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“Balancing Constitutional Shari’a in a Religiously Diverse Nation:
An Examination of the Future for the Sudan”

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I. Introduction

The Sudanese government and the Sudan People’s Liberation Movement/Army (SPLM/A) signed the Protocol on the Resolution of Conflict in Southern Kordofan/Nuba Mountains and Blue Nile States (Protocol) in 2004, completing an important step in ending the conflict in these states and hopefully unifying the religiously diverse people of the Sudan under one nation. Parties from the two future states have expressed a desire to create state constitutions and systems of government that respect shari’a (Islamic law), without necessarily basing all future laws in shari’a. According to the Protocol, however, the state constitutions must conform to the Interim National Constitution of the Sudan. The Draft Interim National Constitution also calls for all laws to conform to it. This requirement for conformity could potentially pose a difficulty for the states and their laws, especially with regards to shari’a. Specifically, the conformity requirement becomes relevant if state enacted laws are potentially in conflict with shari’a. Additionally, the Draft Interim National Constitution (Draft National Constitution) provides for the enactment of national legislation, both consistent with shari’a and seemingly based in other beliefs or customs. These provisions concerning legislative enactments, however, are ambiguous and leave open the possibility that shari’a law may be applied in the non-Muslim southern Sudanese states. Given these potential conflicts and ambiguities, it is critical to examine the issue of balancing national and constitutional shari’a with state constitutions and laws, in order to determine how this balance and shari’a may affect the future of the Sudanese nation.

II. Brief History of Sudanese Governance

The Sudan is the largest country in Africa and potentially a major player in the world economy based on the development of its oil resources and the international competition for this precious commodity. Recently, the world community has focused its attention on the Sudan, both in terms of its oil producing potential, and as a result of the incidents in Darfur and the refugee crisis. Given how the Sudan is currently in the spotlight, questions naturally arise as to what the future holds for the Sudan and its people. The first step, however, in determining what the future may hold, is to look to the past to see how the Sudan has developed.

The Sudanese people are a diverse group, both ethnically and religiously. The northern parts of the Sudan are comprised mainly of Arab Muslims; and, the southern parts of the Sudan are comprised mainly of black Africans, who may be religiously Christian, Muslim or follow indigenous – often animist – beliefs.¹ Arabic is the official language of the nation and Islam is the official religion; other languages, however, and religions are practiced.² The U.S. Department of State has noted that this religious, ethnic and linguistic diversity had made collaboration between the various groups problematic.³ The nation of the Sudan is comprised of twenty-six states (really administrative subdivisions) which are managed by a governor appointed by the president, a local cabinet, and regional ministers.⁴

The Sudan did not truly enjoy independence until 1956, after years of rule by the Egyptians and the British.⁵ At that time, and with much intervention by the British and Egyptian governments, a provisional constitution was enacted. The Arab-led government in Khartoum initially promised to create a federal system at the behest of the southern Sudanese; but, the government broke this promise and it led to civil war from 1955 to 1972.⁶ Beginning in 1958 and lasting until 1969, the ruling apparatus of the Sudan changed numerous times as a result of military coups, a civilian uprising and a parliamentary system of government.⁷ In 1968, under the parliamentary system, two Arab Muslim political parties offered a proposed constitution, which the U.S. State Department argues was the first Islamic-oriented constitution presented in the Sudan.⁸

The parliamentary system was short lived as a result of a military coup in 1969 led by Colonel Gaafar Muhammad Nimeiri, who installed himself as prime minister (later president) and abolished parliament.⁹ An important event occurred during Nimeiri's leadership, namely the 1972 signing of the Addis Ababa Accord – brokered by Ethiopian leader Haile Selassie – which temporarily ended the north-south civil war and afforded the south a measure of self-rule.¹⁰ Also under Nimeiri's reign, however, shari'a (or Islamic law) was instituted and incorporated into the Sudanese penal code; Nimeiri additionally declared his intention to make the Sudan into an Arab Muslim nation.¹¹ The introduction of shari'a was controversial and not well received by all of Sudanese society, eventually leading Nimeiri to declare a state of emergency partially to ensure that shari'a was broadly applied.¹² In fact, non-Muslims in both the north and the south were subjected to shari'a

¹ *Background Note: Sudan*, U.S. Department of State, August 2005, available at www.state.gov/r/pa/ei/bgn/5424 (last checked August 9, 2005).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* (The two parties which proposed this constitution in 1968 were the Umma Party and the National Unionist Party (NUP). These parties were dominated by Arab Muslims.)

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

law and its punishments, which led in part to a resumption of the north-south civil war in 1983.¹³

Eventually, Nimeiri suspended the state of emergency and assured the Sudanese citizenry that the rights of non-Muslims would be respected; the southern Sudanese and other non-Muslims, however, remained deeply suspicious of this assurance and the invocation of shari'a.¹⁴ Less than one year after Nimeiri ended the state of emergency, in April 1985, General Suwar al-Dahab led a military coup which ended Nimeiri's reign.¹⁵ One year later, elections were held and a civilian government came to power.¹⁶ The civilian government, however, did not rescind the Nimeiri era laws instituting shari'a, and the civil war intensified.¹⁷

In 1986, the Sudanese government, led by Prime Minister Sadiq al-Mahdi from the Umma Party, began peace negotiations with the Sudan People's Liberation Army (SPLA), a rebel group comprised predominantly of southern Christian Sudanese led by Colonel John Garang.¹⁸ The SPLA and several Sudanese political parties negotiated the "Koka Dam" declaration, calling for the abolishment of shari'a and the convening of a constitutional conference.¹⁹ This declaration led in 1988 to an agreement between the SPLA and the Democratic Unionist Party (DUP) on a peace plan which called for a cease-fire and an end to Islamic law.²⁰ Prime Minister Sadiq al-Mahdi initially refused to approve the peace plan, but he received an ultimatum from the army: approve the plan or be removed.²¹ His government did approve the peace plan and held talks with the SPLA; but, in June 1989, military officers led by Omar Hassan al-Bashir took over and replaced the al-Mahdi government with the Revolutionary Command Council for National Salvation (RCC).²² General Omar al-Bashir was installed as President, Prime Minister and chief of the armed forces.²³ Al-Bashir's government repudiated the peace plan, but entered new negotiations with the SPLA.²⁴ These negotiations resulted in a temporary cease-fire, which was broken six months later and fighting renewed and continued until recently.²⁵

In 1991, a new penal code was established which allows for harsh shari'a punishments nationwide for crimes.²⁶ The southern Sudanese states are supposed to be exempt from these shari'a-based laws and punishments, but they are not always

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*; See also Who's Who: Significant People and Organizations, SPLA/M, available at www.sudanupdate.org (last checked Sep. 8, 2005).

¹⁹ *Id.*

²⁰ *Id.* (The Democratic Unionist Party (DUP) is the successor party to the National Unionist Party (NUP), which formed in the Sudan after independence and became part of the ruling coalition – along with the Umma Party – during a large portion of the reign of the Sudan's civilian parliamentary system.)

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

exempted.²⁷ Additionally, the penal code provides for the future application of shari'a in the south; and in 1993, all non-Muslims judges in the south were transferred by the government to the north and replaced with Muslim judges.²⁸ Southern Sudanese and other non-Muslims living in northern Sudan are also subject to Public Order Police who enforce shari'a and treat offenses consistent with Islamic law.²⁹

In 1993, leaders of several African nations came together to form the Intergovernmental Authority on Development (IGAD) with the goal of achieving peace in the Sudan.³⁰ The IGAD drafted a Declaration of Principles which should be addressed in order to achieve peace, including the issue of the relationship between religion and state and self-determination for southern Sudan.³¹ The Sudanese government did not approve the Declaration until 1997, three years after its drafting, and during this period, the SPLA, DUP, and Umma Party formed the National Democratic Alliance (NDA) – an umbrella group for anti-government, opposition parties.³² Several rebel factions in the south also began to sign peace agreements with the government of the Sudan and sided with the government against the SPLA.³³

In July 2002, IGAD-sponsored negotiations resulted in the Machakos Protocol, an agreement between the government of the Sudan and the Sudan People's Liberation Movement/Army (SPLM/A) addressing issues such as religion and state, and self-determination in southern Sudan.³⁴ In May 2004, the Sudanese government and the SPLM/A signed the Protocol on the Resolution of Conflict in Southern Kordofan/Nuba Mountains and Blue Nile States (Protocol), outlining the creation of two states in southern Sudan.³⁵ Following the Protocol, the SPLM/A and the Sudanese government initialed the final elements of a comprehensive peace agreement on December 31, 2004, and formally signed the Comprehensive Peace Agreement (CPA) on January 9, 2005, which calls for a new constitution.³⁶ Finally, in April 2005, the National Constitution Review Committee convened and drafted the Draft Interim National Constitution (Draft National Constitution) which was ratified on July 6, 2005.³⁷ The Protocol and Draft Constitution are critical to understanding the future for the peoples of the Sudan.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* (The Sudan People's Liberation Army (SPLA) created the Sudan People's Liberation Movement (SPLM), and they are essentially the same group. Hereinafter, references to the SPLA or SPLM will be combined and referred to as the SPLM/A, unless the official title of a document reflects a different name.)

³⁵ Protocol Between the Government of Sudan and the Sudan People's Liberation Movement (SPLM) on the Resolution of Conflict in Southern Kordofan/Nuba Mountains and Blue Nile States, May 26, 2004, available at www.sudanmfa.com/PROTOCOL.doc (English language translation).

³⁶ Background Note, *supra*, note 1.

³⁷ *Id.*

As of the summer of 2005, President Omar al-Bashir continues to serve essentially in a military dictatorship, as both the head of government and the chief of state.³⁸ He has a cabinet, the Council of Ministers, appointed by him and comprised predominantly of members of the National Congress Party (NCP, formerly the National Islamic Front (NIF)).³⁹ The legislative branch consists of the nominal National Assembly, which last held elections in December 2000, and is also dominated by the NCP.⁴⁰ The judicial branch consists of a Supreme Court and civil and special tribunals, and Islamic principles “inspire the constitution as well as civil and criminal law and jurisprudence.”⁴¹

After the signing of the CPA on January 9, 2005, SPLM/A leader John Garang became first vice president, a significant step towards peace and reconciliation.⁴² Garang, however, died in helicopter crash on July 31, 2005, throwing the Sudan into turmoil regarding the future of the agreements and the fragile peace.⁴³ On August 11, Garang’s successor Salva Kiir Mayardit, a founding member of the SPLM/A, was sworn in to replace Garang and assume the post of first vice president.⁴⁴ Kiir’s responsibilities of leading the SPLM/A, establishing a new government in Khartoum, and dealing with an ongoing conflict in Darfur have been described as a “heavy and complex burden.”⁴⁵ That is surely an understatement given the complexity and history of problems in the Sudan. Kiir, however, does provide a beacon of hope that the Protocol and Draft National Constitution will actually achieve positive results. The Sudan, however, has much to overcome to make it happen.

Despite these ambitious agreements, unresolved issues concerning federalism, shari’a and actual self-governance for the southern states persist. These issues will be explored in order to identify the potential problems that may arise, especially with regards to shari’a, and to explore what the future holds for the Sudan.

III. The Relationship Between Shari’a and the Draft National Constitution and Protocol

To determine what the future may hold for the Sudan, at least in terms of its national and state governments and their interactions, it is necessary to examine the documents that will control these relationships. The Protocol on the Resolution of Conflict in Southern Kordofan/Nuba Mountains and Blue Nile States (Protocol) and the Draft Interim National Constitution (Draft National Constitution) provide an outline for the structure of the state and national governments, and an outline for the future. Critical provisions within these documents determine how the state and national constitutions will interact, and how the state and national legislatures will interact and enact laws. An

³⁸ *CIA World Factbook: Sudan*, available at www.cia.gov/cia/publications/factbook.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Background Note, *supra*, note 1.

⁴² Emily Wax, *In Sudan, Deputy Rises To Tend a Fragile Peace*, The Washington Post, Aug. 14, 2005, at A14.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

important aspect of these interactions is the role of shari'a and how broadly shari'a may be applied, even within the southern states.

A. Conformity Clauses

As noted, the people of the Sudanese southern states of Southern Kordofan/Nuba Mountains (Kordofan/Nuba State) and Blue Nile (Blue Nile State) wish to achieve a lasting peace with the national government while retaining self-determination and self-governance. The people of these states also want to be able to enact laws consistent with their customary, cultural and religious beliefs – without the application of shari'a – and potentially inconsistent with Islamic law. The Protocol recognizes the “importance of cultural and social diversity of the Sudan” and the importance of human rights and fundamental freedoms.⁴⁶ Section 6.2 of the Protocol, however, provides that:

The State Legislature shall prepare and adopt a State Constitution, provided that it shall conform to the Interim National Constitution.⁴⁷

This conformity clause requires that any constitution from either the Blue Nile State or the Kordofan/Nuba State conforms to the Draft National Constitution. In other words, the Draft National Constitution governs the state constitutions and these state constitutions cannot have any provisions which conflict with the supremacy of the national constitution. This provision suggests that these southern states could not completely outlaw in their constitutions the application of shari'a within their borders, since it might conflict with the Draft National Constitution. For example, Blue Nile State could not write a constitution prohibiting the application of Islamic law to all its citizens, Muslim and non-Muslim, since this state constitution might not conform to the National Constitution. This conformity clause allows for shari'a potentially to be applicable in the southern states.

Additionally, the Protocol provides that, “The structures and powers of the courts of the States shall be subject to the [Draft] Interim National Constitution.” This clause is another conformity clause concerning the state courts, again allowing for the potential introduction of shari'a into state governments. In addition, sections 7.5 and 7.6 of the Protocol provide⁴⁸:

7.5 The state courts shall have civil and criminal jurisdiction in respect of State and National Laws, save that a right of appeal shall lie to the National Courts in respect of matters brought before or heard under National laws.

7.6 The National Legislature shall determine the civil and criminal procedures to be followed in respect of litigation or prosecution under National laws in accordance with the Interim National Constitution.

Under provision 7.5, an individual may be tried for violations of national criminal laws, i.e. laws passed by the National Legislature – the national legislative body responsible for

⁴⁶ Protocol Preamble and §1.1, *supra*, note 35.

⁴⁷ *Id.* at §6.2.

⁴⁸ *Id.* at §§7.5 - 7.6.

enacting legislation for the entire nation of the Sudan – in the state courts; or, the individual may bring a civil claim arising under national civil laws in the state courts. This provision sets up a system of concurrent jurisdiction, similar to the system in the United States, whereby state courts may adjudicate cases arising under national laws. For example, a state court in the United States can hear and adjudicate a Racketeer Influenced and Corrupt Organizations (RICO) Act claim, even though the RICO Act is a federal law – not a state law.⁴⁹ Similarly, in the Sudan, a state court in Blue Nile State could adjudicate a case arising under a national law, including a criminal case. The twist, however, is that the procedures used by the courts, including the state courts, to adjudicate the case arising under the national law are procedures selected by the National Legislature. The National Legislature could enact court procedures consistent with shari’a, requiring the allegedly independent state courts to conform to shari’a law, at least with respect to procedures.⁵⁰

To understand how this situation might work, it is useful to provide an example. A national criminal law may be enacted prohibiting the violation of human rights, such as freedom of assembly, which is applicable to the entire Sudanese nation, including Blue Nile State. Suppose a member of the Sudanese police force violates this national law by restricting citizens of Blue Nile State from meeting in a political discussion. A trial of the police officer for the violation of this national law commences in the state court. The National Legislature has enacted a procedural law that in order to be convicted for this crime, two adult, upright, male witnesses must have witnessed the act and testify at trial. This procedural law is grounded in shari’a and mirrors the procedures used in shari’a courts. The state court is required to follow this procedural law and essentially incorporate a rule based in Islamic law into its state court procedures. It, therefore, allows for shari’a to move stealthily into the state governmental structure, especially in the state courts, reducing the potential for self-governance in the southern states.

To take this hypothetical a step further, suppose two adult, upright, male witnesses were not available since the political discussion involved a group only consisting of women. It is possible that the police officer would therefore not be convicted even though he violated a national human rights law.

It might be argued that this type of procedural law could not be passed by the National Legislature since it would 1) also be a violation of human rights laws with respect to gender; and, 2) would violate section 30 of the Draft National Constitution. Section 28 of the Draft National Constitution provides that human rights and fundamental freedoms

⁴⁹ *Tafflin v. Levitt*, 493 U.S. 455 (1990) (State courts have inherent authority, and are presumptively competent, to adjudicate claims arising under federal laws, unless Congress explicitly or implicitly ousts the state courts of jurisdiction over a particular federal claim, or if a clear incompatibility exists between state court jurisdiction and federal interests).

⁵⁰ According to the CIA World Factbook, *supra*, note 38, currently 355 of the 360 seats of the National Assembly are filled by members of the Arab Muslim National Congress Party (NCP). The Protocol on Power Sharing, signed between the Sudanese government and the SPLM/A concurrently with the Protocol, provides that during the interim period prior to general elections fifty-two percent (52%) of the seats of the National Assembly will be allocated to the NCP. At this point and conceivably into the near future, the NCP will control the National Assembly and could enact shari’a procedural laws. In light of this NCP dominance, in the future, when the National Legislature mandated by the Draft National Constitution is formulated, is it likely that the NCP will continue to dominate the national legislative body and could enact shari’a procedural laws to be used by all Sudanese courts.

shall be guaranteed and enforced throughout the whole of the Sudan.⁵¹ Additionally, the Protocol on Power Sharing, signed concurrently with the Protocol, provides for equal rights between men and women.⁵² This guarantee of equality of gender would seem to make the procedural law discussed above a potential violation of the Power Sharing Protocol. This section of the protocol, however, additionally states that these human rights, including equality of gender, can be derogated with the approval of the National Legislature.⁵³ There is essentially, therefore, no prohibition to the potential passage of such shari'a-based procedural laws which must also be used by non-Muslim state courts.

Section 30(d) of the Draft National Constitution provides that:

The judicial discretion of courts to impose penalties on non-Muslims shall observe the long-established legal {shari'a} principle that non-Muslims are not subject to prescribed penalties . . .⁵⁴

This constitutional provision, however, does not guarantee that a court procedural rule such as the one outlined above will not come into existence. It is especially true if the procedural rule is not presented as grounded in shari'a but based in some other principle, such as the fairness and necessity of protecting police officers, who are predominantly male, from false accusations by women especially in the aftermath of events that have occurred in Darfur.

More importantly, Section 30(d) seems to limit the application of shari'a law on non-Muslims only with regard to penalties. It would seem to allow for shari'a to be imposed in other areas, such as procedural rules. Also, Section 30(d) is contained under the title "Dispensing Justice in The Capital," and its preamble states that the provision is applicable in the "National Capital," not throughout the Sudan. These various provisions lead to the conclusion that a procedural law, such as the hypothetical law previously described, could be enacted and applied, even in the southern states. Thus, these states would be subjected to shari'a and required to apply and follow it. This could be viewed as a dilution of the states autonomy and the beginning of renewed conflict between the southern states and the national government.

Perhaps applying and following shari'a in this instance would not have significant consequences. It does, however, demonstrate how the Draft National Constitution contains ambiguities and holes which allow for shari'a to be applied within the southern states. The ostensible goals of the various agreements are to provide the southern states with self-governance, self-determination and a measure of independence from the national government, including independence from Islamic laws. These constitutional provisions, however, indicate that while the system is based in federalism, it also contains the potential for a high degree of intervention (or interference) by the national government, and the potential for the application of shari'a. Thus, the future of the Sudan may be a reflection

⁵¹ Sudanese Draft Interim National Constitution, §28 (2005) (English language translation).

⁵² Protocol between the Government of Sudan and the Sudan People's Liberation Movement on Power Sharing §1.6.2.16, May 26, 2004, available at www.sudanmfa.com/PROTOCOL.doc (Power Sharing Protocol) (English language translation).

⁵³ *Id.*

⁵⁴ *Id.* at §30(d)

of the past, when the southern states were supposed to be exempt from shari'a, but in reality were not. Similarly, these "loopholes" and ambiguities in the Protocol and Draft National Constitution could cause the southern states, which want to be exempt from shari'a, to be subjected to it, at least in certain areas.

B. Enactment of Laws

Another extremely important goal of the Protocol and Draft National Constitution is to allow for the southern states of Kordofan/Nuba State and Blue Nile State to have their own state governments, including state legislatures which enact laws applicable only within these states. For example, the Protocol provides that Kordofan/Nuba State and Blue Nile State shall have their own state legislatures which "shall legislate for the state[s]" including in the areas of social welfare, regulation of businesses, regulation of roads and transportation, and vehicle licensing.⁵⁵ Under the U.S. system, these areas are traditionally areas governed by state laws. The Sudanese Protocol, however, somewhat limits the power of the state legislatures to enact laws completely independent from the national government, offering a further opportunity for Islamic law or principles based in shari'a to be introduced and applied in the southern states.

For example, Schedule A of the Protocol lists the areas where the state executive and legislative branches have exclusive jurisdiction to enact laws, such as in the areas of vehicle licensing and regulations of businesses as previously noted. Schedule A, however, restricts the ability of the state legislatures freely to enact laws concerning religious matters by adding the caveat that state legislatures may act with regard to "[r]eligious matters, subject to the Interim National Constitution."⁵⁶ In other words, any laws enacted by these states concerning religious matters must conform to the Draft National Constitution, which is supreme to the state laws.⁵⁷ This caveat enhances the argument that the states could not universally prohibit the application of shari'a within its borders.

Additionally, Schedule B of the Protocol lists concurrent powers held by the state and national legislative and executive branches, including concurrent powers over "gender policy" and "women's empowerment."⁵⁸ While not an explicit statement regarding shari'a, the fact that the states do not have exclusive province over women's issues suggests that the national government is interested in these issues and wants a significant role in enacting legislation regarding them. Since women's issues are often a controversial and debated element of shari'a, there is a further suggestion that the national government wants to assure that the potential "empowerment" of women does not conflict with Islamic law or Islamic norms.

Finally, Schedule A of the Protocol states that the state legislative and executive branches have exclusive jurisdiction with regards to laws concerning the "[r]egistration of

⁵⁵ Protocol §6.4 & Schedule A, *supra*, note 35.

⁵⁶ *Id.* at Schedule A(10).

⁵⁷ Section 6 of the Draft National Constitution provides that the national constitution is the supreme law of the land and all state constitutions and all laws must comply with it.

⁵⁸ *Id.* at Schedule B(19), (20).

marriage, divorce, inheritance, births, deaths, adoption and affiliations.”⁵⁹ It cannot escape notice that these are the areas traditionally governed by Islamic family law, and often areas of controversy. It may be easily overlooked but important to notice that the states only have authority over the “registration” of marriage and the other areas. This is critical since the language implies that the state does not have authority over the *laws* concerning marriage, divorce and inheritance.

Schedule A basically seems to limit the states’ abilities to govern and enact laws with respect to marriage and other areas of family law. For example, Blue Nile State may enact a law requiring that in order officially to register a marriage in the state, the female must have attained the age of sixteen. The law does not govern the age that the female can be married, just the age the female must attain for the marriage to be registered officially. A national law, however, could govern the age that a female can be married, such as requiring that a female attain the age of nine in order to be married, which is consistent with shari’a. Thus, the state is not able to control or enact its own laws with respect to marriage, just with regards to the registration of marriage. As a result, shari’a law is essentially applicable in these southern states, even if the states wish to enact laws that do not comply with shari’a (such as a law altogether prohibiting marriage until a female attains the age of sixteen).

These provisions of the Protocol demonstrate how the states do not have total autonomy, especially concerning certain areas of law. These provisions also demonstrate an additional avenue that may be utilized by the national government to introduce shari’a into the southern states or at least restrict the southern states from passing legislation incompatible with shari’a. Yet again, the future seems to reflect the past, which indicates that the Kordofan/Nuba State and Blue Nile State may be subject to some areas of shari’a even if they wish otherwise. These provisions also provide a window into how the national and state governments may interact in the future, and how the national government may assert some dominance over the states.

The Draft National Constitution also provides for the enactment of laws by the national and state governments. The provisions of the constitution concerning the sources of legislation seem to suggest that shari’a will not be applied in Kordofan/Nuba State or Blue Nile State; however, when these provisions are read carefully, it becomes apparent that shari’a has an avenue into the states.

Section 3(1) of the constitution provides:

Nationally enacted legislation having effect only in respect of the states outside southern Sudan shall have as its sources of legislation shari’a and the consensus of the people.⁶⁰

In other words, legislation enacted by the National Legislature which presumably affects all states except Kordofan/Nuba State and Blue Nile State has shari’a or consensus as its source. While this provision seems to provide for the exclusion of shari’a within the

⁵⁹ *Id.* at Schedule A(18).

⁶⁰ Draft Interim Constitution §3(1), *supra*, note 50.

aforementioned states, the language is actually ambiguous. In fact, two readings of the provision can be found.

One reading of the provision indicates that the National Legislature could enact a law sourced in shari'a, and as a result of this sourcing, the law would only be applicable outside of southern Sudan. A second reading of the provision indicates that the National Legislature could enact a law applicable only outside of southern Sudan, and could thus be sourced in shari'a. Under the second reading, the National Legislature could also enact a law applicable to all of the Sudan; it is unclear whether this law could be based on shari'a, but the constitution does not seem to prohibit such an occurrence. Importantly, the issue of which reading is intended is an issue often resolved by a constitutional court, an area that will be addressed later.

Section 3(2) of the Draft National Constitution does not clarify which reading of Section 3(1) is correct and continues the ambiguity by providing:

Nationally enacted legislation applicable to the states of southern Sudan and/or the Southern Sudan shall have as its sources of legislation popular consensus, the values and the customs of the people of the Sudan, including their traditions and religious beliefs, having regard to the Sudan's diversity.⁶¹

Similar to Section 3(1), two readings of this provision are possible. One reading would provide for the National Legislature to enact legislation sourced in popular consensus or the values and customs of the people of the Sudan, potentially applicable only in southern Sudan. Another reading would provide for the National Legislature to enact laws exclusively governing southern Sudan, which would only be based on consensus or the values and customs of the Sudanese people. Again, it seems possible that the National Legislature could enact a law applicable to all of the Sudan that could be based in shari'a.

Taking the second and what might be considered the more textualist interpretation of Section 3(2), that the National Legislature can enact laws applicable only to southern Sudan, still leaves an ambiguity within the provision. The provision states that this legislation shall have as its sources "popular consensus," and "the values and the customs of the people of the Sudan."⁶² While the provision does not explicitly mention shari'a as a source of this legislation, it does not exclude shari'a as a source. In fact, it can be argued that the values and beliefs, including religious beliefs, of the people of the Sudan absolutely include shari'a. As a result, shari'a based legislation could be enacted which would apply to southern Sudan, including the Kordofan/Nuba State and Blue Nile State.

It could be argued that Section 3(3) of the Draft National Constitution clarifies these ambiguities, but this section does not really resolve the potential conflicts existing in the constitution. Section 3(3) provides:

⁶¹ *Id.* at §3(2).

⁶² *Id.*

Where national legislation is currently in operation or is enacted and its source is religious or customary law, then a state the majority of whose residents do not practice such religion or customs may:

Either introduce legislation so as to allow or provide for institutions or practices in that state consistent with their religion or custom, or

Refer the law to the Council of States for it to approve by a two-thirds majority or initiate national legislation which will provide for such necessary alternative institutions as is appropriate[.]⁶³

This provision appears to allow predominantly non-Muslim states in the Sudan to reject laws that are based in religious law, such as shari'a. It is unclear, however, whether these states would actually be able to overcome a law based in shari'a and enact an alternative law based in other religious or customary principles.

For example, Section 3(3) requires that in order for a shari'a based law which was enacted by the National Legislature to be inapplicable in the southern states (such as Blue Nile State), the state must introduce legislation providing for alternative practices or laws consistent with its predominant religion or customs. It is unclear, however, how this legislation is to be introduced and exactly how it is enacted. Does the alternative law amend the national legislation or completely repeal it? This issue seems to be unresolved. Additionally, it is unclear what type of vote is required to enact the alternative law. For example, is the law to be considered and voted upon by the entire National Legislature or just members from the affected states? Does it require a simple majority to pass or a super-majority? Again, these issues are not clarified in the text of the constitution.

Section 3(3) also provides an opportunity for the state to refer the law to the Council of States for consideration by this body. There are several problems with this element of the provision. First, the Council of States seemingly may approve the original shari'a-based law, despite the wishes of the non-Muslim state, provided a two-thirds majority consents to the law. This element is potentially problematic because it allows for shari'a to be the law of the land in the non-Muslims states. By way of a hypothetical, suppose the National Legislature passes a law regarding banking practices which is based in shari'a. Blue Nile State opposes the law since it is inconsistent with the customary and religious practices within the non-Muslim state. Blue Nile State refers the shari'a banking law to the Council of States in the hopes that the Council will provide for necessary but appropriate alternative institutions. Instead, the Council of States approves the shari'a banking law by a two-thirds vote; and as a result, the shari'a banking law is applicable in the Blue Nile State. This outcome is potentially problematic because 1) the law conflicts with the traditional practices of the citizens of the Blue Nile State and 2) it may impair the ability of the Blue Nile State to regulate businesses within its borders and improve its economic condition. It is possible that the Blue Nile State did not want to conform to shari'a banking laws simply in order to improve the economy of this extremely poor state. It cannot, however, overcome the law and must apply it.

The second element of Section 3(3) additionally allows for the non-Muslim state to refer the shari'a-based law to the Council of States, which may provide for necessary

⁶³ *Id.* at §3(3).

alternative institutions as appropriate. Applying the same hypothetical previously used, the Blue Nile State refers the shari'a banking law to the Council of States, which initiates national legislation providing for alternative banking methods. The initiation of this national legislation does not automatically guarantee the approval of this legislation or the alternative banking methods. If the Council-initiated legislation does not receive approval, it appears that the Blue Nile State will be subjected to the shari'a banking law, despite its wishes to the contrary.

Essentially, although Section 3 of the Draft National Constitution appears to provide an avenue for the non-Muslims states of the Sudan to be free from the application of shari'a, Section 3 is ambiguous and the states may still be subject to Islamic law. Once again, the goal of achieving autonomous and self-governing states in southern Sudan is partially thwarted by the language of the constitution and potentially by the intent of its drafters. The future is again reflecting the past, and these states and their citizens may not be able to acquire the self-determination for which they have fought. The future for the Sudan, therefore, does not appear to be free from conflict, at least in terms of its various laws. The hope, however, is that future conflicts may be fought in the courts or with words, rather than on the battlefields.

VI. Conclusion

The preceding analysis demonstrates generally how the national Sudanese government may exercise its authority over the southern states of Kordofan/Nuba and Blue Nile, and specifically how shari'a may be applicable in these states. It seems apparent that the ambiguities in the Draft Interim Constitution and the potential conflict between the Protocol and the constitution may lead to the introduction of shari'a within the southern states, despite the desire of these states to have autonomy and self-determination, without the mandate of shari'a.

It is important to note that the introduction or application of shari'a into these southern states is not problematic simply because it is Islamic law. In other words, shari'a itself is not the problem; the problem is the introduction of shari'a at the behest of the national government instead of the state governments. This analysis is not intended to be a condemnation of shari'a as a source of law; it is, however, designed to highlight the potential consequences that may be derived from the constitution, namely the application of shari'a in states who wish to follow their own locally derived laws instead of shari'a.

In fact, the history of the Sudan demonstrates just how controversial shari'a law can be and how its application has led to the intensification of the civil war. For example, when Nimeiri instituted shari'a, the civil war resumed; and, when al-Dahab came to power and retained the shari'a laws, the civil war intensified. A major factor in the 1988 cease-fire was an end to Islamic law in the southern states. It is clear that for the non-Muslim people of the Sudan, a system of government and laws free from shari'a are critical to their cooperation with the national government and inclusion in the Sudanese nation.

With regards to the future, if shari'a is allowed to move into the systems of government and laws of southern Sudan, it is possible that the civil war will resume. The people of southern Sudan have fought to prevent the introduction of shari'a into their

lands, and may take up arms again should shari'a be introduced. The first step, however, in preventing the resumption of this civil war is to identify the potential problems within the constitution which allow for shari'a to be applied in southern Sudan. The next step is to prevent their application, if only to keep the peace and allow for the Sudanese people to have lives free from civil strife.