Codifying a jurist's law: Islamic criminal legislation and Supreme Court case law in the Sudan under Numairi and Bashīr

Köndgen, O.A.

Summary

In 1983 the Sudan introduced for the first time an Islamized penal code which, after a period of strict application, was first suspended with regard to the harsher corporal punishments and subsequently replaced in 1991 by a new, overhauled Criminal Act. The present thesis analyses Islamized Sudanese criminal legislation and ICL-related case law of the Sudanese Supreme Court. In addition, a number of interviews with judges, lawyers, academics, and politicians were conducted. The main research questions of this thesis pertain to the legal and political history of Islamic Criminal Law in the Sudan and its relation with Islamic jurisprudence (*fiqh*) and secular predecessor codes. Further, the application and interpretation of Sudanese ICL in the Supreme Court as well as the relation between Islamic Criminal Law and its contradiction with international human rights treaties were analyzed.

Based on published Supreme Court decisions and human rights reports, the overall analysis of de facto *sharī´a* application shows that severe *sharī´a* penalties such as single and cross-amputations and the death penalty for *zinā* have rarely been upheld by the Supreme Court of the Sudan after the fall of Numairi in 1985. Other *sharī´a*-derived punishments were or are in the statutes but have seemingly not been executed such as the death penalty for apostasy, for homosexual penetratio per penem in ano or stoning as a punishment for *zinā*. Retribution for wounds also does not seem to be applied and is normally replaced by blood money. The general tendency of Supreme Court decisions is to interpret ICL to the effect of avoiding the execution the more severe *sharī´a* punishments as much as possible. However, there are exceptions and a low-level application of amputations and crucifixions still subsists, especially in cases of *ḥirāba*. These, in turn, are more likely to happen in Dār Fūr than in Khartoum or other parts of the Sudan. ICL application continues mostly with regard to the death penalty for *qiṣāṣ* crimes and flogging. The latter is applied large-scale in the Public Order System, which is used by the regime as a parallel court system. Many of the rights the accused enjoy in the regular judicial system such as the right to a defense lawyer or the right

to appeal are in actual practice not available in the Public Order System. Due to its practice of "swift justice" corporal punishments are meted out immediately. It therefore plays an important role in the regime's policy of imposing self-defined standards of Islamic morale on the Sudanese population. Taken as a whole the application of severe *sharī´a* penalties was marked by a clear class bias in the time of Numairi. Under the Criminal Act 1991 and the Public Order Law this striking disequilibrium between different kinds of crimes and groups of perpetrators subsists. While those guilty of *ḥadd*-theft are threatened with amputation large scale government corruption would not result in a severe *sharī´a*-derived punishment and is, as a matter of fact, hardly punished at all.

The Supreme Court serves as a security valve and regulatory agency, reigning in the pro-*sharí´a* disposition of lower courts, on behalf of a political regime that is content with keeping "the *sharī´a*" in the statutes while avoiding the excessive application as practiced during Numairi's reign 1983-1985. For Bashīr and his party it is of secondary importance whether all the punishments contained in the legislation are actually carried out as long as their existence in the statutes enhances the regime's legitimacy among its constituency. Not carrying out amputations or stoning deflects international media attention, avoids domestic opposition, and reduces friction with HR human rights monitoring bodies. To be sure, while the human rights record of the Sudan has been and continues to be abysmal, severe *sharī´a*-based punishments only play a limited role in this regard. Ethnic cleansing, extrajudicial killings, torture and mass rapes obviously have no connection with the Islamized judicial system. Nevertheless, important parts of the Sudanese criminal legislation are contradicting not only the Interim National Constitution of 2005, but also international human rights treaties the Sudan is party to. This is especially the case with regard to cruel, inhuman and degrading penalties such as flogging, amputations, stoning, crucifixion and *qiṣāṣ* punishments, which violate various international human rights treaties the Sudan has acceded to and ratified. Concerning equality before the law women are especially disadvantaged in cases of *zinā* where (pregnant) victims of rape find themselves accused of *zinā*, since pregnancy is admitted as proof of unlawful sexual intercourse. Freedom of religion, especially the right to change one's religion does not exist for Muslims. Muslim apostates do face the death penalty, though, except in a singular case, this punishment has never been carried out. Contradictions with international human rights treaties also exist with regard to children's rights, since children and adolescents under

the age of 18 can be executed by way of a *ḥadd* or a *qiṣāṣ* penalty. They can also be subjected to amputations. In addition, the Criminal Act 1991 allows for the whipping of minors.

A number of important developments have been observed with regard to legislation and procedure. In general the Criminal Act 1991 has removed most of the flaws its predecessor suffered from with regard to the multiple inconsistencies between the fiqh and the solutions the legislator had chosen to codify in 1983. Thus, while the Criminal Act 1991 can claim a higher degree of juridical craftsmanship many of the main problems remain: contradictions with guarantees given on the constitutional level, an imbalance between the harsh punishments for *ḥadd* and *qiṣāṣ* crimes and other crimes and the inherent difficulties to apply these punishments due to procedural impediments. It has also been observed that, compared to its secular predecessors, the Islamized penal codes have established a new balance between the prerogative of the state to punish and the rights of the victims or their heirs. Thus, while in the *fiqh* different methods of executing the capital punishment are known, in Sudanese ICL only hanging, executed by the state authorities, is used in practice. Victims or heirs do not have any part in the execution of punishments and cannot claim more than the theoretical right to inflict on the perpetrator the same kind of death or the same wounds as the victim received. Heirs do have, however, the possibility to save a delinquent's life and settle for blood money or pardon. Since in *qiṣāṣ* crimes the rights of humans are directly concerned (as opposed to the qur´anic *ḥadd* crimes) the legislator has opted to lower the threshold of proof for such crimes. Thus, the relationship between severe punishment and a higher standard of proof, a central precept of the *fiqh*, has been broken. Sudanese procedural legislation is at variance with the *fiqh* also with regard to the inherently discriminatory concepts of inviolability (*´iṣma*) and equivalence (*kafā'a*). Where the *fiqh* discriminates against women and non-Muslims, modern Sudanese ICL makes no difference here and thus ensures that a human life has the same value irrespective of gender and religion.

Given the tangible influence of its pre-Islamization predecessor codes in combination with the continuation of a judicial system that clearly finds its inspiration in Western models Sudan's Islamic "legal revolution" has introduced as many Islamic, i.e. *fiqh*-derived elements into criminal legislation as necessary to satisfy the regime's constituency. It has thus created a system that is more hybrid and marked by an uneasy co-existence of Islamized provisions and a majority of crimes and punishments that would equally find their place in any fully secular legal system. Indeed, today's Sudanese ICL is neither a harmonious continuation of a past

experience nor is it a stable body of law that is likely to remain in force for a long period. It is rather a function of the political aspirations of the now dominant part of the Northern elite and will most likely not survive their demise.