Criminal Law and Justice in Sudan

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LIST OF ABBREVIATIONS

S.G. :	Sudan Government
GNU :	Government of National Unity
NCR :	National Congress Party
SPLM :	Sudan Peoples Liberation Movement
CPA :	Comprehensive Peace Agreement between the NCP and SPLM, 2005
NIC :	National Interim Constitution, 2005.
NSS :	National Security Service
UNSC :	UN Security Council
SLJR :	Sudan Law Journal and Reports

INTRODUCTION

Sudan, is the largest country in Africa, with the population of approximately 40 million persons sharing Arab and Islamic fractures and a multiplicity of ethnic and cultural characteristics. It has had a varied history if self-governance, colonialism and, since 1956, independence. With such historic multiplicity, the developments of its political and legal systems and structures has been equally varied.

This paper is intended mainly to study the development and current statutes of system of criminal laws and principles which have sought to regulate criminal justice and human rights and propose thoughts for reform. Needless to say, this paper is only part of a joint efforts by both Sudanese and non-Sudanese individuals and NGOs who have contributed to different specific themes of the subject. The end result would be to have these efforts analyzed by a group of those involved in the process to try to achieve some consensus to reform the applicable criminal laws and criminal justice system in accordance with universal standards included in many relevant international human rights instruments to which Sudan is a party. As, indeed, acknowledge by almost all Sudanese parties, the principles stated in the Comprehensive Peace Agreement and the National Interim Constitution, both of 2005, would be taken as the spring board for the achievement of these reform goals.

The author of this paper is much indebted to REDRESS, particularly to Lutz and Abdel Salam for having not only involved him a consultative capacity in the process since its inception, but also for the help and support during his engagement in the process. The cooperation of all other Sudanese colleagues is similarly highly appreciated. I have no doubt that the joints efforts of all those mentioned will bear fruition in the not too distant future.

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Khartoum, February 2010

HISTORICAL BACKGROUND

The Pre-Independence Period:

According to historians, what would be referred as the country "Sudan" as a unified geo political entity, with all its mutti social, cultural, ethnic and political diversities began with the Turko-Egyptian invasion in 1821 by Khedive Mohamed Ali, the ruler of Egypt on behalf of the Turkish Empire. It is believed that the invasion was exclusively a colonial expansionist rule to exploit the country's mineral resources and to force Sudanese men to strengthen the expansionist military power and might of the Turkish army in Egypt. Consequently, there was system of law or of administration of justice to be reckoned with. A former Sudanese Chief Justice, G.A. Lutfi, wrote " with very few exceptions, corruption, exploitation and injustice were the main characteristics of the rulers."[1] In essence there was no rule of law or justice to be reckoned with.

The oppressive nature and practices of the Turkish rule formed enough fuel for the support of the Mahdist uprising against foreign rule, and the application of the principles of Sharia for the general governance of the country. Support for the movement soon spread all over Northern Sudan until the Mahdi's army conquered Khartoum, killed the British Governor General Gordon, and won independence for the country. Although the Mahdi died soon after, the system of rule established by him, and strictly followed by his successor, Khalifa, after him, was a rigorous system purporting to apply Islamic Sharia in the most extreme way. The strict rules of the Quran and Sunna were applied by the courts as interpreted and complemented by the Directives (Manshurat) of the Mahdi and, later the Khalifa. Punishments of death, amputations and perishment in prison were ordinarily inflicted, the latter also on judges or Emirs who dared disagree or dissent on the Khalifa's authority, directives (fato as) or policy decisions.[2]

The Mahdist rule was ended in 1998 by the reconquest of the country by the Anglo-Egyptian forces led by General (later Lord) Kitchener. The Anglo Egyptian Agreement on the Sudan gave the British Governor General overall supreme military and civil command, as well supreme legislative authority. Unless otherwise proclaimed by the Governor General, no Egyptian Law was to be applied in the Sudan. Apart from customary law applied in local tribal areas, the Islamic Sharia law was to be administered

[1] G.A. Lutfi. "The future of the English in the Sudan, Sudan Law Journal and Reports." 1967, P.222
[2] See El Fahal El Tahir Omer "The Administration of Justice During The Mahdiya." 1964 SLJR, P.167

on personal status matters under a new Ordinance by Sharia judges mainly brought from Egypt.

As regards all other aspects of civil and penal law, a completely new system had to be started from scratch. On the criminal law, the Sudan Penal Code and the Code of Criminal Procedure were enacted forthwith, based mainly on the Indian law which had been introduced in India by the British Lord Maculay presumably some basic English law principles reformulated and adapted to the conditions prevailing in India in 1860s. As will be elaborated in this Chapter, these two Codes, politically motivated modifications here and there, remain the same Codes of 1898. As for the wider spectrum of civil and commercial law the rules to be applied were provided in Section 9 of the Civil Justice Ordinance, 1902, which provides that :

> "In cases not provided for by this or any other enactment for the time being in force; the Court shall act according to justice, equity and good conscience."

It was this provision that seemed to have given rise to the most intensive controversy in the historical development of Sudanese law. Since justice was to be administered by British judges, trained only in the British tradition, it was natural that they would interpret "justice, equity and good conscience" in accordance with the principles of English Law, the only one they knew. This seemed to be rather illogical as the standards of conduct, social customs, moral and religious value prevailing in the Sudan at the time were, to say the least, different from those applicable at end of 19th century England. Some of the leading British lawyers, however, were aware of this problem from the very beginning and senior judges among them endeavoured to emphasize that their role should not be just to fill the legal vacuum by transplanting English law into the new system. Rather, seek to adapt it to the prevailing local values, needs and customs. A well known obiter diclum "we refuse to be guided or misguided by English law, first used by the well known English Sudan's Chief Justice, Owen, was then often repeated and used the new generation of Sudanese judges. In so doing, they managed to prevent a blind replication of English law into the Sudanese system, and contributed what could have turned "Sudanese Law" by the middle of the 20th century. In the criminal law and procedure, the law had already been promulgated in the two respective Codes. Judges had no difficulties, only their efforts to take Sudanese traditions and values into consideration when making their decisions.

The Post-Independence Period:

Such was the state of affairs by the time of the country's independence in 1956 when Sudanese judges were in full control of administration of justice. Nationalist feelings and the fact that an increasing number of lawyers graduated under the civil law tradition, mainly in Egypt, in other Arab countries and, later, in the Cairo University, Khartoum Branch, led to raising high sounding slogans of law reform, to rid the country of "colonial laws" and promulgating national Sudanese laws. The late Chief Justice, G.A Lutfi, in an interesting Article on the subject described those calling for law reform as follows:

" The first idea is that of a group which consisted of some of the Muslims from the Northern Sudan who asked for the application of Islamic law in all matters. Another group is formed of those who are in favour of some sort of closer relationship with the United Arab Republic and the Arab world, demanded the adoption of the Egyptian law, which is the basic law of all other Arabic countries.

A third group which believed in election, advocated the ideas that the suitable system to be adopted is that which consists of what is chosen from the best laws of each country from all over the world.

As opposed to the above three groups, the majority of the population are of opinion that, since the present laws did not prove unsuitable there is no need to change them."[1]

As the said author of the above statement concluded, except for the Islamists, those mentioned groups were neither organized nor did they provide any projects or draft laws to be implemented. It seemed for all intents and purposes, mere political sloganeering that died a natural death.

In 1974, as the Minister of Justice, a former Dean of the Faculty of Law at the University of Khartoum, made an invaluable contribution on the codification and stabilization of the laws of the Sudan. Aided by some of his colleagues at the Ministry of Justice and the Faculty of Law, they embarked on a colossal process that codified all the criminal and civil laws of the Sudan in eleven volumes which, except for changes and additions subsequently made, here and there, can still today be considered the basic reference for Sudanese law.

By 1983, however, when the then military regime in power had exhausted all its chances of different alliances and scenarios and, together with economic difficulties, the war in the South, it exhausted all chances of survival. Ironically, after a crisis with judges over the rule of law and conditions of service, President Numeri was not satisfied only with abusing the judges and dismissing some of them after they had entered into a strike. Clad in uniform, with all its paraphernalia, he proclaimed a State of Emergency in which he declared Sudan would henceforth be ruled by the laws of Islamic Sharia. In a few weeks he declared the immediate applicability of Islamic criminal law, prepared by some three young lawyers in the Presidential Place. Presidential decrees adopted the laws, although Parliament was in session!!

The Penal Code of 1974 was amended to add the Islamic punishments of **Huddud** and **Qisas**. The former included amputation of a hand for theft, cross amputation or death for robbery, stoning to death for **Zina** (adultery) if the person is married or 100 lashes otherwise, 100 lashes and possible imprisonment for 5 years for sodomy and possible death penalty or life imprisonment in case of a third conviction, 100 lashes and

[1] G.A. Lutfi "The Future Of The English Law In the Sudan", 1967 SLJR, P. 219

imprisonment up to 10 years for rape, unless it also amounted to adultery or sodomy it becomes punishable with death, and flogging for drinking or possession of alcohol.

Such strict punishments, commonly called "The September Laws" relating to the month of September, 1983 when they were adopted, were applied in the most ruthless and widespread manner. Under the State of Emergency special courts, called the "Prompt Justice Courts" were established. Police and Security forces chased men and women into their houses, clubs, cars, everywhere and presented them before these Kangaroo courts which sought to excel each other in passing extremely severe punishments of death, imprisonment, amputation, cross amputation, flogging … etc. Radio, TV and newspapers were quick to publish the full names of persons convicted and punished, men and women found in a car were promptly charged and sent trial for conviction for "attempted adultery" unless they produced evidence of marriage or intimate blood relationship. Real terror reigned all over the country. Mahmoud M. Taha, a well known Islamist and leader of the Islamic Republicans, distributed a leaflet through his supporters, criticizing the practices of the regime as a real insult and undermining of Islamic principles. A special court was set up before which he refused to plead or defend himself, convicted and sentenced him to death for committing a crime against the State under the Penal Code. Instead of sending the verdict to the High Court, a Special Court of Appeal headed by an infamous Prompt Justice Court Judge, Judge Al Mikashfi, not only confirmed the sentence of death, but charged the victim of an offence of "Apostasy", which had not even been an offence under the Penal Code. This he did relying on another infamous September Law called "The Sources of Judicial Decision Act, 1983, which enabled judges, in the absence of a legislative provision, to apply their own opinions on Islamic jurisprudence and make their decisions accordingly. Thus, in contradiction of the established and common law principle of no incrimination or punishment without law i.e. ex-post facto or pocket pistol law! Needless to say, the President confirmed the sentence and Taha was executed on18th January1985, a sad day for justice in the Sudan, condemned the world over.

The continued oppression under the September laws and the general political discontent inevitably led to the popular uprising which brought to end the dictatorial regime on April 6, 1985.

Although an atmosphere of democracy and public freedoms followed, neither the one year Caretaker Transitional Government, nor the multi-party popularly elected Government were successful in abrogating the September laws. This failure was due to the strong Islamists political cadres sloganeering that doing so would amount to renging from Islamic rule! Perhaps the only change of significance was the amendment of the Sources of Judicial Decisions Act, already referred to, restricting its application to civil, as opposed to criminal, matters only. A new Judiciary Act was also adopted in 1986 purporting to confirm the independence of the Judiciary.

THE PRESENT SYSTEM

Then came the final blow to the rule of law by the coup d'etat of 30 June, 1989 orchestrated and executed by the National Islamic Front (now the NCP) allegedly to end the "anarchy" of the democratic period, the proposed peace settlement with the rebel Southern movement, which was described as a set back to Sudan's Islamic orientation, which the new regime declared it came to preserve. Typically the new military rulers

prorogated the Constitution, dissolved all executive and legislative organs, trades unions, professional associations and NGOs. Thousands of army and police officers, civil servants and employees of State corporations were summarily dismissed "in the public interest", and so were hundreds of judges from the High Court level to the District Courts. Large numbers of political trades union leaders, whom the regime consider "possible" opponents, were arbitrarily detained for months, or years, in prisons and "safe houses" throughout the country. Many were tortured to death, physical and psychological injury, using all sorts of brutal methods. All the foregoing was not justicable as the Courts were prevented from entertaining any such complaints under the State of Emergency, which lasted many years. Several military and Special Courts were established and tried those opposed to the regime.

The Criminal Law Act, 1991:

The new regime confirmed its Islamic orientation and considered the war in the South a holy war of **jihad** against the infidel rebels. Young persons and students were forcibly conscripted and sent to the South where they would perish as "martyrs"!. Thus the war continued unabated. The grip of the regime on power was disclosed by subsequently declaring that the political party in power was indeed the National Islamic Front, presently the NCP.

In relation to law reform in general, the regime has not made any radical changes. In civil law several new enactments or amendments were made on such matters as banking, insurance, investment, customs, taxation.. etc. without affecting the basics of civil obligations. Even the Companies Act of 1925, which was based on the 1908 English Act, has remained in tact!

On the penal law, the 1983 Code was replaced by the current 1991 Criminal Law Act, based on almost the same Islamic philosophy of the provision code. On specific crimes, a new crime of Ridda (apostacy) was added to the Code.[1] Apart from that, the new Act reduced the Sections in the 1983 Act to 185, instead of 458. This was done by consolidating several similar acts into one Section, rather than the old system of specifying a single Section for every such act. Some aspects of the new law should now be considered.

(A) Homicide

[1] Section 126 of the 1991 Criminal Law Act. It has already been stated that the Islamic Scholar was executed for apostasy, though it was not an offence at the time.

From the constitutional law angle a Constitutional Court was for the first time established in 1998. Prior to that, cases involving constitutional issues were referred to a Circuit of Supreme Court Judges, especially constituted for determining a particular case.

The 1998 Constitutional Court Act gave it powers not only to look into normal constitutional issues, but also look into issues arising of judgments of the Supreme Court. This resulted in severe constraints between the two Courts, as the Supreme Court was essentially being made subordinate to the Constitutional Court. Advocates and litigants who got unfavourable decisions from the Supreme Court naturally relished to have those decisions overruled, even if the question was not essentially over constitutionality of the decision in question or otherwise.

In spite of the resulting tension between the two Courts, however, many lawyers saw some benefits in the system in relation to the defence rights of persons accused of homicide. It seemed from several decisions of the Supreme Court that in their interpretation of the rules of **qisas** in the Sharia, a person who commits culpable homicide must face the death sentence, in spite of the existence of some legal extenuating circumstances expressly stated in the law.

This, it is submitted, was a flagrant miscarriage of justice. Section 131 of the Criminal Law Act expressly provides that culpable homicide amounting to murder, as defined in Section 130, is reduced to culpable homicide **not** amounting to murder in several specific circumstances, namely:

(i) If the criminal act was not intentional and death was not a "probable" consequence thereof;
(ii) If a public servant in good faith exceeds his lawful authority believing that his act was necessary for the performance of his duties;
(iii) If death is caused by a person by committing an act in excess of his right of private defence;
(iv) If death is caused by a person threatened by death;
(v) If death is committed by a person as a necessity to protect himself or others from death;
(vi) If death is caused on the basis of consent of the deceased;
(vii) If death is caused under loss of self control as a result of grave and sudden provocation;
(viii) If the accused exceeded the limits of his lawful act, causing death;
(ix) If the death is caused by person who suffers acts under such mental or psychological disturbance which seriously affect this ability to appreciate his actions or control them[1].

[1] This is the defence of "Diminished Responsibility" introduced just in England by the Homicide Act, 1957. In a well known Sudanese case, S.G. v. Nafisa Dafalla (1961) SL JR, 199 Justice B. Awadalla introduced this principle to reduce murder to culpable homicide not amounting to murder. The re-enacted 1974 Penal Code formally introduced it in its Section 149 (6).

These clear exceptions notwithstanding, judges of the Supreme Court tended to disregard and convict persons of murder and sentence them to death, in application of what they considered the penalty of qisas under the laws of Sharia.

Many such cases were referred by defence lawyers to the Constitutional Court contesting the constitutionality of such Supreme Court decisions as an infringement of the basic constitutional right to life, in disregard of the express provisions of Section 131 of the Code.

Fortunately, the Constitutional Court agreed with this interpretation and intervened to reduce convictions of murder by the Supreme Court to culpable homicide not amounting to murder by applying the abovementioned exception in Section 131.
Whether this positive constitutional development would be sustained by the newly adopted Constitutional Court Act remains to be seen. Unlike its predecessor, the new Act of 2005 has omitted the express provision in the old Act that the Court could review constitutionality of decisions of the Supreme Court.

It is submitted that the new Court should continue to exercise this jurisdiction as a constitutional jurisdiction reviewing decisions on the basic right to life.

(B) Age of Criminal Responsibility:

According to Section 9 of the Criminal Act "a minor who has not reached puberty" cannot be held criminally responsible. Further, a child who has reached the age of 7 can be transferred by the Court for child care and rehabilitation.

Although evidence whether a child had attained puberty or not is determined by the Court after hearing medical specialists, this is both arbitrary and unacceptable. Determining the age of a child by reference to reaching puberty may become controversial, even between specialists. In any case; this would restrict the determination of the child's congenital ability to his physical, rather than mental or psychological ability, and his attitude towards what could or could not be a criminal act. It, therefore, becomes necessary to determine a fixed age, on the basis of which a child's ability could be determined. The Peking Rules for the Administration of Juvenile Justice, adopted by the UN General Assembly in 1985 stated that the lower age of criminal responsibility "shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity."

It is thus proposed that the age of criminal responsibility for children be fixed at least 16 years. Younger children below that age, above 8 or 9 probably, should be the ones to consider for correction and rehabilitation.

It should be remembered in this connection that Section 49 of the 1974 Penal Code absolved from criminal responsibility (1) the acts of a child under 10 years, and (ii) the

act of a child over 10, but under 14, years if he had not attained adequate maturity to understand the nature of his act and its consequences.

(C) Penal Punishments

(a) Huddud and Qisas:

The Islamic punishments of **huddud** and **qisas**, first introduced in the 1983 re-enactment of the Penal Code, remain in force until today. Most Islamic countries, taking into consideration the educated opinions of different Islamic jurists belonging to various Sharia schools, have done with the **huddud** punishments of stoning to death, crucification, amputation, cross amputation and, even, flogging. This is generally based on the premise that contemporary times have radically changed from Islamic life of 14 centuries ago, that the contemporary punishments of prison detention, fine, compensation ..etc. were not available during the early days of Islam. That the political, economic and social conditions of modern times impel on the rulers to adapt to theories of penology to suit present needs and circumstances of the community. The present undeclared moratorium on these punishments in the Sudan, inspite of their continued presence in the Code, is indeed a mockery of the law. It is therefore recommended that, like all other Islamic countries, Sudan should abolish these punishments and substitute them by more appropriate ones based on modern theories of criminology and penology using the efforts of contemporary religious scholars, social and political scientist and lawyers.

It is proposed as follows:

1- The punishments of **huddud** which, except in cases of consumption and dealing in alcohol, which are presently under an undeclared moratorium, should be abolished and replaced by those punishments prescribed in the corresponding Sections of the 1974 Penal Code. To keep the punishments in the Code, and at the same not enforcing them, most probably for lack of conviction, or dissatisfaction with their efficacy, is both hypocritical and making a mockery of the law. If other Islamic countries have exerted their efforts and used ulemma to dispense with those punishments, there is no reason why Sudan cannot do the same, especially that they had come to be introduced into the law in a mood of political frenzy, rather than religious conviction or popular demand and acceptance.

2- Sudan, like almost all Islamic countries, is unlikely to abolish qisas as a punishment for murder in the near future. Hence, the non-ratification of the Second Optional Protocol to the International Covenant on Civil and Political

Rights. This, however, does not mean that Sudan cannot abolish or replace this punishment in less heinous crimes by other, less final, alternative punishments relying on contemporary concepts of penology. The whole world has gone far beyond the rule "an eye for an eye". At the same time, the principle of dia, as

compensation for injury caused for the victim, may be retained as an instrument of justice. This, naturally, notwithstanding the public policy that the State may impose sentences of imprisonment, fine, or otherwise on those who violate the criminal law of the land, according to the circumstances of each case.

(D) FGM:

Female circumcision has been generally practiced in the Sudan for a long time as a social custom, rather than an act based on religious conviction. It is not practiced in most Arab Muslim countries in the region, except, perhaps, Somalia. It is justified basically on reasoning that it constitutes a physical disincentive protecting girls against sexual

temptation before marriage, and alleged hygiene or health reasons. It is still assumed in some parts of the non-urban parts of the country that an uncircumcised girl stands little chance of finding a husband.

The British rule tried to gradually fight the then strong custom by illegalizing it in a gradual manner. In 1940 they added Section 284A to the Penal Code making unlawful circumcision an offence. They, however, added an Explanation to the Section providing that removal of the free protruding part of the clitoris was not an offence. This was indeed a concession to the strong prevailing custom of circumcision which was (is) of two types: one removing the external part of the clitoris (which was justified as an acceptable form of Sunna circumcision (clitrorictomy) which Prophet Mohammed is alleged to have permitted), and the other type "Pharonic" circumcision (infibulation), which the law purported to prevent.

Nevertheless unlawful circumcision is hardly reported voluntarily as, if and when it is done, the whole family, including parents, brothers and sisters may also likely become accomplices. Most members of society would prefer that no official intervention be permitted in their "private" affairs.

Although embryonic, some change may be noticed especially in the urban areas. Section 184A of the 1974 Penal Code kept the same wording as defined unlawful circumcision in the Penal Code of almost 30 years before. Nevertheless, there has since been a mounting campaign especially among physicians, UN organizations, gynecologists, academic, women and NGOs against FGM, in general, and infibulation, in particular. It is true that the traditional resistance exists, especially upcountry. As recently as 2009, the High Council for Child Welfare submitted a draft law for adoption by the NCP to illegalize FGM on health social and other grounds. The law failed to be adopted. The GNU has,

however, in 2008 committed to national strategy to eradicate FGM within a decade. The Sudanese Network for Eradication of FGM was established as an NGO in 2002.

Other similar NGOs have been established and are actively engaged in their campaign for

eradication of FGM through workshops, reports, seminars and the media. They have worked together with doctors, scientists, religious, media, social science experts to explain the physical, psychological and health hazards involved in FGM.

Although progress was made in adopting a provision prohibiting FGM in the Child Act, this was faced with a setback in 2009 when Parliament abolished the relevant provision in that Act, thus reinstating the status quo ante of allowing FGM. A loud cry is now being heard for the re-instatement of the provision out lowing FGM.

The outcome of this tug of ward is yet to be seen.

(E) <u>Sexual Offences</u>

When the British introduced the first Penal Code in 1898 they were aware that the Sudanese were predominantly Moslems and this was a consideration to take into account, especially in offences affecting the general religious and moral values of the population.

Section 316 of the Code defined "rape" as sexual intercourse with a woman against her will and without her consent. Consent by a woman under 16 years "by her teacher, guardian or every other person entrusted with her care or education" was not considered to be a consent. Further, such intercourses by a man with his own wife, if she attained puberty was not considered illegal.

Under Section 316A sexual intercourse by any person with a girl, not his wife, if she was under 16, but not under 14 was also an offence.

Carnal intercourse against the order of nature without "his" consent was punishable under Section 318. If the person was below 16, such consent would not absolve the person if he be the teacher, guardian or entrusted with that person's care or education.

The same provisions on rape were adopted by Section 316 when the Code was reenacted in 1974, with the change in the age of consent to 18 years. Section 316A also raised the respective ages from 16 and 14 to 18 and 16, respectively. This new Section 318 punished both the person who committed carnal intercourse, and the person who agreed to such intercourse. If the latter did not consent, the punishment was enhanced, provided the person consenting was not below 18 years.

As already stated, the 1983 Code purported to incorporate the laws of Sharia into the Penal Code. In the Explanatory Memorandum introducing the Code, was previous law

criticized for the fact that adultery was permissible so long as the two parties, who had reached the age of consent, agreed to have sexual intercourse.

It also objected to permitting intercourse with a married woman even if she consented thereto.

Under the new law, goes the Memorandum, a Muslim who committed adultery was punishable with stoning to death, if married, and by 100 lashes, if not, in addition to tagreeb (sent into exile) flogging and imprisonment. The Act also punishes rape, indecent assault on persons or animals.

The currently applicable 1991 Code purported to preserve the Islamic principles of the 1983 Code. Section 145 defines adultery as having intercourse without lawful bondage, in which both parties are equally guilty, regardless of consent. If the person is married, the punishment is stoning to death. If not, with 100 lashes. In Southern Sudan the punishment is up to one year imprisonment or fine or both; if married, then up to 3 years or fine or both.[1]

Sodomy in the North is punishable by up to 100 lashes and also liable to up to 5 years imprisonment, for a second conviction 100 lashes and up to 5 years imprisonment; for a third time death or life imprisonment.

Rape is defined in Section 149 as adultery or sodomy on a person without his consent. Consent is not acceptable if the accused has authority over or entrusted with the care of the victim. The punishment for rape, is 100 lashes and imprisonment up to 10 years, unless it also constitutes the offence of rape or sodomy punishable by death.

The present law has resulted in a formidable problem in the context of the current armed conflict in Darfur. Thousands of cases of women in the conflict zone have been reported by several regional and international agencies on cases of women in Darfur being subjected to rape, by several men on occasions, by members of the Sudanese army, security forces and militia men supporting the Government. In most cases rape takes place either in raids on villages by members of the forces or in the open when women leave their camps looking for wood or cooking.

Victims have generally been too timid to report these attacks for multiple reasons including: fear of reprisals, shame on family honour, the feeling of despair and psychological trauma affecting them in addition to not knowing who the rapist was.

One major impediment is the legal one. Under Section 62 of the Evidence Act, 1994, adultery (Zina) can be proved by:

[1] South Sudan now applies its own Penal Code which was adopted by the SPLM in the liberated areas during the civil war.

(i) Confession before the court, unless retracted prior to execution of sentence;
(ii) Evidence of 4 just men;
(iii) Pregnancy by a woman (not a wife) in case of any doubt; and
(iv) Li'an i.e. where a wife denies her husband's oath of li'an

In the circumstances prevailing in the war zone in Darfur it is almost impossible for a woman to prove that she had been raped. In order to prove rape, she must first prove that someone has forcibly committed sexual intercourse (adultery) with her. If she cannot prove the identity of the accused (i.e. the person who had sexual intercourse with her, she is deemed to have "confessed" to committing adultery. As sexual attacks are committed either by a group of people unknown to her, probably masked or at night, in circumstances where she is scared for her life, rather than her chastity, how could she be expected to identify the character of her assailant(s)? So, the victim becomes an accused as a self-confessed adulteress!

The requirement of proof by four just male persons also is also obviously not attainable. The culprits are never likely to testify against themselves or fellow-rapists. The offence is committed in circumstances where no neutral bystanders can be brought as witnesses. So the sole testimony is that of the woman victim; which is not acceptable – even self-incriminating.

As for pregnancy by an unmarried woman, considerations of shame and family honour are in themselves adequate reasons not to come forward with a complaint against an unknown rapist. A pregnant unmarried woman would be fortunate not to be picked at random and be subject to prosecution.

The present state of the law as it applies to the conflict in Darfur simply adds insult to injury!

(F) Flogging:

Apart from the application of flogging as a **huddud** punishment for rape, adultery, sodomy and consumption or dealing in alcohol, the punishment of flogging is found in about another 20 Sections of the Criminal Law Act dealing with common crimes, more than 10% of the penal Sections.

Although the Sudan Penal Code of 1898 was based on the then applicable Indian Penal Code, and although India had abolished that punishment since 1865, the British introduced it in the Sudan Code for many offences. Although that Code has been amended and re-enacted several times, that abhorrent punishment remains one of its ugly features. As already mentioned, the punishment has been vehemently used by military especially as an oppressive measure that those regimes obediently adhere to Islamic principles, particularly in consumption of and dealing in alcohol. Corporal punishment is presently an every day occurrence, almost in all trial courts across the country. In this

connection, women are being particularly harassed by the Public Order Police, especially over dress which police forces arbitrarily determine are repugnant to the so-called "Islamic dress Code"[1]. No such thing exists so long as a woman is decently dressed, not unreasonably showing parts of her body in a provocative or indecent manner. In fact, such intimidatory practice was developed into a source of revenue for such police forces, either they are bribed or the girls spend the night custody awaiting flogging in the morning.

In view of the fact that most Islamic countries have abolished the punishment of flogging on the basis of **fatwas** (edicts) from Islamic scholars, and in view of the fact that the Human Rights Committee of the International Covenant on Civil and Political Rights, 1966, which Sudan has ratified, described corporal punishment as cruel, inhuman and degrading to human dignity reconsideration is a MUST.

As the CPA and NIC have raised hopes for democratic transition and promotion and protection of basic human rights and freedoms, it is proposed that the punishment should be removed from the Code. The mentality of a religious extremist or the opportunism of some political forces who wish to twist moral values to suit their political convenience is unacceptable. In this connection, it becomes pertinent to recall the Explanatory Note which the drafters of the 1983 Code prepared in introducing the Code. On the question of flogging they had this to say:

> "The law has relied a lot on the punishment of flogging due to the inadequacy of the system of imprisonment as a deterrent…"
>
> "Sharia flogging is a medium flogging, with a medium instrument. It should not be inflicted on a drunk person, or in extreme cold, or in extreme heat, or in extreme sickness. But flogging in **huddud** cannot be stopped in serious permanent sickness such as diabetis and other diseases, as there are no alternatives for **huddud** punishments or discretion for judges except as mentioned above in deferring infliction of punishment in cases of drunkness or cases of extreme cold or heat. We recommend for judges to continue inflicting the **huddud** flogging even after the death of the convicted person so that his soul is cleansed before God."

One can hardly add more for advocating the eradication of the punishment of flogging.

(G) Peaceful Assembly:

The Bill of Rights in the NIC expressly provides in Article 40 for guaranteeing the rights of freedom of assembly and association. It is naturally presumed that this relates to peaceful assembly while ensuring the safety of other members of the public. It thus certainly excludes use of force, rioting, threatening the security and safety of others and their property. Such acts would be unlawful and punishable by the Penal Code.

[1] Explanatory Memorandum on the 1983 Penal Code, pp 6-7; emphasis added.

Section 67 of the Code defines "rioting" as the participation of an assembly of five or more persons which demonstrates force or use thereof, terrorism, violence if the predominant intention is: (i) resisting the enforcement of the law; (ii) committing an offence of criminal mischief or trespass; (iii) exercise of any rights or claim in a way that

disturbs peace; and (iv) forcing anyone to commit an unlawful act. Under Section 67 such offence is punishable with up to six months imprisonment or flogging up to 20 lashes; if the accused carries arms or a weapon which threatens life or injury, the punishment may go up to two years or fine or both.

Under Section 69 any persons who disturbs the public or commits an act which may lead to disturbance of public peace and tranquility may be liable to up to one month imprisonment, fine or up to twenty lashes.

The foregoing Sections must be read in conjunction with the relevant Section of the Criminal Procedure Act, 1991. Section 124 of that Act authorizes a police officer or prosecutor to order the dispersal of any "unlawful assembly or assembly which may commit riot or disturbing the pubic peace. If the assembly disobeys the order, force may be used to do so, provided that firearms may be used with permission of the prosecutor. Section 127 empowers the Governor (Wali) of a State or mutamad (Province ruler) to order to prevent or restrict any meeting or public assembly which may disturb public order in the streets or public places.

All the above provisions are thus meant to preserve public peace and tranquility, rather than deprive citizens of their constitutional right of peaceful assembly. Intention to disturb the peace or public tranquility cannot be simply inferred or assumed from the mere meeting of a number of people who wish to assemble peaceably.

It is perhaps natural in many systems that the authorities are "informed" of the intention to organize a demonstration or public rally. This may be a necessity to enable relevant authorities to help organize the route of the possession to avoid busy areas, regulate the traffic and protect members of the public and of the assembly equally. Such information is a matter of course measure, not a permit whether or not to deny the continual right of assembly and freedom of the people to express their opinion.
Two incidents occurred in Khartoum in December 2009 when the SPLM and political opposition parties purported organize a peaceful gathering in front of Parliament to deliver a letter to the Speaker of Parliament protesting the Government's (NCP) refusal to adopt or amend some basic laws (including the State Security Act) which contravene the provisions of the CPA and NIC on public freedoms and transition to democracy. Ironically, perhaps typically, the streets were closed and thousands armed members of the police and the State Security sealed all avenues to Parliament. Although the organizers of the assembly had already informed the authorities concerned and warned the public against any acts of violence, resistance to the security forces, mischief or destruction of property. Nevertheless, the security forces violently attacked members of the public using tear gas, electronic rods and physical violence leading to arrest of tens of citizens

(including MPs and Ministers belonging to the SPLM). What occurred was a serious violating of the law and the constitutional freedoms of peaceful assembly and expression. A peaceful rally with a previously declared intention to simply deliver a letter to the Speaker of Parliament, prior notice having been given to the appropriate circles is NOT an unlawful assembly aimed at rioting or disturbing the peace.

OTHER RELEVANT LEGISLATION

In spite of the several provisions of the CPA and NIC to restore peace, democratic transition, the rule of law and promotion of human rights, the performance of the present Government leaves a lot to be desired. Several arbitrary laws have been left untouched and, worth still, several new laws have been enacted in direct contradiction to the CPA and NIC. As this paper is intended to deal with aspects of penal legislation, with a view to reform, only such laws will be dealt with.

(1) The State Security and Intelligence Act:

Needless to say, most States enact legislation establishing an organization, or more, intended to be concerned with internal and external security of the State. What would spring to mind in this connection is the security of the country and its people against invasion, threat of war, espionage, activities affecting the political and economic security of the country, terrorism, cross-border crimes such trafficking in persons, drugs or arms, money laundering ..etc.

In totalitarian regimes, however, there is a general conception that the State Security Organisation's main task is to protect the regime in power and to curb any opposition to it by any and all means necessary.

The present regime in the Sudan, in power since its coup d'etat of 1989, is no exception to this. It has from the outset been totally dependent on its security apparatus whose powers and resources have overgrown those of the police. The State Security Organization is not only in uniform, expressly considered part of the regular forces and is armed to the teeth with thousands of members of security staff and "collaborators".

Both the CPA and the NIC have provided for the status of NSS in no uncertain terms. A.2.7.2.4. of the CPA states:

> "The National Security Service shall be professional and its mandate shall be advisory and focused on information gathering and analysis."[1]
>
> Article 150 of the NIC provides:
>
> > "(1) There shall be at the national level a National Security Council, the composition and functions of which shall be determined by a National Security Act.

[1] Emphasis added.

(2) The National Security Council shall define the national security strategy based on the analysis of all threats to security of the Sudan."

It is obvious from the express wording of the above texts that what is intended is "the security of the Sudan", not that of the Government of the day, nor the regime in power.

The NSS, however, has been the Achilles Heel of the military regime in power from the day it took over. Massive human rights violations that followed the takeover, which still continue today, at a lesser scale, are master minded and executed by the NSS. Following the conclusion of the CPA and the NIC, the political parties not in government, together with the SPLM, have endeavoured seriously to adopt a new State Security law instead of the one in place few months after the NCP took over power, and amended several times, the last one being in 1999. Briefly stated, the law has been criticized on mainly the following grounds:

(1) It enables members of the Organisation and their "collaborators' to arrest any person, without charge or trial and detain him for a period of up to 3 days;
(2) It allows them to enter and search any place at any time and seize property without a warrant;
(3) It allows the Director of the Organisation to extend the detention period for one month, the suspect may remain a further similar period if the Director is of opinion that the suspect may have committed an offence against the State, in which case he is only required to inform the Prosecutor.
(4) In cases where the Director decides the person may commit an act of terrorising the community, he may order his detention for 3 months, renewable for another 3 months, only "informing" the Prosecutor. The detainee may complain to the Magistrate who should decide as he sees fit. No judicial reversal of such detention orders are ever heard of.
(5) It allows NSS Council to extend the detention period up to 3 further months at a time. In other words, a person may be detained for 9 months, then released for a few hour or days and the process repeated full circle[1].
(6) If gives impunity for acts done by members of the Organisation, except with the consent of the Director. Acts of torture and inhuman treatment have been a normal occurrence. No known cases of prosecuting members of the security for such unlawful practice, which is common.

Inspite of the violation of these provisions of the CPA, the NIC and the international instruments which Sudan has ratified, the NCP has rejected all calls to change the law to conform to the present so-called "transition for democracy". A New National Intelligence and Security Act has been passed towards the end of 2009, in the face of objections by the SPLM, the main partner in Government and of all the Opposition parties. This is

[1] The recently adopted Act of 2009 has reduced this overall period to 4½ months. But again the process may be repeated full circle ad infintem

certainly a retrograde step, coming at a time when the country is facing general elections in April 2010.[1]

The new Act also obviously negates the specific guarantees on arrest, detention, bail, search and treatment of individuals under the Code of Criminal Procedure Act, 1991

[1] Sudan has ratified the International Covenant on Civil and Political Rights. Further, Article 27(3) of NIC expressly provides that international human rights instruments ratified by the Sudan shall become part NIC

(2) The Terrorism Act 2001 :

Following the September 11 events in the U.S.A. and the wave of terror throughout the world many countries have felt the urge to adopt serious legislative action and other security measures in an effort to curb terrorism. However, in many countries including in the West, such measure have been critized as being too rigid affecting basic human rights and personal freedoms. Sudan adopted the 2001 Act on Combating Terrorism. The Act defines several unlawful acts within a very wide ranging definition of what constitutes terrorism. However, the provisions of the Act, in relation to the prosecution and trial of terrorism, give rise to very serious consideration on the incompatibility of the Act with principles of sanctity of the rule of law and protection of human rights as included in the 2005 NIC, which followed the adoption of the Combating of Terrorism Act.

Briefly stated, the said provisions of the Act include the following:

(a) Cases of alleged terrorism are not triable by ordinary courts, but by "Special Courts" established by the Chief Justice. The Rules of Procedure for such courts are established by the Chief Justice "in consultation with the Minister of Justice". The latter is a member of the Executive whose participation in the establishment of trial courts is a flagrant violation of the principle of independence of the Judiciary and of the principle of separation of powers.

(b) The Act enables the Chief Justice to establish a "Special Court of Appeal", in flagrant violation of the provisions of the Code of Criminal Procedure, under which there is a standing Court of Appeal. The Special Court of Appeal is authorized to confirm the death penalty and life imprisonment. Again, a violation of the Code of Criminal Procedure, which gives such powers exclusively to the Supreme Court.

In this connection, reference must be made to the recent case of Kamal Mohammed Saboon v. Sudan Government[1] when the Darfur rebel forces, namely Justice and Equality Movement (JEM), mounted a massive armed vehicles raid on the city Omdurman. Some hundreds of armed rebels entered the city causing panic and serious alarm in the capital. They were eventually overcome by the army and security forces in serious battles resulting in hundreds of casualties on both sides including tens of civilians. The reaction of the Government was too excessive, arresting thousands of suspected Darfurian citizens, including women and children, based simply on ethnic features, colour, accent or place of living.

[1] CS (60) of 2009

Eventually a few hundred were considered suspects and charged to stand trials before some six Special Courts in the three towns of the Capital. In accordance with the abovementioned powers, under the said Terrorism Act, the Chief Justice and the Minister of Justice formulated the Rules of Procedure of trial courts in a flagrant violation of the principle of independence of the judiciary for the said trials[1]. These Rules included:

(a) They expressly provided that they should apply, notwithstanding[2] any provisions of the Code of Criminal Procedure and the Evidence Act, in effect making the Regulations adopted by the C.J. and the Minister more supreme and above the applicable laws, a clear violation of legal and constitutional principles.

(b) The reduced the period for appealing from decisions of the Special Courts to the Appeals Court from two weeks to one week only, in violation of the express provisions of the Code of Criminal Procedure.

(c) Again, in clear violation of the Code of Criminal Procedure, the Regulations restricted the appeal procedure confirmation of sentence from two stages, the Court of Appeal and then the Supreme Court, to one stage only, i.e. that of the Special Court of Appeal, tens depriving a convicted person of his rights of Appeal (and Revision) to the Supreme Court.

(d) They permitted the trial of persons in absentia, contrary to the express provisions of the International Covenant on Civil and Political Rights, which the Sudan has ratified, which Covenant has become part of the NIC by virtue of its Article 27 (3).

(e) They provide that the accused should appoint his defence counsel as soon as he is informed of the date of the trial. The circumstances of the accused in this case, where they came from and where they were kept in detention, and the way they were treated provided no adequate opportunity to appoint, or even meet, defence lawyers before trial. Requests by lawyers to meet defendants before the trial were adamantly rejected by the trial courts.[3]

(f) In the case of evidence of confession of guilt made during investigations, the law requires the Court to take special precautions before solely convicting a person on the basis of such alleged confession, especially when retracted before it. The Regulations empowered the Courts to convict on the basis of such alleged confessions, without investigating the circumstances under

[1] Order No.(82), 2008.

[2] Emphasis added

[3] The author of this paper, together with other defence counsel, withdrew from the first trial after their request to meet defendants was rejected. The said court proceed with the trial, accepting some volunteer lawyers from the Ministry of Justice to represent the defendants inspite of their objections.

which they had been made, or whether the accused understood their consequences. Allegations by some accused that their statements were taken after being tortured, were blatantly rejected by the trial courts.

On the basis of the foregoing arguments, tens of leading trial lawyers submitted a petition to the Constitutional Court in the abovementioned case of Kamal Mohammed Saboon V. Sudan Government, claiming the unconstitutionality of the all proceedings relating to the trials of the JEM suspects on all the above and other grounds, denying the accused a fair trial in accordance with the law, the Constitution and the international human rights instruments ratified by the Sudan.

Unfortunately, the Constitutional Court took little time to dismiss the petition, and the trial courts proceeded.[1] So far about 105 death penalties have been passed by the trial courts. They are still awaiting in death row. In what the author considers a typical political judgment, the Constitutional Court has manipulated the law in such a political way as to appease the regime in power, by upholding perhaps the most unfair civil trials in the history of the country. This, perhaps, cannot be more aptly described than by quoting from the opinion stated by the President of the Constitutional Court in that case.

He stated:

> "Yes, this Court is not a political one; but it is also not an island isolated from what is happening in the Country. It cannot, in my opinion, in considering the Regulations whose constitutionality is contested, do so without reconciling itself with some departure from usual norms. This is not an innovation. In Nuremburg the serious loss of lives and property, and the cruelty and brutality with which the war was conducted forced those in power to disregard one of the most settled principles of law, i.e. the retroactivity of laws. It is quite normal in times of disaster, invasion, war and other national crises to suspend some basic rights temporarily, property may be confiscated and persons may be detained in disregard of the normal law. Therefore, I refuse to decide against Regulation 25, which requires the application of its provisions, notwithstanding the provisions of the laws of Criminal Procedure and Evidence. This would no doubt be in contradiction of the principles of jurisprudence and judicial precedent, which place Constitutional provisions at the top of the pyramid, followed by laws emanating from the legislative authority. Any provision in any law or subsidiary legislation which contradicts the Constitution, and any legislation which contradicts with the law becomes void. Thus I should be impelled to pronounce the illegality of Regulation 25, had it not been for the exceptional circumstances and the exceptional crimes which prompted the adoption of the said Regulations, as I explained in this paragraph."[2]

[1] It took the Constitutional Court less than 2 months to dismiss the petition, although some suits have been pending before at for more than 4 years.
[2] Author's translation and emphasis.

This opinion, it is submitted, is faulty and a regrettable statement in the application of all principles of the law and constitutionalism. The analogy of the JEM attack with Nuremburg trials is staggering. Not even ardent supporters of the regime went that far. Further, the learned Judge quoted Nuremburg in the context of retroactivity of laws. This was certainly not the issue in the JEM trials.

Thirdly, and even more drastically, is the self-contradicting statements on the overriding force of constitutional provisions and legislative enactments over Regulations, yet the decision to accept the validity of Regulations contrary to the Constitution and the law. The effort to justify that by reference to exceptional circumstances and terror crimes, having been committed during the JEM attack, presumes the existence of a State of Emergency under which certain rights are derogated from. No such state of emergency had been declared. The Constitutional Court, any constitutional court, should be the last (not the first body) to declare a state of emergency to derogate from basic rights and freedoms, and seek to justify this although no such emergency is legally declared by the competent authority, i.e. The Executive and the Legislature.

THE ROLE OF THE PROSECUTION

The system of a separate prosecution is relatively new in the Sudan, though it has in recent years developed in such a staggering manner that consideration of its role in the criminal justice system and basic rights and freedoms of the individual warrants serious consideration.

Historically, the role of the prosecutor used to be fulfilled by the police. They took cognizance of the First Information Report on the commission of a crime, proceeded with the investigation, executed search and arrest, after signature of the relevant warrant by the competent Magistrate, deciding on the charge, summarizing the case and, finally, presenting the case to the Court for trial.

With the establishment of the Public Prosecutor Office and the increasing numbers of lawyers at the Ministry of Justice, work previously done by the police has gradually shifted to Prosecutors who at present cover most criminal cases within the country where criminal courts are found.

Prosecutors now issue warrants of arrest to be executed by the police, they can order search and detention of a person for up to 3 days a task previously in the hands of magistrates. Moreover, they may ask Magistrates to extend detention beyond the 3 days for the purposes of continuing the investigation. Further, they conduct prosecutions during the trial.

One criticism of the present prosecution system is that they are part of the Ministry of Justice, i.e. officials of the Executive, with the inherent risk of bias in favour of their employer, the Government. In many systems public prosecution is undertaken by prosecutors working under the Public Prosecutor or Director of Public Prosecutions, who is responsible to the Attorney General. Under such systems the Attorney General is an independent office, not subordinate to the Minister of Justice who is part of the political regime in office. Proponents of an independent prosecutor system argue, in particular, that the power of nulle prosecui (i.e. stopping proceedings in a criminal case at any stage before reaching a verdict by the Court) may be abused or influenced by political considerations if the Minister is himself the A.G., or if the latter is subordinate to him. In the Sudan, the Attorney General is, in that capacity and by virtue of that office, also the Minister of justice.

Another very serious criticism against the present prosecution system is the complex hierarchy of procedures in criminal litigation. A person aggrieved of a decision to refuse a criminal complaint or frame a charge or relating to restriction of freedom, whose case is refused by the Prosecutor, can appeal to the direct Higher Prosecutor, then to the Chief Prosecutor of the State, then to the Public Prosecutor at of the Ministry of Justice and, finally, to the Minister.[1] Such a protracted process may take months, or more, thus seriously jeopardizing public basic rights and freedoms. It also underscores the fact that the old system of having independent magistrates in control of such basic matters of justice is much more protective of basic liberties.

Further, the system of "specialized" prosecutions raises the question of the prosecutor's impartiality towards the public, vis-à-vis the organization to which he is assigned. There are now tens of specialized prosecutors for: The State Security, the Press, Banks, Tax Department, Building's Rates Department, Public Funds, Sudatel Telephone Company, ..etc. More and more specialized prosecutions, are likely to be created. The advantages for working for such prosecutions such as banking and telecom companies, is that such institutions provide prosecutors with well equipped offices, transportation, allowances and other privileges, not readily available at Government offices, a consideration touching on maintaining the integral character and the independence of such prosecutors vis-à-vis the average member of the public.

[1] Regulations of the Work of Public Prosecutions, 1998.

THE JUDICIARY

It is perhaps trite to state that independence of the judicial system is a pre requisite to the rule of law, in respect for human rights and administration of justice. Most democratic constitutions tend to emphasize the principle of independence of the Judiciary. The UN has formuled some guiding principles to assist Member States to formulate principles and rules to guarantee the independence of the Judiciary, the Prosecutors and practicising lawyers[1], the tripartite pillars for the administration of justice.

As already indicated, Sudan's experience with independence of the judiciary, especially under the military regimes, which ruled the Sudan for 37 out of its 55 years of independence is unencouraging. Presently, although the CPA and NIC provide for ambitious principles on preserving an independent judicial system, no practical steps seem to have been taken in the five years since the signature of the two documents. The very same cadres fill all the judicial posts as were present before the CPA. None of the judges previously arbitrarily dismissed at the time of the military coup d'etat have been reinstated in office. Special courts, where the basic principles for a fair trial are absent, are normally established to try opposition members for offences against the State. Judges have no powers to oversee the work of the State Security Organisation, a branch of the Executive, which has extensive powers of arrest, search, confiscation of property and prolonged detention, especially of those opposed to the regime. Moreover, members of the Security Organization enjoy impunity by not being accountable for their actions while fulfilling their "tasks". Such impunity is also available to the Armed Forces and the Police in their respective laws.

One extremely serious consideration in relation to judicial independence is the guarantee of such independence by the institution responsible for ensuring it. In democratic regimes a High Judicial Council, constituted mainly of the Chief Justice, several High Court Judges and one or two ex-officio members, such as the Minister of Justice and the Dean of the Faculty of Law, fulfilled that job. Such was the case under the Judiciary Act, 1986, and the High Judicial Council Act before they were changed.

[1] Basic Principles on Independence of the Judiciary, General Assembly Resolution 40/32, November, 1985; Guiding Principles on the Role of Public Prosecutors, 8th UN Conference on the Prevention of Crime, 1990; Basic Principles on the Role of Lawyers, 8th UN Conference on Prevention of Crime, 1990.

Under the present system, however, this consideration seems to have been seriously overlooked by the two partners of the GNU in their strong power sharing urge. Article 129 of the NIC provides for the establishment of a National Judicial Service Commission to undertake "the overall management of the National Judiciary" whose composition and functions are to be determined by law.

The said law, The National Judicial Service Act, adopted later in 2005, can hardly be described as a body responsible for independence of the Judiciary. First, it is constituted of 14 members: the Chief Justice (Chairperson), the Chairman of the Supreme Court of Southern Sudan, Deputies of the Chief Justice – all four of whom are appointed by the Executive, The National Minister of Justice (NCP), The Minister of Finance (NCP), The Legal Affairs Director of Southern Sudan (SPLM), Chairperson of the Legal Committee of the National Council (NCP) Chairman of the Legal Committee of the Council of States (NCP), Chairperson of the Legal Committee of South Sudan Legislative Council (SPLM), in addition to the Dean of the Khartoum University Faculty of Law, two members representing the two Bar Associations in the North and South, and three persons of relevant experience appointed by the President of the country.

It is obvious from the above that almost the total membership of the Commission are political party members reflecting the power sharing formula between the two ruling parties, the NCP and SPLM, rather than an independent Commission responsible for the establishment and functioning of an independent judicial system.

Nor are the functions of the Commission defined in such a way as to oversee the independence of the system Its functions are limited to adopting the budget of the Judiciary, making "recommendations" to the Executive on appointment of Judges of the Constitutional Court, the Chief Justice and his Deputies, Judges of the High Court and other Judges, promotion of Judges and endorsing dismissal of Judges by the Chief Justice, and making recommendations on the promotion of Judges.

Thus, the Commission mainly makes "recommendations", not decisions. It has no effective role in the selection, appointment, promotion, discipline or dismissal of judges. Thus far, the Commission has played no active role in enhancing the independence of the judicial system. Although its law requires it to meet regularly, at least once every four months, it is a known fact that it has only met a couple of times since its formation. It is also no secret that the Commission has delegated its powers to the C.J. in compliance with Section 6 © of its law.

INTERNATIONAL HUMANITARIAN LAW

The Sudan has ratified the Four Geneva Conventions of 1949 soon after independence and the 1977 Two Additional Protocols since the signing in 2005 of the CPA. However, the country was rather late in incorporating crimes against humanity, war crimes and genocide in its penal law, although it has witnessed a series of civil wars in the South since independence, and the current seven year crisis in Darfur. This has only been done by an amendment to the Criminal Law Act in 2009. The obvious assumption for taking this step is a possible attempt to absorb the strong world reaction to the brutal human and humanitarian rights violations that have been taking place in the region of Darfur since early 2003. The Government appeared to be non-pulsed by the universal condemnation of the tragedy, at times denying it and attempting to convince its people that it is all mere "imperialist" propaganda in enmity to the Islamic orientation of the regime, and greed to have access to the country's mineral resources in the Western part of the country. At the same time it intended to send a signal that its laws are comprehensive and it is capable to try violations in accordance with its competent Legal system.

Accountability and the ICC ISSUE

The serious violations of international human rights and international humanitarian laws, confirmed by various reliable national and international sources, have led to widespread universal calls for restoration of peace, national reconciliation and justice by bringing all violators to accountability before the Courts. The Government's complete failure on the issue of accountability, the professional weakness and politicization of the Judiciary and other political factors have prompted the International Commission of Enquiry to recommend to the UNSC, which had established it, to refer the situation in Darfur to the ICC. Hence UNSC's Resolution 1593 on referral to the ICC under Chapter VII of the UN Charter. The Pre-Trial Chamber of the ICC issued warrants of arrests of suspected violators, including a warrant issued in March, 2009, to arrest the President of the Republic.

The reaction of the Government of Sudan (in particular, the NCP) has been a vehement refusal of this. Their argument is that the ICC has no jurisdiction on the matter since Sudan is not a party to the ICC Statute which (though it signed it) it has not ratified.

The Government, similarly, refuses the applicability of the UNSC referral Resolution under Chapter VII on the premise that it is political, aimed solely at toppling the regime,

that it is selective and discriminatory against weaker African nations, because the UNSC fails to adopt or enforce similar measures on, Israel, Iraq and Afghanistan.

In an attempt to seek peace in Darfur and get out of this legal and political impasse, the African Union established in 2009 the African Union Panel on Darfur (AUPD) to investigate the situation on the ground and to make recommendations to the AU on peace, justice and reconciliation in Darfur. The AUPD, under the chairmanship of former S. African President Mbeki, presented its Report to the AU Council on Peace and Security Summit, which endorsed it on 29th October, 2009. Not only that, but the Summit

appointed a mechanism for implementation of the Report, the African Union High Implementation Panel (AUHIP), again under the chairmanship of President Mbeki and membership of former President of Nigeria, Abdul Salam and former President of Burundi, Babouya. The AUHIP has already begun its task of implementing the AUPD Report.

On the justice/accountability sector, the Report confirmed that the present Sudanese judicial system was neither able nor willing to prosecute violations committed in Darfur. It, therefore, recommended the introduction s system of hybrid tribunals i.e. mixed courts composed of Sudanese and non-Sudanese judges and prosecutors to try possible violators of humanitarian law in Darfur.

The reaction of the Government to the AUPD Report was rather lukewarm. But, todate, nothing seems to indicate any positive step towards its implementation. On the contrary, the Sudan Bar Association, an ardent supporter of the regime since its first day, has published a full page article in most daily papers denouncing the proposal in the strongest possible terms. Starting with the usual (official) rhetorical argument that the Judiciary in Sudan is locally (and universally) known for its independence and impartiality, the Statement rejected outright the idea of mixed tribunals. It was considered contrary to the country's Constitution and an affront to national sovereignty. Naturally, no comment on this came from any governmental sources!!

The actual position now seems to be described briefly as follows: (i) No Sudanese courts or prosecution of any violations of human rights or humanitarian law in Darfur has been, or is likely to be, undertaken soon due to the unwillingness of the regime to prosecute its supporters, especially those in high office; (ii) The ICC is rejected because Sudan is not a party to its Statute, and UNSC Resolution 1593 is an imperialist plot against the regime; and (iii) Adhoc mixed tribunals proposed by the AUPD Report perhaps, constitute an infringement of national sovereignty.

The outcome is a stalemate. The only possible resolution of this impasse would seem to be the undesirable possibility of imposition of various sanctions by the UNSC under Chapter VII of the UN Charter. This, if it happens, would affect the whole population of the country who would pay the price for crimes committed by a few men in, or protected by, the ruling regime. Alternatively, or at best, deterioration of diplomatic, political and

economic relations with many countries in the West, which would also impact negatively on the country as a whole. It is now for the Government to seek a way out?

Universal Jurisdiction

Although Sudan is a signatory of the Four Geneva Conventions of 1949 and, now, the two 1977 Additional Protocols, little seems to be known among Sudanese lawyers of the concept of universal jurisdiction. The Fourth Geneva Convention on the Protection of Civilians defines some gross violations of humanitarian law and requires States Parties to send violators before their own courts or send them for trial before courts of other States Parties, regardless of the culprit's nationalities.[1]

This concept, known as "universal jurisdiction", has now been developed and adopted by many States in the West, for the prosecution of persons accused of committing grave violations of human rights, regardless of their nationalities and of the place or time at which they committed the alleged violation. It should be noted here that according to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 1968, there is no time limit or bar to prevent prosecution of offenders committing such crimes. This is also now an integral rule of the ICC Statute.

This is now established practice in the Western World. The attempt in 1998 to send Pinochet, former President of Chile by Britain to Spain for trial for crimes during his presidency several years before is a classic example of this. Several former Serbian and Rwandese ex-officers have been tried by different European Courts. Former President of Chad, Habre, has been held for trial in Senegal under the same rule.

The conclusion is that, even for countries which refuse to submit to the ICC, there is neither immunity, nor time limit to try culprits who seek refuge in countries which recognize universal jurisdictions. Sudanese persons concerned should bear this in mind.

[1] Articles 146 and 147 of the Fourth Geneva Convention, 1949.

CONCLUSION

This paper has endeavoured to look into several aspects of the criminal law of the Sudan in the context of its historical development and policies of its application from the pre-independence period to the present. It has shown that the substantive criminal law has undergone some changes, mainly motivated by the nature of the regime in power. Some legislation affecting criminal justice, has been propagated solely for political considerations to protect the Government in power and to suppress all political opposition under the so-called protection of national security.

The main ruling one-party (NCP) has been in almost full control of all aspects of governance since they staged the military coup d'etat in 1989 during which period all the said laws proclaimed in the name of Islam and/or national security were adopted. Full control of power was ensured through draconian violations of human rights and freedoms. During the State of Emergency, which lasted a few years the Islamists succeeded in fully controlling all levels of government: security, the civil service, banking, insurance, construction and commercial companies.. etc, systematically executed in their declared programme of Tamkeen, i.e. empowerment, of their cadres to run the State and control and use all sources of revenue for the benefit of the NCP and its leaders in both the public and private sectors.

The scope of this paper does not permit going into the private details of how the oppressive laws and policies have resulted in the most serious violations of human rights and humanitarian laws, especially in the context of the armed conflicts in the South first and, currently, in Darfur. Neither in the foregoing violations in the urban areas, nor in those in the armed conflicts have there been any efforts to remedy situations, redressing the losses, bringing violations to justice, compensating victims or initiating any process of national reconciliation and healing.

Needless to say, embarking on such colossal tasks would, first, require a genuine determination and political will and, secondly, the legal framework and the institutional infrastructure necessary to deliver those tasks.

When the CPA was signed in 2005, after both fighting parties got weary of the war, the NCP considered it an opportunity for giving itself a new lease of life, in government partnership with the SPLM to the exclusion of all other political parties. With the world pressure that has been brought on the parties, the CPA came out not only a document for a ceasefire and accommodation of the respective forces, but as a comprehensive Peace Agreement touching upon all aspects of political life. When the NIC was adopted a few months later, hopes rose very high among all Sudanese that, at last, the democracy they had yearned for more than 15 years has at last arrived. Indeed, the NIC seemed to have provided the golden opportunity for the Sudanese people to aspire for democracy, justice, human rights and freedoms.

As described in many parts of this paper, the outcome has been far from satisfactory. The Constitutional requirements to adopt new laws, or amend existing ones, to reconcile them with the NIC has not materialized. New laws such as the State Security Act, with its negative impact on human rights and criminal justice, the existing Terrorism Act, impunity granted to members of the Security, the Army and the Police, weakness of the judicial system, use of special courts, partiality of the new Constitutional Court to the regime in almost all its decisions so far.. these and other factors make the hoped for transition to democracy, peace and promotion and protection of human rights seem to be empty slogans without effect or meaning.

At a time when the country is due to have its first general elections, after nearly 25 years, when it is going to exercise referendum for self-determination in the South, with the war going on unabated in Darfur the **NEED FOR URGENT REFORM OF LAWS AND INSTITUIONS IS TOO EVIDENT.**