



Seeking Reparation for Torture Survivors



History of Law Reform in Sudan¹

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I. Overview

Law reform is the process of examining existing laws, and implementing certain changes in order to enhance efficiency, justice as well as access to justice. The actual reform takes place when the legislative authority, in a certain country, undertakes the necessary steps to review the law with a view to determining whether it meets sufficiently its intended objectives, whether there are any gaps, whether the law has any unintended effects and whether the law is consistent with international standards binding on the country, including the protection of human rights, and to make the required changes. Law reform per se is as old as the law itself. It is a process which consists of many components including research, advocacy and awareness-raising, campaigning and legislative drafting. The process is as important as the targeted changes, because if done well it increases public awareness of rights and enhances the capacities of civil society organisations and individual activists involved.

This succinct paper aims to provide a historical background to the development of the concept of law reform in Sudan as part of the quest for democracy, rule of law and basic rights.

II. Sudan's Modern Legal System

Although many developments and changes occurred since the British established the legal system of the Anglo-Egyptian Sudan, the current legal system remains to a great extent an offshoot of that system.

Britain was in charge of legislation in the newly established Anglo Egyptian Sudan. This came about in an indirect way. The condominium agreement of 1899 granted the supreme military and civil command in Sudan to one officer, called the Governor-General of Sudan.² The British policy was to develop a modern legal system different from the legal system of Egypt. Article 5 of the Anglo Egyptian agreement stipulated that "No Egyptian Law, Decree, Ministerial Arrete, or other enactment hereafter to be made or promulgated shall apply to the Sudan or any part thereof, save in so far as the same shall be applied by Proclamation of the Governor-General in manner hereinbefore provided". One of the main reasons for avoiding the Egyptian system was to save Sudan from the injustices of mixed courts. According to this system, citizens of European countries who were residents in the territories of the Ottoman Empire were to face trial by their consuls and later on in front of mixed courts. This system was invented to exempt Europeans from the *Hudud* punishments of amputation, lapidation and whipping. Mixed courts continued in Egypt even after the fall of the

² Article 3 of the Anglo Egyptian Agreement for the Administration of Sudan 1899. All Governors general, right from Lord Kitchener who led the re-conquest of Sudan to Sir Robert Howe who handed the country to the first national government, were British.

Ottoman Empire up until the 1930's.³ The first penal and criminal procedure codes introduced in 1899 effectively constituted the first codification of criminal laws in modern Sudan.

The penal code adapted the Code drafted by Lord Macaulay for India to the needs of the Sudan.⁴ The two codes were amended in 1925 and remained in force until the early 1970s. The British administration tried from the outset to make laws compatible with the social and religious values of the Sudanese people. The adoption of the Indian model was based on the assumption that the social structure and habits of India was closer to Sudan than that of England. Nevertheless, the targeted harmony between the law and local values and convictions had to be abandoned by the new authority in some cases. The main examples are the prohibition of slavery, which was a recognised institution in the agricultural communities of Sudan, and the prohibition of the pharaonic type of female circumcision (FGM) which many Sudanese did not consider a wrong.⁵

The 1925 Penal Code has developed over the years to be a truly Sudanese law. In some instances, this was done by legislation like allowing dia (blood money) in settling homicide cases in Southern Sudan. The judges in their application of the law took into consideration the social elements of Sudan's many localities and cultures and that consideration was reflected in the precedents which formed an important part of the Sudanese law until 1983. The status of precedents was similar to the system followed in other common law countries. The Sources of Judicial Decisions Act of 1983 specifies that all matters not explicitly governed by legal codifications be subject to Sharia'a principles. The act places the judicial precedents as the fifth source provided that it does not contradict Sharia'a provisions.⁶

III. The Early Phases of Law Reform

The legal system that was built by the colonial regime seems to have worked well in providing justice to all Sudanese; it was a step forward by all accounts for a country that did not have a stable and comprehensive system of justice. When the first Grand Qadi was tasked to establish the Sharia'a courts for personal affairs in 1899 he faced two major challenges: (a) a shortage of men qualified in Sharia'a; and (b) the absence of a proper system of courts. To overcome the first problem, courses in Islamic law were introduced in the newly established Gordon

³ To confirm that article 6 of the Anglo Egyptian Agreement stated that "In the definition by Proclamation of the conditions under which Europeans, of whatever nationality, shall be at liberty to trade with or reside in the Sudan, or to hold property within its limits, no special privileges shall be accorded to the subjects of any one or more Power.

⁴ Egon Guttman, "The Reception of Common Law in the Sudan", in *International and Comparative Law Quarterly*, Vol. 6 (July 1957), p. 405.

⁵ *Ibid.*

⁶ Article 3(b) Fifth of the Sources of Judicial Decisions Act of 1983.

Memorial College. As a result the work of the Sharia'a courts steadily improved and gained in respect.⁷ Sudan was ruled by Islamic law before the re-conquest during the Mahdia era, and one would have expected there to be a reasonable number of people qualified in Sharia'a law. The problems faced by the first Grand Qadi are indicative of the poor quality of the extant system of justice.

However, the new system of law was not perfect. The penal code contained vague crimes of enticing hatred against government. There were also crimes prescribed in anticipation of any communist activities laid down in the Combating the Subversive Activities Act. This may be said to have infringed freedom of association and freedom of expression.

The aforementioned provisions remained in the statute book after independence, and were used by national governments against the opposition. There were voices that called for the abolition of these laws, especially from the political left.

The more comprehensive approach to law reform was a call to change the whole legal system. It was a call for a national legal alternative to the colonial legacy. Two alternatives were suggested: a. Islamic law; b. to implement the Egyptian legal system. We will discuss the first alternative separately in the following section because the question of Sharia'a is very central in the overall legal and political debate.

The call for the implementation of Egyptian laws and legal system was driven by pan Arab sentiments. Unifying the laws in the Arab countries was seen as a step on the road to unifying the whole Arab nation. Egypt has always been an important country in the Arab world and it was seen during that period (the 1950s) as the leading Arab country under the leadership of President Naser. The call was thus based on a wider nationalist rationale rather than a legal one. However, the supporters ignored the fact that changing to the Egyptian model would have in fact meant replacing one European model by another: civil law in place of common law or French law in place of Anglo-Saxon law. And as Egon Guttman noted "to change the basis of that law from common law to that underlying the law of Egypt would be a change for the sake of change and would have neither intrinsic merit nor popular appeal."⁸

The Nimeiri regime (1969-1985) had strong Arab nationalist tendencies among some of its leadership. In 1970 the regime introduced a new civil code, copied in large part from the Egyptian civil code of 1949. In 1971, the penal code based on the Egyptian code replaced the 1925 penal code. The new laws were alien to Sudan's legal education and training and faced strong opposition from the legal profession. Largely as a result of this, the experiment was short-lived and the

⁷ Egon Guttman, "The Reception of Common Law in the Sudan", in *International and Comparative Law Quarterly*, Vol. 6 (July 1957), p. 407.

⁸ *Ibid*, p. 417.

government repealed these codes in 1973, returning the country's legal system to its pre-1970 common-law basis.⁹

IV. Sharia'a as a Focal Point in the Legal and Constitutional Debate in Modern Sudan

Sharia'a law is the provisions brought by the Quran or Suna (prophet's sayings or deeds) and the provisions developed by the Islamic Ulama (scholars) in what is known as Fiqh (Islamic jurisprudence). The legal provisions developed by the Fuqha (Islamic Jurists) were detailed in the field of family law: marriage, divorce, inheritance, will and *Waqf*. The other aspects of civil law were not very detailed. They covered civil transactions, which were known in the Arab world in the ninth century.

In the field of criminal law, three types of crimes were specified, *Hudud*, Qisas [retribution] and *Ta'azir*:

The first are crimes determined by Quran or Suna. They are exclusive:

(i) *hadd al-zina* adultery or fornication; (ii) *hadd al-qadf* false accusation of adultery or fornication; (iii) *hadd al-sariqa* theft; (iv) *hadd al-haraba* robbery or rebellion; (v) *hadd al-shurb* drinking of alcohol; and (vi) *hadd al-ridda* apostasy.

The crimes of Qisas (retribution) covers homicide and personal injuries. Regarding these crimes the plaintiff has the right to choose between retribution and *dia* (fixed amount of compensation).

The *Ta'azir* crimes are ad-hoc punishments passed by the judge on acts other than those defined in the two, Qisas and *Hudud*. Some observers refer to the other crimes known in the modern penal codes as *ta'azir* crimes. However, some scholars insist that the *ta'azir* shouldn't be codified and have a specific punishment attached to it. In 1982, the Iranian parliament enacted the penal code with four branches. The first contains the Hudud, the second the Qisas (retributions) crimes, the third the *Dia*'s (price of blood or injuries), and the fourth contains the *ta'azir* which include all the crimes which are not included in the previous three parts. The Council to Preserve the Constitution, which examines the compatibility of legislation with the Shari'a refused to pass the law on the grounds that the *ta'azir* should not be fixed and that it should be left to the judge to identify the crime and set the punishment. The parliament insisted on the act because of the rule of the illegality of retrospective prosecution. The conflict was eventually resolved by Ayatollah Khomeini's intervention and the Act was passed¹⁰.

⁹ Helen Chapin Metz, ed. *Sudan: A Country Study*. Washington: GPO for the Library of Congress, 1991. See: <http://countrystudies.us/sudan/65.htm>

¹⁰ Azadieh Niknam "The Islamisation of Law in Iran: A Time of Disenchantment," in MERIP, Fall 1999, published in Arabic by Cairo Institute of Human Rights Studies, Roaa Mugaira, Tenth Edition.

It must be noted that the Sharia'a legal system does not have a system of civil or criminal procedures. It has only rules of evidence and the oath plays a significant role in deciding the case especially in civil matters.

The supporters of Sharia'a law in Sudan and other countries use the dichotomy of divine law and man made law (*wad'i*). They assert that believers who are the majority in Sudan should undoubtedly follow the divine law. So the question of Sharia'a versus secular laws is a question of whether or not to apply the *Hudud* and *Qisas*. Supporters insist that Sharia'a provisions should be implemented whatever the consequences, including concerns over their compatibility with international human rights treaties binding on Sudan.

The status of Sharia'a in the legal system has always been an important and sensitive subject in Sudan. Moslems' personal matters concerning marriage, divorce, guardianship, inheritance, gifts and waqf (charitable and non-charitable trust) were adjudicated by Sharia'a courts in accordance with Islamic law (Sharia'a). There were two types of courts in Sudan Sharia'a Courts headed by the grand qadi and civil courts headed by the chief justice. The first type has jurisdiction over Moslems personal matters as explained above and the second over the rest over all other civil and criminal matters. However, according to the Mohammedan Law Courts Ordinance of 1902, any other civil dispute can be determined according to Sharia'a "provided that all the parties, whether being Mohammedan or not, make a formal demand signed by them asking the court to entertain the question and stating that they agree to be bound by the ruling of Mohammedan law." However, up until independence, no application was made by a Muslim or a non Muslim. Except in two cases, Copts whose succession laws used to be the same as the rules laid down in 'Sharia'a has their dispute over and estate determined by Mohammedan Law Court.¹¹ The same provision was repeated in the second schedule of the civil procedures code of 1974 but there is nothing to indicate that any other exception occurred until 1983 when Sharia'a was declared.

Despite the lack of individuals who demand the use of Islamic law in their disputes, the collective call for the implementation of Sharia'a has always been strong in Sudanese politics, especially after independence. In the second parliamentary period (1964-1969), Sharia'a supporters succeeded in securing the majority to pass a constitution based on Sharia'a but it was stopped by Nimeri's coup of 25 May 1969. However, the same regime formed a committee in the mid 1970s to review Sudanese laws in accordance with Sharia'a. The committee did not finish its work but some committee members stated that over 90% of the then Sudanese laws were compatible with Sharia'a. This led to the impression that only limited amendments were needed in order to ensure the laws were not in violation of Sharia'a. Nevertheless, Nimeri unexpectedly declared the rule of Sharia'a in September 1983. What is known as 'September laws' introduced the

¹¹ EGON GUTTMANN, *supra*.

whole crimes and punishments of Hudud and there were some alterations to the civil laws as well to make it more compatible with Islamic jurisprudence. The Sources of Judicial Decisions Act was passed. It makes Sharia'a provisions the prime source of judicial rulings in the absence of legislation.

The 1983 September laws created a heated debate. Many opposed it on the ground of their incompatibility with basic rights and freedoms. Some considered it as a deviation from the true provisions of Islam. One of those is Mr. Al-Sadiq Al-Mahdi, leader of Ummah Party and Ansar sect who described it as not worthy of the ink it was written with. Nevertheless, the September laws were not abolished during his premiership (1986-1989). The debate over Sharia'a and the fate of the September laws marked the third democracy. There was great support for the abolishment of the September laws among civil society organisations, left wing political forces and the political representatives of marginalised peoples. It was also a precondition for a peaceful settlement to the civil war in the South of Sudan, the Nuba mountains and the Blue Nile. Nevertheless, all these forces supported by some elements in the two major parties, the Ummah and Democratic Unionist Party (DUP), failed to change the September laws. Conversely, the parliamentary majority of the Sharia'a law supporters was insufficient to oppose it. They failed to pass a penal code based on Sharia'a known as Turabi's law due to a strong campaign led by the Bar Association and other parts of the civil society. In mid 1989, the government adopted the blue print of an agreement made by John Garang and Mulana Muhammad Osman Almirhgani to end the civil war. One of the steps was to abolish the Sharia'a provisions. The plan was stopped by the Islamists coup of June 1989.

The current regime sought to transform the Sudanese society into a model Islamic society through what it called the civilization project. It enacted a new Penal law in 1991, i.e. a criminal code on Islamic basis that was technically better drafted than the September models. In 2005, an agreement was reached with the Sudan Peoples Liberation Army/Movement (SPLA/M), known as the Comprehensive Peace Agreement (CPA). The CPA exempted the south from Sharia'a provisions while it kept it in the north. This triggered a fierce debate over the status of Sharia'a in the national capital. Many argued that the capital being the national capital of all Sudanese should be exempted from Sharia'a. The ruling National Congress Party insisted that Sharia'a should be implemented in the capital and this is what was agreed upon.

The ruling party hoped that this would be the end of the debate over Sharia'a law. However, one of the tasks that need to be fulfilled according to the CPA is the democratic transformation of Sudan. This task includes the harmonisation of laws with the National Interim Constitution. Laws should also be harmonised with the international human rights instruments ratified by Sudan in accordance with Article 26 (3) of the Interim constitution of 2005. It reads "All rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of the Sudan shall be an integral part of this Bill".

This raises the question amongst other things as to whether Hudud punishments are compatible with the international declaration of human rights as well as the International Covenant on Civil and Political Rights. There are no easy answers to the questions of Sharia'a in relation to human rights but it has to be addressed wisely and in a manner that can gain the biggest possible consensus.

V. Law Reform Initiatives in Sudan

1. The Sudan Bar Association's Campaign for Law Reform

Sudanese lawyers are renowned for their knowledge and commitment to human rights and the rule of law. The Sudan Bar Association was very active throughout the eighties in defending human rights, basic freedoms and the rule of law.

In 1981 and in celebration of the silver jubilee of Sudan's independence, the council of the Bar association organised a series of seminars to discuss a range of issues related to the administration of justice, independence of the judiciary, promotion of the legal profession, human rights and basic freedoms, and the rule of law. In those seminars, individual lawyers presented research on various laws and made suggestions towards reform. Those seminars were effectively the first time in which law reform was comprehensively considered in Sudan.

The Bar continued that line of activism and the tradition of studying existing and newly enacted legislation in terms of their intrinsic legal quality and in relation to human rights. When Nimeiri introduced the September laws in 1983, the Bar Association organised several forums to discuss it and by the time of the third democratic period (1985-1989) it was able to prepare alternative law proposals. The most well-known among these drafts is the Bar penal code which was based on the 1974 code with some necessary amendments.

This rich heritage of instigating and overseeing law reform initiatives will have a positive impact on any future scheme for law reform.

2. The Civil Project

In 1997 four organisations got together with the aim of furthering human rights in any coming transition to democracy in Sudan. These were the Sudan Human Rights Organisation, South Sudan Law Society, Nuba Mountains Solidarity Abroad, and African Rights (which was later replaced by Justice Africa). The four

organisations formed the Steering Committee for Human Rights during Transition in Sudan. It was later renamed the Committee for the Civil Project in Sudan.

The committee worked for two years preparing for a conference that would bring together Sudanese democratic political forces and civil society organisations to discuss the human rights challenges in any coming transition. The conference was convened in February 1999. The committee organised a second conference in July 2000.

The committee prepared well researched and well written issue papers that helped the conference to have a useful discussion on the issues.¹² Two declarations resulted from the two conferences and were signed by the participating political parties and civil society organisations. The declarations confirmed the participants' commitment to a range of issues pertaining to accountability, human rights and law reform. We quote below the parts, which are relevant to law reform:

“The Conference examined issues of the penal code, customary law, and the structure and reform of the judicial, police and penal institutions of Sudan. The Conference agreed that:

1. In all matters of law, commitment to international human rights law should be supreme.
2. In line with the Charter of NDA, the 1974 Penal Code, with suitable revisions to make it consonant with international human rights Conventions, was appropriate for Sudan and the rights and needs of Sudanese citizens.
3. Customary law, in all parts of Sudan, has both positive and negative elements. It reflects the needs and experiences of Sudan's people with their diverse cultures. There is a need to codify it and reform some aspects of customary law, specially concerning women's rights, an native administration to make them consonant with basic human rights, and to coordinate customary law and the structures to enforce it.
4. Sudan's judicial, police and penal structures are in urgent need of drastic reform including the recruitment of qualified personnel, ... and making justice more accessible to the people, that is cheaper, fairer, and less subject to various biases and corrupting influences.
5. Independence of the judiciary as an institution and judges as state officials should be provided with along with legal aid and a reduction in the cost of litigation.”¹³

¹² The papers were published in two books: *The Phoenix State: Civil Society and the Future of Sudan and When peace comes: civil society and development in Sudan*.

¹³ A.H. Abdelsalam & De Waal, Alex. *The Phoenix State: Civil Society and the Future of Sudan* (Asmara: The Red Sea Press, 2002).

The second Kampala conference called upon “the transitional government to do the following:

1. Cancel all laws that contradict basic rights in a way that ensures full rights for expression and association as well as women's basic rights.
2. Undertake radical transformation in the legal and judicial structures and amend laws in a way that enshrines the values of justice, equality and the rule of law and independence of the judiciary.
3. Abrogate any laws that are contrary to freedom of association, including the Voluntary Work Act 1999.
4. Establish an independent human rights commission or high council for civil society issues within the structure of the government to ensure the promotion of civil society”.¹⁴

The importance of these two conferences or Kampala forum as it was called is that it was well representative of Sudan political forces and geographical, social and cultural diversity. Although the signatures of political parties are not binding legally, it has great moral value and it reflect the common grounds between the main political players except the government party.

VI. Conclusion

The history of law reform initiatives and efforts in Sudan reveal the potentials of Sudan’s lawyers and civil society organisations in relation to law reform. It clearly shows their high commitment to the ideals of human rights and their scholarly skills in the fields of research, analysis, and legal drafting. Those potentials and commitments are great assets for any scheme of law reform in Sudan. Moreover, the current period seems ideal for law reform as the amendment of existing laws to be in harmony with the Interim Constitution is one of the obligatory tasks according to the CPA. Furthermore, the Interim Constitution’s adherence to the international human rights standards means that required amendments have to be compatible with these standards.

Despite all these advantages, the challenges facing law reform are enormous. The fact that no significant amendment has taken place in more than two years after the passing of the National Interim Constitution raises concerns about the political will to expedite law reform. The controversy over the issue of Sharia’a is one of big challenges. However, the CPA itself is a living proof to what can be achieved through dialogue and strong political will.

¹⁴ De Waal, Alex & Yoanes Ajawin. *When Peace Comes: civil society and development in Sudan* (Asmara: The Red Sea Press, 2002).

