THE FAILURE OF CONTINENTAL CODES IN THE DEMOCRATIC REPUBLIK OF THE SUDAN — AN ANALYSIS[1]

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The Sudan government's introduction on October 21, 1971 of the new Civil Code was a bold decision to re-determine the sources of its laws. During the next year the government added the Civil Pleadings Code, the Civil Evidence Code, and circulated drafts of a Commercial Code and a Penal Code. The Sudan Civil Code was similar to the Egyptian Civil Code, written in Arabic, but derived from French-continental codes, as were the other codes being introduced in 1972. Although the newly independent nations of Africa have given special attention to customary or religious law, the vast area of "lawyers' law" (for example, company law) has reflected the modern legal system used by the former colonial power. Prior to 1971, the Sudan's lawyers' laws were in the common law tradition, either through judge-made decisions in areas such as torts and contracts, or by codified versions of the common law[2]. For example there was a statutory version of English criminal law, which was further developed by local judicial interpretation. The shift to continental codes was therefore a dramatic legal development in the Sudan. But within ten months after the introduction of the Civil Code, the major question was not whether the code was working, but whether it would be retained long enough to see if it would work. The promulgation of more continental-based codes in 1972 coincided not with greater acceptance of the changes, but with increasing opposition. The government's appointment in early October, 1972, of Sayed Mohamed Ahmed Abu Rannat, a retired Chief Justice, as chairman of a select committee to investigate the new codes, may be taken as the turning point away from the new laws and back toward the common law tradition in the Sudan[3]. The appointment of Dr. Zaki Mustafa, a vigorous critic of the new codes, as Attorney-General in mid-1973 was the moment of the symbolic and literal defeat of the codes[4]. In a period of approximately two years the attempted

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1 The analysis is based upon the author's experience at the University of Khartoum 1961—65 and visits averaging six weeks or more in 1966, 1967, 1969, 1972, and 1973. During 1972 the author at the invitation of the University of Khartoum and the Ford Foundation was doing an evaluation of the Sudan Law Project, which involved more than 100 interviews. Some 30 of them related specifically to the subject of this article, which in a simpler form but with substantially the same substance was written as a background paper for the longer evaluation presented in July, 1972. During 1973 the author was serving at the invitation of the University of Khartoum as an External Examiner in law, and the visit allowed an updating of the article.
See Zaki Mustafa, Opting Out of the Common Law: Recent Developments in the Legal System of the Sudan, 1973 J. African L. 133 which was written while he and the author of the present article were serving together at the Law School of Haile Sellassie I University in Ethiopia. The two articles provide different but complementary perspectives on the issues.

2 See generally Thompson, The Sources of Law in the New Nations of Africa: A Case Study From the Republic of the Sudan, 1966 Wisconsin L. R. 1146 (reprinted in AFRICA AND LAW 133 [Hutchinson, Ed. 1968]), or The Formative Era of the Law of the Sudan, 1965 Sudan L. J. Rep. 474. Persons interested in further documentation on Sudan law are referred to the sources quoted in the preceding. Documentation in this article will mostly be limited to more recent materials.
Important recent sources are: Zaki Mustafa, COMMON LAW IN THE SUDAN (Oxford, 1971); G. A. Lutfi, The Future of the English Law in the Sudan, 1967 Sudan L. J. Rep. 219; and with special emphasis on personal laws but with broad interest, Natale Akolawin, Personal Law in the Sudan — Trends and Developments, 1973 J. African L. 149.

3 Sayed Mohammed Abu Rannat was the first Sudanese Chief Justice, and has distinguished himself as a judge for more than 35 years. Although he has long been a leader of those who would retain the common law tradition in the Sudan, the terms of reference of this committee far from guaranteed a return to the common law, because the committee was only to recommend whether any of the codes should be amended, suspended, or repealed.

4 Although Dr. Zaki Mutafa was working outside of the Sudan during the time of disputes in 1971 and

transplantation of continental codes did not succeed. An analysis of this requires an understanding of the close linkage which has long existed in the Sudan between politics and the sources of law. This history will illuminate the nature of the professional opposition which helped to defeat the new codes.

1. The Political Background and the Events Before Independence, 1956

The political link with the issue of the choice of sources of law is important to emphasize, because it is often virtually omitted from discussions of choice of law. Those close to events in Sudan may omit such discussion because it seems too obvious in most cases, or perhaps too delicate in others[5]. As a result, others who are less familiar with the actual interaction of political and legal events in the Sudan may not realize the error in overemphasizing legal issues.

In the Anglo-Egyptian Sudan, the British administration was always dominant after 1924, and from the re-conquest by the Anglo-Egyptian force in 1898 to Independence in 1956 the sources of law took on definite forms. The British did not interfere much with personal laws, which related to such issues as marriage, divorce, and succession. The controlling law was the Sharia or customary law, or in some areas such as the far west an unofficial combination of the two[6]. In matters of lawyers' laws, such as company law and contracts, the controlling law was to be determined by common law statutes, or according to section 9 of the Civil Justice Ordinance, by reference to "justice, equity, and good conscience[7]". In the early days of the Condominium, the judges interpreted the phrase by numerous references to Egyptian law, but they later evolved the policy that they were "guided but not bound" by British common law. The Sudanese judges also followed this lead. In terms of African colonial history, the training which began for Sudanese judges in 1936 was uniquely early. A judge was trained in the common law, and when he found a point of, say, commercial law not covered by customary or Islamic law, he relied upon the legal system in which he was trained. In the mid-1950's, just prior to Independence, the eleven volumes of the Laws of the Sudan appeared, a revised compilation of statutes based predominately on the common law, which had been enacted in the preceding halfcentury. Although the penal law was codified, subjects such as contracts and torts were not. In the traditional common law pattern, judges continued to decide points of law as they arose. Sometimes the application of British law was all too mechanical; but at other times there was an imaginative adaptation[8].

1972, he was outspoken in his criticisms of the codes during academic visits to the Sudan in 1972 and early 1973. He had been Dean of the Faculty of Law of the University of Khartoum in 1969, before going to be Dean of the Law School in northern Nigeria, a move which coincided with unexpected political pressure against him by members of the Numeri government. All the more remarkable, therefore, was his return as Attorney-General in 1973 and the acceptance of his legislation which abrogated the new codes. For other details, see the Epilogue in Natale Akolawin, op. cit. supra note 2, at 193—194.

5 For example, Zaki Mustafa's article on the new codes, supra note 1, at 135, omits reference to the 1969 Numeri coup d'état and states merely that the law commissions "were dissolved by the Minister of Justice in July, 1969." Natale Akolawin's article does refer to the coup, supra note 1, at 180, but also compare his politely formal description of the government's process of creating the codes, at 182—183, with the sardonian survey in Mustafa at 135 and 138.

6 See Natale Akolawin, op. cit. supra note 2, 149—172.

7 See generally, the references in note 2 supra; A. N. Allott, Judicial Precedent in Africa Revisited, 1968 J. of African L., 3; and Salacuse, a Background to Law in French-Speaking Africa, Preliminary Issue, AFRICAN LAW STUDIES (Columbia University African Law Center 1969). Thompson, LAND LAW OF THE SUDAN (Faculty of Law, University of Khartoum 1966) provides examples of the combination of statutory law, English law, customary law, and judge-made law in the area of land law — an area of Sudanese common law providing "tangible results" (Dr. Zaki Mustafa in his book, supra note 2, at 237—8).

8 A mechanical application is illustrated by Heirs of Hussein Abdalla vs. Mohamed Mohamed El Amin,

2. Independence and the Impact of the 1964 Revolution

The development of the legal sources continued similarly after independence in 1956. The judges and other government legal officials came almost entirely from the Faculty of Law of the University of Khartoum, where the tradition of common law training continued. The University of Cairo established a non-residential branch in Khartoum, and the law course featured lectures on the Egyptian continental system. Its graduates became advocates, but they had to learn the common law of the Sudan in order to practice before the judges trained in the common law. The pattern of the common law development of the sources of Sudan law also continued because there was not a strong reaction against the legal system at the time of independence[9]. Many influential Sudanese felt that the Sudan was already in the process of creating its own law[10]. The Law Faculty of the University of Khartoum and the Judiciary established the Sudan Law Journal and Reports and the Sudan Law Project to assist in developing this tradition by collecting and making available relevant legal materials.

There were, however, many other competing views about the sources of law for the Sudan, and they gained new strength after the October Revolution of 1964. In an unexpected and unprecedented uprising, unarmed civilians overthrew General Abboud's military regime, which itself had seized power from the faltering political parties in 1958. The Revolutionary Charter of 1964 contained only nine points, and the final one called for new laws consistent with Sudanese traditions[11].

One of the major problems about the nature of the dispute about the sources of Sudan law was the cross-voting which in effect took place in the discussions in the legal profession after the 1964 Revolution. Some of the relevant questions were the following. (i) Should/or/(ii) Can Arabic replace English as the major medium of communication in the courts and in the Faculty of Law? (iii) Should there be more codification of the law, or is case-law and statutory development sufficient? (iv) If there is more codification, should it be continental, or common law, or Islamic, or some eclectic blend?

The discussion in the Sudan of these questions was complicated, because there were as many different answers as the various combination of questions allowed. There was also the danger of additional confusion in the national debate among members of the legal profession because of the possibility of disagreement about inarticulated premises. Thus, a speaker at a conference in the Ministry of Justice who advocated that there should be more codes might believe that the person who agreed with him also agreed that the codes should be in Arabic and should be modeled after the continental law of Egypt, whereas his supporter on the codification point might in fact be thinking of the common law compilations and might believe that Arabic was not practical as a substitute for English in technical

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AC-REV-96-1958, 1961 Sudan L. J. Rep. 113 (English contract law applied without discussion); whereas an imaginative adaptation is found in Heirs of El Tayeb El Malik vs. Ahmadiya Zawya, AC-REV-262-1962, 1962 Sudan L. J. Rep. 135 (English conception of constructive trust distinguished from Islamic conception of wakf).

9 Compare the initially strong reaction against English law after the American Revolutionary War of 1776: see e. g. POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 180—181 (1953).

10 Zaki Mustafa in his book, note 2 supra, at 236—237 quotes a long passage from Judge Lutfi, op. cit. supra note 2, at 236, to the effect that English law in the Sudan "is as deeply rooted as the French law in Egypt" with the overall conclusion that "English law will no doubt continue as the main guidance for our future legal development." Dr. Zaki states, at p. 236, that Judge Lutfi's view "is to a large extent representative of the views of most judges." The introduction of the continental codes deeply tested these views.

11 Broadcast to the nation, 30th October 1964; NATIONAL CHARTER, Republic of the Sudan Gazette ii (Special Supp. 1964).

legal jobs[12]. The disagreements which existed about the sources of law, particularly after 1964, became a problem for the legal system, because they delayed decisions on issues of legal reform although the need for reform was obvious. It is likely in this period that reforms in company law, for example, were being deferred to a large extent because of the unsettled nature of the dispute. But the legal system was continuing to grow, and like the child of parents who cannot agree upon a plan of child rearing, it was in danger of becoming the unfortunate product of haphazard designs.

The various Law Reform Commissions set up after the 1964 Revolution were going to make Arabic codes, but considerable work did not result in any new codes[13]. One of the reasons given for delay was the difficulty of getting proper Arabic translations. There is also the strong possibility that some of those involved did not feel any compelling reason for altering the method of developing through judge-made law. There was also political upheaval and constitutional struggle after the 1964 Revolution, in which one dominant theme was the struggle between the established political parties (such as the Umma and NUP) on the one side, and the growing number of dissidents (including the communists and the socialists) who had no ties with the sects which stood behind the "old political parties". The absence of a Constitution and the delay in the efforts to create it added to the juggling amongst the groups and the sharing of ministerial posts.

The Minister of Justice who emerged in 1965 was politically oriented toward Egypt. He invited only Dr. Sheikh Sadik, the learned head of the Sharia Law Department from the Law Faculty of the University of Khartoum to the Revision Commission. The Minister also brought a Professor from Egypt who was to lead the revision, but the work was not completed. In 1968 there was a change of government in which Sayed Rashid El Tahir became Minister of Justice. He passed a new law to reorganize the Law Reform Commission, and he cooperated closely with Professor Zaki Mustafa, who was then Dean of the Law Faculty of the University of Khartoum. The Commission had topical sub-groups with chairmen, and the overall Chairman was Sayed Mohamed Ahmed Abu Rannat, an expert on the Sudanese development of the common law. The groups utilized the materials of the Sudan Law Project. The goal was to make a common law codification and include Sudanese adaptations and desirable alterations. Work had proceeded for about a year and several groups had drafts in English when Colonel Numeri on 25 May 1969 staged a successful and bloodless coup d'etat.

3. The 1969 May Socialist Revolution and the Introduction of the New Civil Code

The coup had its roots in the 1964 Revolution for it was executed largely by the younger officers who had helped to neutralize the response of the Army in 1964. The military selected civilians to run the ministeries who were progressive intellectuals not identified with the "old political parties". The traditional parties had also been prominent in the 1964 Revolution, but Numeri's group felt that the "old politicians" had failed to justify the accumulation of power in their hands

12 For a longer analysis of these problems, including a description of the four groups which advocated radical departure from the common law heritage, see Thompson, op. cit. supra note 2, Wisc. L. Rev. at 1180—1184. The four groups were the eclectics; the pan-Arabists; the Muslim brotherhood; and the Communist Party.

13 For details on commissions, see Zaki Mustafa, op. cit. supra note 1, 133—135.

which had occurred since 1964. The civilian ministers had a variety of political orientations, including Communist and pro-Egyptian. The most prominent civilian was the new Prime Minister, Sayed Babiker Awadalla, who had been a hero of the 1964 Revolution. During the final days of the 1964 Revolution he had declined an opportunity to be in the running for Prime Minister. He had accepted to be Chief Justice. For a number of reasons, including pressure by the parties on the Judiciary, he subsequently became deeply embittered and left the court. In May of 1969 he emerged from vague business ventures to a position of immense political power. His initial power declined, apparently more from personal rather than policy disputes. "He doesn't know people" was commonly said of him. But the power he retained was considerable, and he used it to bring about significant change: the adoption on October 1971 of the Sudan Civil Code, which was to be followed by the other Egyptian-continental style codes in the Arabic language. The pro-Egyptian aspects of Numeri's government were enhanced by the Arab-Israeli conflict, but these aspects alone were never strong enough to explain the adoption of the Egyptian codes. The new Civil Code was also a personal triumph for Sayed Babiker Awadalla — "This is what I have given my country. I said I would, and I did." Sayed Babiker had been the Judiciary's representative to the Advisory Committee of the Sudan Law Project, and he had provided generous cooperation in the effort to strengthen the common law tradition by the collection of cases and documents. Some persons later asserted that his role must have been devious, a screen to conceal his pro-Egyptian ambitions. But this is an unfair charge. He never concealed his belief that Egyptian codes were the wisest choice for Sudan. His viewpoint was not based upon a knowledge of Egyptian law, but upon a feeling that the Sudan could best move into the future linked with its northern neighbor, and upon his anti-British feelings. As a judge he could have introduced Egyptian law into any case as being "justice, equity, and good conscience" but he did not. He has as fine a mastery of the common law as any judge in the history of the Sudan. There were two sides to his head. He fervently believed the British tradition should be exorcised, and the Egyptian influence admitted. But until he had the power to see that done, he did the best with what was available, and served as an outstanding common law judge[14]. If his effort to introduce the Arabic continental codes into the Sudan had succeeded, he would be best be remembered for that. Because the common law tradition reasserted itself in the Sudan, his recorded judgments are proof of his mastery of the art of the common laws.

Sayed Babiker's reasoning behind his support for the new codes was characterized by his statement that "the common law in the Sudan is like Latin hymns sung to an Arabic speaking congregation". The introduction to the Commentary on the new Civil Code by the Ministry of Justice states that English law was imposed, that it was imperialistic, and vague, and that the new code would meet the needs and traditions of the Sudanese. Official speeches also emphasized that Sharia was incorporated into the code. Persuasion of the professional community was, however, not necessary for enactment, because of Sayed Babiker's ability to act by official decree. A learned committee of Egyptians worked on the code for more than a year, but the Sudanese profession only had one month in which to

14 See any volume of the Sudan Law Journal and Reports 1956—66, where many of his judgments are reported. My own recollection was that he also had the finest mind on the bench for clarifying complex questions of fact and law.

comment on the lengthy draft[15]. When the executive committee of the Advocates Society did raise some objections Sayed Babiker telephoned the chairman to tell him the criticisms were not appropriate.

In any event, the political conditions made it unlikely there could be a meaningful discussion. The Numeri regime had crushed with T-55 tanks the armed opposition in 1970 of the Ansar Islamic sect (closely identified with the Umma political party), closed the University of Khartoum because of disturbances in March of 1971, and with a vengence survived the attempted coup by a section of the Communist Party in July of 1971. As these critical and violent events were unfolding, the Sudan Civil Code was brought into force. Sayed Babiker announced on the second anniversary of the May 1969 coup that the new Civil trade would come into effect in October, the month for celebrating the 1964 Revolution. Sayed Babiker in various speeches described the code as another foundation stone in the revolutionary socialist nation being built by the Numeri government. The code declares that the courts in interpreting it shall be "inspired in their interpretation by the principles of the socialist system of the state" (article 4).

The new Civil Code had 917 Articles in Arabic; there was no English translation. The Ministry of Justice published the Commentary of the Commission along with the code provisions. The result was two volumes, of 415 pages and 1,142 pages. The Code's coverage included obligations (contracts), non-contractual obligations (torts), sale of goods, property, and unjust enrichment.

The organization was thus similar to a continental civil code. It was a surprise to most Sudanese lawyers to learn that in theory at least the law of the Sudan had suddenly become more similar to that of neighboring Ethiopia,which has Amharic, English, and French language versions of its code, which is also adapted from modern continental sources[16]. The Commentary on the new Civil Code articles traced where a similar provision could be found in the codes of the Arab world, but there were no references to the European codes. Most of the code was quite similar to the Egyptian code. The Commission's commentary followed quite closely the longer commentaries of Professor Sanhouri, who was a distinguished Egyptian commentator.

If the new Civil Code had remained in force in Sudan, there would have been the opportunity to analyze the meaning and connections of the articles in the Sudanese context[17]. And there would have been the general question of whether the breach with the past helped or hindered the Sudan's progress. But the new codes failed, and the first official, if tentative, withdrawal from them coincided with the disappearance of Sayed Babiker's political power in the last quarter of 1971[18]. This was a time when discussions in Sudan about the legal system were highly politicalized. There were accusations about the decline in the rule of law and the Chief Justice was occasionally called the Chief Injustice. But because some key

15 A longer period is indicated by Natale Akolawin, op. cit. supra note 2, at 182.

16 This point allows an illustration of the further nuances which permeated the discussion in the Sudan. Whereas some who disliked the introduction of the continental codes saw the model of Ethiopia as a potential help to the Sudan if the codes were retained, other opponents of the new codes used the similarity of the situation in Ethiopia as a further argument against the codes — an argument which played on ancient and modern rivalries between Sudan and Ethiopia.

17 Zaki Mustafa argues forcefully that a straight-forward enactment of the Egyptian codes in the Sudan would not only have been less expensive (saving on the fees for the commission members) but would have been better, because anomolous omissions created by the commission would have been avoided: op. cit supra note 1, at 145.

18 See text accompanying note 3 supra; Sayed Babiker left for a visit to Egypt at this time, and a part of the confusion was the speculation concerning the possibility or not of his return. As events developed, his power was at an end, but this was not fully clear at the time.

political opponents of a government were in prison at this time, it was not unusual for there to be antagonisms which could also account for the pessimistic viewpoint about the quality of the courts. In discussions specifically about the new civil code, there was a tendency for some persons to respond to arguments about the code as signals of the other person's view about the Numeri regime. But a study of the impact of the new Civil Code on three major groupings will demonstrate that there were also other important underlying factors in the opposition to the codes. The three groups are: the professional lawyers, particularly the judges and the advocates; the Faculty of Law of the University of Khartoum; and the Southerners.

4. Impact of the New Codes on the Legal Profession: Judges; Advocates; Others

Chief Justice Osman El Tayeb said in May 1971 that he had personally been occupied with criminal cases but that "by this time the lower courts must be applying the Civil Code . . ." At this time only a few courts in the Three Towns had applied the code, although every judge agreed he "must". Reports from some of the provincial courts indicated they were waiting for the lead from Khartoum. It seems accurate to conclude that the significant fact was that the courts never began in earnest to apply the code. There were several reasons for this. Some judges simply opposed to the new Civil Code in principle and were remarkably open in their criticism. Said one: "The new laws are ridiculous. Like the Industrial Relations Law of 1967 the code will be dropped because it cannot work." Those judges who favored the code were restrained by the reasonable fear that they did not know the law well enough to write a judgment which was free of gross legal error. In a lighter mood, one judge said:

"The new code is wonderfully democratic. The Chief Justice, the Judges of the High Court, the Province Judges, the District Judges, the Registrars, the Chief Clerks, the secretaries, the filing clerks, the messenger boys, the night guards — all the people at the courts: We are all now equally qualified to apply the law!"

Opinions varied about the quality and clarity of the Arabic in the Codes, but most of the judges agreed that it was hard to think about particular provisions without bringing to mind common law discussions of the issues. Experience from other countries supports the view that if the judges had begun to apply the new Civil Code, their interpretations would have been heavily influenced if not distorted by their common law training[19]. What did happen was that common law training influenced the judges, as a matter of policy or of prudence, to go slow in the application of the New Civil Code.

Logically it might be assumed that the lawyers would have welcomed the new code, because most were graduates of the University of Cairo branch in Khartoum, the non-residential school specializing in Egyptian law. But a surprising finding was that many of them were not professionally pleased by the introduction of the new codes. For example, a pro-Egyptian Sudanese who got his degree from the Cairo branch favored the closer ties with Egypt, but said that the new code was no help to him at all. His actual practice had been in the common law, at which he now felt proficient. He frequently referred to his complete set of the Sudan

19 See Twining, Some Aspects of Reception, 1957 Sudan L. J. Rep. 229, 241—252; this article has had an important role in the Sudan because of its usefulness in assisting lawyers to frame the issues raised by the reception of foreign law.

Law Journal and Reports, and he had become familiar with his collection of basic English common law texts, such as Winfield on Torts. Something similar to his situation would be true of any advocate who had managed to practice before the courts with success[20].

The lawyers who serviced the business community were unhappy about the new uncertainty introduced into day to day economic exchanges. A vivid scene in the ongoing drama was the postponement of the introduction of the new commercial code because the Khartoum Chamber of Commerce insisted, despite the political pressure, upon more time to consider the consequences. The temporary result, in theory at least, was that the rules of partnership law, for example, continued to be governed by the common law, whereas the continental law of the new Civil Code governed contracts and sales.

5. Impact of the New Codes on the Faculty of Law of the University of Khartoum

The Law Faculty of the University of Khartoum for more than 20 years after 1936 was the sole source of legal training in the nation. The Faculty's historical role as the heart of legal education has continued, in part because the best students from secondary schools predominantly go to the University of Khartoum. The supporters of the new codes, particularly Sayed Babiker, thus considered the reaction of the Faculty to the codes as vital in the campaign for their introduction. Sayed Babiker placed considerable pressure — including frequent telephone calls — on the Faculty to teach the Codes. The situation seems to have been similar to where an army commander orders the capture of a difficult objective and thereafter does not want to hear reports of troubles or casualties. He wants to hear a report of victory or he will get someone who can achieve it.

The rapid movement with which the new Civil Code came into force faced the Faculty with two critical questions when it opened in October 1971. Should they attempt to teach the newly promulgated Civil Code, and should they attempt to teach in Arabic rather than English? They decided there really was no choice about teaching the code, and proceeded to do so although there was no time to fulfill University procedures for the new courses[21]. The Faculty taught in both Arabic and English[22]. They retained English for teaching the common law subjects now covered by the code, and because the Southern Sudanese students demanded the retention of English even for the instruction of the Arabic code.

The resulting problems were multiple and inter-connected.

(i) A teacher trained in the common law knows statutes, but a continental code is not just a big statute. It has connections and concepts which must be learned. There are many errors a newcomer can commit. The Faculty members had no one to guide them. Quite soundly, Dean Dr. Saeed Mohamed Ahmed El Mahdi, sent to a French university one of his Faculty who was due for graduate study.

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20 A caveat is necessary here because this line of argument was often made by persons with common law education speaking about the experience of the lawyers from the University of Cairo branch, but I had only six interviews with lawyers with no common law training — these did support the point in the text, the quote in the text being the most forceful of the six.

21 The new syllabus, "partly based on the Sudan Civil Code, 1971" was introduced to the University Senate by memorandum of 25 March 1973 (UK/FL/2-A-22 and 54) — even then it was not certain that the abrogation of the new codes would occur, as happened, in May of 1973.

22 For example, the complete syllabus for 1972 for the civil law reguired 17 pages, about half in Arabic and half in English (neither translated to the other language). The final examination of 17 April 1972 in land law and personal law was all in English except one question in Arabic.

(ii) If the Faculty had taught the new code as the Egyptian code was taught at the University of Cairo branch in Khartoum, then the number of errors caused by unfamiliarity would have been reduced, but so would have been the quality of the legal education. The method of teaching at the Cairo branch is by discursive lectures on the code sections, in the style of the Commentaries on the code. The Commentary by the Commission was, according to the Faculty, of little help because it mostly paraphrased the articles. But even where the commentary is good, simply lecturing on it was rejected by the Faculty, because it would have been like teaching geometry by discussing the axioms. One teacher said, "A math student who can recite all of Euclid may not be able to solve problems. We want our law students to be able to solve problems with the rules in the code."

(iii) The Faculty attempted to teach the code comparatively with the common law. For a student who in an earlier year had learned common law contracts and was now supposed to learn continental property law, a comparative approach was undoubtedly essential. But the new law students needed only to learn the code. A comparative approach for them probably served the convenience of the teacher more than the education of the student. A comparative law approach is perhaps attractive in theory, but for a beginning student the mastery of the Code is probably a full-time effort[23].

(iv) The impact of injecting the new code throughout the Faculty's curriculum can be appreciated by comparing the experience of the Law School in Ethiopia at the Haile Sellassie 1 University. The similarity is that the law school in Ethiopia also had teachers trained in the common law faced with the task in 1963 of teaching a newly introduced code based on continental models. This was found to be an extremely difficult challenge, which makes the differences in Khartoum's position the more remarkable. In Ethiopia, the law school was new when the codes were enacted, so that the teachers had plenty of time to prepare for teaching to the first and only class-year[24]. But in Khartoum, of course, all of the years of the law faculty were in operation so that many subjects had to be prepared simultaneously. There was also the problem, already noted, that students in the second and third year were supposed to learn code subjects for which they had the inappropriate common law prerequisites.

(v) The new code was in Arabic and there was no English translation.

(1) The use of Arabic which is more familiar to most of the students than is English was a definite advantage. But the use of Arabic does not mean that the law is suddenly clear to anyone who reads it. The continental legal concepts which were the basis of the codes had to be learned by reference to textbooks. This problem also faced the judges and advocates but it is emphasized here because the Faculty, unlike those other groups, did begin immediately to deal with the problem.

(2) The southern Sudanese students said their Arabic was not proficient enough to allow them to compete fairly with their fellow students whose first language was

23 The experience of teachers trained in common law who were teaching at the Law School in Ethiopia is instructive. Some had considered using, for example, an English casebook on contracts, in order to compare the common law judicial solutions with solutions found in the Ethiopian code, but found that this approach would provide insufficient time for a proper exposition of the codes.

24 See the annual reports of the Dean for the 10 years from 1963 onwards in the Journal of Ethiopian Law, which indicate that there was more than enough to occupy the Faculty without the need for the kinds of problems thrust upon the Faculty in Khartoum.

Arabic. One of the many ramifications was that teachers had to teach some subjects twice — once in Arabic and once in English, with the translation provided by the teacher.
(vi) The Law Library was wholly inadequate in continental code materials. Not many materials in Arabic were available in the library, which was unfortumate because even if the relevant French materials were available, almost none of the teachers, judges, or advocates could read them.
(vii) One of the greatest difficulties to the teachers was the psychological strain caused by the constant awareness that the effort to master the new Civil Code might be a waste of time if the enactment did not stick. The multiple burdens of transforming the Facultys curriculum seemed heavier to the individual teacher to the extent he felt there was the probability of a withdrawal of the Code.
(viii) The academic year 1971/72 would have been difficult in any case for the teachers because the year was only 2/3 as long as usual, due to the late opening following a political crisis in March 1971, yet the entire syllabus for each course had to be covered on an accelerated schedule. Moreover, the Faculty was also managing a transition from a pattern of 2 years of University Arts courses followed by 3 years of law, to a 1 years Arts — 3 years law pattern with an emphasis on a Masters of Law program subsequently for the better students[25].
(ix) At the end of the academic year a shared sentiment by the Faculty was "Thanks be, that year is off our shoulders!" To introduce the new codes into the curriculum of the Faculty was a formidable undertaking. If it had been possible to do this with careful planning and with a paced schedule, the outlined problems would not have disappeared. But it is clear that the forced march which was commanded in order to bring to codes into effect did not insure the result, but was itself an additional and powerful cause of opposition to the codes.

6. The Impact of the New Codes on the Southern Situation

Simplified, the northern Sudan is the desert, the Nile, and Arab Muslims; the southern Sudan is forest, the Nile, and Negroid peoples with animistic religions, except for those converted to Christianity while in mission schools[26]. While the controversy about the new Civil Code was becoming heated in 1972, the most significant news about the Sudan was the "Addis Agreement" reached in April, 1972. This was a serious effort by the rebellionists and the government to end the intermittent war waged in the three southern provinces since the southerners in the Army mutinied in Equatoria Province in August of 1955, on the eve of Independence. In political and human terms, the first problem was to handle the thousands of refugees. In legal terms, one of the first points of attention was the wording of the "Addis Agreement", for there were ambiguities in the distribution of powers. The Agreement and the events preceding it overshadowed any real notice of the relation of the new Civil Code to the southern Sudan.

25 This point is also covered in the memorandum supra note 21; also, the Faculty was further involved in the general work of the University's Committee on Academic Reform (Ref. VC/COAR/3d March 1972) which was meeting regularly in 1972, and the Faculty itself had its own programs which it had been attempting to establish, see e. g., Dean Saeed's "An Appeal for the Establishment of a Continuing Legal Education Centre" (Law Faculty Memorandum, 18 January 1972).

26 Statistics from the 1956 census in Natale Akalawin, op. cit. supra note 2, at 149. The census is reliable as a rough guide only, for reasons now well known to statisticians in developing countries — figures provided by peasants vary widely depending upon the motive they think is being concealed by the statistician when he asks his question.

But it soon became apparent in the Sudan that almost no serious thought had gone into the question of the relationship. The narrow-minded attitude which allowed the new Civil Code to be passed without providing for even a consideration of the problems may be compared to the equally extreme attitude of a southern judge who declared to me that he had spent a day reading the code, and then opened the top-left drawer of his desk, dropped the code in, and vowed he would never look at it again. The obvious first problem was the one of language. A longterm solution, and one which would assist national unity, would be better Arabic language training for southern Sudanese. But assuming there could be a successful resolution of practical problems, such as the provision for teachers, there was still the problem that some influential southerners feel that English is a more useful second language than Arabic. The immediate problem was that southern lawyers and judges did not know Arabic well enough to apply the codes confidently. Some requested a "crash course" in Arabic! Another solution would have been an English translation of the new Civil Code. But one northern judge who had recently served in the south, and who is fluent in Arabic and English, said that his efforts to translate the code from Arabic to English were as difficult as had been his efforts to write improved Arabic translations of the common law statutes. One of the reasons for the difficulty is the technical nature of legal language. The new Civil Code had Arabic versions of French legal concepts. It was virtually impossible for a lawyer trained in the common law to translate that Arabic into English phrases which accurately reflected the French concepts.

Many of the other problems relevant to the potential impact of the Civil Code in the South were tied to political debates which were only beginning to take place. Should, for example, the South have autonomy to the extent of having its own laws, and perhaps its own university? Many southerners felt that the presence of the new Civil Code seemed to be an effort to impose immediately an answer to such questions, which they had only begun to discuss.

7. Summary of the National Debate on the New Codes

Each of the groups I have discussed had its own special reaction to the new codes, as well as taking part in the arguments which affected all groups. All of the groups agreed in the sentiment that there should have been more careful study before the new codes were enacted. Members of each group tended to blame the other groups for not being more outspoken when the new Civil Code was originally proposed. The southerners pointed a finger of accusation at the Law Faculty, the Faculty pointed at the judges, and so on. The reality is that the crucial period was at a time when many political opponents were still in prison, and the political flavor of the new Civil Code was sufficient to discourage most opposition. To the extent that the dispute about the new codes was political, the extent of Sayed Babiker Awadalla's power as Prime Minister and later as Vice President was relevant. But there were many other supporters for the new Civil Code, and just as the discussion about the code was more than political, the question about the retention was more complex than the political power of one man.

The reasons given in the Sudan in support of the new codes can be summarized into five interconnected points. Shorn of most of the political rhetoric, they are as follows, along with the counter arguments.

(i) "The old laws were the product of British Imperialism and did not correspond to the real needs of the Sudanese people."

The argument in reply was that the Sudan was adapting the British common law to national uses, a process which brought the common law into contact with customary law and Sharia[27]. The Law Faculty had created the "Sudan Law Journal and Reports" with the cooperation, including the financial support, of the Judiciary. This provided a medium for the systematic development of Sudanese case law. Appearing first in 1958, the series began with the 1956 volume in order to include all post-Independence judgments. But it was realized that more than 50 years of legal cases and other documentation which were part of this tradition existed throughout the districts, and were rapidly being lost or destroyed. The British had never officially recognized the potential significance of the evolvement of a Sudanese common law, and the Law Faculty, with the encouragement of Chief Justice Abu Rannat and the Judiciary, established the "Sudan Law Project[28]". The availability of scholarly articles and the judgments of the independent courts in the "Sudan Law Journal and Reports", and the availability of the cases and documents of the "Sudan Law Project" were significant stimuli to the development of the common law of Sudan.

(ii) "The new Civil Code was carefully drafted to promote the concerns of the Sudanese; by being in the form of a code it eliminates the vagueness of the common law, and by being in Arabic it is more available to the Sudanese."

One argument in reply was that the new code amounted to French-Egyptian imperialism. That the new Civil Code was greatly similar to the Egyptian law was clear. A few Sudanese ventured the more audacious opinions that "the same code could have been ours and a year of fat fees to the Commission avoided by simply changing the name of the Egyptian code to the Sudan code". Another argument in reply was that a code could not be less vague than the case-by-case approach of the common law, because specific provisions meant inflexibility, whereas general provisions which were flexible were also necessarily vague. It must be emphasized, however, that the vagueness arguments were not much pursued during the debate in te Sudan. Even more interesting, many of the classical arguments used in the common law vs. codification debates, such as the famous Field-Carter controversy in the United States in the last quarter of the 19th century, were not primary concerns in the Sudan[29]. Although Savigny's evolutionary sentiments were expressed and were important, there was in fact considerable acceptance of the notion of a code in the sense of a systematic presentation of rules of law. Undoubtedly, the Sudan's successful experience with the common law Sudan Penal Code was important in this regard[30].

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27 See supra note 10 and accompanying text.

28 The Ford Foundation provided direct financial assistance to the Project, and indirect assistance by grants to the SAILER project of the International Legal Center, U. N. Plaza, N. Y., which provided some personnel.

29 But see the address of Dr. Saeed Mohamed Ahmed El Mahdi, Dean of the Faculty of Law of the University of Khartoum, at Haile Sellassie I University, "Codification in the Sudan" (Mimeograph, October 1972, Law Faculty, H. S. I. U.), a cogent presentation with exceptional use of illustrations from the classical arguments.

30 A survey of the volumes of the Sudan Law Journal and Reports indicates the high frequency of reported cases and scholarly articles on the original Penal Code; perhaps more importantly, judges of all ranks throughout the country had become familiar with the code and felt that their knowledge and experience allowed them to produce even-handed results in a smooth administration of the code, which basically coincided with their sense of justice.

Although the arguments in reply regarding the usefulness of Arabic raised the issues which have already been discussed, the popular sentiment among northern Sudanese favored greater use of Arabic. The aspect of the dispute which received the most stress was the question of the source of the laws to be received from abroad: British vs. Egyptian-French.

(iii) "To the extent that the law must have a foreign influence, it is preferable to have ties with Egypt, which has many cultural similarities to the Sudan, rather than with Britain."

An adequate reply is not the nostalgic answer given by those in the ever-diminishing ancien régime who became pro-British during colonial rule and who never changed[31]. A better argument was similar to the one given to point (l): — that the Sudan can make use of a tradition without being dominated by it, and that the Sudan can be an integral part of the Arab world while at the same time creating its own legal destiny. There is force, however, in the argument that the efforts toward modernization in neighboring Egypt provide a more meaningful model than does Great Britain. How far the Sudan should link itself with Egypt, or whether the Sudan should attempt to go it alone, are complex issues involving hundreds of years (some would say thousands of years) of history and staggering current problems such as the role of the southern Sudan.

(iv) "The decisive enactment of the new Civil Code and other Arabic codes on a continental model ends the lingering dispute about the proper sources for Sudan's law, and thus can eliminate one reason for inaction about needed law reforms, and allow greater efficiency in the legal system."

Of course, the overthrow of the new codes demonstrated the error in the first part of the point, but there is much to be said for a decisive resolution of the dispute. In a close dispute, a firm and official decision can be decisive, because it carries with it the weight of authority. But this official decision came all too quickly, without time for a consensus to grow, and created frustration and confusion in legal circles. The codes were promulgated as building stones in the new state, but the increasing criticisms of the codes made the new laws an unexpected weak point for the Numeri government.

A criticism which was more practical than political in orientation was directed at the claim that the new codes would provide for greater efficiency in the legal system. The argument was that the new codes were a terrible waste of the nation's limited supply of manpower. The Sudan had several hundred persons in key positions who were trained in the common law. The retention of the common law tradition permits these men to handle efficiently the everyday legal questions which assist a smooth operation of the society, and upon which development depends, and also to handle the legal issues in the more complex policy decisions. The supporters of the new codes categorized the preceding argument as a defense of vested interests, which it was. But it is also true that the retention of the new Civil Code and other continental codes would have cancelled thousands of man-years of training and experience.

31 Of course some who worked for the colonial administration became anti-British, and also never changed. The former Dean of the Law School of the University of Zambia, the late Dr. Kwamena Bentsi-Enchill, frequently used to condemn both of the inflexible views with the comment, "Surely we can have the confidence to accept or reject what is British based on what is good for us, and not because it is British."

(v) "The Arabic of the new Codes is superior to the Arabic translation of the common law statutes in the Sudan, and will permit faster development of the law in the Arabic language."

Leaving aside the assumption favoring Arabic rather than English, the arguments in reply tended to admit reluctantly that the Arabic of most of the Sudan common law statutes was poor. But opponents refused to accept the superiority of the Arabic of the new codes compared to the few common law statutes with an adequate Arabic version, such as the Penal Code. The quantity and quality of the Arabic texts on continental law were not known in the Sudan. Many of the Arab countries in the eastern crescent of the Mediterranean, however, have had years of experience in Arabic with continental codes. The texts which were originally most relevant were in French. More over, many of the Arab scholars were educated in the French legal tradition. This fact may be crucial. A Sudanese unfamiliar with continental law will be baffled by the Arabic version whether the Arabic is a good translation or not, just as an Arab trained in continental law would not easily comprehend the concept of "consideration" in contract, however excellent the choice of an Arabic word to express it.

In the Sudan the common law was taught in English, and the replacement of the English in legal affairs was not rapid. This was not satisfactory, for there are practical reasons and feelings of national pride in the general desire of the northern Sudanese to move more quickly to greater use of Arabic in legal affairs.

The Arabic of the new codes, therefore, probably weighed in favor of their retention. But this equation omits the factor previously discussed: the southern, non-Arabic ethnic groups. Most southern intellectuals speak English better than they do Arabic, and they do not have an emotional attachment to wider use of Arabic, even if they were fluent in it.

8. Conclusion

An accurate analysis of the prolonged controversy in the Sudan about the sources of its lawyers' law requires attention to the close relation of the issue of sources with shifts in political power. The enactment in 1971 of the new Civil Code initially appeared to resolve the controversy in favor of a turn toward Egyptian-continental models and away from common law. This impetus was provided by Sayed Babiker Awadalla, the highest-ranked civilian after the Numeri coup d'etat of 1969, who used his power to promote closer ties with Egypt, which he had long favored. The Numeri government believed the new codes would be a source of political pride. Those opposed to Numeri or to closer ties with Egypt joined in an attack on the new codes.

But it is also essential to emphasize that the opposition to the new codes was practical as well as political. The day-to-day operation of the legal system, which had been proceeding with the creation and development of Sudanese common law,

32 The scarcity of accurate scholarly predictions about developments in Africa compels the author not to resist recording that during the inconclusive dispute of 1972 he concluded in the background paper for the Ford Foundation and University of Khartoum (supra note 1) that "the opposition is such that the new Civil Code will not survive the next three years, but if it does, then nothing will dislodge it except political action by another government possessing concentrated power." The reason for the latter hedge was "that the Arabic in the Egyptian codes will become attractive to the present opponents if the codes were in force in the Sudan long enough for the profession to begin to master them."

was thrown badly out of order by the sudden introduction of the Egyptian-continental codes. The new codes thoroughly unsettled the major groups concerned about the sources of lawyers' law. The potential loss of common law training and experience weighed heavily against the abrupt transition demanded. The complex practical arguments which arose from this impact had the further effect of turning what was thought to be a political asset into a liability. This in turn weakened the position of the supporters of the continental codes. The arguments against the new codes were, moreover, actually strengthened by the political decisiveness which was to have defeated them. This is because the advantage of an official political decision behind the new codes was wiped out by the haste in enacting them and by the excessive pressure used in the attempt to force immediate compliance.

Thus the transplantation of continental codes to the Sudan did not succeed[32]. But in two important senses, the effort was perhaps not a failure. The debate made the professional lawyers more acutely aware that Arabicization of the legal vocabulary in the Sudan was inadequate and increased an awareness of the need for greater efforts in the northern Sudan, whatever the resolution for the southern Sudan might be. Second, the new impulse since 1973 to produce common law codes suggests that the form of Egyptian-continental codes, at least, produced a favorable response even among opponents. There had been earlier support for common law codification, but the intensity of the current effort surpasses earlier attempts, and follows the demise of the experiment with the continental models.