
Justice and the Legal System of the Sudan

Dr. El Rasheed Hassan Sayed*

Abstract:

People desire justice whether it is personal, social, or economic. There is no universal agreement on the meaning of justice, and ideal or perfect justice is difficult to attain in this life. People strive for relative justice, not perfect justice, and good laws assist to that to that end. It is the business of citizens in a democracy to ensure that wise laws are passed and that they are fairly administered in the courts of law.

Written in an engaging style that avoids unnecessary jargon, this article offers a concise description and comment upon the major theories of justice. It is also the purpose of the article to explain to what extent does the legal system of the Sudan achieve formal justice and deliver substantive justice.

The article concludes that the best that any system of justice can hope to achieve is justice according to law. It seems this is a task the legal system of the Sudan is well equipped to perform, not least in its capacity for developing and self - correction.

1. Introduction

People desire justice whether it is personal, social, or economic. There is no universal agreement on the meaning of justice, and ideal or perfect justice is difficult to attain in this life. People strive for relative justice, not perfect justice, and good Laws assist to that end. It is the business of citizens in a democracy to ensure that wise laws are passed and that they are fairly administered in the courts of law⁽¹⁾.

* LL.B., LL.M, Ph.D; Assistant professor of law, Faculty of Law, University of Khartoum.

(1) David Barker & Colin Padfield, Law, 9th ed. 1996, Butter worth-Heinemann, at p.3

The aim of this article is to describe and comment upon the major theories of justice and explain to what extent does the legal system of the Sudan achieve formal justice and deliver substantive justice.

2. Definition of Justice

Justice refers to the family of moral concepts connected particularly with Law and politics “politics” here being understood broadly in the sense of public decision-making regarding the distribution of goods. Justice is a subset of morality. Thus, one can sensibly speak of something as being “right” or “wrong” on occasions where it seems inapt to speak of “justice”. Accordingly, justice seems to refer to the relatively rigid application of rules and standards, where right action might sometimes require more nuanced treatment.⁽²⁾

Aristotles Concept of Justice

One of the earliest attempts to formulate a theory of justice was that of Aristotle⁽³⁾. Justice, for Aristotle, exists among those persons whose relationships are truly regulated by law. To administer the law is to distinguish the just from the unjust. He argued that the basis of justice is fairness.

There are various ways of dividing up the domain of justice. The most famous distinction is probably Aristotles, between “distributive justice” and “corrective justice”.

- (i) Distributive Justice is, essentially, that which is exercised in the distribution of honour, wealth, and the other divisible assets of the community, and these may be allotted among its members in equal or unequal shares. Equals must be treated equally; unequals unequally. Justice in the distributive sense, would aim at proportion, in contrast to the disproportion which characterises injustice⁽⁴⁾.

(2) Brian Bix; Jurisprudence: theory and context, 2nd ed. 1999 Sweet & Maxwell, London, at P.95

(3) (384-322 BC) Aristotle was educated at Platos Academy in Athens. His fundamental concern, in his writings on politics, law and justice was with the delination of the path which had to be followed if man was to achieve The good.

(4) L.B. Curzon, jurisprudence, 1993, Cavendish Publishing Ltd; at 17.

Most of the better known modern discussions of justice, which usually treats justice primarily as about the proper structuring of government and society, are basically discussions of distributive justice.

(ii) Corrective Justice stands in contrast to distributive (or legislative) justice; it is concerned with the restoration of a disturbed equilibrium. The judge will treat parties as equals, will investigate the nature of the damage done, and will seek to equalise the situation by imposing penalties which will take away any ill-gotten gains and will take into account the suffering caused by the offence.⁽⁵⁾ Aristotle notes that corrective justice may be administered in the following situations:⁽⁶⁾

- (i) Voluntary transactions, such as selling, buying, hiring, lending, pledging.
- (ii) Involuntary transactions (of a furtive or violent nature) such as theft, assault, maiming.

Modern discussions of corrective justice occur within the context of arguing about appropriate standards within tort law and contract law.

Along with corrective justice and distributive justice, the term “justice” is also frequently used to refer to following the rules laid down. This has obvious applications to law (“no retroactive punishments”). Justice is also often used to describe the appropriateness of punishment for crimes.

However, we can argue that Aristotles concept of justice replaces the question (what is just) with (what is fair).

Utilitarian Theory

The central principle of utilitarianism is that society should be organised to achieve the greatest happiness for the greatest number. Thus, a law is just where it brings about a net gain in happiness for the majority, even if this results in increased distress or unhappiness to a minority.⁽⁷⁾

(5) Ibid. at p.17.

(6) Aristotle, *Nichomachean Ethics*, Book VIII, I: 1155a, in the *Complete Works of Aristotle*, vol., p.1825.

(7) See David Miller, *Social justice*, 1976, Clarendon Press, Oxford, at p.32

Liberal Theory (Natural Rights Theory)

Liberal theory, in contrast to utilitarianism, judges the justice of any form of social organization by the extent it protects its minorities and most vulnerable groups. Therefore, Liberal Theories tend to incorporate notions of natural rights - that there are certain basic rights to which all people are entitled. However, this approach has its own problems, not least in establishing agreement over the content and extent of any list of “natural” rights, e.g. the right to vote is now regarded as an essential and universal right. However, for many years this was subject to a property qualification, and not one to which women were entitled until this century.⁽⁸⁾

A recent attempt to identify a universal set of rights and principles was undertaken by John Rawls. Rawls theory is based upon a hypothesis of what a group of individuals, placed in what he termed the original position, would agree upon. The original position exists behind a veil of ignorance, i.e., the individuals would not know of their individual talents and circumstances (whether they are rich or poor, young or old, male or female, able or disabled, etc.). Therefore, Rawls argues rational self-interest would lead them to agree a set of basic rights and principles that each would find acceptable if it turned out they were the least advantaged of the group. However, persuasive though this hypothesis may seem, it does not resolve the question of precisely what those rights and principles should be. In fact, it seems to lead back to Aristotle's question - what is fair.⁽⁹⁾

Robert Nozick and Libertarianism

Libertarian theory, such as that of Nozick, argues intervention in the natural (or market) distribution of advantages (as required by the other theories) is an unjust interference with individual rights. Libertarian analysis only permits very limited intervention to prevent unjust distribution (e.g., through theft and fraud)⁽¹⁰⁾.

(8) See Michael J. Sandel, *Liberalism and the limits of justice*, Cambridge University Press, 1982, 2nd ed. at pp.6-9

(9) John Rawls, *Political Liberalism*, Columbia University Press, New York, 1993, pp 4-22

(10) Robert Nozick, *Anarchy, State and Utopia* (Basic Books, New York, 1974) at pp 150-164 also see Brian Bix, *Supra*, footnote 2, at PP 102-104

Therefore, the question of abstract justice seems as much a political as philosophical one.

3. Justice and the Legal system of the Sudan

The dichotomy between “formal” and “substantive” justice

The realities of a legal system depend in part on the political and constitutional structures of a country. But the adequacy of a legal system does not depend entirely on the political and constitutional structures, though they help. It depends to a large extent on the court procedure and the legal profession, the Lawyers who have to work the system.⁽¹¹⁾

Whether a particular law is just is, therefore, essentially a political question. However, consideration must also be given to whether the system is just and whether it produces a just outcome. Here the word “justice” is used in two quite distinct senses. The first sense is what might be termed formal justice, which has to do with the following of the rules laid down for the proper conduct of legal business (what the fifth and fourteenth amendments to the United States Constitution call “due process of law”). The second is substantive justice which has to do with the observers subjective impression of the fairness of the outcome.

(I) Formal Justice

The requirements of formal justice are as follow:

- (i) A system of independent courts for the administration of law and the resolution of disputes.

The administration of justice in the Republic of the Sudan is vested in an independent judiciary which assumes judicial power in adjudication of disputes and judgements on the same in accordance with the Constitution and the law.⁽¹²⁾

(11) Professor Akolda M.Tier, The legal system of the Sudan, Modern legal systems cyclopedia, at 655

(12) Const. 1998, Art.99

Judges are independent in the performance of their judicial duties and have full judicial competence with respect to their functions, and they shall not be influenced in their judgements.⁽¹³⁾

The judicial structure of the Sudan consists of a supreme court, appeal courts and courts of first instance.⁽¹⁴⁾

The formal trial and appellate courts, together with the various forms of alternative dispute resolution (i.e. arbitration and conciliation)⁽¹⁵⁾, ensure the legal system of the Sudan meets this requirement.

(ii) Known and fair rules and procedures

Formal justice also requires these institutions follow known and fair rules and procedures. Again this is met through the rules of due process and fair procedure⁽¹⁶⁾, rules regarding the admissibility of evidence,⁽¹⁷⁾ Limitation period,⁽¹⁸⁾ etc.

One of the fundamental principles of natural justice is that each party must be given an opportunity of stating his case and answering any argument put forward against him⁽¹⁹⁾ - audi alteram partem (both sides must be heard). The right to be heard includes the right to be heard in person and the right to call witnesses.

Section 303 (1) of the Civil Procedure Act 1983 provides that the court may at anytime correct any procedural error, may take any measures or make any amendments as may be reasonable for the purpose of the determination of any question in controversy between the parties.

(iii) Access to Justice

For justice to be accessible it is important that people are able to get legal advice and representation. One of the biggest problems is the cost of cases. For poor people and even for those on moderate income, it is often

(13) Const. 1998, Art.101

(14) Const. 1998, Art.103

(15) Civil Procedure Act, 1983, ss 139-156

(16) Const. 1998, Art 31 & 32.

(17) The Evidence Act, 1993, ss 8 and 10 (1). See also the provisions governing the admissibility of confessional evidence, ss 15-22.

(18) Criminal Procedure Act 1991,s. 38.

(19) Also see Martin Hunt, A Level and AS Level law, Sweet & Maxwell, 2000, at 282-283.

too expensive for them to be able to afford to take a case to court. In Sudan, the right to litigate is guaranteed for all persons and no one shall be denied the right to sue⁽²⁰⁾. To ensure this, the first schedule to the Civil Procedure Act, 1983 provides that any suit or objection may be brought by a pauper⁽²¹⁾. A pauper is a person who is not possessed of sufficient means to enable him to pay the fees prescribed for the hearing of the suit or objection as the case may be.⁽²²⁾

Furthermore, the Attorney -General and the legal counsels work as legal advisors for the public generally, including providing legal aid in litigation. In a country where the vast majority of inhabitants cannot afford the services of an advocate, this function probably constitutes the most sacred trust of the Attorney- Generals chambers.⁽²³⁾

2. Substantive Justice

The legal system of the Sudan has a variety of mechanisms to ensure just outcomes. The doctrine of Judicial Precedents, which is one of the sources of law in Sudan,⁽²⁴⁾ together with devices such as overruling and distinguishing⁽²⁵⁾ enable the courts to work towards both the just development of the law itself and a just outcome in any given case.

In criminal law, the principles of sentencing seek to achieve a just balance between the interests of the victim in achieving retribution (qisas),⁽²⁶⁾ of society through deterrence and rehabilitation, and the defendant in ensuring the punishment fits the crime and is not excessive.

(20) Criminal Procedure Act 1991, ss 134 and 139.

(21) Const. 1998, Art 31.

(22) S. 14 (1) of the First Schedule to the Civil Procedure Act, 1983.

(23) S.14 (2) of the First Schedule to the Civil Procedure Act, 1983.

(24) Prof. Akolda M. Tier, Supra note 11, at P 718

(25) Civil Procedure Act, 1983, s. 6 (2)

(26) Overruling is when a case in a lower court is considered in a different case taken on appeal and held to be wrongly decided; distinguishing occurs where the court accepts the ratio decidendi of the earlier case but finds that the case before it does not fall within this ratio decidendi because of some material difference of fact. see e.g. Prof. Akolda, Supra note 11 at P 669

The courts may also turn to the principles of justice where the strict application of the rules of law would lead to injustice. Section 303 (2) of the Civil Procedure Act 1983 reads:

“nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary, for the ends of justice, or to prevent abuse of the process of the court”.

Furthermore, section 6 of the Civil Procedure Act 1983 explains the law to be applied in absence of express provisions. It reads:

- (1) In matters of procedure not provided for by this Act, the court shall apply such rules as are likely to serve the ends of justice.⁽²⁷⁾
- (2) In cases not provided for by any law, the court shall act according to the principles of Sharia law, judicial precedents, custom, justice and good conscience.

It is settled that a court cannot resort to its inherent powers in defiance of the express provisions of the code⁽²⁸⁾. Inherent jurisdiction must be exercised subject to the inherent rule that if the Code does contain specific provisions which would meet the necessities of the case in question, such provisions should be followed and inherent jurisdiction should not be involved. It is only when there are no clear provisions in the Civil Code that inherent jurisdiction can be invoked⁽²⁹⁾.

In accordance with s.70 of the Civil Procedure Act 1983, the court may at any stage of the suit for sufficient cause and on such terms as to costs as it thinks fit:

- (a) from time to time, adjourn the hearing of the suit for short and reasonable periods;
- (b) either before or after the expiration of the time appointed by this

(27) The Criminal Act, 1991, ss 28-32

The expression “not provided for by this Act” covers both procedural and substantive matters. See e.g. Mohammed Abdel Rahman v. Musa El Dabi (1976) SLJR.102

(28) See Ahmed Ibrahim Fuad v. Elhag Omer Elsheikh (1975) Sudan Law Journal & Reports p.67; Omer Ali Osman v. Hamad Ahmed Darfil (1975) Sudan Law Journal & Reports p.75; Gafar Suleiman v. Halima Hassan Gibreel (1977) Sudan Law Journal & Reports p.362

(29) Mulla, Code of Civil Procedure, p.77, 13th ed., 1965. See also Gamal Mustafa Abu Samra v. Abul Ela Engineering Co. (1969) Sudan Law Journal & Reports p.362

Act or by an order of the court for the doing of any act, extend the time for the doing of such act⁽³⁰⁾.

Similarly, the court may at any time of the proceedings before judgement, allow either party to alter or amend his pleadings in such manner and on such terms as may be just and all such other amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties⁽³¹⁾.

The gist of the principle underlying s.77 of the Civil Procedure Act 1983 abovementioned is that amendments which a party desires to make in his own pleadings must be freely granted in order that the real question in issue between the parties be determined, provided that the application is not done in mala fides and that no injury to the opposite party is occasioned save such as can be sufficiently compensated by costs or other just terms.

Furthermore, the Parliament which represents the popular will in legislation, may act to remedy matters through legislation.⁽³²⁾ Indeed, it is this capacity to be self-correcting that is one of the most important aspects of the Sudan Legal systems ability to ensure just outcomes.

Conclusion

Given the variety of essentially subjective, often vague, and sometimes contradicting notions of abstract justice, perhaps the best that any system of justice can hope to achieve is justice according to law. It seems this is a task the legal system of the Sudan is well equipped to perform, not least in its capacity for developing and self - correction.

(30) see Heirs of Elzaki Hag Omer v. Ali Alawad Ali (1977) Sudan Law Journal & Reports p.437

(31) s. 77 of the Civil Procedure Act 1983, also see Ali Saeed Baashar v. Ahmed Ali Saleh (1959) Sudan Law Journal & Reports,p.62

(32) Const. 1998, Art 73 and 67 (1)