

Human Rights in the administration of justice in South Sudan - challenges and recommendations

Thursday 29 November 2012

By Beny Gideon Mador

November 28, 2012 -

1. Application Of International Law In South Sudan Domestic Courts.

The Republic of South Sudan is a country amongst other family of nations that lastly joined the United Nations (UN) on 14 July 2011; African Union (AU) on 27 July, 2011 and subsequent ratification and accession to other regional and International Organisations to mention a few. The most important golden rule as mandatory component of every state law is the application of human rights in the administration of justice in domestic courts. This principle, amongst series of international legal instruments is nowadays subject of debate in many countries with respect to its validity and South Sudan is not an exception to this international legal obligation. We must abide by it.

However, every law whether statutory or customary practice is permitted by either parliamentary mandate or will of the people. The legitimacy of human rights as component of international law and its application at the domestic courts in South Sudan has two faces. In the first place, it must be recognised by the Constitution as the supreme law of the land and custody of the will of the people.

In South Sudan, although international law is not expressly provided under the Transitional Constitution of the Republic of South Sudan TCRSS, 2011 as one source of law, yet Article 5 (e) of the Constitution says any 'relevant source'. This expression is construed to have recognised international law as lawful source, read together with the provisions of Article 9 (3) of the same Constitution which says "All rights and freedoms enshrined in the international human rights treaties, covenants and instruments ratified or acceded to by the Republic of South Sudan shall be an integral part of this Bill'.

Again, the recognition and application of international law in South Sudan is recognised by the provisions of Article 43 (a), (c) and (e) of the transitional constitution respectively.

Apart from constitutional mandate, the other authority which supplement the application of international law in domestic courts in South Sudan, is section 7 (2) of the Civil Procedure Act, 2007 which states: In cases not provided for by any law, the court shall act according to South Sudan judicial precedents, customs, principle of justice, equity and good conscience'.

To that effect, the word justice, equity and good conscience are not statutory legal principles but rather imported by the colonial masters. This is reasons why they were subjected to comprehensive judicial interpretation by many judges and legal scholars in the former united Sudan and even today in our nascent justice system in South Sudan, with compromise to fit in the application of international law in domestic courts without legal implications.

The second face of recognition of international law in South Sudan is found in one of the two legal theories: Monist and dualist legal system. The former says international and municipal laws are one. In other word, where the state ratified or acceded to the

treaties, covenants, conventions, instruments or additional protocols, automatically the international law can be applied by the municipal courts and the citizens of the state can invoke the international law to be applied in the domestic courts.

Also the state must amend existing legislation to conform to the international law in case of any inconsistency with the national legislation. In practice, most of the countries that are member state to the monist theory are civil law countries and that is why there established a constitutional court. The final important aspect of monist legal theory is when the judge apply national legislation in the interpretation process, the judge can take the best option that conform to the international law. In contrast, the dualist legal theory or system says international law and municipal law are different legal systems. Similarly, the application of international law in domestic courts in the dualist theory requires the implementing legislation. Most of the countries mixed the two theories in the legal system but where is South Sudan in these scenarios?

In case of the Republic of South Sudan as it is provided for, in the Transitional Constitution Article 101 (p), the conclusion is

that South Sudan is a monist legal system pursuant to the powers of the president to direct and supervise foreign policy and ratify treaties and international agreements with the approval of the National Legislative Assembly.

In order for either legal theory to be operational such as application of international law in the domestic courts; there are two schools of thought namely: incorporation process and domestication or transformation process. The former requires international law to be incorporated automatically and interpreted as national law once it is ratified or acceded to by the government. And the later requires international law to be implemented through an act of parliament in form of enabling legislation. In South Sudan, it is clear the government is in support of the monist legal system and has therefore taken domestication or transformation process. Examples of these domestication processes are existing pieces of legislation in South Sudan such as Child Act, 2008, Human Rights Act, 2009; IMF and World Bank Organisation Act, 2012 to mention a few.

Now let me turn to the question of death penalty and legal implication on South Sudan as a young country being welcome to the community of nations. It is clear that member states to the AU, UN, regional and international bodies are required to behave responsibly and governed on fountain of implementing international rules of engagement. In other word, to do what is required of a member state in accordance with the international legal instruments, treaties, covenants and additional protocols.

The position of the Universal Declaration of Human Rights UDHR, 1948 Article 3 of the Declaration; African Chapter on Human and Peoples' Rights ACHPR, 1986, Article 4 of the Chapter; the International Covenant on Civil and Political Right ICCPR ,1966 respectively call for abolition of death penalty. In particular, the ICCPR 1966 has two additional protocols: one protocol provides citizens of the member state to the additional protocol to hand over their complaints directly to the human rights committee, for consideration, provided that local remedies have been exhausted before domestic courts. The second additional protocol provides abolition of death penalty by the member state to the additional protocol.

About 139 countries which are more than two thirds of the countries of the world have reportedly abolished the death penalty in law or in practice, including 37 of the 54 member countries of the African Union, although at least 8,679 executions were carried out in the last two years. Secondly, the three covenants constitute Bill of Rights provided under the constitution in every country which are recognised under Article 9(3) of the Transitional Constitution of the Republic of South Sudan TCRSS, 2011 and the enabling pieces of legislation.

In conclusion, although the Republic of South Sudan did not ratify or acceded to UDHR, 1948, ICCPR, 1966 and in particular the second additional protocol that abolish death penalty, the fact that South Sudan has ratified the two notable bodies of the UN and AU, it is legally bound by ICCPR and UDHR principles as they have so far acquired status of international customary law. Therefore, South Sudan must also ratify the conventions, treaties, covenants and additional protocols of other organisations with similar objectives to supplement a testimony that human rights are universal and inalienable in nature.

Amongst the strictest human rights principles to be observed by the state is the due process of law. In a broad sense, due process is interpreted as the right to be treated fairly, efficiently and effectively by the administration of justice. Usually, the rights to

due process place limitations on laws and legal proceedings, in order to guarantee fundamental fairness and justice. Another more important aspect of due process is to serve as the rules administered through courts of justice in accordance with established and sanctioned legal principles and procedures, and with safeguards for the protection of individual rights. The rules applicable to the administration of justice are extensive and refer to, inter alia, fair trial, presumption of innocence and independence and impartiality of the court.

In South Sudan, there is cloud of doubt surroundings the due process of law in terms of quality administration of justice; protection of the rights of parties involved; efficiency; and effectiveness. As due process rights are literally known among human right experts to centre on the right to a fair trial and the right to an effective legal remedy, the first three elements are discussed under the heading of fair trial, while effectiveness is discussed under the right to an effective remedy.

In conclusion, human rights principles are vested in the independency of the judiciary of every country. Where are we in South Sudan? Is our Judiciary really independency? I could remember an article written a year ago by Advocate Dong Samuel Luak and also a Secretary General of South Sudan Law Society. The title of the said article reads "Why hiring a lawyer if you can buy a judge?" The content of this article entails that the judiciary of South Sudan is not independency.

According to the UN Basic Principles on the Independence of the Judiciary, it set out certain requirements that have to be met for a court to be considered 'independent' which are: terms and conditions of service and tenure; manner of appointment and discharge; and degree of stability and logistical protection against outside pressure

and harassment'. In practice, let examine these human rights principles and more specifically in death related offences to prove or disprove the independency of South Sudan Judiciary in particular and the effectiveness of the rule of law sector in general.

Unfortunately, the assessment shows that our rules of law institutions are not implementing them adequately considering the record of arbitrary arrest, detention and unfair trial. The inadequacy or dysfunctional legal aid strategy in South Sudan despite the explicit provisions of the applicable laws causes appalling situations of suspects awaiting trials in serious offences. Although the legal aid initiative is existing or underway in the national Ministry of Justice, yet it is still limited in scope and application.

This vacuum 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. But the question is 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 implemented and respected.

Again, 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 correctly called a contaminated evidence to court for determination.

When the relevant institutions are asked to change this challenging situations, the answer always given is that 'we just got independence a year ago and do not expect us to do everything overnight'. 'Rome was not built in a day or two and list of excuses go on'. But in a simple literature, the question posse is that did the SPLM-led government start implementing any pillar with respect to human rights in the administration of justice amongst other obligations?

How come the youngest state with a population of 8,260,490, already lost more than 2.5 million lives in the war for justice and freedom still imposing death penalty when it is clearly said to be against human life and dignity for all, the very reason for universal campaign for abolition of death penalty. Instead, death penalty would have not been included in our Constitution but rather infliction of life imprisonment and causes the convict (s) to work for the development of the state inform of a technical knowledge to be acquired at the correctional facility.

In South Sudan, death penalty is enforceable in law and practice. Article 21 (1) of the Transitional Constitution says 'no death penalty shall be imposed, saved as punishment for extremely serious offences in accordance with the law'. The enabling law is Penal Code, 2008 where death penalty is permitted under section 206 which provides: Whoever causes the death of another person-

(a) With the intention of causing death; or

(b) knowing that death would be probable and not only a likely consequence of the act or of any bodily injury which the act was intended to cause, Commits the offence of murder, and upon conviction be sentenced to death or imprisonment for life, and may also be liable to a fine; provided that , if the nearest relatives of the deceased opt for blood compensation, the Court may award it in lieu of death sentence with imprisonment for a term not exceeding ten years'.

However, the death penalty in law and practice under section 206 is not absolute per se but mollified by the same Act by seeking consent of the closest relatives of the deceased to support court decision or opt for blood compensation. To my opinion this has created serious conflict between statutory courts and customary which is discussed in this paper

2. Absence Of Legal Representation In South Sudan

The very limited or total lack of legal representation in South Sudan is primarily seen a serious barrier to justice for all. Apparently, there are many factors which led to absence of a right to a fair trial in South Sudan. Chief amongst them are four main causes:

(1) some do not know what is legal representation; (2) others said they were rejected legal representation; (3) majority are indigent criminal offenders and (4) absence of legal representation as non-existence before customary courts. Summarily, the victims of legal aid vacuum are indigent accused persons and there is no pro bono legal services rendered to them by the Ministry of Justice or volunteer advocates.

The secondary contribution of judges to lack of legal representation is that they knowingly or ignorantly at very instant of a case prosecution do not ask parties to the case whether each has legal representation or not and what is the cause, in order to request the Ministry of Justice to provide legal counsel for assistance to such indigent accused person, since they do not know their rights to be represented in the criminal cases and death related offences in particular.

In supplement to the legal representation, Article 19 (7) of the Transitional 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 enabling legislation that is the National Ministry of Legal Affairs and Constitutional Development Organization Act 2008 provide 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'. Conclusively, one may really wonder why do the government designed good laws but without implementation? It is very challenging in our progressive justice system and requires urgent attention from all relevant actors.

Despite such good attempt to put laws in place, yet there is very bad record of arbitrary arrest, detention and trial without ensuring due process of law. 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 to set it precedent on such questionable records in the nascent legal system.

3. Conflict Between Statutory Courts And Customary Courts

The adoption of these two courts in South Sudan with both criminal jurisdiction to trial criminal cases and in particular death related offences was the genesis of weakening the independency of the Judiciary. The difference between the two courts for the benefit of understanding is that statutory courts are the state courts established by the provisions of Article 122 of the Transitional Constitution of the Republic of South Sudan 2011, read together with the provisions of section 7 of the Judiciary Act, 2008.

The customary or native courts are established in every county of South Sudan by the local government administration and supervise by the same, including collection of taxes and fines to the treasury of the local government. Section 97 of the Local Government Act, 2009 provides establishment of customary law courts in each county with judicial competence to adjudicate on customary disputes and make judgment in accordance with the customs, norms and ethics of the communities. In other word, the legal proceedings under customary courts do not consider human right in the administration of justice.

Another serious concern is how to define relationship between statutory and customary courts while ensuring equal access to justice and the protection of human rights. Therefore, the degree of wrong judgment is always order of the day before the customary courts. And the appeals of the customary courts judgment are in most cases raised before statutory courts and not local government or customary courts per se. But the local Government wants these customary courts to remain under them just because of 'revenues' and nothing else but 'revenue collection'.

After such explanation surrounding existence of these courts, the question turns to conflict between them since there are no clear judicial linkages and the way forward. Instead, Section 97 of the Local Government Act contradicts Article 123 (e) of the Transitional Constitution which provides: 'establishment of others courts or tribunals as deem necessary to be established in accordance with the provisions of the law'. In fact, the law referred thereunder is the Judiciary Act, 2008 section 7 (f) of the same Act which provides the mandate of the Article 123 (e) of the Constitution. In other word, the establishment of customary law courts is power of the Judiciary and not local government.

With this clear powers vested by the constitution to the Judiciary, the question is where do local government get authority to establish customary courts and other courts under its legislation? And the second most burning question is which provisions of either court supersede the provisions of another in the determination of judgment on death related offences in South Sudan? This is evidenced by numerous areas of conflict between statutory and customary courts in the administration of justice.

One identifiable conflict arises under section 206 of the penal Code, 2008 on death sentence where the penalty for example is being mitigated to blood compensation by the interest of closest relative of the deceased. This option for blood compensation is not a public interest vested in the statutory courts and the law but a mere private interest vested in the customary courts.

Again another conflict arises when a murderer for instance has killed two or more people and the closest relatives of one deceased or more disagrees and opted for blood compensation while closest relatives of other deceased person or more

prepares death sentence. In this situation, I have noted with full confidence that the court usually set aside the call for blood compensation by closest relatives of other deceased and concur with the closest relatives who supported the death penalty. Where is an equal justice in this situation where final outcome of judgment come from parties to the case and not evidenced based judgment?

You can see this conflict in the case of Republic of South Sudan (RSS) Vs. Emmanuel David Nawa, 2011 case No: JOSS/HC/CES/J/CR./545/2011 (unreported). The accused person commits an offence of murder punishable under section 206 of the Penal Code, 2008. The summary facts of the case were that on 9 February 2011, the accused person broke into vehicle No: 3167 GXR taking therefrom an AKM

47 rifle No: 2481M and enters into the premises of the national Ministry of Cooperative and Rural Development at the Ministries complex in Juba, South Sudan where he shot the deceased Marko Circilio, a bodyguard to the Minister of the said Ministry, and again shot deceased Jimmy Lemi Milla, Minister of the said Ministry. All died instantly respectively.

The accused person was arraigned before High Court, Central Equatoria State in, Juba where the proceeding was presided over by Judge Malek Mathing Malek, President of the High Court. The accused person was found guilty of murder and sentenced to death under the said section of the said Act. As a practice to seek consent of the relatives of the deceased and hereby a conflict point of view between statutory and customary law, the closest relatives of deceased Marko Circilio opted for blood compensation while closest relatives of deceased Jimmy Lemi Milla supported the death penalty. The statutory court objective is retributive while the customary court position is restorative justice respectively.

This disagreement by parties to the case put the high court in a litmus test for equitable justice. But at last the High Court decided to pass death sentence under the pretext that when there arise a conflict between public and private interest, then public interest is to prevail, meaning that death sentence is a maximum interest of the court and in order to protect the society from potential criminals of such calibers, the accused person must face death sentence.

4. Challenges

After having evaluated the criminal justice trial system through considerable research and legal analysis and further ascertained numerous challenges facing human rights in the administration of justice in South Sudan, I thought wisely to share these shortcomings with the learned readers and specifically and together we make the difference. One identifiable issue negating human rights in the administration of justice is the very low or complete lack of awareness on legal aid and access to justice for all. The failure to implement this civil rights engagement program remains in a limbo for reasons best known to the rule of law institutions.

The second challenge to quality administration of justice in South Sudan is lack of judicial accountability. It is likely strange news or perhaps others may describe me of developing a new discovery or theory. However, it is not new discovery but the world has now generally agreed that the judiciary, like its counterparts in the executive and the legislature, must be held accountable to the discharge of its constitutional mandate of judicial function. With this legal implication, the only question that arises is as to who the judiciary be accountable to and a subsequent mechanism of accountability.

In comparison with other two organs of government, the executive is accountable to Parliament by the vote of no confidence and to the Court by the judicial review mechanism pursuant to Articles 55 (3) (f), 57 (e) and 126 of the Transitional Constitution of the Republic of South Sudan 2011. The National Legislature power is checked by the exclusive competence of the executive organ in dissolution of the parliament and again the legislature is accountable to the electorates through the general elections pursuant to Articles 101 (g) of the Transitional Constitution.

To the judiciary, it is not accountable to any other institution of government. But to my opinion in agreement with Hon. Justice J. E. Gicheru, of the Republic of Kenya, judiciary is accountable to the people on whose behalf it exercises the judicial power under the Constitution and the law. Article 124 (4) supported my argument and reads: the judiciary shall be subject to this Constitution and the law which the Judges shall apply impartially and without political interference, fear or favour'. This is accountability in itself. The justices and judges must adhere to this principle in good faith and realise it tangibly.

The final challenge is adoption of hybrid judicial system of both statutory and customary law practices without functioning linkages. The raise of conflict between these legal frameworks and indeed the de facto predominance of the customary law in the everyday life of the average South Sudanese is an inseparable mess. The right of South Sudanese communities to govern themselves according to their customary law is also proclaimed as one of the principal achievements of the SPLM-led Government.

Therefore, the South Sudanese seemingly do not care about statutory justice. They even accused judges and legal advisers of bribery and undue delay of judgment. In the words of the first post-CPA Chief Justice of Southern Sudan, Ambrose Riiny Thiik,

he said “customary law is a manifestation of our customs, social norms, beliefs and practices. It embodies much of what we have fought for these past twenty years. It is self-evident that customary law will underpin our society, its legal institutions and laws for the future”.

5. Strategic Recommendations

After careful analysis of the existing principles governing the aspects of human rights in the administration of justice and further noticed the impeding issues; the author in consultation with majority opinion including some circles in the rule of law sector,

found out way forward and recommends the following strategic recommendations.

First, the government must commit to its constitutional principle provided under Article 48 (1) (d) which says: pursuit of good governance through democracy, separation of powers, transparency, accountability and respect for the rule of law to enhance peace,

socio-economic development and political stability’. In other word, the author want the building of the rule of law sector and a measurable focus should be on the Judiciary, Ministry of Interior and the Ministry of Justice to train and raise the capacity of judges,

police and prisons officers and legal counsels to ensure delivery of competent legal and correctional services to the people.

This capacity building should include comprehensive English langue training as many of them do not know English at all or low level of English literacy. The command of English language in the administration of justice is central to the research and evidence based legal argument in citation of recent judicial precedents and legal opinions.

Second, the National Ministry Of Justice should 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 to ensure equitable dispensation of justice. The right to 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 in question comply with strict demand of legal representation and access to justice for all including that the court must not entertain any case whose party has no legal representation .

The third most important recommendation our democratically elected government must do without delay or any excuse is to immediately ratify or acceded to the UDHR, 1948, ICCPR, 1966 and indeed the second additional protocol that abolish death penalty. The death penalty does not serve any purpose because the state at the end of the day lost both the first victim and again lose the murderer inform death sentence.

The fourth recommendation is harmonisation of customary and statutory law into one legal framework to avoid such conflicts.

This proposal includes transfer of the authority wrongly exercise by the local government administration to establish customary courts back to the Judiciary of the Republic of South Sudan. It will be appropriate for the judiciary to form special or customary courts and will be easy to supervise such court from legal perspectives, while the local government supervises them from administrative performance.

The final point is the conflict of powers over confirmation of death sentenced and death commuted to life imprisonment. Section 264 of the Code of Criminal Procedure Act, 2008 provides that the Supreme Court may commute a sentence of death to a sentence of imprisonment, and commute a sentence of imprisonment and fine to a fine only; while the President have the same powers under Article 101 (h) to confirm death sentence, grant pardon etc...This is clear conflict of powers.

In resolution with respect to conflict of current powers, Section 264 of the same Act contradicts the provision of Article 101(h) of the Constitution. Therefore, the provisions of Supreme law of the land must prevail over the provisions of national legislation. Therefore it is recommendable that section 264 of the same Act be deleted and left such powers of death confirmation, commutation into life imprisonment or any decision exclusively fall within the powers of The President

Bibliographies

1. Beny Gideon Mabor, Lack Of Legal Representation Jeopardies Right To a fair Trial In South Sudan, (2012) published in daily Citizen Newspaper in Juba.
2. South Sudan Local Government Act, 2009 section 97 page 64
3. Human Rights in the Administration of justice: A facilitator Guide For Judges, Prosecutors and Lawyers. United Nations, New York, (2011) Chapter 5 page 29.
4. Ulrich Garms, Promoting Human Rights in the Administration of Justice in Southern Sudan. Mandate and Accountability Dilemmas in The Field Work of a DPKO Human Rights Officer,
5. Beny Gideon Mabor, Prospect of Justice System in the Republic of South Sudan: Challenges and Recommendation, 2008

6. South Sudan Civil Procedure Act 2007,
7. South Sudan Penal Code, 2008
8. South Sudan Code of Criminal procedure, 2007
9. Beny Gideon Mabor, Rule of law and administration of Justice remain at slow pace in South Sudan, 2009
10. Hon. Mr. Justice J. E. Gicheru, E.G.H. Independence of the Judiciary: Accountability and Contempt of Court: Republic of Kenya, 2007 page 6
11. Judgement in the case of RSS vs. Emmanuel Dabid Nawa: Case No: JOSS/HC/CES/JJ/CR./545/2011, by Jude Malek Mathiang Malek, President of High Court CES, Juba page 2
12. Transitional Consitution of the Republic of South Sudan, 2011

*Beny Gideon Mador is an independent commentator on governance and human rights. He can be reached at:
benygmabor@gmail.com or +211955812788*