Law Reform in the Sudan

The ongoing debate on peace prospects and democratic transformation in the country often leads naturally for that matter, to the prospect of law reform. This is not only in the sense of reforming all the institutions of justice, but also a revision and a comprehensive overview of the whole body of legislation; the valid ones and even some of those which were repealed because of various nationalist or political motives. There has been some talk about the constitution of a Governmental Committee at the Ministry of Justice to review a number of laws (assumed to be 40). Reference was also made to the setting up of a committee to harmonize the current laws with the provisions of the Peace Protocols, and another committee, consisting of the two parties of the CPA [Comprehensive Peace Agreement] (the NCP and SPLA) that will draft the Constitution. We believe that a committee to prepare the Constitution or to review all the laws should not be confined to the Government or the two CPA partners. Laws affect all political, social, economic, and scientific affairs and impacts on all aspects of citizens' life indiscriminately. This necessitates the involvement of all groups in society: political parties, civil society organizations, lawyers, businesspeople, academics, and experts in all relevant aspects. Such an involvement should be real and effective, to reflect all visions and views in the laws or the Constitution. It should not be a cosmetic participation to enable the regime to pass what conforms to its plans and policies. We should draw lessons, in that respect, from the experience of the 1998 Constitution.

The above is not our purpose here. We would rather hope to demonstrate the issue of the future of law in a larger context. I hope by doing so, that I will embark on finding an answer to a legitimate question, and I don't know whether any of our lawyer colleagues has an answer for it: **What is the law currently applied in Sudan?** Or what is law that should be applicable? It is known that the British ruled the Sudan for more than half a century, during which they applied British law in the civil sphere and drew on Indian law in the realm of criminal law. They allowed the application of Shari'a law in personal matters for Muslims and customary law in tribal and rural areas, in addition to a number of administrative and technical laws that govern the different aspects of life. As for civil transactions matters, not covered by laws, the British relied on article 9 of the Civil Justice Ordinance, 1902, and applied the provisions of "Justice, Equity and Good Conscience". The British had always interpreted this in the light of the law known to them, the English Law, though they tried to take into consideration local customs and cultures. It is no wonder that senior Sudanese judges followed the same method after independence. This was especially so since most of them studied English law at the Faculty of Law, University of Khartoum, while some acquired postgraduate degrees or professional training in Britain. The former Chief Justice and the prominent lawyer, the late Abu Rannat, and some of his assistants, exerted considerable efforts to interpret the principles of "Justice, Equality and Good Conscience" in the light of local culture and customs, confirming that they are guided by English statute and common law but do not have to abide by it in an absolute way.

Back to historical narration, we say that after independence the Sudanese aspirations were divided. Some called for the repeal of the inherited laws as being colonial and foreign, which should be replaced by laws based on the Islamic Shari'a law or on the Egyptian Law (which itself was drawn from the French Law). Others called for the continuity of the existing laws as they had become Sudanese laws appropriate for the realization of justice, and not in conflict with Shari'a or Sudanese culture and values. The status quo continued until the October Revolution of 1964 when calls for changing the laws to Islamic or Egyptian laws were renewed. Despite such demands by Islamists parties and pan Arab forces, no specific proposals for changes to existing laws were made and no draft bills that clarified the details and the provisions of the required legislation were introduced. This happened for the first time in 1971, through an initiative by the Prime Minister of the May Coup d'état, Mr. Babiker Awadallah, who, despite his English legal culture was motivated by his Arab nationalist political affiliation. He declared a "legislative revolution" and immediately invited a number of lawyers from Egypt and other Arab countries. They met behind closed doors for a few weeks to prepare a comprehensive civil law with all its branches to replace the Sudanese civil laws. This took the form of literal copying of various provisions of the laws of Egypt, Syria, Jordan and other Arab countries. The Civil Law Act 1971, was hastily promulgated to replace the laws known to the country for over half a century. The new law caused unprecedented disruption in the judicial work all over the country. Neither lawyers nor judges (except those who had studied in Egyptian Universities) were educated or trained on it. They did not have access to relevant jurisprudence or judicial precedents to guide them, and there were no specialised scholars that could be consulted. The legal profession became confused, civil justice was shaken. Disposition of cases almost stopped. Some judges kept on applying the old laws that they knew. In the face of this mess there was no alternative but to acknowledge the mistake, to return to the previous state of affairs and repeal the new Civil Law Act after three difficult years.

In an attempt to resolve this dilemma, the late Dr Zaki Mustafa, Minister of Justice in 1974 and former Dean of the Faculty of Law, together with some of his lawyer colleagues, exerted great efforts to codify the laws which were valid before 1971. They prepared many bills which were promulgated successively. These included the drafting and promulgation of several new laws including Contract, Sale of Goods, Agency, the Penal Code, and Codes of Civil and Criminal procedures. These laws remained in force for a decade.

Great optimism emerged that Sudanese law had reached stability, its characteristics identified and documented in an inclusive codified legal encyclopaedia. However, this optimism was short lived. The then President of the Republic, Numieri, after all his political alliances and empty plans fell through, saw that the only way for him to remain in power and silence his opponents was to declare the implementation of Islamic Shari'a and to appoint himself *Ameer El Mo'omineem* (Prince of the Believers). This took place in September 1983, immediately after the judges had challenged him in their famous strike. A State of Emergency was declared. Three young lawyers from the Republican Palace advisors hastily started producing one law after the other. The laws were promulgated by provisional Presidential Decrees, without the constitutionally required

referral to the People's Assembly, (Parliament). The new laws included the amendment of the Penal Code by inserting Hudud (Islamic) punishments and the Civil Transactions Act, 1984, which repealed several laws including the laws that were issued in 1974. The Civil Transactions Act also included some of the provisions pertaining to laws that were not repealed such as the Companies Act of 1925 which is based on the English law of 1908.

The Civil Transactions Act which supposedly included the new laws of Contracts, Sale of Goods, Agency, Lands, Gifts, Lease, Labour, subcontracts, Deposits, Insurance, Promissory Note, Property Mortgage and others, consisted of approximately 600 sections. It is obvious that it is virtually impossible to cover all these areas of the law in one Act. There are many cases that are not covered by the Act and there is no provision to assist judges in reaching decisions or the lawyer in their pleadings. It seems that the answer to this was thought to be provided in the Sources of Judicial Decisions Act, 1983, which preceded the Civil Transactions Act by one year. The former Act stipulates in its Article 3 the following:

"Not withstanding what may be envisaged in any other law and with the exception of the criminal cases, in the absence of legislative provision that governs the incident*:*

(a) The judge shall apply what he finds in Sharia provision established by the texts of Holy Book [Quran] and the Sunna.
(b) If the judge does not find a text he shall exercise his own thinking and shall be guided in so doing by the following principles where he shall take them into consideration and shall decide their order of priority on the basis of the following principles:

1) The consensus and the requirements of Sharia's holistic and general principles and what its directions guide ;
2) The Analogy which is based on Sharia's provisions realising its criteria and corresponding to its parallels;
3) Bringing of public interests and averting of harm;
4) Presumption of innocence, a permissive approach towards human acts and leniency in imposition of God's commandments;
5) Seeking guidance from Sudanese judicial precedents provided that they do not contravene with Sharia;
6) Consideration of customary law of transactions provided that it does not contravene with Sharia provisions or the principles of natural justice;
7) Principles of universal justice prescribed by noble human laws and equity enshrined in good conscience."

It is submitted that these provisions, detailed as they are, do not resolve the issue. Consensus or analogy or averting of harm is subject to opinion and controversy. Furthermore, the text does not specify the Shari'a School* that should be followed by the courts. The Hanafi School, for example, has views and rules different from Shafi'i,

* There are four main jurisprudential schools in Sunni Islam: Hanafi, Maliki, Shafi'i and Hanbali.

Maliki and Hanbali. There are also disparities within the same school in many aspects. The judge should not be left to apply his own opinion as to what school to follow. If it is decided to leave it to the discretion of the judge, what will be the case if there are different opinions at the level of the Appeal Courts or the Supreme Court. How can one establish uniform decisions between the judges, lawyers and students? And what will be the fate of the citizens' rights?

The absence of a doctrine that should be followed among the different doctrines of the various Shari'a schools and within the specific school will essentially lead to divergent and contradictory judgements. It is worth mentioning that the British, at the beginning of their rule, vested the Mohammedan (Shari'a) Courts with jurisdiction over personal status of Muslims pertaining to marriage, divorce, wills, constitution of trusts (*Waqf)*, inheritance and guardianship. They, however, did not leave the matter to the judges' discretion. Section 53 of the Muhammadan law Courts Organisation and Procedures Regulations provided that the jurisprudence of the Sharia Courts be based on the authoritative opinion of the Hanafi Jurists, unless the Grand Qadi decides that it be based on other opinion of Hanafi or other jurists. It is also worth mentioning that the Sudanese Chief Justice, after the promulgation of the September laws in 1983, used to issue circulars to guide judges on the terms of *Hudud* punishments in accordance with the various schools in order to avoid leaving the matter to the discretion and moods of the various courts. One should not overlook the risks of leaving the matter to the judge's *ijtihad* (interpretation). This was highlighted in the precedent of the execution of Sheikh Mahmoud Muhammad Taha in 1985 when the Sources of Judicial Decisions Act was also applied in criminal cases. The Trial Court convicted Ustaz Mahmoud of committing crimes against the State security. The judgement was referred to the Appeal Court chaired by El Mikashfi El Kabashi instead of the Supreme Court as the law stipulates. El Mikashfi convicted him of what he called apostasy (a crime which did not exist in the statute book at the time) on the ground of Judge's *ijtihad* (interpretation) in order to confirm the death sentence and to pave the way for (the Prince of Believers) to confirm it as well. The 'Prince of Believers' confirmed it saying in a televised statement that he had done so "after exhausting all possible avenues" to avoid passing a sentence,[*] that was carried out the following day. Needless to say, that the concept of judge's interpretation in such an absolute form does not only contravene the well established legal principle of non-retroactivity of laws and penalties, but it contradicts also the provision of the Quranic Verse **"And We would never punish until We have sent a Messenger (to give warning)."**

When we look at the judicial decisions issued by the highest judicial bodies lately we will encounter quotes from Abdu-Hanifa, Malik, Altabari, Abdelrazig Elsanhori, Thomas Creed, Bonham Carter, Abu Rannat, Lord Denning, Salmond, Gower and others. These names represent legal references of Shari'a, references of Egyptian, English laws as well as Sudanese judicial precedents.

[*] Numiri's words in his announcement of the confirmation of sentence the night before the execution was carried out.

In conclusion, and without engaging in lengthy detail, we wish to establish that the Sudanese Law is passing through a state of haziness, contradiction and ambiguity. The confusion emanates from the conflicting legal texts, from contradicting orientations and from the divergent legal cultures of members of the legal profession. This makes the lawyer, let alone the citizen, doubtful about the applicable law in any particular situation. This is the case in all sorts and levels of courts. There is no doubt that this state of affairs will not accomplish either justice or equity and will not facilitate the protection of citizens' rights. Nor will it facilitate the safety and stability of society. One does not call here for following this or that legal system. Instead it is submitted that it is time to put an end to the uncertainties of the past which were brought by political interests, various ideological visions or different educational backgrounds. It is time to look into the basis of the applicable law in Sudan. This can be achieved by constituting a National Committee to review the laws, in addition to sub-committees specialised in the various areas. The sub-committees should consist of legal experts, besides experts in social sciences, religion, sciences and technical experts in the fields of commerce, agriculture, industry and the different professional fields. It should be complemented by civil society organisations, including political parties, trade unions and professional associations. These committees should be given ample time to prepare draft bills in all areas and submit their findings to the High Committee to endorse it after publishing it to the public. Then, they shall be submitted to the Legislative Authority for adoption. This should take the method of election from all available legal systems for the purpose of uniformity and stability of the legal system, the achievement of justice and protection of citizens' rights.

This is a cry for help to establish the principles of the rule of law and the protection of human rights. We hope it will have the expected response.

God is behind the intent