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# The Accused Privacy Rights in the Sudanese Legal System

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**Abstract**

The purpose of this article is to discuss the rights of the accused person in the Sudanese legal system. Similar with other criminal justice systems, the Sudanese law do provide rights for the accused person to enable him or her to defend him or herself. These rights are considered as the core idea behind the thinking of human rights in the criminal proceedings. However the problematic issue here is to what extent does Sudanese law provide and protect the accused right especially the privacy right. It is also pertinent to balance the law enforcement interest in evidence collection in criminal proceedings with the privacy right of the accused in the Sudanese legal system. We found that there are evidence of privacy right protection on the accused within the Sudanese legal system. The result of this research shows that in Sudan, the privacy right was provided for the first time at the constitutional level in the T1973 Constitution (Articles 42 and 43). It has later received recognition in the 1985 Transitional Constitution (Articles 24 and 30), the 1998 Constitution (Article 29) and the 2005 Interim National Constitution (Article 37). At the statutory level, legislative protection is given to this right in the Penal Code 1991 (Section 166), the Code of Criminal Procedure 1991 (Sections 86 through 95) and the Informatic Offences (Combating) Act 2007 (Sections 16 and 6). The method adopted in this article is a qualitative content legal analysis of primary and secondary data obtained from legislation, case-law and various literature.

**Keywords:** Sudanese criminal procedure code, privacy right, accused persons, Sudanese Constitution and statutes

## 1. Introduction

The development of penal laws in Sudan brought the current Code of Criminal Procedure (CCP) into practice, which was enacted in 1991. In this law, the rights of the accused including one's privacy right in the process of evidence collection in criminal proceedings are clearly provided. Some of the rights of the accused person extend through the whole process of the criminal proceedings while other rights are limited to a certain stage or stages of the criminal proceedings. These include the due process of the law, the presumption of innocence, the right to be informed of the grounds of arrest, the right to counsel, the right to a speedy trial and the right to call a witness, to mention a few. In addition, the accused also enjoys the privacy right which requires reasonable searches and seizures. The discussion in this article will also focus on the right to silence and the privilege against self-incrimination as examples to other rights (O'Sullivan, 2007; Seidman & Stein, 2000).

Regarding the right to silence, the accused person should be told that he or she is not required to say anything unless he or she wishes to do so, and that what he or she may say could be used as evidence against him or her. Suffice it to say here that section 5 (g) of the Sudanese Evidence Act 1994 guarantees this right to the accused person. However, section 98 of the Penal Code 1991 stipulates that "Whoever required by a competent public servant to answer questions which he is bound by law to answer or to sign his statements and refuses to do shall be punished with imprisonment for a term not exceeding one month or with fine or with both". This means that a person being investigated by police officer may face penalty if he or she chooses to refuse to answer a question posed to him or her by the investigating officer (Oette, 2011). This shows that the Sudanese law does not fully observe the defence rights of the accused person in line with the general rights and freedoms provided in the *Bill of Rights* in the Interim National Constitution (INC) 2005.

For the privilege against self-incrimination, (Frahany, 2012; Gerstein 1970) the Sudanese law, does not fully

recognize the right to silence. It also inflicts a penalty on the person being investigated by the police if he or she chooses to refuse to answer a question posed to him or her by the investigator by virtue of Article 98 of the Penal Code. This means that the privilege against self-incrimination is not guaranteed in the Sudanese legal system as the CCP does not provide that the accused be informed before the start of the interrogation with his or her right to silence. There are also no judicial precedents exist in this respect. This means that the accused is compelled to testify against him or herself. However, compelling the accused to testify against him or herself is inconsistent with the Constitution and the CCP. Article 14 of the International Covenant on Civil and Political Rights provided the accused person with this privilege. Paragraph (3) (g) states that "in determining of any criminal charge against the person, he shall not to be compelled to testify against himself or to confess guilt". This provision is acknowledged in Art 27/3 of the INC on the *Nature of the Bill of Rights* which states that "all rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of the Sudan shall be an integral part of this Bill". The ICCPR is one of these international covenants.

In the Sudanese Code of Criminal Procedure, Section 4 (d) states that "it is forbidden to intrude into the accused's person or his wealth nor the accused be compelled to testify against himself". However, despite been providing similar provision to Art 14 (g) of ICCPR, it further allows the accused to testify against himself in the same Section 4 (d) as it states that "nor the accused be asked to take an oath except in non-*hudud* crimes that the rights of others are related to". Here, asking the accused to take an oath means compelling him to testify against himself. The CCP provision is inconsistent with the Constitution. It should be nullified by the legislature and ignored by the courts until be nullified. Providing this right in the Constitution does not mean that the accused enjoys it unless it is provided in the CCP.

The Supreme Court in Sudan despite been bound by virtue of Art 48 of the INC and Section 6 (2) of the Interpretation of Laws and General Clauses Act 1994 to ignore statutory provisions inconsistent with the INC, it refused to do so in a number of cases. (Abdalla, 2015) Section 6 (2) states that:

> "If any provision in any law is inconsistent with any provision of the Constitution the provision of the Constitution shall prevail to the extent of such inconsistency".

In addition, Section 10 of the Evidence Act 1994 states that:

> "… the evidence should not be inadmissible merely because it had been obtained through illegitimate means once the court is satisfied that it is independent and acceptable. The court, whenever it sees that it is suitable to the interest of justice, may not base its guilty verdict on this evidence without supporting it with another evidence".

## 2. Methodology

The methodology for this research/article is qualitative. A doctrinal-type of research is used based on secondary library materials including statutes, decided cases, books and journal articles on the topic. The data analysis was performed through a content analysis of the said secondary data to obtain the findings. Provisions of the statutes in operation in Sudan are analysed for the purpose of exploring the areas in which the accused person's right to privacy is not adequately valued vis-à-vis the interest in evidence collection as well as to assess if the latter is balanced with the former. In addition, court decisions and scholarly works related to this matter were also reviewed and critically discussed. This is a purely legal study which is primarily based on legal analysis. Hence, there is no field work such as questionnaire survey or interviews carried out.

## 3. Results and Discussion

### *3.1 State of Privacy Protection in Conventional Means*

Before proceeding to the state of privacy protection in conventional means, it should be stated that in line with the local values in Sudan, adherence to the concept of privacy, especially home sanctity, is inclined in the subconscious of the Sudanese people. This can clearly be noticed in the way rooms in the houses are distributed and doors are located. In his book, *Sudan*, Clammer (2009) described in details how houses in the country are designed and built in observance of the privacy of the occupants. He mentioned that houses have separate entrances to the family members and guests.

Although privacy as a concept is not known to a large majority of the population in Sudan and that no many privacy violation claims, to the best of the authors' knowledge, are heard by courts in the country, people in urban as well as rural areas live and interact in their daily life and societal relationships within the limits and guidelines of privacy. These limits and guidelines are partly stemmed from the Islamic teachings but mainly rooted in societal norms. They are partly Islamic as Islam is considered the religion of the country especially after the separation of the Southern part of Sudan in 2011. Prior to this development, the country is considered

by the Interim National Constitution (INC) as being multi-religious with Islam been the religion of the majority, thus all social ties and activities are made under this large religious umbrella. Article 1 (1) of the Interim National Constitution of Sudan 2005 states that "The Republic of the Sudan is an independent, sovereign state. It is a democratic, decentralized, multi-cultural, multilingual, multi-racial, multi-ethnic, and multi-religious country where such diversities co-exist".

Even with the non-Muslim community in the country these issues are considered to be communal in nature as people usually behave in observance of what may please or displease others in the neighbourhood or community at large. The protection of privacy in any jurisdiction might be provided in the constitution, civil claims or statutes (Hassan et al, 2018; Hassan & Bagheri, 2016, Yaakob 2016; Safavi & Syukur 2014; Hassan 2012). Privacy protection in the Sudanese legal system is no exception.

*3.2 State of Privacy Protection in the Constitution*

Sudan has seven constitutions since its independence due mainly to the political instability in the country. In the constitutional experience of the independent Sudan, protection of the privacy right has differed from constitution to another. Some of the constitutions enacted in the two decades following the independence gave no interest in the privacy right. These include the ones enacted in 1956, 1958 and 1964. This situation is understandable as the focus in that period was given to more urgent issues and matters that directly affect the daily lives of the people. The privacy right was first articulated in the 1973 Constitution enacted after the signing of the *Addis Ababa Agreement* between the central government of Sudan and the Southerners. In this Constitution, the legislature recognized privacy as a human right. It also provided protection to some privacy aspects, namely, the postal, telegraphic and telephonic communications privacy. Article 42 stated that "The private life of citizens is inviolable. The State shall guarantee the freedom and secrecy of postal, telegraphic and telephonic communications in accordance with the law". Article 43 provided protection to the home privacy. It stated that "Dwellings are inviolable and they shall not be entered or searched without the permission of their occupants, except in cases, and in the manner prescribed by law".

In the Transitional Constitution of Sudan 1985, the privacy right received no explicit mentioning or recognition. Nevertheless, some aspects of the right had been recognized and protected. These include the privacy of correspondence (Article 24) and the home privacy (Article 30). It should be noted here that in response to the above-mentioned provisions, the Sudanese scholar Fadlalla (1988) opined that many other aspects of the privacy right received no protection in this Constitution despite the fact that they are protected in the Penal Code. He argued that the privacy right includes among other things one's reputation. This shows the scholarly mix between the right to privacy and the right to reputation in search of the grounds for privacy. It also ignores the recognition of the right to privacy as an independent right in modern legal systems including the Sudanese law itself.

The right to privacy was also part of the *Freedoms, Rights and Responsibilities* provided in the 1998 Constitution. The original draft of the Constitution was hailed as containing a solid collection of provisions on human rights but when the draft was sent from the President's Office to the National Assembly it contained less human rights provisions compared to the initial draft. In the words of Suleiman and Doebbler (1998), the drafters of the Constitution initially sought that containing these provisions would create a more optimum balance of the powers and increase the authorities granted to the President.

With the title *Privacy of Residence and Communication*, Article 29 provided that "All citizens are allowed freedom of communication and correspondence. Confidentiality is guaranteed and no communication or correspondence may be monitored or recorded except as provided by law. Personal privacy of residence, living quarters, households and family are sacred and they may not be investigated except by permission or as provided by law". It appears from the Article that the Constitution protected the privacy of communications and correspondence against any monitoring or recording. Although the provision gave no mentioning to the wrongdoer, being the law enforcement agencies or individuals, but it should be understood in its broad sense to mean the monitoring or recording done by both law enforcement agencies and individuals.

The Article also provided in details protection to all types of dwellings as well as to the family privacy. Protection of the family privacy is influenced by the policy direction of the legislature. The government relies heavily on its professed commitment to Islamic values and thus the Constitution is described as an *Islamist* constitution (Roald 2011). In addition, Article 29 of the Constitution provided protection to the above different aspects of privacy against what it termed as "investigation" except in the situation whereby there is a permission or law provision that allows it. Although the above provision mentioned the investigation in general but the term investigation should be understood in its narrow sense to mean "entry, search and seizure" as residences, living quarters and households can be entered by law enforcement officials and searched for evidence as part of the

investigation they conduct in a committed offence.

Moreover, Article 34 reinforced the protection of this right and other rights and freedoms. It provided that "Every injured or harmed person who has exhausted all his executive and administrative remedies has the right to appeal to the Constitutional Court to protect the sacred liberties and rights contained in this Part. The Constitutional Court in exercising its authority may nullify any law or order that is not in consistence with the Constitution and order compensation for damages".

With regard to the present 2005 Interim National Constitution (INC), it provides an important part under the title "Bill of Rights", whereby privacy is given explicit recognition. Article 37 of the INC states that:

> "The privacy of all persons shall be inviolable; no person shall be subjected to interference with his/her private life, family, home or correspondence, save in accordance with the law".

This shows that the current Constitution explicitly protects the different aspects of privacy including one's person, his family, his home and his correspondence. Violation of privacy according to this provision is only allowed when the law permits. The above protection is reinforced in Article 27. Paragraph 2 states that "The State shall protect, promote, guarantee and implement this Bill". In addition, paragraph 4 requires that the rights and liberties included in the INC be regulated in statutes as well as not to be detracted or derogated. It stipulates that "Legislation shall regulate the rights and freedoms enshrined in this Bill and shall not detract from or derogate any of these rights". Moreover, as stated earlier, the government is abided under Article 27 (3) not to intrude into the rights and liberties protected in international human rights instruments. It provides that "All rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of the Sudan shall be an integral part of this Bill".

Pursuant to this provision, Sudan is bound to observe the privacy right as enshrined in the international and regional human rights instruments. These include Article 12 of the Universal Declaration of Human Rights (UDHR) which states that:

> "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks".

In addition, they include Article 17 of the International Covenant on Civil and Political Rights (ICCPR) which contains the same wording of Article 12 of the UDHR. It provides that:

> "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour or reputation. Everyone has the right to the protection of the law against such interference or attacks".

Likewise, Article 8 of the Cairo Declaration of Human Rights (CDHR) provides in details protection to all the aspects of the privacy right. Sudan is a founding member of the Organization of Islamic Cooperation, or OIC (formerly known as the Organization of Islamic Conference) that issued the CDHR. Again, the INC has strengthened the protection of the privacy right with another provision similar to that found in the Transitional Constitution 1998 which gives the injured or harmed person the right to appeal to the Constitutional Court to protect his or her constitutional rights. It also vested the Human Rights Commission with the authority to monitor the adherence to these rights and freedoms. It states in Article 48 that:

> "Subject to Article 211 herein, no derogation from the rights and freedoms enshrined in this Bill shall be made. The Bill of Rights shall be upheld, protected and applied by the Constitutional Court and other competent courts; the Human Rights Commission shall monitor its application in the State pursuant to Article 142 herein".

From the above discussion, the privacy right has received recognition and protection at the constitutional level in the experience of Sudan. This has started with the 1973 Constitution and continued in the subsequent constitutions, with the 2005 INC being the constitution in operation. In the recent two constitutions, the Transitional Constitution 1998 and the INC 2005, the protection had been reinforced and strengthened with giving the injured or harmed person the right to appeal to the Constitutional Court. The house is provided with this protection in recognition of its importance for all the occupants and their family members to enjoy their domestic privacy and to be free from the intrusion of others through prying into the house to see what is inside it or overhearing the conversations taking place there.

Although Article 37 of the INC provides no explicit mentioning to privacy protection against the invasion made by law enforcement agencies in criminal proceedings, the provisions contained in the INC are general as to

include invasion by both private individuals and law enforcement officers in their gathering of evidence. Thus, it protects the person, his home and his family against entry by law enforcement officers for the purposes of search and seizure. As indicated earlier, protection of the house is provided regardless of the place where the house is located, the material of which it has been built or the design it takes. Interestingly, the INC stated in Article 156 (c) that "personal privacy is inviolable and evidence obtained in violation of such privacy shall not be admissible in the court of law". Paragraph (c) comes after the legislature stated that:

> "Without prejudice to the competence of any national institution to promulgate laws, judges and law enforcement agencies shall, in dispensing justice and enforcing law in the National Capital, be guided by the following:".

Thus, paragraph (c) is criticized for been restricted in its jurisdiction to the National Capital. The protection also included the communications and correspondence privacy, with the 1973 Constitution gave special reference to the communications and correspondence means used at that time including post, telegraphy and telephony. This protects the contents of the letters sent by post, the messages sent by telegraphy and the telephone conversations from being monitored or recorded. The provision should also be understood in its broad sense to include the monitoring or recording done by law enforcement officials or individuals. However, the different constitutions enacted in the country since its independence gave no mentioning or reference to the privacy of data or information.

*3.3 State of Privacy Protection in Civil Claims*

The concepts referred to for privacy protection include rules of defamation, trespass, nuisance and breach of confidence. With regard to the rules of defamation, no specific statute on defamation in Sudan exists. Defamation rules are provided in the Penal Code. Section 159 (1) states that:

> "A person is said to commit the offence of defamation who publishes, states or conveys to another by any means facts relating to a certain person or an evaluation of his manners with the intent to harm his reputation".

Compensation for the damage is always connected to the establishment of the defamation case. One of the cases heard by the Supreme Court is the *Government of Sudan v H. A. M. and Others* [2007] SLJR 208 in which the plaintiff pleaded the decision of the Appeal Court of Khartoum that upheld the ruling of the General Criminal Offences Court of Northern Khartoum. In the ruling, the defendant was convicted of committing defamation under Section 159 of the Penal Code and Sections 29 and 37 of the Press and Printed Press Materials Act 2004. After assessing the penal matters with regard to defamation, the court made its decision on the compensation for the damage in the case in terms of its type as well as other requirements. The Court nullified the compensation and returned the case to the court of first instance. Writing for the court, Justice Abdelrahman Mohamed Sharfi stated that for the complainant to receive the compensation for the damage, he should prove the damage, grounds for compensation and elements of damage. The kinship between the complainant and his witness does not forbid the acceptance of the witness' statements unless there is a lie or fabrication in favour of the complainant but he did not prove the pillars and grounds for the compensation. What is judicially consistent is that whenever the damage is proved and the civil claimant demonstrates the grounds and components of the compensation and there is no any hyperbole or extravagance in the calculation of the compensation, the court does not interfere. Here, it should be noted that no claims with regard to privacy invasion were made based on defamation suits.

The position in the Sudanese legal system is similar to what prevails in the US legal system before the mid-1970s. As stated earlier, the year 1974 was a milestone in the disintegration between privacy and defamation claims. The American Supreme Court affirmed this matter in the *Gertz v Robert Welch, Inc.*, 418 U. S. 323 (1974).

With regard to nuisance, the Penal Code in Sudan makes public nuisance a punishable offence. Section 77 (1) states that:

> "A person is said to commit the offence of public nuisance if he commits an act which is likely to cause public damage or danger or inconvenience to the public or those living or working in a neighbouring place or to those who exercise a public right".

Here, nuisance rules as a ground for compensation do not provide effective protection to privacy as they do not protect anyone other than the owner of the premises.

*3.4 State of Privacy Protection in Other Statutes*

The INC requires that the rights and freedoms it has enshrined to be regulated by legislations. Assessment of the

required regulation in this context would be limited to the discussion of the conventional statutes enacted in the country. It should be restated here that in pursuant of this constitutional requirement, regulation of the rights and freedoms by legislations as stated above is essential in all conventional statutes. This means that all the statutes passed in Sudan before the date of the commencement of the INC should be amended to meet this requirement, while the statutes enacted after the date of its enforcement should inevitably observe this provision. Thus, the subsequent discussion of the statutes in operation before the legislation of the INC is conducted not with the purpose of assessing whether or not those statutes are in line with this Constitution but as an overview of the development of the Sudanese legislations with regard to the privacy right.

Yet, in the history of the penal law in Sudan, the privacy right received no attention in the legislations that followed the country's independence in 1956. These include the Penal Code 1974 and the Penal Code 1983. However, the Sudanese law scholar Fadlalla (1988) argued that the 1983 Code had provided protection to some aspects of the privacy right through the protection of reputation (sections 433 and 435). The analysis done and conclusions reached by this scholar, in the researcher's opinion, is influenced with what is prevailing to some scholars and practitioners who mix between privacy and defamation as seen earlier, whereby protection is not afforded to privacy as an independent right but sought through other concepts of the law including defamation rules (Steel, 1999).

The first protection in the penal law is provided to the privacy right in the legislation in operation in the country, the Penal Code 1991. Under a chapter on the *Offences Related to Infringement of Personal Freedoms*, Section 166 titled *Violation of Privacy* provides that:

> "Whoever violates another's privacy by watching him in his house without his permission or hear him by stealth without lawful excuse or sees his letter or secrets shall be punished with imprisonment for a term not exceeding six months or with fine or with both".

This clearly shows that the legislature protects most of the aspects of the privacy right, i.e., home privacy, conversation privacy, correspondence privacy and other things the person keeps secret. It is clear from the provision that permission is required for the entry of one's home. Although the provision could be understood as limiting the violation of home privacy to watching the home's occupants but the provision should be understood in its broad sense to include the entry. For the secret listening of what happens inside the house to be considered violation to the occupants' privacy, the law made this possible only if there is no legal excuse. Based on the above, if someone listens to what is taking place inside the home with legal excuse, the occupants cannot claim that their privacy is violated. From the wording of Section 166, the provision should be understood as having a wide scope in its application to include violations by law enforcement agencies and/or individuals. The provision inflicts a punishment on the wrongdoer in the form of imprisonment, fine or both of them.

Other legislations that deal with the protection of privacy is the Telecommunication Act 2001. It states in Section 34 that:

> "No person shall break into, eavesdrop, or monitor telephone conversations save under a decision from the attorney of prosecution or the competent judge. If the person providing the services discovers, after the monitoring or the control made under sub-section (1), that the source of nuisance is one of the users of his services, he shall submit a report to the attorney of prosecution or the competent judge".

In addition, the Child Act 2010 also provided clear respect to this right. It states in Section 79 that:

> "The privacy right of the Child shall be respected, during the sittings of trial, to avoid any injury, as may affect him; and no information, relating to his appearance before any court, shall be published, save by permission of the Child Court".

Moreover, Section 83 provided safeguards to the rights and interests of the victim children during the different phases of the judicial proceedings. It states that:

> "The Justice Organs shall guarantee the protection of the rights and interests of the Children, who are victims of the practices, prohibited under the provisions of sections 43, 45 and 46, at all the stages of the judicial proceedings".

It further required in Section 83 the protection of the child's privacy right during the above-mentioned proceedings. It stipulates that:

> "Protection of privacy and identity of the victim Children, and taking the necessary measures, to avoid publication of such information, as can lead to recognize such victim Children".

The above provisions show that the Sudanese legislature explicitly provides protection to the privacy of the child. The Sudanese legislation restricts the publication of the information related to the child involved in judicial proceedings. It allows such publication of information only be done after the issuance of permission from the Child Court. It also provides the same protection to the privacy of the victim child. While the grounds of the protection of privacy of the child who is part of judicial proceedings is to protect the child against any injuries that may be caused to him or her, the aim of the protection of the privacy of the victim child is to avoid leading to the recognition of him or her.

Protection of the rights of the child in the Sudanese legal system is a clear observance of the international standards in this respect as required by the Interim National Constitution 2005. As mentioned earlier, Article 27 (3) of the INC states that "All rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of the Sudan shall be an integral part of this Bill". Sudan signed the Convention of the Rights of the Child (CRC) in July 1991 and ratified it in September of the same year (Al-Nagar & Tonnesen, 2011). The Convention gives explicit recognition and protection to the child's privacy right. Article 16 of the CRC provides that "Children have the right to privacy. The law should protect them from attacks against their way of life, their good name, their family and their home". In addition, in Article 40 (2)(b)vii) the CRC provides protection to the rights of the child in the judicial proceedings. It requires the States Parties to the Convention "to have his or her privacy fully respected at all stages of the proceedings".

In addition, Sudan has also ratified the African Charter on the Rights and Welfare of the Child (ACRWC). According to Ankut (2006), the Charter is considered a real positive step towards securing the protection of the rights of the child in the African continent as it stipulates the required basis for the promotion and protection of these rights at both national and regional levels as well as codifies the responsibilities of the state, community and individual in the protection of these rights.

Article 10 of the Charter states that:

> "No child shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to the attacks upon his honor or reputation, provided that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children. The child has the right to the protection of the law against such interference or attacks".

Compared to the CRC, it is noticed that the ACRWC has subjected the enjoyment of the privacy right by children to the supervision of their parents and legal guardians (Ghose, 2002). In my opinion, this is in observance of the local family values of the Africans. In assessing the rights contained in the ACRWC in light of the virtues of the African cultural heritage, historical background and the values of the African civilization, Kaime (2009) argued that emphasis on the sanctity of privacy reflects an inherently Western and individualistic view of children, state and society. According to him, privacy is amongst the contentious rights and freedoms in the African societies that are characterized by strongly rooted local values and that African children were regarded by the Charter as having a quality life similar to that prevails in the West (Kaime, 2009).

Compared to the wording of the CRC, the wording of the provisions of privacy for the child in the ACRWC is criticized by Gose (2002) for not using the male and female form of pronouns in a gender neutral way but using a male pronoun (his privacy). Nevertheless, the ACRWC is hailed as containing more specific provisions with regard to the protection of the accused child's right to privacy compared with the ones provided by the CRC in this respect (Ghose, 2002). As indicated earlier, in Sudan's criminal procedure legislations, the right to privacy is indirectly protected with the provisions requiring some regulations and guarantees for conducting the search of the persons and of the premises. This could be found in all the three legislations passed in the country after its independence including the statutes legislated in 1974, 1983 and 1991.

Being the law in operation in the country, the Code of Criminal Procedure 1991 provides requirements that govern the search of persons and premises (s. 86-95). As indicated earlier, the suspect could be arrested based on a warrant or without warrant (s. 67-75). In the arrest without warrant the suspect could be arrested by policemen or administrators. However, the law restricted the power to search the arrestee only to the prosecutor or police. As a result, when the arrest of the suspect is made by administrators, the administrators are not permitted to search the arrested person. After the arrest, the administrator should handover the arrestee to the prosecutor or police (s.75 (2)). In this situation, the prosecutor or police should then re-arrest the suspect immediately based on the powers given to them. This shows one of the guarantees provided to the suspect against the violation of his or her privacy by law enforcement officials.

When a suspect is arrested by a police in execution of a search warrant or handed over to the police by

individuals after his or her arrest, only the police may conduct a personal search of the arrestee as well as seize all the things found with him or her and be kept in a secure place after making a list of these things (s.89). This is also another guarantee provided to the suspect. When it comes to the search that is not conducted incident to the arrest of the suspect, there are generally three types of search permitted by law. The first is the one that is conducted upon the consent of those who occupy the place (Awade, 1989) This includes the situation whereby the place is entered and searched based on the request of its occupants when an offence is committed in that place or when the occupants ask for assistance or help due to fire, flood, earthquake, etc.

The second is the search that is based on warrant. Section 86 (2) states that:

> "The public prosecutor or judge at any time spontaneously or based on a request from the competent agency in a criminal case can issue a search warrant for any place or person whenever he sees that helps the investigation, trial or execution. The judge at any time based on a request from the competent agency can issue a warrant for general search of any place or person whenever he sees that helps in the discovery of the crime".

It can be noted here that Section 86 (2) neither states the objective of the search such as to seize something or person that helps in the investigation or trial nor it mentions the safeguards of the search warrant. In addition, it allows the prosecution to issue the warrant. The authority to issue the warrant should only be given to the judge being the neutral party in the criminal proceedings compared to the prosecution being a party in the proceedings.

Also compared to what prevails in the American legal system, the provision does not include the probable cause of the search. The search warrant should include a probable cause to find the thing to be seized as a result of the search. Hence, the officer should take an oath and clarify the circumstances that led him to believe that the thing or person to be seized exists in the premises to be searched. Section 87 requires the search warrant of premises to be in writing and to be signed by the competent prosecutor or judge as well as includes the purpose of the search and place to be searched. The High Court in Sudan reaffirmed these requirements in its rulings. In the *Government of Sudan v Ohag Hussain Mahmoud*'s case [1974, SLJR 144, the Court ruled that the search warrant should specify precisely the place to be searched and the reason for the search.

The third is the search without warrant. Section 88 restricts the authority of the prosecutors and judges to order search of persons and premises only to those who are authorized to issue the warrant in that case as well as requiring the search to be at their presence. General search without warrant is restricted to the policeman who arrests the suspect or re-arrests him if the suspect is handed to him (s.89).

By virtue of Section 90, entry to the premises without warrant for search is only allowed in the situations that do not require such warrant such as the entry in execution of an arrest warrant. Here, although the entry takes place in execution of the arrest warrant, it is required to meet the search guarantees as it invades the privacy of the premises (Yousif, 2015). The Supreme Court in Sudan also showed the importance of the search warrant in its verdicts in a number of cases. However, the verdicts are not consistent as to the value of the search without warrant. It ruled in the *Government of Sudan v Hussain Abdel Latif*'s case [1986] SLJR 209, that the search without warrant is void and valueless.

Other guarantees include forbidding entry by force to the premises to execute an arrest or conduct a search except in situations when the authorized official's request to enter the premises is declined (s.91). Generally, the official executing the search warrant is allowed by the occupants of the premises to enter and conduct the search. However, in some situations he might not be allowed to enter. Here, entering by force is permitted only if the officer is not allowed to enter the premises. In addition, the search of persons without warrant is only permitted if there is a reasonable suspicion that the person in or near the premises to be searched is hiding something of the things searched for by the authorized law enforcement official (s.92). This assumes that a search warrant is executed against someone, and that while the official is executing the search he noticed some suspicions that one of the persons in the premises or near to it is hiding something that justifies him or her to be subjected to the search although no search warrant is issued for his or her search or arrest. The search here is justified with the appearance of suspicions related to the things searched for.

To protect the privacy of women, if the person to be searched is a woman, the CCP requires that the search be conducted by a female officer (s.93). The legislation does not require here that the female officer conducts the search only after taking an oath in facilitation of this guarantee. Yet, the legislator should have provided similar provision requiring that when the person to be searched is a man he should be searched by a male officer.

Moreover, Section 95 spells a number of guarantees to be met in conducting the search of premises. These include the presence of two witnesses unless the judge orders otherwise and the presence of the occupants of the

premises or their representatives. It requires the search warrant to state clearly the place to be searched. It is worth-noting here that in commenting on this Section, Awade (1989) argues that the presence of witnesses is not required in the search of luggage and the things carried by the person. It is also not required in the search of vehicles and other animals and carriages as people ride as transport or near by the suspect in a public street. The CCP addresses the requirements for executing the search and seizure the same way it was addressed in the other two legal systems. The situation in the Sudanese legal system is similar to the one in its Malaysian counterpart with regard to privacy related to the search of women as the two countries share similar cultural values.

The CCP, however, does not address the matter of the value and admissibility of the evidence collected as a result of the search conducted in violation of one or more of the above-said requirements. Court rulings are inconsistent in this matter. On the one hand, the Supreme Court ruled in the *Government of Sudan v Yahya Awadelkarim* [1978] SLJR 258 that if the search warrant is afflicted with, the evidence obtained thereof should be very carefully taken. In the *Government of Sudan v Dahab Sharif Dahab* [1978] SLJR 421, it accepted the admissibility of the evidence collected from the search conducted without the presence of the two witnesses. In this case, the court of first instance inflicted a punishment of five years imprisonment on the accused in a hashish offence. The convict appealed the ruling to the Court of Appeal claiming that unlike the Latin legal system, the Sudanese law does not accept the admissibility of evidence collected in violation of the law. The judge after rehearsing the facts, judicial precedents and English references concluded that from all these he reached the conviction that the evidence resulted from the search conducted without the presence of the two witnesses is acceptable. He added that the existence of the two witnesses aims at providing guarantee to the accused against the predominance of the police and fabrication of the accusation or evidence.

On the other hand, some courts ruled that as the search in this situation is void because the executing officer did not follow the law, the evidence resulted from this search should not affect the level of evidence presented. This is shown in the *Government of Sudan v Mohamed Diab* [1980] SLJR 174. The Supreme Court ruled that if the search is conducted without judicial order, all the following proceedings would become null and have no effect. A similar verdict is reached in the same year in *Government of Sudan v Ibrahim Yasin* in which the Court held that conducting the search without order issued by a judge or court is deemed void albeit it resulted in the discovery of the crime. It is also upheld in the *Government of Sudan v Hussain Abdel Latif*'s case [1980] SLJR 146 in which the court ruled that the search of the house of the suspect conducted by the policemen without the presence of the two reliable witnesses and without the judge ordering otherwise is void for violating Section 73 of the Code of Criminal Procedure 1991 and the evidence resulted from this search is unacceptable. It is also upheld in the *Government of Sudan v Omer Mohamed Idris* [1989] SLJR 93 in which the Court ruled that the entry of houses without meeting the requirements of Section 73 of the Code of Criminal Procedure is considered intrusion in the sanctity of the residences and thus the evidence resulted could not be used as evidence of guilt.

In the words of Yousif (2015), the matter of the admissibility of the evidence is left to the discretion of the court. As the court is exercising its discretionary power, it should note that its discretion should not go beyond the procedural to substantial defects as the latter leads to the violation of the law. An example to the substantial defects is the issuance of the warrant from an unauthorized body. But, failure to meet the requirement of the two witnesses to be relatives of the person subjected to the search is considered a procedural defect.

The matter of the admissibility of the evidence collected in violation of the warrant requirements is dealt with at the statutory level in the Evidence Act 1994. Section 10 states that:

> "… the evidence should not be inadmissible merely because it had been obtained through illegitimate means once the court is satisfied that it is independent and acceptable. The court, whenever it sees that it is suitable to the interest of justice, may not base its guilty verdict on this evidence without supporting it with another evidence".

In the evidence law in operation in the country, the Evidence Act 1994, it is stated in section 11 that:

> "The productive evidence is the evidence that affects the proving and disproving of the lawsuit. The court may at any stage of the lawsuit stages exclude the evidence if it sees that it is not productive".

This means that the court should conduct an assessment process of the evidence as it is admissible. The court accepts the evidence if it is satisfied that it is productive despite been illegally obtained. It should be noted here that the provision is a codification of the rulings that support the admissibility of the illegally obtained evidence. The ground behind this is to make a balance between the adherence to the provisions in the law and the interest of justice that would be jeopardized if the evidence is deemed inadmissible only because it is illegally obtained. The INC stated that "personal privacy is inviolable and evidence obtained in violation of such privacy shall not

be admissible in the court of law". But the clause is criticized as it restricts its jurisdiction to the National Capital. It does not provide a provision that applies to all the country. Here, the situation in Sudan differs from the situation in the USA as in the latter the matter of the inadmissibility of the illegally obtained evidence is unarguable.

## 4. Conclusion

The Sudanese legal system is considered of historical English law origin that follows the accusatorial model in criminal procedure, which gives the impression that they should provide more recognition and protection to these rights compared to legal systems that adopt the inquisitorial model that provide less respect. Sudan accepted the ICCPR and ICESCR. However, it rejected the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Sudan is not party to CEDAW for being not in compliance with the Islamic principles and the Sudanese family values. The discussion of the protection of privacy in the Sudanese legal system showed that the privacy right received protection in almost all the constitutions legislated in Sudan after its independence. Privacy also received direct and indirect protection in a number of statutes including the Penal Code and the Code of Criminal Procedure. In the area of criminal proceedings, it is indirectly taken care of in the CCP and Informatic Offences (Combating) Act.

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## References

Abdalla, N.A. (2015). *Haq al muttaham fi an yatim tanbihahu lihoquqihi al-dastoriyyah*. Retrieved January 10, 2016, from http://www.hurriyatsudan.com/?p=187150

Al-Nagar, S., & Tonnesen, L. (2011). S*udan Country Case Study: Child Rights*. UTV Working Paper 2011:3, February 2011. Retrieved January 30, 2015, from http://www.sida.se/publications

Ankut, P. Y. (2006). The African Charter on the Rights and Welfare of the Child: linking principles with practice. *Fair Play for Children*. Retrieved February 1, 2015, from www.fairplayforchildren.org/pdf/1299577504.pdf

Awade, M. M. (1989). *Huqoq al-Insan fi-al-Ijra'at al-Jinaeyyah.* Cairo: Dar al-Nahdah al-Arabiyyah.

Clammer, P. (2009). *Sudan*. Goose Lane: The Globe Pequot Press Inc.

Fadlalla, A. S. (1988). Huqoq al-Tifl fi dhil al-Dimoqratiyah al-Sudaniyah. In M. C. Bassiouni et al, *Huquq al-Insan*, Beirut: Dar-al-Ilm.

Farahany, N. A. (2012). Incriminating thoughts. *Stanford Law Review, 64*, 351-408.

Gerstein, R. S. (1970). Privacy and self-incrimination. *Ethics, 80*, 87-101. https://doi.org/10.1086/291757

Gose, M. (2002). *The African Charter on the Rights and Welfare of the Child*. Community Law Center, Bellville.

Hassan, K. H. (2012). Data protection in employment: new legal challenges for Malaysia. *Computer Law and Security Review, 28*, 696-703. https://doi.org/10.1016/j.clsr.2012.07.006

Hassan, K. H., & Bagheri, P. (2016). Data Privacy in electronic commerce: Analysing legal provisions in Iran. *Journal of Internet Banking and Commerce, 21*(1), 1-14.

Hassan, K. H., Abdelhameed, A., & Ismail, N. (2018). Modern means of collecting evidence in criminal investigations: Implications on the privacy of accused persons in Malaysia. *International Journal of Asian Social Science, 8*(7), 332-345. https://doi.org/10.18488/journal.1.2018.87.332.345

Kaime, T. (2009). *The African Charter on the Rights and Welfare of the Child: A Socio-legal Perspective*. Pretoria: Pretoria University Law Press (PULP).

O'Sullivan, H. (2007). The Right to Silence at Trial: a Critique and Call for New Approach, PhD. Thesis, Griffith University, Australia.

Oette, L. (Ed.). (2011). *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan*. Farnham: Ashgate Publishing.

Roald, A. S. (2011). Freedom of religion in Sudan. In A. N. Longva, & A. S. Roald (Eds.), *Religious Minorities in the Middle East: Domination, Self-Empowerment, Accommodation*. Leiden: Brill. https://doi.org/10.1163/9789004216846_008

Safavi S, S. Z. (2014). Conceptual Privacy Framework for Health Information on Wearable Device. *PLoS ONE, 9*(12), e114306. https://doi.org/10.1371/journal.pone.0114306

Seidmann, D. J., & Stein, A. (2000). The right to silence helps the innocent: a game-theoretic analysis of the Fifth Amendment Privilege. *Harvard Law Review, 114*, 450-510. https://doi.org/10.2307/1342573

Steel, A. (1999). A non-material form of copyright: the strange history of lecturer's copyright. *Australian Journal of Legal History, 185*(4), 196.

Suleiman, G., & Doebbler, C. F. (1988). Human rights in Sudan in the wake of the new constitution. *Human Rights Brief, 6*(1), 2.

Yaakob, H. (2016). Facing up to the legal challenges arising from the human variome project. *Malayan Law Journal*. 4: lxxxix-xcii.

Yousif, Y. O. (2015). *Al-bayyenah al-mutahassal alayha biejra ghair mashroo fi al-qanun al-Sudani.* Arabs lawyer. Retrieved March 10, 2016, from http://www.arabslawyer.com/articles_show.php?show=10