

Religion and the Secular State: Sudan National Report¹

I. SOCIAL CONTEXT

It has been generally recognized that the independence of political power from religious power, within Western experience, marks the definitive transition to the modern state² but does not interrupt the relationship between law and religion.³

The widespread presence of religion within the social context, its importance for the achievement and maintenance of political integration and legitimization,⁴ and the recent transition from religious freedom to cultural freedom⁵ make the political and legal approach to religious questions quite problematic,⁶ though decisive for better satisfaction of the needs of the multicultural and multireligious society.⁷ At the same time, one of the

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1. [Author's note:] It is amply known that, since 2011, it is not possible to consider the Sudan as a unitary state in the same way that we have considered it in the National Report of 2010. In fact, now, after the referendum for the independence of the Southern Sudan, we have to discuss about two different states, the Republic of the (North) Sudan and the Republic of the South Sudan. Consequently, at the first sight, we could even think that it could be better to have two different reports now, one for the Sudan and one for the South Sudan. Nevertheless, in accordance with the Editors of this volume, it seemed finally to be more useful to confirm the original report, in its substantial lines and contents referring to the 2010, even for the definitive version of this volume, and to add, in some new footnotes, some information and evaluations that could be considered more significant in confirming the sense of the special relationship between the State and the religion that characterizes, even in the current phase, the evolution of the Sudanese institutional and constitutional experience. It is worth considering, in a wider view, that there are decisive reasons to support this option. In particular, we have to consider that no decisive innovation in the constitutional structures has been formally realized at the moment, while it is clearly too early to discuss about a real reversal of the legal and social context. But especially, we can surely assume that a unitary representation of the national report for the Sudan allows to analyse, in a very interesting dynamic perspective, the very important role of religion in constitutional processes and transition started up in this area.

2. This is a very much discussed question, from different perspectives: for example, Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* [*Diritto e Rivoluzione. Le Origini della Tradizione Giuridica Occidentale*], trans. E. Vianello (Bologna: Il Mulino, 1988); Ernst-Wolfgang Böckenförde, *Diritto e Secolarizzazione. Dallo Stato Moderno All'Europa Unita*, trans. Mario Carpitella (Roma-Bari: Laterza, 2007); Carlo Cardia, *Manuale di Diritto Ecclesiastico* (Bologna: Il Mulino, 1996); Maurizio Fioravanti, *Lo Stato Moderno in Europa: Istituzioni e Diritto* (Roma-Bari: Laterza, 2002); Pier Paolo Portinaro, *Stato* (Bologna: Il Mulino, 1999); Ivana Vecchio Cairone, *Forme di Stato e Forme del Sacro. Percorsi Storici* (Roma: Aracne, 2009).

3. José Casanova, *Public Religions in the Modern World* [*Oltre la Secolarizzazione. Le Religioni alla Riconquista della Sfera Pubblica*], trans. Maurizio Pisati (Bologna: Il Mulino, 2000); René Rémond, *La Secolarizzazione. Religione e Società nell'Europa Contemporanea*, trans. Michele Sanpaolo (Roma-Bari: Laterza, 2003); Maria Christina Folliero, *Diritto ecclesiastico. Elementi. Principi non scritti. Principi scritti. Regole. Quaderno I I principi non scritti* (Torino: G. Giappichelli, 2007), 132 ff.

4. Antonio Vitale, *Ordinamento Giuridico e Interessi Religiosi. Corso di Diritto Ecclesiastico* (Milano: Giuffrè, 1998); Ivana Vecchio Cairone, *Introduzione alla Storia e Sistemi dei Rapporti tra Stato e Chiesa* (Roma: Aracne, 2009).

5. Nicola Colaianni, *Eguaglianza e Diversità Culturali e Religiose. Un Percorso Costituzionale* (Bologna: Il Mulino, 2006); Kirsten Ketscher, "Cultural Rights and Religious Rights," in *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?*, ed. M.P.L. Loenen & Jenny E. Goldsmith (Antwerpen – Oxford: Intersentia, 2007), 219-237.

6. Just considering the necessary relationship between law and religion, with specific regard to relevance of canon law and religious law: see, from different perspectives, Salvatore Berlingò, "Diritto Interculturale: Istruzioni per L'Uso di un Ecclesiasticista/Canonista," in *Daimon. Annuario di Diritto Comparato delle Religioni* (Bologna: Il Mulino, 2008), 8; Silvio Ferrari, *Lo Spirito dei Diritti Religiosi: Ebraismo, Cristianesimo e Islam a Confronto* (Bologna: Il Mulino, 2002); Mario Ricca, "Soggettività Giuridica e Comunità Culturali (Metafore e Metamorfosi per un Diritto Interculturale)," in *Comunità e Soggettività*, ed. Mario Tedeschi (Cosenza: Luigi Pellegrini, 2006), 215-277; Mario Tedeschi, "Diritto Ecclesiastico e Diritti Confessionali," *Diritto e Religioni* 3 (2008): 293-297.

7. Maria Christina Folliero, "La Libertà Religiosa nelle Società Multiculturali: La Risposta Italiana," *Stato*,

most important themes in the debate is represented by limitation of the “public” role of religions⁸ and definition of their exact collocation in the “public arena”⁹ or, in other words, by the antagonism between secularism and religion¹⁰ and, especially, by the goal of a (re)secularization of the State and politics¹¹ and the consequent (re)affirmation of the basic principles of legal system, firstly laity.¹² Recently, the acknowledgment of the social relevance of religious interests as well as the need for a promotional protection of religious freedom meets with new dimensions of state sovereignty¹³ and adheres to the goal of a more decisive protection, transcending traditional (i.e., national or, in a wider sense, regional) borders¹⁴ and consequently aspiring to be asserted on a global level.¹⁵

Within an international legal context and according to a prescriptive description of comparative law, secularization represents a desired approach which should therefore be promoted and sustained with the perspective of a universal vision of the protection of human rights and, especially, freedom of conscience, belief, and religion.

The call for secularization therefore acts, from the outside, as one of the most significant elements consenting to satisfy the conditions of (global¹⁶) constitutionalism, even though a more detailed investigation leads to the assumption that, firstly, the qualification of states as secular or non-secular can not be decisive at all and, secondly, that the same qualification is unable to limit the socio-cultural and legal relevance of religion.¹⁷ However, the forms, limits and legal consequences of the various systems of relationships between the State and religious groups are to be considered as dependant variables of the respective socio-cultural and political contexts.¹⁸ Also according to a correct comparative method,¹⁹ they should therefore be studied within this context.²⁰

Chiese e Pluralismo Confessionale (June 2008): 1-14.

8. Silvio Ferrari, “Islam in Europe: An Introduction to Legal Problems and Perspectives,” in *The Legal Treatment of Islamic Minorities in Europe*, eds. Roberta Aluffi Beck-Peccoz and Giovanna Zincone (Leuven: Peeters, 2004), 1-10.

9. Jocelyne Cesari, “Islamic Minorities’ Rights in Europe and in the USA,” in *The Legal Treatment of Islamic Minorities in Europe*, id. at 11-29.

10. See, with regard to a specific question, Dominic McGoldrick, *Human Rights and Religion: The Islamic Headcraft Debate in Europe* (Oxford: Hart Publishing, 2006).

11. Loenens & Goldsmith, *Where to Draw the line?*, supra n. 5.

12. Stefano Rodotà, *Perché Laico* (Roma-Bari: Laterza, 2009); Giuseppe Casuscelli, “Dal Pluralismo Confessionale alla Multireligiosità: Il Diritto Ecclesiastico e le sue Fonti nel Guado del Post-Confessionismo,” in *Multireligiosità e Reazione Giuridica*, ed. Antonio Fucillo (Torino: Giappichelli, 2008).

13. Giuseppe D’Angelo, *Crisi dello Stato, Riforme Costituzionali, Principio di Sussidiarietà* (Roma: Aracne, 2005).

14. Giovanni Cimbalo, “L’Incidenza del Diritto dell’Unione Europea sul Diritto Ecclesiastico – Verso un ‘Diritto Ecclesiastico’ della Comunità Europea,” in *L’Incidenza del Diritto dell’Unione Europea sullo Studio delle Discipline Giuridiche nel Cinquantennio della Firma del Trattato di Roma*, eds. L.S. Rossi and Giacomo Di Federico (Napoli: Edizioni Scientifiche, 2008), 213-239; Marco Ventura, “Religious Pluralism and Human Rights in Europe. Equality in the Regulation of Religion,” in Loenens & Goldsmith, *Where to draw the line?*, supra n. 5 at 119-128.

15. Francesco Margiotta Broglio, “Il Fenomeno Religioso nel Sistema Giuridico dell’Unione Europea,” in *Religioni e Sistemi Giuridici. Introduzione al Diritto Ecclesiastico Comparato*, eds. Francesco Margiotta Broglio, Cesare Mirabelli, and Francesco Onida (Bologna: Il Mulino, 2000), 87 ff.

16. See “Symposium: Global Constitutionalism-Process and Substance,” in *Indiana Journal of Global Legal Studies*, 16 (2009), particularly Anne Peters and Klaus Armingeon, “Introduction: Global Constitutionalism from an Interdisciplinary Perspective,” 385-395; Anne Peters, “The Merits of Global Constitutionalism,” 397-411; Karolina Milewicz, “Emerging Patterns of Global Constitutionalization: Toward a Conceptual Framework,” 413-436; Beth Simmons, “Civil Rights in International Law: Compliance with Aspects of the ‘International Bill of Rights,’” 437-481.

17. Giuseppe D’Angelo, “Regolamentazione Giuridica del Fenomeno Religioso e Crisi di Sovranità: Spunti Problematici dalle Più Recenti Decisioni della Corte Suprema Statunitense in Tema di Clausola di Separazione,” *Diritto e Religioni* 1 (2006): 707-741.

18. Maria Christina Folliero, *Diritto Ecclesiastico. Elementi. Principi non Scritti. Principi Scritti. Regole. Quaderno I I Principi non Scritti* (Torino: Giappichelli, 2007), 132 ff.

19. Lucio Pegoraro and Angelo Rinella, *Diritto Pubblico Comparato. Profili Metodologici* (Padova: CEDAM, 2007), 7 ff.; Roberto Sacco, “Introduzione al Diritto Comparato,” in *Trattato di Diritto Comparato*, ed. Roberto Sacco (Torino: UTET, 1992), 128 ff.

20. On application of comparative method to the study of the ecclesiastical law of the State and relationships between religion and comparative law, Francesco Onida, “L’Interesse della Comparazione negli Studi di Diritto

In a different dimension, viewing the situation from within individual countries, the pressure towards the secular state can act as the element of potential failure of the unity of the legal system. This is the case of Sudan where, on the one hand, the demands of the international community decidedly push in the direction of the alignment to the standards relating to the upholding of constitutional rights, while on the other hand the ideal of the separation between state and religion²¹ – commonly perceived as an immediate consequence of secularization²² – constitutes one of the most significant elements through which the aim of territorial independence and legal differentiation as well as the secession and division of national unity could be reached.

Practically, the tension towards the secular state revives and strengthens the democratic appeals of a part of the country, operating as a decisive factor of political division with significant results on the legal and constitutional system, but it also paradoxically ends up strengthening the religious fundamentalism of the remaining article.

The case of Sudan is indeed particularly interesting and significant. Its ethnic-cultural and religious composition, lead Sudan to claim to be a valid representation of the particular heterogeneity of the African continent and in particular of Africa south of the Sahara. It is the largest country in Africa, with a population of about 30 million inhabitants spread over an area of 2.5 million km², which can be approximately divided into 56 ethnic groups, which are sub-divided into 597 subgroups, speaking 115 languages and dialects.²³ It is also characterized by various religious faiths (about 60 percent Muslim, 15 percent Catholics, and 25 percent animists or belonging to traditional autochthonous religions²⁴). Such a reality²⁵ certainly produces a significant web of intercultural and inter-religious relationships²⁶ which could be useful in improving the conditions of a peaceful co-existence, so that it clearly could contribute to attaining a deeper meaning of the ideal of modern multiculturalism.²⁷

Nevertheless, the same reality often clashes with the political aim of the unity of the legal system, which is imposed by the improper transposition of the Western idea of state and rule of law within a completely different context such as that of Sub-Saharan Africa²⁸.

The basic tension between the ambition to integrate such a rich variety of ethnic-cultural and religious identities and its potential suppression, has long been the cause of the dramatisation of the contrast between the African, and the Arab and Muslim identities

Ecclesiastico,” in *La Legislazione Ecclesiastica. Atti del Convegno Celebrativo del Centenario delle Leggi Amministrative di Unificazione*, ed. Pietro Agostino D’Avack (Vicenza: Neri Pozzi, 1967), 603 ff.; Harold J. Berman, “Comparative Law and Religion,” in *The Oxford Handbook of Comparative Law* (Chapter 22), eds. Mathias Reimann and Reinhard Zimmermann (Oxford: Oxford University Press, 2006), 739 ff.; Cesare Mirabelli, “Diritto Ecclesiastico e Comparazione Giuridica,” in *Religioni e Sistemi Giuridici. Introduzione al Diritto Ecclesiastico Comparato*, eds. Francesco Margiotta Broglio, Cesare Mirabelli, and Francesco Onida (Bologna: Il Mulino, 2000).

21. On separation and separation theory, *ex multis*, Mashood A. Baderin, “Religion and International Law: Friends or Foes?,” *European Human Rights Law Review* 5 (2009): 637-658; Sophie van Bijsterveld, “Equal Treatment of Religions? An International and Comparative Perspective,” in Loenen & Goldsmith, *Where to draw the line?*, supra n. 5 at 103-117; Jenny E. Goldsmith & Titia Loenen, “Religious Pluralism and Human Rights in Europe: Reflections for Future Research,” id. at 311-329.

22. Loenen & Goldsmith, id.

23. Mohamed Salih, “Etno-Nazionalismo nel Sudan Post-Indipendenza: Dalle Guerre Civili al Genocidio,” in *Sudan 1956-2006. Cinquant’Anni di Indipendenza, Afriche e Orienti*, n. 1-2, ed. Stefano Belluci and Massimo Zaccaria (Dogana, Repubblica di San Marino: AIEP, 2006), 46-56.

24. Miguel Angel Ayuso Guixot, *Christian-Muslim Relations in the Sudan: A Survey through the Sudanese Politics, Islamochristiana* (Roma: Pontificio Istituto di Studi Arabi e d’Islamistica, 2004), 30, 132; Referring to 2008, ACS (Aiuto Alla Chiesa Che Soffre), *La Libertà Religiosa nel Mondo. Rapporto 2008* (Roma: 2008), indicates about 70.3% Muslim, 16.7% Christians, 11.9% animists and 1% belonging to other religions.

25. For an interesting history of Sudan, see Peter Malcolm Holt and Martin W. Daly, *A History of the Sudan: From the Coming of Islam to the Present Day*, 4th ed. (London: Longman, 1988).

26. Guixot, *Christian-Muslim Relations in the Sudan*, supra n. 24.

27. Giuseppe D’Angelo, “La Libertà Religiosa nelle Società Multiculturali: Il Caso Sudanese,” *Diritto e Religioni* 2 (2008): 149-162.

28. The limits of occidental approach to reality of subsaharan Africa are confirmed by historical studies as well as political studies: see, for example, Anna Maria Gentili, *Il Leone e il Cacciatore* (Roma: Carocci, 2004); Giovanni Carbone, *L’Africa. Gli Stati, la Politica, i Conflitti* (Bologna: Il Mulino, 2005).

and has turned towards the dichotomy between the north of the country, approximately declivable with the majority being Arab-Islamic, and the South, otherwise linked to traditional religions or those converted to Christianity. The intensification, in certain periods of the country's history, of the contrast has determined the outbreak of bloody and long lasting armed conflicts which are still far from being resolved, in which the context of religious claims have played a large role, at least under a symbolic profile.²⁹

As international literature frequently recognizes, the intolerance towards the attempts of Islamization produced over time and in particular to those consequences of the generalized introduction of Islamic law often act as fuel to the claims of autonomy of Southern Sudan as well as the result of an endemic situation of conflict.³⁰

II. THEORETICAL AND SCHOLARLY CONTEXT

The dynamics and the – potential or emerging – results of this double tension – regarding, from the outside as well as the inside, the authoritarian approach of the relationship between the national community and the holders of political power, leading to the political use of religion, and the re-alignment to the international standards protecting the rights of individual conscience as requested by the international legal system – constitute further reasons for the interest in studying the Sudanese experience.³¹

The recognition of the role of the Sharia in the Sudanese socio-political and legal system, or the Islamic nature of the State, is a recurring problem that determines – or, if preferred, proceeds along with – the evolution of the political relationships in an authoritarian direction. It deals with issues that clearly reflect the diversity of the different Islamic theoretical-cultural approaches and interpretations, and it also influences the answer to the theme of the nature of the State, specifically relating to the relationship between law and religion, so that these questions are at least conditioned by the relationships of strength, established, time after time, within Islamism.

Generally, a specific emphasis is given³² to the theoretical approach attributed to the era of Mahdiyya, (from “Muhammad Ahmad ibn’Abdallah, the Mahdi of Sudan in the 19th century, who was the founder of a Messianic movement that tried to realize “a pure and incorrupt Islamic State”) and to the affirmation of the idea that there could not be a separation between state and religion.³³

At the same time, current literature highlights the complexity of the relationships between this theoretical approach and the autochthonous religious traditions of Sufism, also considering that Sufism was the means through which Islam entered the area. It has probably greatly influenced the way to interpret Islamism in Sudan³⁴, allowing the maintenance of a certain moderation, even with the arrival of Hasan al Turabi's radical Islamic view. Notwithstanding the conditions imposed by the Ottoman dominion and the results of the activity of the Mahdi, it is worth considering that before the independence of the Sudan (1956), and more precisely in the phase of the Anglo-Egyptian condominium (established in 1899 following the conclusion of the Mahdist revolution), Islam

29. Jeffrey Haynes, “Religion, Ethnicity and Civil War in Africa: The Cases of Uganda and Sudan,” *Round Table* 96 (2007): 305-317.

30. Aharon Layish and Gabriel R. Warburg, *The Reinstatement of Islamic Law in Sudan under Numayrī: An Evaluation of a Legal Experiment in the Light of its Historical Context, Methodology, and Repercussions* (Leiden: Brill, 2002).

31. Giuseppe D’Angelo, “La Libertà Religiosa...”, supra n. 27.

32. Peter Woodward, “Cinquant’Anni di Politica Islamica,” in *Sudan 1956-2006: Cinquant’Anni di Indipendenza, Afriche e Orientali*, n. 1-2, ed. Stefano Belluci and Massimo Zaccaria (Dogana, Repubblica di San Marino: AIEP, 2006), 87-93.

33. Camillo Ballin, “The Dimmis in the Sudanese Mahdiyyah (1881-1898),” *Islamochristiana* 27 (2001): 101-129.

34. Carlo Carbone, “Religiosità e Religioni in Africa Subsahariana. Il Contatto con il Nord e la Nascita del Problema Religioso,” in *La Libertà Religiosa*, vol. III, ed. Mario Tedeschi (Soveria Mannelli: Rubbettino Editore, 2002), 701-741; Ioan M. Lewis, “L’Islam nell’Africa Subsahariana,” in *Storia dell’Africa e del Vicino Oriente*, eds. Alessandro Triulzi, Guido Valabrega, and Anna Bozzo (Firenze: 1979), 66-80.

maintained its role, even if slightly less important than in the past.

The Sharia was considered the personal law of the Muslims. In other words, it was the law applied to the relationships between themselves, while customary law was recognized as the guidelines of both the local, and the English law, which were to be considered as the territorial law, of general application.

On this basis, the Sharia highlights a progressive tendency to implement its own efficacy by legitimizing itself through the legal tools introduced by the colonizers, indirectly, as an effect of the claim carried out by the English legislator to the parameter of "Justice, Equity and Good Conscience"³⁵ or also, directly and especially after independence, following the attempts to extend the nature of personal law and amplify its possible value as territorial law.

Non-Muslim parts are thus allowed to opt for the application of Islamic law, while this one is necessarily applied when, dealing with marital issues, one of the parties is Muslim or belongs to one of the religions of the Book. Secondly, there is the adoption of a civil code based on the principles of Islamic law, according to the Muslim model, or the acknowledgment of the Sharia as a general source of inspiration of the law, so that only non-Muslim, in personal matters, could be allowed to deviate from it.³⁶

A significant turning-point in the direction of the Islamization of Sudan really occurs during the second phase of the political-military dictatorship of Jafaar Numeiri, which succeeded (1969) the brief democratic experience that set up the defenestration of Ibrahim Abboud (1964).

Abandoning the initial socialist option (which had culminated in the approval of the constitution of 1973) and starting a political phase of national reconciliation – particularly drawing together of the more convinced supporters of Islamic fundamentalism – Numeiri announced in 1977 the setting up of a committee for the revision of Sudanese legislation, headed by the influential figure of Hassan al-Turabi.

The declared task of the committee was more specifically the adaptation of the current legislation to the dictates of Islamic law. They are the premonitory symptoms of the issuing (1983) of the "laws of September," through which the Sharia is explicitly recognized as the source of law for all the Sudanese.

The evaluation of the laws of September and the real meaning thereof that emerges in the context of the international reading, is highly contrasting. On the one hand, it highlights that the extended recognition of the Sharia as the source of the law has led to a decisive recognition of Sudan as an Islamic State, or the affirmation of a conception of national unity based on the once Arab and Islamic nature of national community (with evident disrespect to the religious and ethnic varieties of the country, as well as its being, above all, African). At the same time, it also places emphasis on the superficial nature of Islamization set up by Numeiri or, alternatively, the negative consequences, in terms of progressive isolation of the dictator, coming from the indiscriminate enforcement of Islamic law, which is even more declined according to a particular interpretation which was not unanimously shared by all Islamists.

Firstly, it has been pointed out that the introduction of the Sharia was not accompanied by a profound activity of Islamization of the civil society as well as the same government contexts that should have supported it, so that the subsequent analysis, should discuss as being a substantial failure, in reference to Numeiri's attempt.

Secondly, it is worth noting that the proclamation of Islamic law and the correlating postulates have led to the reopening of the civil war between North and South.

It has also been pointed out that the politics of Numeiri did not have a large following in Islamic circles, as highlighted by the execution of Mahmud Mohammed Taha.³⁷ International literature points out that this event had a really negative effect, strengthening

35. Aharon Layish & Gabriel R. Warburg, *The Reinstatement of Islamic Law*, supra n. 30.

36. Marco Guadagni, "Sudan," in *Il Diritto Africano*, ed. Rodolfo Sacco et al. (Torino: UTET, 1995).

37. Silvia Tellenbach, "L'Apostasia nel Diritto Islamico," *Daimon. Annuario di Diritto Comparato delle Religioni* 1 (2001): 63 ff.

the belief that the activity of the dictator was significantly deviating from Islamic traditions, in such a way that it was no longer tolerated.

It is therefore not surprising that the progressively authoritarian deviation imposed by Numeiri to his government is considered to be at the basis of his removal from office (carried out without violence and accepted by a significant following within the population) by Suwar al-Dhahab (in 1985). Even with such limits (recognized in terms of a propagandistic use of the religious ideals), the aim of the Islamization of Sudan, or the construction of an Islamic State, can not claim to have been completely abandoned by the holders of political power. Indeed, it became stronger and conditioned the history of Sudan as well as the actual legal and political evolution.³⁸ The democratic governor of Sadiq al-Mahdi, upon taking office, as a natural consequence of the transitional government of al-Dhahab, never seriously questioned the enforcement of the laws of September and, even³⁹ for this reason, was not able to end the conflict with the South.

However, the arrival on the political scene of Omar Hasan Ahmad al-Bashir (1989) determined another significant reform, on a fundamentalist basis, of the State to the point that Sudan was considered as the first and only example of an Islamic State in the whole Sunnite Islam world. The introduction of a new penal code, largely based on the dictates of the Sharia (1991), constituted a more knowledgeable and radical interpretation of political Islam and, under the unfailing direction of al-Turabi⁴⁰, accompanied, internally, a more decisive socio-cultural transformation (involving schools, the Army and the media) and, externally, a decisive policy of international propaganda based on the values of Islamic fundamentalism.

As in the case of Numeiri – but according to a chronology that I would define “inverted” – the claim of the role of Islam marks the progressive succession of a different phase of the Bashir era, in which the radical enforcement clashed with the need to overcome the deadlock deriving from the progressive international isolation of Sudan. The approval of a new constitution in 1999 gave hope to a “reconciliation” of Islamic law with the postulates of Western constitutionalism and the ideology of human rights.⁴¹

More recently, the relaxation of the alliance with al-Turabi as well as the signing of the peace treaty between the North and South announced the start, for Sudan, of a new legal and institutional phase culminating with the approval (in 2005) of the interim national constitution and the interim constitution of Southern Sudan.⁴²

In both cases, the relationship between state and religion is of significant, even symbolic, primary importance. It confirms, with reference to the African context, the relevance of religions⁴³ in today’s constitutional processes and transitions.⁴⁴

38. Irene Panozzo, *Il Dramma del Sudan, Specchio dell’Africa* (Bologna: EMI, 2000).

39. But not only: Ali A. Mazrui, “Constitutional Change and Cultural Engineering: Africa’s Search for New Directions,” in *Constitutionalism in Africa. Creating Opportunities, Facing Challenges*, ed. Joseph Oloka-Onyango (Kampala: Fountain Publishers, 2001), 23, 27.

40. J. Millard Burr and Robert O. Collins, *Hasan al-Turabi and the Islamist State, 1989-2000* (Leiden: Brill, 2003).

41. Ilias Bantekas and Hassan Abu-Sabeib, “Reconciliation of Islamic Law with Constitutionalism: the Protection of Human Rights in Sudan’s New Constitution,” *African Journal of International and Comparative Law [Revue Africaine de Droit International et Comparé]* 12 (2000): 531-553. Some Authors prefer to point out that the 1991 Criminal Act and the 1998 Constitution of the Republic of Sudan “epitomize what may be described as the regime’s ‘discursive dissimulation’”: Mohamed Mahmoud, “When Sharia Governs: The Impasse of Religious Relations in Sudan,” *Islam and Christian-Muslim Relations* 18 (2007): 275-286.

42. This transitory phase has come to an end with the approval of the referendum’s results, confirming the will for secession of the Southern Sudanese. As we previously noted, the birth of the Southern Republic of the Sudan has been finally declared (9 July 2011). On this basis, a new constitutional phase – still in course – has been started up, both for the Republic of Sudan and the Republic of South Sudan.

43. Giuseppe D’Angelo, “Factor Religioso, Procesos Constituyentes, Transiciones Constitucionales: La Esperiencia de Sudán,” *Revista General de Derecho Publico Comparado* 4 (2009), <http://www.iustel.com>.

44. On the concept and the dynamics of constitutional transitions, Giuseppe De Vergottini, *Le Transizioni Costituzionali* (Bologna: Il Mulino, 1998).

III. CONSTITUTIONAL CONTEXT

A. *The Constitution of 1999*

For a better reconstruction of the constitutional web upon which the relationship between state and religion in Sudan is based today, it is worth focusing on, and comparing, the 1999 constitution and the transitional constitutions, both national and of Southern Sudan approved in 2005.

Regarding the first, it is important to point out that this is a text to be considered as a result of a highly authoritarian power, destined to operate within a highly authoritarian context.

This is a very noteworthy observation, drawing attention to the various difficulties it could meet with, with regard to the real alignment to the Western vision of constitutionalism and especially of individual and collective rights (with it being highlighted that the 1999 constitution should be considered nothing more than a facade).

However, we can clearly realize its very distance from the Western sensitivity, especially with regard to the concept inspiring the relationship between the State and religion. In fact, the latter not only assumes a clear political role absolving to an effective task of legitimization of the constituting power and conditions, in a negative sense, the constitutional set-up of rights even if formally sanctioned in the constitution.

With regard to the first aspect, it is worth considering the preliminary dispositions dealing with the State and the main directives, contained in the first part of the constitution (Article 1-19), even if we must consider that these dispositions are explicitly deprived of a legal relevance. They are indeed considered as objectives of an essentially programmatic nature and therefore void of any prescriptive value (Article 19), finally destined to the legislator and, more generally, to public officials, intending to guide them in the managing of public things.

For this reason, it is clear that we could consider these dispositions as very significant ones, regarding that their meaning lets us know, so to speak, the “identity card” of the statutory order. It is very significant, in its singularity, the disposition defining the nature of the State. It declares openness toward the various races, cultures and religions (due to the fact that Sudan is described as “embracing homeland”), but immediately adds the recognition that Islam is the religion of most of the population, while Christianity and other traditional faiths have a considerable following (Article 1).

Another singular – and symptomatic of the intention to establish a clear subordination of the State to religion – is the set up that is given to the issue of sovereignty, or in other words, the concrete allocation of sovereign power to the rulers. The preliminary recognition of Sudan as a federal republic (Article 2) necessarily requires the constituent to recognize in the Sudanese people the holder of sovereign power as well as the source of legitimacy of the power of the State, but the Sudanese people themselves are expressly considered to be God’s representative on Earth.

This translates into an explicit division between the attribute of sovereignty, recognized to the people (and through them, to the State, substantially according to the basic set up of Western democratic constitutions) and the more meaningful supremacy, undeniably recognized in the Divine (Article 4). In other words, the State is nothing more than a vehicle for divine action, which is guided through the people.

The further unravelling of these preliminary dispositions is absolutely consequent with the assumed views, so that the formal concessions to a secular vision of the relationship between political power, institutions and citizens are quite marginal and irrelevant.

The dispositions dealing with the zakat (defined as financial duty, requested by the State) are particularly interesting as well as those dispositions showing a consideration of the State as an ethical state. For example, Article 16 defines the preservation of society from corruption, delinquency, hostility towards Muslims, and promotion of morally virtuous behavior as aims of the State’s action.

These dispositions include the very interesting Article 18, which expressly and in detail orders public officials to behave in line with the religious dictates when carrying out their public duties.

The same constitution also sets out to condition (Article 71) those undertaking any public office by taking an oath according to a formula, painstakingly described, full of clear and decisive religious elements.

In fact, it is nothing more than a further confirmation of a type of identification between religion and politics, or, in other words, of the instrumental nature of resorting to the religious factor as an element of political legitimization, in the sense we have just outlined, even if, at the same time, it does not specifically seem necessary to be a Muslim in order to undertake a public office, be it of a political type or not, and the complete set of rights and duties to which the Constitution is bound, requires mere citizenship. That is the reason why, according to some,⁴⁵ the Sudan could not yet be considered a strictly Islamic State.

However, the most significant consideration deals with the setting up of the theme of sources of the law.

According to Article 65 of 1999 constitution, "Islamic law and the consensus of the nation, by referendum, Constitution and custom shall be the sources of legislation; and no legislation in contravention with these fundamentals shall be made; however, the legislation shall be guided by the nation's public opinion, the learned opinion of scholars and thinkers, and then by the decision of those in charge of public affairs."

Islamic law is therefore clearly indicated as the source and parameter of constitutional legitimacy of the state legislation while its fundamental characterization as a religious law with the substantial indeterminateness of the distinction between the political and religious levels which lead to considering the Sharia as prevailing in absolute over the other forms of rule making as set out within the context of the same disposition.

This notation is indirectly confirmed by the second part of the same disposition, that, establishing the principle which "the legislation shall be guided by the nation's public opinion, the learned opinion of the scholars and thinkers, and then by the decision of those in charge of public affairs," evidently refers to an internal and typical dynamic of the interpretation of Islamic law.

It leads us directly to the second of the aspects that we have previously highlighted, as particularly significant of the non-secular nature of the State, as defined in the 1999 constitution.

In fact, it is difficult not to realize how the explicit claim to a religious source and particularly to the Sharia can herald relevant consequences with regard to the real meaning and efficacy of rights formally recognized in the dispositions of title II, first part, of the same constitution.

These dispositions seem highly severe and detailed in explaining the contents of "rights and duties," proposing a reconstructive model of the first, fundamentally, in accordance with the Western characterization of "negative freedom," or, in other words, taking care to protect those subjective situations of illicit inclusions and pressures of political power.

Many of these dispositions expressly request that rights and freedom are recognized according to the law. It is the case even with regard to the right to life: Article 20 excludes from this limit only freedom from slavery, forced labor, torture and humiliating practices, thus allowing the violation of the right to life "in accordance with the law." Article 33 following coherently expresses the principle in which the death sentence will not be ruled unless in the case of "extremely serious offences by law," leaving the possible eventuality of incriminating laws being placed after the crime has been committed. It is naturally the case for personal freedom and movement freedom or freedom of belief and religion, thought and expression, association and organisation, the right to property and so on.

45. Ilias Bantekas and Hasan Abu-Sabeib, "Reconciliation of Islamic Law with Constitutionalism . . .," supra 41 at 540.

It is true that it is also possible to identify dispositions in which such limitation is not specifically mentioned. This is the case in the aforesaid freedom from slavery and torture, the right to citizenship, the right to preservation of cultural identity and religion, the right to legal action, the presumption of innocence and the right to defense, and, even more, the right to equality. More specifically, the 1999's Constitution contains specific dispositions on the theme of equality without distinction of religion (it is worth highlighting Article 21: "All people are equal before the courts of law. Sudanese have duties as regard to functions of public life; and there shall be non discrimination only by reason of race, sex or religious creed. They are equal in eligibility for public posts and offices not being discriminated on the basis of wealth") and religious liberty (Article 24, Freedom of creed and worship: "Every human being shall have the right of freedom of conscience and religious creed and shall have the right to declare his religion or creed, and manifest the same by way of worship, education, practice or performance of rites or ceremonies; and no one shall be coerced to adopt such faith, as he does not believe in, nor to practice rites or services he does not voluntarily consent to; and that is without prejudice to the right to choice of religion, injury to the feelings of others, or to public order, all as may be regulated by law").

Therefore, in one case as in another, dealing with the inviolable recognized rights that include the possible restrictions (only) in the cases and manner established by the law, it is likely that the effective contents of the contemplated laws are substantially determined by Islamic law, directly relevant through the effects of the explicit claim contained in Article 65 of the Constitution.

Taking into account Article 24 of the Sudanese Constitution and the solemn affirmation of the right to religious freedom it contains.

Notwithstanding the letter of the rule, such a declination can hardly be considered capable of covering the eventual hypotheses of abandoning the Islamic faith.

Freedom of religion should not consider apostasy as a faculty for Muslims, in coherence with the interpretation which inspires what is commonly defined "Islamic reserve" in ratification of the International Charter of the rights by several Islamic states,⁴⁶ and, generally, with the Islamic view of human rights⁴⁷ as well as the consequent Islamic declarations, like the Declaration of Cairo (Article 10).⁴⁸

On the contrary, it is also worth highlighting a further aspect that emerges from Article 65 and can be positively evaluated.

This disposition, indeed, does not only consider the Sharia but explicitly calls upon the role of the customs as a source of legislation, indirectly recognizing the relevance of the variety of the social-cultural and legal context.

Thus being, the nature of Sharia makes it very decisive and tends to tip the balance with customary law in favor of Islamic law or at least to determine a decisive counterposition between them. Also considering the variety of Sudanese views on human rights,⁴⁹ the same disposition could favor, or legitimize, a relationship of mutual conditioning between the Sharia and customary law that could also contribute to neutralize the reciprocal difficulty, along the evolutionary dimension resulting at least coherent and respectful of the African characteristic.⁵⁰

B. *Interim National Constitution (2005)*

46. Antonio Vitale, *Corso di Diritto Ecclesiastico* . . . , supra n. 4.

47. Andrea Pacini, ed., *L'Islam e il Dibattito sui Diritti dell'Uomo* (Torino: Edizioni Fondazione Giovanni Agnelli, 1998).

48. Ola Abu Zeid, "Equality, Discrimination and Constitutionalism in Muslim Africa," in *Constitutionalism in Africa. Creating Opportunities, Facing Challenges*, ed. Joseph Oloka-Onyango (Kampala: Fountain Publishers, 2001), 173 ff; Edward Hiiboro Kussala, "Islam and Human Rights in Sudan," *Encounter* 331 (2008).

49. Id.

50. On the African legal system as a "pluralistic system," Marco Guadagni, "Diritto dei Paesi Africani," in *Digesto delle Discipline Pubblicistiche*, 4th ed. (Torino: UTET, 1991).

The interim national constitution as well as that of Southern Sudan, issued and enforced during 2005 to regulate the political-institutional dynamics as well as the juridical sphere of the country during the transitory period, is based on different prospects which, however, presume the common recognition of the importance of the religious factor. In a distinct line of continuity to the 1999 constitution, the interim national Constitution deals with the recognition of the “political” role of religion, even if there are significant adjustments in the direction of a more knowledgeable precise definition as well as a more decisive guarantee of rights and freedoms, even in religious matters.

The opening to the religious legitimization of political power seems, in the comparison with the 1999 constitution, to be less intense and more implicit. This is probably due to the political need to draw up a widely shared constitutional text, therefore acting upon a greater care in the use of religious references that had been perceived as evident and impassable reasons of division.

At the same time, it is not to exclude that the writers of the constitution had intended not to preclude (and even favor) the obtaining of results that are substantially not so different from the 1999 constitution, specifically with regard to the situation in North Sudan, so that we had to raise the problem of the meaning to be attributed to the recognition which “the Interim National Constitution shall be the supreme law of the land. The Interim Constitution of Southern Sudan, state constitutions and all laws shall comply with it.”

In fact, a certain inclination to the strengthening of the bond between the State and religion – as well as the (re)affirmation of the nature of the State as substantially non-secular – clearly results at the basis of the single dispositions and spirit of the constitution.

The national constitution does not reproduce the divide between the concepts of supremacy (in the relationship between divine and earth) and sovereignty (in the temporal context). It prefers to deal with the first directly, ascribing it to the population, with regard to ownership as well as the State regarding the exercise thereof, “in accordance with the provisions of this Constitution and the law, without prejudice to the autonomy of Southern Sudan and the states” (Article 2, National Const. 2005).

The explicit basis of state sovereignty to a source of divine legitimization – originally founded in the formulation of Article 4 of the 1999 Constitution, in other words in the specific recognition of the State subordinate to God – is now only apparently dissolved by the recondensation of the relative reference within the context of the preamble to the Charter of 2005: here indeed we can find the explicit formalization of the gratitude of the Sudanese population to the merciful God “who has bestowed upon us the wisdom and will to reach a Comprehensive Peace Agreement that has definitively put an end to the longest running conflict in Africa.”

In fact, it is a far from irrelevant homage as highlighted by the further dispositions relating to the nature of the State and the set up concerning the fundamental basis of the Constitution and the directive principles and objectives of the action of the State.

The formulation of Articles 1 and 4, dedicated to the nature of the State and the fundamental basis of the Constitution, respectively, underlines indeed the very significant openness to religions and cultures (Article 1) or traditions and customs (Article 4) as sources of the moral cohesion and inspiration of the Sudanese population, so enforcing a decisive mixture between politics and religion.

Stated differently, it is clear that such a wide and general formulation can favor an instrumental use of religious reference, depending on (because of) the particular socio-cultural and regional circumstances and consequently the supremacy, in such contexts, of the Islamic issues of the North.

With these assumptions, we can now (re)consider the configuration assumed by the disposition of the 1999 constitution (Article 18), regarding the relevance of religious values as a profile of the relationship between the State and religion and the nature of the first, and compare it with the correlative setting of interim national constitution.

It is worth remembering that Article 18 of the 1999 constitution served to impose on public power and those in public office the respect of the fundamental religious

inspiration (in) one's own actions and those of the State. Therefore, the homologous (regarding its collocation) disposition of Article 6 of the interim national constitution inverts the perspective, preferring to access a type of self-limiting of the State towards specific and detailed religious rights, which explicitly oblige the respect of the State itself and, therefore, could induce belief that the religious reference to avoid any worth of political legitimization.

Considering what we have just highlighted, we could affirm that the Sudanese constituent preferred not to face the issue and therefore for the same reasons adopted for other profiles voluntarily vague and ambiguous dispositions. Article 6 of the interim national constitution seems to rather limit itself to anticipate the contents of the subsequent Article 28, allocated to the part dedicated to the Bill of Rights.

In fact, it is sufficient to move slightly away from Article 6 to observe the persistence of a certain tendency to color with ethnic-religious contents the political objectives of the State as well as the contents of the legislation. According to Article 16, first comma, collocated in the dispositions relating to the principles and guiding criteria of the action of the State, – but we can also point out that Article 22, explicitly but in a less evident way that the homologous Article 19 of the 1999 constitution, deprives them of any formal-judicial relevance – the State is legitimated in drawing up laws aimed at the protection of society from corruption, delinquency and social perils as well as guide the national community in following social values coherently with the religions and cultures of Sudan. This is presumably, even in this case, the way to intend the disposition, which can vary considerably depending on the regional context in which it is applied, placing itself in a substantial line of continuity in relation to the 1999 constitution.

On the other hand, with Articles 56, 71 and 89 of the same constitution, the oath imposed with the aim of the valid admission in the functions of the President of the Republic, Minister and member of the National Legislation, respectively, remains unaltered. Clearly, it is not completely coherent with the eventual needs to obtain a religious neutralization of political power or, in other words, to secularize the State.

Similar considerations can be made for the rights and freedoms disciplined by the second part of the Constitution.

Surely, it is evident that there is an attempt to define the contents precisely and, above all, to reaffirm the legal value of the affirmations constituting the basis of reference of the Sudanese Bill of Rights. It is also worth highlighting the potential inclination towards a positive and promotional reconstruction of the rights and constitutional freedoms that could derive from the dispositions allocated in the previous sections of the aforementioned Constitution (e.g., Article 1, comma 2 collocated in the context of the first part, title I as well as Article 12 and the whole title II of the first part).

It is also worth focusing on the subtraction of the dispositions of the Bill of Rights from the relevant context of the emergency presidential powers (Article 211).

However, many of the problems present in the 1999 Constitution still remain intact. The diffused reference to the formula of “according to law” and to public order in limiting the effective content of rights and freedom and the relevance, on such a level, of the determinations of Islamic law (see Article 38 dealing with religious freedom), the explicit prevision of crimes punished with hudud and so on.

In particular, Article 5 introduces a decisive differentiation of the system of the sources by declaring that “Nationally enacted legislation having effect only in respect of the Northern states of the Sudan shall have as its sources of legislation Islamic Sharia and the consensus of the people. Nationally enacted legislation applicable to Southern Sudan or states of 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 believe, having regard to Sudan's diversity. Where national legislation is currently in operation or is to be enacted and its source is religion or custom, then a state, and subject to Article 26 (1) (a) hereir in the case of Southern Sudan, the majority of whose residents do not practice such religion or customs may: (a) either introduce legislation so as to allow practices or establish institutions, in that state consistent with their religion or

customs, or (b) refer the law to the Council of States to be approved by a two-thirds majority of all the representatives or initiate national legislation which will provide for such necessary alternative institutions as may be appropriate.”

As we can see, in relation to the new Sudanese constitutional phase, the set-up based on Article 65 of the 1999 Constitution is developed in two directions: in a quite negative direction, strengthening the claim of the prevalence of Islamic law in the North, and in a quite positive direction, freeing the dynamic of the sources of legislation as in the South.

In fact, as coherently specified in Article 5 of the Interim Constitution of Southern Sudan: “The sources of legislation in Southern Sudan shall be: (a) the Interim National Constitution; (b) the Interim Constitution of Southern Sudan; (c) customs and traditions of the people of Southern Sudan; (d) popular consensus of the people of Southern Sudan; and (e) any other sources.”

C. The Interim Constitution of Southern Sudan (2005)

As Article 13 affirms, the dispositions of the national interim constitution are integrated and completed by the corresponding dispositions of the interim Constitution of Southern Sudan. Leaving out of consideration several specific profiles (the limitations “according to law” of many of the dispositions regarding rights and freedoms, the permanence of the death sentence, etc) as well as a natural structural homogeneity of the same dispositions, the latter indicate a more decisive improvement of those provisions of the national constitution that are evidently conditioned by non (completely) secular nature of the State. The explicit extension of the prohibition of torture with reference to the hypotheses of punishment following prosecution (Article 22) and even more the exclusion of the punishment hudud (Article 25) is significant.

In relation to religious freedom, it is worth highlighting how the relative disposition completely reproduces the content of Article 6 of the national constitution, collocated among the determinations relating to the nature of the State and its guiding principles.

The collocation of the disposition within the context of the Bill of Rights seems to be more in keeping with its finality and its contents but above all, it allows it to operate in a completely opposite way in relation to the choices imposed in the national Constitution, making space, among its founding principles, for a different construction of the relationship between the State and religion.

In fact, according to Article 8 of the interim Constitution of Southern Sudan, “in Southern Sudan, religion and state shall be separate. All religions shall be treated equally and no religion shall be declared the official religion of Southern Sudan; religion or religious beliefs shall not be used for divisive purposes (...)”.

The solemn affirmation of the principle of separation between state and religion naturally assumes a fundamental importance as well as a symbolic nature, constituting a characterizing and distinctive trait between North and South.

It is nevertheless evident that it does not lead to – it can not lead to – a confining of religion within the context of only individual conscience and to exclude every form of cooperation between the State and religions.

The same constitutional context in which that solemn affirmation is inserted inspires this conclusion. In fact, it is worth considering that the preamble of the interim constitution of Southern Sudan seems to be interested in taking note of the role of religion in relation to the creation of the new constituting phases, by integrally using the model of gratitude towards a merciful God, who in this case is thanked “for giving the people of the Sudan the wisdom and courage to reach a peace agreement which ended a long and tragic conflict.”

This is a very significant recognition, due to it strengthening the idea that religion can still play a relevant public role, in consolidating the peace process as well as in relation to the future political determinations.

It is also worth considering that a different type of reasoning would lead to a paradoxical interpretation of the constituting process. In fact, it would be a constitution

that rather than aid social dynamics, would with every probability neutralize them.

The point is essential and is confirmed by a more complete interpretation of the same article, which highlights the ultimate finality of the principle of separation. It should emphasize not the refusal to recognize the social role of religion but it should guarantee the equal treatment of all religions in order to stop that one prevails over the others and above all, the neutralization of every possible form of religious conflict. This has a corresponding meaning in the subsequent Article 37: "Ethnic and cultural communities shall have the right to freely enjoy and develop their particular cultures; members of such communities shall have the right to practice their beliefs, use their languages, observe their religions and raise their children within the context of their respective cultures and customs in accordance with this Constitution and the law."

IV. LEGAL CONTEXT

In substance, the transitory constitutions of 2005 highlight, when dealing with religious freedom and the relationship between state and religions, a double disciplinary regime.

The transitory national constitution continues to recognize the value of the Sharia in the North, as (potentially unique, however prevailing) source of law. The transitory constitution of Southern Sudan affirms, for the South itself, an innovative principle of separation between the State and religion that clearly serves to stop that Islamic law can be recognized as having the role of general source of the law.

In both cases, the constitutional declarations relating to the system of the sources of law and the general relationship between State and religion are followed by the recognition of the right of religious freedom as well as the prohibition of discrimination due to religious reasons, even if the real meaning of this recognition changes considerably with the changing of the affirmations that precede it, being less permeable to the influence of Islamic law in the case of the South.

Nevertheless, even when living with the explicit recognition of a principle of separation, religion in Sudan maintains a role of primary importance on a political level as well as in the concrete development of legal and administrative relationships.

It is firstly worth noting that the most important political parties are characterized by an explicit religious matrix, conditioning their political action and social appeal, so that it could be said that the political antagonism often leads to religious antagonism, even though it is not always easy to understand how sincere the religious reasons founding the politics of the government are.

It is so, in particular, for the parties that are currently in power. On the one hand, the National Congress Party (NCP), a government party that is associated to the conservative Muslims of the North and is to be considered as a direct descendant of the National Islamic Front (NIF) active during the Nineties. While on the other, the Sudanese People's Liberation Movement (SPLM), main member of the coalition, linked to the Christians of the South and the historical Umma Party (UP) that is considered as a direct link to the Mahdist revolution. It results indeed founded in the second half of the 1940s, by the son of Mahdi, Said Abd al Rahman al Mahdi, and was associated to the Ansar order, which was lead by through its most well known leader, Sadiq al-Mahdi. It is also worth considering the other historical Democratic Unionist Party (DUP), that is inspired by the Sufi orders, as well as the Islamic movement known as Khatmiyya and the Popular Congress Party (PcP), founded from the secession of the NcP as a consequence of the dispute between Al-Turabi and Bashir.⁵¹

It is worth highlighting that the political dynamics influence the very significance to be ascribed to the constant reference to Islamic law. In particular, it is the interpretation of

51. Irene Panozzo, *Sudan. Le Parole per Conoscere* (Roma: Editori Riuniti, 2005); Campagna Sudan, ed., *Scommessa Sudan. La Sfida della Pace Dopo Mezzo Secolo di Guerra* (Milano: Altra Economia Edizioni e Cart'armata Edizioni, 2006), 113 ff.

the governing party that determines what the meaning of the Sharia actually is, as it is evident just considering the potential importance of the codification of Islamic rules.

As soon noted, following the signing of the Comprehensive Peace Treaty and the subsequent start of the new constitutional phase, both the Muslims and Christians were then called upon to cooperate with the authorities in the managing of the transitory period.

From a second perspective, which will be discussed in detail later, the reference to the religious factor greatly conditions the daily life of the common citizen.

The fact that the constitutional provisions widely guarantee the right to religious freedom and sanctions the equality of all the citizens in the eyes of the law has already been mentioned.

Nevertheless, discrimination on religious grounds, to lead again to the recognition of a fundamental condition of privilege guaranteed to Islam or however to be considered as the result of the previous Islamization of society, are frequent in the North.⁵² While in the South, the real conditions of life, on the whole more uncomfortable, make it more difficult, or put in second place, the satisfaction of the issues associated to freedom of conscience, belief and religion.⁵³

With regard to the institutional level, it is worth considering that both in the North and the South, there is no space, even if, naturally, for different cultural reasons – identification between the State and religion in the first case, separation in the second – due to the explicit affirmation of a principle or practice of cooperation, in a formal sense according to the model of concordat or, more generally, to the principle of necessary negotiation, that in effect would see the State and Churches face each other on an equal basis as well as in an antagonistic direction, because of the consideration of the latter as autonomous legal systems (be they original or not).

It is also worth considering that several religions and in particular the Catholic Church have often accused their own legislative reformation – above all following the issuing of the Miscellaneous Amendment Act (1994) – in terms of private associations, on the model of voluntary organisations.⁵⁴ Nevertheless the government agencies do not disdain to use the support of religious representations in order to make their own politics more efficient – or at least in order to justify and support them – especially following the conclusion of the conflict and the subsequent start of the transitory phase.

In particular, the presence of Islamic exponents as well as the Christian Churches in the country has led to the integration of the lay components (state rulers and magistrates) within the context of the commission as set out by the peace treaties of 2005 with the task of finding a solution to the condition of the non-Muslim residents of the city of Karthoum, with particular regard to the problems of the application of Islamic law.⁵⁵

This commission seemed moreover to want to carry out a role of intermediation with the Government, urging for presidential pardons or in some cases the release of those who had been arrested for violating determined rules of a religious nature such as the selling of alcohol.

It is also worth considering that the churches with the greatest and longest presence in the country continue to request to be included in the consolidation processes of the peace treaties.

Even if often and with official stands, the religious representations complain about the marginalization of their support in relation to the conclusion of the conflict as well as the drawing up of the peace treaties, the possible result of inter-religious dialogue, which even the external observers do not fail to indicate the potentiality, do not seem to be

52. ACS, *Rapporto 2008*, supra n. 24; U.S. Department of State, *2009 Report on International Religious Freedom-Sudan*, available at <http://www.state.gov/j/drl/rls/irf/2009/127257.htm>

53. J. Saverio, interview, *Sfollati, il Punto Debole*; G. Sartor, “L’impatto del Cpa sulle Popolazioni del Sud Sudan. Il ‘Possibile’ Ritorno degli Sfollati e Rifugiati e la loro Integrazione,” in *Scommessa Sudan. La Sfida della Pace Dopo Mezzo Secolo di Guerra*, ed. Campagna Sudan (Milano: Altra Economia Edizioni e Cart’armata Edizioni, 2006).

54. ACS (Aiuto Alla Chiesa Che Soffre), *La Libertà Religiosa nel Mondo. Rapporto 2004* (Roma: 2004).

55. Id.

irrelevant for the desired stabilisation of the peace processes.

In this direction, several specific agencies have been created, under government protection, the inter-religious Council of Sudan and, in a more strictly religious view, the Council of the Sudanese Churches.

Regarding the first, it is to be considered as the result of a first attempt to institutionalize inter-religious dialogue, as the international context requests, in the perspective of constructing a more solid national identity that does not ignore the consideration of the public role of religion.

It consists of Islamic representatives as well as representatives of the Council of the Sudanese Churches and exponents of other churches that do not belong to the council; its specific and main task consists of acting as a governmental consultancy agency for the promotion of government policies regarding “religiously important” areas such as human rights, development and occupation and education.

The agency therefore subtends an explicit recognition of the role of inter-religious dialogue in the development of the relationships between government agencies and the community, as well as in the growth of a conscience of the importance of basing religious relationships on the reciprocal respect.

Regarding the second organization (the Council of the Sudanese Churches), it could be said an agency created and acting within Christianity. It could clearly attract the attention of Islam, within the perspective of inter-religious dialogue, or as a political reference for the Sudanese government as well as the international community⁵⁶.

The direction of its “political” action towards the Sudanese government as well as the international community has a significant confirmation in its most official stands.

Its declaration, dated 13 March 2009, that followed the announcement of the decision of the International Penal Court to issue a international warrant for the arrest of President Bashir, is very significant in this direction.⁵⁷

It is indeed to be considered as proof of the fear of the Sudanese people regarding the effects of that news, in considering its potential and negative consequences especially on the goal of a definitive peace for the whole Country.

That is substantially the reason why it appeals to the Government of Sudan as well as the armed forces, asking for the real removal – through a stronger diplomatic and politic action – of every impediment to the goal of national reconciliation.

The tone of the declaration – that does not hide a critical vein towards the decision of the Court – is indeed particularly significant. The Court’s decision becomes a problem, pointing out that, on the one hand, it can surely appear justified in a strictly juridical perspective, while on the other, it risks appearing disrespectful of the real conditions of the Sudanese society, also dissuading the attention of the International community – which the same Council expressly appealed to, in requesting to continue keeping the peace and maintain the difficult reconstruction throughout post-conflict Sudan – from the real objective of the peace process. As the declaration itself clearly implies, the real aim of the peaceful requests are the recuperation of the truth within the perspective of institutional reconciliation, of reforms and re-integrations. In this way, it should be clear that the main worries, or in other words, the responsibilities and objectives of the international action, are something completely different, as clearly highlighted by the further declaration of the Council of Sudanese Churches issued after the XVII general assembly held in Khartoum between 10-14 August 2009.⁵⁸

On the whole, these positions can even seem to be pro-government, but they undoubtedly help us understand the real impact of international decisions on Sudanese

56. The relationship between the institutional and constitutional processes and the religion is confirmed by the recent evolution of the Council itself. As a consequence of the secession, the Council has been in fact constituted in two distinctive councils: the Council of the Southern Sudanese Churches (in Juba) and the Council of the Sudanese Churches (in Khartoum): see <http://allafrica.com/stories/201308261288.html>.

57. Available at <http://www.conflittidimenticati.it/cd/a/28961.html>.

58. Available at <http://www.allafrica.com/stories/200908171180.html>.

society, inducing the international agencies to adopt a more pragmatic behavior.⁵⁹ That is a position also confirming the importance of an inter-religious dialogue, as highlighted by the explicit exhortation, aimed at all the religious communities, to observe the prophetic message of God in preserving the peace, harmony and stability of the country, as well as to pray for the Nation, President and people of Sudan.

V. THE STATE AND RELIGIOUS AUTONOMY

It is difficult to quantify how important these stands are in orientating the action of the international agencies as well as the politics of the government. Nevertheless, it does not seem that they should be considered completely useless or inefficient.

It is also worth noting that indirect recognition of the “public role” of religions produces very negative consequences with regard to religious autonomy from the State. Governmental authorities heavily intervene on the internal organisation of religious groups (impressing on the power of nomination and removal of the imam⁶⁰) and even on the religious-doctrine content, determining its real meaning as correspondent to true interpretation.

The State institutions also show very evident difficulties in adapting their action to the constitutional indications, with more specific reference to protection of collective and individual freedoms. They tend, particularly in the North, to heavily interfere in the religious choices of individuals, favoring the conversion to Islam and forbidding, or rather discouraging, the abandoning of the Islamic faith. Public order and security frequently constitute the excuse for sudden and violent blitzes in places of worship, in particular non-Muslim, by the armed forces or the imprisoning of religious leaders and missionaries, often accused of forcing religious conversions from Islam. Public authorities also carry out rigorous checks of the religious affiliations of citizens.⁶¹

The preference for top-level relationships between the government and religious authorities highlights that, on the whole, the government authorities are interested in maintaining a penetrating form of control on religious-associative phenomena.

Within this context, public institutions confirm, in the North, a privileged consideration towards Islam.⁶² Laws regarding religious freedom are interpreted in a more coherent way when they are to be applied to non Islamic groups while in the South, the same appear to be ineffective and inapplicable.

The Christian churches more frequently highlights about the ease with which government permits are given for the building of mosques rather than those of other faiths, in particular Christian ones.

The theme is important because it is connected to the issue of the properties of religious groups. Theoretically, religious groups are able to be real estate proprietors and, particularly, landowners.

Nevertheless, the concrete impossibility to construct buildings for worship on their lands can indirectly act as a reason to abandon the possession or at least undersell them.⁶³

The dynamics of the concluded (definitively, it is to be hoped) armed conflict between the North and South have also had a negative influence. During the war, these lands and buildings were often occupied. However, with the end of the war, the returning of these to real proprietors has been far from immediate and easy.

Similarly, it is worth considering that foreign organisations and religious groups wanting to carry out proselytism and evangelisation have to apply for government

59. Victor Peskin, “Caution and Confrontation in the International Criminal Court’s Pursuit of Accountability in Uganda and Sudan,” *Human Rights Quarterly* 31 (2009): 655-691.

60. U.S. Department of State, *2008 Report on International Religious Freedom*, <http://www.state.gov/j/drl/rls/irf/2008/>.

61. ACS, *Rapporto 2008*, supra n. 24.

62. U.S. Department of State, *2009 Report on International Religious Freedom*, supra n. 52.

63. ACS, *Rapporto 2008*, supra n. 24.

authorisation. However, this disposition is not applied when relating to Muslims⁶⁴.

The provisions of the penal code on specific religiously characterizing behaviors, such as apostasy, are clearly acting in this direction. They also justifies government authorities' incident surveillance towards all activities that are carried out inside churches and places of worship and often creates episodes – frequently reported by non-Muslim groups – of abuse of power on the part of the armed forces.

It is worth noting the unfavorable stand of the Sudanese government towards the non governmental organisations as well as the other humanitarian organisations acting on the Sudanese territory, whose range of activity is somewhat limited due to the specific legislative dispositions that place it under strict forms of control⁶⁵.

On the other hand, as previously mentioned, non-Muslim religious groups and organisations are substantially considered to be just like voluntary organisations as well as non governmental organisations, so that they are subjected to the same obligations of registration and the same controls of the public authorities.

VI. RELIGION AND THE AUTONOMY OF THE STATE

As previously discussed, the most important and deep-rooted religious communities are called upon to develop a significant dialogue with governmental authorities, even through the inclusion of specific representation within specific state agencies.

Nevertheless, this recognition, appears, at the least, highly ambiguous.

Firstly, it does not seem to be completely efficient (but different notations could be naturally made for Islam). Secondly, it leads to a significant strengthening of a vertical set up of relationships being on within religious communities, indirectly limiting the freedom of minor groups as well as individuals.

In order to distinguish with precision what attains to the public sphere and what to the religious one still remains difficult. The most recent stands assumed by the agencies we have previously mentioned, such as the Council of the Sudanese Churches, could lead us to think, at first sight, that the State is not completely autonomous from religion. Nevertheless, the tendency to the political use of religion could rightly lead us to point out a kind of subordination of religion to the State. Religious rules of Islam continue to constitute, in the North, a really important parameter for the evaluation of the lawfulness of the behavior of individuals and groups even when they are not Muslims, also determining the real extension of freedom and rights as they are formally sanctioned by constitution.

VII. LEGAL REGULATION OF RELIGION AS A SOCIAL PHENOMENON

Discussing the importance of religion, as a social phenomenon, primarily means recalling the real respect of religious freedom by public authorities.

With regard to this theme, as previously discussed, the constitutional determinations appear formally in line with the need to guarantee the civil and political rights of the citizens. Naturally the real adaptation of the legislation as well as the administrative and governmental procedures to the constitutional assumptions – that, as we have seen above, in the cases of both North and South, should lead to a decisive implementation of the degree of protection of the freedom of conscience, belief and religion – can not be immediate. It should be necessarily gradual and therefore, in our case, results being highly problematic.

This is valid not only for the North – even though we could rightly think that the interim national constitution is not so different from the previous one – but also for the South. Here, social and economic difficulties of everyday life make it increasingly

64. ACS *Rapporto 2004*, supra n. 54.

65. Campagna Sudan, *Scommessa Sudan* . . . , supra n. 51.

difficult to bring into effect the constitutional provisions regarding rights and freedom, even in religious matters.⁶⁶

At the moment, neither the common constitutional recognition of the right to religious freedom, nor the constitutional diversification, between North and South, of the relative regimes of the relationship between the State and the Church still seem to act, on the whole, as a factor of improvement of qualitative standards regarding religious rights and freedom. They have not still lead to any relevant legislative reforms but rather operate, on an interpretative level, as a further factor of territorial re-adaptation of the already existing, single ruling regulations.

This leads to results that are somewhat ambiguous, above all in the North, leading to new limitations of individual freedoms as well as making old discriminations even more severe.⁶⁷

On several more specific profiles, as in the particular case of religious crimes, the south of the country is far more liberal, resulting in almost none of the specific punishments of the North being applied. Nevertheless, several of the limitations of religious freedom or rather discriminations of religious belief present in the North tend to be reproduced or rather crystallized – inverted in part – in the South.

It is worth taking consideration the case of religious holidays within both (a) working and educational context. In both the North and South, the identification of a specific day dedicated to a festivity (Friday in the first case and Sunday in the latter) is accompanied by the recognition of the right to a two hour justified break, for the Christians of the North on Sunday and Friday for the Muslims in the South.⁶⁸

However, in both cases, neither one nor the other can effectively make use of this right or either apply the relative laws associated to the needs of their own religions (with two hours not being enough, especially when considering the time required to reach the Christian places of worship).

In a medium-long term perspective, it is possible that the explicit recognition of the principle of separation between the State and religion in the interim constitution of Southern Sudan can aid the process of real improvement of the protection of religious rights and freedom.

We can mention, as a significant example in this direction, the recognition of personal statutes or, in other words, the possibility that, in determined sectors, statutory law leaves space to religious rules or, even, to traditional law and customs.

This is a former practice, having also found an explicit recognition in the 1999 constitution, but it is to be considered that the Sharia has progressively ended up occupying every possible normative space, above all, in the capital city as well as the urban centers.

Nevertheless, particularly outside of such contexts, Islamic law has more decisively interacted with customary law, creating a quite positive mutual conditioning process. It could indeed lead Islamic and customary law to reduce their respective strictness. In this context, it is even not to exclude that Islamic law can result in fact even more respectful of human rights than certain interpretations of customary law.

Reporting this evolutionary trend in the context of the current transitory phase and considering that both of the interim constitutions expressly confirm the role of personal

66. International worries about real conditions of life in Sudan were confirmed by United Nations Security Council. See Resolution 1891 (2009), in http://www.un.org/docs/sc/unsc_resolutions09.htm, where it is noted “with deep concern the ongoing violence, impunity and consequent deterioration of the humanitarian situation and humanitarian access to populations in need”, and reiterated “its deep concern about the security of civilians and humanitarian aid workers...”

67. It is often pointed out that “non-Muslims suffer persecution in the form of denial of work, food aid and education”: so the African Commission, as outlined in Malcolm Evans and Rachel Murray, eds., *The African Charter on Human and People’s Rights. The System in Practice, 1986-2006* (Cambridge: Cambridge University Press, 2008).

68. U.S. Department of State, *2007 Report on International Religious Freedom*, <http://www.state.gov/j/drl/rls/irf/2007/>.

statutes and, in particular, of customary law as an integrative/alternative source of legislation in relation to personal issues, several further possible developments can be defined. It is therefore possible that the application of the principle of separation between state and religion, in Southern Sudan, could lead to interesting consequences:

(1) act as a training factor for the North, therefore supporting a tendency to the evolutionary interpretation of the Islamic law, making use of results of a positive relationship with local uses and customs and so allowing a type of controlled progression of itself in the direction of the protection of human rights;

(2) differently act as a factor of closure of Islamic law in the North, according to a tendency to which the different (in relation to Article 65 of the 1999 Constitution) formulation of the art 5of the interim national constitution could prelude.

In fact, the claim to customary law as well as uses and traditions as a possible general source of legislation seems to be greatly reduced in national interim constitution, so that we could rightly think of a substantial closure of the sources of law around the central value of the Sharia, which would favor a strict interpretation, as impermeable as possible to the support of local identities.

VIII. STATE FINANCIAL SUPPORT FOR RELIGION

The theme of financial support that the State recognizes for religion is naturally affected by the discriminating conditions under which non-Muslim religious groups and communities exist.

Public institutions could seem not to be obliged to support religious communities and their activity. However, in the North, it is not uncommon for the State to financially support the construction of mosques.⁶⁹

It is also worth highlighting that the 1999 constitution considers the paying of the zakat by Sudanese citizens to be a financial duty, so that its collection being, at least, a State task. In coherence with the diversification introduced in the interim phase, the interim national Constitution (Article 20) clarifies, firstly, that no fiscal duty can be imposed if only by law, then reduces the zakat to a Muslim duty. The matter is naturally ignored by the interim Constitution of Southern Sudan.

IX. CIVIL EFFECTS OF RELIGIOUS ACTS

The cultural and ethnic-religious heterogeneity of Sudan and the absolute permeability to the religious values of the Sudanese socio-juridical context – according to the characterization that, with the due diversification, can be considered as a characteristic of the whole of sub-Saharan Africa, as we have seen above – leads us to consider any effort to confine religious rules within the context of mere juridical irrelevance substantially vain. It is so even when the State law seems to lack any specific, formal reference in such (a) sense.

Family law is naturally the area within we can appreciate the very long distance from a secular approach to the theme of the sources of legislation, characterizing the Sudanese legal system. The most important family legal relationships are indeed regulated by personal statutes, Islamic laws for Muslim, customary and traditional law for the others.

Nevertheless, it is not surprising that, even in this area, the process of Islamization leads to Islamic law expanding and sacrificing the need of the minor ethnic and religious groups. The consideration of Islamic law as the general source of inspiration of the law has progressively lead it to be applied to the case of mixed marriages as well as those of uncertain definition as customary law⁷⁰. At the same time, it is still worth pointing out that the differentiation between civil law, Muslim law and customary law can not always be

69. U.S. Department of State, *2008 Report on International Religious Freedom*, supra n. 60.

70. Marco Guadagni, "Sudan," supra n. 36.

considered in a very rigorous way; it is also to be considered that the specific context – for example, urban or rural – could be really significant.

According to these indications, we must consider the fact that Sudanese family law (fundamentally, the Muslim Personal Law Act, 1991) is explicitly based on the Sharia, so that State law ends up considering explicit religious prohibition – such as Muslim women not being allowed to marry non-Muslim men unless they convert to Islam, while a Muslim man can easily marry a non-Muslim woman – just like civil prohibition.⁷¹

The Sudanese therefore seem to be free to have a religious ritual when getting married without the obligation of having a civil ritual, but rather having to register the marriage.

Nevertheless, there are significant limitations regarding civil effects (especially about women's rights or marital status), in the cases of traditional or unregistered weddings. It is also worth considering that the system regarding registration of marriages principally serves the needs of the Muslims. It does not include any form of contamination between religious rituals (not required in the case of Muslim marriages, expected that it does not assume a sacramental nature) and civil procedure of recognition. In addition to the preliminary aspects as well as the drawing up of the matrimonial contract, it is only requested that the marriage is made public, even if only through the wedding celebrations.⁷²

The importance – more or less direct according to the case – of religious rules as well as traditional and customary law has a natural correspondent on the level of judicial function, with regard to controversies and discipline of family relationships, confirming – even if in the lack of specific formal rules – a consistent space for customary and religious law as well as the relative courts. For most of its recent history, the Sudanese judicial system has in fact been characterized by the existence of three different jurisdictions: civil, sciaraitic and customary, with separate hierarchies but united under the control of the Supreme Court, having the very important and specific task, among others, of establishing, in cases of doubt, which jurisdiction should settle a determined controversy.⁷³

Openness towards traditional courts and tribunals could be considered as still operating in the current State, but now in a quite different context.⁷⁴ Current interim constitutions as well as the 1999 constitution move from the (re)affirmation of statutory nature of judicial power and organisation, consequently operating under State guidance.

Article 130 of the Interim Constitution of Southern Sudan more specifically claims that “The Supreme Court of Southern Sudan shall: (a) be the court of final judicial instance in respect of any litigation or prosecution under Southern Sudan or State law, including statutory and customary law (...)”. This is a very interesting provision, confirming that the Supreme Court itself constitutes the possible tool through which State authority can hinder the decisions of the traditional or religious tribunals, which it considers to be improper.

As previously stated, the extension of Islamic law to non-Muslims is a phenomenon of wider range. It is destined to follow several different applicative paths as highlighted in the case of several dispositions of the 1991 penal code which allows rules to be applied to non-Muslims that would be only applicable to them.⁷⁵ For example, the obligation to wear a kind of clothing should regard only Muslim women but the same obligation can often regard non-Muslim women due to it considering a different behavior as offending public morality or assuming a provocative connotation.

71. ACS, *Rapporto 2008*, supra n. 24.

72. See Embassy of the United States Khartoum, Sudan, “Personal Status Laws: Marriage,” <http://sudan.usembassy.gov/marriage.html>.

73. Marco Guadagni, “Sudan,” supra n. 36.

74. On the process of unification of judiciary realized under Numeiry, see Aharon Layish and Gabriel R. Warburg, *The Reinstatement of Islamic Law*. . . , supra n. 30.

75. In fact, the application of religious law to non-adherents of the religion is, naturally, often considered “fundamentally unjust”: Evans & Murray, *The African Charter* . . . , supra n. 67.

Motives of religious intolerance also seem to be at the basis of the ban to produce and sell alcohol, according to Islamic law but clearly extending to non-Muslims. Nevertheless, it is to be considered that the concrete application of the disposition is at the same time moderated by the widespread appeal to a presidential pardon.⁷⁶

It is therefore possible that the confirmed recognition of personal status (see Article 15 of the interim national Constitution, with the corresponding Article 18 in the interim Constitution of Southern Sudan, where the right of men and women to get married and have a family is recognized “according to their respective family law”) have different consequences, according to whether it refers to North or South. In the second case, it could prove less permeable to the dominant influence of Islamic law and therefore more open to customary law.

Clearly, the problem of respecting human rights, in particular for women, remains from being resolved.⁷⁷ However, the reform of the judicial system will probably play an important role, above all in the South, as well as, more specifically in the North, the cultural and scientific construction of those called upon to administer justice and who are in fact, at the moment, not very inclined to an interpretation of the law free from the basic assumption constituting the recognized centrality of the Sharia.

X. RELIGIOUS EDUCATION OF THE YOUTH

Being closely associated to a problem of proselytism, the theme of education, and more widely that of the youth, is highly conditioned by the religious element.

Geographical location therefore conditions the content of scholastic education. In the North, in particular, Islamic education classes are necessarily taught in all public schools⁷⁸; they are held by State approved teachers. At the same time, Christian private schools too must employ teachers to hold Islamic religion classes.⁷⁹

The possibility of following Christian religious education classes is sometimes granted to the Christian students in the North. In practice this is often difficult to realize, however, due to the lack of teachers of this subject. As in the case of the working context, within the school context, the Christian students of the North have to go to school on Sunday, just like all the other students. Similarly, Muslim students have to go to school on Friday in the South.

XI. RELIGIOUS SYMBOLS IN PUBLIC SPACES

The civil recognition of the rules of Islamic law, particularly in the north of the country, conditions the freedom to wear religious symbols in public, above all, upon gender, specifically upon being female. The dictates of Islamic law therefore influence the real meaning of several rules contained in the Sudanese national penal code, for example, Article 152, which references “Obscene and Indecent Acts” inserted into chapter XV dealing with “offences against honour, reputation and public morals”: “(1) Whoever does in public place an indecent act or an act contrary to public morals or wears an obscene outfit or contrary to public morals or causing an annoyance to public feelings shall be punished with flogging which may not exceed forty lashes or with fine or with both.” (2) The act shall be contrary to public morals if it is regarded as such according to the standard of the person’s religion or the custom of the country where the act takes place.”

76. See, for example, the episodes pointed out in ACS, *Rapporto 2008*, supra n. 24 at 480, 482.

77. Evans & Murray, *The African Charter* . . . , supra n. 67.

78. U.S. State Department *2009 Report*, supra n. 52, points out that some public schools excuse non-Muslims from Islamic education classes.

79. As the *2009 Report*, id., also points out, “Christian leaders cited these requirements as exacerbating problems in the relationship between the Muslim majority and the Christian minority and as further marginalizing the place of Christianity in northern society.” For more from the United States Department of State see, *International Religious Freedom Reports* for “Sudan” (2010, 2011, July-December 2011, and 2012) and for “South Sudan” (2011, July-December 2011, and 2012) at <http://www.state.gov/j/drl/rls/irf/>.

Arrests are frequent, as well as subsequent convictions leading to the flogging of women (even those originally from Southern Sudan as well as non-Muslims and therefore not held to respect the Sciaraitic dictates) caught wearing trousers. In a recent case, reported in the international press, rather than declare herself guilty and receive a reduced penalty, the accused preferred to give up her immunity (due to being a UN representative), and faced a public trial, inviting international journalists and national figures to assist the trial.

The Sudanese judges sentenced the accused to a pecuniary punishment as set out by the law, avoiding any form of corporal punishment. However, the accused refused to pay the fine, preferring imprisonment. After only one day in jail, the accused was freed due to the fine being paid – against her will – by a local trade union association.

XII. FREEDOM OF EXPRESSION AND CRIMES AGAINST RELIGION

In general, the discrete spaces assigned to religious freedom are naturally determined, geographically. The situation in the North should be clearly more problematic than in the South. However, we have also to consider that the conditions of poverty and economic and cultural underdevelopment in the South, where, due to the conflict, large portions of the population live.

There is consistent suffering, not always immediately evident if considering only the legal-formal ground, on the level of recognition as well as the practice of individual civil freedom: the latter indeed are not always guaranteed in a completely convincing manner, which could be due to the constitutional determinations that solemnly place the rights to freedom at the center of the legal system.

In fact, such rights are created under highly ambiguous terms and often accompanied by limits that could be defined as being subjected to a very “liberal interpretation.”

It is clear that, on these assumptions, the most-favorable status accorded to the Islamic faith leads to significant consequences, determining the existence of particular specific penal sanctions aimed at protecting religion (or better a particular religion, therefore acting with no respect of the principle of equality) by actions held by many to be offensive.

Even on this level, it therefore is worth noting the particular bond that is created between the necessary protection of the sphere belonging to political power, in terms of a reconstruction of the latter in a strictly authoritarian version, and the coloring in an ethical and religious sense of most of the obligations and/or prohibitions of the citizens.

This is also for freedom of expression and press, that are subjected to the typical powers of the authoritarian states (the pre-approval of contents of the publication by the Government as well as the suspension of journalistic and informative activity considered to not conform to the governmental political direction) and however suffer from the set up, directly or indirectly, of penetrating constraints of a religious nature, according to the 1991 penal code. We could consider the well-known episode of the publication of an article considered to be blasphemous due to it offending Mohammed, with the subsequent closure of the paper which published the article as well as the arrest of its editor.⁸⁰

Recent provisions relating to the freedom of the press seem to want to accord a greater respect to this right, while at the same time maintaining the power of the government to censor. Similar consideration can also be made in the case in which the freedom of expression and demonstration of thought are carried out in different contexts than that of the press, being on the verge of the limits of the freedom to teach and therefore include the educational function of the teachers.

An elementary school teacher in the capital was accused of blasphemy, subsequently being arrested and then pardoned by the President, for having allowed her young students to name a teddy bear Mohammed.⁸¹ This kind of case without a doubt reports on a

80. ACS, *Rapporto 2008*, supra n. 24.

81. *Id.*

tangible level the (apparent abstract) juridical analysis, highlighting the idea of how evident the difficulties of the Sudanese population actually are in carrying out their freedoms. It also highlights how decisive and predominant the influence of the claim to ethnical-religious values in limiting the civil right and freedoms is.

Nevertheless, the conclusion of several of the events mentioned – and in particular those discussed in this paragraph and paragraph XI that can in effect appear singular in the eyes of the Western observer – and in particular the inclination to use presidential pardons, could also give the possibility of considerations of a wider perspective with which to define the possible results of the Sudanese constitutional transition, under the specific profile of the relationship between the qualification of the State through the relationship with the religious phenomena and possible implementation of the levels of protection of the freedom of belief, conscience and religion.

Excluding extreme solutions – indeed far from being remote – such as the renewal of the civil conflict, the clear and decisive declaration, in the transitory constitution of Southern Sudan (Article 8), of the principle of separation between state and religion seems to constitute a very significant element through which we can point out the alternative between the secession of the country and the progressive getting over of extremist positions. Clearly, in the latter case, the appeal to the needs of the secularization of the State can strengthen the bond with the democratic ideal and assume the meaning of a complete modernisation of the whole Sudan. It is difficult to foresee with a degree of certainty what will happen in the immediate future, as well as identify any symptomatic elements of an evolution that will go in one direction or another.⁸²

It also seems that the diversification of the constitutional regime in relation to the relationships between the State and religion represents, at a first reading as well as on a juridical-formal ground, a strengthening element of the tension towards the decisive interruption of the previous order.⁸³

The prospect of an autonomous institutional destiny of the South of the country could therefore act, for the North, as an element of definitive abandoning of the legitimate ambition of the non-religiousness of the public institutions as well as lead to a definitive withdrawal in relation to the results of the 1999 constitution. In fact, as previously discussed, the reaffirmation, in the transitory national constitution, of the role of Islamic law, seems to be less permeable to the “other” influences, than the 1999 constitution.

Starting with the different assumption of the reaffirmation of the political ideal of a united Sudan, in the medium-long term the urge for secularization coming from the South of the country could influence, if not accompanied by the attempt to marginalize Islam, the constitutional set up of the North, favoring the progressive secularization or at least support a positive relationship of mutual conditioning between the dictates of the Sharia and customary law. The frequent use of presidential pardons with subsequent merely symbolic affirmations of the sentence associated to the civil laws with a religious content, can be considered, at the moment, as a positive signal in this direction.

Nevertheless, it is worth clarifying the true meaning to be ascribed to the separatist ideal of the constitution of Southern Sudan. Separation between state and religion in no way can be considered as an index of a complete and definitive neutralization of every juridical relevance of religion or its public role.

The current experience of Sudan leads, then, to restating that the objective of secularization is far from representing uniform results, so that it can not always be interpreted in the same way. It constitutes an aim as well as a result to be contextualized, in both a diachronic and synchronic sense, but it can not absolutely lead to a complete neutralization of every reference to religious values.

82. Joseph Oloka-Onyango, “Constitutionalism in Africa: Yesterday, Today and Tomorrow,” in *Constitutionalism in Africa. Creating Opportunities, Facing Challenges*, ed. Joseph Oloka-Onyango (Kampala: Fountain Publishers, 2001).

83. Robert O. Collins, ““Un Sudan Democratico, Secolare e Unito”: Illusione o Realtà?” in *Sudan 1956-2006: Cinquant’Anni di Indipendenza, Afriche e Orienti*, n. 1-2, ed. Stefano Belluci and Massimo Zaccaria (Dogana, Repubblica di San Marino: AIEP, 2006), 17 ff.

On these bases, the separation between state and religion as well as secularization should be intended as a means for an equal opening towards religions or, in general, different ethno-cultural and religious identities, imposing an impartial recognition of their relevance in the order of the State.⁸⁴

84. As we have previously noted, the new constitutional phase starting up – since the declaration of 2011 – both for the Sudan and the South Sudan is still in course so that it is probably too early to get a definitive evaluation about the real perspectives of these processes. Nevertheless, we can observe that religion is going to confirm and improve its importance and particularly in enlarging the distance between the two states. As the goal of the unity of the Sudan is failed, it is probable that the North Sudan will lead itself to the constitutional and legal affirmation of the Sudan itself as a real Islamic State. At the same time, referring to the South Sudan, religion will play a decisive role in contributing to give people a new constitution: see, on the one hand, the President Bashir's statement of 8 July 2013 (<http://af.reuters.com/article/topNews/idAFJ0E86700C20120708>) and, on the other, the advisory message to the citizens of South Sudan on the occasion of the first anniversary of the independence of the Republic of South Sudan from His Grace Archbishop Paolino Lukudu Loro, Catholic Metropolitan Archbishop of Juba and The Most Reverend Daniel Deng Bul, Archbishop and Primate of Episcopal Church of the Sudan and Archbishop of ECS Diocese of Juba, <https://docs.google.com/viewer?a=v&pid=forums&srcid=MDAxODM4NzI0NjU3MTQxNjA3OTIBMTI5ODgyNTMyNDg0MDM0NTcxOTM5YkdPbVRtalR4ZHdKATIBAXYy>.