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5 Shari'a and national law in the Sudan

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Abstract

This chapter maps the Sudanese experience around the application of elements of the shari´a from early Islamisation in the sixteenth century to early 2010. It shows how the Sudanese legal system has been shaped by a variety of sources – from customary law and shari´a law to Turko-Egyptian law, British colonial law, and modern Egyptian civil law, to name some of the most important sources. In a second part, the chapter offers an analysis of the role of the shari´a in recent Sudanese legislation: in the constitution, in family and inheritance law, and in the fields of criminal law and economic law. A section on human rights and international obligations further demonstrates where Sudanese shari´a-based legislation clashes with the human rights obligations of the Sudan. Taken as a whole, shari´a application has been expanding from 1983-1985 with a new stimulus as of 1989/1991 with the advent of the present military-Islamist regime. At this juncture, after more than twenty years of military-Islamist rule, expansion of shari´a application has clearly come to a standstill for the time being. Given the threat of Southern Sudan breaking away in addition to the Darfur and other conflicts, shari´a application is not a top priority for the Sudanese regime in 2010.

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The Republic of the Sudan came into being on 1 January 1956, when it gained its independence from Great Britain and Egypt. As of mid 2009, an estimated 41 million people live in the Sudan, of whom 70 per cent are Sunni Muslim. They live mainly in the North. An estimated 5-20 per cent of the population is Christian and lives in the South and in and around the capital Khartoum.[2] Another 10-25 per cent of the population professes native religions. Sudan has nineteen important ethnic groups and 597 subgroups. More than a hundred languages and dialects are spoken in the Sudan. Arabic and English are the official languages of the country, for about half of the population Arabic is the mother tongue. The Southern part of the country chiefly consists of a black African population, composed of the Nilotic, Nilo-Hamitic, and Sudanic groups. While the majority of the population is of African descent (52%), many Sudanese are of Arabic descent (39%). Around 9% are Beja.

(Sources: Beck 2001; Bartleby 2010)

5.1 The period until 1920

The rising prominence of Islamic law under Ottoman-Egyptian, Mahdi, and British rule

From the Funj-Sultanate to Ottoman-Egyptian rule

In 1800 the area, which is today the Sudan was largely dominated by the Funj-Sultanate in North and Central Sudan with its capital Sinnar (1504-1820) and the Sultanate of Dar Fur (1640-1916) in the West (Holt 1997: 943-945, 121-125). Early jurisdiction under the Funj – who had adopted Islam under their first king `Amara Dunqas (1504-1534) – was marked by only limited knowledge of the shari´a and the dominance of customary law. By the time of the Ottoman-Egyptian conquest, Islamic law and its institutions had made headway against the king's absolute judicial authority, not the least due to enhanced commercial activities and the presence of a large number of foreign Muslim traders (Spaulding 1977). In Dar Fur Islamic law equally coexisted with customary law, with the former gaining importance in the higher echelons of Fur society. Penal law seems to have been entirely a domain of customary law, '[...] there is no evidence that the shari´a punishments were ever imposed' (O´Fahey & Abu Salim 1983: 9).

It was under Ottoman-Egyptian rule (1820-1881) that, for the first time in their history, the North and the South of the Sudan gradually became united. This process was largely completed with the 1874 conquest of the Sultanate of Dar Fur. In harmony with the new administrative centralism a centralised judiciary was created for the first time with

a hierarchical system of local and provincial courts and an appeals court in Khartoum (*majlis ´umum al-Sudan*). Any decision of the appeals court had to be endorsed by the highest mufti and the Governor-General and was sent for final approval to the highest judicial body in Egypt, the *majlis al-ahkam* in Cairo. Which laws were actually applied by the Egyptian administration remains to a certain degree unclear, as relevant archives were later destroyed by the Mahdi's army (see below).[3] In some instances shari´a was applied, in other cases Egyptian military and civil codes appear to have been implemented. In more remote areas, justice was administered according to customary law (Mustafa 1971: 37). As of 1850, a new penal code was introduced as part of the *tanzimat* reforms (see 6.1) and implemented through a newly created system of secular courts (*Nizamiyye*) (Fluehr-Lobban 1987: 30). As a consequence of this, the competence of the shari´a courts was limited to personal status law and matters concerning land rights. Egyptian dominance and the introduction of a unified court system also meant the introduction of Hanafite law.[4]

Shari´a of its own kind: Islamic legislation under the Mahdi

Ottoman-Egyptian rule came to an end when the Mahdi's army conquered Khartoum in 1885. Muhammad Ahmad al-Mahdi, a religious renovator, had set out to liberate the Sudan from its 'infidel' oppressors by means of a holy war (*jihad*). Consequently, after the conquest all verdicts of the judges of the Turco-Egyptian rule were declared void. Using the early community of Muslims as a model, he aspired to restore the religious purity of the Prophet Muhammad's time. The only sources of the Mahdi's legislation were thus the Qur´an and Sunna in his – often idiosyncratic – interpretation. His large number of legal circulars was frequently in conflict with the traditional Sunni schools of law. Thus, for example, the payment of blood money (*diya*) was abolished, retaliation (*qisas*) became compulsory, and more severe punishments were imposed on smoking than on drinking alcohol. Throughout the Mahdi's rule, recourse to the *fiqh* (Islamic jurisprudence) was largely excluded and the position of the traditional religious scholars (*ulama´*) was weakened (Köndgen 1992: 16-18).

Between 1896 and 1899 a joint Anglo-Egyptian army conquered the Sudan and the Anglo-Egyptian condominium was established, which made the Sudan effectively another British colony. The judicial structures of the Mahdi state had been centred largely around the Mahdi. Their collapse, thus, meant that the British 'had to start from scratch' (Salman 1983: 66). The first Penal Code and the Criminal Procedure Act were promulgated in 1899. The former was based on Anglo-Indian colonial legislation, the latter on Egyptian military law, which, in turn,

had its origins in British military law. Both had been adapted to Sudanese conditions and the penal code had already been applied in the East African protectorates and Zanzibar. The penal code was re-enacted in 1925.

Serving the Condominium: Shari´a after the British-Egyptian conquest

Lord Cromer, British consul general in Cairo, travelled to Khartoum immediately after the conquest and promised British respect for the application of Islamic law (Salman 1983: 66). Shortly thereafter, the colonial administration was to – at least partially – fulfil his promises. The Mohammedan Law Courts Ordinance of 1902 and the Mohammedan Law Courts Procedure Act of 1915 provided the basis for the creation and procedures of the 'Mohammedan Law Courts'. These courts administered the shari´a in personal status cases and in litigation regarding pious foundations (*awqaf*). The Mohammedan Law Courts Ordinance provided for the Grand Qadis to issue legal circulars (*manshurat*) functioning as provisions and regulating the interpretation of the shari´a. Being published regularly, as they were, these circulars constituted a precursor to codification, an innovation 'the Egyptian ´ulama appear not to have opposed' (Jeppie 2003: 2).

Within the framework of the condominium, the Egyptians were generally kept at bay and only filled the lower ranks in the colonial administration. An exception, however, were the shari´a courts, which were operated almost exclusively by Egyptian judges. Until independence, the Grand Qadi was always an Egyptian (Jeppie 2003: 2). Native or tribal courts dispensing justice in the South and among Muslim nomads in the North received recognition only twenty years after the conquest (Jeppie 2003: 2). Under Reginald Wingate, the Sudan's second Governor-General, fear of a regenerated Mahdism led to a resolute suppression of what was perceived as heterodoxy. As such, Sufi orders were denied legality and surviving Mahdist leaders subdued. Concurrently, the *ulama*, who had never been very important in the Sudan, were granted pensions and status. In 1912, an institute to train *ulama*, emulating al-Azhar in Cairo, was opened in Omdurman. In addition, mosques were built and repaired and the pilgrimage to Mecca (*hajj*) was promoted in order to pre-empt 'fanaticism' (Daly 1997: 746).

5.2 The period from 1920 until 1965

From colonial shari´a to the quest for a constitution

Refining the system

From 1920 native courts were given official recognition and effectively used to gradually supplant the shari´a courts. In order to diminish the status of the shari´a courts, native courts were now given jurisdiction on personal status issues. By 1929, a good number of shari´a courts had been suppressed and native courts set up instead. However, even though reduced in number, shari´a courts continued to exist throughout the era of the condominium (Jeppie 2003: 3).

Throughout the time of the condominium, the shari´a co-existed with British common law and local customary law administered by tribal leaders. As to penal law, provincial administrators and governors were allowed great leeway. The same crime could be punished differently, depending on whether the culprit was a nomad, a Southerner, or an Arab (Köndgen 1992: 19).

The path to independence and beyond

The Sudan's path to independence accelerated with a Self-Government Statute passed in April 1952. In January 1954 it was decided that within a period of three years the Sudanese had to reach a decision between independence and union with Egypt. Immediately after, a Sudanisation committee was established and British officials started leaving the Sudan. In December 1955 the Sudanese parliament unanimously voted for independence.

The Sudan's first constitution a month after the country achieved independence, in January 1956, guaranteed parliamentary rule, the existence of a multi-party system, and free elections. It was intended to be a transitional constitution, later to be replaced by a permanent one. Instead, however, it survived three military takeovers and was revitalised whenever the military had to step down (Warburg 2003: 144).

Three distinct tendencies dominated the discussion about the future constitution and legislation between the years before independence and on into the seventies. Firstly, proponents of an Islamic constitution and legislation were represented above all by the Umma party, the Democratic Unionist Party, the Muslim Brothers (originating from Egypt), and some members of Sufi sects (Kok 1991: 240). Secondly, the camp of the Nasserites, Ba´athists, and Arab nationalists advocated the Egyptianisation of the Sudanese legal system, thus harmonising it with the majority of socialist Arab states and dispensing with the British

colonial heritage. Thirdly, a pragmatic camp endorsed the reform of the existing legal system, but rejected its complete replacement by either Islamic or Egyptian legislation. Most of the secular *intelligentia* and graduates of the Law Faculty of the University of Khartoum belonged to this camp (Köndgen 1992: 19-21; Kok 1991: 237-243).

As early as September 1956 a committee began to draft a 'permanent' constitution. Sectarian leaders such as Sayyid Abd al-Rahman al-Mahdi and Sayyid Ali al-Mirghani, joined by the Muslim Brotherhood, advocated an Islamic parliamentary republic with the shari´a as the main source of legislation. Khartoum was to be the capital of a centralised system of government with Arabic as the official language and Islam as the religion unifying the nation (Kok 1989: 439). Non-Muslims were to be granted all rights envisaged by the shari´a. Racial or religious discrimination was to be excluded. Within a period of five years the Sudan was to be fully Islamised. Southern objections against Islamisation and demands for a federal system were dismissed. Thus, when in November 1958 the military took over under General Ibrahim `Abbud, a national consensus on the permanent constitution had not been reached and the draft constitution had not yet been promulgated.

5.3 The period from 1965 until 1985

From democratic interlude to Numeiri's Islamisation programme

Sudan´s second democratic experience

After the downfall of Abbud's military dictatorship in 1964, the Sudan lived through its second democratic stage. A slightly amended version of the transitional constitution of 1956 was reenacted. However, solutions for the constitutional impasse proposed by the different parties concerned had not materially changed. Southern claims to self-determination and demands for a referendum on their future rapport with the Muslim North continued to fall on deaf ears, even with moderate parties in the North (Warburg 2003: 146). As of December 1967 a constitutional committee debated anew a future 'permanent constitution' and in early 1969 presented a draft defining the Sudan as a 'democratic socialist republic under the protection of Islam' (Art. 1). This formulation was meant to placate the left as well as the traditional Islamic right. Falling short of full recognition of the Sudan's religious plurality, Article 3 stipulated Islam as the state religion. The shari´a was meant to be the main source of legislation and all existing laws were to be reviewed in order to bring them into conformity with the shari´a (Kok 1989: 443-444). The draft also set forth that the presidency would be

reserved for Muslims only, thus – in constitutional terms – turning Southerners into second-class citizens.[5]

At the beginning of 1969, the Sudan's two largest Sufi orders, Ansar and Khatmiyya, agreed upon a common platform; thus, the creation of a presidential republic with an Islamist constitution was imminent. However, Numeiri's *coup d'état* in May 1969 averted the ratification of this second constitutional draft. Backed by a coalition of Nasserites, communists and Ba´athists, Numeiri immediately outlawed all political parties and revoked the transitional constitution (An-Na´im 1985: 332) in its 1964 version. In March 1970, the new regime bombarded the Ansar in their stronghold on the Nile island of Aba during a head-on confrontation. Their Imam al-Hadi al-Mahdi was killed when trying to take refuge in Ethiopia so his nephew Sadiq al-Mahdi fled to Libya, where he, together with Hasan al-Turabi and Sharif al-Hindi (Democratic Unionist Party leaders), founded the anti-Numeiri-coalition 'National Front'.

Numeiri's honeymoon with the Sudan Communist Party (SCP) did not last long. Disagreements between Numeiri and the SCP on the creation of a single-party system and the ensuing power struggle came to a head when a communist coup attempt in July 1971 fell short of sweeping the Numeiri regime away. However, with concerted Egyptian and Libyan help, a counter-coup brought Numeiri back to the helm. The general secretary of the SCP and hundreds of its members were executed. In the course of the ensuing political reorientation, the United States, Egypt, and Saudi-Arabia became the Sudan's key allies.

Numeiri´s early law reforms: an attempt to break free from the colonial heritage

Soon after Numeiri's takeover, a good part of the legal system came under scrutiny, resulting in the enactment of a succession of new laws. A Law Reform Commission was appointed in 1970; it composed a Civil Code written in Arabic. The code, hastily drafted, was mainly inspired by the Egyptian Civil Code of 1949 and, thus, meant a radical shift from common law to continental (French) European law (Amin 1985: 334). In the description of a Sudanese jurist,

> [...] the commission proceeded to copy with impunity, and with trivial and sometimes absolutely meaningless amendments, section after section and chapter after chapter from the Egyptian Civil Code of 1949, flavouring it here and there with a slightly modified or differently phrased version from the Iraqi, Syrian, or Libyan Civil Codes (Kok 1991: 238).

In the same assembly-line fashion, a Civil Evidence Code (1971), Civil Procedure Code (1972), and draft penal and commercial codes (1972) were expeditiously produced. But Numeiri's 'legal revolution' was not to last. The new codes were revoked in 1974, and the common law was restored once the regime's preoccupation with Arab unity had subsided and given way to other priorities (Kok 1991: 238).

Meanwhile, in February 1972, Numeiri's government and the Southern Sudan Liberation Movement (SSLM) had concluded a peace treaty in Addis Ababa to end the rebellion that started in August 1955 and had continued as a large scale insurgency. The peace agreement, which provided for an autonomous regional government in the South, addressed, among other things, developmental, economic, and human rights questions and was promulgated as the Southern Provinces Self-Government Act in 1972.

In September of the same year, the People's Assembly was convened to hammer out a new constitution. After seven months of deliberations, in May 1973, a 'permanent' constitution was promulgated. Several factors contributed to this success, seventeen years after reaching independence. For one, the non-participation of the sectarian parties and the Muslim Brothers allowed for an official recognition of the Christian and all other Southern religions. Also, important contentious issues, such as the status of the South and the nature of the executive, had been solved beforehand and the ban on political parties had paved the way for the Sudan Socialist Union (SSU) to operate as the sole remaining party in a single-party system. Article 9 of the permanent constitution stipulated that Islamic law and customary law were main sources of legislation. While non-Muslims and secularists in 1973 understood the two to be on an equal footing, Article 9 would later be invoked (in September 1983) to justify the introduction of the shari´a.

In 1974 the Sudan saw yet another wave of new legislation. With the defeat of the pan-Arabist trend, the pragmatist school this time had its way and neither the shari´a nor Egyptian law played a significant role in the drafting process. A Sales of Goods Act, a Contracts Act, a new Civil Procedure Act, an Agency Act, a Penal Code, and a Criminal Procedure Act were promulgated (Köndgen 1992: 22). While the Civil Procedure Act simply repealed the Civil Justice Ordinance of 1929, the Contracts Act, the Sales Act and the Agency Act were for the most part codifications of the pertinent concepts of English law and the Sudanese precedents. As to the 1974 Penal Code, it was an adaptation of the penal code from 1925 and, likewise, free of shari´a elements.

'The Islamic path' – Numeiri finds new allies

Meanwhile Numeiri himself increasingly advocated 'the Islamic path'. During the seventies new Islamic institutions and events were founded such as the 'African Islamic Center', an educational centre for African Muslims (1972) and the 'Festival of the Holy Qur´an' (1973). After forcing his government and high-ranking civil servants to abstain from alcohol (1976), Numeiri gave the 'Islamic path' an important role in his 1977 electoral programme. The same year saw the establishment of a committee for the revision of Sudanese legislation and the first bank working according to Islamic principles.

In the meantime, domestic opposition to the Numeiri regime did not diminish. After several failed attempts to overthrow Numeiri's regime between 1970 and 1975, the abovementioned National Front came very close to toppling Numeiri in 1976. This failed coup attempt was followed by a historical compromise with the leading opposition parties. Its leaders, Sadiq al-Mahdi and Hasan al-Turabi, were co-opted into the Sudanese Socialist Union (SSU). In turn, the National Front agreed to cease its military resistance. However, the Front proved unable to overcome internal divisions. In October 1978, Sadiq al-Mahdi withdrew from the SSU in protest against Numeiri's support of the Camp David agreement.

The majority of Muslim Brothers nevertheless concluded that backing the Numeiri regime was their best option.[6] Al-Turabi and fellow Muslim brethren began to fill government, SSU and other official positions. In August 1977 al-Turabi took over the chairmanship of a committee reviewing Sudanese laws for their compliance with the shari´a; a month later he joined another committee reviewing the constitution (Köndgen 1992: 35-36). The former worked out draft laws banning alcohol, the charging of interest, and on gambling as well as draft laws on alms tax (*zakat*), *hadd* punishments, and a law on the sources of legislation. The *zakat* draft law was ratified by parliament, but repealed due to difficulties with its application. Further, some specialised banks were established to give interest-free loans. In 1979 the position of the Muslim Brothers improved noticeably when al-Turabi was appointed Minister of Justice. While the Muslim Brothers widened their influence within the regime, the political and economic situation deteriorated further in the late seventies and early eighties. The credibility of the Numeiri regime was seriously undermined by drought, the influx of some two million refugees from neighbouring countries,[7] high inflation rates, cutbacks of food subsidies, and inadequate supplies.

Regarding his Southern policy, Numeiri in 1979 began to gradually dismantle the 1972 Addis Ababa agreement. He suggested to the National Congress of the SSU that they restructure the South into

three, instead of one, autonomous regions, each with its own regional parliament and government. When in March 1981 the Southern Regional Assembly rejected the motion, he dissolved the Southern Regional Assembly and installed an interim government. Southerners had economic grievances too. Government investment in the South promised under the Addis Ababa agreement had hardly materialised and hopes for oil revenues had been foiled. Thus, in early 1983, the Sudan People's Liberation Army (SPLA) was founded and a civil war broke out, which by June 1983, when Numeiri decided by presidential decree to restructure the South, was already in full swing.

Shari´a as a last resort: Numeiri islamises the legal system

On the domestic front, the situation proved to be little better. A full-scale confrontation between Numeiri and the judiciary had led to a strike between June and September 1983 and a complete collapse of the judicial system. In July 1983, while the confrontation between the regime and the judiciary persisted, Numeiri appointed a three-member committee to islamise the Sudanese legislation. The delicate question of an Islamic constitution was excluded from the agenda. Al-Turabi, whom Numeiri wanted to keep away from the process, had been ousted as Minister of Justice shortly before the committee began its deliberations.[8]

In September 1983, the first new Islamist laws were enacted as presidential decrees. The Sudanese parliament ratified the 'September laws' without further discussion in November 1983. The most important of these statutes were: the Civil Procedure Act (1983), the Civil Transactions Act (1984), the Penal Code (1983), the Criminal Procedure Act (1983), the Evidence Act (1983), the Judgements Acts (1983), the Propagation of Virtue and the Prevention of Vice Act (1983), and the Zakat Act (1984) (Layish & Warburg 2002). It is worth noting that although parliament had the right to introduce a bill, none of the more significant laws enacted before the downfall of Numeiri in 1985 were initiated by parliament. Rather, they were initiated by the Sudanese president himself who was the driving force of the Islamisation process.

Churned out in very much the same fashion as the Egyptianised legislation of the early seventies, certain provisions of the September laws were in conflict with traditional Islamic jurisprudence (*fiqh*). For instance, the Evidence Act required the testimony of four adult men to establish unlawful sexual intercourse (*zina*), but it was in contradiction to the *fiqh* in allowing that 'when it is necessary, the testimony of others may be taken'. The 1983 Penal Code drew heavily on its 1974 predecessor, summary punishments such as flogging, fines or prison no longer

corresponded to the gravity of the offence (Köndgen 1992: 42). As to *hadd* punishments, the 1983 Penal Code eclectically took its inspiration from different schools so as to aggravate possible punishments. Simultaneously, the use of 'legal doubts' (*shubha*), used in the *fiqh* to restrict the execution of *hadd* punishments, was rather limited. In combination with the admission of witnesses not approved by the *fiqh*, the application of *hadd* punishments was thereby considerably facilitated.[9] Furthermore, by adding more severe punishments for political offences, the new penal code provided a suitable instrument for the oppression of political opposition.

The September laws were rejected by many Sudanese. In the South, demonstrators protested against their second-class status within the new shari´a system. Not surprisingly, the Sudan Council of Churches also rejected the presidential decrees. In the North, a broad alliance of secular parties, labour unions and liberal Muslims denounced the new laws as un-Islamic, anti-women, generally repressive, and destructive to the unity of the country. According to the Umma party, the September laws represented a distortion of true Islam; Sadiq al-Mahdi suggested that corporal punishment was inadmissible in a society that had not yet attained a fair level of social and economic equality. One of the most outspoken critics of the introduction of the shari´a was Mahmud Muhammad Taha, spiritual leader of the reformist 'Republican Brothers'. For his opposition he would have to pay with his life in 1985 (see discussion below).[10]

After some discussion, al-Turabi and the Muslim Brothers decided to back Numeiri, despite their exclusion from the process of codification. In his earlier writings, al-Turabi had advocated a rather modernist approach towards the shari´a, arguing against a blind imitation of the traditional Muslim jurists (*fuqaha´*) and for an adaptation of Islamic law to the needs of today. However, as the last remaining allies of a discredited regime, the Muslim Brothers themselves had come under pressure. The introduction of the shari´a retrospectively justified their close cooperation with the regime and 'what mattered was that the Islamic laws were in place and that a new atmosphere had been created which the movement [had to] exploit to the full' (Osman 1989: 267).

Theoretically, the shari´a was meant to be applied nationwide, but this proved impossible. The scheduled establishment of a shari´a court in the Southern city of Juba in 1984 had to be cancelled due to strong local resistance. Southerners living in the North, however, were subjected to floggings and amputations (MERIP 1985: 12). For the SPLA, the September laws were yet another important reason, if not the only one, to continue the war that had broken out in the spring of 1983.

In April 1984 the deteriorating economic situation led to a wave of strikes, including by the judiciary. The judges voiced grievances directly

connected with the September laws. In order to be able to continue within the new system, some of the most prominent judges saw themselves forced to undergo further training, while others were summarily discharged (Osman 1989: 294). To cope with the crisis, on 29 April 1984 Numeiri declared a state of emergency, which he would use in the remaining year of his rule before his downfall to quell any resistance to the shari´a. For this purpose, a competing body of emergency courts was created. While the regular courts had to deal with proceedings that had been pending for some time, the emergency courts had jurisdiction over all recent and new court cases, thus over all cases to be judged in accordance with the September laws. The judges manning the emergency courts often had no legal training. Furthermore, Numeiri made the presidents of the new courts accountable to him, thus disempowering the Chief Justice and taking formal control of an important part of the judiciary.

Already in June 1984 Numeiri had suggested a long list of constitutional amendments to the People's Assembly. The Islamisation of the legal system under a secular constitution had led to a number of laws becoming unconstitutional. However, with the Supreme Court filled with supporters of the September laws, no judicial review of such laws ever took place (Kok 1991: 242). Now Numeiri suggested the Islamisation of the constitution to bring it into line with the shari´a-based legislation and, above all, his political interests. Islamic terminology was to replace the secular wording of the 1973 constitution. While the president would have become a leader of the faithful (*qa´id al-mu`minin*) for life, the parliament was to mutate into a consultative council (*majlis al-shura*), swearing an oath of allegiance (*bai´a*) to whoever the leader of the faithful determined to be his successor. Thus, the president would not be accountable to parliament, but the new consultative council would owe their allegiance to him.

According to the draft reforms, Article 1 now declared the shari´a to be the sole source of legislation, in contrast to its equal footing to customary law as per the 1973 constitution. The South was to lose its autonomy; all reference to the 'Southern Provinces Regional Self-Government Act' of 1972 had been dropped. Not surprisingly, Numeiri's draft of constitutional amendments met with fierce resistance from national as well as regional parliaments in the South. The September laws had been approved by the parliament in order to avoid its dissolution and, to be sure, due to some genuine sympathy for Islamisation of the legal system. Accepting Numeiri's constitutional amendments, however, would have amounted to a near total (self)-disempowerment of parliament. Once Numeiri had realised that despite some suggestions for corrections parliament was not to be subdued, he adjourned the discussion (Köndgen 1992: 54-55).

From the trial and execution of Muhammad Taha to the end of Numeiri´s regime

Probably the most blatant abuse of the implementation of Numeiri's version of the shari´a was the trial and subsequent execution of Mahmud Muhammad Taha, the leader of the 'Republican Brothers' mentioned above. While the Republican Brothers had backed Numeiri during his secular beginnings, they opposed the September laws and Numeiri's divisive Islamisation policies. In May 1983 the confrontation escalated and Taha and fifty of his followers were arrested. In 1984, the Republican Brothers launched a campaign against the September laws, criticising their unconstitutionality and multiple points of contradictions with the *fiqh*. Moreover, several constitutional complaints were deposited on grounds that the new laws discriminated against women and non-Muslims. Numeiri would not tolerate any further criticism of his shari´a: the 76-year old Taha was arrested again, sentenced to death, and hanged for apostasy on 18 January 1985 (Rogalski 1990: 39-51).

While the indictment was initially construed as a state security offence, subsequently Article 458(3) of the Penal Code was invoked. Article 458(3) stipulated that even uncodified *hadd* offences could be punished. During the appellate proceedings Taha was declared an apostate, based on the 1968 decision of a shari´a court, which, at the time, had not had jurisdiction in cases of apostasy. Apart from the highly flawed underpinning of the judgment, the sentence contravened Article 247 of the Criminal Procedure Act exempting persons over 70 years of age from the death penalty. In 1986, posthumously, the death sentence for Taha was eventually declared to be null and void.[11] The execution, highly controversial in the Sudan and strongly criticised in the Western press, was only one more step toward the downfall of the Numeiri regime.

In September 1984 a power struggle broke out between Numeiri and al-Turabi. In spring 1985 all Muslim Brothers were dismissed from their government and SSU positions. Al-Turabi and 200 Muslim Brothers were imprisoned, among them the president of the People's Assembly and one of the judges who had helped to sentence Mahmud Taha. For the Muslim Brothers, this last-minute wave of arrests came as a blessing in disguise. Instead of being drawn into the abyss, they could now portray themselves as victims of the very regime they had helped to stabilise for so long.

When at the end of March 1985 Numeiri abolished the subsidies for bread and fuel, political parties, labour unions, and professional associations formed a broad coalition demanding his resignation. Numeiri, who underestimated the imminent threat to his rule, flew to the U.S. for talks with U.S. president Ronald Reagan. In his absence, bread riots

broke out, which escalated to a general strike. On the 6th of April, while Numeiri was already on his way back from the U.S., the Sudanese military assumed power.

5.4 The period from 1985 until the present

Whither shari´a?

Frozen shari´a under Siwar al-Dhahab

The new Transitional Military Council (TMC) under Siwar al-Dhahab (April 1985 – April 1986) abrogated the 1973 constitution, abolished Numeiri's singular political party, the Sudan Socialist Union (SSU), and reinstated the 'transitional' constitution of 1956, thus guaranteeing religious freedom, political pluralism, and separation of powers once again. The execution of *hadd* punishments was suspended as far as amputations were concerned, but floggings were still to be administered. Those convicted under the September laws stayed in prison, joined by others likewise sentenced to single or cross-amputation (see 5.7).[12]

The political forces rejecting the Numeiri-style shari´a legislation proved too weak to have a decisive influence on its abolition during the one-year reign of the TMC. Moreover, key ministers in the new cabinet, such as the Prime Minister al-Djizuli Daf´allah, were either Muslim Brothers or sympathetic to their cause. Hasan al-Turabi, who had been released from prison immediately after the coup, did not lose time in organising a demonstration demanding the retention of the shari´a. Using the newly attained political freedoms – more than forty political parties had been founded or resurrected after the TMC takeover – al-Turabi established the National Islamic Front (NIF), an alliance of Muslim Brothers, Sufis, tribal leaders, *ulama*, and former military officers. The NIF portrayed itself as hard-core defender of the shari´a in their political programme, claiming that Islamic law also best protected the culture and identity of non-Muslims. Resistance to Islamisation, according to the NIF's view, is either 'a Western plot' or emanates from 'Southern Marxists' such as the SPLA-leader John Garang. It is worth mentioning that an important motive for the NIF's enthusiasm for the retention of the shari´a was economic. The banks controlled by the Muslim Brothers had made considerable profits under its Islamic provisions.

Indecision and procrastination under Sadiq al-Mahdi

When the military ceded power to a civilian government in 1986, none of the Sudan's urgent problems had been tackled. The economy

continued to be in a precarious situation. No peace treaty with the SPLA had been negotiated. And, even though protest against Numeiri's abuse of Islamic law had been a driving force behind the 1985 demonstrations, the shari´a was still in place.

Unsurprisingly, the first free elections in May 1986 resulted in a majority of the two largest sectarian parties, the Umma and the Democratic Unionist Party (DUP), who together attained an absolute majority.[13] The NIF, with 28 out of 232 possible seats,[14] proved successful, but was excluded from participation in the new coalition government at this time, because it was held partially responsible for the oppression of the Numeiri regime. Sadiq al-Mahdi, as the new prime minister, immediately resumed the quest for an Islamic alternative to the existing shari´a laws. The renewed discussion provoked fierce criticism from the Bar Association and the Sudan Council of Churches.[15] Despite al-Mahdi's repeated promises to revoke the September laws and replace them by completely overhauled legislation, only a few minor corrections were ever effectuated.[16]

In May 1988 the NIF joined the second coalition government of the Umma and the DUP parties, making it a precondition that new Islamic legislation would be enacted within two months. Under Hasan al-Turabi, who became minister of justice and chief public prosecutor, the Ministry of Justice finally submitted a draft penal code in September 1988. Hammered out by a group of jurists led most likely by the NIF, the draft suppressed to a large degree the politically-motivated stipulations of the 1983 Penal Code. The South was to be exempted from *hadd* punishments. The location of the commission of the crime (e.g. North or South), rather than the identity of the perpetrator (e.g. Southerner, non-Muslim, Muslim, etc.), was to be decisive in determining penalties. Highway robbery, thus, was to be punished with cross-amputation in the North and a maximum prison sentence of ten years in the South. On the other hand, non-Muslim Southerners living in Khartoum were subject to the shari´a, while Muslims living in the South could enjoy alcoholic drinks or even become apostates, at least according to a literal interpretation of the letter of the law (Köndgen 1992: 70-71). In parliament, the draft met with resistance from the Southern deputies, who demanded that Khartoum be exempted from any Islamic legislation. The Umma and DUP, even though some of their members had been part of the drafting committee, called for a revision of the draft.

In the meantime, negotiations with the SPLA conducted by Muhammad Uthman al-Mirghani in Addis Ababa had gained momentum, leading in November 1988 to a cease-fire. Al-Mirghani had, unlike Sadiq al-Mahdi in earlier negotiations, agreed to suspend the shari´a and to exclude any call for its implementation from the government's agenda (Warburg 1990: 635). Placated, the SPLA agreed to the

convocation of a 'national constitutional conference' that was to deliberate on a new constitution and a new penal code that would be considered acceptable to the non-Muslim Southern minority. Prime Minister Sadiq al-Mahdi did not want to give the credit for having ended the civil war to his political rivals. Siding with the NIF, he deliberately wrecked the DUP/SPLA peace initiative. In protest against his tactics, the DUP left the government coalition.

In the new government, formed in January 1989 with the Umma party and the NIF as the sole remaining coalition partners, al-Turabi became foreign minister, with another NIF member heading the crucial Ministry of Justice. Before the government could decide on a new Islamic penal code, an alliance of labour unions, professional associations, and army officers issued an ultimatum, demanding the ratification of the DUP/SPLA peace agreement and the formation of a new government of national unity. Only after Sadiq al-Mahdi had formed a new cabinet, replacing the NIF with the DUP and representatives of the labour unions and professional associations, the peace agreement with the SPLA was ratified in April 1989. Now the tides had turned in favour of a revocation of the shari´a laws. In mid-June, the al-Mahdi government announced that the shari´a laws would be at last be nullified by the 1st of July and that a government delegation was to meet SPLA representatives to discuss a permanent end to the civil war. However, one day before the cancellation of the shari´a laws, the military intervened once more and ended another – rather short – era of civilian rule.

A regime with an agenda: Bashir and Turabi take over

After the bloodless *coup d'état*, led by Brigadier Umar al-Bashir, the Revolutionary Command Council for National Salvation (RCC) was formed. In addition, the National Assembly was dissolved, all political parties outlawed, the constitution revoked, and a state of emergency declared. Even though al-Turabi, like other religious leaders and members of the former government, was detained after the coup, it later became clear that the coup was in fact staged with the active support of the National Islamic Front.[17] Once firmly entrenched, the Bashir/NIF regime followed a systematic approach toward the transformation of all relevant Sudanese institutions, turning them into NIF bastions. Thousands of civil servants – 14,000 in 1989 alone – were sacked. More than a hundred career diplomats were dismissed; others resigned in protest and were replaced by NIF loyalists (Lesch 1998: 134).

A takeover of educational facilities and the underlying bureaucratic infrastructure was effectuated. The Ministry of Education was purged, teachers and faculty members replaced by NIF members, and the elected faculty unions dissolved. Furthermore, the regime islamised the

curricula, and Arabic became the language of instruction in all public universities. The Arabic language excluded many Southern students who often had insufficient knowledge of Arabic to pass the compulsory entry exams (Lesch 1998: 143-145). To enhance its influence, the NIF founded several new universities and doubled numbers in the existing ones. This was important because NIF understood that a higher percentage of university graduates close to the NIF would ensure greater influence in professional associations in the future. By 1996, hundreds of faculty members had been dismissed or left the country. In fact, the brain drain had been so dramatic that a review by the Ministry of Higher Education found a shortage of teaching staff as high as 80 per cent in some universities (Lesch 1998:144).

Judiciary and legislation as cornerstones of the NIF´s Islamisation agenda

Not surprisingly, the judiciary was a prime target for the realisation of the NIF's Islamisation programme. According to estimates, 'over sixty percent of all judges have been replaced by appointees of the new regime' (Lauro & Samuelson 1996: 9). Between 300 and 400 judges were dismissed or resigned between 1989 and 1991 alone (Amnesty International 1995: 20). Their replacements often lacked proper training in shari´a beyond personal status matters or were not qualified at all. While purging the traditional judiciary, the Bashir/NIF regime simultaneously built up a parallel system of courts that consisted of Security of the Revolution Courts (later to be re-baptised 'Emergency Courts') and Public Order Courts. One observer came to the conclusion that '[t]he parallel judicial institutions created by the NIF now handle more than 95% of the caseload of the Sudan, and are under the absolute control of the executive branch' (Abdelmoula 1996: 17). This estimate obviously does not take into account the high number of cases tried in customary courts.

While Southern law students, not trained in Arabic, were excluded in practise from access to the legal professions, those who did enter were often trained in newly founded law schools, concentrating on the shari´a and neglecting the Sudanese common law traditions. Many Southern judges were transferred to the North to hold minor positions or left the judiciary to pre-empt dismissal. NIF adherents were appointed in their place to guarantee the application of Islamic law wherever non-military courts in the South were allowed to function (Lauro & Samuelson 1996: 37-38).

According to some observers, many of the female judges who held positions in the civil and in the shari´a-governed personal status courts were dismissed by the new regime or relegated to insignificant assignments (Lauro & Samuelson 1996: 10). A 1996 report from the Lawyers

Committee for Human Rights indicates that neither Southern nor female judges were appointed by the Bashir/NIF regime until the mid-nineties.[18] The regime also made sure that any opposition from the legal profession was muted. Thus, the Sudanese Bar Association was first dissolved after the coup and later 'downgraded to a trade union subject to the controls of the Registrar of Trade Unions and the Minister of Labor' (Lawyers Committee for Human Rights 1996: 37-38). Concomitantly, the Bar Association lost some of its traditional immunities, such as the inviolability of a lawyer's files in his/her chambers.

Not surprisingly, the Bashir/NIF regime also promulgated important legislation to further its strategic goal of an in-depth Islamisation of the Sudanese society. As of early 1991, an overhauled, Islamised penal code was implemented (Bleuchot 1994: 423-427; see also 5.7 below). The new code contained the full range of *hudud* (sing. *hadd*) offences and punishments and included, for the first time in the history of Sudanese law, apostasy. In the same year, for the first time, a Muslim Personal Law Act codified personal status law (Ali 2001: 29; An-Na´im 2002: 83). Other important legislative initiatives include the Public Order Act of 1996 (now the Security of the Society Law), the 1998 Constitution, and the Political Associations Act of 1998.

A cornerstone of the NIF's claim to power was the establishment of parallel military and security forces, meant to gradually replace the existing ones. Accordingly, al-Turabi openly stated that the Popular Defense Forces (PDF) were meant to absorb the regular army and 'mobilise the public behind the jihad' (Lesch 1998: 135), as the war against the Southern forces was now baptised. To al-Turabi, at least according to his public statements, the PDF was a means for the Muslim collective to fulfil its obligation to contribute to *jihad*, implicitly portraying the non-Muslim soldiers of the South as an infidel enemy (Abdelmoula 1996: 20). Thus, while thousands of officers critical of the coup were fired despite the ongoing war in the South, the Popular Defence Forces were built up, from Arab tribal militias, NIF volunteers, drafted students and civil servants, and forcibly recruited teenagers (Lesch 1998: 135). In the meantime, the regime had made sure that most pro-government fighters were Southerners, either rounded up in Khartoum and sent to fight for the Sudanese army in the South or belonging to Southern pro-goverment militias (Martin 2002: 3).

In May 1999 al-Turabi negotiated a secret alliance with Sadiq al-Mahdi in Geneva in order to prepare a regime change towards an NIF/Ansar coalition, whilst simultaneously engaging in plans to get rid of Bashir and the military. To this end, al-Turabi, as speaker of parliament, contrived a motion suggesting the creation of the position of Prime Minister, thus effectively reducing Bashir to a mere figurehead stripped of any real power. When Bashir asked the parliament to postpone the

discussion of the motion, he was harshly rebuffed by al-Turabi. Being in no doubt about the imminent threat to his regime, Bashir swiftly dissolved parliament and imposed a state of emergency, which also served as a cover for the regime's human rights violations. Al-Turabi, however, did not easily accept defeat and in February 2001 hammered out a memorandum of understanding between his new party, the Popular National Congress (PNC), and John Garang's SPLA. The bypassed President Bashir forestalled the scheme, had al-Turabi arrested and held him in detention for two-and-a-half years, until his release in October 2003.[19] At the end of March 2004, Hasan al-Turabi was arrested anew and remained in prison until June 2005.

Elimination of the architect of the Sudan's Islamisation programme of the nineties did not, however, lead to a political realignment. Bashir soon made clear that adherence to the shari´a was still a pivotal element of the regime's ideology. At the time of writing, the Islamist statutes are still in force and applied. The statement that the 'Islamic experiment' has come to an end seems therefore premature (Burr & Collins 2003: 253-280).

Peace at last?

In May 2004, a protocol on power sharing between the Bashir government and the SPLA's political wing, the SPLM, was signed in Naivasha, Kenya. In this 'Protocol between the Government of Sudan and the Sudan People's Liberation Movement (SPLM)', the latter agreed to the application of the shari´a in the capital Khartoum; other provisions of the agreement gave guarantees as to the protection of non-Muslims. In principle, the wording of these provisions was meant to safeguard the rights of non-Muslims in the capital, while simultaneously allowing for the continued application of the shari´a in Khartoum as the government saw fit.

In July 2005, the Interim National Constitution of Sudan was adopted after the National Congress Party, representing the central government and the SPLM, had reached a peace agreement (Comprehensive Peace Agreement – CPA) in January 2005. According to this agreement, the Sudan is to be governed by an interim constitution during the six-year transitional period. At the end of this period, in January 2011, a referendum will take place in Southern Sudan to determine whether the South will remain part of the Sudan or whether it will become an independent state. In all likelihood a majority of voters will opt for the latter.

In early 2010 it has become clear that the spirit of reconciliation as reflected in the protocol, the CPA, and in the interim constitution has not been translated into a stable legal and political reality since the signing of the CPA in 2005. Without cooperation of the international

community to support CPA implementation and post-2011 arrangements as well as a lasting solution to the conflict in Darfur, the Sudan is risking a return to war.

5.5 Constitutional law

The 2005 Interim National Constitution (INC)[20] largely draws on its 1998 predecessor, but also contains provisions for power-sharing on a 70-30 basis with Southern Sudan; establishment of an upper house representing the states; and creation of a first and a second vice-president, with one of the two from Southern Sudan. Article 218 makes it obligatory for any person running in elections to respect the Comprehensive Peace Agreement and to enforce its main clauses.[21] The INC, not changing the territorial principle applicable before, maintains that the shari´a is to be effective in the North only, thus posing the problem of the status of non-Muslims living in the North. Article 160 calls for an Interim Constitution for 'Southern Sudan', which was promulgated in September 2005.[22]

Islam not the state religion

Only a few of the INC's articles make direct reference to Islam. Most importantly, the Sudan is not defined as an Islamic republic, nor is Islam the religion of the state (Böckenförde 2008: 85). Article 1 of the 1998 constitution set forth that '[t]he State of Sudan is an embracing homeland, wherein races and cultures coalesce and religions conciliate. Islam is the religion of the majority of the population. Christianity and customary creeds have considerable followers.' In comparison, in the INC references to Islam with respect to the nature of the state have been omitted. Instead, Article 1 (INC) states that the Sudan is a multi-racial, multi-ethnic, multi-religious, and multi-lingual state. Thus, *de jure* Islam is not the state religion.

Sources of legislation

Under the 1998 constitution, pivotal regulations, such as those concerning the sources of legislation, contained ambiguous language. Article 65, for instance, read as follows:

> Islamic law and the consensus of the nation, by referendum, Constitution and custom shall be the sources of legislation; and no legislation in contravention with these fundamentals shall be made; however, the legislation shall be guided by the nation's

> public opinion, the learned opinion of scholars and thinkers, and then by the decision of those in charge of public affairs.

While Islamic law was named first in this list of sources of legislation, even for the South, it remained unclear what role the other sources were to play in relation to shari´a. In contrast, in the 2005 INC version of the constitution, it is clearly stated that the shari´a is not to play a role in Southern Sudan: 'Nationally enacted legislation having effect only in respect of the Northern states of the Sudan shall have as its sources of legislation Shari´a and the consensus of the people' (Art. 5 (1)). While Southern Sudan is to have its own non-shari´a-based legislation (Art. 5 (2)), the shari´a-clause for the North would leave non-Muslim Southerners in the North to be subject to Islamic law.[23] This situation has been addressed in part by certain safeguards that protect non-Muslims in Khartoum from being subjected to shari´a punishments. No similar provision exists, however, for non-Muslims living outside the capital.

Status of non-Muslims in the capital Khartoum

A fundamental difference with the 1998 constitution is a group of five provisions (Art.s 154-158) protecting the rights of non-Muslims in the capital Khartoum. Next to pledging respect for all religions in the capital (Art. 154), Article 156 outlines the principles that are to guide the dispensation of justice in Khartoum. Apart from the application of tolerance with respect to different cultures, religions, and traditions, Article 156 affirms that: 'The judicial discretion of courts to impose penalties on non-Muslims shall observe the long-established shari´a principle that non-Muslims are not subject to prescribed penalties, and therefore remitted penalties shall apply.' Article 157, finally, calls for the establishment of a special commission 'to ensure that the rights of non-Muslims are protected and respected [...] and not adversely affected by the application of Shari´a law in the National Capital'. It must be mentioned here that Article 156 contradicts the position of non-Muslims in the Criminal Act (1991) in many ways and that a faithful application of the INC would require a substantial reform of the Sudan's penal laws.

Eligibility of non-Muslims to become president of the Sudan

In 1998, Muslim dominance was further ensured by legislators who made Arabic the official language of the Sudan (Art. 3) and also bestowed supremacy (*hakimiyya*) in the state upon *Allah* (God), the creator of mankind (Art. 4). Governance (*al-siyada*) was bestowed upon the people of the Sudan, who practise it as worship of Allah. Thus, governance

was exercised by the faithful worshippers of Allah, acting as his trustees. This wording essentially excluded secular Muslims and non-Muslims. These articles, however, have been omitted in the INC. According to the INC a non-Muslim could, theoretically, become president of the whole of the Sudan (Art. 53).

Omission of Islamic precepts

Equally omitted from the INC are most other articles from the 1998 constitution relating to Islamic precepts and notions, such as alms tax (*zakat*), state-based support for martyrs (*shuhada*), the purging of society from Muslims drinking alcohol, and so forth. It goes without saying that the 1991 Criminal Act and other existing laws (e.g. the Public Order Laws) on the different levels (e.g. state, governorate) still give the Northern Islamists enough leverage to pursue its policy of Islamisation and enforcement of Islamic law, at least as long as no substantial legal reforms are undertaken.

The INC expressly makes reference to and confirms the death penalty for *hadd* and retribution-related offences (*qisas*). It also confirms applicability of the death penalty for underage (below 18) and elderly (above 69) offenders in *hadd* or *qisas* cases (Art. 36).

Religious freedom

Concerning religious freedom, Articles 6 and 38 of the INC commit the state to all precepts of religious freedom normally associated therewith. Article 38 stipulates: 'Every one shall have the right to [...] declare his/her religion or creed and manifest the same [...]'. It should be noted here that this right must be seen in the light of the pertinent sections of the Criminal Act (1991), which make apostasy of Muslims punishable by death (Art. 126). Non-Muslims are, thus, free to convert to Islam, but not vice versa. In practise, however, death penalties have not been imposed in cases against converts since the promulgation of the Criminal Act in 1991.[24] But, discrimination against Christians and adherents of native religions was and is still commonplace,[25] irrespective of Article 31, which sets forth that '[a]ll persons are equal before the law and are entitled without any discrimination as to race, colour, sex, religious creed [...] to the equal protection of the law.'

(Un) Equal rights of women

The INC also guarantees men and women equal rights in the areas of civil, political, social, cultural, and economic rights (Art. 32). These guarantees, however, contradict to some degree other Sudanese

legislation. Equal rights for men and women are especially relevant with regard to shari´a-based parts of the Criminal Act (1991) and in consideration of family and inheritance laws, which are known to be disfavourable to women in a variety of ways (see below). Article 15 of chapter II on the 'guiding principles and directives' of the INC guarantees that: 'No marriage shall be entered into without the free and full consent of its parties.' In the second section of the same article, the state is called upon to 'protect motherhood and women from injustice, promote gender equality and the role of women in family, and empower them in public life.' Article 22 of the same chapter, however, clarifies that these provisions 'are not by themselves enforceable in a court of law'.

The Constitutional Court

In 1998 a Constitutional Court was established, with jurisdiction over all issues related to the constitution. It can be appealed to by 'any aggrieved persons for the protection of freedoms, sanctities and rights' guaranteed in the constitution (Bantekas & Abu-Sabeib 2000: 543). The INC maintains the Constitutional Court whose president, a deputy, and five members are appointed by the president of the republic with the approval of two-thirds of the Council of States.[26] The president can, thus, ensure a composition of the court favourable to his interests.

5.6 Family and inheritance law

The relevant Muslim Personal Law Act (MPLA) of 1991 is predominantly based on the Hanafite school. However, in order to introduce reforms, particular solutions from the other three Sunni schools, especially the Malikite school, have been introduced (Ruiz-Almodovar 2000: 180; Ali 2001: 30). It is applicable, if both parties or only the husband are Muslim. Christians and Jews may use their respective laws with regard to personal status, marriage and divorce, if both partners belong to the same religious community. Members of Southern Sudanese tribes are subject to customary law. Customary laws with regard to marriage have been codified only for the Dinkas, Luos and Fertit in the Re-statement of the Bahr El Ghazal Customary Law Act (1984).[27] Customary law, however, remains to a large extent uncodified and unpublished. If both partners belong to the (small) community of Hindus, Hindu law is applicable (Ali 2001: 30).

Marriage

Mixed marriages and customary marriages

Even though a Muslim man can marry a non-Muslim woman as long as she belongs to 'a heavenly religion' (i.e. Christianity or Judaism), a Muslim woman cannot marry a non-Muslim man, unless the non-Muslim man converts to Islam (Art. 19 MPLA). In Southern areas not controlled by the government, this regulation is not enforced. In the case of mixed marriages between a Sudanese and a foreign citizen, the effects of such a marriage, such as property rights and child custody, are adjudicated in accordance with the laws of the husband's country.

Unregistered, customary (*'urfi*) marriages are considered valid, but do not result in the same legal rights for women. Under an *'urfi* marriage, for example, a woman is not entitled to alimony.

Dower

The marriage contract obliges the husband to pay a sum of money as a dower (*mahr*) to the wife (Art.s 27-31 MPLA). The dower can also take the form of services or other assets. The full dower gift, which becomes the property of the wife (Art.s 28-29), is due with the conclusion of a valid marriage contract confirmed by the consummation of the marriage. The two spouses can either agree on the dower before the marriage or, if no agreement has taken place, the 'fair *mahr*' (*mahr al-mithl*), based on the social status of the bride, is due at the time of marriage in accordance with Article 29(5) (Ali 2001: 75).

Maintenance during marriage

The wife is entitled to receive maintenance from her husband from the time of conclusion of a valid marriage contract (Art. 69 MPLA). Maintenance includes food, clothing, dwelling, medical treatment, and everything else required in order to live according to custom (*'urf*, Art. 65). In determining the maintenance due, the economic situation of the husband must be taken into consideration. If these circumstances change, the maintenance due changes with it (Art.s 66-67). Maintenance of the wife is due irrespective of whether the wife is well-to-do or has an income of her own. The MPLA (1991) does not recognise any obligation of the wife to contribute to the family income (Ali 2001: 83). In case the husband does not pay maintenance, or only pays part of it, the wife can claim up to three years of arrears, unless the spouses have come to a different agreement (Art. 70(1)).

The wife loses her right to maintenance, if she refuses to move to the common home without legally valid grounds, if she leaves the common home without legally valid grounds, if she prohibits the husband to enter the common home without legally valid grounds, if she works

outside the home without the consent of the husband, or if she refuses to travel with her husband without legally valid grounds (Art. 75(a-e)).

Rights of wife and husband

Next to maintenance, the wife has the right to visit and to receive visits from her parents and close family (*maharim*) Wives, however, cannot travel abroad without the consent of their husband or male guardian. (Art. 51(a-b)). She is further entitled to protection with regard to her personal property (*'adam ta'arrud amwalha al-khassa*) and protection from material or mental harm. She also has the right to fair treatment *vis-à-vis* other wives, if the husband has more than one wife (Art. 51(a-d)).

The husband, in turn, has the right to be attended to and the right to obedience from his wife. She also has the duty to guard and defend him, his honour, and his property (Art. 52(a-b)).

Consent to marriage and guardianship

Both parties willing to marry must be past the age of puberty and must consent to marriage out of their own free will. The law does not stipulate a minimum age at which puberty can be considered to have been reached. Both the man and the woman have the right to call off the marriage (Art. 9(a)).

The male guardian (*wali*) marries adult women with their consent (Art. 34). If he refuses to consent to the marriage without justification, however, a judge can replace him and provide legal consent to the marriage in his stead. If the guardian refuses to consent to the marriage of his ward she can demand to be married by a judge (Art. 37(1)). The judge can authorise the marriage of whoever demands it, if it is proven that the guardian refuses to give his consent without legal justification (Art. 37(2)).

In meeting legal requirements for the witnessing of a marriage contract either the testimony of two men is permissible, or of one man and two women (Art. 26).

Divorce

A divorce can be realised in the following ways (Art. 127 MPLA): a) on the (formal) initiative of the husband (*talaq*); b) by initiative of both spouses (the so-called *khul´*), or repudiation against compensation (*talaq ´ala mal*); c) divorce on the initiative of the wife by court decision (*tatliq* or *faskh*); and d) death of one of the spouses.

Divorce initiated by the husband (talaq)

A marriage can be dissolved at any time by the unilateral repudiation by the husband or his representative (*talaq*) (Art.s 128-141); marriage

dissolution initiated by the wife using the *talaq* procedure is also valid, if the husband has invested his wife with such authority (Art. 132). The husband does not need to give reasons for the repudiation, and it is not necessary that a court intervenes (Ali 2001: 100). There are two kinds of repudiations, revocable and irrevocable.

Revocable repudiation terminates the marriage contract only at the end of the waiting period (*´idda,*[28] see Art. 136(a)). The husband has the right to return to his wife during the *´idda* period, even against her will (Art.s 139-141). However, for the revocation of the repudiation to be valid, the repudiated wife must be informed of the repudiation within the *´idda* period (Art. 141). Irrevocable repudation terminates the marriage in two ways: 1) after a simple irrevocable repudiation (*talaq ba´in bainuna sughra*) the marriage can only be restored by concluding a new marriage contract and again paying the dower; and 2) after an absolutely irrevocable repudation (*talaq ba´in bainuna kubra*) the former marriage can only be restored by way of a new marriage (as in 1), if the divorced wife is first married to another man and this marriage is consummated and subsequently dissolved (Art. 136(b)).

Divorce initiated by both spouses (khul´)

An alternative method of divorce is called *khul´* (Art.s 142-150). In this case both parties agree to dissolve a marriage without court intervention by means of a financial compensation to be paid to the husband by the wife. The financial settlement consists of the wife either returning the dower or giving up her rights to financial compensation, such as renouncing the payment of the parts of the dower not yet payed in exchange for a divorce. The financial settlement cannot be replaced by compensation of a non-monetary form, such as by the wife giving up custody rights to their common children (Ali 2001: 105). *Khul´* divorce is irrevocable.

Divorce initiated by the wife in court (tatliq)

In the framework of the *tatliq* (divorce) procedure, which recognises various valid grounds for divorce, the court intervenes. Grounds for divorce that may be invoked by the wife include, for example, situations such as the husband suffering from an incurable physical defect (Art.s 151-152) or impotence (Art.s 153-161); cruelty of the husband or discord between the spouses (Art.s 162-169); divorce by redemption (Art.s 170-173); failure of the husband to pay maintenance to the wife (Art.s 174-184); absence or imprisonment of the husband (Art.s 185-191); and refusal of the husband to have sexual intercourse with his wife (Art.s 192-195).

Maintenance and financial compensation after a divorce

Following divorce, the wife is entitled to maintenance during the *´idda* period (mentioned above), unless the divorce is the consequence of an illegal act on the part of the wife (Art. 72). A woman in the state of *´idda* who is not breastfeeding has the right to receive maintenance after the divorce for a maximum of up to one year (Art. 73(a)). A woman in the state of *´idda* who is breastfeeding receives maintenance for up to three months after the end of lactation. If she swears that her menstruation fails to appear due to breastfeeding, the period of maintenance will be prolonged to two years and three months after the birth of the child (Art. 73(b)).

In addition to the alimony described above, the divorced woman is entitled to a financial compensation (*mut´a*) equivalent to the maintenance of the *´idda*, not exceeding six months and according to the solvency of the ex-husband (Art. 138, Ali 2001: 110). However, in the following cases, the *mut´a* is not due: a) if the reason for the divorce is the non-payment of maintenance due to the lacking solvency of the husband; b) if the divorce has been caused by a fault (*´aib*) of the wife; and c) if the divorce has been reached by mutual consent against a payment by the wife (Art.s 138 and 2(a-c)).

Custody

After divorce the mother is entitled to custody of boys until they are seven years old and of girls until they are nine years old (Art. 115(1) MPLA). A judge can authorise the custody of divorced mothers for boys between seven years of age until they reach puberty and for girls between nine until the consummation of marriage if it is in the interest of the ward (Art. 115(2)). If the woman who has custody has a different religion than the Muslim father of the ward, she loses custody when the child reaches the age of five or at any time it is feared that she is raising the child in a different religion than that of the father (Art. 114(2)). The father or another male guardian is to supervise all affairs of the ward in the custody of the mother, such as education, guidance, and instruction (Art. 118). The custodial parent may not travel within the country except with the permission of the guardian of the child (Art. 119). On the other hand, the guardian (i.e. the father or another person) also cannot travel with the ward without the permission of the woman who has custody (Art. 120). Financial support of the child is the father's responsibility for girls until the daughter is married and for boys until the son is old enough to earn his own living (An-Na´im 2002: 85).

Polygamy and special clauses

Sudanese personal status law allows for polygamy (Art. 19(b) MPLA). However, the wife has the right to insert a clause in the marriage contract prohibiting the husband from taking additional wives. When there is a violation of this clause, the first wife can obtain a divorce without having to prove damage (*darar*). In general, any clause in the marriage contract is permitted, unless it 'allows for something prohibited or prohibits something permitted' (Art.s 42(1-3)). The husband cannot live with his second wife in the same house where he lives with his first wife, unless the first wife has agreed to such an arrangement. In the latter case, the first wife maintains the right to terminate cohabitation at any moment (Art. 79).

Inheritance

The inheritance laws discriminate against women. Male heirs receive twice the share given to females possessing the same degree of relation to the deceased. Daughters inherit half the share of sons in cases of the death of a parent. A widow inherits a smaller percentage than do her children. Heirs must also be adherents of the same religion. Thus, a non-Muslim widow cannot inherit from her Muslim husband except as a legatee in his will, which amounts to a maximum of one-third of his assets. Of the other two-thirds, distributed according to shari´a principles, she receives nothing (Art.s 344-400 MPLA).

5.7 Criminal law

The Sudan Criminal Act (CA) was promulgated in 1991. Its text is identical to that of a 1988 draft criminal code with the exception of a handful of amendments.[29] Related laws are the Criminal Procedure Act of 1991, and the Evidence Act of 1993.

Hudud offences

The Criminal Act of 1991 (CA), which is based on the pertinent qur´anic prescriptions, defines six offences as '*hudud* offences': drinking alcohol, unlawful sexual intercourse, unproven accusation of unlawful sexual intercourse, banditry, theft, and apostasy.[30]

Only Muslims are to be punished with forty lashes for the drinking of wine (*shurb al-khamr*), and, in extrapolation, for the consumption of any other intoxicating drink (Art.s 3 and 78(1) CA). Exceeding traditional Islamic jurisprudence, Sudanese criminal law also stipulates the same

hadd punishment for individuals found guilty of the offence of production and/or possession of intoxicating beverages. Non-Muslims, though not subject to the above provisions, face the same punishment – whipping of up to forty lashes – for alcohol consumption in conjunction with causing public nuisance (Art. 78(2)). Recidivists who commit one of the above crimes or anyone found guilty of dealing in alcohol and indicted for the third time is liable to a prison term of up to three years or a whipping of up to eighty lashes; in other words, twice the amount of lashes stipulated for the *hadd* crime may be inflicted on the non-Muslim recidivist alcohol 'dealer'[31] (Art. 81). Non-Muslim women have been particular targets for indictments made in relation to alcohol-related offences.

Unlawful sexual intercourse (*zina*) is punishable by stoning for the *muhsan* and by one hundred lashes for the non-*muhsan*, with *muhsan* being defined as the legal status of an individual who, at the time of the commission of adultery, is in a valid and ongoing marriage that has been consummated (Art.s 145 and 146). Widowers, widows, and divorcees do not therefore fall under the definiton of *muhsan*, different from traditional Islamic jurisprudence (Scholz 2000: 445).

Female victims of rape have, in some instances, suffered grave injustices from Sudanese courts when the rape resulted in pregnancy. Since pregnancy out of wedlock is recognised as proof of unlawful sexual intercourse, in some cases pregnancy was taken for implicit proof of *zina*. In other words, rape can be proven either, rather unlikely, by four male witnesses to the crime or by a confession of the rapist, equally unlikely (Sidahmed 2001: 197-200). If neither the witnesses nor the confession could be produced, a conviction for unlawful sexual intercourse, proven by the fact of pregnancy, was permissible in court.[32] In other more recent cases, however, alleged rape has been recognised as legal doubt, the effect of which is to avert the *hadd* punishment.[33] In all of the cases referenced here, the (alleged) rapist was released for lack of evidence.

Offenders committing *zina* in the Southern states are not subject to the *hadd* punishments, but do face a prison term of up to one year for the non-*muhsan* and up to three years for the *muhsan*, in combination with a possible fine.[34] Non-Muslims in the North, however, are not exempted from the *hadd* punishments and are not treated differently from Muslims, according to the Criminal Act (1991).[35] Hetero- or homosexual anal intercourse (*liwat*) is not subsumed under the article on unlawful sexual intercourse (*zina*). In fact, it is not part of the *hudud* and consequently the prescribed punishment is equally applicable in the Southern states as it is to offenders in the North. Nevertheless, punishment is severe. First and second time offenders are sentenced to one hundred lashes and a prison term of up to five years; the third-time recidivist faces execution or life imprisonment (Art. 148).

Unproven accusation of unlawful sexual intercourse (*qadhf*) is punishable by eighty lashes under the condition that the victim of *qadhf* has not been previously convicted for unlawful sexual intercourse (*zina*), anal intercourse (*liwat*), rape, incest, or practising prostitution (Art. 157). While *liwat* has been defined separately from the *hadd* offence of unlawful sexual intercourse, it is now, inconsistently, subsumed under *qadhf* (Scholz 2000: 447). Among other reasons, the punishment for unproven accusation of unlawful sexual intercourse can be remitted if the offender is an ascendant of the victim or when the defamed person pardons the defamer before the execution of the punishment.

The *hadd* offence of banditry (*hiraba*) is a 'composite crime' and thereby punished according to the gravity of the crime(s) committed. As the smallest common denominator, the crime of *hiraba* is committed by whoever 'intimidates the public or hinders the users of a highway with the intention of committing an offence against the body, or honour, or property' (Art. 167). Thus, if murder or rape are committed in the context of *hiraba*, the punishment will be severe: execution or execution with subsequent crucifixion. If grievous hurt was committed or the property stolen reaches the minimum value required in cases of *hadd* theft, the punishment is cross-amputation, that is the amputation of the right hand and the left foot. All other cases of *hiraba* are punishable by a prison term of up to seven years in exile (*taghrib*). If the offender voluntarily abandons the commission of *hiraba* and declares his repentance before his arrest, the *hadd* penalty will be remitted. However, a prison term of up to five years may imposed and the rights of the victim with regard to *diya* (blood money) and/or compensation must be respected (Art. 169).

Hadd theft (*sariqa haddiyya*) is punishable by amputation of the right hand (and with a prison term of up to seven years for second time recidivists) (Art.s 171 (1) and 171(2)). In comparison to non-*hadd* theft, theft punishable by the *hadd* penalty must fulfil certain conditions. If one of these conditions is not met, the *hadd* penalty will not be due. Among these conditions are that the stolen property must reach a certain value (*nisab*); it must be taken from a safe place where moveable property is kept (*hirz*); and the property must be moveable, belong to another person, and must be taken covertly with the intention of appropriation (Scholz 2000: 449-451). A number of reasons can lead to the remittance of the punishment of amputation for theft (e.g. when the offender has or believes to have a share in the stolen property or when the theft takes place between ascendants and descendants or between spouses). The punishment is also remitted if the offender either restores the stolen property before being brought to trial or becomes the owner of it, or if he retracts his confession and the theft was proven by conviction only.

Apostasy (*ridda*), punishable by death, was codified for the first time in Sudanese history in 1991 (Art. 126 CA). Every Muslim who renounces the creed of Islam either by an express statement or by a conclusive act commits the crime of apostasy (Art. 126 (1)). The law, however, does not specify further which form such a statement or act must take to fall under this definition. Thus, this wording leaves a lot of room for interpretation and, therefore, abuse. However, apart from the notorious Muhammad Taha case (1985), no other execution for apostasy has been reported. Irrespective of the sex, the apostate is given a chance to repent during a period to be determined by the court. If the apostate recants before execution, the punishment will be remitted (Art.s 126(2) and 126(3)). Recent converts are exempted from the death penalty for apostasy (Art. 126 (2)).

Blood money and retribution

Other pertinent concepts of Islamic criminal law, such as blood money (*diya*) and retribution, have also been codified. Blood money has been enacted as possible compensation for crimes such as intentional homicide, semi-intentional homicide, and homicide by negligence (Art.s 130-132 MPLA); abortion (Art. 135); and the infliction of intentional and semi-intential wounds and wounds by mistake (Art.s 139-141).

Retribution (*qisas*, or literally 'an eye for an eye') is the penalty stipulated for causing intentional wounds. Article 29, however, sets forth precise conditions for retribution, namely that the two organs must be similar in type, soundness, and size. There will be no retribution except for a counterpart of the injured organ, and a sound organ cannot be taken for a defective one. Likewise, a whole organ can only be taken as retribution for the loss of a whole organ, and part of an organ only for the loss of a part.[36]

No Islamic criminal law in the South

The provisions of the Criminal Act (1991) on *hudud* offences – drinking alcohol and causing nuisance, dealing in alcohol, sale of carcasses, apostasy (*ridda*), for causing intentional wounds (*qisas*), unlawful sexual intercourse (*zina*), false accusation of unlawful sexual intercourse (*qadhf*), armed robbery (*hiraba*), and theft (*sariqa*) – are not applicable in the Southern states of the Sudan.[37]

Public Order Act

A more tangible enforcement of the regime's view of Islamic values than the Criminal Act of 1991 was, and still is, for many citizens the

public order acts of individual governorates. The governorate of Khartoum's 'Khartoum Public Order Act' of 1996, which was 'introduced to storm against society's 'immorality' [...], to organise market places and to control public appearances' is particularly illustrative.[38] In addition to the relevant articles of the Criminal Act of 1991 on alcohol consumption, prostitution, obscene acts, and public morality, all of which were enforced from the time of their promulgation, Bashir issued complementary directives in November 1991 imposing Islamic dress in all government offices, schools, and universities (Sudanow 1992: 26-27). The Khartoum Public Order Act of 1996 went even further in controlling public space, adding new offences such as 'dancing between men and women', 'private parties' without permission, or 'singing of trivial songs' during a party. It further mandated gender separation in public transportation[39] and banned men from working in the hairdressing business. Contraventions against the Public Order Act and relevant articles under the Criminal Act (especially alcohol offences) are tried by Public Order Courts. Their rulings are carried out on the spot. To allow the accused to prepare a defence is not a requirement in Public Order Courts, neither is the right to legal assistance provided for (SIHA 2009: 14). In 2002, the Public Order Act was repealed and supplanted by a 'Security of the Society Law'. In 2009, this Security of the Society Law continued to be applied in Khartoum State.[40]

5.8 Economic law

Islamic finance

Islamic finance, closely linked to the establishment of Islamic banks, did not make its appearance in the Sudan before the late seventies. The first bank to apply Islamic principles was the Faisal Islamic Bank of Sudan (FIBS), which was established by a special act of parliament in 1977 granting it extensive tax concessions and freedom to transfer foreign currency. It began operating in 1978 and proved to be a considerable success. A net profit of 1 million Sudanese Pounds in 1979 rose to 21 million Sudanese Pounds in 1982, enabling the bank to pay to their shareholders 25 per cent return on their investment. Next to practising interest-free banking, the FIBS statutes stipulated that 10 per cent of net profits were to be distributed to the poor as *zakat* (Stiansen 2004a: 156-159).

The unprecedented success of the FIBS led to the establishment of other Islamic banks, some of which had close links with the main political groups.[41] Only the Umma Party did not run its own bank. The Muslim Brotherhood, who already had close links to the Tadamon Islamic Bank, managed in the early eighties to take over all important

management positions of the FIBS. Audits of the Bank of Sudan disclosed that loans in many Islamic banks were given preferentially to members of the respective political group to which the bank had links. This had led to a very high default rate on such loans (Stiansen 2004a: 159).

In 1983 and 1984, the Civil Procedure Act, the Civil Transaction Act, and circulars from the Bank of Sudan gradually abolished interest-based bank lending and as of December 1984, Islamic forms of contracts such as *musharaka, murabaha,* and *mudaraba*[42] were introduced. Interest-bearing accounts were changed to comply with the new rules. Enforcement of the ban on interest, however, was lax, and in 1986 the new democratic government under Sadiq al-Mahdi re-introduced a choice between banking based on interest and non-interest banking by allowing compensatory rates on loans and the payment of compensatory rates on deposits (Stiansen 2002: 43, 53). The government led by Sadiq al-Mahdi did not, however, change the existing legislation on interest.

After the 1989 Islamist coup these compensatory rates were abolished and the streamlining of Islamic financial contracts gained momentum. Special attention was given to *murabaha* contracts, which until at least the late nineties were the dominant financial contract, used in as much as possibly 80 per cent of all financial transactions (Stiansen 2004b: 83). *Murabaha* contracts in theory consist of a sale agreement in which the bank buys a commodity on behalf of a customer. The latter pays when the good is delivered or after delivery on the basis of an agreed schedule. The profit margin charged by the bank is not considered to be interest because it cannot be changed, i.e. increased, even if the customer fails to pay after having received the commodity. The bank necessarily has to take physical possession of the commodity before it is handed out to the customer. Until the mid-nineties, however, *murabaha* contracts were little more than camouflaged interest-based transactions that minimised the risks for the banks. Thus, banks asked for down-payments, letters of guarantee, liens on real estate, or mortgage loans equivalent to the amount of the *murabaha* contract. The banks normally did not see the commodities bought for clients (Stiansen 2004b: 83). In 1993, a *fatwa* issued by the Bank of Sudan's Shari´a Council established criteria for *murabaha* contracts that would ensure their legality and also bring them closer to the spirit of the shari´a. But it took until 1995 before a tighter supervision by the Bank of Sudan led to an enforcement of the new rules.

The Sudan's experience with Islamic finance is paradoxical. Economically speaking, the experiment has been a failure; the financial sector is extremely weak. The IMF estimated in 1998/1999 that 18-19 per cent of bank loans had to be categorised as 'non-performing'.

Reasons for this weakness include factors external to Islamic finance such as high inflation rates, worsening terms of trade due to declining agricultural production, and the war in the South. Yet, factors inherent to the experience of Islamic finance in the Sudan, often in conjunction with a lack of political control, also contributed to the low performance of Islamic finance. Thus, the Bank of Sudan did little to supervise banks and curb fraud and corruption in connection with lending practises. Only in the late nineties did it introduce restrictions on loans to the higher management of banks and a ban on additional loans to already indebted customers (Stiansen 2004a: 164). Further, banks suffered from high default rates in agricultural finance, especially with regard to advance contracts (*salam*). In years of bad harvest, farmers saw themselves incapable of delivering what they had sold to the bank through such contracts. If no agreement with the bank could be reached, many farmers resorted to not harvesting at all. A breach of contract by farmers under such circumstances was accepted by the Sudanese government, but led to losses for banks of up to 50 per cent in agricultural investments (ibid).

In political terms, however, the introduction, application, and further development of a wide range of tools of Islamic finance has been a success. Sudanese banking laws until 2005 were based entirely on the Qur´an and Sunna, with convential, interest-based financial tools eliminated from the system. Despite these precautions, strong vestiges of interest-based financial techniques survived at least until the mid-nineties.[43] A further advantage for the regime, and closely connected to the application of Islamic finance, is the transfer of wealth to groups closely associated with the regime (Stiansen 2004a: 165).

The Comprehensive Peace Agreement 2005 alongside the Interim National Constitution, however, has changed the legal framework and context of finance in the Sudan. In fact Article 201(2) of the Interim Constitution provides for the establishment of a dual banking system consisting of an Islamic banking system in the North and a conventional banking system in Southern Sudan. The Central Bank shall be responsible for the use and development of both sets of banking instruments, the Islamic one and the conventional one (Art. 202(1)). The Bank of Southern Sudan, as a branch of the Central Bank of Sudan, provides, *inter alia*, conventional banking services (Art. 201(3)) to Southern Sudan. Likewise, the Central Bank of Sudan implements its monetary policy through an Islamic financing window in Northern Sudan and, managed by the Bank of Southern Sudan, through a conventional window in Southern Sudan (Art. 202(1)(a-b)).

Zakat

A national system of voluntary donations of wealthy Sudanese and companies was first institutionalised in 1980. With the application of the Zakat and Taxation Act in September 1984, however, *zakat* lost its character as a religious alms tax and took on instead the form of another tax within the existing taxation system. A Chamber of Zakat (*diwan al-zakat*) under the supervision of the president was created, but the collected sums were not managed on separate *zakat* accounts. Rather, they entered the very state budget they were intended to support. After the downfall of Numeiri in 1986, a new law on *zakat* made the *zakat* administration autonomous. From now on the collected sums were managed separately from the public treasury. The state, however, continued to supervise the use of *zakat* through the Ministry of Social Affairs. The last legislation on *zakat* was a presidential decree in 2001 which reorganised its collection on the national and regional levels (Converset & Binois 2006: 41-44).

Originally *zakat* was also levied on the salaries of all Sudanese citizens. However, due to a large amount of unregistered employment and a lack of control, this system became unmanageable. Today, unofficial *zakat*, i.e. voluntary *zakat* given by individuals, is not paid to the state, but is normally distributed within the families and relatives of the donators (Converset & Binois 2006: 45). In contrast, official *zakat* is levied on all commercial companies, farms, cattle-breeding and dairy operations, poultry farms, fisheries, and more. The proceeds are distributed in kind (cereals, flour, sugar, dates, lentils, etc.) to local institutions, such as hospitals, orphanages or qur´anic schools or in cash in the form of subventions or salaries paid especially to social or health institutions (Converset & Binois 2006: 53).

Some authors claimed in the mid-nineties that the funds levied were being partially re-funnelled into the Islamisation programme, the war in the South, efforts to proselytise prisoners of war, and possibly even used to the personal benefit of high-ranking government supporters (Lauro & Samuelson 1996: 9). Criticism has not fallen silent in more recent times. In particular, critics express concern with maladministration of the collected money, lavish spending on cars and buildings, and the sumptuous lifestyle of parts of the *zakat* management and personnel (Converset & Binois 2006: 42).

5.9 Human rights obligations

The Sudan is party to a number of international human rights treaties, including the International Covenant on Economic, Social, and Cultural

Rights (ICESCR), the Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and the Convention on the Rights of the Child (CRC). Further, the Sudan is party to the Convention on the Prevention and Punishment of the Crime of Genocide, the Slavery Convention, and the Convention relating to the Status of Refugees. The Sudan is also party to the International Convention on the Suppression and Punishment of the Crime of Apartheid and the African Charter on Human and Peoples' Rights. The Sudan has signed, but not yet ratified, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). The Sudan is not a party to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). With regard to the CAT and CEDAW, the government argues that some of the articles in the two conventions do not comply with the principles of shari´a. In January 2001, President Bashir reportedly said that the Sudan would not sign CEDAW because it was held to contradict Sudanese family values. As of early 2010, the Sudan still had not become party to the two conventions.[44]

Immediately after the 1989 coup, the Bashir regime suspended the 1985 Transitional Constitution and ruled by constitutional decrees enacted by the Revolutionary Command Council (RCC). In relation to this, the Sudan's initial report (1991) to the U.N. Human Rights Committee lodged a derogation concerning its obligations under the ICCPR:

> It became expedient to proclaim a state of emergency with the inevitable derogation from Sudan's obligations under the Covenant on Civil and Political Rights [...] With the achievement of more progress in the peace process and the establishment of the political system, that state of emergency will be naturally lifted and the derogation from Sudan's obligations under the Covenant will be terminated forthwith.

Since that 1991 report, first in 1998, and then in 2005, new constitutions have been enacted, the first of which, in turn, has been partially suspended due to the imposition of emergency law in 1999. It is unclear whether with the lifting of the state of emergency in 2005 in most of the Sudan the above derogations have become groundless.

Legal contradictions between the shari´a and human rights in national and international law

The INC of 2005 (see 5.5) does not mention international human rights as a source of legislation. Article 27 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 the Bill of Rights (i.e. the INC). It is, however, not clear that these international human rights treaties and conventions enjoy the same legal recognition as other articles of the constitution, nor does the INC explicitly mention that these treaties and conventions are enforcable in Sudanese courts.[45]

In fact, in many instances the INC subjects itself to 'prescribed laws', thus inverting the usual practise of the hierarchy of norms.[46] To date, little progress has been made concerning the adjustment of statutory laws in order to make them compliant with the Interim National Constitution and international human rights conventions to which the Sudan is party.[47]

Thus, Sudanese criminal legislation is clearly in conflict with the country's commitments under Article 7 of the ICCPR, banning torture, cruel, inhuman, and degrading treatment. Especially shari´a-based punishments such as flogging, stoning, crucifixion, and amputation as stipulated in the 1991 Penal Code plainly contradict the ICCPR. While I could not find any trace of an execution of stoning, the punishment of flogging is imposed and executed on a regular basis. While Article 14(5) of the ICCPR guarantees the right of appeal, sentences to flogging in accordance with the Security of the Society Law are in practice carried out instantaneously, and without counsel. The Criminal Act (CA) 1991 allows in cases concerning the *hudud* and *qisas* the death penalty for individuals below the age of 18, while the ICCPR and the CRC both prohibit death sentences against offenders who have not yet reached the legal age of maturity. The *hadd* offence of apostasy and its respective punishment constitute a violation of Article 18(1) of the ICCPR, which guarantees freedom of thought, conscience, and religion. It is also discriminatory in its differential treatment of adherents of the different faiths.

Important shari´a-based stipulations of the CA do not exempt non-Muslims in the northern governorates. Thus, Article 168(1) on armed robbery (*hiraba*) provides for the death penalty and/or crucifixion for Muslims and non-Muslims alike. Similarly, Article 171(1) punishes capital theft (*sariqa*) with amputation of the right hand, irrespective of the faith of the offender. It goes without saying that cruel corporal punishments as such constitute a human rights violation, no matter whether the person sentenced is Muslim or not. In practice non-Muslims in the North are frequently victims of shari´a-based legislation on alcohol-related offences. Thus, the majority of prisoners in the Omdurman Women's Prison were imprisoned for alcohol-related offences. More recently, the Sudanese government seems to have taken measures to rectify this situation.[48]

While the Sudan has not yet signed CEDAW, it is important to mention that the Muslim Personal Law Act 1991 is in contradiction with Article 16 of CEDAW, which calls for equal rights of men and women with regard to their rights to enter a marriage out of their free will and equal rights with regard to its dissolution, and with regard to equal rights and responsibilities as parents and concerning guardianship (Tønnessen & Roald 2007: 27-29). CEDAW also calls on state parties to accord women equality with men before the law (Art. 15). This provision is in clear contradiction with the reduced status of female witnesses in the Sudanese Evidence Act 1993.

Apart from contradictions between the Sudan's obligations under the ICCPR and other human rights covenants and its shari´a-based national legislation, there are many examples of violations of the Sudan's international obligations at a *de facto* level. In addition to the well-known mass killings and mass rape in Dar Fur, one of the most blatant human rights violations that has long persisted throughout the country is the recurrent scourge of slavery. Banned by both the ICCPR (Art. 8) and the Slavery Convention, it has nevertheless continued to be practised with impunity (Lobban 2001 and Darfur Consortium 2009).

5.10 Conclusions

Diversity of legal systems that influenced the Sudan

As this study demonstrates, the Sudanese legal system has been shaped and influenced by a variety of sources since the nineteenth century: by Ottoman-Egyptian law in the nineteenth century, by common law from the beginning of the condominium rule in 1898, by jurisdiction and laws either influenced by or based on the shari´a throughout the history of Islamic Sudan, by modern Egyptian civil law since the early 1970s, by customary law during the entire history of the Sudan, and by the diverse family laws of different denominations. While the different ingredients have occupied different spaces at different times, certain tendencies can be filtered out for the post-colonial period.

The camp advocating for Egyptianisation of the legal system can claim victory for the important field of civil law. After the failed introduction of a slightly modified version of Egyptian civil law in 1971, a second attempt in 1984 was successful. The Sudan has, thus, joined the large group of Arab states that have adopted Egyptian civil law.[49]

Further, the Sudanese legislation has to some extent since 1983 gone through an accelerated process of Islamisation. For more than twenty years, two autocratic regimes have expanded the influence of the shari´a to the detriment of Sudanese legal tradition and customary law. The shari´a has importantly influenced criminal legislation, banking laws,

taxation laws (*zakat*), the 1998 and 2005 constitutions, and, as in most Muslim countries, family and inheritance laws for Muslims.[50]

However, with regard to the actual implementation of the *hudud* it has been noted that 'the new legislators seemed rather keen to give an impression of moderate and considerate application as opposed to the cavalier deployment that characterised the 1983 experiment' (Sidahmed 1997: 220). Even though no precise statistics for the number of stonings, crucifixions, floggings, and limb amputations inflicted between 1989 and 2008 is available, a synopsis of the relevant human rights reports since 1989 corroborates Sidahmed's assumption. Enhancing the regime's legitimacy and drawing a boundary 'within which the regime accommodates or excludes other political forces' (Sidahmed 1997: 222), the shari´a – well embedded in a multitude of Islamisation measures – has ostensibly fulfilled the regime's need for Islamic symbolism.

At present, the Sudan possesses a legal system that is characterised by a high degree of legal pluralism. The heritage of the common law is, despite the ups and downs of twenty years of Islamisation efforts, still clearly visible in two important aspects: first of all, certain laws of the time of the condominium are still valid, and, secondly, more recent legislation can be traced back to the condominium in terms of organisation and wording. Most significantly, despite efforts of the Bashir government to marginalise it, customary law is still of major importance in the rural areas of the Sudan. It is estimated that as much as 80 per cent of all cases in the Sudan are judged in accordance with customary law.[51]

Resistance in the North and in the South

The Islamised legislation, introduced by former President Numeiri and reinforced by the current President Umar al-Bashir continues to be objected to by the non-Muslim minority living predominantly in Southern Sudan and in and around the capital Khartoum. Fears of further Islamisation and deep disagreement concerning the Sudanese religio-political identity fuelled the armed rebellion in the South from 1983 to 2005. Compromises over shari´a legislation as negotiated in the 2004 Naivasha peace protocol and stipulated in the Interim National Constitution are a step in the right direction. However, underlying, more complex questions such as the nature of a future constitution, which must include acceptable formulas on democracy, the rule of law, and Sudanese identity, will have to be tackled first.

It can be safely assumed that there is important opposition to the current variant of Islamised legislation in the North as well. It was not without reason that the major thrust for the Islamisation of the legal system came from rather unpopular autocratic regimes. However, during the short-lived democratic interludes (1964-1969 and 1985-1989),

the traditional sectarian parties have neither managed to present a viable constitution nor have they translated their own calls for a shari´a-based legislation into lasting concepts, simultaneously acceptable to the Muslim majority and reassuring the non-Muslim minority at the same time.

Contradictions with human rights conventions

The Islamisation programme has also led to serious contradictions between the Sudan's obligations under international human rights covenants and its national shari´a-based legislation. Sudanese government officials have forwarded arguments to counter criticism. At a base level, they maintain that international human rights legislation, such as the ICCPR, forms an integral part of the Sudan's national legislation and can be invoked before national courts within the Sudan.[52] Another popular argument is that 'the rights of the individual [i.e. in an Islamic society] should not prejudice the rights of the community or its public interest'. In other words, the rights of the Muslim community supersede the rights of the individual, irrespective of international treaties. Further to this point, President Bashir has excluded the Sudan's future adherence to CEDAW, claiming that it contradicts Sudanese family values.

It is indeed the case that the Sudan's Islamisation programme, facilitated by emergency laws, has led to a multitude of human rights violations, stemming, among other motives, from a profound disregard of the Bashir regime for the rights of religious minorities, women, non-Arab Muslims, and those professing views of Islam differing from the official Sudanese regime position. Many of the Sudan's human rights violations, however, have no relation whatsoever to shari´a. They must, rather, be attributed to the regime's efforts to stay in power at all costs. Islam, in this context, only serves as one instrument among many others, to attain this goal (Böckenförde 2008: 88).

Perspectives for the future

The January 2005 Comprehensive Peace Agreement (CPA) between the Sudanese government and the SPLM was supposed to lead to important reforms of the legal system. A new constitution is a key issue on the agenda. Apart from some limited changes, the CPA has, however, not yet led to a substantial revision of criminal legislation. Rather, the government stalled any legal reform that could be construed either by its opponents or by its followers as a gradual retreat from its pro-shari´a positions. The CPA, as much as it has been welcomed by the international community, represents a piecemeal approach. In order to achieve

a lasting peace in the whole of the Sudan, the regime needs to come to terms with its opponents in Dar Fur, in Eastern Sudan and abroad as well. Only then can legal reforms be expected that take into account the interests of secular Muslims and non-Muslim minorities.

For the time being, several committees concerned with elaborating legal reforms have been set up. Thus, the National Constitutional Review Commission (NCRC), provided for by the CPA and composed of members from several political parties, has identified over sixty laws in contradiction with international human rights standards. It is currently working on certain priority areas such as arrest procedures, rape legislation, evidence laws, and immunity.[53] In 2006 already, the Legislative Standing Committee of the National Assembly (Majlis Watani) had singled out twelve laws for priority areas of reform, including among others the Criminal Act, the Criminal Procedure Act, and the Evidence Act. Other steps were the adoption of a National Action Plan on Combating Violence against Women in 2005 and a new Armed Forces Act (2007), which recognises rape committed in war as an international crime. In 2009 international crimes, such as crimes against humanity, genocide and war crimes, were incorporated in the Criminal Code. Observers, however, are doubting 'whether these changes can result in effective application' (REDRESS 2009: 37-38). The same observers have pointed out that the law reform process since the signing of the CPA has been hampered by a lack of transparency, delays, and 'the lack of mechanisms that ensure the conformity of reformed legislation with the provisions of the INC and the CPA' (REDRESS 2009: V).

In a nutshell, in the beginning of 2010 the Sudan's outlook is rather bleak. The implementation of the Comprehensive Peace Agreement has been obstructed by the North from the beginning. But not only the CPA, also the Darfur Peace Agreement and the East Sudan Peace Agreement lack proper implementation. With less than a year to go until the referendum on the South's self-determination, the referendum will most likely end in a decision in favour of the South's separation. Given the profound lack of trust between both sides a return to the North-South war is looming (International Crisis Group 2009: 1). What these developments will mean for the space the shari´a occupies in the legal system of the Sudan remains to be seen. If indeed a new civil war between the North and the South breaks out, guarantees for non-Muslims given under the INC will become meaningless. Should both sides manage to disentangle peacefully, an important source of pressure against shari´a application would disappear. In either case, the shari´a is likely to hold its ground in the legal system of the Sudan.

Notes

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2 Estimates of the number of Christians vary widely. Some sources claim that very successful missionary activities have increased the percentage of Christians up to 20% of the overall population.

3 As to the paucity of studies of this era, see Bleuchot 1994: 161-185 and Köndgen 1992: 15.

4 The Malikite *madhhab* was the traditional school in the Sudan until the introduction of the Hanafite school.

5 See also the revealing dialogue between Hasan al-Turabi and Phillip Abbas Gobosh in An-Na'im 1985: 329.

6 A small minority, however, preferred to break off and establish their own organisation. This splinter group called itself 'the Muslim Brotherhood', while the majority faction was organised as the National Islamic Front under their political leader Hasan al-Turabi.

7 In 1983 alone, around 640,000 refugees from Ethiopia, Uganda, and Chad entered the Sudan. See also Abd al-Rahim 1989: 284.

8 Warburg 2003: 187 maintains that Numeiri dismissed al-Turabi 'so that he would not claim the credit for the Islamic laws'.

9 The 1983 Penal Code stipulated *hadd* punishments for crimes similar to *hadd* offences, but not covered by traditional definitions (Köndgen 1992: 42-44).

10 During a prison term in 1946-1948, Taha had developed his own legal theory, propagating a liberal version of the shari´a, adapted to the needs of modern society. Based on his teachings, the Republican Brothers, who had never participated in elections as a political party, called for a democratic state with equal rights for Muslims and non-Muslims and for both men and women. On the juridical aspects of the Taha case see An-Na´im 1986. On Taha and his weltanschauung see Rogalski 1990: 59-121.

11 See discussion in e.g. 'Mahmoud Taha – Sudan's new martyr?', *Middle East*, February 1987.

12 See *Sudan Monitor*, December 1990, Vol. 1, issue 6.

13 However, the elections were a setback for the DUP who gained only 63 seats instead of the 101 seats it had won in 1968. The Umma, in contrast, went up from 72 seats (1968) to 100 seats. See also Kok 1995: 43-49.

14 Altogether, 48 seats remained unoccupied as a result of the war (Kok 1991: 45).

15 See e.g the 1989 article 'Les Chrétiens et la Législation sur la Shari'a au Soudan', in *Islam et Societés au Sud du Sahara* 3.

16 Flogging, used rather summarily under the September laws, had been limited to *hadd* offences.

17 In an interview with al-Turabi's son Sadiq Hasan al-Turabi, it was confirmed that the imprisonment of his father was meant to cover up his involvement in the coup. Personal communication with Sadiq Hasan al-Turabi, dated 10 June 2004.

18 This information was confirmed in an interview with a lawyer at the Institute of Training and Legal Reform in Khartoum on 8 June 2004. However, according to the same source, three women were shortlisted for positions as judges in June 2004.

19 See BBC News online, 'Sudan strongman Turabi arrested', dated 21 February 2001; See BBC News online, 'Sudan Islamist leader released', dated 13 October 2003.

20 See http://www.reliefweb.int/library/documents/2005/govsud-sud-16mar.pdf.
21 The Heidelberg-based Max Planck Institute for Comparative Public Law and International Law (MPI) originally helped to prepare a constitutional framework for the content of the six separate peace protocols. However, the MPI 'Draft Constitutional Framework for the Interim Period' was not adopted by the Sudanese government. Subsequently, the Sudanese government, against the wishes of the SPLM, excluded the MPI from the process and instead relied on their own legal experts. See http://www.qantara.de/webcom/show_article.php/_c-476/_nr-593/i.html. The MPI's draft is downloadable on its website.
22 See http://www.cushcommunity.org/constitution.pdf.
23 For the full text of the Interim Constitution 2005 see the website of the Max Planck Institute: http://www.mpil.de/shared/data/pdf/inc_official_electronic_version.pdf.
24 The hanging of Taha in 1985 is to my knowledge until today the only known execution in the Sudan on the grounds of apostasy.
25 Non-Muslim university graduates have difficulty finding government jobs. There is an undeclared policy of Islamisation of public services in place, leading to non-Muslims losing their jobs in the civil service, the judiciary, and other professions. Christian secondary school students have not been allowed to finish their obligatory military service because they attended church (U.S. Department of State 2003). This is critical because students who do not complete their military service are not permitted to study at universities. There are also recurrent reports of *hadd* punishments being inflicted on Christians. Furthermore, while Muslims may proselytise among non-Muslims, proselytisation among Muslims is *de facto* excluded, since apostasy of Muslims is punishable by death.
26 The newly formed National Legislature, whose members were chosen in mid-2005, has two chambers: the National Assembly (Majlis Watani), i.e. the Lower House and the Council of States (Majlis Wilayat), the Upper House. The National Assembly consists of 450 appointed members, representing the government, former rebels and other oppositional political parties. The Council of States consists of 50 members. These are indirectly elected by state legislatures.
27 For details on Dinka law see e.g. Makec 1986.
28 *´idda*: period after a divorce during which remarriage is prohibited in order to guarantee that the wife is not pregnant by her ex-husband.
29 After the downfall of Numeiri in 1985, none of the subsequent military and civilian governments abolished the Islamised penal code, which was introduced in September 1983. After long discussions and some cosmetic modifications (Köndgen 1992: 61-72), the Ministry of Justice, with Hasan al-Turabi as minister and chief public prosecutor at the time, finally submitted a new draft penal code in September 1988. The draft did not have majority support in parliament. However, the new Bashir military Islamist regime that came to power a year later in 1989 drew significantly from the 1988 draft law when it promulgated the Sudan Criminal Act in 1991.
30 For an in-depth comparison between *hadd* offences as defined in the Criminal Act (1991) and traditional Islamic jurisprudence (*fiqh*) see Scholz 2000.
31 'Dealing in alcohol' in the definition of Article 79, CA91 includes storing, selling, purchasing, transporting, and possessing with the intention of dealing therein with others.
32 See cases of Mariam Muhammad 'Abdallah (1985) and Amina Babikr Ahmad (1985), published in *Sudan Law Journal and Reports* (SLJR) of the same year.
33 See e.g. cases of Mariam Muhammad Sulaiman (1989) and Kalthum ´Ajabna (1992), published in *Sudan Law Journal and Reports* of the same years. Compare analysis in Sidahmed 2001.

34 Interestingly, the concept of *muhsan*/non-*muhsan*, which is derived from Islamic criminal law, is applied here to Sudanese citizens who live in areas exempted from the application of the shari´a.
35 For the somewhat contradictory legal situation as of 2005, see chapter 5.5 'Constitutional Law'.
36 Compare also Articles 30-32: on multiple retribution; reasons for the remittance of retribution; and on the relatives of the victim who are entitled to retribution.
37 These provisions, however, become applicable if the accused himself requests their application or the legislative body concerned decides to the contrary. Compare Criminal Act (1991), Art. 5(3).
38 Ratified in October 1996 by the Khartoum State Council as the Khartoum State Public Order Act 1996 in its original form. The Khartoum State Public Order Act was valid only in the Governorate of Khartoum. Similar laws were promulgated in other governorates of the Sudan. See also SIHA (2009): 9-10.
39 During my visits in 2004 and 2009 I observed that this provision was not enforced in Khartoum.
40 A case that found a lot of attention from Western media was the arrest of Lubna Hussein, a well-known Sudanese journalist. She had been arrested in a restaurant for wearing trousers, together with twelve other women. Hussein, however, was indicted under Article 152 of the Criminal Code (1991), not under the Security of the Society Law. See SIHA 2009: 5-6.
41 In this formative phase of Islamic banking in the Sudan, before 1983, some of the newly established banks called themselves 'Islamic' without offering interest-free banking (Stiansen 2004a: 157).
42 For a discussion of Islamic financial contracts as applied in Sudan see Stiansen 2004b: 80-89.
43 It should be noted that the Sudanese government accepts interest-based foreign loans.
44 For CEDAW see http://www.un.org/womenwatch/daw/cedaw/reports.htm#s, for CAT see http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en.
45 The INC explicitly states that rights described in its Chapter II ("Guiding Principles and Directives") are "not by themselves enforceable in a court of law (art.22)." For a detailed critique of the 2005 Interim National Constitution see 'Observations on the Transitional Constitution', *The Sudanese Human Rights Quarterly* 20 (January 2006).
46 See for example the freedom of beliefs (Art. 38), the right to vote (Art. 41), and the right to own property (Art. 42).
47 On the conflict between Sudanese criminal law and human rights see e.g. REDRESS 2008.
48 According to a government statement, around 800 individuals convicted for alcohol-related offences were released. See REDRESS 2008: 11.
49 For example, Jordan, Iraq, Syria, Algeria, Yemen, Kuwait, and others. See Krüger 1997. Witness to the importance of Egyptian civil law for Sudanese jurists are Khartoum's book shops. Wherever legal literature is available, Egyptian commentaries abound.
50 This is to name the most important legislation of the present regime. It should be noted that systematic research on the influence of Islamic law on the Sudanese legislation from 1989 until present is lacking.
51 Interview with Supreme Court judge, Khartoum, on 6 June 2004.
52 International human rights law is indeed invoked by Sudanese attorneys before Sudanese courts. See personal communication with Noah Salomon, University of

Chicago, on 30 April 2004. I am, however, not aware whether these attempts were successful.

53 For an assessment of current legal reform projects see REDRESS 2009.

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