Shari'a Law in the Sudan: Why it Does Not Work Under the Sudanese Constitutions of 1973 and 1985

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Shari’a Law in the Sudan: Why it Does Not Work Under the Sudanese Constitutions of 1973 and 1985

I. Introduction

The following statement appeared in the September 20, 1988, edition of the Washington Post:

The Sudanese cabinet . . . approved a harsh new code of Islamic Shari’a Law . . . . Among the punishments spelled out in the criminal code are death by stoning for the offense of adultery, 100 lashes with a whip and five years in prison for the offense of homosexuality, . . . death for the offense of apostacy,1 . . . crucifixion for armed robbers and amputation for petty thieves.2

This excerpt provides a few examples of punishments included in the Sudanese Penal Code Act of 1988.3 Many individuals, including Sudanese, were shocked by what appear to be unconstitutional violations of fundamental rights and freedoms. The Sudan is currently embroiled in the fifth year of a civil war between forces of the Muslim leadership in the north and non-Muslims of the south, primarily over the application of this Shari’a Law.4 This religious demarcation exists because Shari’a Law, the religious law of Muslims, is contrary to the beliefs of non-Muslims.5 Fundamentalist Muslims, however,

2. Harden, supra note 1.
3. At the time the article was written, the Penal Code Act of 1988 [hereinafter 1988 Penal Code] had been passed by the Council of Ministers (cabinet) but had not yet been passed by the Constituent Assembly (legislature). Harden, supra note 1.
4. The civil war actually began in 1955 over the issue of autonomy for the Southern region of the Sudan. The autonomy issue was resolved and the civil war ended in 1972 with the signing of the Addis Ababa Agreement. This agreement was abrogated by the Sudanese government in 1981 and the civil war over autonomy was renewed. The application of Shari’a Law did not become an issue in the civil war until 1983 when President Numeiri promulgated the new Shari’a penal code. SUDAN: A COUNTRY STUDY 56, 60-62 (H. Nelson ed. 1982), 15 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: SUDAN 6-7 (1986) [hereinafter 15 CONSTITUTIONS].
5. See infra section II and accompanying text. See generally Sudan, 1984 I.C.J. REV. 30, 30 (Christians believe Islamic law favors Muslims and is unacceptable).
control the government in the Sudan and insist on complete Islamization of the constitution and the laws enacted thereunder. The non-Muslims, on the other hand, assert that *Shari'a* Law is violative of the Sudan's constitution and insist upon secularism.

This Comment analyzes the validity of the non-Muslims' claim that *Shari'a* Law and its codification in the Sudanese Penal Code Act of 1983 and the 1988 Penal Code, are unconstitutional in light of the democratic values espoused in the 1973 and 1985 Constitutions of the Sudan. In preparation for this constitutional analysis, section II attempts to give the reader a basic understanding of *Shari'a* Law. Section III analyzes the inherent unconstitutionality of *Shari'a* Law in the context of the 1973 Sudanese Constitution, which was in force in 1983 when the *Shari'a* Law was first codified. Section IV analyzes the constitutionality of the Presidential promulgation and legislative enactment of *Shari'a* Law in the 1983 Penal Code pursuant to the 1973 Constitution, and addresses several constitutionality problems within the 1983 Penal Code. Section V compares relevant similarities between the 1973 and 1985 Constitutions and considers the constitutionality of *Shari'a* Law and the 1983 Penal Code pursuant to the 1985 Constitution. Section VI introduces the 1988 Penal Code and comments on its constitutionality pursuant to the 1985 Constitution. Section VII correlates sections II through VI, responds to the non-Muslim constitutionality claims, and offers a potential scenario concerning the future of the Islamic constitution.

II. *Shari'a* Law

To properly understand why *Shari'a* Law has become such a controversial issue in the Sudan, it is necessary to understand the concept of *Shari'a*. This understanding requires a brief historic ex-

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7. *See C. Gurdon, supra* note 6, at 71 (concerning application of punishment); Harden, *supra* note 1 ("gorilla movement . . . is prepared to fight for decades against any Sudanese Government that rejects a secular code of justice"); Sudan, 1986 I.C.J. Rev. 15, 20 (listing steps which the non-Muslims deem necessary before a constitutional conference can be convened); and Sudan, *supra* note 5, at 30 (equal protection concerns).


10. An Islamic constitution is a constitution based upon concepts of Islamic law as opposed to democratic principles. J. Voll and S. Voll, *supra* note 6, at 93.
amination. Islamic law originated from a divine revelation to the Prophet Muhammad. Theologically, this can be compared to the theory that Christian law originated from the divine revelation of the Ten Commandments to Moses. Shahi'a is the name Muslims give to the revelation to Muhammad.

Shahi'a has several literal interpretations: "the road to the watering place," "the clear path to be followed," or "the whole duty of man." In the context of its relationship to the Sudanese Penal Codes and Constitutions, however, Shahi'a simply means "the sacred law of Islam." It may, in fact, prove helpful to think of the terms Islamic Law and Shahi'a Law as somewhat synonymous. Authorities on Shahi'a Law tend to agree that it encompasses the entire system of Islamic Law, not just the penal law but daily religious, social, and personal interactions as well. For the purpose of this Comment, however, the term "Shahi'a Law" will be used to denote the relationship between specific criminal offenses and their respective punishments.

There are two types of criminal offenses and punishments under Shahi'a Law, specified and unspecified, representing three levels of criminality: moral offenses against God (hadd offenses), physical offenses against man (kisas offenses), and moral offenses against man and/or the state (ta'zir offenses). Each level of crime requires

11. The depths to which one must go to develop even a basic understanding of Shahi'a Law are far beyond the scope and purpose of this Comment.
12. Muhammad, the Prophet of Islam, was born in 570 A.D. in Mecca and died in 632 A.D. S.H. Amin, Islamic Law in the Contemporary World: Introduction, Glossary, and Bibliography 1, 2 (1985); F. Hassan, The Concept of State and Law in Islam 98 (1981); The Islamic Criminal Justice System 6-7 (M. Bassiouni ed. 1982).
13. In fact, Muhammad is believed to have received the last of the divine revelations of God, the first being to Moses, the second to David (Psalms), and the third to Jesus. Muslims consider all four men to be Prophets of God. The Islamic Criminal Justice System, supra note 12, at 7; Tier, Freedom of Religion Under the Sudan Constitution and Laws, 26 J. Afr. L. 133, 134 (1982).
15. Gordon, The Islamic Legal Revolution: The Case of Sudan, 19 Int'l Law 793, 800 (Summer 1985) (citing Schacht, Shahi'a, in Shorter Encyclopaedia of Islam 524 (1974)).
16. Id. (citing Vese-Fitzgerald, Nature and Sources of the Shari'a, in Law in the Middle East, Vol. 1: Origin and Development of Islamic Law 85 (1955)).
17. Id. (citing J. Schacht, Introduction to Islamic Law 1, n.1 (1964)).
19. The term "Shahi'a Law" appears to be used generically by most modern authorities to denote Islamic crimes and punishments. Possibly, this is because when Islamic law was codified, what were essentially religious offenses became criminal offenses.
20. The hadd offenses are also referred to as Alhuddoud, Hudud, Hudood, or Hudoud depending upon which authority is being read. Each hadd offense carries a hadd punishment, hadd being the singular form of the word. To avoid confusion, the term hadd will be used throughout this Comment to denote all the specified offenses against God, either collectively or singularly. See generally note 21 infra (each using a different spelling of the plural)
a different burden of proof; hadd offenses require specific evidence of three or four witnesses, kisas offenses require only two witnesses, and ta'zir offenses require only one witness. Each level also provides different methods of punishment and permits a tribunal to employ different degrees of discretion in exacting such punishment.

The tribunal may exercise only the most limited amount of discretion in handing out punishments for the hadd offenses (specified offenses against God). There are seven of these offenses, each carrying a punishment specified in the Koran or the teachings of the Prophet Muhammad. These offenses and punishments are the following: (1) adultery (punishable by lashes with a whip or by death-by-stoning) and fornication (punishable by one-hundred lashes with a whip), (2) false accusations of adultery or fornication (punishable by eighty lashes with a whip), (3) apostacy (punishable by execution), (4) consumption of alcohol (punishable by forty to eighty lashes with a whip), (5) theft (punishable by the amputation of a hand or foot), (6) robbery (punishable by the amputation of a hand or foot, unless aggravated by the death of the victim, then pun-
ishable by multiple amputation of limbs followed by crucifixion),34 and (7) attempted overthrow of the government (punishable by execution).35 A tribunal has no discretion in determining the punishment for these offenses beyond dispensing of lashes. Nor does the tribunal have discretion to determine the specific evidence required for conviction.36 The general philosophy seems to be that when a crime is committed against God, He should define the punishment; man is in no position to question His wisdom in such matters.

The second level of criminal offenses consists of kisas offenses (specified offenses against man).37 These are strictly physical offenses consisting of murder, pre-meditated murder, involuntary homicide, felonious pre-meditated assault, and serious accidental injury.38 The punishment scheme for these offenses is complicated and involves one or a combination of three types of punishment: retaliation (based upon the eye-for-an-eye concept),39 atonement, and payment of blood money.40 Punishment can vary depending upon different levels of intent and culpability.41 The tribunal appears to have a great deal of discretion in determining the appropriate punishment, but the victim or the victim's family is free to reject the tribunal's determination and make a binding punishment agreement with the offender.42 The reasoning behind this procedure seems to be that,

34. In chapter 5, verses 36 and 37, the Koran provides the various punishments for robbery. It should be noted that verse 37 also indicates that, in certain cases, the offender can avoid punishment by repenting before capture. The crime then becomes a kisas offense. Id. at 47 and 101. J. SCHACHT, supra note 21, at 176, indicates that the hadd punishments for robbery and theft would lapse if the offender returned the stolen property before the victim reported the crime. Repentance would not eliminate the kisas requirement to compensate the victim, however, and in the event a killing accompanies the robbery, no repentance is possible. Id.

35. The author was unable to locate chapter and verse of the Koran prohibiting the attempted overthrow of the government but the offense is listed in the sources cited above. See sources cited supra note 25.

36. See S.H. AMIN, supra note 12, at 23-29; J. SCHACHT, supra note 21, at 175-87; THE EFFECT OF ISLAMIC LEGISLATION, supra note 1, at 42; Al-Thakeb and Scott, supra note 21, at 66-67.

37. These offenses are also specified in the Koran or the Sunnah. See supra notes 27 and 28.

38. Al-Thakeb and Scott, supra note 21, at 67. See S.H. AMIN, supra note 12; J. SCHACHT, supra note 21; THE EFFECT OF ISLAMIC LEGISLATION, supra note 1; THE ISLAMIC CRIMINAL JUSTICE SYSTEM, supra note 12.

39. Retaliation, or retribution, is literally an “eye-for-an-eye” punishment in which the offender can be subjected to the same physical harm perpetrated upon the victim, but only if the exact harm can be done. J. SCHACHT, supra note 21, at 185; Al-Thakeb and Scott, supra note 21, at 67. The Koran, chapter 42, verse 40 states: “The recompense for an injury is an injury equal thereto.” THE EFFECT OF ISLAMIC LEGISLATION, supra note 1, at 219.

40. Blood money and atonement are utilized when exact retaliation is not possible or is not desirable to the victim or the victim's family. See J. SCHACHT, supra note 21, at 185; Al-Thakeb and Scott, supra note 21, at 67.

41. J. SCHACHT, supra note 21, at 178-87 contains a complex description of some of the interactions among the various offenses, punishments, burdens of proof, and levels of culpability.

42. See Al-Thakeb and Scott, supra note 21, at 67.
when an offense is committed against a man, he or his family should decide what compensation will make them whole.

The third level of criminality, and second type of crime, is the *ta'zir* offenses (*unspecified crimes*). These consist of such crimes as forgery, bribery, embezzlement, and other offenses of a moral nature which are not specified in the Koran or the teachings of the Prophet Muhammad. Offenses of this type require the least burden of proof and provide the tribunal with virtually unlimited discretion in dispensing punishment. Although these offenses are considered to be offenses against God, they are viewed as being more against the order of the state. It is held, therefore, that the state should set the punishment. Punishments for *ta'zir* offenses include, but are not limited to, imprisonment, whipping, banishment, public degradation, and fines.

Although not an exhaustive discourse on *Shari'a* Law, the preceding discussion should provide the reader with sufficient knowledge to understand the constitutionality analysis which follows. This analysis, however, is subject to the caveat that the problem with *Shari'a* Law is not necessarily within the law itself, for that has been practiced by Muslims since the first revelation to Muhammad. Rather, the dilemma lies in attempting to apply *Shari'a* Law in conjunction with a constitution that contains irreconcilable provisions and, subsequently, renders *Shari'a* Law unconstitutional.

Although the Sudanese perception of what is or is not constitutional undoubtedly differs from American perceptions, the general concept of constitutionality is constant. The following section analyzes the conceptual constitutionality of *Shari'a* Law pursuant to the 1973 Constitution and provides a comparative analysis of such laws under similar provisions of the United States Constitution.

43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* See also, *The Islamic Criminal Justice System*, supra note 12, at 213-19 (addressing the scope of *ta'zir* offenses and punishments).
47. For the purpose of this Comment, constitutional or unconstitutional will simply denote whether a particular act is or is not in agreement with the specific constitution being analyzed. See *The Reader's Digest Great Encyclopedic Dictionary* 291 (1968) (definition of constitutionality).
48. The first revelation to Muhammad occurred in 622 A.D. *The Islamic Criminal Justice System*, supra note 12, at xiv.
49. The description, "undoubtedly" different, is utilized because research has failed to locate any sources describing Sudanese perceptions of constitutionality. It seems logical, however, that such diverse religious foundations as Islam and Christianity would develop equally diverse perceptions of constitutionality.
III. Constitutionality of Shari'a Law

A. The Permanent Constitution of the Sudan

In 1973, the Sudan was relatively peaceful. In March of 1972, the government, under the regime of Jaafar Mahammed Numeiri, ended seventeen years of civil war between Northern and Southern Sudan with the signing of the Addis Ababa Agreement of 1972. This agreement granted complete autonomy to the Southern Region subject only to national regulation of defense, foreign affairs, currency, economics, and inter-regional affairs. In August of 1972, President Numeiri created a Sudanese People’s Assembly to draft a new constitution based upon theories of democracy and socialism. The constitution, completed in April of 1973 and promulgated in May of the same year, was entitled “The Permanent Constitution of the Sudan.”

The 1973 Constitution is a document of typical democratic principles. Its preamble contains similar justifications for making a constitution as are contained in the Preamble to the Constitution of the United States and the body of the document contains two hundred and twenty-five articles. These include guarantees of personal rights and freedoms, powers and duties of the executive, legislative, and judiciary branches, functions of the military, state sovereignty, supremacy of law, and a host of other rules of procedure for the effective operation of the government. The 1973 Constitution also provides, “Islamic law and custom [Shari’a law] shall be the main sources of legislation. Personal matters of non-Muslims shall be governed by their personal laws.”

These article 9 provisions served a two-fold purpose in the 1973

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50. The Southern Region of the Sudan had been in a perpetual state of rebellion since 1955 when its autonomy was stripped from it by the British sovereign under a program designed to establish self-government in the Sudan. SUDAN: A COUNTRY STUDY, supra note 4, at 60-62; D. WAI, THE AFRICAN-ARAB CONFLICT IN THE SUDAN 144-45 (1981); 15 Constitutions, supra note 4, at 5-6. British and Egyptian troops supported the Northern Region in establishing dominion over the South which endeavored for the next seventeen years to regain its autonomy. Id.
51. SUDAN: A COUNTRY STUDY, supra note 4, at 56 and 62. See S.H. AMIN, MIDDLE EAST LEGAL SYSTEMS 329 (1985); 15 Constitutions, supra note 4, at 5-6.
52. T. NIBLOCK, CASES AND POWER IN SUDAN 261 (1987); SUDAN: A COUNTRY STUDY, supra note 4, at 62; 15 Constitutions, supra note 4, at 6.
53. The principles of democracy entail a form of government in which political power resides in all the people. Each citizen shares equally in political privilege and duty and the right of each to do so is protected by free elections and other guarantees. THE READER’S DICTIONARY GREAT ENCYCLOPEDIC DICTIONARY 355 (1968).
54. The English translation of the 1973 Constitution used for this Comment was at one time an insert in 15 Constitutions, supra note 4, but has been replaced by the 1985 Constitution. It should, however, be available at law libraries carrying that series of constitutions [hereinafter all articles of the 1973 or 1985 Constitutions will be cited only to the specific constitution and not to the source within which constitution was found].
55. 1973 Constitution, supra note 9, art. 9.
Constitution. The first clause of this provision, making Shari'a Law the main source of legislation, was included to make the constitution more acceptable to the fundamentalist Muslim religious groups of the Northern Region.66 The second clause, guaranteeing that non-Muslims will be governed by their personal laws, was included in the constitution to make it more acceptable to the non-Muslim religious groups of the Southern Region and to accord the constitution with the terms of the Addis Ababa Agreement.67 Read together, these provisions of article 9 suggest that legislation will be based upon the principles of Shari'a Law but will not be applied to non-Muslims, only to Muslims. Under this analysis, however, article 9 directly violates article 38 of the 1973 Constitution, which provides that "[t]he Sudanese have equal rights and duties, irrespective of origin, race, locality, sex, language or religion."68 This apparent inconsistency in the drafting of the 1973 Constitution requires reconciliation before proceeding to a constitutionality analysis of Shari'a Law.

For all Sudanese to enjoy the equal rights guaranteed by article 38, it is necessary that only one set of laws be applied uniformly to all. Interpreting article 9 to guarantee separate laws for Muslims and non-Muslims renders this impossible. Thus, assuming that the drafters of the 1973 constitution intended no inconsistencies, an alternate interpretation must be suggested. If the two provisions of article 9 are read in conjunction with, instead of in contrast to, article 38, they could suggest that Shari'a Law is merely one source of legislation, not the source of legislation,69 and that Shari'a Law would be applied in such a manner as to render it secular in nature, a primary demand of Southern non-Muslim Sudanese.70 Consequently, Shari'a Law would violate neither article 9 nor article 38.71

Such an analysis, while appearing to be contrary to the plain language of article 9, is logical in light of the actual legal practices at that time. When the 1973 Constitution was promulgated, the main source of law in the Sudan was a secular hybrid of Shari'a Law and English common law applied equally to all Sudanese.72 It is

56. C. Gurdon, supra note 6, at 66; Sudan: A Country Study, supra note 4, at 62.
58. 1973 Constitution, supra note 9, art. 38 (emphasis added).
59. Support for this contention can be found in a quote by President Numeiri who, when asked about the role of Shari'a Law in the 1973 Constitution, said, "it says, 'the Islamic Shari'a is a fundamental source among the sources of legislation', that is, it is not the sole source." (Cited in J. Voll and S. Voll, supra note 6, at 93).
60. Mayer, Khartoum: After the Fall, Middle East Executive Reports, October 1985, at 22. See also Harden, supra note 1.
61. Additionally, one set of laws based upon non-Muslim beliefs would not violate articles 9 and 38 because there is no constitutional guarantee that Muslims will be governed by Shari'a; the Constitution only provides that non-Muslims will not be governed by Shari'a.
62. During the Mahdiya period, from 1884 to 1898, strict Shari'a Law was applied in the Sudan. From approximately 1902 to 1955, British sovereignty gradually diminished application of Shari'a Law through interfusion with the English common law, creating an English/
logical to presume that the drafters of the 1973 Constitution would write it in such a way as to preserve a criminal law system which had been successfully applied in the Sudan for seventy years. The following analysis of the conceptual constitutionality of Shari'a Law is conducted according to this presumption of the integrity of the 1973 Constitution.

B. Constitutionality Analysis of Shari'a Law

Citizens and non-citizens of the United States enjoy such personal liberties as privacy, equal protection, freedom of religion, freedom from cruel and unusual punishment, and freedom of speech which are guaranteed by the Constitution of the United States. Through the enjoyment of these rights, perceptions of what actions are and are not constitutional have developed. These perceptions are supplemented by determinations of the United States Supreme Court — which is charged by the United States Constitution with the duty of determining what is constitutional and what is unconstitutional. Conceptually, conduct which does not conform to the Constitution is unconstitutional pursuant to the Supremacy Clause. In the Sudan, the relationship between constitutional guarantees and the evaluations by a tribunal are similar.

The 1973 Constitution of the Sudan guarantees such personal liberties as privacy, equal rights, freedom of religion, freedom from unusual and inhuman punishment, and freedom of speech. It charges the Sudanese Supreme Court with the task of determining

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Islamic hybrid. During this period the highly objectionable hadd punishments were virtually non-existent. This hybrid law remained in force in the Sudan until 1983 when President Numeiri promulgated strict Shari'a Law. C. Gurdon, supra note 6, at 66; Sudan: A Country Study, supra note 4, at 213; Fluehr-Lobban, Islamization of Law in the Sudan, 11 Legal Stud. F. 189, 191 and 194 (1987).

63. See supra note 62. Seventy years, from 1902 until the 1973 Constitution was written in 1972.

64. U.S. CONST. amend. IV.
65. U.S. CONST. amend. XIV.
66. U.S. CONST. amend. I.
67. U.S. CONST. amend. VIII.
68. U.S. CONST. amend. I.
70. U.S. CONST. art. VI ("This Constitution . . . shall be the supreme Law of the Land.").

71. 1973 CONSTITUTION, supra note 9, art. 42 states: "The private life of citizens is inviolable." Article 43 states: "Dwellings are inviolable."
72. "All persons . . . are equal before Courts of law. The Sudanese have equal rights and duties, irrespective of origin, race, locality, sex, language or religion." 1973 CONSTITUTION, supra note 9, art. 38.
73. "Freedom of belief, prayer, and performance of religious practices, without infringement of public order or morals is guaranteed." 1973 CONSTITUTION, supra note 9, art. 47.
74. "No person shall be subjected to an unusual or inhuman treatment or punishment." 1973 CONSTITUTION, supra note 9, art. 72.
75. "Freedom of opinion is guaranteed. Every Sudanese shall have the right to express his opinion in writing or verbally." 1973 CONSTITUTION, supra note 9, art. 48.
what is constitutional, and contains a supremacy clause holding that the “Rule of Law” is paramount. Non-Muslims and many non-fundamentalist Muslims in the Sudan believe that, pursuant to these provisions, any acts not conforming to the Constitution are conceptually unconstitutional. This belief specifically includes Shari'a Law.

1. Hadd Offenses.—The primary objections to Shari'a Law appear to be toward the hadd offenses and punishments. This should be understandable to the American reader who, upon first reading the basics of Shari'a Law, is shocked to learn that adultery and fornication, the first hadd offenses, were punishable. An American perception is that although such activities may be morally wrong in some way, they are protected by the right to privacy and the right to equal protection. Non-Muslims in the Sudan, and some Westernized Muslims, seem to echo this perception based upon their religious beliefs. While American courts have consistently held that adultery and fornication statutes do not deny equal protection, the Chief Justice of the Supreme Court of the Sudan has simply held that non-Muslims will not be subjected to the punishment for such offenses and has apparently passed on the question of constitutionality. The non-Muslims do not seem to have a constitutionality objection to the second hadd offense of defamation. This is undoubtedly due to recognition that even though the 1973 Constitution grants freedom of speech, some types of speech do not deserve constitutional protection. The Sudanese echo the United States Supreme

76. 1973 CONSTITUTION, supra note 9, art. 190, cl. a.
77. “Rule of Law” is a term adapted from the British which basically means that the law is supreme over arbitrary powers of government and that all men are equal under this law. TURPIN, BRITISH GOVERNMENT AND THE CONSTITUTION 46-58 (1983).
78. “The State is subject to the Rule of Law and the Supremacy of the Rule of Law shall be the basis of Government.” 1973 CONSTITUTION, supra note 9, art. 59.
79. See C. GURDON, supra note 6, at 72; Tier, supra note 13, at 146-47; Mayer, supra note 60, at 22; Sudan, 1986 I.C.J. REV. 15, 20; Sudan, 1984 I.C.J. REV. 30, 30.
80. See C. GURDON, supra note 6, at 71; Fluehr-Lobban, supra note 62, at 199-200; Mayer, supra note 60, at 22; Sudan, 1986 I.C.J. REV. 15, 20; Sudan, 1984 I.C.J. REV. 30, 30.
81. “Westernized Muslims” denotes those Muslims who have become accustomed to the western standards of morality.
83. 2 AM. JUR. 2D Adultery and Fornication § 12.5 (1964); 41 A.L.R.3d 1338, 1340 (1965).
84. Chief Justice Daf'allah al-Hajj Yusuf has stated that although the prohibition regarding alcohol applies to all citizens, the penalty for the crime of drunkenness applies only to Muslims. See al-Tahir, supra note 82, at 53.
85. See supra note 75.
86. This is supported by language in article 48 (omitted from note 73 supra) that the right of written and verbal expression must be “in accordance with the law.” 1973 CONSTITUTION, supra note 9, art. 48.
Court in this respect, by also recognizing the constitutionality of criminal defamation. 87

In contrast, the third hadd offense of renunciation of the Islamic religion appears to be in direct violation of article 47 of the 1973 Constitution which explicitly protects “freedom of belief, prayer, and performance of religious practices.” 88 It is difficult to imagine a perception that “freedom of belief” for Muslims means freedom to follow Islam or to die, yet there appears to be no other way to reconcile the third hadd offense with article 47, and Muslim authorities on Shari’a Law generally support this perception. 89 Their reasoning is that freedom of religion exists in choosing between belief and disbelief before embracing Islam. 90 Once having been born a Muslim or otherwise having adopted the Islamic beliefs, this freedom no longer exists because rejection of Islam would be humiliating and derogatory to the faith and must be prevented. 91

Non-Muslims, on the other hand, apparently perceive the constitutionally guaranteed freedom of religion in a more conceptual manner. They interpret the constitutional provision to mean equal freedom of religion for all Sudanese. 92 It is ironic to note that the Koran tends to support the non-Muslim view, stating in chapter 2, verse 256: “Let there be no compulsion in religion: Truth stands out Clear from Error.” 93 Given this contradiction between the Muslim perception of freedom of religion and the precepts as announced in their scripture, it is probably safe to say that the third hadd offense is unconstitutional.

The fourth hadd offense, drinking alcohol, is regarded by non-Muslims as an unconstitutional infringement of their right to freedom of religion. 94 The complete ban on alcohol includes the use of sacramental wine in religious ceremonies. 95 Accordingly, it interferes with their freedom of worship. The Chief Justice of the Supreme Court of the Sudan justifies the constitutionality of this offense by pointing out that the United States, India, and other countries have at certain times in their histories prohibited alcohol. 96 Similarly, al-

88. 1973 CONSTITUTION, supra note 9, art. 47.
89. THE EFFECT OF ISLAMIC LEGISLATION, supra note 1, at 84.
90. Id.
91. Id.
92. The archbishop of Khartoum (the capital of the Sudan) has stated that, whereas “Islamic law favours Muslims in disputes with Christians and non-Muslims, Christians believe that all Sudanese should be equal before the law.” Sudan, 1984 I.C.J. Rev. 30, 30.
93. The Koran, chapter 2, verse 256. THE EFFECT OF ISLAMIC LEGISLATION, supra note 1, at 83.
94. This presumption is derived from an outcry of injustice following an incident in which an Italian priest was sentenced to one month’s imprisonment, twenty-five lashes, and a L = 500 fine for keeping sacramental wine in his home. Sudan, 1984 I.C.J. Rev. 30, 32.
95. Id.
96. al-Tahir, supra note 82, at 53. See also THE EFFECT OF ISLAMIC LEGISLATION,
though freedom of religion is a fundamental right in the United States, it clearly is not without certain restrictions. Subsequently, the concept of freedom of religion is not likely to be violated by a prohibition of alcohol, including a ban on sacramental wine.

The fifth, sixth, and seventh hadd offenses of theft, robbery, and attempted overthrow of the government summarily can be eliminated from constitutional evaluation because there appear to be no constitutional objections by either Muslims or non-Muslims. Article 60 of the 1973 Constitution empowers the Sudanese government to enact and enforce any law which does not violate the individual liberties granted by other articles of the constitution. There is no reason to believe that the fact that theft and robbery are outlawed by religious law rather than governmental law would change non-Muslim perceptions of the constitutionality of making such acts punishable.

This analysis suggests that despite non-Muslim contentions that Shari'a offenses deprive them of having equal rights with Muslims, only one of the seven hadd offenses appears unconstitutional and then only to the extent that it denies Muslims freedom of religion. The following examination explores non-Muslim contentions that the hadd punishments are unconstitutional and compares that analysis with perceptions of cruel and unusual punishment and the proportionality of punishment in the United States.

2. Hadd Punishments.—There are only four hadd punishments for the seven hadd offenses. These consist of various forms of the death penalty, amputation of a hand or a foot, public flogging performed in varying numbers of lashes, and a combination

97. U.S. Const. amend. I.

98. The United States Supreme Court has held that certain religious freedoms may be infringed by an overriding or compelling governmental interest. See United States v. Lee, 455 U.S. 252 (1982) (forced to pay employment tax which violated Amish religion); Braunfeld v. Brown, 366 U.S. 599 (1961) (Orthodox Jew whose religion forced him to close his business on Saturday was forced by Pennsylvania statute to close on Sunday); Bowen, Secretary of Health and Human Services, et al. v. Roy et al., 476 U.S. 693 (1986) (American Indian family who refused to register their daughter for a Social Security Number because it violated their religious beliefs was denied benefits).

99. “The State shall recognize and provide effective means for the protection and enjoyment of the established legal rights of all persons.” 1973 Constitution, supra note 9, art. 60.

100. This was recognized by Sudanese Chief Justice Yusef who noted that Shari'a laws have not touched the religious freedom of the non-Muslims. al-Tahir, supra note 82, at 53.

101. Some of the recommended methods for death are by crucifixion, by stoning, by the sword, and by hanging. The Islamic Criminal Justice System, supra note 12, at 233; Sudan, 1984 I.C.J. Rev. 30, 32; Harden, supra note 1.

102. This is the punishment for theft. Robbery is punished by amputation of a hand and a foot, each from opposite sides of the body. J. Schacht, supra note 21, at 181.

103. Id. at 175.
of any or all of the first three. The non-Muslims' main contention seems to be that these punishments are an unconstitutional violation of their rights under article 72 of the 1973 Constitution, which states: "No person shall be subjected to an unusual or inhuman treatment or punishment." Additionally, articles 70, 72, 73, 74 and 75 when read together, suggest a fairness or proportionality standard which should be applied in dispensing punishment. Furthermore, the kisas punishment of retribution clearly establishes a proportionality standard.

The application of a right such as that guaranteed by article 72 necessarily requires a value judgment about what treatment or punishment is to be considered unusual, inhuman, or both. The Muslim perception of what types of punishment are not unusual or inhuman seems to be clearly established by the fact that the hadd punishments have been inflicted upon followers of Islam for over 1,350 years. Death, amputation, and flogging are the usual, common, or ordinary methods of punishment for Muslims, and therefore they are not contrary to custom. Similarly, most Muslims believe that when the hadd punishments are carried out by trained officials they are quite humane. Subsequently, Muslims could reasonably believe the hadd punishments do not contravene article 72 of the 1973 Constitution.

The same argument can be made with respect to the Muslim perception of proportionality, most notably with the hadd offenses and punishments. As noted in section II, there is no discretion under Shari'a Law in applying the hadd punishment; discretionary application is tantamount to second-guessing God, and therefore is improper. Thus, if God has determined that a particular punishment is appropriate for a particular crime, it must also be proportionate.

Non-Muslims have a different perception of what is unusual

104. For example, if a robbery victim is killed, the offender can be whipped, have a hand and foot amputated, and then be crucified. Id. at 181; Al-Thakeb and Scott, supra note 21, at 73.

105. See C. Gurdon, supra note 6, at 71.

106. 1973 Constitution, supra note 9, art. 72.

107. Article 70 prohibits infliction of punishment that exceeds that prescribed by law. Articles 73, 74 and 75 limit the circumstances under which the death penalty can be applied. 1973 Constitution, supra note 9.

108. For retribution, or retaliation, the punishment must be the same injury as that received by the victim. See supra note 39.

109. This represents the period of time that has passed since the revelations to Muhammad in 622 A.D. See supra note 48 and accompanying text.

110. These methods of punishment comprise the hadd punishments.

111. Unusual is defined as not usual, common, or ordinary. The Reader's Digest Great Encyclopedic Dictionary 1470 (1968).

112. The Islamic Criminal Justice System, supra note 12, at 230-36.

113. See supra note 20 and accompanying text.

114. Id.
and inhuman. They believe that the *hadd* punishments are unacceptable, contrary to human dignity,\(^{118}\) and restrictive.\(^{118}\) One reason for this belief probably lies in the fact that until 1955 the non-Muslims of the Southern Region were autonomous.\(^{117}\) The pre-colonial Arab Muslims who had successfully imposed their religion on the indigenous population of Northern Sudan were unsuccessful in extending their influence over the indigenous population of the Southern Region.\(^{118}\) Consequently, the Southerners were not subjected to the harsh *hadd* offenses and punishments which were imposed upon the people of the North during the Mahdiya period of 1884-1898,\(^{119}\) nor were they subjected to fundamentalist Muslim religious teachings which embrace the *hadd* offenses and punishments.\(^{120}\) The Southern government was dominated by Christian factions and their laws were secular in nature.\(^{121}\) As a result, the non-Muslims could develop a perception of unusual and inhuman punishment more similar to that of the United States, based somewhat on the concept of Christianity.

In the United States, courts look "to the evolving standards of decency that mark the progress of a maturing society" in determining whether a punishment is cruel\(^{122}\) and unusual.\(^{123}\) The United States Supreme Court has determined that any punishment involving "unnecessary and wanton infliction of pain" is presumed to be cruel and unusual.\(^{124}\) Under this philosophy, and overlooking the fact that fundamentalist Muslims believe that pain is necessary,\(^{125}\) the *hadd* punishment of flogging should qualify as cruel and unusual punishment because, by its very nature, and by the admission of the Muslims who exact this punishment,\(^{126}\) flogging inflicts pain. The line of demarcation is thus drawn at the perception of whether the infliction of pain is unnecessary or wanton. On this point, Muslims would disagree\(^{127}\) while non-Muslims would probably concur.\(^{128}\)

Amputation, on the other hand, is not intended to be painful as

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\(^{115}\) See Sudan, 1984 I.C.J. Rev. 30, 30.


\(^{117}\) D. Wai, supra note 50, at 181-83.

\(^{118}\) Id. at 181.

\(^{119}\) Fluehr-Lobban, supra note 62, at 191-92.

\(^{120}\) See D. Wai, supra note 50, at 181-83.

\(^{121}\) See C. Gurdon, supra note 6, at 65; Fluehr-Lobban, supra note 62, at 191-92.

\(^{122}\) Inhuman is defined as cruel in WEBSTERS COLLEGIATE DICTIONARY 517 (5th ed. 1941). For the purpose of this Comment, the words inhuman, inhumane, and cruel will share the same meaning.


\(^{124}\) Id. (citing Rhodes v. Chapman, 452 U.S. 337, 346 (1981)).

\(^{125}\) The Islamic Criminal Justice System, supra note 12, at 231.

\(^{126}\) Flogging is intended to be painful as a deterrent to future criminal activity. Id.

\(^{127}\) See supra notes 109-14 and accompanying text.

\(^{128}\) See supra notes 115-21 and accompanying text.
Islamic jurists have established regulations which provide who may perform an amputation and what amount of training is required to inflict no more pain than is necessary. These regulations are intended to render the punishment humane. The non-Muslims, however, believe that mutilation of this nature is contrary to human dignity. This echoes an American belief that amputation as a form of criminal punishment is contrary to the "standards of decency," and thus is cruel, unusual, and a violation of article 72 of the 1973 Constitution from a non-Muslim perspective.

The death penalty, however, is another matter. It does not appear that non-Muslims would object to this punishment when applied in an appropriate situation. In fact, the Christian Bible provides for death as the proper punishment for a murderer. Thus, the death penalty could not be said to be unusual from a non-Muslim perspective, and considering the Muslim rules establishing the training and expertise required for those people inflicting such punishment, the taking of one's life as punishment is not cruel and is not in violation of article 72.

The non-Muslim objection to the death penalty is most likely its disproportionate application to non-capital offenses such as adultery and apostacy. This again simply appears to be a matter of religious difference transposed onto the civil and criminal laws. Whereas Muslims believe that there is no discretion in applying the established hadd punishments to the offenses God has designated, non-Muslims, would undoubtedly perceive any punishment for apostacy to be disproportionate and violative of articles 72 and 47 of the 1973 Constitution based upon their belief that the offense of apostacy is contrary to freedom of religion.

In short, it is apparent that the Muslim leadership in the North can justify the constitutionality of the hadd offenses and punishments as a natural part of their history and religious beliefs. Similarly, non-Muslims can justify their perceptions of the unconstitutionality of many of the hadd offenses and punishments pursuant to their history and beliefs. Americans, who share many of the theological beliefs of the non-Muslims, are likely to support the non-Muslims' perspective while defending the Muslims' right to their own beliefs. In practice, these differing beliefs were able to co-exist in a relatively peaceful manner until 1983 when President Numeiri
promulgated a codification of \textit{Shari'a} Law to be applied to all Sudanese, regardless of faith.

The following section analyzes the conceptual constitutionality of the Presidential promulgation and the subsequent legislative enactment of \textit{Shari'a} Law in the 1983 Penal Code pursuant to the 1973 Constitution. This section also addresses some apparent constitutional problems with the 1983 Penal Code itself.

IV. Penal Code Act of 1983\textsuperscript{138}

A. Promulgation

On September 8, 1983, President Numeiri shocked his countrymen by announcing that, effective immediately, strict \textit{Shari'a} Law would be applied throughout the Sudan, to Muslims and non-Muslims alike.\textsuperscript{139} The substance of this decree was the return of the \textit{hadd} punishments to Sudanese jurisprudence.\textsuperscript{138} President Numeiri's decision was sudden, apparently made with little or no consultation with his advisors, and caused great trepidation among Muslims and non-Muslims.\textsuperscript{139} Furthermore, his decision violated the 1973 Constitution.

Many explanations have been offered for President Numeiri's decision.\textsuperscript{140} Whatever his intent, it is clear that the promulgation of \textit{Shari'a} Law was pursuant to article 106 of the 1973 Constitution,\textsuperscript{141} which provides in relevant part: "If at any time when the People's Assembly is not in session or in cases of importance and urgency, the President of the Republic may issue Provisional Republican Orders having the force of law."\textsuperscript{142}

Conceptually, a constitution is a document which embodies the fundamental organic laws and principles for the governing of a na-
Theoretically, for an action by the government to be considered valid it must first fall within the powers specifically authorized by the constitution, and second, it must not violate any particular limitations that the constitution places upon those powers. Assuming arguendo that a case of “importance and urgency” actually existed, there can be no doubt that President Numeiri had constitutional authority pursuant to article 106 to promulgate laws. Article 106 does not, however, empower the President to make laws that violate other provisions of the constitution, in this case article 16(e).

Article 16(e) of the 1973 Constitution states in part: “Any act, which is intended or is likely to promote feelings of hatred, enmity, or discord among religious communities shall be contrary to this Constitution and punishable by law.” This language limits the President’s power under article 106 to the promulgation of laws which are not intended and are not likely to promote feelings of hatred, hostility, or conflict between Muslim and non-Muslim religious communities. Assuming that at least two commentators are mistaken in asserting that President Numeiri’s promulgation of Shari’a Law was intended to stir up dissent between Muslims and non-Muslims, it is inconceivable that the President would not know that his decision was likely to promote feelings of hatred, hostility, and conflict between those groups.

The religious conflict between Muslims and non-Muslims over the application of Shari’a Law has continued since Muhammad re-
ceived the revelation from God in the seventh century A.D.\textsuperscript{152} It is clear that after more than 1,350 years of hatred, hostility, and conflict between Muslims and non-Muslims, promulgation of Shari'a Law in a country containing 70\% Muslims and 30\% non-Muslims "is likely" to promote more hatred, hostility, and conflict among those religious groups.\textsuperscript{153} Since President Numeiri's promulgation of Shari'a Law was likely to promote feelings of hatred, enmity and discord among religious communities, it violated the limitations which article 16(e) places upon the power to act pursuant to article 106 and was therefore contrary to the 1973 Constitution.

B. Enactment

The 1983 Penal Code was authored by Hassan al Turabi,\textsuperscript{154} the Sudanese Attorney General, and contains definitions of existing kisas and ta'zir crimes, provisions for crimes not previously criminal, and a set of punishments not previously applied, the hadd punishments.\textsuperscript{155} Some previous offenses, such as theft, were modified to reflect the hadd punishment of amputation, reserved for more serious cases of theft, while the hadd offense of adultery and fornication was redefined to include rape and sodomy.\textsuperscript{156} Essentially, the 1983 Penal Code is a codification of modified Shari'a Law and a written version of the law promulgated by President Numeiri on September 8, 1983. As such, it became an enactment of a law that the legislature had no more power to make than had President Numeiri, and subsequently, that violated article 16(e).\textsuperscript{157} As enacted, the 1983 Penal Code appears to have been drafted without strict adherence to the 1973 Constitution. For example, section 318 of the 1983 Penal Code states that:

[T]he penalty specified in sub-sections (1) and (2) above [death for a married fornicator and whipping, exile, and imprisonment for a male unmarried fornicator] shall not be imposed upon any person whose Heavenly Religion provides an alternative penalty

\textsuperscript{152} See supra note 48.

\textsuperscript{153} The Sudan's population is comprised of about 70\% Muslim and 30\% non-Muslim. Of the non-Muslims, about 70\% are animist, or traditional African religions, and 30\% are Christian. Fluehr-Lobban, supra note 62, at 189; Sudan, 1984 I.C.J. REV. 30, 30.

\textsuperscript{154} Hassan al Turabi is the brother-in-law of Sadiq el Mahdi, the current Prime Minister of the Sudan, and holds a doctorate in law from London University. He is also the leader of the rightest National Islamic Front, a strong fundamentalist political group, and remains a prominent figure in Sudanese politics. J. Voll and S. Voll, supra note 6, at 93; Harden, supra note 1. See also Islam, Nationalism and Radicalism in Egypt and the Sudan, 113-42 (1983) (an article on the evolution of Islamic Fundamentalism in which the author, John Voll, provides additional background regarding Turabi's political activities).

\textsuperscript{155} S.H. Amin, supra note 51, at 341-42; Fluehr-Lobban, supra note 62, at 198.

\textsuperscript{156} S.H. Amin, supra note 51, at 341-42. Dr. Amin's book was the only source located citing chapter and verse of the 1983 Penal Code and thus is relied upon heavily.

\textsuperscript{157} For the legislature (called the People's Assembly) to enact the 1983 Penal Code it would first have to repeal article 16(e). Repeal, however, was not attempted.
for fornication. In such cases the offender shall be punished by the alternative penalty provided by his religion.\(^{158}\)

In contrast, article 38 of the 1973 Constitution provides that "the Sudanese have equal rights . . . irrespective of . . . sex . . . or religion."\(^{159}\) Accordingly, section 318 of the 1983 Penal Code, by differentiating between male and female offenders and between Muslim and non-Muslim offenders, denies each group the equal rights guaranteed by article 38.\(^{160}\)

Section IV reveals that, in addition to the basic non-Muslim objections of Shari'a Law, both the promulgation of Shari'a Law by President Numeiri and its subsequent enactment in the Penal Code Act of 1983 were violations of article 16(e) of the 1973 Constitution and, hence, unconstitutional. Additionally, the 1983 Penal Code, itself, is not without constitutional violations.

The following section introduces the Transitional Constitution of the Republic of the Sudan 1985. This section compares the 1985 Constitution with the 1973 Constitution while assessing the effect of applying it in conjunction with Shari'a Law and the 1983 Penal Code.

V. The Transitional Constitution of the Republic of the Sudan 1985

On April 6, 1985, the Sudanese military executed a coup d'etat deposing President Numeiri during his visit to the United States.\(^{161}\) The new Transitional Military Government, which adopted the Transitional Constitution of the Republic of the Sudan 1985 on October 10 of that year, promised the adoption of a new Permanent Constitution after the election of a Constituent Assembly to replace the People's Assembly.\(^{162}\) In addition, the new government halted the application of the hadd punishments of the 1983 Penal Code but left the Penal Code itself in force.\(^{163}\)

The 1985 Constitution is remarkably similar to the 1973 Constitution in granting such specific personal liberties as equal protection,\(^{164}\) freedom of religion,\(^{165}\) freedom of speech,\(^{166}\) right to pri-

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158. S.H. Amin, supra note 51, at 342 (emphasis added).
159. 1973 Constitution, supra note 9, art. 38.
160. Admittedly, the constitutional conflict of one section of the 1983 Penal Code does not render the entire act unconstitutional. Unfortunately, the entire act was not available for such scrutiny.
161. 15 Constitutions, supra note 4, at 8; Fluehr-Lobban, supra note 62, at 189.
162. As of November 1988, however, the 1985 Transitional Constitution was still in force although somewhat amended. Telephone interview with Dr. Carolyn Fluehr-Lobban (November 1988). See infra note 179.
163. Misapplication of Shari'a Law by the Numeiri regime had been a primary reason for the coup. Fluehr-Lobban, supra note 62, at 190; Mayer, supra note 60, at 21-23.
164. 1985 Constitution, supra note 9, art. 17(1)(2).
vacy,¹⁶⁷ and freedom from inhumane and undignified punishment.¹⁶⁸ Due to the similarity, Shari'a Law under the 1985 Constitution can be subjected to the same analysis as it was pursuant to the 1973 Constitution. Thus, the hadd offense of apostacy remains a violation of the freedom of religion pursuant to article 18 of the 1985 Constitution.¹⁶⁹ In addition, the hadd offenses of adultery and fornication, drinking alcohol, theft, armed robbery, and attempting to overthrow the government do not violate the 1985 Constitution¹⁷⁰ because they are not deemed fundamental rights. On the other hand, the offense of defamation remains a legitimate infringement on the freedom of speech.¹⁷¹ Similarly, from a non-Muslim perspective the hadd punishments of flogging and amputation remain a violation of the freedom from inhumane and undignified punishment pursuant to article 29 of the 1985 Constitution,¹⁷² while the hadd punishment of death remains constitutional when applied to the hadd offense of robbery aggravated by the killing of the victim and to the offense of attempting to overthrow the government. The death penalty remains a violation of article 29 when applied to the offense of adultery and fornication and to the offense of apostacy.¹⁷³

Although the 1983 Penal Code continued to be applied,¹⁷⁴ changes in governmental policy and in the 1985 Constitution resolved some of the Code's constitutionality problems. First, the Transitional Military Government suspended the application of the hadd punishments of the 1983 Penal Code. This action eliminated the potential article 29 constitutionality problems arising from the execution of those punishments. Second, the 1985 Constitution does not contain a state religion pronouncement similar to that of article 16(a-e) of the 1973 Constitution. Further, whereas promulgation of Shari'a Law was a violation of article 16(e) of the 1973 Constitution, the 1985 Constitution contains no direct ban on enactment of

¹⁶⁵ Id. art. 18.
¹⁶⁶ Id. art. 19.
¹⁶⁷ Id. art. 21, art. 30.
¹⁶⁸ Id. art. 29. Note that the 1985 Constitution grants a freedom from inhumane and undignified punishment as opposed to the freedom from unusual and inhuman punishment granted by the 1973 Constitution. This difference could have some effect on the constitutionality of the practice of public floggings entirely separate from the constitutionality of flogging itself. Similarly, it raises the question of whether unusual punishments are to be permitted.
¹⁶⁹ Compare with supra note 88 and accompanying text.
¹⁷⁰ Compare with supra notes 80, 94, 99 and accompanying text.
¹⁷¹ Compare with supra note 85 and accompanying text.
¹⁷² Compare with supra note 101 and accompanying text.
¹⁷³ Compare with supra notes 80, 88 and accompanying text.
¹⁷⁴ Pursuant to article 133 of the 1985 Constitution, "all laws in force immediately prior to the coming into force of this Constitution shall continue unless repealed or amended by the competent authority." Although the hadd punishments were halted, the 1983 Penal Code remained in force. See Fluehr-Lobban, supra note 62, at 200; Mayer, supra note 60, at 22.
acts which are "likely to promote feelings of hatred, enmity, or discord among religious communities" and the government may constitutionally enact legislation accordingly. Finally, the 1985 Constitution contains no provision equivalent to article 106 of the 1973 Constitution which granted the President power to make laws under "important and urgent" conditions, eliminating the need for the constitutional offset of an article similar to article 16(e) of the 1973 Constitution.

The effect of the 1985 Constitution on the constitutionality of Shari'a Law is minimal because it provides personal liberties similar to those set forth in the 1973 Constitution. The promulgation of Shari'a Law through the retention of the 1983 Penal Code appears constitutional since the 1985 Constitution does not contain article 16(e) limitations. The application of Shari'a Law, as codified in the 1983 Penal Code, was shorn of much of its unconstitutionality by the elimination of the hadd punishments. In effect, the Transitional Military Government had returned the Sudanese criminal law to a pre-1983 status wherein one set of laws, albeit Shari'a Law instead of the British/Islamic hybrid, was applied to all Sudanese equally.

The issue of Shari'a Law remained a primary concern to the non-Muslim Southern Region, however, and its abrogation a major demand before ending the civil war. In response to this concern, Prime Minister Sadiq el Mahdi, on July 7, 1986, required the Sudan's Attorney General, Hassan al Turabi, to create substitute statutes for the Shari'a Law of the 1983 Penal Code. The resultant construct was the Penal Code Act of 1988, which is discussed in the following section.

VI. Penal Code Act of 1988

The 1988 Penal Code was passed by the Constituent Assembly in early October 1988. According to the 1986 campaign promises of Prime Minister Sadiq el Mahdi, the Code was to be a moderation of Shari'a Law that would be acceptable to both Muslims and non-Muslims. This does not appear to have occurred. The new penal

175. The only real change in the fundamental rights is in the wording of article 29 which is discussed supra note 168.
177. 15 CONSTITUTIONS, supra note 4, at 9.
178. Like the 1983 Penal Code, the 1988 Penal Code is not available in the United States in any language. The information on the 1988 Penal Code used in this Comment is located in Harden, supra note 1. Out of necessity, section VI assumes that the information in the Harden article is substantially correct.
179. Information of the passage of the 1988 Penal Code by the Constituent Assembly was provided by Dr. Carolyn Fluehr-Lobban of the Anthropology Department at Rhode Island College.
180. Harden, supra note 1.
code reportedly is nothing more than a revision of the 1983 Penal Code, but more rigidly fundamental in following strict *Shari'a* Law. The moderation supposedly will come in the alleged non-applicability of the 1988 Penal Code to non-Muslims. This, however, will do little to relieve the basic unconstitutionality of codified *Shari'a* Law.

According to available reports, the 1988 Penal Code explicitly contains the *hadd* punishments of death-by-stoning for adultery, death for apostacy, amputation for theft and armed robbery, and flogging for homosexuality. If the reports are accurate, the 1988 Penal Code is no more constitutional than its predecessor, the 1983 Penal Code. In fact, the 1988 version is less constitutional than the earlier Code. The 1985 Constitution, which is still in force, guarantees freedom of religion to all Sudanese, not just non-Muslims. Criminalization of apostacy, even when applied only to Muslims, is nevertheless a deprivation of religious freedom. Similarly, the *hadd* punishments violate the freedom from inhumane punishment under article 29 of the 1985 Constitution just as they violated article 72 of the 1973 Constitution, regardless of application. Finally, the imposition to Muslims of a set of laws different from those applied to non-Muslims violates the equal protection guaranteed by article 17(1)(2) of the 1985 Constitution regardless of the justifications. The result is that the 1988 Penal Code, assuming that it contains the provisions reported, violates the 1985 Constitution in much of its proposed application and reverts Sudanese criminal law to its status under the Numeiri regime; unacceptable to Muslims and non-Muslims.

VII. Conclusion

To correlate the continuing problem of the co-existence of a Sudanese constitution and *Shari'a* Law, remember first that *Shari'a* Law is an ancient religious doctrine and was applied in its strictest form from 1884 to 1898 in Northern Sudan; Southern Sudan was autonomous and applied secular laws. After 1898, the British spent fifty-four years diluting *Shari'a* Law with English common law and the *hadd* punishments were no longer applied. Freedoms of religion, speech, privacy, equal protection, and freedom from cruel and unusual punishments existed for all Sudanese.

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181. *Id.*
182. When Numeiri promulgated *Shari'a* Law in 1983 it was also under the alleged non-applicability to non-Muslim. Within one year, however, flogging of non-Muslims for alcohol consumption became commonplace and at least seven non-Muslims had been sentenced to amputation. Fluehr-Lobban, *supra* note 62, at 199; Sudan, 1984 I.C.J. Rev. 30, 30.
184. 1985 *CONSTITUTION,* *supra* note 9, art. 18.
In 1954, the British relinquished control of the entire Sudan (Muslim North and non-Muslim South) to the Muslim leadership in the North and left the country to its own rule. During the ensuing twenty-nine years the Sudanese government was overthrown three times for various political reasons with each new government drafting a new constitution containing fundamental personal liberties and continuing to apply the British/Islamic hybrid criminal laws which conceptually conformed to each constitution.

The problem of constitutionality with respect to Shari'a Law began in 1983 when the Numeiri regime, which had enacted its constitution in 1973, abrogated the British/Islamic laws in favor of strict Shari'a Law which contained provisions in violation of the existing constitution. This resulted in the overthrow of the Numeiri regime in 1985, the creation of another new constitution containing the same fundamental personal liberties, and the return to a criminal law system similar to that successfully applied in the Sudan for eighty-three years. In 1988, however, the new government returned to the same Shari'a Law which it disfavored to such an extent that the Numeiri government was overthrown. The first question that one poses is, “Why?”; but the answer is not yet known. The second inquiry is, “When is the next coup?”

From an American perspective, Shari'a Law may never be constitutional because by its very nature it infringes upon the fundamental rights of freedom of religion and freedom from cruel and unusual punishment. Codification of Shari'a Law in its strict form also may never be constitutional unless the freedom of religion and the freedom from cruel and unusual punishment provisions are omitted from the constitution or the offense of apostacy and the hadd punishments are omitted from codified Shari'a Law. If one of these alternative solutions is applied equally to Muslims and non-Muslims, Shari'a Law and a democratic constitution may be able to co-exist in the Sudan. Until then, the fighting continues.

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