIETAC, the sub-commissions or arbitration centers established by CIETAC in Chinese mainland are not independent arbitration institutions, but the situation is different with the CIETAC arbitration centers outside the Mainland. CIETAC set up its Hong Kong Arbitration Center in 2012 and European Arbitration Center and North American Arbitration Center in 2018. These centers are CIETAC's overseas branch offices, but on the other hand, also the institutions established in accordance with local laws where the branches are set up. For the cases administered by these offices, unless otherwise agreed by the parties, the seat of the arbitration shall be in Hong Kong, Vienna and Vancouver and the arbitration laws of Hong Kong, Austria and Canada shall be applicable to the arbitrations, which means that the local courts will support and supervise the arbitrations and the awards are those of Hong Kong, Austria and Canada respectively, although their awards are CIETAC awards. The enforcement of such awards in the Chinese mainland shall be conducted in accordance with the Mutual Arrangement between Hong Kong SAR and the Chinese mainland, and the New York Convention of 1958. These arbitration centers, as CIETAC's overseas branch offices, enjoy their independence in administering arbitration.

3. The *Shandong Baodi* case

(a) The basic facts

In the case of *Shandong Baodi Agricultural Technology Co. Ltd. (Shandong Baodi, Shandong, China) v. Bansi Machinery (Shanghai) Co. Ltd. (Bansi Machinery, Shanghai, China)* (the *Shandong Baodi* case)[29], the Plaintiff Shandong Baodi applied in April 2015 to Shanghai No.2 Intermediate People's Court against the Defendant Bansi Machinery for confirming the validity of the arbitration clause in the Sales Contract signed by them on 10 September 2013. The arbitration clause provides that, any dispute arising from the Contract shall be resolved by the parties through friendly negotiation; in case of no successful negotiation, the disputes shall be submitted to China Chamber of International Commerce (CCOIC) for arbitration that will be conducted by three arbitrators designated in accordance with CIETAC Arbitration Rules; the presiding arbitrator shall be the citizen from a neutral country; the award shall be final and binding upon both parties; the seat of arbitration is in Shanghai with the Chinese as the language, and the arbitration fees shall be borne by the losing party.

The Plaintiff alleged that, CCOIC did not carry the function of national or international arbitration and could not exercise power in the arbitration. Therefore, it claimed the above arbitration clause was invalid. The Defendant argued that, although CCOIC could not arbitrate disputes at its own capacity, it had the affiliated arbitration institution. By the arbitration clause of the Sales Contract, the arbitration shall be conducted in accordance with CIETAC Arbitration Rules. Taking these elements into consideration, it shall be confirmed that parties had agreed CIETAC as the arbitration institution.

(b) The Court's decision

According to Article 2 of CIETAC Arbitration Rules 2015, CIETAC, originally named the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade (CCPIT) and

[29] See Shanghai No.2 Intermediate People's Court's Civil Decision, [(2015) huerzhongminrenzi No.17]

later renamed the CCPIT Foreign Economic and Trade Arbitration Commission, concurrently uses as its name the "Arbitration Institute of the China Chamber of International Commerce". The Court held that, the agreement about the arbitration institution of the arbitration clause was not accurate. However, looking at the fact that CIETAC concurrently used as its name the "Arbitration Institute of the China Chamber of International Commerce", it was sufficient to ascertain the arbitration institution chosen by the parties was CIETAC.

(c) The commentary

CIETAC has been concurrently using CCOIC Arbitration Institute as its name since 2000, but this is the first case which is involved with the ascertainment of CIETAC as the chosen institution arising out of parties' agreement upon CCOIC arbitration. The Court's decision is right, and it is clear and straightforward to determine CIETAC to be the arbitration institution chosen by the parties under the arbitration clause of the Sales Contract. As a matter of law, under the CAL, CCOIC is the proper body to organize and establish the foreign related arbitration institutions in Chinese mainland[30]. The CAL provision is in line with the history of CIETAC and CMAC. CIETAC and CMAC were set up in 1956 and 1959 respectively within CCPIT, which has been concurrently using CCOIC as part of its name since 1988.

C. VALIDITY OF HYBRID ARBITRATION CLAUSE

1. The *Zhejiang Yisheng* case

(a) The basic facts

In the case of *Zhejiang Yisheng Petrochemical Co. Ltd. (Zhejiang Yisheng, China) v. Invista Technologies S. a. r. l. (Invista Technologies, Luxemburg)* (the *Zhejiang Yisheng* case)[31], the Plaintiff Zhejiang Yisheng and the Defendant Invista Technologies

[30] The CAL, Art.66

[31] See Hangzhou Intermediate People's Court's Civil Decision, [(2012) zheyongzhongquezi No.4]

concluded in April and June 2003 respectively two Technology License Agreements, the arbitration clauses of which read: "the arbitration shall take place at China International Economic and Trade Arbitration Center (CIETAC), Beijing, P.R. China and shall be settled according to the UNCITRAL Arbitration Rules as at present in force."

The Plaintiff in October 2012 applied to Hangzhou Intermediate People's Court for confirming the arbitration clauses of the Technology License Agreements were invalid. The Plaintiff alleged that, in the arbitration clauses, the parties did not agree expressly with the "designated arbitration commission" under the CAL; the agreed UNCITRAL Arbitration Rules were applicable to *ad hoc* arbitration; therefore, the disputed arbitration clauses were typical agreement on *ad hoc* arbitration; moreover, the arbitration proceedings as processed at CIETAC had been conducted in the manner of *ad hoc* arbitration. The Plaintiff claimed the disputed arbitration clauses were invalid as per the stipulations of the CAL.

The Defendant argued that, the parties had definitely chosen CIETAC as the arbitration institution in arbitration clauses at hand, which meant both parties had agreed on institutional arbitration. For *ad hoc* arbitration, it was not necessary for the parties to list out the name of the arbitration institution in the arbitration clauses. Moreover, the interpretation of the arbitration clause should be based on the principles of respecting and preserving the intention of the parties for arbitration and upholding the validity of the arbitration clause. The UNCITRAL Arbitration Rules were not only for *ad hoc* arbitration but also applied worldwide in institutional arbitration, hence the choice of the Rules did not result in the voidance of the institutional arbitration. The arbitration proceedings of CIETAC case involving both parties were actually processed by the approach of institutional arbitration. Taking all the elements above into consideration, the application of the Plaintiff should be dismissed by the Court.

(b) The Court's decision

The Court held that, both parties did not agreed upon the governing law of the arbitration clauses in the Technology License Agreements, but chose the law of Chinese mainland in the Court litigation as the proper law, which complied with the stipulation of Article 18 of the CALFCLR and was hereby confirmed by the Court; the parties in the arbitration clauses used the term "…take place at…", the content after which ("at") might be the place (of arbitration) , for example a city ,or a designated arbitration institution (for the purpose of institutional arbitration); the Chinese name of the arbitration institution as agreed by the parties was not accurate (for CIETAC's full name) but the English short name of "CIETAC" indicated the designated arbitration institution was China International Economic and Trade Arbitration Commission in Beijing. According to Article 3 of the SPC Judicial Interpretation on the Application of the CAL 2006, it shall be deemed that the parties had chosen the arbitration institution if the specific arbitration institution could be ascertained from the agreement of the arbitration clause, though the name of agreed institution was not precise. The Court confirmed the validity of the institutional arbitration clauses in the Technology License Agreements.

(c) The commentary

This is the first case where Chinese court made decision over the validity of the hybrid arbitration agreement. You may argue that, in the arbitration clauses, the parties have chosen *ad hoc* arbitration with CIETAC as the appointing authority. I do agree with you from the perspective of general international arbitration practice, but I think the Court has done the right thing in that it somehow managed to preserve both the sanctity of parties' autonomy in arbitration and the validity of the arbitration clauses themselves.

Under the CAL, a valid arbitration agreement shall include a designated arbitration institution as agreed by the parties; otherwise, the arbitration agreement shall be void unless the supplementary

agreement over this can be made.[32] That means that *ad hoc* arbitration is not allowed in Chinese mainland, and merely choosing an institution as the appointing authority cannot meet the requirement of having institutional arbitration under the CAL. For the purpose to realize the parties' intention for arbitration, the Court appropriately interpret the chosen arbitration as institutional arbitration with CIETAC as administrator so as to uphold the validity of the hybrid arbitration clause under the CAL. The practice of the Court has also demonstrated the pro-arbitration policy adopted by Chinese court to nurture international arbitration in China.

IV. CONCLUSION

The Doctrine of Separability confers the power of the arbitral tribunal to decide on its own jurisdiction over the case. Under the most domestic arbitration laws and international practice, the dual track approach is adopted where besides the arbitral tribunal the competent court at seat of arbitration may ultimately decide the jurisdiction issue.

The Chinese law expressly confirms the separability of arbitration agreement but vests the power to decide on jurisdiction to the arbitration institution, and the power of supervision to the competent courts.

The selected court decisions on arbitral jurisdiction have showed that, Chinese courts uphold the stance of pro-arbitration and decide the arbitral jurisdiction properly, although some necessary measures still need to be undertaken to optimize the practice of the lower courts.

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[32] The CAL, Art.16 and 18.

THE SEVENTH CIRCUIT PICKS A SIDE IN THE DEBATE REGARDING SECTION 1782(a)*

By Sarah E. Reynolds, Charles E. Harris, II & Michael P. Lennon Jr**

In *Servotronics Inc. v. Rolls-Royce PLC*,[1] the United States Court of Appeals for the Seventh Circuit deepened the circuit split on the question of whether 28 U.S.C. § 1782(a) authorizes district courts to order a person or entity to give testimony or documents for use in private foreign arbitrations. The Seventh Circuit sided with the Second and Fifth Circuits, holding that Section 1782(a) permits courts to provide discovery assistance only to state-sponsored foreign tribunals, not private international arbitrations.

Servotronics had asked the court to issue a subpoena compelling The Boeing Company to produce documents for a private London arbitration. The Seventh Circuit rejected that request. But in *Servotronics Inc. v. Boeing Co*.,[2] the Fourth Circuit took the opposite approach in a case involving the same parties and the same underlying private arbitration.

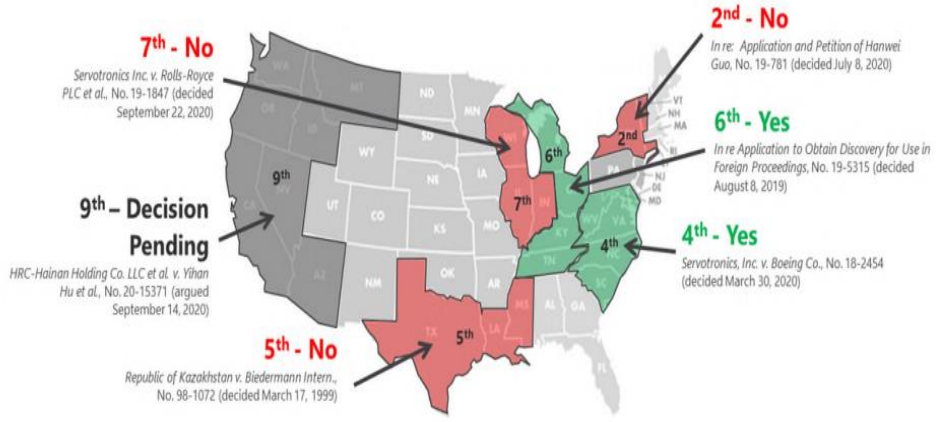
With the clear disagreement in the circuits, the issue is ripe for review by the US Supreme Court.

The Circuit Split

Section 1782(a) authorizes an interested party to petition a district court where a person resides for an order requiring the person to provide testimony or documents "for use in a proceeding in a foreign or international tribunal."[3] The question is whether a private foreign arbitration is a "foreign or international tribunal" for the purposes of Section 1782(a).

About 20 years ago, this question seemed settled. The Second and Fifth Circuits had held, based on their reading of Section 1782(a)'s text and legislative history, that the statute does not apply to a private foreign arbitration.[4] No other court of appeals addressed the question until last year, when the Sixth Circuit decided in *In re Application to Obtain Discovery for Use in Foreign Proceedings* that a private foreign arbitration is a "foreign or international tribunal " under Section 1782(a).[5] The Sixth Circuit relied on *Intel Corp. v. Advanced Micro Devices, Inc*.,[6] where the US Supreme Court held that a government agency with quasi-judicial powers was a "foreign tribunal" under Section 1782(a). As we discussed in a prior Legal Update, the Sixth Court read Intel as espousing a broad interpretation of "foreign or international tribunal," one that could include foreign international arbitrations.

In *Boeing Co*.,[7] the Fourth Circuit agreed with the Sixth Circuit's view. But then in *In Re Guo*, the Second Circuit reiterated its long-standing position that Section 1782(a) does not cover private international arbitrations (as we noted in a prior Legal Update).[8] This was the legal landscape as the Seventh Circuit considered *Rolls-Royce*. And, as we discuss below, the Ninth Circuit is poised to decide this issue soon.



The Dispute in *Rolls-Royce*

The arbitration *in Rolls-Royce* was about whether Servotronics must bear the loss for damage to a Boeing airplane. The plane caught on fire as Boeing employees tried to dislodge a piece of metal caught in an engine valve. Rolls-Royce paid Boeing $12 million for the damage and sought indemnity from Servotronics, the maker of the valve. Per the parties' long-term supply agreement, Rolls-Royce commenced an arbitration under the auspices of the Chartered Institute of Arbitrators. The parties' contract specified that Birmingham, England, was the arbitral seat, but the parties agreed to hold the arbitration in London.

Servotronics filed an *ex parte* application in the Northern District of Illinois under Section 1782(a), asking the court to issue a subpoena directing Boeing to produce documents for use in the London arbitration. The court initially granted the motion but changed course after both Boeing and Rolls-Royce objected to Servotronics' application on the ground that Section 1782(a) does not authorize a district court to order discovery for use in a private foreign arbitration. The district court agreed and quashed the subpoena. Servotronics appealed.[9]

The Seventh Circuit's Decision

The Seventh Circuit's decision relied primarily on what it described as "statutory context" and its belief that a broad interpretation of "foreign or international tribunal" under Section 1782(a) would conflict with the Federal Arbitration Act (FAA).[10] The court declined to rely on dictionary definitions of "tribunal" or the ruling in *Intel* to resolve the issue at hand.

Statutory Context

The court first noted that Section 1782(a)'s text was written by a

group Congress created in 1958, the Commission on International Rules of Judicial Procedure. The Commission's charge included recommending legislation to improve "the procedures of our State and Federal tribunals for the rendering of assistance to foreign courts and quasi-judicial agencies." The Seventh Circuit found it telling that the charge did not require the Commission to "study and recommend improvements in judicial assistance to private foreign arbitration."[11]

Second, the court relied on the principle that "[i]dentical words or phrases used in different parts of the same statute (or related statutes) are presumed to have the same meaning."[12] It noted that when Congress adopted the Commission's proposed legislation revising Section 1782 in 1964, the same legislation included revisions to two other statutes that use "foreign or international tribunal" in the context of judicial assistance in a foreign country—one statute concerns service of process in foreign litigation and the other, letters rogatory.[13] The court concluded that "[s]ervice-of-process assistance and letters rogatory … are matters of comity between governments," suggesting that "the phrase 'foreign or international tribunal' as used in this statutory scheme means state-sponsored tribunals and does not include private arbitrations."[14]

Lastly, the court found that the use of "tribunal" within Section 1782(a) suggested that "tribunal" in this context means a "governmental, administrative, or quasi-governmental tribunal operating pursuant to the foreign country's 'practice and procedure.'"[15] In particular, the court stated that:

> [T]he operative sentence authorizing the district court to order discovery 'for use in a proceeding in a foreign or international tribunal,' and again in the next sentence, which authorizes the court to act on a letter rogatory issued by 'a foreign or international tribunal.' Two sentences later the word 'tribunal' appears again where the statute provides that the court's discovery order 'may prescribe the practice and procedure, which may be in whole or part *the practice and procedure of*

the foreign country or the international tribunal.'[16]

The Potential FAA Conflict.

The court also favored a narrow interpretation of Section 1782(a) to avoid any conflict with the FAA. Section 7 of the FAA permits arbitrators to summon a person to appear before them to testify and produce documents; a party may petition the court to enforce the summons.[17] The court viewed the discovery available under Section 1782(a) as more far-reaching because it permits "both foreign tribunals and litigants (as well as other 'interested persons') to obtain discovery orders."[18] It stated that "litigants in foreign arbitrations would have access to much more expansive discovery than litigants in domestic arbitrations" if Section 1782(a) were construed to cover private foreign arbitrations, and it is "hard to conjure a rationale for giving parties to private foreign arbitrations such broad access to federal-court discovery assistance in the United States while precluding such discovery assistance for litigants in domestic arbitrations."[19]

Definitions and Intel.

The court held that neither legal nor non-legal definitions of "tribunal" "unambiguously resolve" whether the term encompasses private international arbitrations because some definitions are more expansive and some are more narrow. The court was also not convinced the holding in *Intel* helps resolve the present issue. Intel is the only US Supreme Court case addressing Section 1782(a). In *Intel*, the Court held that a proceeding before the Directorate General for Competition of the Commission of the European Communities was a "foreign or international tribunal." The Seventh Circuit characterized *Intel* as addressing "a public agency with quasi-judicial authority," not a private international arbitral body. The Seventh Circuit also was unmoved by a footnote in *Intel* that quoted a law review article suggesting that "tribunal" under Section 1782(a)

included "arbitral tribunals." The Seventh Circuit "s[aw] no reason to believe that the Court, by quoting a law-review article in a passing parenthetical, was signaling its view that § 1782(a) authorizes district courts to provide discovery assistance in private foreign arbitrations."[20]

The Ninth Circuit's Pending Case

The Ninth Circuit may soon have to pick a side because the issue about the scope of Section 1782(a) is presented in *HRC-Hainan Holding Co., LLC v. Yihan Hu*.[21] The district court in *HRC-Hainan* held that a private arbitration before the China International Economic and Trade Arbitration Commission was a "foreign or international tribunal" for purposes of Section 1782(a).[22] The parties argued the case on September 14, 2020, and the appellant filed a supplemental brief on September 24, 2020, bringing the *Rolls-Royce* decision to the Ninth Circuit's attention.

Conclusion

As it stands, there is a clear split in the circuits about the scope of Section 1782(a). Either *Guo* (in the Second Circuit) or *Servotronics* (in the Seventh Circuit) could file a certiorari petition and ask the US Supreme Court to decide the issue. Whether either will do so remains to be seen. But if a certiorari petition is filed with the US Supreme Court, there will no doubt be many interested parties urging the Court to take the case and provide certainty about whether Section 1782(a) applies to private international arbitrations.

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1 __ F.3d at __ (7th Cir. Sept. 22, 2020).
2 954 F.3d 209 (4th Cir. 2020).
3 28 U.S.C. § 1782(a).
4 See Nat'l Broad. Co. v. Bear Stearns & Co., 165 F.3d 184 (2d Cir. 1999); Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880, 883 (5th Cir. 1999).
5 939 F.3d 710 (6th Cir. 2019).
6 542 U.S. 241 (2004).
7 954 F.3d at 210.
8 965 F.3d 96 (2d Cir. 2020), as amended (July 9, 2020).
9 Rolls-Royce, __ F.3d at __.
10 9 U.S.C. § 1 et seq.
11 Rolls-Royce, __ F.3d at __.
12 Id. (citation omitted).
13 See 28 U.S.C. § 1782(a); 28 U.S.C. § 1696; 28 U.S.C. § 1781.
14 Rolls-Royce, __ F.3d at __.
15 Id.
16 Id.
17 Id.
18 Id.
19 Id.
20 Id.
21 No. 19-MC-80277-TSH, 2020 WL 906719 (N.D. Cal. Feb. 25, 2020), appeal docketed, No. 20-15371 (9th Cir. Mar. 4, 2020)
22 Id. at *8.

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VICTIM OFFENDER MEDIATION: AN ALTERNATIVE TO THE CRIMINAL OFFENDER JUSTICE SYSTEM?*

By George SK and Simarata Randhawa**

Abstract

Victims feel progressively baffled and estranged by our current frameworks for justice. Despite the fact that the criminal justice framework exists accurately, victims abused by criminal conduct have no legitimate remaining during the time spent getting justice. Traditionally, mediation is seldom used as a method of dispute resolution. Does restorative justice bring justice to the victim for the crimes of the criminal offender? The idea of mediation is to create an opportunity for both sides to voice themselves; to give the victim the opportunity to articulate the effect the crime has had on them while simultaneously allowing the offender to show repentance for his offence, owning up to his actions that have profoundly affected the victim while atoning for it. There are certain decisions of the Disciplinary Committee that are final and are not subject to appeal; except for such decisions to which an appeal is not allowed, the Appeal Committee may decide upon the merits of the case whether an appeal to a decision must be granted or not.

1. Introduction

Therapeutic victim-offender mediation is a relatively niche area within the traditional criminal justice process. This method of mediation has a high potential for rehabilitation of the criminal offender giving him the opportunity to redress whilst righting his wrongs under the alternate dispute resolution philosophy. Ideally, any judiciary's opinion about restorative justice depends on their belief of how much potential a criminal offender to rehabilitate

himself, and whether the level of seriousness of his crime even gives him access to this method of mediation. In simple words, if the court believes there is very little scope for the rehabilitation of the criminal offender, they would not allow a victim-offender mediation program.

It is debatable whether the justice system concentrates on the wounded or even the wrongdoers, however, the justice system is concerned about reprisal and finding suitable types of discipline and punishments. Victim-offender mediation usually handles crimes of not the most severe nature but ones like minor property related matters, juvenile crimes, etc.

It is again debatable whether an adequate opportunity is provided to either the victim or the criminal offender in the justice process. If provided a measured environment with enough supervision, having the criminal offender and victim face each other and express themselves may give positive outcomes in the long run. The victim is able to completely realise the gravity of the situation and how it has affected them, whilst voicing it directly to the criminal offender, who is made to realise the negative and deep impact it has on the life of a person, in the hope that rehabilitation is an option, and that restorative justice could be an essential tool to humanizing the criminal justice process. It may not match up to the turmoil that the victim has faced, but it may provide a level to satisfaction that the victim was given an opportunity to face the offender and say things to relieve them of the trauma mildly, if not substantially, instead of having to hold their peace about not being given the chance to do the same.

Victim-offender mediation may prove to be an excellent alternative to the current criminal justice procedure around the world. It is pertinent to note that it is voluntary, which means if only the victim wants to pursue this method of alternative dispute resolution, should they be allowed this option. Alternately, there is always the traditional criminal proceeding mechanism available.

2. What is Restorative Justice Practice?

Tony Marshall of the Restorative Justice Consortium (United Kingdom) proposed a valuable working meaning of Restorative Justice:

> *"Restorative justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future."*

While Tony Marshall's definition feels incomplete, it provides a gist of the concept behind restorative justice, which is two-fold:

I. Victims and their wrongdoers in the case are in an up-close and personal space, and
II. The aim of this congregation is to arrive at a conclusion.

According to Marshall, each subdivision of mediation developed freely and have impacted and complemented one another. The branches are mainly: community mediation, victim-offender mediation, and victim-offender reconciliation programs.

Therapeutic restorative justice depends on qualities that stress the significance of giving open doors for the increasingly dynamic association through dialogues in the procedures of offering backing and help to the aggrieved party. It is important that the victim is actively involved in the criminal justice procedure.

The focus of restorative justice is to repair the harm. It focuses on giving the offender the chance and opportunity to hold himself accountable for his actions, to realise the gravity of his actions, and if permissible, be granted a way to right his wrongs. Restorative justice promotes addressing of all the issues in person and to mutually reach an understanding of what the next step should be towards the justice of the victim.

Conferencing, which is branch of victim-offender mediation, refers to the procedure where the victim, the offender and their supports (moral supporters or otherwise) along with certain community members work towards reparation in the presence of a neutral and unbiased third party.

3. How Does Victim-Offender Mediation Work?

An unbiased third party intercedes an exchange among victim and the guilty party who:

I. Talk about how the wrongdoing influenced them;
II. Express their side of the story;
III. Build up a commonly acceptable composed compensation assertion;
IV. Build up a subsequent arrangement, in this way empowering the aggrieved and the offender to conclude the remedial procedure.

4. Need for Restorative Program in the Criminal Justice

In the traditional retributive justice system, crime is demarcated by the violations of the prevalent criminal legislation of a country. Restorative justice, on the other hand, takes into the account that the crime against the victim is defined by the harm caused. Restorative justice humanises the criminal justice process.

In a victim-offender mediation, the victim and the offender directly involved in the case are the primary parties. They have direct involvement at each stage of the mediation process which evolves with the changing needs of the parties.

While retributive justice focuses on the offender being punished for the crime committed, restorative justice, on the other hand, demands that if the case allows, the offender be allowed to

make his wrongs right. It demands that the victim direct in deciding how he wants justice to be served, and what action needs to be taken. It is essential that the victim is satisfied at the end of any proceeding or path he chooses. When victims have the open door for direct association with the offender, such cooperation can be transformative- from enduring in silence to shared mending, from detachment to network support, from frailty to strengthening, from melancholy to reengagement.

Restorative justice additionally takes into account 'society' as an interested party in criminal cases. The crime committed by the offender not only affects the victim directly or abuses the legislative system of a country, but also affects the general public at large.

5. Advantages of Victim-Offender Mediation

5.1 The Victim

It is essential that at apposite stages of a case, inputs of the victim should be inculcated while arriving at an outcome suitable. The fact that the restorative justice system adds the human factor while delivering justice, is the main reason that it benefits the victim. This form of mediation and justice process gives a chance to the victim to recuperate from the deep, traumatising effects of the crime, mentally and emotionally, by allowing them to sit face-to-face with their offenders and talking to them at intervals convenient to them. This has a liberating advantage for the victim since it relieves them of the questions about the crime that daunts them, as they can directly get answers from the offender.

An important benefit of this system to justice is that victim-offender mediation allows the victim, who is directly affected by the crime, to devise a personal restitution agreement. It is important to note that the intention is not to let the victim individually decide what the punishment for the offender should be, but to allow the victim to have a say in an

outcome favourable to him, or to his satisfaction. The idea of justice differs from person to person and it is important in a case where the victim is affected, that he has a say in what would bring him justice.

The involvement of victims in criminal cases is unique to that followed traditionally by criminal courts. The courts ordinarily are worried about reformatory compensation fundamentally through fines or detainment; victim-offender mediation uses individual restitution that is fittingly custom to the victim and the offender. Mediations are tailored for each case.

In an article by Howard Zehr titled '*Justice paradigm shift? Values and visions in the reform process'*, six questions were stated that goes through the mind of the victim which he/she seeks answers to. The questions are as follows:

i. "What happened?
ii. Why did it happen to me?
iii. Why did I act as I did at the time?
iv. Why have I acted as I have since that time?
v. What if it happens again?
vi. What does this mean for me and for my outlook, my faith, my vision of the world, my future?"

The benefit of victim-offender mediation for the victim is that the victim can personally get the answers to these questions directly from their criminal offender. Once the victim has the responses to these questions when they are given an opportunity to reflect on them, they also have the chance to be heard, and more importantly, it allows them to directly say it to the offender.

In line with Zehr's opinion on what victims demand,

Heather Strang in an article titled '*Repair or Revenge: Victims and Restorative Justice*' also concluded in her own way what the victim needed; in her opinion, she felt the following was needed by victim in a criminal justice system:

i. Involvement in the process as well as the end result.
ii. To be dealt with consciously and reasonably.
iii. An expression of remorse for emotional rebuilding.
iv. Being allowed to take part in their case.
v. Monetary compensation.
vi. A semi-formal procedure where they are valued.

5.1.1 Victim Satisfaction

When the victim is involved in every stage of the justice procedure they elect to go forward with, they will be satisfied that they did what they could in their power. Victim-offender mediation fundamentally respects the need of the victim to be involved at every stage of the mediation for maximum satisfaction. It is only fair that the person aggrieved should be given priority for his needs. When the case is handled how the victim wants it, it is likely that they are also satisfied with the outcome of the mediation.

5.1.2 View of Reasonableness

In the event the criminal court excludes the victim from directly participating in the criminal proceedings, the victim may find it unfair and unreasonable. The fact that victim-offender mediation supports the view of victims being directly involved, they find the procedure more reasonable to themselves.

5.1.3 Fear of Revictimisation

All things considered, when a crime is committed against a victim, he fears that a similar will transpire once more. It is more plausible, that through victim-offender mediation, the victim is less scared about revictimization, by the same offender or another person in the future.

5.1.4 Resulting Outcome

It is believed that the victim will be more satisfied with the outcome of a victim-offender mediation as the victim's active participation in the mediation gives direction to what outcome they expect and what the end result of the mediation should be. In the case of criminal court proceedings, even though it is conceded that the victim may exhibit a sigh of relief that justice is served, it is far more likely that the victim is more satisfied when the end result of the proceeding was fundamentally based on what the victim wanted along with keeping in mind the repercussions it has on the society as a whole.

5.1.5 Regret

Even though it may seem trivial, an apology from the offender coupled with appropriate action can have a long-lasting positive impact on the victim. While an apology cannot and should not be an individual outcome of a crime committed, it is one of the factors that gives, if nothing else, some mental peace to the victim.

5.2 Benefits to Offenders

This alternate method of dispute resolution is not solely meant for the victim only. It is essential to understand some key points about why it benefits everyone party to it. This method gives the offender a chance to appreciate the egal system. It is plausible that his outlook to the whole restoration system would be more positive and it would be open-minded and mentally prepared to actually rehabilitate himself.

Retrospectively, if the victim watches the offender repent what he has done and regret his actions, it helps in the psychological healing of the victim.

5.3 Advantages to the Community

It is a common notion that a crime against another human being consequently affects society as a whole. While retributive justice keeps the criminals locked away to maintain general security and peace, victim-offender mediation aims at rehabilitating the offender so that he does not make the same mistake again. Offenders who refer to restoration justice tend to have a low probability of engaging in such criminal acts again, and the result of that is the same retributive justice, only better.

6. Drawbacks of Victim-Offender Mediations

It is not always that the outcome of victim-offender is fruitful. There were times when reviews of the experience of victims who chose victim-offender mediation were traumatising. The main concern of those unsatisfied with victim-offender mediation was the 'lack of authority' and impression of insufficient discipline, paired with an inadequate level of punishment.

There have also been negative feedbacks about the mediators in such proceedings, where it was felt that the mediator was not as professional or equipped to mediate criminal proceedings. It was felt that the mediators did not have substantial experience in mediating criminal cases and being able to justice to the process for outcomes for the satisfaction of victim, offender and the society as a whole.

Some also felt revictimized by the process of victim-offender mediation. In other cases, victims displayed dissatisfaction with the procedure because they were given hopes arrangements suitable to them which could not be met.

As reported by Maxwell and Morris in their '*Re-forming juvenile justice: The New Zealand experiment*', some victims were not content with victim-offender mediation because the follow-up

mechanism to let the victims know of the outcome was underdeveloped.

Twenty-five studies about the victim's experience with victim-offender mediation was reviewed by Jo-Anne Wemmers in her research on '*Restorative justice for victims of crime: A victim-oriented approach to restorative justice*' in which it was found that some of the mediators did not give ample opportunity to the victims to express their emotions and participate; at the same time, the compensation that the victims were either promised or expected was not met. In her study of the reviews, she also highlighted that some victims felt additional victimisation, and that heightened the psychological trauma of the victims, elevated the level of fear they had against the offender too.

Endeavours were made to depict a hole that regularly existed between restorative justice hypothesis and actual practice in light of their perception on the approaches, especially in juvenile justice.

Inadequate preparation is of utmost importance in the case of victim-offender mediation. Proper planning is essential that should encompass precise information to be given to the victim about the mediation, setting sensible expectations of results, educate them on potential dangers and fallouts of the mediation as well as advantages and disadvantages of the same.

Victim-offender mediation is still being developed. It is evolving and needs refining. Extensive research in this niche area is needed to have a more concrete and uniform method of mediation. It is important that there be consistency in the positive experience of the victims, that the probabilities of contrary outcomes be minimised.

It is plausible that the deterrent nature of crime would be lessened, because, through victim-offender mediation, the victims in the course of action would settle for lesser than the ideal injunction

and penalty. The idea behind harsh penalties and punishments under the criminal code of the country is to ensure that its deterrent nature and know-how of consequences of criminal conduct would keep others from engaging in such violations of rights of others. While a court gives its judgement, it not only keeps in the mind the aggrieved party and party at fault, but it takes into the account the welfare of the society as a whole, so people feel safe. If such criminals are imprisoned and kept off the streets, the people will feel safer. If these criminals are allowed to get away with marginal punishment, there would remain that doubt where they still pose threat to the public at large or they would continue to engage in illegal activities, affecting the peace and sanctum of the society as a whole. It is understandable that due to victim-offender mediation's tailored nature, it is more oriented to the result as desired by the victim. The victim is likely to only take into account his individual interest instead of trying to look at the crime with the view of the public at large. What may seem like an ideal settlement for a victim at the point may not coincide with what is best for the society.

Another drawback that is more consequential to certain cases is that there can be situations where compensation is granted to the victim he deems fit, but maybe the offender's financial background does not provide enough to comply to such mediation; this calls for alternatives to be viewed.

Another potential drawback of victim-offender mediation is to be able to decisively decide where to draw the line for sanctions that can be drawn for mediators. What are the limitations on mediators to grant certain sanctions? What if the nature of the crime and the sanction is not proportionate? Is it compensated by the fact the only the victim's needs are to be considered, and not the turmoil in the natural justice system?

6. Comparative Analysis

6.1 United States

In a generic sense, school and churches set up programs for victim-offender mediation which were isolated from the traditional criminal mechanisms. Offenders are asked to refer to victim-offender programs in lieu of criminal proceedings.

It is important to note that the sanctions granted during the mediation are not irrefutable; the judges still hold the power to execute supplementary punishments, even imprisonment. This indicates that while the option of victim-offender mediation is granted by the judge, he also has strings attached which he may pull anytime to stir the restorative process into the direction of retributive justice or both.

Victim-offender mediation is voluntary, and offenders are not generally obligated to be referred to the same. This is because of the view that if the offender is involuntarily forced into this type of alternative dispute resolution, the fact that he is in close vicinity of the victim and others, he may act aggressively towards everyone.

It is pertinent to note, that irrespective of the decision and sanction by the mediator in criminal cases in the United States, the sanction so granted must be approved by a representative of the government. This makes it clear that victim-offender mediation may be an option but fairly controlled by the government keeping in mind the welfare of the people.

The case of People v Moulton [182 Cal. Rptr 766 (1982)(California Court of Appeal Decisions)], made an exemption to the general standard that victims ought not to have an expansive say in setting discipline levels

(punishments). For example, according to the revised Criminal Code § 13-3981 (Arizona, United States of America), "*If the party injured appears before the court in which the action is pending at any time before trial, and acknowledges that he has received satisfaction for the injury, the court may, on payment of the costs incurred, order the prosecution dismissed, and the defendant discharged.*" The question is whether a provision like this protecting the safety of the society or [not, contrary to the belief of the court. In the case of State v Dummond [530 P.2d 32 (1974) (Oregon Supreme Court)], held that compromise resolution gave the preliminary court circumspection to expel charges if there is hard copy (evidence) corroborating victim satisfaction, regardless of whether that party or the sate agrees to the expulsion.

It is of the belief that currently, the victim-offender mediation programs are deprived of procedural uniformity which consequently renders the restorative justice process futile.

6.2 Poland

To first conclusively summarise Poland's stand: Mediation does not establish a focused foundation towards the customary legal framework (traditional criminal court regime) which still remains the purveyor of cases for intercession in criminal issues in Poland.

Directive 2012/29/EU presents the guidelines on the rights, protections and support of the victims' rights under restorative services. It was also implemented in the Polish Code of Criminal Procedure, 1997. As indicated by this guideline, it incorporates all systems by which the victim and culprit are permitted to take a functioning part in settling the issues by restorative means with the assistance of a neutral party. Evidently the scope of restorative justice was wider than that of mediation in Poland.

Poland has efficiently incorporated the importance of the need of the victim as granted through restorative measures through their recital in the Preamble which states that the advantage must be given in any case to the victim's interests and needs, to fix the harm caused to him and to forestall further harm.

As far as restorative measures within the criminal procedure in Poland is concerned, mediation fulfils the prerequisites of this program. Then again, victim intercession in Polish arrangement of criminal law is a widespread measure, as it tends to be connected at all phases of the criminal procedures: both in preliminary, court and executive procedures against adults just as minors/juveniles. Unlike the United States, there is no limitation in the legislature that restricts any type of punishment related to the mediation.

Regardless of refined mediation uniformity, the process of mediation is fairly unpopular in Poland. The reasons for the same being:

I. Mediation is relatively underdeveloped at the preliminary stage and procedural restrictions prevent the same;
II. Deficiency of standard procedure for referral of cases to mediation;
III. Inadequate proficiency of exercise of judiciary body and prosecutors.
IV. Instead of qualitative, there is an arithmetical/quantitative focus on prosecutors.

Poland is in the hope that mediation may become fairly popular in the coming years with the evolving laws surrounding it, regulating it and maintaining a standard of uniformity in procedures.

The Criminal Code has a new provision (Article 59(a)) very similar to the United States which states that in accordance with the wish of the victim, criminal procedures will be ceased for an offence deserving of a punishment not surpassing three years detainment, just as for offence against property rebuffed with a punishment not surpassing five years detainment, if before the beginning of the suit at preliminary stage, the offender fixes the harm or gave penance for the criminal offence, except if there is an exceptional case where stopping such proceeding would be contrary to accomplish the principle of discipline.

6.3 Canada

Following the meeting at the Commission on Crime Prevention And Criminal Justice, the apex authorities in Canada and Italy inculcated in their legal regime a proposal for the development of restorative justice.

The first-ever victim-offender reconciliation programme was initiated as an experiment in Ontario in the 1970s. It was after this initiation that these programs were promoted through church donations and grants by authority.

Currently, the victims in Canada have the following rights as mentioned by the Office of the Federal Ombudsman for Victims of Crime:

I. According to the Canadian Victims Bill of Rights, every victim has the right to information about the program and the services it provides. It essential to note that the authorities are not obligated to provide such information on their own. The same needs to be requested by the victim. At any stage, the victim cannot hold the authority responsible for not imparting such knowledge on its own. The victim may only be permitted to do that if the victim has requested information, but it has not been duly

provided to him.

II. The same right has also been vested with the victim under the Corrections and Conditional Release Act.

III. Under the Criminal Code of Canada, alternative measure (which is one of the blanket terms used for restorative justice) has been provided which may be referred to. In the case of R v Gladue [(CanLII 679 SCC) (Supreme Court of Canada) (1999)], collectively stated that restorative justice principles apply to all the offenders.

6.4 Czech Republic

The Probation and Mediation Service may be used at a preliminary stage with the view of the outcome being pro-social when it comes to certain crime-related matters. It is essential that both parties give their consent to be referred to mediation.

6.5 Thailand

The concept of mediation in Thailand has been fairly archaic. Mediation has been followed in Thailand from the time when distinction could not be made between different branches of law. Decades ago, Thailand has a person appointed as the community leader, who to his best knowledge and understanding resolved the disputes that people brought before him. Mediation was one of the most commonly used modes of justice.

Needless to say, his power was passed onto the government. Eventually, in 1914, district chief was vested with the authority to mediation in an attempt to bridge the hole in the dispute resolution mechanism then. It was in 2007 that the civil mediation was highlighted through an amendment to Local Administration Act 1914 and more importantly, the incorporation of criminal mediation into the Act was introduced.

The Civil Procedure court has had a number of amendments and mediation may be referred to at any stage of the proceeding, from the preliminary to the right before the decision it to be given. Even though the mediation is referred to mainly for civil cases, mild criminal cases, like any other jurisdiction may be referred to arbitration.

At an earlier stage, if the victim demanded compensation, it could be done by filing a civil suit in court. And the stand of Thailand nationally on the same for criminal law was underdeveloped. After amendments in 2004, the Criminal Procedure Court allowed for compensation as well to the victims expressly. This was a crucial step taken, hence, working towards promoting victim-offender mediation for criminal cases where the limitations of remedies that the victim could seek were not so limited anymore.

Hence it is pointed out that the law regarding victim-offender mediation has developed more so in the last decade and to adapt to the evolving needs of the nation in the global sphere.

6.6 Sweden

The Swedish government on its part has tried to allocate a number of resources into the implementation of victim-offender mediation mechanism. It is not just the courts that have tried to prevent committing of rime by adults and juveniles, but also an array of social service authorities. The provisions in the Swedish legislature is of very positive nature.

In its Social Services Act and the Care of Young Person Special Provisions Act, it has been highlighted that the importance of having the best interest for the child and for his future development. The idea was to prevent adolescents and adults from committing a crime, and in case they have, to prevent them from doing it further. It was in the 1980s that

mediation started to get recognised in Sweden.

In Sweden, a government commission delved deep into the matter to mediation to highlight that mediation is an excellent alternative dispute resolution mechanism and that there needed to be a standard, uniform and developed legal framework for the same. The commission was of the view that intensive research needed to be conducted to stabilise the regulation of mediation. The commission suggested that this tool be used by social services agencies. The government was of the belief that the needs of social services, their budgeting were different though mediation needed further development.

A new act on Mediation in Penal Matters was incorporated which was based on the proposal of the above commission. The government came to a realisation that this mode of alternative dispute resolution needed to be independent and self-sufficient to encompass individually all the aspects of mediation. This act laid down the framework for mediation. It included how the mediation was to take place, what its principal objectives are and what the future of mediation in Sweden would look nice.

It put emphasis on the fact that mediation was supposed to be carried out in a fast-track manner upon request. In simple words, upon referral to mediation, there should not have been any delay in starting the process. In cases where a proceeding was already underway for the matter and of the parties should willingness to refer themselves to mediation, it could do so at any stage, and if it was preliminary, then the mediator and investigator of the case had to work together initially. At any other stage, the mediator was to contact the prosecutor to convey the intention of the parties to refer to mediation instead of the legal

proceeding so that there is no clash between the two.

Under the Swedish law, mediation is completely confidential and in case the parties were to switch between the two at any stage, there was conflict as to how much information about the case could the mediator convey. Along with the establishment of a proper mediation regime, there also developed some problems. There were questions on the law as well as the practicality of the act itself.

One interesting point about victim-offender mediation, especially in juvenile cases was that the legal guardians or parents of the juvenile offender should be given an opportunity to take part in the transactions of the mediation process. While this was interesting since it was only fair that the minor has some moral support and guidance, the regulatory framework was silent on this matter and this again created the gap between the practical application of the act and the formation of act itself which would not be able to function stably if these unaddressed provisions were not attended to.

Another issue that this legal framework faced was the ambiguity of the provision where it said that the parties could decide their own compensation as to whatever suited them. The fact that a specific provision giving guidelines for deciding the limitations on compensation was not available, to arrive at an ideal outcome was a little tougher.

7. Conclusion

Evidently, to common knowledge and sense, as well as through several studies, crime victims face unparalleled psychological trauma and physical suffering. They are prone to unveiling an array of psychological traumas like anxiety, depression, etc. These not only have a deep effect in the lives of the victims when the crime is

fresh, but such effects are imbed causing lifelong effects.

Restorative justice system shows that they can be compelling in mending damages and finding significant types of justice for the parties involved. In any case, in spite of the fact that survey of the literature was in no way, shape or form thorough, it additionally is by all accounts clear that restorative justice procedures can deliver unfavourable results for the victims when they move towards becoming offender focused and uncaring to the requirements and worries of the unfortunate victims.

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TRADITIONAL JUSTICE SYSTEM IN SUDAN

By Dr. Mawada Abu Agla*

This paper will give a detailed analysis of the function of custom as a source of law and how it was utilized by different tribes to serve as the law deciding their disputes through tracing and analyzing the historical background of the various alternative dispute resolution (ADR) mechanisms namely arbitration and mediation practiced in Darfur, Bahr El-Ghazal and Dinka in South Sudan, before its separation to become The Republic of South Sudan in 2011. Finally, events leading to the abolishing of the traditional justice system will be examined.

1. Introduction

The use of ADR mechanisms namely arbitration by communities cannot be traced to a certain era or region. Historians have related the practice of ADR to tribal disputes resolved by the chief serving as an umpire while others related it to disputes resolved in accordance with the norms of religion or Sharia. It is important to appreciate ADR both in its traditional sense as in serving different tribes in Sudan as well as in the modern conventional sense as in serving businessmen and assisting courts through a multi-door courthouse system by providing ADR mechanisms such as arbitration and mediation as means to resolve disputes.

The justification behind choosing this topic lies in the important role ADR serves in Sudan along traditional justice system at a tribal level through analysis of their elimination or progression and their effects.

The objective of this paper is to determine whether abolishing the

traditional justice system founded by tribes of certain districts of Sudan and the local administration laws has contributed in the distorted peace and security of those regions (without entering into explicit discussion of the instances).

Sudan a country that was once the biggest in Africa until 2011, when the voting poll by the majority of southern Sudanese declared the birth of the state of South Sudan which still remains an example of unique diversity. Sudan resonates a blend of many races, backgrounds, religions and dialects, a uniqueness that was celebrated by each region through developing its unique ADR mechanisms founded by their customs developed and enforced overtime and precedents, which further furnished their rules.

One of the major issues of Sudan following its independence in January 1956 was how to maintain a functional traditional system, which was once preserved during the Condominium Rule against advocates of progression and cutting links of the English law through Sudanization and Arabization of the laws. Alas, the battle was lost due to the political agenda of the governments that ruled the country forgetting the blanket these mechanisms served in preserving peace and security. Furthermore, the vital role custom played as a source of law in deciding these disputes and how its role has shrunk due to the enactment of the September Laws of 1983 and how though it being unwritten has affected their recognition as a source of law unless declared by the courts under the doctrine of justice, equity and good conscience. Finally, a full account of the fall of the traditional justice system will be discussed stressing on the opposing movement led by the Pound Conference in 1976 declaring the “Multi-door Courthouse System” to the world.

2. Custom as a Source of Law in Sudan

The examination of ADR mechanisms in Sudan would be incomplete

without discussing the vital role of custom as a source of law.[1] Before South Sudan's referendum poll declared the birth of the youngest state in Africa, The Republic South Sudan on 9thJuly 2011, Sudan was the largest country in Africa. The uniqueness of Sudan lies in its diversity, a blessing that is unfortunately been dealt with as a burden.

With the dawn of independence on January 1st 1956, came advocacy for aborting all Common Law traces from Sudan's legal system and calling for Sudanization of the laws as evidence of independence from the English rule, a move that Americans have adopted after revolution from the English Rule.[2] Changes made in radical measures, ignoring sometimes the diversity of this huge country in terms of the level of literacy of its societies were unfortunately made; further analysis on these measures will be examined below.

The reason behind this introduction is to emphasize on the importance of embracing diversity by establishing a legal system that identifies the rules engraved in these mini-societies whether it came from custom or legislation and whether it was decided by a judicial system that is formal or informal therefore developing a legal system or hierarchy, that is capable of achieving justice, stability and security.

a. Implementation of Custom under the Principles "Justice, Equity and Good Conscience"

Perhaps the most apparent policy observed by the Anglo-Egyptian Condominium Rule 1899-1955 was to segregate the regions of the country in terms of law, development and

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[1] Natale Olwak Akolawin, *The Courts And The Reception Of English Law In The Sudan. A Case Study of Application of "Justice, Equity and Good Conscience" under Sudan Civil Justice Ordinance*, SLJR 1968 230

[2] Cliff F. Thompson, *The Formative Era of the Law of the Sudan*. (SLJR 1965) 474

education. Darfur, which was brought under the Condominium Rule in 1916, after the fall of the Fur Kingdom with the defeat and demise of Sultan Ali Dinar,[3] suffered the segregation policy exercised by the Condominium through enacting the Closed Districts Act 1922, which was implemented in the southern district, Nuba Mountains, South of the Blue Nile and Darfur.[4] Under this Act, it was not possible for a northerner to enter Darfur without written consent from District Commissioner. Moreover, there was a constraint on the movement of Darfurians to other Darfur districts to avoid any integration, not only that but trading was prohibited for non-Darfurians in Darfur under that Act.[5] This resulted in the development of customary law and vehicles of informal justice.

The significance of custom as source of law for the operation of informal justice was administered through *Judiyya* (*الجودية*) serving as "people-based *Judiyya*"[6] and "government sponsored *Judiyya*"[7] administered through the Native Courts Ordinance 1932 enacted by the colonial rule where the reigns were managed by the local or native administration- introduced by the colonial rule (1921-1933)- of the region.[8] The Chief Courts established under the Chief Courts Ordinance 1931 in the South as a direct result of the segregation described above. The fact that customs were unwritten - with the exception of Bahr El-Ghazal in 1975 which codified its customary law[9]- caused a

[3] Adam Azzain Mohamed and Balghis Y. Badri (2010) A Case Study of Darfur Region in Editors Balghis Badri and C. Martin In*ter-Communal Conflicts in Sudan Causes, Resolution Mechanisms and Transformation (*Published by Ahfad University 2010) 111.
[4] Yousif Tekana دارفور صراع السلطة و الموارد، دراسة في السياسة و الحكم و الإدارة 1650-2002 (Madarik 2014) 299
[5] Ibid 300
[6] Mohamed and Badri (n 3) 128
[7] Ibid 128
[8] Mohamed and Badri (n 3) 128
[9] John Wuol Makec, *The Essentials for the Re of Customary Law in the Southern Sudan* (SLJR 1993) 1. The London Conference on the Future of Law in Africa hosted by SOAS, December 1959—January 1960 came out with The Restatement Project proposed by English lawyers for the need of codifying tribal customs of the new independent states of Africa, Obeid Hag Ali. *The*

significant imbalance in its effectiveness within courts (formal legal systems). This led the courts to apply the formula of "justice, equity and good conscience" to decide on whether to declare the custom in question as rule of law.[10] Francis Deng interpreted this as an implication of the inferiority of custom to legislation and precedents. [11] I find myself disagreeing with Deng's interpretation since the non-codification of customs results in the difficulty of the courts applying such custom due to lack of the court's knowledge of its existence, hence the referral to precedents does not create the custom instead it declares it. But, since the implication of recognizing and applying a custom that was initially developed to serve a certain group of individuals over a continuous period of time, should at a court level that targets the public be in accordance with public policy. Therefore, in a way the court's duty is to strike a balance between the two i.e. declaration of a custom and the public's interest.

The principle of "justice, equity and good conscience" was translated in the Chiefs Courts' Ordinance 1931, section 7 of it stated:

"… the Chiefs Court shall administer: The Native Law and Custom prevailing in the area over which court exercises its jurisdiction provided that such Native Law and Custom is not contrary to justice, morality or order."

Furthermore, the Peoples Local Courts Act l977, section 13 provided that: "A people's local court shall administer the custom prevailing within the local limits of its jurisdiction provided that it is not contrary to justice, morals, and Public Order." It appears

Conversion Customary Law to Written Law (SLJR 1970)147

[10] Francis M. Deng, 'The Crossfire of Sudan's War of Identities' in Deborah Isser, Customary Justice and the Rule of Law in War-torn Societies (US Institute of Peace Press, 2011) 306. For further reading on the principles of justice, equity and good conscience, please refer to Zaki Mustafa, The Common Law in the Sudan: An Account of the 'Justice, Equity and Good Conscience' (Oxford: Clarendon Press. 1971)

[11] Ibid 306

that the distinction between this section and section 7 above, is that this section limits the application of an existing prevailing custom whereas section 7 applies to cases where there is no known rule and the court decides to apply the prevailing custom.

Recognition of customary Law as one of the sources of law in Sudan after repealing the Chiefs Courts 1931 Ordinance and Native Courts Ordinance 1932 and the enactment of their replacement, The Peoples' Local Courts. Act l977 with its limitation in applying customs as provided above. Nonetheless, section 5 (b) of Civil Procedure Act (CPA) 1983 provides that in issues relating to family disputes ranging from marriage, divorce, inheritance, wills, *hibba* (gift) and *wakf* (trust) that the custom prevailing in that society shall prevail over the parties provided that it is not contrary to justice, equity and good conscience or its not contrary to this law or any other law or it has not be been pronounced void by a competent court.

Moreover, section 6 (2) of the CPA 1983 provided that,[12] in cases not provided by this or any other enactment for the time being in force, the court shall apply Sharia norms and precedents and custom and principles of justice, equity and good conscience. Reference to customs as a source of law in section 3 (6) of the Basis of Judgments Act 1983 in cases of absence of legislation on matters with exception of criminal matters, custom is to be applied provided that it is not contrary to Sharia norms and justice and good conscience. All these principles have been preserved and upheld by courts through judicial precedents.

i. Examples of the Role of Judicial Precedents in the Recognition of Customs

To demonstrate the role of precedents in recognizing custom

[12] Equivalent to section 9 of the Civil Justice Ordinance (CJO) 1929.

as a law in accordance with the principles of justice, equity and good conscience, a few cases have been selected to serve this purpose:

In the case of *Nicolas Stephanou Stergiou V. Aristea Nicolas Stergiou (SLJR 1963)182* Plaintiff and defendant were married in the rites of the Greek Orthodox Church Plaintiff converted to Islam and now lives separately from his wife. Plaintiff brought this suit for custody of the children, a girl under 9 and boy over 7.

The High Court held that although the parties were married in the Greek Orthodox Church, the husband has converted to Islam and there is therefore no custom presently applicable to both parties under Civil Justice Ordinance (CJO) 1929, section 5(a) and the court must rule in accordance with CJO 1929 section 9 under the principle "equity, justice and good conscience". Although both Greek Orthodox Canon Law and Sharia coincide on rules of custody, the father's personal law should apply in Sudan where he occupies such a superior position in the family. In accordance with Sharia, custody of the boy above seven goes to the father and the girl under nine to the mother.

The *Bari* custom was discussed in the case of *SG V. Rainando Legge (SLJR 1963)54* the facts of this case involve the prisoner having had sexual intercourse with the daughter of the complainant Ibrahim Sahayer in Juba. When he was approached to marry the victim, he refused to do so. The Resident Magistrate convicted him and sentenced him to imprisonment for one year. In essence, the petition is one for mercy. The prisoner has appealed the decision before the Central Bari Regional Court. The Court's findings were although the offence is described in the court record as being adultery, there is nothing to indicate, let alone to prove, that either of the parties is a married person. Nor could the prisoner

be convicted for rape since it is not clear what the victim's age is and she appears to have consented to the act on the strength of an alleged promise of marriage. The Court referred to the *Bari* custom whereby, pre-nuptial intercourse is allowed, provided the man is prepared to marry the girl afterwards. A pure girl, i.e., a virgin, is regarded as her father's property that no man should copulate -with her unless he is prepared to marry her, thereby compensating her father by payment of dowry. Age in this respect is immaterial. This rule however does not apply to girls who have already lost their virginity or who are divorced. The Court held that this custom is "valid" i.e. in accordance with "justice morality and order" within the meaning of Chiefs' Courts Ordinance 1931, s. 7(1) (a).

Issues of recognition of a custom contrary to public order were settled in the case of *Shandag Adam Niem Alla V. Ibrahim Yousif Khamgan (SLJR 1973) 33* where the appellant was '*Sheikh Hilla'* granted the land in dispute to the respondent's father, who was resident at the same village for cultivation purposes. Later, the respondent's father abandoned the land and left for good, while his son resumed cultivation. Appellant claimed the land on the basis of a local custom to the effect that the land reverts to him as a 'Sheikh' whenever abandoned by the grantee. The Supreme Court held that the appellant had no authority to claim the land in his capacity as 'Sheikh'. Moreover, alleged customary rights must be proved before the court according to the ordinary rules of evidence, the court will not accord judicial recognition to a local custom if it is contrary to public order.

Another example is *Hag El Gusad (حق القصاد)* as a prevailing custom was explicitly described in the case of *Owners of Sagias 19-20-22 v. Owners of Sagias 5-6-7 SLJR (1987)44,* the dispute arose as the norm of most of the disputes in the Northern province in consequence of the emergence of islands

in the course of the Nile. In so for as there are no express legislative provisions governing the facts in question the Court established a rule of law that in such disputes the principle of *Hag El Gusad* is applicable. *El Gusad* (i.e. land lying in the frontal direction) a local custom that the owner of high land owns the land below or in front of his registered land up to the middle of the river. In order to give effect to the said principle the middle on the river should be marked by an illusionary line called (*mirin*) and the land is divided according to location to the mirin between the owner's own river banks. The part of land lying east of the *mirin* will go to owners of eastern *sagias* and the part lying west of the *mirin* will be allotted to owners of the western *sagias* (a *sagia* is an agricultural unit).

Lands in dispute emerged at a point lying between the eastern *sagias* (Nos 19-20 - 21 Al Gabrab) Owned by respondents and the western *sagias* (Nos 5-6-7 gall Island) owned by applicants. The followed practice is to refer such disputes to the settlement officer (under *solh* principles i.e. mediation) because the land is unregistered and the disputes are numerous involving various parties. The Courts cannot adjudicate upon such disputes unless disputes between individuals are brought before them by the parties to civil suits. Furthermore, the decrees of the Courts cannot be registered simply because there is no register of the ownership of the Island (Refer to *Sudan Government V. El Amin El Awad 1974 SLJR P.61).* Hence, the Prescription and Limitation Act 1928 at the end of the provisions of section 2 thereof provides that the presumption of the ownership of the government of an unregistered land may be rebutted in a settlement duly carried out under the Land Settlement and Registration Act 1925. The Supreme Court held that the lower courts failed to conceive rightly the real cause of action, specifically classifying the land in dispute as government land overlooking the saving provision in the Unregistered Land Act 1970. All settlements made in the Northern Province were not subject to the application of the

provisions of this Act, on the basis of the prevailing custom. Concerning the government's ownership of the unregistered land, it is rebuttable before the settlement committee on the ground of *Hag El Gusad* and the latter challenge shall prevail. The question to be answered under this custom is ownership rather than actual possession of the land. In this regard, section 605 of the Civil Transaction Act (CTA) 1984 has codified the right of ownership under *Hag El Gusad* , while repealing the Unregistered Land Act 1970 but still preserving the principle laid by it that all unregistered land is owned by the government.

In this respect, *Hag El Gusad* is an independent ground sufficient by itself for acquisition of ownership and no other elements are required for acquiring that right. *Hag El Gusad* must be distinguished from *Hag El Eltisag*. The latter requires that the new land that is formed by gradual erosion should adjoin as part of the motherland. However, as regards *Hag El Gusad* the new land may or may not adjoin the permanent original land. Therefore *Hag El Gusad* wider than *Hag El Eltisag.* This exposition of *Hag El Gusad* principle reinforced by the fact that the Northern province settlements under the Land Settlement Act 1925 were excepted from the application of the provisions of the preserved principles of Unregistered land Act 1970 within the CTA 1984[13] on the basis of the above.

ii. Significance of Publication under The Sudan Law Journals and Reports

With regards to judicial precedents and the implication of their publication their format today as The Sudan Law Journals and Reports (SLJR) which commenced as Sudan Law Reports (SLR) in relation to customs which reinforces their

[13] Section 559.

implementation, a brief historical background has to be made to validate the efforts made. Cliff Thompson has described the efforts exerted in "four milestones". The first milestones was the recommendation made by Mr. Justice Osman El Tayeb in 1956 as follows:[14]

> This [Northern Province] circuit we are mainly engaged in the determination of agricultural land cases. These lands which lie on the banks of the River Nile or in bed when it changes its course, as it usually does throughout the years, causes some lands to disappear and others to emerge. We have to for ourselves the legal principles to be applied in litigation arising out of this state of affairs and other matters. We have to investigate and carefully study the local and customary notions of possession and ownership, of acquisition of title and rights of cultivation These local and customary notions must form the bases of our judgment provided they are not repugnant to any codified law, and not contrary to justice equity and good conscience. Many of these seem to be firmly and finally established, but as we see from the English Law Reports, the established rule or principle of law when applied to a new set of facts, itself appears as a novelty.

The second milestones was the fund raising campaign led by the Faculty of Law University of Khartoum, submitted to the government upon independence in 1956 which repeat its fruits in 1957 for the publication of judicial precedents after vigorous efforts- without consideration- to collect five years' worth of legal reports hence, convincing the government to establish a post to carry out this task. The third milestones was the appointment of first full-time general editor and the final milestones was in 1965 with the appointment of the first Sudanese general editor.[15]

[14] Thompson (n 2) 481
[15] Ibid 481

Publication of the SLR from 1900-1955 and the SLJR from 1956-1969 was in English and the SLJR from 1970 until 2015 publication is in Arabic with some cases translated to English. It may be purposed that the SLJR be bilingual for purposes of accessibility and research.

b. The Quest to Abolish English Law after Independence

With independence as mentioned above, came advocacy to depart from the English Law and adopt laws from neighboring countries e.g. Egypt in their codified form rather than the unwritten English law approach. Despite their orientation being continental or civil law was reflected in the law of contract, criminal procedures, property and torts.[16] This has caused a sense of confusion in practice, especially since the new laws were in some instances contrary to each other in context as well as the small number of qualified lawyers at the time being mostly common law oriented who disapproved the approach advocated by civil law oriented lawyers .[17]

Arabization of laws along the lines of codification and the Arab identity bestowed on Sudan- an incorrect label due to the diversity of the country- specifically and in a broader sense; the legal education was and remains a major factor in eradicating any “traces of the common law” as advocated by civil law lawyers in Sudan.[18] This factor has definitely created an imbalance not only in the teaching and the practice of law but in all disciplines emanating from the change of schooling curriculums which reduced the English language dose to the teaching in universities which to great extent maintained English as a source of referencing for their students. Consequently resulting in the retardation to some extent of the new generations as compared to the past. Now that the Sudan’s Interim Constitution 2005 in

[16] Ibid 503
[17] Ibid 504 an example is the Civil Procedure Act 1971.
[18] Ibid 502

article 8 dictating English as an official language in Sudan, hopes are that this could be utilized in the improvement of the current situation, needless to say this clause was developed during the Comprehensive Peace Agreement in 2005.

Moreover, the invasion of Sharia judges to settle civil disputes caused paralysis to the courts role of interpretation hence creating a gap and alienating the supremacy of the doctrine of precedents.[19] Furthermore, the 1980s did not only bring September Laws which could be regarded as a major transformation in Sudan's legal system, with the introduction of Sharia into all laws from criminal law, contract, torts, evidence, sale of goods, property and agency etc. drawing a clear exception for some acts such as "*hudud*" (الحدود) against southern states.[20] Consequently, the present legal system in Sudan can be described as a hybrid or mixed legal system of common law, civil law and Sharia that is in great need of legal reform to achieve harmonization.

All these factors were strengthened by the growing presence of civil law practitioners due to the establishment of universities such as Al-Neelain University which used to be the University of Cairo, Khartoum Branch until 1993.[21] Nonetheless, Al-Neelain University continued with the same curriculum as its predecessor. An important observation is that the Faculty of Law of the University of Al-Neelain graduates a very high number of law students compared to the Faculty of Law University of Khartoum[22] for example.

[19] Ibid 489
[20] Francis M. Deng. Customary Law in the Modern World. The crossfire of Sudan's war of identities' (Routledge 2010) 8. See the various sections of the Criminal Act 1991 in relation to *hudud* crimes.
[21]Official website of Al-Neelain University: http://neelain.edu.sd/ as seen on 18-01-2016
[22] Official website of the University of Khartoum http://law.uofk.edu/index.php?lang=en as seen on 18-01-2016

The Faculty of Law, University of Khartoum continues to reflect the spirit of the law of Sudan emanating from the common law and the different shades of civil law together with the September Laws 1983 "Islamic laws" and its aftermath. Alas, the lobby of the civil law practitioners remains persistent and overwhelming.

The aftermath of independence did not only call for the relinquishing of the English law as demonstrated above but also it came with the advocacy to depart from informal justice to formal justice. This had a direct effect on weakening the position of custom as a source of law, which was evident by the hurricane of the September Laws, that effected the entire legal system and its interpretation tool embodied in the Basis of Judgments Act 1983 (amended 1986), which shifted the positions of the sources of law, to place the Sharia sources on top, leaving judicial precedents in the fifth position followed by custom as mentioned above.[23] This shift resonates from the first steps taken previously to abolish all traces of English law through the codification of laws and departing from the doctrine of judicial precedents that has persuasive significance only under civil law hence moving a step further backwards in recognizing custom by the court. The change of the political agenda reflected heavily on the social values and customs in these rural areas, as evident by a Sudanese administrator of the Dinka who stated that, "a lot of development has taken place in their customs according to the spread of education and civilization and this simultaneously developed their laws."[24]

In summation a strong opposing opinion against the movement that took place to depart from the English Law and adopt the Arabic codified laws of neighboring countries namely Egypt was that of the late former Chief Justice Galal Ali Lutfi

[23] sections 3(b)(5) and (6)
[24] Thompson (n 2) 490

echoing the arguments made above:

> We now come to the controversial question of the wholesale adoption of the Egyptian law, its advocates say it is codified, written in the Arabic language which the majority of the people speak in the country, it is a good gesture of friendship with the Arab world and a step towards Arab unity. In my opinion this may be a good thing for any country here all its population are Arabs and they all favor one single policy. But the position in the Sudan is totally different. We are not all Arabs; and we are not all in favor of a single policy[25]…In my opinion, therefore, there is nothing wrong with the way followed in applying the English law in the Sudan. If there is anything wrong, it is ourselves to blame. We ought to have appointed a standing committee to examine and look into our laws from time to time in order to keep pace with all changes in the English law ,and make recommendations as to what is worthy of adoption, so that it may be embodied in our Codes by the legislative authority… In fact we lack the machinery to carry out such a radical change in our legal system. We have not got enough lawyers, and we have not got enough of everything. We are just a starting nation. We only started our proper law reporting in 1956. We have not got a single book written on our laws[26] with the and ideas tainted and colored with sentiment and emotions then any change to a different system will serve no purpose other than the temporary political gain by those who are advocating it. If this unnecessary change has taken place—and I hope not—the result will definitely be a disastrous one.[27]

3. Customary Law in Darfur

Darfur is an example among many examples in north, South and east Sudan that relied mainly on custom as a source of law. This source was used by the local tribes as an ADR mechanism known as

[25] G. A. Lutfi. *The Future of the English Law in the Sudan (SLJR 1967) 235*
[26] Ibid 247 248
[27] Ibid 248-249

"*Judiyya*" a process that will be explained thoroughly below.

The concept of *Judiyya*, a form of ADR mechanism closely resembling arbitration in the tribal level, has been associated to the region of Darfur since the Fur Kingdom in the 17th century. Dr. Tekana describes it as an "institution" for dispute resolution that used what was known as *Dali or Daleel Law*, a consolidation of customs prevailing from the numerous tribes in Darfur.[28] *Dali Law* was assembled by Sultan Dali the founder of the first Fur Kingdom "*Aldajo"* and "*Aldunjur"* and his assistant *Aba Alsheikh* who laid down the pillars for ruling the kingdom through customs.[29]

Maintaining and updating of *Dali Law* was the job of "*Alfarangba",* an employee serving at the sultan's palace namely the "divan" who is a descendent of *Alfur* tribe (*Alfarangba and Albaldanga*) and also served as a judge between disputing parties in light of his excessive knowledge of customs and precedents. *Alfarangba's* knowledge of customs and precedents was preserved in written records.[30] With the introduction of Islam in Darfur in the 16th century in the reign of Sultan Suleiman, matters relating to personal or family law were dealt with using Sharia Law. Yet, the strong presence of *Dali law*, which was regarded as the law of the land was still in force. [31]

The supremacy of the *Dali Law* as a constitution for the tribes of Darfur lied in the consensus among tribes to uphold the customs. *Dali Law* continued to operate along with customs associated to each tribe for three centuries resolving disputes whether tribal disputes or individuals disputes in areas ranging from property disputes namely land or criminal disputes involving *Aldiya* or individual rights among men and women. Due to the African ethnicity of some of the tribes in

[28] Face to face interview with Dr. Yousif Tekena, former Governor of North Darfur in 1986 on 09-01-2015 at his home in Kafouri. Recording is available for disclosure.
[29] Tekana (n 4) 196
[30] Ibid 197
[31] Ibid195

Darfur, individual rights in some cases reached to the level of equality among the sexes in what was evidenced in the children taking their mother's name.[32]

The Condominium rule applied the local administration rule in Darfur and utilized the customary law that was already embedded in the society i.e. *Dali Law* as legislative tool base, in deciding cases in the local courts which were established by the local administration and headed by the chiefs of the tribes. The English rule understood the vitality of keeping the informal legal system in ensuring social security, while still establishing a formal legal system, "state courts", equipped with legislation, precedents and customs.[33] Emphasis on custom as a source of law upheld by courts conditioned by the custom not being contrary to the law was made as described above.[34]

In 1941, around 16 tribe of Southern Darfur held a conference chaired by District Commissioner in *Abu Salaa* which is a lake by *Alhabania tribe*.[35] This conference was regarded as an annual meeting to discuss the main issues and challenges facing these tribes especially that they have interrelated issues namely *Aldiya* (blood money).

The recommendations made in this conference were illustrated in an agreement on the amount of *Aldiya* for each tribe that was reflected in a schedule. Illustrations of the *aldiya* agreed upon range from, *Albagara* agreed that *Aldiya* for a man is 70 cows and 30 cows for a woman, clearly this tribe was influenced by Sharia. While *Almasalat* and *Bargu* i.e. indigenous tribes for example agreed that *aldiya* for men and women is equal, namely six cows. Tribes that

[32] Tekena (n 28)
[33] Deng (n 20) 6
[34] Section 5(a) Civil Justice Ordinance 1929 states in matters relating to personal law, "(a) any custom applicable to the parties concerned, which is not contrary to justice, equity or good conscience and has not been by this or any other enactment altered or abolished and has not been declared void by decision of a competent court."
[35] Tekena (n 4) 217

were located North of Darfur *Aljamala* and *Alabala* that resided among the Fur tribes went with the indigenous tribes equating *aldiya* among the sexes 100 cows or camels.[36] Besides *aldiya* against losing a life, the schedule also included *aldiya* against body parts i.e. losing a finger, or a hand. Having the local courts administered by the local administration using customary law and *aldiya* mapped out in a schedule under the consensus of the tribes of Darfur resulted in a settled society governed by the rule of law enrooted in consensus among the tribes.[37]

a. Aldamlaj Institution in Darfur

i. Who is Aldamlaj?

As mentioned above, historically the *Alfarangba* was assigned the job of recording customs and precedents in the sultan's divan. The tribal practice in Darfur evolved to adopt through elections persons known as *Aldamlaj (Aldawana)* to enact and enforce custom- closely connected to its tribe- like his predecessor *Alfarangba*.[38]

Aldamlaj had three main tasks, firstly, to ensure peace and security for the tribe and for the outsiders living within the territories of the tribe through the recording and updating of customs and precedents relating to the tribe. Here, the importance of literacy in terms of reading and writing becomes of great importance. Secondly, to decide disputes among parties in matters ranging from individual rights to issues relating to land disputes or criminal issues namely *aldiya*. Lastly, to maintain peaceful relations with other tribes especially when a dispute arises, this is achieved through working together with other *damalij* on the case to achieve justice in accordance of the law i.e. customs and precedents

[36] Ibid 218
[37] Tekena (n 28)
[38] Tekena (n 4)199 usually males.

(*Judiyya* process will be discussed below).[39] It follows that *Aldamlaj* institution resembles the legislative and judicial body within the tribal system.

There are two main components that are usually observed when selecting *Aldamlaj*, which are being an heir and owning land. The former component ensures that the candidate has received knowledge on customs and precedents from a member of his tribe that served in that position- e.g. decedents of *Alfur* tribe as mentioned above - the latter is a sign of wealth and prestige. However, a candidate not possessing these components may still be chosen for this post. [40]

ii. Characteristics and Authorities of Aldamlaj

Being *Aldamlaj* required certain characteristics to be present in the successful candidate, namely patience, knowledge of customs and precedents, to be of age specifically over 40 years old, to be just, generous, well-spoken and to be known for his renowned manners i.e. never convicted of an offence involving honesty or moral turpitude. [41]

Election of *Aldamlaj* takes place in two stages; the first stage is electing the "*Young Damalij*" from the decedents of the tribe known for producing *Damalij* i.e. based on kinship and the other tribes residing within the tribe's territory of the same *damalij* decent in the presence of the chief of the tribe. The second stage involves the voluntary election of *Aldamlaj Aldawana*, if the vote is not unanimous for one candidate and there appears to be a competition then the candidate who has the support of the majority of the *Young Damalij* wins. Moreover, *Aldamlaj* elected by *Young Damalijs'* is accountable before them, in some cases *Aldamlaj* might be

[39] Ibid 199-200
[40] Ibid 201
[41] Ibid 201

removed from his position if he performs poorly in the eyes of the *Young Damalijs'.* With the position of *Young Damalij and Aldamlaj Aldawana* elected by each tribe, *Aldamlaj Alkabir* who is the oldest in the tribe that enjoys the above characteristics heads these two levels. [42]

The authorities of the elected *damlaj* range from collecting tax imposed by custom even from the tribe's chief and imposition of a fine in case of delay in payment. Also *Aldamlaj* receives contingency fees in return of *aldiya* cases where if he decides on 12 cows he takes 2 cows and gives the party 10 cows. He also receives a piece of land to cultivate as a mean of income as well as a house with a divan to host his guests. These are some of the rights and authorities given to *Aldamlaj* which reflects the level of prestige and power this position holds within the tribe.[43]

b. Features of a typical Judiyya process in Darfur[44]

The disputing parties select and agree on who they want to as *alajaweed (الأجاويد)* i.e. "arbitrators"[45] to decide their case, the persons chosen are based on the characteristics mentioned above and also the trust and confidence of the parties in them. Usually the number of *alajaweed* would be more than two depending on the nature of the case.

[42] Ibid 199-202
[43] Ibid 202-203. For further reading on the Sultan or Shiekh's authorities in Central and North Sudan, please refer to J.G. Mathew, *Land Customs and Tenure in Singa District (SNR Vol 4 1921 5-19)*and A. Paul, *Sagia Custom in Shendi District (SNR Vol. 19 1936 346-350)* and C. E. Lyall, *Rights, Dues and Customs Prevailing Among Arab Tribes in the White Nile Province (SNR Vol. 4 1921 200)*
[44] Tekena (n 28).
[45] Mohamed and Badri described the Judiyya process as mediation when actually the process is arbitration since alajaweed decide the dispute rather than the parties. Therefore, the wrongful use of the term "mediation" instead of "arbitration" when describing an arbitration process is misleading. Mohamed and Badri (n 3) 127-128

Once *alajaweed* are selected, they take an oath before the chief of the tribe to be impartial and independent in dealing with the dispute and the parties and to deliver their judgment based on customs and precedents prevailing. *Alajaweed* selected are usually from different tribes as the disputing parties and that is to ensure impartiality. The parties are interviewed privately by *alajaweed* regarding the subject matter of the dispute, once both parties are heard, *alajaweed* will retreat in a private location away from the people usually under a tree to deliberate upon the findings made and the customs and precedents that could apply to the dispute.

Once a decision has been made, *alajaweed* will call upon the parties to read their decision in an open session witnessed by the tribe. *Alajaweed* will outline the faults made by each party and the remedy to it in accordance with the customs and precedents prevailing. Enforcement of *alajaweed's* decision is based on consensus of the parties as well as the power to enforce the decision by the Chief or Shiekh.[46]

4. Customary System in South Sudan (Before 2011)

Perhaps discussing this broad topic might seem as historical background given the South Sudan is no longer a part of Sudan today. However, the significance of analyzing the transition of traditional justice in the South and examining the mediation or reconciliation and arbitration processes exercised before, during and after the Condominium has important weight in Sudan's history of

[46] An interesting case to read would be the Arbitration Award rendered in 1953, between two nomad tribes the Kabbabish and the Howawir Tribesin Kordofan Central Sudan, regarding "Dar Rights". Justice Kevin Hayes of the High Court in Kordofan served as the sole arbitrator to decide on the dispute. The parties agreed to refer the dispute to arbitration, appointing a judge as arbitrator. An advocate represented each party. The award is in favor Kabbabish giving limited rights to Howawir of benefiting preemptive rights in watering their cattle and movement during certain seasons. This award was agreed to be final and binding on both parties and that enforcement will be carried out through the parties' consensus and the tribe's Shiekh. Kevin Hayes, *An Arbitration Award between the Kabbabish and the Howawir Tribes (SLJR 1960 339-347)*

ADR. The south's society is diversified with about 50 tribes as estimated by anthropologists and historian.[47]

Francis Deng an esteemed diplomat and United Nations official, has conducted extensive research in the 1950s and 60s on the pillars of concepts in *Ngok Dinka* of Abyei.[48] These concepts mirroring on the customs prevailing and how it effects the dispute resolution process in the *Ngok Dinka,* will be briefly examined below:

1. Procreation immortality, serves the continuity of a person after death. The belief that ancestors live on even after their death and are closely associated to the Gods if they were not regarded by some as that, this is evident on the ability of a married dead man to still reproduce through his widow being passed on as property to a male relative. The dominancy of men's positions within the tribe over women is apparent, while women still proclaim their level of loyalty and respect within the tribe. [49]

2. Unity and harmony among the tribe to prevail over all, in what is described as *cieng*, when used as a verb it means, "to live together" as a noun "conduct, human relation, way of life or culture". The hierarchy of authority range at the top is God, followed by the ancestors who are sometimes set in the same rank as God due to their spiritual symbolism followed by the oldest living member of the tribe who is regarded spiritually closer to the ancestors.[50]

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[47] Justice Aleu Akechak Jok, Robert A Leitch, Carrie Vandewint, B.Hum. *A Study of Customary Law in Contemporary Southern Sudan for World Vision International And The South Sudan Secretariat of Legal and Constitutional Affairs. World Vision International, August 2004 17*

[48] The Dinka in its many groups are the largest indigenous tribe in Sudan. The Customary Law Project Faculty of Law University of Khartoum has confirmed that Francis Deng was a major collector of Dinka custom and used his research as a source. For further details, please refer to The Customary Law Project Faculty of Law University of Khartoum. A Bibliographical Guide to the Customary Law in Sudan, (1979) 75

[49] Deng (n 20)14-15

[50] Ibid 15-16

3. Individual and collective dignity "*dheeng*" observed by all members of the tribe to uphold the dignity of the tribe through serving and representing the best interest of the people of the bigger community and among each other hence emanating social welfare and security.[51]

4. Finally, the leadership characteristic embodied in the chief of the tribe who is able to observe the concepts above as well as establishing control over the tribe "*dom/mac*" while maintaining, sustaining and improving the proportion wealth among of the tribe under the umbrella of peace and security among the tribe. The chief is believed to be a spiritual leader a righteous man, with divine powers from God guided by ancestor's spirits to bring justice to the people.[52]

It follows from the above that like native societies in Africa polygamy is the norm rather than monogamy. The need to reproduce even when a person dies is a symbol of fertility and continuity. Dean Green description below though not targeting the African cultures yet is appropriate:

Personalities live long after their bodies die. The relation between living and deceased relatives is no mere matter of sentiment to be brushed aside as valueless. It is as real as between living members of a family. And once it is recognized that the family relation continues after death, and that in the relation is found one of the dearest and most valued interests known to human beings, there should be no difficulty either in reaching or articulating acceptable judgments where such interests are involved. [53]

Francis Deng has provided in his study the levirate relationship i.e. a widow bearing children after her husband's death by close relative of

[51] Ibid 17
[52] Ibid 17-18
[53] Francis M. Deng. *The Family And The Law Of Torts In African Customary Law* (SLJR 1965) 536

the deceased except for his son, and the implication of adultery in this regard. An example provided was the case of *Deng v. Gwing de Col*:[54] A widow of Deng's father was living with a relative, Achwil, by agreement with Deng. Gwing, having committed adultery with her, was sentenced to five months imprisonment and made to pay three head of cattle, the traditional compensation. In this case, Deng was the plaintiff in his capacity as the heir, and not Achwil, to whom he had delegated the functions of a genitor. Commenting on that case, Howell, then colonial officer in that area, thought that the rank of the parties to the case must have influenced the outcome. He argued that "it is doubtful that in ordinary circumstances '*arwok'* (compensation) would be enforced against a woman living in "widow-concubine".

Francis Deng construed the above findings on the basis of Dinka Law as:[55]

> This view implies that "widow-concubine" imposes an inferior marital status on the widow. With due respect, this is a misconception of Dinka law, and it is surprising that the writer failed to see evidence against his contention amidst the many cases on the point. Of course, there is an increasing tendency nowadays to give the widow more freedom to decide her own destiny. But once she chooses to live in levirate, she is expected to be exclusive. For all intent and purpose she is considered to have the ordinary matrimonial rights and duties of a wife.

It is apparent from Mr. Deng's findings that the Dinka law has evolved giving more rights to women among which is her right to choose her own destiny and the full rights of a wife if she chooses to live in levirate.

[54] Ibid 543-544 Abyei, Ngok Dinka Ct. (1946).

[55] Ibid 544

a. Selection of decision makers

Before the Condominium, members of traditional or local courts were selected in accordance with rules of succession within that tribe as portrayed above for *Ngok Dinka*. With the need of the English rule to spread its authority and control over the south, legislations such as Chief's Courts Ordinance 1931 and the Native Courts Ordinance 1932 and their successor People's Local Courts Act 1977 enacted after independence,[56] all adopted the democratic approach of electing the decision makers as described by Deng, a practice implemented by federal court judges in the US.[57]These customary law courts established under these statutes were formed by the Chief Justice in towns and villages where he sees fits in order to resolve disputes in the local tribal level in a cheap and speedy manner.[58]

This modern twist as seen above with *Ngok Dinka* goes against the customary norms, which this indigenous society is based on. The spiritual significance of the chief replaced by an elected chief with a defined term unlike the traditional approach, which proclaimed the chief position as "hereditary and held for life".[59] The distortion of the traditional system is apparent, however what this new system fails to realize the overall threat of anarchy and demise of social security this modern system unleashed on the society. Deng Biong describes it as, "the chief who is elected will not be at peace with some of the people who did not support him." [60] Accordingly, magnifying the misconception of the legislature on the significance of the role of ADR mechanisms in serving these indigenous groups in norms

[56] Until the Governor's general council in 1944, Ngok Dinka of Abyei applied Native Courts Ordinance, 1932 (originally instituted by the Shiekh Courts Ordinance 1922) afterwards applied Chief's Court Ordinance 1931.
[57] Deng (n 20)21
[58] Akolda M. Tier and Abraham Matoc Dhal, A Case Study of the Dinka-Nuer Conflict (2010) in Editors: Balghis Badri and C. Martin .Inter-Communal Conflicts in Sudan Causes, Resolution Mechanisms and Transformation (Published by Ahfad University 2010) 257
[59] Deng (n 20) 22
[60] Ibid 244

not resting on the principles of deterrence and retribution as advocated by the formal justice system enforced by the judge's role in deciding the process by producing a unilateral judgment.[61]As will be discussed below, the ADR mechanism practiced by these tribes aims to provide unification through reconciliation where the parties claim is heard and no blame is assigned on one party instead restitution is aimed through the parties working together with the elder in reaching a decision hence ensuring that consensus is met and that with the dispute resolved parties can still co-exist comfortably in the community without grudges.[62]

b. Dinka's ADR mechanism:

Conflict resolution practiced by the Dinka tribe is of three levels:[63]

1. Arbitration and Reconciliation or mediation - as per Dinka law:
   a. In a limited informal arena and without formalities
   b. In a broader spectrum with formalities observed
2. Informal Court: Chief's court
3. Formal Court: State Courts as an appellate court.

1. Arbitration and Reconciliation or mediation - as per Dinka law:

The Dinka law calls for reconciliation a term used interchangeably with mediation, which is an ADR mechanism where a neutral third party is selected by the parties based on their consent to facilitate the exchange of information between them when a breakdown of negotiations occurs, all the while retaining the control of reaching to an agreement in the hands of the parties. The role of a mediator changes with the stage of negotiation, parties, nature of the dispute and the authority and knowledge standard of the mediator.[64] It is important to emphasize that although parties are

[61] Jok, Leitch, , B.Hum (n 48) 16
[62] Ibid 16
[63] Deng (n 20) 23-26
[64] P Gulliver: Disputes and negotiations: A Cross- Cultural Perspective (1979) in Simon Roberts and Michael Palmer, *Dispute Processes: ADR and the Primary Forms of Decision Making* (2nd edn, Cambridge University Press 2005) 160-161

agreeing to settle their case amicably nevertheless, they resort to an arbitration panel to endorse their agreement in what could only be described as a "consent award" binding and enforceable on the parties.

a. In a limited informal arena without formalities:

This is a case of a family dispute or a mild nature of the dispute, where the wrongdoer or the aggrieved party or a family member or third party within the community aware of the conflict may initiate mediation proceedings. The proceedings are initiated before the local council consisting of a number of elders in a meeting involving members of the local community[65] starring in the role described by Gulliver as a "leader mediator" who, "more or less directly injects his own opinions and recommendation."[66] The initiator will present the case – if the wrongdoer initiates then, he must apologize for his actions- and plea to the elders to arbitrate and mediate the dispute. Once the parties present their case and the members serving as leader mediators propose compensation or restitution suggestions to facilitate settlement, deliberation of the proposals between the parties takes place until they reach a consensus on the settlement proposed. During which the elders oversee the whole process in an informal atmosphere and pronounce the mediation agreement or settlement in the form of a consent award. The rationale behind a consent award is the binding effect it has on the parties dictating its enforcement as a final and binding decision whereas a mediation agreement or a settlement is effective if the parties choose to be bound by it in the same way as contracts.[67]

b. In a broader spectrum with formalities observed:

With reference to the above procedures, the formalities factor is observed due to the seriousness of the dispute or the disputants'

[65] Deng (n 20) 23
[66] Gulliver (n 65) 171
[67] Simon Roberts and Michael Palmer, *Dispute Processes: ADR and the Primary Forms of Decision Making* (2nd edn, Cambridge University Press 2005)175-176

status. Here, the arbitration panel formed by the elderly will rely on an *agamlong*, "a person whose role is to repeat, clarify and summarize statements in a high voice for the benefit of the court."[68] The ***agamlong's*** role can be as Gulliver describes it as a "chairman mediator", "…he keeps order and tends to direct procedure…the mediator may announce and reiterate points of agreement, giving emphasis to them…" [69] The elders serve as "leader mediators" striving for the parties to reach an amicable settlement that will be translated in what could be described as a consent award. Although this stage uses formalities nonetheless, no records are kept or maintained by the *agamlong*.[70]

2. Informal Court: Chief's court:

The transition to courts taking the complete formality form, with the participation of the *agamlong*, along with a triad panel of judges presided by the senior judge[71] who are layman-applying unwritten law based on customs,[72] however the judge can never be viewed as an umpire. This is due to the definition of the concept of justice to the Dinka being as described by Francis Deng as "…anyone involved in the settlement of a dispute must balance the opposing positions and try to reconcile them"[73]hence, rendering the role of a judge as an executioner in terms of assigning blame. In order to achieve justice in the Dinka sense, settlement is still sought by the elders outside court during the trial.[74]

The question of impartiality is raised when a party is related to the judges, in some instances this could be an indication of victory in other cases with the judge might rule against his

[68] Deng (n 20) 24
[69] Gulliver (n 65) 169
[70] Deng (n 20) 24
[71] Ibid 24
[72] Tier and Dhal (n 59) 257
[73] Deng (n 20) 24
[74] Ibid 24

relative. However if they are immediate relatives of the parties, the judge like civil systems will be excused from his post.[75]

Once a decision is reached, the junior judge recites his decision and ending with the presiding judge serving the final judgments. The presiding rules to what he conceives as a consensus of the court. Dissatisfied parties may appeal before the formal courts, hence stage three.[76]

c. Jur Tribe dispute resolution in Bahr El-Ghazal

A study conducted by Jad Boutros Ghawi in 1924 on the customs of Jur tribe has described the dispute resolution mechanism exercised.[77] His findings identified the dispute resolution mechanism followed by the Jur tribe as arbitration. The chief or sub chief of the tribe and in his absence the elders of the tribe hear civil or criminal disputes. The case is heard in the chief's house yard or the village's court yard surrounded by the elderly members who together serve as co arbitrators with the chief as the presiding arbitrator (chairman).

Each party presents its case, starting with the accused who presents his statement together with his witnesses. All statements made by the accused and his witnesses are repeated to him by a reciter and the same process is conducted by the complainant. The arbitrators will retire to private deliberations on the findings of the case and once they reach a decision the chairman recites it to the parties. The punishment or remedy is usually a fine. One of the methods of enforcement is for the debtor to deliver his unmarried sister or daughter as security to the creditor until payment of the fine is made.[78]

[75] Ibid 25
[76] Ibid 25-26
[77] Jad Boutros Ghawi, *Notes on the Law and Custom of the Jur Tribe in the Central District of Bahr El Gazal Province* (SNR Vol. 7 1924)71
[78] Ibid 71-72

In light of the above, it can be deduced that the Jur tribe follow *Judiyya' s* practice in Darfur of arbitration rather than the Dinka's practice which combined mediation and arbitration.

During the course of accumulating different practices carried out by the different tribes in the different regions of Sudan and their customs and after visiting Sudan Library and Sudan's Central Archives it was noted that the publications namely published in the Sudan Notes and Records dropped by the 1960s. Also, the efforts that evolved have focused on the South due to the efforts of few academics and practitioners like Francis Deng, P.P. Howell and John Wuol. The collection of customs assembled from the different regions of Sudan has seized after the conclusion of the Sudan Project in 1964, an initiative taken by the University of Khartoum, Faculty of Law in a joint venture with the Judiciary and the Ford Foundation in 1962.[79] Although the Faculty of Law tried in 2006 to revive the collection of customary law from the remote areas of Sudan nevertheless, nothing has materialized on ground. Thus, the grey cloud of unrecorded customs persists to hang over the head of the legal system as whole thereby creating further segregation in the communities and the legal system a gap that was once covered by the recognition of informal justice by the state.

5. The fall of the Traditional Justice System

The settlement experienced by these tribes during the Anglo-Egyptian rule, was shook by three major events:

a. October Revolution 1964

Prior to the October Revolution, in 1959, a committee from the

[79] Thompson (n 2) 485. The Sudan Project's initiative in collecting local customs from Dinka tribe in south Sudan 489. See Mr. R. A. Cook, Research Associate of the Sudan Law Project: Stubbs ' "Customary Law of the Aweil District Dinkas" (1962) S.L.J.R. 450; and "Blood Money and the Law of Homicide in the Sudan, A Documentary Survey (1962) S.L.J.R. 470.

judiciary held a meeting in Khartoum headed by Chief Justice Mohammed Ahmed Abu-Ranat to discuss the local administration.[80]According to the bylaws of the Province Act 1960, the position of District Commissioner was rescinded and never replaced.[81] Instead, the local courts came under the umbrella of resident judge appointed by the judiciary and not the local administration. Furthermore, the budget of the local courts was allocated to the judiciary instead of the local administration.[82]

The responsibilities of the resident judge embodied both official court cases and local disputes, this task proved to be challenging especially that the judge had limited knowledge on the prevailing customs and local precedents of the tribe in question as well as the hidden duty of observing social security within the tribe and its surroundings. Instead, cases were tried based on the law laid down by the legislature, which in most instances failed to serve justice in the eyes of the disputing parties. A significant reason for the ignorance of judges was their ignorance of local customs prevailing in many districts of Sudan as well as their lack of interaction and knowledge of the tribes' dynamics, which is not the case with *Judiyya* or the chief of the tribe who were born into these societies.

With the dawn of the October revolution, talks surfaced among the intellectual and political elite of the country to elevate the standard of government administration through abolishing all traces of local administration particularly Native and Chief's Courts previously implemented by the Condominium and instead adopt a civilized approach which involved the interference of the judiciary.[83] The proposal submitted by Al-Shafi Ahmed Al-Sheik the World

[80] Recommendation made resulted in the enactment of Province Administration Act 46/1960. This post was the pumping heart for the local administration system, which was responsible for the local courts.
[81]Hussein Mohammed Ahmed Shawki (1973-1942) صور من: الإداء الإداري في السودان (University of Khartoum Publishing House 2nd edn 1992) 247-248
[82] Tekana (n 4) 301
[83] Tekena (n 4) 303

Federation of Trade Unions representative to the Minsters Council in 1964, advocating that the local administration no longer serves the needs of the people nor does it match the ideals of the October Revolution embodied the following:[84]

1. The freezing of the local administration in north Sudan and dividing its responsibilities to competent authorities.
2. Repealing the Chief's Courts Ordinance 1931 and the Native Courts Ordinance 1932.
3. Assigning the judicial authorities to the judiciary instead of the Chief of the tribe.
4. Increasing the police force within the local council to fill in the gap created from the separation of the local council authorities.
5. Establishing a committee for corruption investigation and punishment against employees of the local administration
6. The immediate repealing of the local administration in South Sudan.

Former Police Officer Osman Jad Alrab headed the committee assigned by October Revolution Council 1964 to conduct a study for the implementation of Al-Shafi recommendations targeting the ministries of interior, finance and judiciary and proposing the best approach for abolishing the local administration and alternatives as well as the proposed budget for execution of the proposal.[85]

In light of the above, it becomes apparent that was once known as ADR mechanism has now been replaced by adjudication mastered by the judiciary. The resident judges, who lack the "knowhow" on tackling tribal disputes in terms of customs as well as the trust and consensus that was once borne in the *alajaweed* or the chief of the tribe, has now disappeared since the judge is a stranger appointed by the judiciary and not through the local administration as

[84] Ibid 303-304
[85] Ibid 307-308

the tribe's chief or *Aldamlaj* were selected in the processes described above. In a way this transition has denied the public the alternative venue of dispute resolution that parties pursued before adjudication which was usually a step reluctantly pursued by the parties due to the notion of its affiliation with the government intertwined with their lack of knowledge of customs.

b. May Revolution 1969

The local administration was finally abolished in 1970 and instead, the People's Local Courts Act 1977 was enacted. This act was based on assigning the position of the judge through rotation with no regard made to the components of the descendant's position within the tribe, wealth and the knowledge of customs and precedents. Unfortunately, the tools created by this Act from local council to the local courts were mere instruments used to spread the political agenda of the ruling party instead of actually striving to achieve social security and accessibility to justice channels.[86]

c. April Uprising (Intifada) 1985/ Salvation Revolution (Al-Ingaz) 30-06-1989

The Council of Ministers formed a committee consisting of the ministers of local government, labor, public utilities, interior and Attorney General to prepare a study on restoring the local administration for North and South districts. Recommendations were submitted on the 76th session of the Council of Ministers on 07-05-1987, which included the redrafting of a local administration act. Efforts for reinstating trust in the local administration commenced in Darfur in anticipation of the enactment of the new local administration act, however the implementation of this act never saw the light due to the military revolution of *Al-Ingaz* 30-06-1989.[87]

In 1995, a conference on local administration was held with an agenda emanating an Islamic appeal on the roles of the tribe

[86] Ibid 309-310
[87] Ibid 312

leadership. The new local administration order continued where the May regime left off in the choice of the local administrator but exceeded it with the political affiliation of the appointed person to the ruling party.[88]This affiliation goes against the norms of the local communities, which are based on their private settings. Moreover, advancing the political agenda of the ruling party with disregard to the basic norms regulating these societies in terms of the status of the individual in their tribe and the role their family may have occupied in relation to acting as a chief or sheikh, or fulfilling a high post of *aldamlaj*, may have catastrophic results since it affects the entire social hierarchy and the selection of individuals who are not qualified to carry out the roles assigned, especially that of the local administrator who acts as the beating heart of the local administration in the appointment of judges and other personnel.

Perhaps one of the major issues for the ignorance that our nation suffers from is lack of historian publication on the actual historical and legal events that occurred. These publications could serve as references to guide our legislature and policy makers in their duties. There is insufficient literature on the shelfs that links the political decisions to the legal outcomes in terms of legislation in addition to the drought in publication of practices of tribes in different areas of Sudan since the 1960s with a few exceptions as mentioned above. This is what led me to interview Dr. Tekena the former Governor of North Darfur District in 1986 who is from Darfur and actually witnessed *Judiyya* process and has conducted his own research on local administration in Darfur as a main source of assistance. It is not too late for our legal and political minds who witnessed our countries independence to leave their mark by publishing the actual events that have occurred and the interesting phenomena's they witnessed in different areas especially ADR.

In light of the above, it is important to reflect on the irony of

[88] Ibid 311-312

how Sudan, through its many governments since independence, determined to elevate the legal system by abolishing the informal justice system in the contrary has backfired to cause greater damage than the benefit anticipated. The irony lies in the timing of this renovation where at time the world was moving towards establishing a complementary system bridging the informal with the formal system to better serve the population through "access to justice movement" in the 1960s and 70s.[89]This movement was the direct cause of the 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (the Pound Conference), where Frank Sander used for the first time the term "ADR". In his presentation Sander proposed the Multi-Door Courthouse system, which calls for the use an ADR mechanism suitable for the dispute e.g. mediation, ombudsman or arbitration and leaving adjudication as the last resort. Sander's prophesized that by the year 2000 that a Dispute Resolution Center not a simple court would serve the aggrieved. [90] It seems that his vision came true in countries like the US and UK as will be discussed in chapter four below.

Sonia Kazemi[91] clearly identifies that the norms used in family mediation in the non-western societies are the same as those adopted later on by the western states to resolve non-western family disputes, hence, easing the process for the expats- of non-western orientation- who are already familiar with it. This further emphasizes on the irony of abandoning a system that is rooted in our customs and was proved effective in ensuring social and legal security.

6. Conclusion

This paper analyzed the shrinking role of custom as a source of law

[89] M Cappelitti and B G Garth: Access to Justice, Volume 1: A World Survey (1987) Sijithoff and Noordhoff, Milan 6-9 in Roberts and Palmer (n 68) 45-46
[90] Ibid 46
[91] Sonia Nourin Shah-Kazemi, *Cross-cultural Mediation: A Critical View of the Dynamics of Culture in Family Disputes*, (14 International Journal of Law Policy and the Family 2000) 302

used by the different tribes in Sudan through informal justice systems that practiced either arbitration or a hybrid process of med-arb. Upon independence, the shift of the governments agendas and priorities dictating the moving towards formal justice and ignoring recording customary law and the need to revise recorded customs regularly. It was only through precedents that the customary norms were recognized and in a way recorded, nevertheless the different regions of Sudan remain disconnected by forming two teams, one for customs as a law and another for legislation with no bridge to conjoin the two.

The abolishing of the local administration, marked the end of the traditional mechanism for dispute resolution that acted not only as a mere judicial tool but also as a preventive tool against disputes through settlement and providing social security. The consensus established through custom and the Chief's and Native Courts was torn down, by the political will imposed by the governments that ruled Sudan, who in their quest ignored an important fact, which is the diversity of its nation. The irony remains true that with the world enacting laws for ADR, Sudan has deprived itself from an operative system which proved its success for centuries and instead limited itself with conventional ADR mechanisms.

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