BUCHBESPRECHUNGEN / BOOK REVIEWS

Olaf Köndgen, **The Codification of Islamic Criminal Law in the Sudan: Penal Codes and Supreme Court Case Law under Numayrī and al-Bashīr,** Studies in Islamic Law and Society, Volume 43, Brill, Leiden, 2018, 480 pages,149 Euro, ISBN 978-90-04-34743-4

The introduction of Islamic Criminal Law in the Sudan in 1983 and its subsequent application have been at the heart of political debates and human rights concerns. The haphazard experience of applying the so-called September laws introduced under the then President Numayrī (1983-1985) has been examined in some detail in academic literature.[1] Yet, there has been no similar examination of the nature and application, particularly of the *fiqh* (Islamic jurisprudence), of the 1991 Criminal Act adopted by the al-Bashīr regime that had come to power by means of a military coup in 1989. Köndgen's book, based on his doctoral thesis and building on his earlier work on Islamic criminal law in the Sudan, fills an important gap in the English language academic literature on Sudanese criminal law, particularly on developments in its Islamic criminal law over the last three decades. It also constitutes a valuable addition to in-depth country studies on the application of Islamic criminal law, i.e. pertinent legislative and judicial practice.

The book examines the role of Islamic criminal law in the Sudan's legal history, its sources, its conformity with the *fiqh* and its application by Sudan's Supreme Court. Drawing on a detailed literature review, case law records and interviews with "judges, experts and Sudanese politicians" in 2004 and 2009, Köndgen succeeds in presenting a detailed analysis of the history of Sudan's Islamic law, the applicable system (referred to as "Sources, Structures, Procedure, Evidence, and General Principles") and a series of Islamic criminal law offences. For each, unlawful sexual intercourse (zinā) and related offences; unfounded accusation of unlawful sexual intercourse (qadhf); alcohol consumption (shurb al-khamr); Ḥadd theft (sariqa ḥaddiya); highway robbery (ḥirāba); apostasy (ridda); and homicide and bodily harm, as well as Ta'zir, he discusses definition and punishment in the *fiqh* before critically analyzing how they have been dealt with in the 1983 Penal Code and the 1991 Criminal Act, and selected jurisprudence. This analysis is complemented by a brief examination of human rights and Sudanese Islamic Criminal Law and a conclusion that synthesizes findings in a broader context.

The book sets out the different trajectories of Islamic criminal law in the Sudan, an approach that yields important insights. Its recent incarnation cannot simply be viewed as a

1 See in particular *Aharon Layish and Gabriel Warburg*, The Reinstatement of Islamic Law in Sudan under Numayrī, Leiden 2002. *Carolyn Fluehr-Lobban*, Shari'a and Islamism in Sudan. Conflict, Law and Social Transformation, London/ New York, 2012.

revival of authentic pre-colonial laws: "In both form and content, modern Islamic criminal law is at best only superficially related to the precolonial practice of Islamic criminal law in the Sudan… The claim of some *sharīʿa* supporters that the application of modern Islamic criminal law represents the removal of a historical wrong (that is, the introduction of the common-law system), and concurrently reinstates an authentic and indigenous system cannot be substantiated, given the profound dissimilarities between the historical practice of Islamic law and its present day codified form" (p. 412). Indeed, "the criminal law as it is applied today, in form and content and despite its (partial) Islamization, is far from being detached from its colonial heritage" (pp. 412, 413). The 1983 Penal Code "drew heavily" on the secular 1974 Criminal Act, which itself derived from the colonial 1924 Criminal Act. The drafting of the 1983 Code was hasty and incompetent; the book identifies a series of flaws from a *fiqh* perspective and illustrates the dilemmas faced by the judiciary at the time, which is, rightly, criticized for its overtly political approach in key cases, particularly in the trial resulting in the execution of Maḥmūd Muḥammad Ṭāhā for apostasy. The book also usefully reminds readers that the 1991 Criminal Act was derived from a 1988 Bill, which was rejected at the time and, according to Köndgen, bore al-Turābī's imprint. The 1991 Criminal Act addressed several apparent flaws of the 1983 laws, with the book commending several of its features as being appropriate responses in a multi-religious society. This includes abandoning the notion of equivalence (*kafāʾa*) by stipulating the same blood price (*diya*) for Muslims and non-Muslims and men and women in *qiṣāṣ* (homicide and bodily harm) cases.

The book "highlight[s] the function of the Supreme Court as a security valve and as a regulatory agency" (p. 402). Several case studies illustrate how judges grappled with lacunae and inconsistencies in the newly introduced laws. The book argues that the judges sought to avert the application of *ḥadd* (corporal) punishments and to mitigate the adverse consequences of applying Islamic criminal law. An example is the "acceptance of rape as a legal uncertainty that thereby remits the *ḥadd* punishment for *zinā* [unlawful sexual intercourse]" (p. 403). Yet, this example demonstrates the limits of such jurisprudence. It had to operate within the confines of problematic legal provisions, here the old article 149 of the Criminal Act of 1991 (amended in 2015), which conflated rape and *zinā*, exposed rape victims to punishment for *zinā*, and resulted in impunity for the perpetrators of rape. Further, the analysis of the role of the judiciary would have benefited from a more critical assessment, contextualizing the strategic use of "authoritarian legal politics" by the al-Bashir regime. This includes the Arabization and Islamization of legal education as well as the dismissal and selection of judges,[2] a process analyzed in-depth by Mark Fathi Massoud.[3]

2 Köndgen mentions on p. 77 that "[t]he judiciary especially was a prime target for the realization of the National Islamic Front's the Islamization program", and "between 1989 and 1991 aloneapproximately 300 to 400 judges were dismissed or resigned."

3 *Mark Fathi Massoud*, Law's Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan, Cambridge 2013, pp. 119ff.

Köndgen finds that "the Sudanese legal system has become even more hybrid than it was before [thirty years of Islamization efforts]" (p. 415). He rightly emphasizes the eclectic approach to Islamic criminal law in the Sudan, which he attributes to political contingencies and the role of al-Turābī and his disciples. His conclusion, which is perhaps inevitable for the implementation of *sharīʿa* law in any modern context, is that "the combination of Islamized penal codes, legislation on criminal procedure, and the growing body of case law … related to Islamic criminal law, creates what we would call a 'Sudanese national *sharīʿa*'" (p. 407). The "Sudanese national version of Islamic criminal law" is, ultimately, a "human affair", and for that matter one that "cannot claim to be the result of an unequivocal and clear democratic decision of the Sudanese people. It has been controversial from its inception and it continues to be so" (ibid).[4]

A major reason for this controversy is the adverse human rights impact of the application of Islamic criminal law. The book identifies a series of violations in respect of equality before the law, freedom of religion, the rights of children, and cruel, inhuman, and degrading penalties. The summary of violations and concerns is succinct and largely accurate. However, it seems to locate article 27 of the Interim National Constitution of 2005, which makes international human rights treaties binding on Sudan an integral part of the Bill of Rights, in Chapter II (non-binding guiding principles and directives) instead of Part Two: Bill of Rights (p. 384). Article 27 entails that any incompatibility of the Sudan's Islamic criminal law with binding international human rights standards is not only a matter of Sudan's adherence to its international obligations but also an issue of constitutionally guaranteed rights. In that regard, it would have been of interest to examine and point out discrepancies within the Sudanese Bill of Rights, particularly provisions that ostensibly seek to ensure consistency with Islamic criminal law, such as article 33 which omits any reference to cruel, inhuman or degrading *punishment* when referring to the prohibition of torture and other ill-treatment.[5] The Constitutional Court plays a potentially important role in addressing the compatibility of Islamic criminal law with fundamental rights, such as in the case of Mariam Yahya Ibrahim Ishag, in which a fundamental rights petition was brought before the Constitutional Court in December 2015 in relation to her conviction for apostasy (the case is mentioned in the introduction but not discussed further in the section on apostasy). Against this background, it is of considerable importance "[w]hether and how the Constitutional Court in its jurisdiction dealt and deals with the obvious contradictions between Islamic criminal law and the various constitutions in the Sudan since 1983" (p.416, footnote 22) but this question was "beyond the scope of this work" (ibid). It is certainly part of relevant judicial practice that merits closer analysis in any future research on Islamic criminal law in the Sudan.

4 Similarly, on p.7, Köndgen comments on the memorandum accompanying the 1991 Criminal Act, calling its claim that the "Sudanese masses" called for an Islamic Penal Code doubtful, and representing a "mixture of facts and propaganda."

5 See for such an analysis contributions in *Lutz Oette* (ed.), Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan, Farnham, 2011.

The book acknowledges that "the cumulative contribution of the application of Islamic criminal law to this negative record [on human rights] is certainly sizeable" (p. 412). It highlights the political and class dimension of Islamic criminal law as applied in the Sudan, particularly the public order laws against persons, especially women from marginalized groups (who are somewhat misleadingly referred to as refugees (p. 86) even though South Sudanese used to be Sudanese citizens who were internally displaced, at least prior to South Sudan's independence in 2011).[6] It is certainly correct that Sudan's Islamic criminal law is not fully implemented, particularly in terms of application of several *ḥadd* punishments, and largely serves symbolic functions. Yet, it would have been useful to draw out the broader conclusion further, namely to what extent the repressive and social control function of Islamic criminal law legitimizes the abuse of power and use of violence in various contexts, which has been one of the hallmarks of Sudan's current regime.

The book analyzes several recent reforms, such as the Child Act of 2010 and the Criminal Law amendment of 2015, but only incidentally refers to sustained challenges and efforts to reform Sudan's criminal law.[7] An assessment of these developments, and the future prospects of Islamic Criminal Law, and its reform, in the Sudan would have been of considerable interest.

Köndgen's comprehensive and detailed study constitutes a major achievement that opens a rare window into the doctrinal and judicial aspects of the Sudan's Islamic criminal law. Its in-depth examination of the subject makes it a demanding, and ultimately rewarding read. *The Codification of Islamic Criminal Law in the Sudan* can be expected to become the main English language reference book on its subject. It must be hoped that it will inspire further research in an area of the law that is as politically charged as it is legally fascinating, and will, for better or worse, be part of Sudan's chequered and turbulent legal history.

Lutz Oette[*], London

6 See for a recent contribution on the public order laws, *SIHA and REDRESS*, Criminalisation of Women in Sudan: A need for fundamental reform, London, 2017.

7 See e.g. *Oette*, note 5, and www.pclrs.com.

* The author is grateful to Ali Agab for his perceptive comments on an earlier draft.