Islamization of the Sudan Laws and Constitution: Its Allure and its Impracticability

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The issue of the place of Islamic or Sharia Law in the Sudan dates back to the Anglo-Egyptian condominium rule from 1899 to 1956, which established the Sudan with its present boundaries, but started to assume a new significance after independence in 1956. Starting as a personal law of Muslims, for which it is peculiarly suited, Sharia law gradually ventures, through territorial application, into other areas of law and into some aspects of the constitution. This study attempts to examine this radical transition and the delicate and difficult legal issues it poses for a country inhabited by people of different religious and ethnic or national background. Two streams of inquiry appear simultaneously. The first is to evaluate the Islamization of the laws and constitution by its own aims, to look at it from the inside. It will then be looked at from the outside both because of its impracticability and, with the benefit of a larger framework provided by legal pluralism, because of the need for an alternative approach. In principle, the second evaluation offers a pluralistic state a valuable opportunity to move away from religious and ethnic divisiveness and strike out a legal system that is not exclusively attributable to a specific community.

I. Sharia Law as a Personal Law in "Mixed" Civil, Sharia and Customary Jurisdictions

Traditionally, Sharia law is a personal law of Muslims. For this purpose, three sets of jurisdictions should be distinguished: civil, which applies all the laws operating in the Sudan, Sharia, which applies Sharia law, and local or customary, which applies customary law.[1] The word "civil" itself is used in two senses. In the wider sense of the hierarchy or division of the judiciary, "civil" means non-Sharia. In this sense it embraces courts of civil jurisdiction, courts with criminal jurisdiction, and courts with both civil and criminal jurisdiction. It is also used in the sense of non-criminal. This narrow sense of "civil" also excludes local or customary courts, which are courts of both civil and criminal jurisdiction.

1 *Akolda M. Tier*, The Legal System of the Sudan, in *K. Redden* (ed.), 6 Modern Legal Systems Cyclopaedia: Africa, 651, at 680-696 (1985).

1. The Subject Matter of Sharia Law

To take the civil jurisdiction first, the earliest legislation on the subject matter of Sharia law was section 3 of the Civil Justice Ordinance 1900, which had been re-enacted three times: the Civil Justice Ordinance 1929, section 5; the Civil Procedure Act 1974, section 5, and the current Civil Procedure Act 1983, section 5. Like its predecessors, section 5 of the 1983 Act requires a civil court to apply Sharia law to "any question regarding succession, inheritance, wills, legacies, gifts, marriage, divorce, family relations and the constitution of wakfs" between Muslims.

In the case of Sharia courts, the legislator has repeatedly deprived them of any criminal jurisdiction. Under section 6 of the Sudan Mohammedan Law Courts ordinance 1902, the Sharia courts were basically competent to decide on, and apply Sharia law to, matters of personal status of Muslims. Specifically, they were competent of any matrimonial matter, if all the parties were Muslims or the marriage was contracted in accordance with Sharia law. Likewise, they were competent on any question concerning a gift or succession where the donor or deceased, respectively, was a Muslim. However, this subject matter could be extended to any civil (i.e. non-criminal) matter, if all the parties, irrespective of their religion, consented in writing. Thus non-Muslim parties could consent to the jurisdiction of Sharia courts in matters of family and succession, and any party, whether Muslim or not, could submit itself to their jurisdiction in all other suits. In each case, Sharia law will be applied.

Since the competence of a Sharia court entailed the application of Sharia law, its *lex fori*, the provision was clearly intended to extend Sharia law to persons who desired it. In practice, jurisdiction on the basis of the consent of the parties was ignored, apart from two succession cases between Copts whose succession laws resemble rules of Sharia law.[2] Although, on the basis of these jurisdictional rules, Sharia law could apply to a non-Muslim, its application can either be justified on the grounds of choice or the legal rules of conflict of personal laws, namely: any question relating to a gift or to succession is determined by the religious law of the donor or deceased, respectively; the validity of the marriage is determined by the law under which it was celebrated, and any matter of personal law is determined by the law which the parties have chosen.[3]

Doctrinally, the extension of Sharia law to non-Muslims in matters of the family was effected through the jurisdictional rules of Sharia courts. First, the 1902 Ordinance was amended by the Sudan Mohammedan Law Courts (Amendment) Act 1961 by adding a

2 *Guttman*, The Reception of Common Law in the Sudan, 6 I.C.L.Q. 401 (1957).

3 *Akolda M. Tier*, Techniques of Choice of Law in Conflict of Personal Law, 30 J. African L. 1, at 4 and 13-18 (1986).

provision giving competence to the Sharia courts in matrimonial cases where one of the parties was a *ketabia*, i.e., a woman who believes in any of the holy Books[4]. It is not clear why the amendment was limited to women who believe in Judaism, Christianity and Islam. Another extension occured in 1967, when the 1902 Ordinance, as amended in 1961, was repealed and re-enacted as the Sharia Courts Act 1967. Section 5 (1) of this Act retained the jurisdictional rules under the 1902 Ordinance, as amended in 1961. Moreover, and here was another extension, this section gave the Sharia courts competence in cases when one of the parties - not necessarily a woman - believes in any of the holy Books. Thus, under the Sharia Courts Act 1967 as under the 1961 Amendment, Sharia courts were competent to decide on, and apply Sharia law to, a matrimonial matter in which one or both parties were Christians or Jews. At the same time, Jewish personal law and the personal laws of certain Christian denominations were, and still are, applied by the civil courts.[5]

Unlike the 1961 Amendmend Act which was passed during a military regime, the Sharia Courts Act 1967 was passed by a Sudanese parliament and, as might be expected, it stirred up much political controversy. The opponents - mainly Christians from the South of Sudan - did not have sufficient strength in parliament to resist its imposition, but this extension of Sharia jurisdiction and law was disqualified in practice. First, because of the existence of "mixed" civil, Sharia and customary jurisdictions and the practice of forum shopping created by overlapping jurisdictional rules on the same matters of legal relationship, cases regarding matters of personal status continued to be litigated before the civil courts.[6] The records of the local or customary courts, which administer customary law, suggest much more. They handle between 55 and 75 per cent of the whole judicial work in the Sudan.[7] Secondly, the Sharia division of the judiciary was surprised by the burden imposed on them and it was generally thought that they would decline jurisdiction.[8] The reason ist not difficult to find. Since rules of Sharia law presuppose that one or both parties are Muslims, they will be inapplicable to many issues between two Christians or Jews. One such issue is the custody of a child. Under Sharia law, a *ketabia* loses her right to the custody of child, if she teaches him or her Christianity or Judaism. Clearly such a rule is not relevant in a custody dispute between two Christians.

4 S. 3 The holy books are the *Torat* (Pentateuch), the *Zabur* (Psalms), the *Ijil* (Gospels) and the *Koran* which, in Islamic view, were revealed to Moses, David, Christ and Mohammed, respectively.

5 The Non-Muslims Marriage Act 1926, s. 5 and s. 5 of the Civil Procedure Act 1983, re-enacting an earlier statute which appeared for the first time in 1900 as the Civil Justice Ordinance. For detail discussion, see *Akolda M. Tier*, The Evolution of Personal Laws in India and Sudan, 26 J. Indian L. Inst. 445, at 469-490 (1984).

6 See, e.g., Amal Fakhri Saad U. Fayer Shukri Bishara (1968) Sudan L. J. & Rep. 99, where a Coptic Orthodox wife sued her Coptic Orthodox husband for divorce in a civil court.

7 *El Nur J.*, The Role of the Native Courts in the Administration of Justice in the Sudan, 41 Sudan Notes and Records 76, at 78 (1960); *Thompson*, The Formative Era in the Law of the Sudan, Sudan L. J. & Rep. 474, at 477 (1965).

8 *Khalil*, The Legal System of the Sudan, 20 I.C.L.Q. 624, at 629 (1971).

The absurdity of jurisdiction based on belief in a holy Book was whittled down in 1970. Under the Sharia Courts (Amendment) Act 1970, the Sharia courts were competent in any matrimonial matter, if one of the parties was a Muslim at the time when the marriage was celebrated.[9] The time element in this provision operated as a further restriction, since it excludes a spouse who converted to Islam after the celebration of marriage.

This initial extension of Sharia law through jurisdictional rules of Sharia courts was followed by a brief decline. The Judiciary Act 1972 repealed the Sharia Courts Act 1967 as amended, abolished the separate Sharia jurisdiction and merged it with the civil division of the judiciary. However, the two divisions did not merge, and since the Judiciary Act 1972 saved the regulations issued under earlier legislation from repeal, the Sharia courts continued to function on their authority. This was regularized on a statutory basis by the Civil Procedure Act 1974, the second schedule, re-enacted as the Civil Procedure Act 1983, the second schedule.

The Civil Procedure Act 1983 is reminiscent of earlier legislation on Sharia courts with regard to the matters on which they are competend, namely: marriage, divorce, custody of children, maintenance, succession, gifts, wakfs and other matters of personal status. It also resembles earlier legislation in providing in section 12 of the second schedule that the Sharia courts are competent "to decide any suit not falling within their jurisdiction, as specified by law, if the parties requested to have the Sharia rules applied to their suit". The section expressly states that a suit of a matter of personal status of non-Muslims can be entertained by the Sharia courts on this basis of jurisdiction. Apart from submission, there are no detailed rules of jurisdiction. Section 1 of the second schedule merely asserts that the provisions of the Act apply to all suits concerning the personal status of Muslims. Although the rule is not well expressed, it seems that the jurisdiction of Sharia courts with regard to gifts and succession to property is not altered. However, the wording of section 1 suggests two variations from earlier jurisdictional rules. First, it is probable that the Sharia courts no longer have jurisdiction on any question relating to marriage on the basis that the marriage was celebrated in accordance with the Sharia law. Secondly, in contrast to earlier law, section 1 omits any reference to the time at which a person has to be a Muslim, i.e., whether at the time of marriage or of the proceedings. To the extent that a Sharia court may exercise jurisdiction in divorce, maintenance and custody of children where one of the parties is a Muslim at the time of the proceedings, section 1 seems on its face to convey another instance of doctrinary extension of Sharia jurisdiction and law to non-Muslims.

A similar preference for Sharia law is shown by the legislature in relation to customary law in Northern Sudan which has a Muslim majority. Under section 13 of the Local Courts Act

9 S. 2 (1).

1977, re-enacting earlier legislation[10], each local or customary court applies "any custom prevailing within the local limits of its jurisdiction" to a great range of civil and criminal matters. In Northern Sudan, customary law has borrowed, by means of regulations and decisions of courts, most of, if not all, the rules of Sharia law in matters of family and succession.[11] The regulations require an *alim* (an expert on Sharia law) to be a member of a local court hearing any dispute relating to a matter of family, succession and gifts, and his decision on a point of Sharia prevails. Non-compliance of a local or customary court's decision with Sharia law on matters of family, succession and gifts is a ground for setting aside the judgment on appeal to a civil court.[12]

What emerges from this brief survey may be stated in two propositions. The first is the variation of the subject matter of Sharia law in civil, Sharia and, in Northern Sudan only, customary jurisdictions. Another point to be noted is that, since 1961, Sharia law has tended to be predominant in "mixed" cases, that is, where one of the parties is a Muslim.

2. Legal Status in the "Mixed" Civil, Sharia and Customary Jurisdictions of Sharia Law

The legal status of the system of Sharia personal law may be seen, firstly, in terms of the structure of law courts. It is possible for the systems of law courts to be co-ordinate or be ranked in terms of superiority or inferiority. The legal status of the systems may also be seen in relation to the constitution. This is of particular importance when a constitution contains a bill of rights and grants the courts the power of judicial review of legislation.

(i) The Structure in the Systems of Law Courts

From what is said above, it is clear that, at an early date, the judiciary in the Sudan consisted of two co-ordinate divisions: the civil and Sharia divisions of which the Chief Justice and the Grand Kadi were their respective heads. The duality of the judiciary was elevated into a constitutional principle in the various constitutions adopted before the Constitution of 1973.[13] Since 1973, the duality of the judiciary has been provided for in

10 The Chief's Courts Ordinance 1931 and the Native Courts Ordinance 1932, which applied to Northern and Southern Sudan respectively.

11 *Akolda M. Tier*, supra note 5, at 465-466.

12 Chief Justice *Abu Rannat*, The Relationship between Islamic and Customary Law in the Sudan, 9 J. African L. 9, at 11-13 (1960).

13 The Self-Government Statute 1953, arts. 77-79; the Transitional Constitution 1956, arts. 93-95, and the Transitional Constitution (Amended 1964), arts. 90-92.

ordinary law.[14] Starting with a common Supreme Court, the two divisions in descending order branch out into separate co-ordinate courts which comprise the Courts of Appeal, Province Courts and District Courts.[15] The Supreme Court itself is divided into five circuits, one of which is the Sharia Circuit for matters of personal status of Muslims. The remaining four circuits are based on the subject matter: criminal circuit; circuit for matters of personal law of non-Muslims; circuit for civil, commercial and other matters, and the constitutional circuit. But questions of status lie deeper than this formal structure of law courts. In this respect it must be conceded that the restrictions on the competence of Sharia courts over persons and with regard to the subject matter has left the civil division of the judiciary with enormous judicial power and prestige. In criminal law, for example, the civil division is as much concerned with law and order as are the executive and legislative organs.

(ii) Judicial Review of Constitutionality of Laws

The various Sudanese constitutions adopted since 1953 have repeatedly conferred on the High Court (the Supreme Court since 1973) the power to review the constitutionality of laws.[16] This judicial review is limited in two ways, which are relevant to the subject under consideration. First, it is limited to the protection of constitutional rights. A law may be declared unconstitutional and void of it violates a constitutional right. Clearly, there are many laws outside the bill of rights which will not attract judicial review. Secondly, control of constitutionality can only be an issue in the case of "law", which section 4 of the Interpretation of Laws and General Clauses Act 1974 defines as comprising primary and subsidiary legislation. Apparently, this definition excludes personal laws, such as the Sharia law. For aside from the organization of the courts, legislation has seldom been used to develop Sharia law, which is derived from the Koran and Sunna. A court cannot, therefore, examine whether a rule of Sharia law, such as one which discriminates on the ground of religion or sex, conforms to the constitutional right to equality and non-discrimination.

In this respect, Sharia law has a legal status not accorded to the customary laws of Sudanese ethnic, Christian and Jewish communities under what is now section 5 (a) of the Civil Procedure Act 1983, as interpreted by the courts.[17] In section 5 (a) customary law is applied subject to the provision that it "is not contrary to justice, equity and good conscience, and has not been by this or any other enactment altered or abolished, and has

14 The Judiciary Act 1976, s. 4 (2) (a).

15 *Akolda M. Tier*, The Legal System of the Sudan, supra note 1, at 680-698.

16 The Self-Government Statute 1953, art. 82; the Transitional Constitution 1956, art. 102; the Transitional Constitution (Amended 1964), art. 100; the Constitution of 1973, arts. 58 and 59; the Transitional Constitution 1985, art. 125.

17 *Akolda M. Tier*, supra note 5, at 469-494.

not been declared void by the decision of a competend court". Likewise, section 13 of the Local Courts Act 1977 requires a local or customary court to apply "any custom prevailing within the local limits of its jurisdiction provided that it is not contrary to justice, morals or public order". Thus customary law is expressly subordinated to legislation and judicial decisions.

II. Sharia Law as a Territorial Law

Outside the fields of family, succession and gifts, the law in the Sudan is territorial, i.e., it applies to all persons without distinction as to religion or ethnic community. This section examines the extent to which Sharia law has been a source of judicial decisions and legislation in the area of territorial laws.

1. Sharia Law as a Source of Judicial Decisions

Both now and in the past, the Sudanese legislator has provided the civil courts with a framework for deciding cases in the absence of legislation. The matters for which no legislative provision was made included those matters of personal status to which Sharia and customary laws did not apply and also most other matters of civil law, such as tort and contract. In the Civil Justice Ordinance, both in its original form in 1900[18] and as re-enacted in 1929[19], the civil courts were required to decide such cases according to "justice, equity and good conscience". Although this wording is ambiguous, the courts, for reasons of certainty and accessibility, adopted the principles of English common law and methods of deciding cases, including binding precedent, as "justice, equity and good conscience"[20], and the extension of Sharia law into this area was neatly averted.

This trend continued until the adoption of the Civil Code 1971. Section 4 of this Code replaced the "justice, equity and good conscience" provisions with hierarchical sources of law, namely: the Principles of Sharia law, custom, principles of natural law and rules of equity in that order. Since in the absence of legislation the civil courts decision was in the first instance to be according to Sharia law, section 4 of the Civil Code 1971 represents the first potential extension of Sharia law to an area of territorial laws. No such extension

18 S. 4.

19 S. 9.

20 *Guttman*, The Reception of Common Law in the Sudan, supra note 2, at 401; *Natale Akolawin*, The Courts and the Reception of English Law in the Sudan: A case study of Application of Justice, Equity and Good conscience under the Sudan Civil Justice Ordinance, Sudan L. J. & Rep. (1968); *Zaki Mustapha*, The Common Law in the Sudan: An Account of the Justice Equity and Good Conscience (1971); *Akolda M. Tier*, supra note 5, at 500-503.

occurred, however. The courts were bound by precedents. Moreover, the Civil Code 1971 was short-lived. It was repealed by the Organization of Laws Act 1973, section 7 of which required the civil courts to decide, in the absence of legislation, according to the principles which are established in the Sudanese judicial decisions, the principles of Sharia law, custom and good conscience. The section clearly retained the main features of section 4 of the Civil Code 1971, except that the sources of law to be applied in the absence of legislation were no longer hierarchical. Section 7 was re-enacted as section 6(2) common to the old Civil Procedure Act 1974 and the present Civil Procedure Act 1983. Despite this specific mention of Sharia law as a source or one of the sources of judicial decision in the absence of legislation, there is no reported case of such use. Clearly, the civil courts have been reluctant to extend Sharia to these areas.

2. Sharia Law as a Statutory Territorial Law

The key to the statutory adoption of Sharia law as the territorial law is the Constitution of 1973 which made three major changes in the political and constitutional structure of the Sudan. First, article 4 established a one-party state. Evidently, participation in the process of government depended largely on membership in this single party. Secondly, the constitution created an executive president with extra-ordinary powers, including the power to legislate independently of parliament in normal, non-emergency times. Finally, article 9 of the constitution stated:

> The Islamic law and custom shall be the main sources of legislation. Personal matters of non-Muslims shall be governed by their personal laws.

In other words, legislation was to be modelled on Sharia law in all areas of legal relationship other than matters of family, succession and gifts. Article 9 is, of course, a directive principle of state policy and it is probable that, without the other two changes, the transition of Sharia law from personal to territorial law would not have made an appreciable advance.

In 1977, the Government set up a "Committee to Revise the Laws of the Sudan so as to Conform to the Sharia Rules and Principles". The committee drafted six bills, one of which was enacted as the Zakat Fund Act 1981. This Act deals with collection of *zakat*, i.e., alms which a Muslim must pay, and its distribution to paupers, persons who adopt Islam and the worship and educational requirements of Muslim groups in non-Islamic areas. The Committee also produced a long list of citations of statutory provisions which it considered contrary to Sharia law. Having drafted six bills and made citations, the Committee fell desuetude.

For some time it was widely assumed that Islamization of the laws would not materialize. The draft bills showed clearly its impracticability.[21] Suddenly, in September 1983, the President promulgated a series of laws seemingly based on Sharia law, including the Penal Code, the Evidence Act and the Judgments (Basic Rules) Act. In 1984, he promulgated the Civil Transactions Act covering, *inter alia*, contract, tort, sale of goods, agency, insurance, companies, loans, unlawful enrichment, gambling, real property and wakf (Islamic religious endowments). It is impossible in this brief survey to examine the legislation in detail, and the reader may refer to a useful study by *Carey Gordon*.[22] Here, my immediate purpose is to select a number of statutes in order to illustrate the allure and impracticability of Sharia law as a territorial law.

(i) The Evidence Act 1983

One of the Statutes to which reference may be made is the Evidence Act 1983. Of the provisions of the Act, the most unique are those relating to proof of ***hudud***, i.e., offences to which Islam attaches specific penalties, namely: adultery, drinking alcohol, apostacy from Islam, false accusation of unchastity, armed robbery and capital theft. In the case of adultery (*zina*), proof may be made in four different ways.[23] The first is the admission of adultery by the accused in case he or she does not retract the admission before the execution of judgment. Secondly, it may be proved by testimony of four men. Testimony of four eye witnesses was further provided for by section 315 (2) of the Penal Code 1983. Thirdly, in the case of an unmarried girl, pregnancy is sufficient proof. Fourthly, in the case of adultery by a wife without witnesses, the adultery is proved by the husband saying on oath four times that his wife has committed adultery and on the fifth occasion that he will be cursed by God, if he is not telling the truth. It will be observed that a woman is not a competent witness in cases of illicit sex relations.

For other ***hudud*** offences, proof is given, firstly, by admission before the court.[24] Secondly, and in the absence of admission, the offence may be proved by testimony of witnesses. The exact number of witnesses required varies according to sex. Basically, proof is by evidence of two males. Exceptionally, these types of ***hudud*** may be proved by evidence either of one man and two women or of four women. It is as though a woman is half of a man's value. Additionally, and in the case of drinking alcohol, a specialist's report that the accused smells of alcohol can be accepted. This use of specialists in proving drinking alcohol was

21 For a discussion of these bills, see *Akolda M. Tier*, Freedom of Religion under the Sudan Constitution and Laws, 26 J. African L. 133, at 148-151 (1982).
22 *Carey Gordon*, The Islamic Legal Revolution: The Case of Sudan, 19 Int. Law. 793 (1985).
23 S. 77.
24 S. 78.

further provided in section 443 (2) of the Penal Code 1983. Clearly, the Evidence Act 1983 is biased in favour of men.

(ii) The Judgment (Basic Rules) Act 1983

Another statute of which reference may be made is the Judgments (Basic Rules) Act 1983, which deals with the sources of law to be applied. A court must apply Sharia law as established by the Koran and Sunna not only in the absence of legislation but also notwithstanding any legislative provision in another law. This provision contrasts markedly from the bill drafted by the 1977 committee in that the latter limited resort ot Sharia law in the absence of legislation and in civil cases.[25]

The preeminence of Sharia law is repeatedly asserted in other statutes of 1983 and 1984. Thus section 458 of the Penal Code 1983 provided, *inter alia*, that interpretation was to be in accordance with Sharia law especially in *hudud* offences. Likewise, section 3 of the Evidence Act 1983 requires the courts to apply Sharia law in the absence of legislation. Finally, section 3 of the Civil Transactions Act 1984 states:

> In applying the provisions of this Act, interpreting the words and expressions in it, and in cases not provided for by any law the courts shall be guided by Sharia principles and the rules embodied in the sources of Judgments (Basic Rules) Act 1983.

Since, as noted earlier, the provisions of the Civil Transactions Act 1984 cover virtually all matters of civil law other than matters of family and succession, it follows that Sharia law is capable of becoming the territorial law for those matters dealt with the Act.

(iii) The Criminal Act 1991

Finally, reference may be made to legislation in criminal matters. As mentioned earlier, Islamic criminal law was first introduced with the Penal Code 1983 during the period of one-party state. The Transitional Government, established upon the collapse of the one-party state in April 1985, suspended the carrying out of amputation of the limbs. Nothing further was done with regard to these laws not only during the entire period of the Transitional Government 1985 - 86 but also during the first two years of parliamentary government. In 1988, the government declared its intention to repeal the Penal Code 1983 and replace it with "true" Islamic laws. The crucial step was taken in September 1988, incidentally the fifth anniversary of Islamization of Sudan laws, to present to parliament the

25 *Akolda M. Tier*, supra note 21, at 149.

Draft Penal Code 1988. In terms of numbers, the government had a comfortable majority to pass any law, both because of the decision of the Union of Sudan African parties to boycott sessions of parliament in which the Draft Penal Code was being debated and because all Northern-based political parties were in the coalition government. However, parliament did not have a chance to vote on the bill. The government withdrew it after second reading, and, a year later, the military seized power.

The revolutionary government ignored the opposition the Islamization of laws have engendered and will continue to engender. It repealed the Penal Code 1983 and replaced it with the "true" Islamic Criminal Act 1991. Since it generally follows the Draft Penal Code 1988, the Criminal Act 1991 both resembles and differs from the Penal Code 1983.

One of the notable features of the Criminal Act 1991, re-enacting the Penal Code 1983, is in the punishments which are listed as comprising death, which may be by hanging, stoning or death in the same manner in which the offender caused death; imprisonment, including exile, i.e., imprisonment in a place far from the scene of the crime and from the offender's residence, and expatriation, i.e., the restriction of the offender's residence away from the place where the offence was committed; fine; whipping; forfeiture and destruction; detention in a reformitory; death and crucifixtion; amputation of the limbs; cross-amputation of the limbs; compensation, blood-money (*dia*); retribution (*gisas*), i.e., punishing the offender with the same offensive act that he has caused; and closing of premises.[26] Although the first-mentioned six punishments have been in the Penal Code since it was first adopted in 1899, the death penalty has been radically transformed both as to the manner of its execution and the number of offences punishable with it. Thus, under the Penal Code 1983, death penalty existed not only for homicide[27], and offences against the state such as treason[28] but also - and this is an extension - for adultery (*zina*)[29], keeping a place for illicit sex relations[30] and armed robbery (*hiraba*)[31]. Entirely new punishments were introduced, namely: death and then crucifixion; amputation of the limbs and cross-amputation of the limbs e.g. left hand and right foot. Amputation of the limbs was also a new punishment for theft.

The Criminal Act 1991 generally accepts this extended use of the death penalty and prescribes the manner in which it will be carried out in some offences, namely: death for amputating three or more parts of the human body from one or several victims[32]; death for

26 The Criminal Act 1991, Ss. 27-50, re-enacting the Penal Code 1983, s. 63.
27 Ss. 251-253.
28 S. 98.
29 S. 318.
30 S. 318 A.
31 Ss. 334 and 336-338.
32 S. 30.

certain offences against the state[33]; death by retribution for homicide[34]; death by stoning for adultery[35]; death for homosexuality[36]; death for keeping a place for prostitution[37]; and death for armed robbery[38]. The last-mentioned offence may be punished with death and then crucifixion or cross-amputation in Northern Sudan. The Act also follows the 1983 Code in prescribing amputation of the right hand for first conviction for capital theft[39], i.e., theft of moveable property valued at no less than a dinar of gold weighing 4.24 grams or its value in money as determined by the Chief Justice from time to time.

As to retribution (*gisas*), which was introduced for the first time by the Penal Code 1983, this existed unter that law as an alternative punishment for hurt and bodily injury.[40] The other punishment was blood-money (*dia*). Under the Criminal Act 1991, it exists for intentional homicide[41], and intentionally causing bodily wounds[42]. Retribution is defined in section 28 of the Act as the punishment of an accused with the same offensive act that he has inflicted on his victim. It is statutory enactment of the ancient idea of an eye for an eye, tooth for a tooth. In the case of murder, section 28 (3) states that retribution is death by hanging or, if the court thinks fit, it may be in the same manner in which the offender had caused death. For wounds, section 28 (4) provides that retribution is to be in accordance with the parts and wounds listed in the First Schedule to the Act, namely: eye, nose, ear, lip, tooth, tongue, arm, leg, finger and fingertips, pennis, the two testicles and *al muadtha* (i.e., wound that ends up to a bone). Conceivably, retribution for wounds may result in the death of the accused. Anticipating this, section 337 (3) of the Penal Code 1983 provided for payment of *dia* where it was feared that retribution might cause death. Similarly, section 29 (6) of the Act makes the application of retribution conditional on not resulting in the death of the offender and failing this condition *dia* is payable as specified in the Second Schedule to the Act.

Another notable feature common to the Penal Code 1983 and the Criminal Act 1991 is the variation of punishments. Under the Penal Code 1983, some of the punishments varied according to the religion, marital status and sex of the accused. For example, the punishment for adultery (*zina*) was in section 318 death in the case of woman; 100 lashes for virgin girl, and imprisonment, exile and flogging for an unmarried man. The section

33 Ss. 50-51 and 53.
34 S. 130.
35 Ss. 146, 149 (3) and 150 (1) (Rape and incest are assimilated).
36 S. 148 (2) (c).
37 S. 155 (3). This applies upon third conviction.
38 S. 168.
39 S. 171 (1). A second conviction is punishable with imprisonment: S. 171 (2).
40 S. 277 (1).
41 S. 130.
42 S. 139.

expressly exempted believers in heavenly religions (i.e. Christians and Jews) and provided separate punishments for them, namely: any punishment in the religious law of the accused and, in the absence of a provision in that law, the punishment of 80 lashes with either a fine or imprisonment. A similar variation of punishments on the basis of religion was made on offences relating to mariage, such as cohabitation caused by a man deceitfully inducing a belief of lawful marriage; marrying again during the lifetime of husband or wife; adultery with a married woman, and adultery by a married woman.[43] In each, Muslims were to be punished in accordance with Sharia law and non-Muslims, in accordance with the laws of their respective religions and, failing a provision in that law, the punishments specified in the Penal Code 1983 were to apply. Clearly, Muslims were subject to their religious law only but non-Muslims were subject to two laws simultaneously: their respective religious laws and the Penal Code 1983. The other observations to be made is the assumption that every person has a religion, which supplies the law. In fact, there are persons in the Sudan without any religion and religions without criminal laws. It is doubtful whether a person without a religion could be punished under the Penal Code 1983 as the applicable law *in the absence of a provision in the religious law.* Problems of interpretation are bound to increase when the religious texts, which are not drafted in legal form, are examined. Finally, for the offence of drinking alcohol, a Muslim was punished with imprisonment and 40 lashes while a non-Muslim received flogging in addition to either imprisonment or fine.

A similar variation on the ground of marital status and sex of the offender is made in section 146 of the Criminal Act 1991 on the punishment of adultery (*zina*). In Northern Sudan *zina* is punishable with death by stoning for a married (*muhsan*) offender and 100 lashes for an unmarried (non-*muhsan*) offender. A non-*muhsan* male offender may in addition to whipping be punished with expatriation.

But the Criminal Act 1991 differs from the Penal Code 1983 in important respects. First, apostasy (*ridda*) from Islam is a crime punishable with death under section 126 of the Act but not under the Penal Code. The section states that apostasy occurs when a Muslim "propagates for the renunciation of the creed of Islam or publicly declares his renouncement thereof by an express statement or conclusive act". Thus apostasy may be demonstrated by express statements and by conduct. It is not clear what outward manifestations amount to apostasy.

Secondly, the Act makes separate punishments for three offences on a geographical basis - North and South Sudan. Thus armed robbery (*hiraba*) is punishable in North Sudan with death, or death and then crucifixion, or cross-amputation (i.e., amputation of the right and left foot), or imprisonment; and in Southern Sudan, with death or imprisonment.[44] Like-

43 Ss. 425-432.
44 S. 168.

wise, in Northern Sudan adultery (*zina*) is punishable with death by stoning for a married (*muhsan*) offender and 100 lashes for an unmarried (non-*muhsan*) offender. The latter, if a male, may, in addition to whipping, be sentenced to expatriation; but in Southern Sudan, the punishment is imprisonment or fine or both.[45] Both imprisonment and fine increase, if the offencer is a *muhsan*. Finally, for intentional bodily wounds, the basic punishment in Northern Sudan is retribution (*gisas*) or, in its absence, imprisonment or fine or both; but in Southern Sudan, the punishment is imprisonment or fine or both.[46]

Thirdly, the Act accepts diversity in criminal law with regard to drinking, possession or manufacturing of alcohol by a Muslim; dealings in alcohol by storing, sale, purchase, transport, possession or advertising for it; sale of carcass, i.e., a dead terrestrial animal whether it died naturally or slaughtered in a manner contrary to Sharia; apostasy from Islam; false accusation of unchastity (*Qasf*), i.e., allegation that a person has been convicted for adultery, homosexuality, rape, incest or practicing prostitution; and capital theft.[47] These are criminal in Northern but not in Southern Sudan. It must be stressed, however, that the exemption of Southern Sudan from the offences of drinking alcohol and sale of carcass is seriously incomplete in one respect. Section 86 provides for a separate offence of prohibited drink or food which is not included in the exemption section 5 (3). It is an offence for any person to offer to another drink or food which is prohibited by the religion of the person offering it or to whom it is offered. Since drinking alcohol, and sale of alcohol and carcass begin with the offer, the exemption of Southern Sudan from the offences of drinking alcohol, dealings in it and the sale of carcass is seriously undermined where at least one person is a Muslim. Again, since capital theft can be assimilated to ordinary theft, the reality of the exemption lies in the absence of amputation of the limb as a punishment for any type of theft in Southern Sudan.

A more curious aspect of the exclusion of certain punishments and offences from Southern Sudan is the possibility of their waiver and abrogation. An accused may request that the punishments and offences inapplicable in the Southern Sudan under section 5 (3) are applied to him. It is doubtful whether Sharia criminal law in these areas will be extended to Southern Sudan by parties' choice of law. Since the act of the accused is not considered criminal in Southern Sudan, it is not easy to see how he will be brought before a court. In any event, in matters of personal status, the pattern has already been set. The right given to the parties in civil suits to opt for Sharia jurisdiction and law has not been used in practice and it is unreasonable to expect its use in criminal matters. Rather than extending the scope of parties' choice of Sharia law, the legislature should have abolished it altogether.

45 S. 146.
46 S. 139.
47 Ss. 79 (1), 79, 85, 126, 157 and 171 read with s. 5 (3).

Future abrogation of the exemptions leaves no doubt as to where the sympathies of the Sudan legislature lie. Each of the three future state legislatures in Southern Sudan is given the power to abrogate the exemptions within its state if it so chooses. The crucial question here is whether the state legislature will be composed of elected or nominated members of both. There are precedents in the Sudanese constitutional history for both types membership in a legislature.[48] And since nominated members are usually "Yes" men, it is not inconceivable that persons nominated by a central or national legislature biased in favour of Sharia law may revoke the exemptions regarding punishments and offences.

III. Sharia Law as Constitutional Law

The use of Sharia law as a model for a Sudanese constitution was first articulated in 1956 by Grand Kadi Hassan Muddathir in a pamphlet entitled A Memorandum for the Enactment of a Sudan Constitution Derived from the Principles of Islam. The Grand Kadi was able to buttress his arguments with generalized statistics about racial and religious composition of the Sudan. He stated:

> In an Islamic country like the Sudan the social organization of which has been built upon Arab customs and Islamic ways and of which the majority are Muslims, it is essential that the general principles of the Constitution of such and Country should be derived from the principles of Islam, and, consequently, the laws governing its people should be enacted from the principles of an Islamic constitution and in accordance with Islamic ideals out of which such community has been shaped.[49]

The allure, then, of Islamization of Sudan laws and constitution is that Islam and Arabism - the two are used synonymously - have shaped the values of the majority of the Sudanese People. The law and constitution should reflect these traditions. The Memorandum did not refer to any single provision of the then Transitional Constitution 1956 as contrary to Islam nor does it contain a statement of constitutional principles derived from Islam. But he criticized as contrary to Islam laws which allow drinking of alcohol and sexual intercourse with unmarried woman of over 16 years of age.

For the contents of an Islamic constitution, reference may be made to the Draft Third Amendment to the Constitution of 1973, which attempted to extend the Islamization to the Constitution. It is the most comprehensive attempt to apply Islamic principles to a written constitution, and it amply shows that it cannot be done. Of the 225 articles of the constitu-

48 *Akolda M. Tier*, The Legal System of the Sudan, supra note 1, at 65 and 658-661.

49 Grand Kadi *Hassan Mudathir*m, A memorandum for the Enactment of a Sudan Constitution Derived from the Principles of Islam, 1 (1956).

tion, 123 articles were proposed to be amended. A few of the proposed amendments may be noted.

In Part I of the 1973 Constitution on "Sovereignty and the State", it is stated in article 1 that the Sudan is a "democratic, socialist and sovereign republic" whose sovereignty according to article 2 "vests in the people". Both articles were to be amended. The Draft article 1 declared the Sudan to be an Islamic republic and article 2 vested its sovereignty in God. Another important change in this part relates to article 4 which directed the Sudanese Socialist Union, the then sole political party, to "enhance the values of democracy". The Draft replaces the word "democracy" with the word "Islam". Finally, whereas Islamic law and custom are the sources of legislation under article 9 of the 1973 Constitution, the Draft amendment to it deletes the word "custom".

On directive principles of state policy in Part II, article 16 of the 1973 Constitution recognizes Islam and Christianity as state religions. The Draft amendment deletes reference to Christianity as a recognized religion. Again, whereas in article 23 of the Constitution military service is an honour and a duty, in the Draft, *jihad* (holy war) in the service of God and country is a duty. Finally, in both the Constitution and the Draft Amendment, article 30 requires socialism to be the basis of the economy. In the case of the Draft only, socialism is to be derived from Islamic principles.

In Part III of the Constitution of 1973 on "Freedoms, Rights and Duties", article 48 on the right to free expression of opinion becomes in the Draft the right to free expression of opinion and the obligation of *ma'ruf* (i.e., encouraging matters permitted by Islam) and *munkar* (i.e., discouraging matters prohibited by Islam). It is not clear how a non-Muslim can be expected to know matters which are *ma'ruf* and *munkar*.

The proposed amendments to Part IV of the 1973 Constitution begin with the title: "The Supremacy of the Rule of Law" becomes in the Draft "The Supremacy of the Rule of Sharia and Law". In the Draft Amendment to article 59, the state is subject to the rule of law based on the principles of Sharia. Any law contrary to Sharia law is void and any citizen has a right to petition the courts to be declared void. To put the same point differently, the validity of legislation depends on its conformity to Sharia law, not the rights specified in a constitution. In actuality, the existence of the constitution makes little or no difference in the protection of the individual against state power. Again, the prohibition in article 70 of the Constitution on trying an accused for an act which was not an offence at the time of commission is replaced in the Draft by the rule that where an act is not an offence under criminal law, resort may be made to the Koran and Sunna. Evidently, this is no protection against retroactivity of laws.

Finally, the changes suggested by the Draft to the organs of State in Part V - VII of the Constitution blurr the doctrine of separation of powers. For example, the Draft amendment to article 80 makes the executive President the *imam* (the highest office in Islam) of Muslims and head of state. He holds office by virtue of oath of allegiance (*bei'a*) and his term of office is unlimited. On the other hand, parliament becomes an advisory council. Although the advisory council has the usual immunities of parliament, the Draft amendment to article 133 adds the important rider that immunity does not protect actions contrary to Islam. On the judiciary, the Draft amendment to article 187 states obscurely that the judges and the President are responsible to God.

To sum up, an examination of selected articles of the Draft Third Amendment to the Sudan Constitution 1973 shows that Islamic constitutional law is still at a relatively nebulous stage of development and many problems of constitutional law were unintelligible to the authors of the Draft. Moreover, one notices a tension at two levels between the principles of the 1973 Constitution and the Draft. There is a struggle of different sets of ideas of human rights and institutions of government. There is also a struggle at a personal level between different population groups - Muslims and non-Muslims. The upshort is the erosion of democratic human rights.

IV. Policies and Ideas on Personality and Territoriality of Sharia Law

It is worthwhile to consider the policies and ideas on the operation of Sharia law as a personal law in matters of family and succession, and its transition to a territorial law on the remaining areas of legal relationship. To take the policies and ideas on the operation of Sharia personal law first, the reasons for its necessity are the reasons for any personal law. I have discussed them elsewhere in the wider context of "mixed" civil, Sharia and customary jurisdictions.[50] According to my analysis, the various factors that account for the operation of personal laws include the difficulty or impossibility of providing a uniformed law in matters of family and succession, the vastness of the country, limited funds and personnel, and a weak central government which cannot enforce law territorially. The inference to be drawn from these factors is that the operation of personal laws is provisional.

On the transition of Sharia law to territorial law, the central theme is twofold: to perpetuate a social and political order that denies pluralism and to promote morality and Islamism mainly through prosecutions of immoral sexual offences, blasphemy, apostasy and drunkenness. This theme, it is asserted, reflects Arab and Islamic traditions of the majority of Sudanese. This is the allure of Islamization of the Sudan laws and constitution. It

50 *Akolda M. Tier*, supra note 5, at 507-511.

proceeds on a relatively simple but erroneous assumption: that majorities are stable at all times and on all issues.

In any event, an obvious unease haunts the Islamization of the Sudan laws and constitution principally because of its impracticability in a plural society. First, it is not clear at this stage how the diversity of criminal law on such matters as drinking alcohol and dealings in it will be accommodated in "national" matters, including customs, defence and foreign affairs. Will the customs regulations permit import and export of liquor and charge duty on it? Admittedly, in some countries - federal or unitary - the law varies from one state or region to another. But that diversity in the laws is not great in part because a constitution provides for fundamental rights and the rule of law for all persons throughout the country without discrimination on the grounds of religion, race, sex or other classification not related to a person's capability. Secondly, despite its embodiment in the constitution as a source of legislation, customary law has not attracted the attention of the legislature. The new legislation passed since 1983 is derived exclusively from Islamic sources. This is surprising since, as has been seen, the majority of the inhabitants of the Sudan prefer to litigate in the local or customary jurisdiction.

Thirdly, it is arguable that punishments such as death by stoning or by *gisas*, death and then crucifixion, amputation of the limbs and whipping are cruel both to the offender and the person who carries them out. They do not cease to be cruel because the offender is a Muslim. The other danger with the punishments is their preponderant impact on the poor. This is true even of blood-money (*dia*) since a consequence of a person's inability to pay it is that he or she stays in prison indefinitely, and this can be for the rest of his or her life. No such difficulty confronts a wealthy man. He can easily buy himself out of jail.

Fourthly, some provisions of the Evidence Act 1983 and the Criminal Act 1991, re-enacting the Penal Code 1983, expressly discriminate on the grounds of religion, sex and marital status. The list of the grounds in which discrimination can find expression goes beyond those enumerated, since in the Sudanese context religious affiliation - Islam and Christianity - happens to coincide both with racial affiliation - Arabs and Africans respectively, and with regional affiliation - North and South Sudan respectively. Of course, discrimination exists in many subtle forms and is hidden in discretionary decisions in the field of employment, housing, education and the allocation of resources.[51] It now exists on the face of the law. And since the Judgments (Basic Rules) Act 1983 leaves much to be filled by resort to Sharia law, which is biased in favour of Muslims and men, discrimination on the face of the law is of increasing concern.

51 ILO, Growth, Employment and Equity: A Comprehensive Strategy for the Sudan, esp. 123-145 (1976).

Finally, the experiment going on in the Sudan has to be seen in a wider context. Some of the new offences such as drinking, possessing or carrying alcohol and *zina* (adultery, including fornication) have no victims, and when they take place in private, the desire to detect and punish the law-breaker comes into clashes with the rights of individuals, in including inviolability of dwellings and the private life of an individual. Little wonder that the era of Islamic criminal laws in the Sudan was in 1984 when the government proclaimed a state of emergency, suspended constitutional rights and set up special courts to administer the new legislation.[52] Recognition that no law is self-executing probably explains the limited diversity of certain punishments and offences under the Criminal Act 1991 on a regional basis - North and South Sudan. A law has to be enforced by law enforcement officials. Should they refuse to enforce it, as the institutions in South Sudan did in relation to the Islamic provisions of the Penal Code 1983, the law becomes a dead letter. This fact also explains why all persons in Northern Sudan, including Southern Sudanese, are subjected to all the Islamic provisions in the Criminal Act 1991.

Enough has been said to show that the transition of Shaira law from personal to territorial law confronts practical difficulties. Given these difficulties, it is necessary to recapitulate sound policies on unification of laws. *Twining* conveniently summarizes these policies as follows:

> A foreign legal system may be imported as part of an attempt to unify a country of diverse elements into a nation; it may also be part of a policy of secularization of a legal system, which has hitherto been dominated in part by religious or other non-government elements; it may be part of a speedy "modernization" or "Westernization" of a country as was the case in Turkey 1925, or it may be necessary to import a legal system to fill in a partial or total "legal vacuum", as for instance when a previously uninhabited area is opened up by settlers who may be out of sympathy with certain aspects of life in their country of origin. In specific instances these "policies" may be more or less deliberate, articulate and conscious or unplanned, unconscious and inarticulate, and will be fused together in different ways, but in nearly every case "reception of foreign law" will be one aspect of a wider whole, and to focus on "reception" without a continual awareness of those wider issues would involve danger of some distortion. This is particularly true in a country like the Sudan which is undergoing only a partial reception and in which the problems of language, of diverse population, of religion, of development and modernization, and of being primarily, but not entirely, Arab country are all relevant and make the situation additionally complex.[53]

52 *Akolda M. Tier*, The Legal System of the Sudan, supra note 1, at 697-698.
53 *Twining*, Some Aspects of Reception, Sudan L. J. & Rep. 229, at 230-231 (1957).

Since the common law that has been received has taken into account the special circumstances of the Sudan, there is no reason why the unified law should not have elements of Sharia and customary laws selected on their merits. This point is stressed by *Disney*. Writing in 1959, he stated:

> The interaction between the Sudan codes drafted and introduced by British lawyers and for many years administered in part by British judges and magistrates - and Sudanese "common law" - itself owing much to Sharia as well as to non-Islamic African tradition - has been going on for half a century. What of the future? Will the two streams eventually join to produce a distinctly Sudanese legal system, based on the best of both? This would perhaps be the most fitting outcome of the experiment of drafting an adapted version of English law - itself a product of such a rich and diversified tradition - on the sturdy stock which the Condominium Government found alive in the Sudan.[54]

The outstanding characteristic of this unification of laws is eclecticism. A law is selected solely on its merits. Eclecticism was alo advocated by the late Chief Justice *Abu Rannat*. Addressing the London conference of 1959 - 1960 on The Future of Law in Africa, he stated:

> For the future, I believe that a Sudanese common law will have to develop as an integral part of society now emerging in the Sudan, and it will not be based on religious adherence but upon the social customs and ethics of the Sudan as a whole.[55]

These passages express a fundamental idea. In a country with pluralistic systems of laws, one community cannot hope to impose its culture, including legal culture, on the rest of the country, particularly, if the rights of other communities are adversely affected. In such countries, the diverse values must be accommodated in the unified law. In short, eclecticism is an approach that a government that respects equality may deliberately choose.

V. Conclusions

The "mixed" civil, Sharia and customary jurisdictions have not been properly adjusted to the needs of a pluralistic society. This failure started in the 1960s with the extension of Sharia law in matrimonial disputes in which at least one of the parties is a non-Muslim. On the whole, Sharia law works relatively well as a personal law in matters of the family and succession between Muslims *inter se*.

54 *Disney*, English Law in the Sudan 1899 - 1958, 4 Sudan Notes and Records, 121, at 123 (1959).
55 *Abu Rannat* CJ, supra note 12, at 15-16.

The new critical areas of Islamization are the territorial laws and constitution. Here, Islamization raises the fundamental problems of democracy, secularism and the human rights of individuals. Additionally, for non-Muslim Sudanese, Islamization of the laws and constitution imposes on them difficulties somewhat analogous to those of foreigners in a secular state. Outsiders may see some of the deprivations and plead patience. The perpetrator considers the deprivations as obedience to the dictates of his religion. But looking at the deprivations from the victim's perspective, I am reminded of the words of Mercutio in Shakespeare's Romeo and Juliet. Apparently unaware of Mercutio's fatal injury, Romeo says: "Courage, man; the hurt cannot be much." But Mercutio, who knows of his death-wound, replies: "No, 'tis not so deep as a well, nor so wide as a church door; but it is enough, 'twill serve."[56]

56 *Shakespeare*, Romeo and Juliet, Act III, Scene 1.

claims it comprises by dividing it into two groups: a group which contains rights with an ordering function in the international society (these rights will be called third generation rights). The international order which is to ensue from the realization of these rights is one characterized by the formal equality of its constituent parts, the states. The second group (called the "fourth" generation) consists of claims which embody a concept of material equality. Both groups operate within the international community in contradistinction to the first two generations which have explicit functions within national societies.
The division of rights into four generations is based on the assumption that the rights of respectively the first and third generation are congenial and that a similar congeniality exists between the second and fourth generations.
Besides these parallels which are demonstrated in the article, one "fourth" generation right is analyzed, the right to benefit from the common heritage of mankind such as formulated with reference to outer space. In the Agreement governing the Activities of States on the Moon and other Celestial Bodies, the moon and its natural resources are declared to be the common heritage of mankind. The states parties to this treaty undertook to equitably share the benefits deriving from exploitation of the lunar common heritage. With help of John Rawls' theory of justice, in particular its device of the "original position", the meaning of such "equitable sharing" will be identified.
The analysis of the right to benefit from the common heritage of mankind is not only intended to exemplify the distinct character of the fourth generation but also to refute an important objection to solidarity rights in general, viz. that these rights lack a precise object and are thus incapable of producing definite obligations and as a consequence cannot be judicially enforced.

Islamization of the Sudan Laws and Constitution: Its Allure and its Impracticability

By *Akolda M. Tier*

Traditionally, Sharia (or Islamic religious) law is a personal law for Muslims in matters of the family and succession to property. Although this subject matter can be extended to other civil (i.e. non-criminal) matters through parties' choice of law and the quasi-legislative power of the civil (i.e. in the wider sense of non-Sharia) courts to decide, in the absence of legislation, according to "justice, equity and good conscience" or other similar phrase, no such extension occured. The transition of Sharia law from personal law of Muslims, for which it is peculiarly suited, to the unfamiliar area of territorial laws (i.e. laws which apply to all persons without distinction as the religion or ethnic community) and some aspects of the constitution was effected by the legislature. In 1980's, Islamic principles were incorporated by way of addition to, or repeal of, existing rules of criminal law

and procedure, evidence and civil (other than matters of family and succession) law. Here, Islamization of the laws raises the fundamental problems of democracy, secularism and human rights of all persons. Additionally, for non-Muslim Sudanese, Islamization of the laws and constitution imposes on them disabilities somewhat analogous to those attaching to foreigners in a secular state.

Practical Problems in the South-South Development Cooperation: Some Experiences Involving Tanzania

By *Paschal B. Mihyo*

South-South economic cooperation for economic change has a long tradition. Starting with a historic glance at the first Afro-Asian Conference at Bandung in 1955 and the development to the present situation, the article focusses on the role of the non-aligned movement in the development of the South-South development cooperation. After considering the specific issues and difficulties of South-South cooperation, its basic forms and assumptions are examined. Evidence of the assumptions is given by an evaluation of the characteristics and weaknesses of selected specific cooperation projects between Southern states and Tanzania between 1970 and 1980 in the areas of, first, technology and technical assistance agreements, second, in the area of trade of machinery and equipment and, finally, engineering and construction contracts.

The author comes to the conclusion that, since the difficulties are, to a considerable degree, based on the values of the partners involved, they can only be changed consciously and slowly. He contends that the South-South cooperation may be more likely to succeed if, as Nyerere has argued, it is based on a new outlook of relations between the developing countries and on a new framework of relations. Mihyo concludes, firstly, that the dialogue and debate amongst the Southern countries has to be intensified and their goals have to be clearly identified. New instruments of trade cooperation and own codes of conduct have to be developed. Secondly, regional cooperation has to be strengthened as the only basis for meaningful development. Thirdly, only a firm commitment to democratic and exploitation-free economic relations between countries of the South can form a solid basis for the development of new institutions of economic cooperation.