

Where Now for Iraq? Lessons from Sudanese Legal History.¹

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This paper has been written during an internationally problematic period culminating in the use of military force to bring about disarmament in Iraq. The regime change that has come about as a consequence of this was arguably a central aim of the military operation². After the fall of Saddam Hussein's government many suggestions have been made as to the nature such a change should take. One model mooted, prior to the war, at a conference of religious, political and military ex-leaders from the region held in London on 14 December 2002 was a system of subsidiary governance.³ More recently, reporters have speculated about what would happen next, many considering that some form of shared governance might be one way forward.⁴ It is certainly clear that the British Prime Minister, Tony Blair intends to form a government made up of Iraqi people. After a continued period of Anglo-Egyptian rule, Sudan was left to establish its own government. Reflection on how the legal regime of Sudan grew out of this as well as consideration of the reasons for its eventual failure may teach us valuable lessons about how to deal with similar situations.

A Unique State

The Sudanese legal system was one of subsidiarity. There have existed, and do exist, legal regimes in which degrees of legal power are exercised at levels closest to those who experience their effect, as opposed to closest to the exercise of central power. Federal systems, where different states exercise some degree of control over their individual legal regimes, exist in countries such as Germany and the United States. Other nation states recognise certain tribal legal norms as existing alongside their own such as Australia's recognition of the Aboriginal customary law of 'payback'.⁵ However, few other regimes have experienced a period of such recognition of tribal and cultural legal differences as that of the Sudan.

Relativist legal systems tend to exist after some system of colonial rule ends. The new regime attempts to create a modern legal system that takes in the views of the many interested groups. Often after colonial rule, countries are left with arbitrary borders that bear little or no relation to the traditional tribal boundaries that exist. This forces post-colonial countries to create a legal regime that fairly represents cultural and ethnic diversity whilst enforcing some coherent legal order. Sudan is one such country. Sudan is the largest country in Africa

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² "...our partners in Washington are less interested in disarmament than they are in regime change in Iraq" Resignation speech of the Rt. Hon. Robin Cook before the Parliament, 17th March 2003 (<http://robincook.org.uk/cook/robin.htm>)

³ P. Cockburn, 'Mint Tea and Turbans as East Meets West in an Edgware Road Hotel', *The Independent on Sunday*, 15 December 2002, 16.

⁴ For example, see M. Colvin, 'And on the Day After Victory...', *The Sunday Times*, 9 March 2003, 11

⁵ For discussion, see M. Finnane, 'Payback', Customary Law and Criminal Law in Colonised Australia', (2001), *Journal of the Sociology of Law*, 29, 293-310.

covering approximately 100,000 square miles. It borders countries as diverse as Libya and Egypt to the north, Ethiopia to the east, Kenya, Uganda, Zaire and the Central African Republic to the south and Chad to the west.⁶ Sudan has traditionally been divided into two groups, the Muslim Arabs who inhabit northern Sudan and the Christian Africans who inhabit southern Sudan. Yet, such groupings are perhaps naïve, as the southerners are largely tribal. Thus, there exist many groupings in the south each expressing their own cultural and religious traditions. Whilst Christianity may be prevalent in the south, many tribal religions still exist. A lot of tribal traditions have been absorbed into Christianity, creating an array of denominations or versions of Christianity. Further, a distinct group of western Sudanese exist that is considered by the northerners to be a distinct and separate group of people. The massive refugee and émigré populations that exist in Sudan further this ethnic diversity.⁷

History

In order to understand Sudan's legal history, it is important to be aware of the region's political history.⁸ Northern and southern Sudan were separate until 1821. The former formed the region known as Nubia, and the latter, the Nilotic region. Egypt penetrated the Nubian region from the period of the Old Kingdom⁹, declaring it a province of Egypt prior to the forming of the 18th dynasty until ended in the 8th century BC by Nubian revolt. A succession of independent kingdoms subsequently followed. The southern region has a poorly documented history and appears to have endured a somewhat uneventful history as a black African region occupied with agriculture. The Islamic prophet Muhammad died in 632 BC and shortly afterwards Arab armies carried Islam towards northern Africa. By 643 BC, the Arab armies had taken control of what is now Libya, but attempts to invade Nubia in 642 BC and 652 BC both ended with Arab withdrawal.

Egypt finally took control of Sudan in 1821 when Egypt was part of the Ottoman Empire. The British took control of Sudan in the 1870's and Charles George Gordon, a British soldier, became Governor General in 1877. Throughout the 1880's, Madhist¹⁰ forces attempted to take back control of Sudan. Eventually, Prime Minister William Gladstone sent over relief forces to repel the Madhists, however, large parts of Sudan fell to the Madhists. Only small pockets of Sudan, remained under Anglo-Egyptian rule. In 1899, Sudan was regained by British forces and returned to Anglo-Egyptian rule. The Egyptians became resentful of British authority in the region, and after some negotiation a treaty was signed between the two nations in 1936 that confirmed the original convention entered into in 1899. This did not appease Egyptian concerns and negotiations to revise the 1936 treaty were instated in 1946. The Egyptian government wanted a complete British withdrawal from the region. This was in sharp contrast to the British who were only willing to modify the existing regime. Negotiations ended in deadlock.

Nonetheless, while Egypt and Britain disputed control over the Sudan, the region itself remained relatively quiet during the 1920s and 1930s. Britain exercised control through local tribal leaders, gradually devolving judicial functions to those leaders. This marked the beginning of a decentralised legal regime. Sudan remained under Anglo-Egyptian rule until 1956, although a democratically elected Parliament was established in 1953. It was this Parliament that requested Sudanese independence. The British granted this request on 1 January 1956. In 1958, the democratically elected government was overthrown in a military coup. The Abbud military government then took control of Sudan until 1964. A mass strike, referred to as the "October Revolution of 1964", brought about the demise of the military government. Democracy was re-instated for a brief period until 1969. At this time, another

⁶ See Appendix for a map of the region.

⁷ Due to the commandments of Mohammed in the Qu'ran to offer help to all who ask Sudan does not turn away refugees and has émigré populations from the majority of its neighbouring countries.

⁸ A simplified outline of Sudanese history is included as a timeline in the appendix.

⁹ 2575-2134 bc

¹⁰ An islamic religious order.

military group, this time led by Colonel Jaafar an Nimeiri, seized power. Several small military coups occurred in the interim and control changed hands relatively often. In 1989, a military coup brought General Omur Hassan al-Bashir, leader of the Revolutionary Command Council to power. The Government then held democratic elections in 1996 and brought in a new constitution. The constitution was approved by public referendum in 1998. Presently, the Government is engaged in a civil war against the non-Muslim black African south and are enforcing policy viewed by some as akin to cultural genocide.

The Legal System

Towards the end of Anglo-Egyptian rule until the introduction of Shar'ia law in 1986, Sudan had a legal regime that embraced different religious, cultural and tribal beliefs. This system ended in 1986. The system relied on a balance of power with each group co-existing with other groups but no group taking total control. Effectively, the Sudanese legal system was based on a form of trust relationship.¹¹ When the balance of power shifted and one group was able to successfully control other groups, the fragile and balanced trust relationship was betrayed and ceased to operate. Yet, while this trust relationship operated, Sudan experienced a period of legal relativism that was unique. Sudanese law attempted to recognise differences of belief and culture that existed within the different groups within its borders. The Sudan had a common law system based on the principles of 'justice, equity and good conscience', akin to the Indian Penal Code, which attempted to "... reflect and accommodate the local traditions and practices [of different groups] ... [creating] ... a set of rules suited to local traditions and needs..."¹²

The flexibility of the old Sudanese legal system is still exemplified not just in minor matters but also in the interpretation of the law of homicide. Whilst local courts can try 'minor' matters (essentially all matters except homicide), homicide may not be tried in such courts. Moreover, the legal regime still recognises differences in belief and culture in homicide trials. Examples of this differing application can be seen throughout the Sudanese law of homicide. The Sudanese law of homicide recognises supernatural belief as a defence and displays compassion to defendants in decisions regarding infanticide of illegitimate children. It also has differing rules applied to fighting when it occurs in different tribal traditions.¹³ Examples of superstition as a reason for killing exist throughout Sudanese culture. For example, the Nuer tribe of East Africa believe that if an infant is born deformed, it is the infant of a hippopotamus mistakenly born to human parents. Consequently, the infant should be returned to its hippopotamus family by throwing it into the water.¹⁴ The belief is central to the Nuer culture and there can be little doubt that it is a genuine and strongly held spiritual belief. It is also claimed by some in Sudan that young female tribeswomen have been buried alive because they had green eyes. Green eyes, it is believed, indicate demonic possession. There exist no reports of prosecutions brought in these situations. Credence, thus, may be given to statements received by the author whilst in the region that such incidents were not prosecuted.

Like many legal regimes, the Sudan legal system recognises mistaken belief as a partial or total defence to murder. In the case of *Sudan Government v Ngok Keir*¹⁵, a man's sentence was reduced after he speared a tribeswoman whom he mistakenly believed was a marauding monkey in a densely planted area. Vasdev argues that this was decided wrongly¹⁶ and that such a mistaken belief is a total defence to murder. Vasdev holds that the case should have

¹¹ For further discussion, see P. Lenard, 'Ethnicity, Disagreement, (Dis)trust and Democracy', *unpublished*

¹² M. Zaki, *The Common Law in The Sudan*, (Clarendon Press, Oxford, 1971), p. 89

¹³ Vasdev has a sub-chapter devoted to Nuba fights. K. Vasdev, *Law of homicide in the Sudan*, (London and Boston, Butterworths, 1978) pp. 318-20.

¹⁴ H. Kuhse, *The Sanctity of Life Doctrine in Medicine; A Critique*, (Clarendon Press, Oxford, 1987) pp. 202-19

¹⁵ (1953) unreported.

¹⁶ *Supra* 132

been decided along the lines of a later case¹⁷ where a man was acquitted for spearing a woman he mistakenly believed was a wild beast.

Sudanese law offers a further unusual, and separate, defence of supernatural belief. This defence applies when the defendant held an honest and reasonable¹⁸ belief that the victim was a supernatural creature. There appear to be only four cases in which this defence was raised, three of which are unreported. In one case¹⁹ the defendant's sentence was reduced to 6 years. He raised the defence after spearing a 60-year-old man he met at night on a road believed to be haunted, the man had his head wrapped against the cold and it was believed this could have caused confusion. In all the subsequent cases, the defence has been accepted and a total acquittal granted. Subsequent case law has held that this is a total defence. In *Sudan Government v Abdel Rahman Yacontu Daw El Bet*²⁰, the defendant raised the defence after he threw stones at an elderly and infirm man before repeatedly cracking the man's skull with an axe. Defendant believed his victim to be an evil spirit. In *Sudan Government v Mirghani El Tahir*²¹ the defendant, an 18 year old shepherd, stabbed his 15 year old friend three times after the defendant woke up to see his friend standing over him. Defendant believed his friend was a ghost. In a similar case²², a man looking for a cow beat a man in black to death with a stick. The defendant here again believed his victim to be an evil spirit.

Sudanese law in general also exemplified this flexibility, The Peoples Local Courts Act (1971), recognised local courts such as Chiefs' Courts, Native Courts and Peoples' Councils Courts as having legitimate power to confer judgements and sentencing²³ in all cases other than homicide. Case law clearly indicates that the views of these courts were respected on appeal.²⁴

Conclusion

In the example of the Sudan, pragmatism achieved a society in which differing values and beliefs were safeguarded and respected without the need to impose one's beliefs onto another. The system worked by recognising differences between people and allowing them to be treated differently based upon these differences. Whilst there are strong arguments to support the view that one should respect the beliefs of others, when the law is this flexible legal certainty is surrendered. One role of legal rules is to define what is acceptable practice in order to allow the operation of society. This is not to take a deontological view and say there are absolute moral rights and wrongs but rather there is a necessity for society to decide on a series of basic legal rules in order to facilitate its operation. Whilst Sudanese law was very successful in recognising differences in belief, it failed to establish legal certainty and

¹⁷ *Sudan Government v Mejei Mberte* (1961) SLJR 29

¹⁸ There is no clear definition as to what 'reasonable' means in this context. The case law does not discuss this. It appears that if one can demonstrate that the belief was honest, then reasonableness is assumed.

¹⁹ *Sudan Government v Muhamed Ahmed Mohamed Mohamedin* (1948) unreported

²⁰ (1951) unreported

²¹ (1955) unreported

²² *Sudan Government v Abdullah Mukhtar Nur* (1959) SLJR 1

²³ Part II refers specifically to Northern Sudan allowing sentences of up to 5 years imprisonment or fines of up to 5000 Dina (The exchange rate as at May 2001 is 372 Sudanese Dina to £1 Sterling). Part III refers specifically to Southern Sudan and allows sentences of up to 1 year imprisonment and fines of up to 1000 Dina; Part III further established legal centres in the Southern regions called 'Main Peoples' Local Courts' with powers to confer sentences of up to 7 years imprisonment and fines of up to 8000 Dina.

²⁴ Mohammadan law was limited in its application; "there can be no conflict of jurisdiction unless a suit is first instituted in a Mohammadan law court and then instituted before a Civil Court. But in this case there is no suit before a Shar'ia Court." (*Fatma Abdel Rahman v Heirs of Mohamed El Azrak (HC-Revision-5-1956)* [1960] SLJR 1 at 1-2) Customary rights were considered by the courts (*Heirs of Sawiris Mahrous v William Morgos Mahrous (DPC-CS-210-1955)(AC-Revision-129-1957)*, [1960] SLJR 15). Consideration was made for the varying levels of literacy and education that existed; "Where an offence requires knowledge of the promulgation of an order such knowledge cannot be imputed from mere publication of such order in the local press and on public notice boards" (*Sudan Government v Abdel Wahats Mohamed and Abdullah El Ballah and Busra El Tayed* (1960) SLJR 98 at 98) and for varying levels of knowledge of the law (*El Khidir El Hag Omer v Alla Mana Farah Massoud (HC-CS-150-1959)* [1960] SLJR 152).

facilitate social interaction. Any future new legal regime based on group power sharing will have to decide where the boundary between relativism and certainty should lie, a decision which will be very difficult to make.

As discussed above, this legal order can no longer be seen in Sudan. Yet, in small peripheral towns such as Shendi, the residue of this legal system can still be felt. In Shendi, although Arabs and Christians live in different areas of town, they work, trade and live together in many other ways alongside a large community of Egyptian Christian refugees who are not tolerated in Egypt. Unfortunately, this tolerance is not seen in the larger picture. Whilst small communities co-exist, there exist rifts between larger groups often escalating to bloody confrontation. How much of this conflict is due to real differences and how much is a direct effect of the government's efforts to exasperate tensions in the southern region to prevent the formation of an effective opposition is difficult to say. The perceived view of Sudan is that it is a deeply divided and bloody country. This negative view fails to recognise that it is a country that enjoyed a period of genuine tolerance exemplified through their legal regime.

Patti Lenard²⁵ argues that societies operate on trust relationships and that any rebuilding of society needs to be established on these relationships. Trust has to be a balance between allowing individuals and groups to act as they wish while establishing a basis of what constitutes an acceptable framework in which these relationships can operate. Any future Iraqi society will have to begin by creating trust relationships between competing tribal groups with bloody histories or by the imposition of the will of one party over others. The former is how Sudan existed prior to the 1980s; the latter is how Sudan operates today. The former raises the myriad of difficulties raised above, while the latter would work to disenfranchise certain groups. This would further inhibit future attempts to create trust relationships.

²⁵ *Supra*

Appendix

Maps of Sudan



1. Map indicating Sudan's position and relative size in Africa²⁶



2. Map indicating Sudan and its neighbours²⁷

²⁶ Adapted from an image at <http://i.timeinc.net/time/reports/heroes/images/map.jpg>

²⁷ Image from <http://www.mapzones.com/world/africa/sudan/sudan.jpg>

Timeline

