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The Supreme Court of South Sudan and the Protection of Human Rights: a Critical Analysis of Pagan Amum's Case

Mut Turuk
Department of Public and Comparative Law
School of Law, Kampala International University Uganda,
East Africa

Abstract

The Supreme Court of South Sudan is the highest court with an exclusive jurisdiction under the Transitional Constitution of South Sudan (hereinafter, "the Constitution") to uphold, protect human rights and fundamental freedoms in the Country. However, the Court had decided to take a different and controversial approach from regional and international human jurisprudence in the case of Pagan Amum, the former Secretary General of the ruling party (hereinafter, "the Petitioner") against President SalvaKiir, (the chairman of the ruling party and the Sudan People's Liberation Movement (hereinafter, "the Respondents"). This paper will critically examine the role of the Supreme Court in the protection of human rights in South Sudan in the light of Pagan Amum's case which was the first high profile constitutional case ever in the Country. It examines the jurisdiction of the Court, its arguments and reasoning upon which the ruling was founded, and how it had interpreted the doctrine of exhaustion, as well as whether the Court had complied with the Bill of Rights under the Constitution and the regional and international human rights jurisprudence in terms of the concept of available remedies as well as examining the ouster clause used by the Court. It critically highlights the significance of the reforms needed for the Judiciary to perform its mandate and how the Court can advance the concept of the principle of universality of human rights in promoting and protecting the rights of individuals within the Country.

Keywords: *Supreme court, Human rights, Doctrine of exhaustion, Remedies, Ouster Clause*

Corresponding Author: Mut Turuk

Background to the Study

Since South Sudan's independence in July 2011 from Sudan, the issue of human rights has been very critical and controversial and even developed into a horrific situation during the current non-international armed conflict which has recorded gross and widespread human rights violations in the country. On 23 July 2013, the Respondents issued an order number 01/2013 by suspending the Petitioner's activities from the ruling party and at the same time forming an investigating committee to probe the Petitioner on the grounds of alleged mismanagement of the ruling party's affairs. Subsequently, on 25 July 2013, the Respondents issued an order number 02/2013 as a standing order to be observed by the Petitioner during the probe prohibiting the Petitioner as follows:

In exercise of power conferred upon me under Article 25(1)(9) and (k) of the SPLM Constitution 2008, I General Salva Kiir Mayardit, Chairperson of the SPLM, do hereby issue the chairperson standing orders to be observed by the Secretary General while under investigations hereunder: (1) not to make any press conference or address any media whatsoever, (2) not to travel outside Juba until the investigation is completed and the report is submitted accordingly, (3) observe the general provisions of the SPL Minterim basic rules and regulations, 2006.

On 7th August, 2013, this petition was filed before the Supreme Court because it is the only court with exclusive jurisdiction to hear all applications seeking constitutional remedies in the Country. The Petitioner had sought from the Court to declare that the acts of the Respondents were unconstitutional and that the Respondents' acts were contrary to the provision of article 24 of the Constitution, and that the Court should declare that the Respondents had acted unconstitutionally by prohibiting the Petitioner "not to make any press conference or address any media whatsoever, and not to travel outside Juba until the investigation is completed and the report is submitted accordingly," and that the Court should declare that the provisions of the ruling party's constitution has no force of law. Furthermore, an application for temporary injunction was also filed before the Court under section 166 of the Code of Civil Procedure Act, 2007 for the Court to grant a temporary injunction order against the Respondents stopping them from continuing breach of the rights and fundamental freedoms of the Petitioner so that the Petitioner does not suffer any irreparable injury should the ruling be pronounced in his favor.

The Supreme Court and the Protection of Human Rights: The Pagan Amum's Case

Jurisdiction

The Court is mandated under article 126(2) (k) of the Constitution as the custodian of the Constitution as well as state constitutions, and particularly, the Bill of Rights which is defined to be the covenant between the people of South Sudan and their government at all levels, and that all stakeholders are committed for the promotion of human rights and fundamental freedoms at all level. It is also defined as 'the cornerstone of social justice, equality and democracy'. The Constitution also strongly declares that 'all rights and freedoms of individuals and groups provided under the Bill of Rights shall be respected, upheld and promoted by all organs and agencies of government and by all persons' and such include non-state actors like

political parties. Exclusively, the Court is also mandated under the Constitution to "uphold and protect human rights and fundamental freedoms" as well as to hear all constitutional applications on the grounds of any alleged constitutional rights violations and remedies. Such jurisdiction was also consolidated by Article 9(4) of the Constitution that the Bill of Rights "shall be upheld by the Supreme Court and any other competent courts as well as monitoring and investigative role and function of Human Rights Commission" of South Sudan. With such mandate the Court is the only court in the country with exclusive and original jurisdiction to hear and rule on all constitutional matters which are based on human rights infringements. In other words, it is a court of first and final judicial instance as far as human rights claims are concerned. And therefore, the human rights litigants have found it difficult and completely seen by practitioners in legal fraternity as a frustrating procedure considering the size of the Country and the distance from other states to the capital city which is the seat of the Court and the cost involved. Such procedure is to be perceived to be either it is deliberately designed by the lawmaker to shield the government and non-state actors from bearing consequences of their human rights violations or acts. Such provisions serve as claw clauses that prevent human rights litigants from access to the Court, or unknowingly it could be lack of having people with relevant expertise and experience in the area of international human rights law.

Merely, such a situation could be concluded not only as a setback to the development the protection of human rights in the Country but it could be a total denial of the fundamental rights of justice seekers. The lawmaker should have created a judicial system that at least provides two appellate stages beside the court of first instance so that the parties can resort to should they feel unsatisfied with rulings. Therefore, it is a clear conclusion that the country's judicial system lacks minimum standards to apply for protection of human rights when compared to other regional and international jurisprudence. And as such, the *raison d'être* of the protection of human rights under the Constitution is defeated despite the fact that article 20 of the Constitution guarantees the right to litigation to all persons in the country.

Procedure, Doctrine of Exhaustion and the Ruling of the Court

As the practice and procedure in many common law jurisdiction in which highest courts are guided by separate rules and orders of procedure. The Supreme Court of South Sudan has no rules of procedure that guide it when it comes to filing of cases or petitions since its creation, the only procedural law is the Code of Civil Procedure Act, 2007 which applies to all civil cases before all courts in the Country including the Supreme Court itself. Law and rules of procedures should have been adopted to regulate the procedures and functions of the Court as provided for by the Constitution; nevertheless, the Court has been operating without law and rules of procedure since its creation in 2005.

As to the jurisprudence, the South Sudan's legal system is inherited from Sudan. For example, non-hearing of cases at appellate courts still exists being practices up to date unlike many common law jurisdictions whereby cases are being heard at appellate level. In most cases, the appellate courts in South Sudan only allow written submissions from litigants. The fatal mistake the Court had made deliberately or unknowingly was the decision to hear the petition with a bench of three judges instead of the bench of nine judges as mandatorily spelt out by the

Constitution with condition that such constitutional panel should be headed by the Chief Justice (CJ) himself. Despite the fact the Court acknowledged the provision of article 126(2) (k) in its ruling that it was sitting as a constitutional panel. Thus, the question is if the Court was sitting as a constitutional panel, why determining the petition with a bench of three judges? As a matter of fact, the reason could be attributed to many factors; for example, the serious question is the independence of the judiciary affairs due to political interference by the government agents and/or non-state actors and the environment in which the case was brought in 2013 at the time when there was a fierce political rivalry within the ruling party was boiling up in which the Petitioner and Respondents were involved. Such influence and interference into the judiciary affairs were evidenced by the C J's reaction immediately after the petition was filed in the morning of 7 August 2013. He (CJ) acted furiously and unprofessionally in what was interpreted as a direct influence of the executive, its agents or non-state actor's interference into the judiciary's affairs. The CJ's reaction came when he learnt that the Petitioner had addressed the media within the judiciary compound immediately after filing of the petition. Such a hysterical reaction from the CJ was an indication that the independence of the judiciary was just a mere provisions in the Constitution because if the Petitioner was prohibited from addressing media by the Respondents what would be the legal effect of such decrees? His reaction was perceived to be directed by the executive as well as non-state actors although he was aware that the Petitioner was in court to challenge the same grounds in which such orders were issued by the respondents despite his knowledge that the orders was issued by the first respondent in his capacity as the chairman of the ruling party and not even as the Head of State.

Notwithstanding, the order was executed by government agents though it lacks force of law. Such behavior from the top of the judiciary was widely criticized even within legal fraternity in South Sudan as well as in the region. In other words, it was like saying that the Judiciary is not completely separate from the executive and the Petitioner should also be prohibited from addressing the media at the judiciary's compound in accordance with the Respondents' order. Such react was considered to be a signal that the Court could not rule against the Respondents whatsoever, and that incident reflected negatively on the credibility of the judiciary in the Country. The CJ's rejection of the Petitioner briefing of the media about his petition at the judiciary's compound in that hysterical manner was not only unprofessional and unethical but also a denial of the Petitioner's right to enjoy the right of equality before the law and his entitlement to equal protection before the law without discrimination as to political opinion. Therefore, the Court could have provided the Petitioner with equal protection without fear or favor from the Respondents. The addressing of the media at the judiciary compound should have been the protection which the Court could offer as far as the right of equality before the law is concerned. The manner in which the CJ represented himself was a complete demonstration of political interference into the judiciary affairs and it was a total gross infringement of the principle of the independence of the judiciary which is enshrined in the Constitution.

Eventually, knowingly or unknowingly or perhaps on intimidation and interference which was demonstrated by the conduct of the CJ, the Court decided to continue determining the petition with a bench of three judges, not with standing the provisions of the Constitution are

accessible. And the petition should have been heard by a bench of not less than nine judges chaired by the CJ.Therefore, the Court should have constituted itself when determining constitutional remedies into a bench of not less than nine judges chaired by the CJ. Furthermore, the Court had contradicted itself in its ruling which was written in both Arabic and English languages by admitting that it had jurisdiction under section 306 of the Code of Civil Procedure Act 2007 to hear all constitutional petitions and by acknowledging that it is a constitutional panel however, it failed to adhere itself to the provision of Article 126(3) of the Constitution read together with section 306 of the Code of Civil Procedure Act 2007 that gives the Courta mandatory directive to constitute itself as a bench of not less than nine judges chaired by the CJ whenever a constitutional remedy is sought. It has also failed to give substantiated justification as to why it had determined the petition in a panel of three judges rather than a full constitutional panel of not less than nine judges?.

In its argument on whether the petition had complied with the provisions of section 308(c) of the Code of the Civil Procedure Act 2007 which provide a precondition on whether or not a petition is admissible? Or in other words, whether or not there is a cause of action? Saeed SCJ who was one of the panelists had to say the following in his reasoning for the dismissal of the petition:

It is clear from the provisions of section 308(c) of the Code of Civil Procedure Act 2007 that a constitutional petition in regard to any alleged violation of any right or freedom enshrined in any law, international instrument or Constitution of South Sudan, the Court must find out as to whether the petitioner had exhausted all the remedies available or not? If we consider the Interim Basic Rules and Regulations of the ruling party and its constitution of 2008, we would find that the ruling party has organs in a hierarchal order. And as such, any issue for debate within the party should be decided by majority in accordance with the rules and regulations. Therefore, the question is, did the petitioner exhaust the available remedies within the party's organs, for example, did he seek remedy before the National Political Bureau in accordance with the provisions of section 19(2) of the party's constitution? The answer is negative, as such, and pursuant to the provisions of section 308(c) of the Code of Civil Procedure Act 2007, as cited above, the petition could be premature to be admitted because the petitioner did not exhaust all available remedies within the party's organs before seeking court remedies, and therefore, the petition is dismissed accordingly.

As Saeed, SCJ stated in his argument, section 308(c) states the application shall be dismissed if'…the applicant has not exhausted all the remedies available to him or her'. The Court had directed itself in its arguments to justify its ruling to the issue of the 'doctrine of exhaustion' under sub-section (c) of section 308 of the Code of the Civil Procedure Act2007 whether a petition could be inadmissible or summary dismissed. The provision of section 308(c) states that "the Court shall dismiss the application, and record the reasons for such dismissal, where it appears to the Court that: the petition does not disclose any clear infringement of any constitutional rights or that the application has not exhausted all the remedies available to him or her". Based on its arguments, the Court did not discuss the first part of sub-section(c) that provides for the disclosure of "clear infringement of any constitutional right" because the Court

was convinced that there was a sustainable constitutional ground for the petition. However, the Court focused its arguments on the second part of the sub-section(c) which states that an application could be dismissed if the petitioner "has not exhausted all the remedies available to him or her". And hence, the Court did not discuss or explain thoroughly and extensively what type of the doctrine of exhaustion it meant? Probably, the intention of the Court could have been to discuss the doctrine of administrative remedies; if so, what type of administrative remedies available within the ruling party structure or hierarchy? The Court also did not consider the fact that the ruling party was a co-respondent in the case. Furthermore, the Court did not ask itself as to whether those administrative remedies were available and effective within the ruling party structure and could justice have been delivered without reasonable delay had the Petitioner resorted to it? The starting point for critical analysis of the Court ruling should have started with the question of; what does the term "Administrative remedies" mean? Administrative remedies "is defined as a non judicial remedy provided by an agency, board, commission or any other like organization". And with that definition, the ruling party could by an organization or a non-state actor in that sense. In connection to the Court's arguments and reasoning in the ruling, the administrative remedies available must be exhausted before a court takes jurisdiction of the case. For example, the US district courts "will not consider a social security case unless all hearing, appeal and other remedies that is available before the social security administration is exhausted". The main question which the Court should have been asked before coming to the conclusion for dismissing the petition is whether or not there are available remedies within the ruling party structure and whether justice could have been served to the Petitioner without any reasonable delay had he resorted to the alleged administrative remedies within the party?

Arol DCJ, who was the president of the panel admitted in his arguments and reasoning that the jurisdiction lies on the Supreme Court as far as constitutional remedies sought are concerned and that was in contrast to the constitution of the panel as required by the Constitution? So the question of "the jurisdiction is therefore not in dispute", said Arol in his argument. Nevertheless, Justice Aroltried to differentiate between the first Respondent (President Kiir) and the second Respondent (the ruling party) in an attempt to disprove the petition from its grounds but he felt short to discuss whether or not a non-state actor like the ruling party and its chairman can infringe human rights?.

Section 18(1) of the Political Parties Act 2012 which was cited by the Court seems to be irrelevant because it states that: political parties shall have constitutions and regulations containing objectives, programs, organizational structures and financial administration organs which shall not be inconsistent with provisions of the Transitional Constitution of the Republic of South Sudan or this Act and applicable regulations specifically, political parties' constitutions…

However, the provision of section 18(1) does not mention anything related to individuals' constitutional rights. However, if the Court was trying to discuss or interpret section 18(1)(d) which states that "specially, political parties" constitutions shall include…: "(d) conditions for membership, procedures for joining the political party, resignation, dismissal and rights and

obligations of its members". It is axiomatic that the provision of section 18(1) (d) of the Political Parties Act 2012 does not provide any constitutional rights as stipulated under the Bill of Rights in the Constitution. That is to say, the rights and obligations under any organization's constitution are not the same to the rights and obligations provided under the Constitution. For example, a right of membership of the political party is not equivalent to the right of citizenship in the Constitution. And as such, the Court failed to substantiate its argument ad reasoning by citing section 18(1) (d) which is totally irrelevant in this regard.

The Court also tried to justify its ruling by citing section 13(2) of the Political Parties Act2012 that gives the Council of Political Parties (hereinafter 'the Council') a right to "(a) receive complaints from party members relating to application of this act and/or the constitution of any political party; (b) investigate and take decisions concerning such complaints; (c) demand that all political parties comply with the Transitional Constitution of South Sudan 2011, laws, regulations and obligations set forth in the Act". Notwithstanding the Court did not question whether the orders of the Respondents against the Petitioner were in compliance with the Constitution? If this is one of the available remedies which the Court urged the Petitioner to seek before filing his petition before the Court, a question may arise here, could the Council provide remedy to the Petitioner against the Respondents? By furthermore, the Court also failed to elaborate further by explaining what it termed as 'sufficient remedy" which the Petitioner could have got from the Council had he resorted to it.The Court also attempted to interpret the provisions of the ruling party's constitution in an attempt to give more reasoning weight to its ruling. It had misquoted section 14(1) (c) which provides that 'the functions of the National Convention shall be to: review, ratify, alter or rescind any decision made by the National Liberation Council' instead of section 16(5) of the SPLM Constitution that states that "the National Liberation Council shall be an appellate authority on the loss of membership of the SPLM". In what could be unreasonable error of the Court, the provision of section 16(5) of the ruling party constitution is providing for the "loss of membership" and absolutely not about violation of individual rights under the Constitution 2011. Understandably, the provision of section 14(1) (c) of the ruling party's constitution provides for the functions of the National Liberation Council as the highest organ within the party which conduct its convention annually. The Court did not explain whether it means that the Petitioner should have resorted to the National Liberation Council for available remedies when it is convened after a year.

Doctrine of Exhaustion, Human Rights and Jurisprudence

Analyzing the doctrine of exhaustion, first and foremost, what is the concept of doctrine of exhaustion? And how is it interpreted in light of the protection of human rights? Can a court with exclusive jurisdiction at national level reject the petition because other local remedies were not exhausted when it comes to the protection of human rights? Were those remedies "judicial" or "non-judicial" in nature? Were those remedies in practice available, effective and sufficient to address the petitioner's claims?

Notwithstanding the Constitution of South Sudan states that "all rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified or acceded

to by the Republic of South Sudan shall be an integral part of this Bill", the Court did not even attempt to look into international human rights treaties even though the youngest country is behind in term of ratifying and acceding to the most of the African human rights instruments leave alone international instruments; however, the Court could at least provide a clear interpretation of the concept of local remedies or the doctrine of exhaustion as far as the application of human rights is concerned in accordance with the provisions of article 9(3) of the Constitution.

The concept of the exhaustion of local remedies has been a long practice under international law and it was meant for giving a state an opportunity to address any claim by aliens within its territory through its domestic legal system. Later on, the same concept was transferred and applied into the protection of human rights. Thus, national courts were given an opportunity to address any human rights claims with their domestic legal system before resorting to any other regional or international human rights tribunal. For example, article 56(5) of the African Charter of Human and People's Rights states that communications relating to human and people's rights received by the African commission "shall be considered if they are sent after exhausting of local remedies, if any, unless it is obvious that this procedure is unduly prolonged".

The petition of MrAmumwas dismissed by the Court on the grounds that it did not exhaust all available remedies within the ruling party organs. Therefore, the question is, were those remedies available, effective and sufficient? And what type of remedy the political party organs can provide? Can it provide judicial remedies to address any question of the infringement of constitutional rights under the Bill of Rights in the Constitution? If so, what type of remedies could the ruling party organs provide to the Petitioner? It is imperative to acknowledge that the practice of the African Commission on Human and People's Rights (hereinafter "the Commission") declared in several occasions that "remedies are unavailable and ineffective if they are non-judicial or discretionary and their accessibility had been affected or ousted by provisions of the jurisdiction". In *the Constitutional Rights Project v Nigeria*, the Robbery and Firearms (Special Provision) Decree of 1984 did not allow for judicial appeals against decisions of special tribunal. The Commission considered the remedy as non-judicial and discretionary in nature and that it did not require exhaustion because it lacks effectiveness and that:

The Robbery and Firearms Act entitle a governor of a state to confirm and disallow the conviction of the Special Tribunal…This power is to be described as a discretionary extraordinary of a non-judiciary remedy. The object of the remedy is to obtain a favor and not to vindicate a right. It would be improper to insist on the complainants seeking remedies from sources which do not operate impartially and have no obligation to decide according to legal principles. The remedy is neither adequate nor effective…Therefore, the Commission is of the opinion that the remedy available is not of a nature that requires exhaustion according to article 56, paragraph 5 of the African Charter.

In a similar case of *Achuthan and Another (on behalf of Banda and Others) v Malawi*, the available remedy was considered mostly discretionary where the complainant Aleke Banda was being

held on executive order of the head of state. In another case of *Avocates Sans Frontieres v Burundi*, and in response to the argument by the state party the complainant had not exhausted other remedies including the plea for pardon, the Commission held that a "pardon is not a judicial remedy". Therefore, it is crystal clear from the jurisprudence of the Commission that the local remedy must be effective; first and foremost, it must be of a "judicial" nature and must be founded upon "legal" principles. Secondly, it has been proved that any influence or intervention on the part of executive organ of the state party renders that available remedy ineffective. These two elements were clearly mentioned in the case of *Amnesty International and others v Sudan*, the Commission held that:"In case of violation against indentified victims, the Commission demands the exhaustion of all internal remedies, if any, if they are of the judicial nature, are effective and not subordinate to the discretionary power of public authorities".

Thirdly, it is important to emphasize that the Commission had used an objective test rather than a subjective test in its ruling to determine the existence and effectiveness of those domestic remedies. Thus, the 1991 case of *Civil Liberties Organization v Nigeria* came as a result of the inaccessibility of domestic remedy whereby the Nigerian State Security and Detention of Persons Decree was granted immunity from legal proceedings before any court for human rights violations committed in pursuant to the decree. Such clause was considered by the Commission as ouster clause of the jurisdiction of the courts, and similarly, the Court could have applied the same objective test as it was held by the Commission by considering the provisions of article 308(c)of the Code of the Civil Procedure Act 2007 as ouster clause. And such ouster provision "does not exclude the court's intervention in a case where there is a merely purported determination given in excess of jurisdiction".

The Court should not allow itself to be barred from granting judicial remedy merely because of the so called ouster provision under article 308(c)of the Code of Civil Procedure Act. Such ouster provisions would not only serve as a shield for the State and non-state actors rather as a denial of individuals from seeking judicial remedy as well as a clear denial of the rights to access to the Court by making the anticipated judicial remedies unavailable and non-existent. Furthermore, it raises a significant question as to the constitutionality of that ouster provisions under article 308(c) of the Code of Civil Procedure Act. The Commission has defined the criteria for application of the local remedy rules or exhaustion of available remedies as it spelt out that they must be "available, effective, and sufficient". Furthermore, the Commission has explained that "a remedy is considered available if the petitioner can pursue without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint".

In the basis of these criteria, the Commission concluded that ouster provision as negating and affecting the availability and effectiveness of local or available remedies is that: A remedy is considered available only if the applicant can make use of it in circumstance of his case …[R]emedies, the availability of which is not evident, cannot be invoked by the State to detriment of the complainant. Therefore, in a situation where the jurisdiction of the courts have been ousted by decree whose validity cannot be challenged or questioned, as is the position with the case under consideration, local remedies are deemed not only to be unavailable but also non-existent.

Findings

In the findings of this paper, it is obviously clear that the Court should have set a leading precedent by interpreting section 306(c) and particularly by considering the environment in which this case was filed and the parties involved. It should have gone further to analyze the exceptions to the doctrine of exhaustion on which if the environment and parties to the case are considered, the petition should have been admitted. The Court should have justified its arguments and reasoning only if the Petitioner was seeking reinstatement of his membership into the ruling party or if his petition was seeking normal administrative remedies. For example, the Court's arguments could have been justifiable if it was determining the petition on the grounds of arbitrary dismissal of an employee without being given a notice for the termination of his or her contract. It is of a great shock for the highest court of the land to poorly make such a ruling despite its knowledge that it is the only court of first and last judicial instance. The Court should have differentiated between normal workers complaints on which administrative remedies are sought and the violation of human rights and fundamental freedoms under the Constitution as well as bearing in mind that its exclusive jurisdiction on issues related to human rights and constitutional matters.

Furthermore, failing of the Court to correctly interpret the concept of the doctrine of exhaustion and its exceptions raised a serious question about the competence and capacity of the judges involved in the bench as far as their understanding about the protection and enforcement of the Bill of Rights under the Constitution, the application of regional and international human rights law as far as the universality of human rights is concerned. It could look into the interpretation of the application of regional and international human rights using the theories of international law and the national law system such as the doctrine of incorporation which has been adopted by South Sudan under article 9(3) of the Constitution.

For example, the Court could ask itself of what sort of remedies the Petitioner could get had he resorted to the ruling party's organs? Could justice be provided to the Petitioner against the Respondents who is the Chairman of the party in that environment of rivalry within the ruling party? Failure of the Court to examine the exceptions available to the doctrine of exhaustion was considered as a denial of the protection of human rights and fundamental freedoms not only to the Petitioner's but to everyone who may seek constitutional remedies in the Court on the grounds of alleged violation of human rights and fundamental freedoms. And particularly, the dismissal of the petition was a denial of the access to court and justice by itself. It is worth mentioning that the Supreme Court is the only court mandated to uphold and protect human rights and fundamental freedoms even though article 9(4) of the Constitution gives other competent courts a jurisdiction to uphold human rights but such provision has not been operationalised, and by not doing so, it is a setback in the sense that the Court was created to protect and enforce human rights concepts in the Country as a human rights national institution.

Hence, the competence of the constitutional panel if not all judges of the Supreme Court could be questionable as far as the interpretations of legal provisions, doctrines, the position of the law and the concept of the protection of human rights are concerned, because the provisions of

any law should not be interpreted to deny litigants the rights of access to court which by itself is a fundamental right recognized under international law. And indeed, most of the international law writers consider that most of the provisions of international human rights have become customary international law or *jus cogens*. And that could have been a good reason for the Court to either question the constitutionality of section 308(c) of the Code of Civil Procedure Act 2007 or apply the exceptions of the doctrine of exhaustion without denying the Petitioner access to justice. Had the court not misguided itself knowingly or unknowingly, this case could have been a leading precedent for interpretation of legal provisions and doctrines of exhaustion as far as the protection of human rights is concerned, and particularly, the last part of section 306(c) of the Code of Civil Procedure Act 2007 which provide that the petition can be dismissed if"…the applicant has not exhausted available remedies to him or her" by considering the exceptions of the doctrine of exhaustion as it is the practice in the regional and international jurisprudence. The Court should understand that it is mandated under article 126(2) (d) of the Constitution to "adjudicate on the constitutionality of laws and set aside or strike down laws and provisions of laws that are inconsistent with this Constitution…", and as in the analysis cited above, any remedies provided under any political party constitution are not of a judicial nature and therefore, they are not only unavailable rather non-existent as they as subject to the discretion power of the ruling part organs.

Conclusion

In conclusion, and as read in the arguments advanced by the Court to justify its ruling for the summary dismissal of the petition, the Court urged that the dismissal was on the grounds of the failing of the Petitioner to exhaust available remedies to him under the ruling party constitution and its rules and regulations as it has come from its ruling by saying that" it is clear that the Constitution of the SPLM and its rules and regulations provides for remedies that the applicant is seeking from the constitutional panel of the Supreme Court". The Court did not clearly explained which remedies available within the ruling party organs despite the fact that it has erred by misguiding itself in several occasions through its arguments and reasoning making unnecessary contradictions and inconsistencies including misquoting of the provisions which are irrelevant. The fatal contradiction to be mentioned as discussed above is the failing of the Court to constitute itself as a constitutional panel before examining the petition as a dictated under article126(3) of the Constitution. Nevertheless, it has considered itself as a constitutional panel in its ruling.

The Court also failed to interpret the provisions of section 306(c) of the Code of Civil Procedure Act 2007 by interpreting the meaning of sub-section(c) which provides that the court shall dismiss the application if"…the applicant has not exhausted the available remedies to him or her". it has felt short to explain what type of remedies exist within the ruling party, if any, as well as it has failed to follow any regional and international jurisprudence or even citing any relevant cases in its ruling as well as it was completely silent about the general concept of the doctrine of exhaustion and its exceptions. The Court also miserably failed to interpret and ruled on the ouster provisions that restrict not only its exclusive jurisdiction on matters related to human rights and fundamental freedoms but its inherent power to adjudicate.

Recommendations

Finally, as the Country has been witnessing a critical and controversial human rights record and with existing of incapacitated and dysfunctional judiciary that has undermined its credibility not only in the eyes of the people of South Sudan but before regional and international human rights observers, the judiciary must be given attention for a comprehensive reform. Such reform must include human rights capacity building, particularly in the area of regional and international human law; it should include a comprehensive review of the judiciary Act 2009 such that the provisions for the appointment be reconsidered with more transparent procedures as well as repealing or abolishing the promotion of the judges so that the qualified junior judges and lawyers with expertise in regional and international human rights law get through into the highest courts in a free and transparent competition instead of maintaining incompetent and pensionable judges who are not able to appreciate the development of human rights. The reform must come as a holistic approach for addressing rule of law sector in the country.

And most importantly, the reform must include removing of original jurisdiction for adjudicating on human rights applications from the Supreme Court down to subordinate courts. Such jurisdiction or power for determining constitutional petitions should start at High Court as court of first instance such that litigants can have another appellate level before reaching the Supreme Court as the final appellate court in the Country. Such holistic approach must include a legislative reform for reviewing all provisions that are not complying with the provisions of the Constitution for guaranteeing the independence of the Judiciary as well as realizing the compliance of legislations with the Constitution.

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