



Ending Torture. Seeking Justice for Survivors



The Draft Social Control Act, 2011, for Khartoum State: Flogging into Submission for the Public Order

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1. Introduction

This Paper – written by Dr. Amin Mekki Medani on behalf of the Project for Criminal Law Reform in Sudan – forms part of broader efforts by Sudanese civil society to raise awareness about the repressive nature of Sudanese public order law. This campaign advocates for a repeal or amendment of provisions incompatible with applicable national and international human rights standards.¹ The current draft of the Social Control Act, 2011, for Khartoum State² entrenches repressive features of Sudanese public order law for the capital, which carries particular symbolic weight for Sudan as a whole, and fails to reflect any of the concerns or indeed proposals for change that have been expressed and made in recent years. Besides signalling a lack of responsiveness and willingness of the State legislature to constructively engage in public debates, the current draft demonstrates a disregard for human rights, including in particular women’s rights. This is starkly illustrated in the types of punishment envisaged, especially flogging as a staple sanction for a range of infractions, however trivial. A reading of the draft suggests that the order envisaged by the law is not for the public but imposed on the public. Given the recent history of public order laws, its broad scope further opens the door to arbitrary law-enforcement, often at the expense of individuals and groups who are already marginalised. Indeed, the very name of the draft law makes its use as a tool of control explicit and does not bode well for the post-separation period in Sudan.

Public Order Acts are certainly not an innovation or creation of the current Government of Sudan (GoS). Most countries, either at central or, most likely the municipal levels, have legislation or bylaws (whether known as Acts, Ordinance, Orders or Regulations) aimed at maintaining public order, health, the environment, safety and tranquillity. Such rules are not restricted to undemocratic or oppressive regimes and can be found under all types of governments. It is an ordinary normal process meant to make life easier, more pleasant and less repulsive or offensive for the whole population, regardless of any political or other motivation. Indeed, as a matter of international law and many constitutions, states are duty-

¹ See, for example, Strategic Initiative on Women in the Horn of Africa (SIHA), *Beyond Trousers: The Public Order Regime and the Human Rights of Women and Girls in Sudan*, A Discussion Paper, Submission to the 46th Ordinary Session of the African Commission on Human and Peoples’ Rights, Banjul, the Gambia, 12th November 2009, available at <http://www.pclrs.org/downloads/Miscellaneous/Public%20Order%20Submission%20Paper%20MASTER%20FINAL.pdf>; Asma Abdel Halim, ‘Gendered Justice: Women and the Application of Penal Laws in the Sudan’, in Lutz Oette (ed), *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan*, Ashgate, 2011 (forthcoming) (Arabic version available at http://www.redress.org/downloads/publications/Transitional_Justice_and_Criminal_Law_Reform_Human_Rights_Perspectives_for_Sudan_Arabic.pdf) and Nabil Adib, *The Public Order Act as an instrument of violence against women*, 2011 (on file with Project on Criminal Law Reform in Sudan).

² The report is based on a draft obtained by the author; the draft has not been made public; neither has it been circulated or introduced in the State legislature.

bound to protect the population against any violation of their rights, including where relevant acts are “committed by private individuals or entities”.³

In authoritarian and oppressive regimes, in addition to arbitrary laws, states of emergency, so-called anti-terrorism legislation, restrictions on freedoms of speech, peaceful assembly, association, freedom of the press, lack of independence of the judicial system, and high handedness of security and police officers subjecting individuals to arrest, detention, torture and imprisonment, the authorities tend also to use “public order” regulations as an added instrument of oppression.⁴ Targets, rather victims, of such practices are essentially political opposition members, NGO human rights activists, trade unionists, students and women. The basic rationale for public order laws in these circumstances is to suppress any opposition to the regime and to stifle any claims or popular demands that seek to realise democratic goals or advocate for better economic, social or cultural conditions of life. Those behind such claims are generally described in the government-controlled media as “power seekers”, “terrorists”, “anarchists”, “agents of foreign powers agendas”, “anti-Islamists” or “perverted youth” seeking to import immoral values into the Islamic society. In such atmospheres what is known as “public order” or “public control” regional legislation is no more than additional venom to silence any opposition or criticism of the regime.

The so-called Public Order legislation owe their origin to the 1983 “Islamization” of society through the introduction of *Sharia* “September laws”, including the imposition of *Sharia huddud* punishments.⁵ Under this pretext the then regime created a reign of terror through declaring a state of emergency which authorized security officers to chase people in their homes, clubs, and then to take them before especially established Kangaroo “prompt justice courts”. These courts tried persons summarily with no right of appeal and instantly enforced sentences of flogging, imprisonment, fine and confiscation of homes or possessions for offences of drinking alcohol, gambling, mixing of sexes without family bonds or unlawful gatherings. These practices were so offensive that momentum for opposition grew speedily, resulting in the 1985 popular *intifada* (uprising) which toppled the Nimeiri regime. However, the democratic governments which ruled the country in the period 1985-1989 failed to repeal the September laws. A military coup d’etat brought the National Islamic Front to power in 1989; the new regime reinstated a state of emergency and a curfew which lasted for a few years. When the state of emergency was finally lifted, the policy of repression started to be implemented through what is now known as “public order” laws passed in each of the fifteen State as a regional law and measure of incrimination of social behaviour considered (by the authorities) as immoral or against the *Sharia*. These Orders prohibit and sanction acts of sedition, unlawful

³ Human Rights Committee, General Comment 31, The Nature of the General Legal Obligation imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para.8.

⁴ See on the panoply of repressive legislation in Sudan, Amin M. Medani, ‘A Legacy of Institutionalized Repression: Criminal Law and Justice in Sudan’, in Oette, *Criminal Law Reform and Transitional Justice* (forthcoming) and for an overview of applicable international standards, *ibid.* (Available in Arabic at http://www.redress.org/downloads/publications/Transitional_Justice_and_Criminal_Law_Reform_Human_Rights_Perspectives_for_Sudan_Arabic.pdf)

⁵ *Huddud* punishments comprise death by stoning, crucifixion, amputation, cross amputation and flogging.

assembly, waging war against the government, rioting, offences affecting public health, safety, decency and morals. In addition, the present 1991 Criminal Act penalizes sedition, terrorism, rioting, disturbing the public peace, polluting the environment, public nuisance, drinking alcohol and gambling, sale of noxious food, insulting religious creed, gross indecency and offending public morality, the latter particularly in its article 152.⁶

It is noticeable that these public order laws, which are now common in all Northern Sudanese States, tend to emphasize three main areas: firstly, provisions relating to health, hygiene, environment, cleanliness that seek to promote and ensure order and social tranquillity; secondly, social values and public morality; thirdly, adherence to so-called Islamic principles and values in social life.

It is readily apparent that the first objective is both acceptable and desirable for the sake of all people, wherever they may be, regardless of the nature of the political regime in office. However, the obligation of the citizen to comply with relevant requirements presupposes that the government, for its part, fulfils its duties towards the citizens in return for the taxes they pay to it. This includes services such as good roads, drainage systems, efficient public transport, public rubbish and garbage collection bins, public toilets, working drainage systems, a system of social insurance benefits for the poor and the unemployed, old and homeless peoples' residences and residential clinics for the mentally sick. It contravenes basic principles of justice and fairness to punish people for non-conformity to certain standards of behaviour if the required infrastructure – which would allow them to act “lawfully” – is not available.

Second, the question of the so-called moral values of Sudanese society should not be stretched in such a way as to render punishable acts of persons who act within prevailing custom even if considered reprehensible by some, such as selling goods or food or drinks in public wearing “appropriate clothing”, selling cattle outside enclosures, leaving parts of cars, building materials, empty packing boxes, smoking *sisha* in public or leaving broken down vehicles on the road, living in places under construction or planned plots.

Finally, the enforcement by means of punishment of what is assumed to be Islamic values is stretched to prevent acts that are not necessarily contrary to religion as understood in Sudan. In fact some are traditional practices in certain groups within society as, for example, “mixed” dancing, queues of men and women in one line, mixing between men and women in sports, using loudspeakers in parties such as weddings presumably to avoid disturbing neighbours who, as a matter of custom, usually partake in the whole ceremony, or preventing commercial activities when calls for prayer are announced from the mosque.

⁶ Article 152 Criminal Act of 1991: “(1) Whoever commits, in a public place, an act, or conducts himself in an indecent manner, or a manner contrary to public morality, or wears an indecent, or immoral dress, which causes annoyance to public feelings, shall be punished, with whipping, not exceeding forty lashes, or with fine, or with both; (2) The act shall be deemed contrary to public morality, if it is so considered in the religion of the doer, or the custom of the country where the act occurs.”

The State Legislative Council for the capital, Khartoum is now considering a new draft law to replace the existing 1996 one. The organization responsible for implementation of the Act is a Council of Officials constituted by the *Wali* (Governor) of the State of Khartoum, including concerned Ministers, Administrators of local governments of the State and the Director of the State Police, who is also the Director and Rapporteur of the Council.⁷ It is remarkable that the commission includes no civil society representatives, religious persons or experts on social behaviour.

This Paper reviews the proposed legislation in the prevailing socio-political context, the latter being inclined towards so-called Islamisation of public life, even at the cost of rights and freedoms of the individual as recognized by the Bill of Rights included in the Interim National Constitution (INC) and the International Bill of Rights, particularly the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The purpose of the Paper is to contribute, critically and objectively, to the discussion of the proposed legislation in the media and within discussion groups, parliamentarians, academicians and human rights activists. It aims to demonstrate the unconstitutionality of the proposed legislation and its impact on day to day behaviour so that the general public is made aware of the shortcomings of the proposed Act and can take the necessary steps to restore their rights and dignity.

2. The Draft Social Control Act of 2011

2.1. Contents

2.1.1. Introductory Part

Sections 1-8 of the draft legislation deal with the name of the Act (section 1); its geographic application (section 2); repeal of the current 1998 Act⁸ (section 3); definition of certain terms used in the Act (section 4); objectives of the legislation (section 5); and principles of general application (section 6). Section 7 defines the membership of the High Council for Social Protection and section 8 the powers of the Council relating to the realisation of the Act's objectives.

⁷ The Council is concerned with the coordination of official and popular efforts to protect society against assumed harmful thoughts and habits, review plans and programmes aimed at "protecting" society, facilitating the work of the Administration, overcoming obstacles thereto, engaging official and popular efforts for such purposes, assessing the Director in fulfilling his functions, formulating work regulations and any other functions the Council may deem necessary.

⁸ The text of the 1998 Act is available from: http://www.pclrs.org/Khartoum_Public_Order_Act_1998.pdf

Sections 5 of the Act, shows in clear terms the intention of the Act to impose social control rather than “public order”. It describes the objectives of the Act as contributing to ensuring public security and tranquillity, conservation of the social fabric and public appearance. This is to be done in accordance with respectful values, promoting social efforts for the service and purity of society and reinforcing good values and fighting vice and perverted and immoral behaviour.

Section 6 lays down the general principles which govern the application of the Act. These include some general and some supposed Islamic principles of social behaviour such as promoting good values and prohibiting bad deeds. Specialized institutions should promote morality; social progress, purifying society through wisdom and good advice according to law; avoidance of any act which insults or degrades human beings; prevention of all deeds or sayings which result in excitement, unlawful companionship between different sexes, and crowding among sexes except when deemed necessary; abstaining from obstructing resources and pollution of the environment; avoidance of corrupt practices takes precedence over realizing benefits; caring for mentally ill persons and weaker persons by returning them to their families or putting them in care homes; prevalence of wisdom and gradual treatment through advice and advisory guidance first, followed by official dealing and, finally requiring a written undertaking to abstain from unacceptable behaviour or repeating it; and, applying confidentiality and avoidance of publication, whenever possible.

2.1.2. Crimes and Punishments

Sections 9 to 43 of the draft Act define offences that are committed in violation of the Act and set the punishments prescribed therefore. These could be generally described as follows:

Section 9: punishes abetment or aiding a person for the act of becoming a “vagabond” or organizing a group of persons to become vagabonds for up to six months imprisonment or flogging up to hundred lashes. In case the abetted person is a “child” within the definition in the Child Act the punishment may be up to one year imprisonment or flogging up to hundred lashes. The Act defines a vagabond as any person with no apparent or known habitual residence or a means of earning his living. The Section empowers the Administration of the Council to “collect” vagabonds and deliver them to specialized social care homes. No such formal homes are known to exist.

Section 10: punishes “begging in public places” or benefiting from it with up to 50 lashes or one year imprisonment or both. Money obtained as a result of begging is liable to be compensated.

Section 11: A person convicted of organising networks of begging is liable to up to five years imprisonment and a fine. If the network includes children or disabled persons the punishment can extend to ten years imprisonment.

Section 12: The provision punishes collection of donations for charities, without a written permit from the Minister or commissioner concerned according to jurisdiction, with a fine or up to 100 lashes or

both; the acts are also liable to imprisonment of up to one year with confiscation of the benefits obtained.

Section 13: Subject to the relevant provisions of the 1991 Criminal Procedure Act, the Administration may “collect” any mentally ill person from public places and deliver them to mental and psychological health institutions, and may also deliver them to their relatives with an undertaking to keep and care for them. Any person who undertakes to take care of such persons and fails to do so shall be liable to a fine, regardless of rectifying any damage resulting from neglect.

Section 14: Any person who practices, manages or permits the practice of sorcery or witchcraft⁹ may be punishable with up to year’s imprisonment or fine and may be liable to punishment of 100 lashes.

Section 15: Whoever urinates or relieves himself on streets, public areas or water resources shall be liable to up to 100 lashes.

Section 16:

- (1) No commercial activity shall be carried out during Friday’s noon prayers time.
- (2) All commercial shops, clubs, public parks shall be closed at or before midnight except during Ramadan and on occasions decided by the *Wali* who shall determine the closing time then. Any breaches of the provisions of subsection (1) and (2) are to be punished with a fine or up to 100 lashes or imprisonment for a period not exceeding two years, or with both.

Section 17:

- (1) Taking into consideration the current laws regulating trade licenses and business names, no license shall be issued or renewed for any place if the name of that place conflicts with religious beliefs, values, morality or public taste.
- (2) Any person who breaches Subsection (1) shall be punished with a fine and the licence in breach shall be removed.

Section 18:

- (1) Any person who exercises peddling on cross roads and side streets, or exhibits merchandise or goods or offers services in the main markets shall be punished with 50 lashes or imprisonment up to one year or both and the possible confiscation of the goods displayed.
- (2) Except in main markets and town centres, the local authority may issue temporary trade licenses inside smaller markets taking into consideration the requirements of public health, security, traffic, morality and public appearance.

Section 19:

- (1) Sellers of food and tea shall comply with the following:
 - (a) Not engaging in sale except with the approval of the local authority on the recommendation of the Administration.
 - (b) Wearing appropriate clothing and following good conduct and public morality.¹⁰

⁹ This is defined in section 4 of the Draft as verbal or actual practices leading persons to believe in obtaining benefits to him or harm to another including spiritual domination through trances (zar), magic, sand tracking or astrology or any allegations of fortune telling.

- (c) Not exercising their work after 11 p.m.
- (d) Any person who commits a breach of such conditions shall be punished with fine and the Court may confiscate the utilities used.

Section 20:

Persons working in public squares, parks or recreation areas, cafeterias, communication centres, internet cafes, perfumeries, celebration halls, exhibitions, sports areas shall comply with the regulations passed by the Director in accordance with this Act. Anyone in breach thereof shall be punished with a fine.

Section 21:

- (1) No person shall engage in the sale of food or drink during the day time of the month of Ramadan except with the approval of the Commissioner concerned on the recommendation of the Director on exceptional grounds.
- (2) Any person who engages in such sale during the day time during the month of Ramadan without approval shall be punished with up to 100 lashes or imprisonment up to one year or with both.

Section 22:

Any place which operates or shall operate by organizing queues for citizens must separate men from women and the public shall comply therewith. Those in breach of this Section shall be punished with fine or up to 50 lashes.

Section 23:

Taking into consideration relevant local orders, sale of cattle outside enclosures specified therefor by the municipalities is prohibited. Persons in breach thereof shall be liable to fine.

Section 24:

- (1) No building materials or leftovers, containers, vehicle frames, broken down cars may be left in public streets or in front of commercial places. Persons in breach thereof shall be subject to a fine and immediate removal of the item concerned.
- (2) The person responsible for violation shall bear all costs of removal in case he fails to comply with the provisions of Subsection (1).

Section 25:

- (1) It is not allowed to throw away any waste or leftovers in public streets and places in any manner.
- (2) Taking into consideration the provisions of any other law it is not permitted to carry any material which may expose street users to danger or causes pollution of the environment or public street, except after taking all precautionary and safety measure.
- (3) Whoever violates these provisions shall be punished with a fine or flogging up to 100 lashes or both.

¹⁰ Such provision is still widely seen as pretext for harassing “tea ladies” and others. There is no definition of “appropriate” or “Islamic” clothing and women are regularly abused or intimidated and forced to pay bribes.

Section 26:

- (1) It is not permitted to smoke, offer or deal in *Shisha* (hubble bubble) in public places.
- (2) Whoever is in breach of the above shall be punished with a fine and the Court may confiscate the *Shisha* and its equipment.

Section 27:

It is not permitted to smoke or use *tumbak* (snuff) in public transport vehicles or closed public places. Any person in breach of this shall be punished with up to 100 lashes or a fine.

Section 28:

It is not permitted to wash vehicles on paved roads, parking areas or public parks, except in places designated for such purpose by the municipality. Any person in breach thereof shall be punished with a fine or up to fifty lashes or both.

Section 29:

Subject to the current law of traffic *ragshas* (rickshaws) cannot be used for passenger transport or goods between 12:00 midnight until 6.00 a.m. subject to imposition of a fine.

Section 30:

Carts pulled by animals shall not be used for any purpose or on any paved roads and main markets and town centres, subject to the imposition of a fine.

Section 31:

- (1) The following conditions shall apply to the use of microphones or commercial generators in residential areas:
 - (a) Generators shall be affixed to a base to prevent vibration in land and neighbouring buildings;
 - (b) Observing measures of safety;
 - (c) Exhaust pipes shall be supplied with a pipe to reduce the degree of noise.
- (2) Anyone who breaches these conditions shall be subject to a fine and removal of the cause of breach

Section 32:

Loudspeakers and recording equipment shall not be used at commercial places and public transport in a manner that may cause disturbance, subject to a punishment of a fine or flogging up to 50 lashes, or both.

Section 33:

- (1) No private parties can be organized except with the approval of the Director and the organizers, persons attending, the singer and his group shall comply with the following:
 - (a) Not to disturb public peace and order;¹¹
 - (b) Not to use firearms;
 - (c) Conform to decent dress;¹²
 - (d) Prohibition of mixed dancing;

¹¹ The Act does not define public peace and order, or disturbance thereof.

¹² The Act does not define what constitutes "decent dress".

- (e) Not to use the microphone during prayer hours;
 - (f) Not to extend the party beyond 12:00 midnight;
 - (g) Not singing "lowly" songs.
- (2) Any person who breaches Subsection (1) shall be imprisoned with fine and the equipment and devices used may be promptly confiscated.
- (3) If the party is in a public place the authority responsible for managing the place shall be responsible for the punishment for breaching Subsection (1) and the court may in such a case increase the punishment.

Section 34:

- (1) Taking into consideration the conditions stated in Section (32) no public party shall be organized without the approval of the Director of Police, subject to punishment with a fine.
- (2) All conditions stated in Section (32) shall be applied to public parties;
- (3) No parties for graduation from high education institutes shall be held outside the buildings of the institute;
- (4) The *Wali* or person delegated by him may extend the time allowed for the duration of the private or public party in public places, halls and clubs whenever necessary, provided that the time for the end of the party shall not exceed 1.00 a.m.

Section 35:

No person shall engage in the profession of women hair dressing without obtaining a licence from the local authority, on recommendation of the Director and compliance with the following conditions

- (a) Not employing men inside the place;
- (b) Men shall not be admitted inside the place and a sign post to this effect shall be displayed;
- (c) All entrances to the place shall face the public street;
- (d) Any person who breaches this provision shall be punished with a fine or flogging up to 100 lashes.

Section 36:

- (1) No statements may be written or pictures or paintings affixed which are contrary to the faith, public morality, conduct or taste on public means of transport or public places, or advertising any goods or services or theatrical or cinema shows containing pictures or comments repugnant to public morals.
- (2) The local authority shall determine the places for fixtures, writing and advertisements.
- (3) Any person in breach thereof shall be punished with a fine and the substance of breach shall be promptly removed.

Section 37:

- (1) Taking into consideration the current law of building rents, the owner of a building to be rented or his agent, the representative of the estate agency seeking to have the building rented and the Administrative Committee shall inform the nearest police station responsible for the Administration on the location of the building and information on the tenant. Breach of this shall be punishable with a fine.

- (2) Taking into consideration the law of passports and Immigration, the owner of the building to be rented to a foreigner, his agent, and representatives of the estate agency which is engaged in renting the building shall ensure that the tenant and persons using the building is a foreigner lawfully resident in the Sudan. Breach thereof shall be punishable with fine or imprisonment up to six months.

Section 38:

- (1) Taking into consideration the law relating to current tourist business law in the State of Khartoum, owners and agents of furnished places for residence shall comply with the following:
 - (a) To refrain from allowing furnished places to be used for any purposes contrary to public morality and public order;
 - (b) To report to the nearest police station responsible to the Administration all information on the tenant and copy of his identity papers within 24 hours of concluding the contract.
- (2) The Administration shall verify, register and classify furnished places to ensure compliance with the conditions in Subsection (1).
- (3) Any person who is in breach of this Section shall be punished with a fine.

Section 39:

It is not permitted to use a public place for internet network except with approval of the Director, those in breach shall be punished with a fine or flogging up to 50 lashes, or both.

Section 40:

Those in charge of public parks or cafeterias shall comply with the following:

- (a) Adequate lighting for all parts of the place,
- (b) Adequate seating space,
- (c) Those in breach of such conditions shall be punished with a fine.

Section 41:

- (1) It is not permitted to have men and women mixed in the exercise of any sports training of whatever type, whether in public places or parks or closed halls.
- (2) Women and girls must comply with decent dress when exercising any sports in a public place.
- (3) Any person in breach of the above shall be punished with flogging or a fine, or both.

Section 42:

- (1) The following conditions shall be complied with in steam baths and massage parlours:
 - (a) Women and men shall not mix in steam baths and massages;
 - (b) Special places must be restricted for women and directed by women;
 - (c) The activities shall not be commenced without the approval of the local authority after recommendation of the Director;

- (d) No massage of a man may be performed by a woman and no massage for a woman may be performed by a man;
- (2) Any person who commits a breach of Subsection (1) may be punished by flogging up to 100 lashes or a fine, or both, and the place may be closed for a period not exceeding three months.

Section 43:

- (1) It is not permitted to live in unfinished buildings or establishing habitation in planned residential plots to live therein except after making a temporary building for “public convenience”. Engineering departments concerned shall specify the type of such building.
- (2) The following conditions must be satisfied when *Khaffirs* (guards) use building under construction:
 - (a) Obtaining approval of the police;
 - (b) The *Khaffir* must be of good conduct;
 - (c) No family, relative or other person may reside in the building with the *Khaffir*;
 - (d) The *Khaffir* shall not exercise any commercial activities on the site;
 - (e) Information shall be reported of any violation of the environment, public health and public order and security.
- (3) Any person who breaches this Section shall be punished with a fine and any unauthorized buildings shall be removed forthwith.

Section 44:

Without prejudice to the provisions of the applicable Criminal Act any person who commits for the second time an offence provided for in Sections (9), (10), (14), (16), (18), (19), (25), (26), (27), (32), (38), (42), (43) shall be punished with up to 100 lashes or with fine or imprisonment or with all three punishments or any two of them, with the possibility of confiscating the equipment used or closure of the place for up to one year if any of them belongs to the person convicted or was used with the knowledge of the owner.

2.2. Commentary

The foregoing draft of the new Public Order Act, proposed for the capital State of Khartoum, is obviously stricter and harsher than the existing law (1998 Khartoum Public Order Act) which the new law purports to replace. The current law in force has been the subject of continuous criticism for its arbitrary violation of basic human rights and freedoms enshrined in the Interim National Constitution of 2005 and international treaties ratified by Sudan, particularly the ICCPR and the African Charter on Human and Peoples’ Rights.¹³ The proposed draft for the State of Khartoum would most certainly set a pattern for similar laws to be adopted in other Northern

¹³ See above at 1.

States. It is not yet known whether the draft is going to be adopted as proposed. But it would be ironic, and legally peculiar, if it is adopted even before the proposed new Constitution is even drafted, let alone adopted.¹⁴

What is certain, however, is that the proposed draft law, to be called the “Social Control Act” is intended for implementation of the ruling Party’s (National Congress Party) declared programme for governing. The Party’s President (who is also the President of the Republic) has already stated that, following separation of the Southern Sudan, the national identity of the country is an “Arab Islamic State” in which the laws of *Sharia*, indeed as interpreted by the ruling authorities, would be applied.¹⁵

It is clear from the foregoing that the said principles of the law are partly based on Islamic *Sharia* concepts as well as general principles of moral values which may be found in different religions or societies. This commentary is not concerned with the origin or basis of the values principles concerned. It is simply to review them in the light of their conformity or otherwise to the principles of human rights under the INC and in international human rights treaties which Sudan has ratified.

1. One of the important observations is that the Act provides for the punishment of flogging in most of its sections (frequently up to 100 lashes). This punishment has also been one of the prominent features of the 1998 Act. In the 1991 Criminal Act reference is generally made to flogging leaving it to the discretion of the trial court to specify the number of lashes.¹⁶ Only a few sections specify the number of lashes. 100 lashes is obviously excessive both in relation to whatever the number of lashes is specified in the Code or as a cruel and harsh inhuman punishment. Section 35 of the Criminal Act specifies that, except for *huddud* crimes, lashing should not be inflicted on a person who reached 60 years.

It is a universally established principle that whipping or flogging is a degrading and humiliating punishment which has ceased to be applied in all but a handful of countries.¹⁷

¹⁴ The opposition political parties, civil society organisations and others are engaged in (though not necessarily in coordination) preparing working papers on, and draft models for, a new constitution. It is widely believed that the NCP is also (separately and confidentially) preparing its own version. The President has declared that a “National Committee” will be established to draft the constitution but the current process is characterised by a lack of transparency, including lack of clarity about the process itself.

¹⁵ See for example Sharia law to be tightened if Sudan splits- president, BBC News, 19 December 2010, <http://www.bbc.co.uk/news/world-africa-12033185>.

¹⁶ Section 68 of the Criminal Act sets the maximum number of lashes at 20 for the offence of disturbing the peace. Section 78 makes a Muslim liable for up to 40 lashes for drinking, possessing or dealing in alcohol for first offenders and up to 80 lashes for recidivists. Section 125 punishes insulting religion with up to 40 lashes. Section 149 punishes an unmarried person who commits adultery with 100 lashes. Section 149 provides the same punishment for adultery. Section 152 prescribes a punishment of up to 40 lashes for indecent acts against public morality. Section 153 provides the same punishment for acts against public morality. Section 154 sets up to 100 lashes for prostitution and Section 155 provides the same punishment for running a brothel. Section 155 sets up to 28 lashes for insulting a person. Section 174 provides for a punishment of up to 100 lashes for theft.

¹⁷ Most countries have abolished flogging as a punishment, including recently by way of legislative reforms in Kenya and as a result of judicial pronouncements in Namibia, Uganda and Zambia. Only few countries, such as

Even *Sharia* prescribes this punishment strictly for three offences only.¹⁸ The frequent use of this punishment in the Act is a repressive measure which has no religious sanction or support among the Sudanese people. The INC in its Article 27 (3) provides that Sudan is committed to the principles of international human right covenants which Sudan has ratified. Flogging is considered an inhuman and degrading treatment under the 1984 Convention Against Torture. Although Sudan has not ratified the Convention, it has signed it in 1986. Under the Vienna Convention on Interpretation of International Treaties, 1969, a state which has signed (but not ratified) an international treaty is bound to refrain from any acts which are tantamount to violation of the treaty in question, in this case the infliction of any punishment which is tantamount to a violation under the 1984 Act. Moreover, both the Human Rights Committee responsible for monitoring state compliance with the ICCPR and the African Commission on Human and Peoples' Rights responsible for monitoring state compliance with the African Charter on Human and Peoples' Rights have found that corporal punishment is incompatible with the prohibition of torture and inhuman treatment or punishment.¹⁹

The so-called "Islamic" mentality of the present lawmakers may best be described by a provision in the Explanatory Memorandum to the previous Penal Code of 1983, which purported to introduce *Sharia* Law. Note No.7 on inflicting punishment provides that "the magistrate should continue the punishment of flogging in the offences of *huddud* even after the death of the culprit to complete his purification before God"!

2. Section 9 of the draft Social Control Act punishes abetment or organization of vagrancy, a "vagrant" being defined as a person with no human habitual residence or a known vocation or clear means of livelihood. By contrast, section 450 of the 1983 Penal Code defines vagrancy as a consequence of unemployment, defining an unemployed person as someone with no known habitual residence or known vocation or clear means of livelihood. An unemployed person is someone who is fully or partly capable of supporting himself or his or

Botswana, Iran, Northern Nigeria, Saudi Arabia and Singapore, have retained flogging as corporal punishment, see study prepared by the SOAS Human Rights Clinic 2010/2011 for the Project for Criminal Law Reform Sudan (on file with PCLRS).

¹⁸ *Sharia* explicitly provides for flogging for the crimes of adultery (*zina*), unfounded accusation of adultery (*qazf*) and drinking of alcohol (*shurb al khamr*) only.

¹⁹ See Human Rights Committee, General Comment 20, Article 7 [concerning prohibition of torture and cruel treatment or punishment] (1992), UN Doc. HRI/GEN/1/Rev.1 at 30 (1994), para.5; Human Rights Committee, General Comment 28: Equality of rights between men and women (article 3), UN Doc. CCPR/C/21/Rev.1/Add.10 (2000), para.13 (on dress codes and corporal punishment). See further *Tyrer v UK* (1978) 2 EHRR 1; *Osbourne v Jamaica*, UN Doc. CCPR/C/68/D/759/1997, 13 April 2000; *Higginson v Jamaica*, UN Doc. CCPR/C/74/D/792/1998, 25 June 2002; *Caesar v Trinidad and Tobago*, Inter-American Court of Human Rights, Judgment 11 March 2005, Series C. No.123. See on Sudan in particular Human Rights Committee, Concluding observations of the UN Human Rights Committee: Sudan, UN Doc. CCPR/C/SDN/CO/3/CRP.1, 26 July 2007, para.10: "[The Committee] considers that corporal punishment including flogging and amputation is inhuman and degrading"; and *Doebbler v Sudan*, African Commission on Human and Peoples' Rights, Communication 236/2000 (2003), para.42: "There is no right for individuals, and particularly the government of a country to apply physical violence to individuals for offences. Such a right would be tantamount to sanctioning State sponsored torture under the [African] Charter and contrary to the very nature of this human rights treaty."

her family and neglects or refuses to do so, or a person who wanders in the streets and public places begging or collecting alms or induces or encourages children to do so unless he is unable to earn his living because of age or incapacity, and a person who has no settled residence or obvious means of livelihood and cannot give adequate information about himself. Strangely enough this definition is followed by a repugnant and blatantly discriminatory if not racist provision stating that if the person in question is an “Arab” he cannot be convicted if he has no place of habitual residence if he shows obvious means of livelihood or gives adequate information about himself. The section then proceeds to define vagrancy as relating to any person who was convicted as an employed person who thereafter commits one of the same offences again.

The problem with the punishment of vagrancy, beggary, and soliciting donations in public and unemployment in a country like Sudan is that it does not take into account the realities of the socio-economic conditions in the country. Sudan is one of the poorest nations in the world, with one of the lowest per capita income and highest rate of unemployment as well as very poor health, education, residential and environment services. With no homes to accommodate and care or any social benefits for the unemployed, it is not abnormal for a large number of victims of such circumstances to resort to begging, loitering or sleeping in the streets. Subjecting them to conviction and punishment, instead of care and attention, would be adding insult to injury. Needless to say, those who do commit such offences - which, incidentally, do not cause any apparent harm to the personal integrity or harm of others - under such dire situations are unlikely to take notice of the law.

3. Prohibition of exhibition of merchandise or peddling in the streets and in the centre of towns to comply with the demands of public order ignores the needs of the poor to find means of earning a living, including the sale of quick meals, tea, coffee or ground nuts in public. Again, treatment of the cause should come in a welfare State where the livelihood needs of the population are necessary elements in a democratic society in which a popularly elected government would depend for its survival on satisfying the basic economic, social and cultural life of its people i.e. education, job opportunities, health facilities, housing, a good transport system, a clean environment and a system of accountability for good or bad governance.²⁰ In the absence of such a system, citizens cannot be expected to meet unrealistic goals and, worse still, to be punished for opting to create their own means of survival and livelihood.

4. Other main provisions of the Act endeavour to impose a moral code of conduct or ethical values, assumed to be based on the *Sharia* and assumed moral values of Sudanese society. Neither premise is convincing. First, “Sudanese” should include (even after the separation of South Sudan) a large number of non-Muslims, including people of Southern Sudanese descent who opt to stay in Khartoum and elsewhere, some small Arab Community in the

²⁰ Sudan is also obliged to provide for economic, social and cultural rights under the ICESCR and the African Charter on Human and Peoples’ Rights, particularly articles 15-24.

North and a larger number of citizens of African descent in the West and Southern Blue Nile. Needless to say, those people have to have their faith, values and traditions respected. As for Muslims, Sudanese are generally known for respect of their religious faith and values, and there is neither an established tradition nor need to have their moral codes enforced through penal legislation. Their resort to begging, peddling goods in public, loitering, sleeping in the streets is solely caused by lack of education, housing, and scarcity of jobs and means of livelihood. Waste and lack of environmental awareness is due to the absence or shortage of such culture, programmes and resources being provided by the Government, which is due to wrong spending priorities. Prevention of women companionship, mixing in sports, mixed dancing, and so-called decent dress is a projection of a fundamentalist Islamic view of the man as a raving maniac and the women as an easy prey or sex target, which, again, does not reflect gender roles and relationships as traditionally understood in Sudan.

3. Concluding Observations

The above commentary shows that the cumulative effect of the provisions of the draft Social Control law, intended for application in the State of Khartoum, violates several basic rights and freedoms of the INC and the International Bill of Rights. It also contains several provisions of offences already defined and punishable under the Criminal Act in force in the country, though with some variations. Some of the offences in the draft Act are also made punishable with imprisonment, fines or flogging without specifying the maximum length of the period of imprisonment, the amount of the fine to be imposed or the number of lashes to be inflicted. This seems to be left exclusively to the Magistrate trying the case, which raises the spectre of arbitrariness. No reference is made to the procedure to be applied at the trial, especially the right of appeal and the powers of the appellate authority in relation thereto. In almost all cases punishment, especially flogging, is imposed immediately upon pronouncement of sentence, rendering the possibility of appeal, if any, of no real value, the damage already having being done.

Some aspects of the Act purport to address issues which, at face value, seem reasonable and desirable. Examples of this are the provisions governing vagrancy and beggary, cleanliness of the environment and public places, nuisance to others, unlawful peddling, sale of food, tea and coffee in public etc. However, such otherwise desirable objectives must not be enforced by threat of disproportionate punishments. The prohibition of the sale of such items during the month of Ramadan should take into consideration the number of Sudanese non-Muslims, and foreign nationals who would have to satisfy their thirst or hunger even during Ramadan. Also, prohibition of throwing away garbage and litter requires civil education, public media campaigns and supply of items such as bins, barrels, collection vehicles, public baths in the streets and squares. Civil education through the family, school curricula, the media, civil society etc. are prerequisites for raising awareness among the general public, which should come before inflicting punishments, particularly on marginalised and impoverished citizens looking for sources for their and their children's next meal.

Other provisions of the Act, supposed to be based on principles of *Sharia* and/or Sudanese traditions and values, are no more than restrictions on individual and public freedoms imposed to supplement the official policy of individual repression and suppression of gatherings and public assemblies. It facilitates if not perpetuates a climate in which security and public forces arbitrarily exercise their broad powers, in addition to enriching or subsidizing some of them who would be only too happy to allow the alleged “violation” against a small amount of money given to them as a bribe to permit the activity in question.

Examples of the prohibited activities, many of which clearly have a gender dimension, i.e. a disproportionate impact on women, include: separation of women from men in any places requiring persons to stand in queues, organizing a private party in or outside the house except with approval of the Director, obligation to wear “decent dressing” described as a dress which shows part of a woman’s body which “*Sharia* requires to be covered” (whatever that means), mixed dancing i.e. between a man and woman!, singing lowly songs, organizing a public party except with approval of the Director of the Police, organizing graduation parties of higher educational institutes outside the buildings of the institute, opening women’s hairdressing places without approval of the local Council or employing men in or allowing them to enter such places.

In conclusion, the proposed State of Khartoum Social Control Act, which would in most likelihood be applied in one form or another in other States, is no more than yet another piece of legislation, complementing existing national legislation affecting citizens public and private rights and freedoms (the State Security Act, the Trades Union Act, the NGO Law, the Press and Publications Act, the Anti-Terrorism Act, the Penal laws affecting freedom of assembly and of expression etc.) that are unconstitutional and violate Sudan’s international human rights treaty obligations.²¹ The proposed State of Khartoum Social Control Act for its part raises serious concerns about its compatibility with a series of obligations binding Sudan under international law and guaranteed in the Bill of Rights. This includes the principle of legality, which requires that offences are clearly defined; the right to liberty and security (prohibition of arbitrary arrest and detention), which requires that arrests must not only be lawful but also not be arbitrary (unreasonable) and the right to a fair trial, which includes the right to a defence and the right to an appeal.²² Sudan’s international obligations also comprise freedom from inhuman, degrading or cruel punishment, which prohibits flogging. The ICCPR in particular requires that the state does not arbitrarily interfere with someone’s privacy or family. In addition, freedom of expression and of assembly may only be restricted if necessary and proportionate for “respect of the rights or reputation of others; [or] for the protection of national security or of public order, or of public health or morals”.²³ The draft law also raises concerns over its compatibility with the principle of non-discrimination, according to which “rights must be recognised ...

²¹ See for a comprehensive analysis, Medani, *Legacy of Institutionalized Repression*, supra.

²² See for an overview of relevant international standards, *ibid.* Part II. Introduction to I, II and IV respectively.

²³ See articles 19 and 21 ICCPR. See on the interpretation of relevant terms and standards in this context particularly Human Rights Committee, General Comment 34: Article 19 (Freedom of Opinion and Expression), UN Doc. CCPR/C/GC/34, 21 July 2011, paras.21-49.

without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".²⁴

Finally, the timing of drafting the Social Control Act, even before the new Constitution is adopted, calls into question the government's commitment and future policies for the protection of human rights.

4. Recommendations

Following from the above it is recommended that:

- (a) the proposed draft Social Control Act should not be adopted; a revised text may only be adopted after the National Constitution comes into force to avoid any conflict with basic human rights and freedoms;
- (b) the punishment of flogging should not be imposed for any offences, being contrary to the prohibition of torture and other cruel, inhuman and degrading treatment or punishment;
- (c) the National and State Governments shall ensure that national programmes in educational curricula and the media should include provisions for raising public awareness on public order, public security and tranquillity, health precautions, the environment, civics and the duties of individuals towards fellow citizens;
- (d) beggary, loitering in public, peddling, living in slums and building sites, wandering on the streets of mentally sick persons or street children are not crimes to be treated by penal measures but rather symptoms of poverty and underdevelopment, requiring urgent political and social curative measures through the creation of jobs, housing the old and poor homeless, provision of public baths, care for street children, medical institutions for the mentally sick, with efforts by the Government, civil society and the international community;
- (e) some social habits and gatherings that are customary in the community, especially among non-Muslims or those of African origin, be tolerated rather than outlawed and punished, which reinforces vulnerabilities and stigmatisation;
- (f) Public Order laws should be gender sensitive and conscious of customs which enable men and women to be together in sports social events or the workplace, so long as offensive behaviour is avoided.

²⁴ Article 2(1) ICCPR.