

Lack of Legal Representation Jeopardizes Right of Fair Trial in South Sudan

Thursday 27 September 2012

By Beny Gideon Mabor

The Republic of South Sudan is a country amongst other family of nations with imposition of capital punishment such as death sentence. Article 21 (1) of the Transitional Constitution of the Republic of South Sudan says 'no death penalty shall be imposed, save as punishment for extremely serious offences in accordance with the law'. The enabling law is Penal Code 2008 where death penalty for instance amongst other death related offences is permitted under section 206 of the same Act.

To the contrary, the same Constitution under the Bill of Rights Article 11 says 'every person has inherent right to life, dignity and integrity of his or her person which shall be protected by law; no one shall be arbitrarily deprived of his or her right to life'.

Worriedly, the legitimate question to the rule of law institutions and private legal consultants is which provisions of the law is supreme between that of the Transitional Constitution and the Penal Code 2008, with respect of right to life and imposition of death penalty as stipulated under Article 11 and section 206 of the former and the later? And further what is resolution in respect of current powers, save under Article 11 and 21 (1) of the same Constitution? Although this is not the primary intention and a forum to challenge the death penalty, yet I must highlight something about such legal implications for the government and the human rights campaigners.

However, the underlying idea about my argument is the lack of legal aid services in both criminal and civil disputes across South Sudan. The increasingly victims of this legal vacuum are indigent accused persons, be the criminal offenders or civil wrongdoers or both parties. For instance according to a research data released by UNMISS Human Rights department and my colleague David K. Deng, a senior researcher on human rights with South Sudan Law Society, therefore found that there are 109 people on the death row with four women and only six people have undergone legal representation. The rest were tried without right to a fair trial in a manner prescribed by law. This is very sad news for a country promised to have been founded on the basis of justice, equality, respect for human dignity and advancement of human rights and fundamental freedoms.

In fact, Article 19 (7) of the Constitution says 'any accused person has the right to defend himself or herself in person or through a lawyer of his or her own choice or to have legal aid assigned to him or her by the government where he or she cannot afford a lawyer to defend him or her in any serious offence'.

Additionally, the said legal aid service has been provided in the National Ministry of Legal Affairs and Constitutional Development Organization Act 2008 under section 10 (d) and (g) which says providing legal aid for person in need and educating citizens on their constitutional rights through workshop, seminars and media. With this situation, one may really wonder why do the government designed good laws but without implementation? It is very challenging in our progress justice system and requires urgent attention from all actors.

Challenges Facing Legal Representation

After having evaluated the literature review of the both criminal and civil justice trial system through considerable research, I found out numerous challenges facing provision of legal aid to the parties whether such person is capable of hiring a lawyer or an indigent accused person. The very low or even complete lack of awareness of legal aid and access to justice for all remain in a limbo for reasons best known to the rule of law institutions.

Second, there is inadequacy or dysfunctional legal aid strategy in South Sudan despite the explicit provisions of the applicable laws. The appalling situations of suspects awaiting trials in serious offences seemingly remain unmet. However, the legal aid initiative in the national Ministry of Justice is still limited in scope and application. Nobody is aware and when exactly to translate this constitutional obligation into reality to the poor people who are in dire need of legal services.

Third, with the lack of legal aid system in the Republic of South Sudan, causes unnecessary and lengthy detention of people including that of juveniles, women and people of unsound mind without quick and due process of law. How will such watertight legal principle be achieved? It is of the majority opinion that a strong legal system can be achieved only through constitutional governance where doctrine of separation of powers and subsidiary rules of procedure are respected.

Fourth, as a result of non-observance of the due process of law, the police and public prosecution attorneys usually conduct pre-trial proceedings of the accused persons without legal representation right from earlier stages of interrogation. This is

unconstitutional act that often discredits the facts of the case and the prosecution will present what I called a contaminated evidence to court for determination.

Strategic Recommendations

After exhaustively explore the importance of legal aid services and notifying the hindrance factors; the author in consultation with relevant stakeholders found out and recommends the following strategic suggestions: First, there should be established a legal aid centre with full and part-time salaried legal practitioners and legal counsels tasked with functions to providing pro bono legal services to the most economically and socially disadvantaged accused persons in the society.

Second, the right of a fair trial will only be achieved in South Sudan when the rule of life must originate from the rule of law. It will also be achieved when all law enforcement agencies like police investigators, prosecutors, prison warders and the court comply with strict demand of legal aid and access to justice for all including that the court must not entertain any case whose party has no legal representation.

Third, the applicable laws are silent about death commuted to life imprisonment. Legally speaking, when a convict is sentence to death and a judicial order is taken to the President for confirmation in accordance with the provisions of Article 101(h) of the Constitution; the President is required by law to have time limit for death confirmation, grant pardon etc... and if the President exceeds the said period without confirmation of the same, then the death penalty is deemed to have been commuted to life imprisonment. Therefore, I am of the opinion that the Penal Code 2008 be urgently amended and incorporate this provision in accordance with a uniform rule of legislation.

Beny Gideon Mabor is an independent commentator on governance and human rights. He can be reached at: benygmabor@gmail.com