

# A comparative overview on agricultural contracts in Sudan

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Sudan, like other African nations, has experienced challenges related to land ownership, aggravated by its previous status as the largest country in Africa before South Sudan's secession. Traditionally, land in Sudan has been held collectively by tribes, managed by chiefs or tribal leaders through customary regulations. In this system, an individual's right to land is derived from their membership in the community or tribe. Specific areas for communal use are exclusively reserved under customary law, where individuals can access them as a shared resource. This concept aligns with the notion of a native common good in modern terms, as described by the economic analysis of law, where ownership rights prevent individuals from excluding others. The right to exclude others does not apply in this case. These customary traditions remained mostly unaffected by colonial and post-colonial governments, which introduced a separate land tenure system based on the state's authority to allocate land. Alongside these customs, Islam, as a religious faith, also played a significant role, providing principles and regulations that intertwined with customary traditions to form a binding body of law. However, the religious rules themselves are only one component of the living law, whose content is shaped through the interaction with customary practices. Official land law in Sudan, influenced by colonial practices, has undergone modifications under successive governments but remains fundamentally rooted in the colonial land laws. These laws were initially implemented to confiscate large land areas for commercial farming, particularly cotton production, and to regulate urban residency in support of colonial regime security. One of the fundamental issues related to rural land tenure stems from the principle introduced by the British colonial power in 1898, which assumes that unregistered land is owned by the government unless proven otherwise. Considering the premises, the purpose of this contribution is to analyse the land laws in Sudan and, in particular, the main type of agrarian contracts.

*Keywords:* Sudan, agrarian law, Shari'a, customary law, agrarian contracts.

## 1. Introduction

Sudan, like many other African countries have been suffering of land ownership issues combined with the fact of having been the largest country in Africa (before the cession of South Sudan). This aspect has always been used by the government to "justify" a very regressive land policy claiming that there is "land enough for everyone". This statement is indeed an inaccurate if not even false<sup>1</sup>.

Historically, land in Sudan is vested in the tribe as a whole and is administered on its behalf by chiefs or tribal leaders, by means of customary regulations.

To put it even clearer, an individual's right to land derives from his right as a community or tribe member<sup>2</sup>.

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<sup>1</sup> For a general overview: Omer A. M. Agriculture Policy // Sudan. Agricultural Science Research Journal. 2011. P. 1–29.

<sup>2</sup> Abbadi K. A. B., Ahmed E. A. Brief Overview of Sudan Economy and Future Prospects For Agricultural Development. Available at: <https://reliefweb.int/report/sudan/brief-overview-sudan-economy-and-future-prospects-agricultural-development> (accessed: 15.03.2023).

Customary law exclusively reserves specific areas for communal usage, which may be used by individuals, a native common good in modern sense, that is, with the words of the economic analysis of law, a non-rivalrous good whose ownership rights prevent the individual to exclude other members from them. The *ius excludendi alios* is not that case.

These traditions were left largely undisturbed by colonial and post-colonial governments who instead introduced an entirely new level of land tenure normative system based on the right of the state to allocate land.

These building blocks were also living along with religious faith, Islam, whose tenets, principles, and inspired regulation, at the end of the day, is another immanent body of binding law. But the content of these religious rules is indeed just an ingredient of the living law, whose content is created by the entangling with the customary traditions.

On the top of these customs (with a twist of Islamic taste), official land law has undergone transformations under successive governments, but essentially it remains founded on colonial land laws.

These laws were introduced with the aim of confiscating large areas of land for commercial farming (notably cotton production) and regulating who was able to reside in towns (in order to guarantee the security of the colonial regime).

The most basic problem concerning rural land tenure is rooted in the principle introduced by the British colonial power in 1898, that unregistered land is by assumption, owned by the government unless the contrary is proved.

## 2. Historical path

During the Turkish (1821–1884) colonialism and the brief Mahdist rule (1885–1898) there have been no changes to the basic structure of the land tenure system. Tribal stabilization on the rain lands of Sudan was, however, interrupted during the Mahdiya when “tribal leadership was abolished and a new administration based on army leaders was instituted”<sup>3</sup>.

Although many developments and changes occurred since the British established the legal system of the Anglo-Egyptian Sudan, the current legal system remains to a great extent an offshoot of that system. During the British colonial era, the politicization of land ownership was pursued through a series of law land reforms amounting to more than twelve ordinances and their amendments from 1899 to 1930<sup>4</sup>.

In Sudan, a Civil Code had already been enacted in 1971, substantially replicating the tried, tested and widespread model of the Egyptian Civil Code of 1949, by means of a long route starting somehow from the Iraqi experience and the Anglo-Mohammadan tradition from India.

The legislative process, since then, through the enactment of a well-stocked series of new codes and laws particularly between 1983 and 1984, has been grafted into the broader process of recovering Islamic principles: not only merely legal ones.

The traditional systematics developed by the Maliki school, prevalent in Sudan until the time of the Anglo-Egyptian condominium, placed agrarian contracts among the associative contracts of capital and labor. On the other hand, the Egyptian Civil Code of 1949 has been received in Sudan through the circulation of the Iraqi Civil Code of 1951 in

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<sup>3</sup> Shazali S. Pastoral Land Tenure in Sudan, Project Reduction of Resource based Conflict between Pastoralists and Farmers // UNDP Report. 2002. Vol. 1. P. 5.

<sup>4</sup> One major policy of these ordinances was to expand cultivation while safeguarding the inhabitant rights and encouraging the formulation of a Sudanese proprietary class (*Warburg G. The Sudan under Wingate. Administration in the Anglo-Egyptian Sudan, 1899–1916. London: Taylor & Francis, 1970. P. 156 ff.*).

which the doctrine of the Hanafi school has been founded on the Ottoman *Mejelle*. This complex legal model prevails influencing the arrangement of the contracts in question in the 1984 Sudanese Civil Code<sup>5</sup>, that provides for three more types of contracts regarded as associative forms of capital and labor.

Based on the Code's regulations, it seems that the fund (along with the consistent rights) is granted by the owner to the other party; so, a partnership relationship is not exactly established over it.

The contracts examined are clear examples of the circulation of regulatory models taking place among some contemporary African Muslim countries, combining both customary and religious rules within the framework of state regulations.

One of the most important features of such customary tenure is the right and authority exercised by the leadership of the native customary institutions in the allocation of land rights, its administration, and the settlement of disputes over it. This right was consolidated through the institutionalization of the Traditional Administration, based on the principle of *Dar*, or "tribal homeland", and empowered by economic and legislative mechanisms<sup>6</sup>.

The interest that arises from their analysis and originality of the concrete solutions call for further study, in the broader field of private law and a challenge for the comparative lawyers and scholars. In the groove of a wide re-Islamization in some areas, the efforts made by contemporary African formants to govern the matter in substance the contemporary needs resorting to the customary traditions competing with pre-established Western models is surely a promising test.

The *Qānūn al-mu'āmalāt al-madaniyya* (Civil Transactions Act) of 1984<sup>7</sup>, represents one of the main stages in the process of the de-Islamisation of Sudanese law. With this Act, moreover, Sudan ranks both among the many Arab countries that have completed the work of codification, and among those that are moving towards a recovery of *Shari'a* on an increasingly vast scale. In 1971, Sudan had already enacted a Civil Code that substantially followed the tried and tested and widespread model of the Egyptian Civil Code (*al-qānūn al-madani*) of 1949<sup>8</sup>.

In the following year (1972), two other pieces of legislation in the field of civil procedural law had seen the light of day: the Civil Pleadings Code and the Civil Evidence Act. Alongside these circulated a draft of the Commercial Code, which never came into force.

At that time, there was a lively debate among Sudanese jurists as to whether to introduce codes according to the Egyptian model, and thus continental French, or to main-

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<sup>5</sup> The reason why Islamic law preferred to regard them as associative contracts, typical of the Islamic traditional schools, is related to the Quranic prohibitions of *ribā* (usury, interest) and *gharar* (*alea*). Lease contracts, in fact, could conceal more easily *ribāwī* elements that in society were eliminated by the very nature of this contract.

<sup>6</sup> See, generally: *Babikir M.* Land tenure in Sudan Country case study. Report to UNDP Dry lands. Beirut: Development Centre, 2007.

<sup>7</sup> Published by President Nimeiri by Provisional Decree (*amr mu'aqqat*) No. 6 of 14 February 1984 and published in Official Gazette (*al-Jarida al-rasmiyya*) No. 1340 of 16 February 1984. The Act states that its provisions shall apply to "all obligations and rights arising, inter alia, out of lease, ownership, incidents of ownership, and mortgages. More generally, in conformity with well-established situs choice-of-law rules, the C. T. A. states that the law of Sudan shall govern the possession, ownership and rights regarding land in the Sudan, including contracts with respect to Sudanese land" (*Gordon C. N.* Recent Development in the Land Law of the Sudan: A legislative Analysis // Journal of African Law. 1986. Vol. XXX, No. 2. P. 146).

<sup>8</sup> For the Sudanese Civil Code of 1971, see: *Dilger K.* Das Sudanische Zivilgesetzbuch von 1971 und sein Verhältnis zu den anderen arabischen Zivilgesetzbüchern // Zeitschrift für Vergleichende Rechtswissenschaft. 1974. P. 39–65. — On the preparation, implementation, fundamental structure, inspiring principles, and dissemination of the Egyptian code, see for all: *Castro F.* La codificazione del diritto privato nei paesi arabi contemporanei // Rivista di Diritto Civile. 1985. Vol. XXXI, No. 4. P. 387–447, spec. P. 413 ff. — On the legal system of Sudan in general, see: *Amin S. H.* Middle East Legal Systems. Glasgow: Royston, 1985. P. 328–351.

tain the application of colonial law, progressively formed since 1898 under British rule or, again, to recover the Islamic legal discipline, which in fact already constituted one of the sources of post-colonial law<sup>9</sup> and which should have led to the constitution of an Islamic State.

Postcolonial land tenure legislation did not deviate much from the colonial time. In practice however, “customary land rights and therefore the interest of local communities, were significantly undermined by national state practices”<sup>10</sup>.

The registration of land and the process of bringing communal land under the government control was not done at once but started at the center and progressively moved out towards the peripheries. This process was accomplished by “continuing the colonial processes of recognition, settlement, and eventual registration of the customarily and communally owned lands as they existed in the remaining regions of Sudan”<sup>11</sup>.

After the introduction of the 1971 Code, the supporters of the Egyptian model soon saw its ranks dwindle. As early as 1973, in fact, the recently enacted codes were repealed, and studies of new drafts began.

The drafting of the new laws, from this point of view, should have been done in a mainly casuistic style that would have allowed the integration of numerous jurisprudential solutions that had long been founded with reference to the *Shari'a*<sup>12</sup>.

In fact, following the 1983 adoption of Sharia Islamic law, recognition of customary law was restricted to those following and conforming with Sharia, the acts of *Sahaba* (the prophet disciples) and the Islamic Four Sunni Legal Schools.

The legislative process, since then, through the issuance of a substantial series of new codes and laws, particularly between 1983 and 1984<sup>13</sup>, has been grafted into the broader process of recovery of Islamic, and not only legal, principles.

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<sup>9</sup> On the debate concerning the introduction of codes on the Egyptian or Common Law models, see: *Thompson C. F.* The Failure of Continental Codes in the Democratic Republic of the Sudan — An Analysis // *Verfassung und Recht in Übersee*. 1975. 3/4 Quartal. P.407–421; *Zaki M.* The Common Law in the Sudan. An account of the “Justice, Equity, and Good Conscience”. Oxford: Oxford University Press, 1971. P.41–157. — In particular, it should be added that here, Common Law should be understood to mean not so much the British legal system, but the product of its impact on the legal systems in place at the time of British colonial expansion, in the Indian subcontinent and in the colonised Islamic countries. This impact gave rise to laws that have been referred to as Anglo-Indian Law and Anglo-Muhammadan Law.

<sup>10</sup> *Mohyeldeen T. E.* Land Use, Ownership and Allocation in Sudan. Available at: <https://landportal.org/node/75444> (accessed: 05.12.2022).

<sup>11</sup> *Ibid.* By doing so, it was again assumed that the national state would make use of the land for good public purposes, but at the same time “protect the customary communal or individual landowners” interest in the land. Contrary to these assumptions, the national state proved to be more repressive when it categorically undermined these fundamental principles”.

The 1990 Amendments, in the first Article confirmed that all non-registered land should be considered as if registered in the name of the State. The second provision stated that “[n]o court of law or any other authority, is concerned with considering any plea or petition or procedure regarding and subject relating to the ownership of State-owned land in accordance with the Act”.

<sup>12</sup> *Gordon K. N.* The Islamic Legal Revolution: The Case of Sudan // *The International Lawyer*. 1985. Vol. 19, No. 3. P.793–815. — On the application of Islamic law in Sudan and the Shariah courts, see also: *Fluehr-Lobban C.* Islamic Law and Society in Sudan. London: Frank Cass, 1987. P.22–80. — With the independence of Sudan in 1956, a whole generation of English-trained jurists took over the administration of justice. The judges continued to follow colonial law by filling in the gaps with increasingly frequent references to *Shari'a*. A clear departure from this practice is represented by The Judgments (Basic Rules) Act, 1983, reported in the appendix to: *Gordon K. N.* The Islamic Legal Revolution... P.814–815. — This law sets “the principles and general spirit of the *Shari'a*” as the sole point of reference for judges in legislative interpretation.

<sup>13</sup> Among many (the title of which is given in the official English translation): Road Traffic Act, 1983; Civil Procedure Act, 1983; Advocates Act, 1983; Penal Code, 1983; Evidence Act, 1983; Criminal Procedure Act, 1983; Act, 1984; Zakat Tax Act, 1984; Excise Duty Act, 1983; Customs Act 1983; People’s Forced Arms

With regard to the 1984 Code of Civil Transactions (*qānūn al-mu'āmalāt al-madaniyya*) in particular, we can say that it assumes, as a whole, fundamentally original characteristics, even though it remains in substance tied, at least from the formal point of view to the analytical style proper to the Statute law of the Anglo-Indian model. The general structure of the code and the discipline contained in it appear, on the other hand, as a further evolution, through the Jordan Civil Code of 1976, of the model of the Iraqi Civil Code of 1951, which in turn constitutes a variant of the Egyptian text of the same name.

The detachment from these precedents is, on the contrary, total if one looks at the Arabic terminology used, which takes up the traditional one elaborated by the Islamic legal schools<sup>14</sup>.

### 3. Agrarian contracts

The agrarian contracts provided for in the Sudanese code at issue here must be analyzed within legal-historical framework described above.

The agrarian contracts envisaged by the Sudanese code in question<sup>15</sup>, must be analysed within this historical-legal framework. Four are regulated: the lease of rustic land (*ijārat al-arādi al-zirā'iyya*), the *muzāra'a*, the *musāqāh* and the *mughārasa*. To these must be added the lease of *waqf* (*ijārat al-waqf*), which is also connected to the agrarian field if the *waqf*<sup>16</sup> is established on a rustic property and for this purpose one of the above-mentioned contracts is subsequently stipulated<sup>17</sup>. All these contracts are contained in

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Act, 1983; Judgments (Basic Rules) Act, 1983; Order of Ma'arouf and Prohibition of Munker Act, 1983; Civil Transaction Act, 1984; Zakat Tax Act, 1984; Excise Duty Act, 1983; Customs Act (Amendment), 1984; Prison Act, 1984; Auditor-General Act, 1984; Exporters and Importers Registration Act, 1984; Employees Trade Unions Act, 1984; Industrial Relation Act, 1984.

<sup>14</sup> On the spread of these regulatory models, see for all: *Castro F.* La codificazione del diritto privato nei paesi arabi contemporanei. P.424–428, 439–447. — At a closer look and through an analysis of the codes issued in some Arab countries after 1978, it can be seen that a process of recuperation of the Ottoman *Mejelle* (1863–1875), as a codensation of Muslim law of the Hanafi school, is underway. The issue, which cannot be developed here, is particularly interesting in reference to the detachment from, and remaining influence of, Western models, especially through the Egyptian Civil Code mentioned above, and in relation to those institutions that enter or remain within the sphere of influence of one or the other model. However, this process seems to have been smoother in those countries where, due to the influence of the typical Common Law style of law, it was easier to update the Ottoman model and integrate it with local jurisprudential material. Interesting, in this regard, is the title of the recent civil code of North Yemen (1979–1983) (*Qānūn al-mu'āmalāt al-shar'iyya*, i. e. Code of Obligations and Contracts in accordance with the Shari'a), which appears, however, although broader, to be largely linked to the Egyptian model in its Iraqi variant. The *Qānūn al-mu'āmalāt al-madaniyya* (same title as the Sudanese code in question) of the United Arab Emirates was also issued in 1985.

<sup>15</sup> See, in particular: *Gordon C. N.* Recent Development in the Land Law of the Sudan... P. 143–174. — In general, on land law in Arab countries, see: *Ziadeh F. J.* Land Law and Economic Development in Arab Countries // American Journal of Comparative Law. 1985. Vol. 33. P.93–106.

<sup>16</sup> The *waqf* (on which see for all: *Santillana D.* Istituzioni di diritto malikita con riferimento al sistema sciafiita. 2 vols. IPO: Rome, 1932. P.412–451). — Sometimes hastily and imprecisely defined as the Islamic trust, as is well known, is an act of liberality that consists in the constitution for pious purposes of a right of perpetual enjoyment or usufruct, having as its object a thing, which by the effect of this constitution becomes inalienable, while remaining the property of the grantor (see: *Ibid.* P.413). See also: *Gordon N. C.* Recent Development in the Land Law of the Sudan... P. 164–165. — For a comparison between the charitable trust and the *waqf khairi*, see: *D'Emilia A.* Per una comparazione tra le pieae causae nel diritto canonico, il charitable trust nel diritto inglese e il *waqf khairi* nel diritto musulmano / Scritti di diritto islamico. Raccolti a cura di Francesco Castro. IPO: Rome, 1976. P.237–276.

<sup>17</sup> An administrator is appointed for the *waqf* who has the power to lease it (Art. 349.1). If a co-adjutor (*mushrif*) is also appointed alongside the administrator, this power must be exercised jointly (Art. 349.3). Authorisation of the court is necessary for the administrator, both to lease the *waqf* for himself and to lease its main and secondary property (*usūl wa furu'*) at a price higher than their rental value. The beneficiary, in

Title IV of Chapter X of the code, dedicated to the contract of *ijāra* (rent, lease). The traditional systematics elaborated by the Maliki school<sup>18</sup>, prevalent in Sudan until the time of the Anglo-Egyptian condominium, placed the contracts of *muzāra'a*, *musāqāh* and *mughārasa* among the associative contracts of capital and work. It is, on the other hand, the Egyptian civil code of 1949, in which the doctrine of the Hanafi school prevails<sup>19</sup>, and its evolution in the previously mentioned codes, that influences the arrangement of the contracts in question in the Sudanese code. The reason why Islamic law preferred to consider them as associative contracts is linked to the Koranic prohibitions of *ribā* (usury, interest) and *gharar* (alea). Lease contracts, in fact, could more easily conceal elements of *ribā* that in society were eliminated by the very nature of the contract. In the context of recovering the principles and general spirit of the *Shari'a*, the Sudanese legislator, as the Jordanian one had already done in 1976, preferred to reintroduce the typical associative element in the agrarian contracts drawn up by the classical schools.

As in Muslim law, these are consensual contracts. The very style in which the individual articles expound the matter, by means of “it is lawful” (*yajūz*) or “it is not lawful” (*lā yajūz*) recall the style proper to Islamic legal schools<sup>20</sup>. Moreover, the text we are examining does not contain any rule binding the contracting parties to a particular form, thus referring implicitly to the general discipline on the form of contracts (Art. 41), which states that a contract is concluded with the agreement of the parties (*ittifāq al-tarafayn*) on all matters (*masā'il*) dealt with in relation to the contract itself. Whereas an agreement on a part only of these matters does not bind the parties unless the agreement is evidenced in writing<sup>21</sup>.

The lease of a rustic property (Arts. 322–328) is, in fact, valid (*sahh*) with the simple definition (*bayān*), between the contracting parties, of what will be cultivated there or with the choice made by the tenant to cultivate on the property what he wants (Art. 322).

turn, may neither lease the waqf nor collect the rent from it without a mandate from the constituent or authorisation from the one who has the power to lease it (Art. 351). In fixing the duration of the lease (Art. 352), it is not possible to violate the conditions and terms set by the constituent. In the absence of such a term, real estate shall be leased for one year and land for a maximum of three years — a term to which contracts concluded for a longer period shall be reduced — unless the interest of the waqf requires otherwise and the longer term is approved by the court. The court may also order the lease for the period most suitable for the waqf or for a period sufficient for its restoration, if the waqf needs it and there are insufficient rents for this purpose. The waqf may not be leased for a rent lower than its rental value determined by certain experts at the time the contract is concluded (Art. 353). He who has built or planted on the land subject to the waqf (Art. 356) at his own expense and with the permission of those who have the power to lease it, has the right to be preferred to a third party in a subsequent lease. Whoever, on the other hand, has carried out such works without the necessary authorisation, is obliged, at the expiry of the lease and at his own expense to simply demolish or uproot what he has built or planted if there has been no damage to the waqf, or, if not, to restore it to its original state. In any case, the waqf entity (*jihat al-waqf*) may take ownership of what has been built or planted by paying its value equally.

<sup>18</sup> On the topic see amplius: Santillana D. Istituzioni di diritto malikita con riferimento al sistema sciafita. P. 413.

<sup>19</sup> Which had already been codified in the Ottoman Mejelle of 1869–1876 and for which see: Castro F. La codificazione del diritto privato nei paesi arabi contemporanei. P. 391–396.

<sup>20</sup> On the distinction of human actions into five categories (*al-ahkām al-khamsa*) see *ex multis*: Castro F. Voce Al-ahkām al-khamsa. Digesto. Turin: Utet, 1987. P. 245–246.

<sup>21</sup> On the problem of legal formalism and anti-formalism in Muslim law, see: D'Emilia A. Voce Fiqh (Iurisprudentia islamica). Novissimo Digesto Italiano. Turin: Utet, 1961. P. 373–377; Schacht J. An Introduction to Islamic Law. Oxford: Oxford University Press, 1964. P. 116–117; Chenata C. Théorie générale: de l'obligation en droit musulman hanefite. Les sujets de l'obligation. Paris: Bibliothèque Dalloz, 1969. P. 105–107. — The question arises with reference to the relationship between form (*sigħa*) and intention (*niyya*) among classical Islamic jurists. The latter is sometimes understood as an internal moment of the will, at other times as an external moment and thus as actual form, most often free and rarely bound to the observance of solemnities. Moreover, there are also forms of anti-legal formalism, as in the case of the *hiyal* or legal *cautelae*, sometimes used, especially in the commercial sphere, to overcome prohibitions relating to certain transactions.

A question arises at this point in relation to the definition of what will be cultivated. If, in fact, it is only a matter of the burden of choice on the part of one of the two contracting parties, according to what has been established between them, and the subsequent communication — the term *bayân* also indicates, in fact, communication, manifestation — to the other, no special problems arise. If, on the other hand, as it is probable, the choice belongs to both, the institution appears polluted by an element indicating the presence of a corporate relationship on the fund. What is evident here is that recovery of classical Islamic discipline to which we have just referred, and which grants the contracts in question an interest that deserves a far more careful examination than is possible here.

The contract includes, unless otherwise agreed, all the rights and appurtenances of the land and agricultural implements for which the tenant must undertake their maintenance and use according to usage (*'urf*) (Art. 324). If the contract does not provide for any restrictions (*quïd*), the land may be cultivated in any season of the year (Art. 325) and an increase in rent is not possible if the lease period expires before the harvest is ripe (Art. 326).

On the other hand, it is not permitted for the lease to be definitive (*munjaza*) and for the land to be cultivated for another type of non-durable cultivation, unless the tenant is also the owner of what has been cultivated (Art. 323, 1). Land that has already been worked may be leased at different times, referring to the maturation of what is cultivated there, depending on whether cultivation has taken place with or without right, while it is always possible to refer the commencement of the lease to the time when the land is freed from all activity (Art. 323, 2–3).

With regard to the obligations of the lessor and the lessee established by law (Art. 327), the former is obliged to carry out on the fund all the repairs necessary for the realisation of the desired profit, while the latter must work the fund appropriately. The other must work the land properly, without changing the cultivation system, the effects of which last beyond the term of the lease, and carry out all the repairs required by the normal use of the land itself and maintain the irrigation (*sawâq*) and drainage (*masâriq*) canals, the roads (*turuq*), the aqueduct (*qanâtir*) and the wells (*a'bâr*)<sup>22</sup>.

If it is impossible to cultivate the land for a cause external to the contracting parties (Art. 328), the tenant may terminate the contract without payment of the established rent. This, on the other hand, is reduced in proportion to the time elapsed in the contract if cultivation is destroyed before harvest. Both provisions do not apply if the tenant has received a guarantee (*damân*)<sup>23</sup> from any public body or entity to cover the damage (Art. 328).

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<sup>22</sup> For a general overview on the point, see: *Abdalla M. S.* Water Policy of Sudan: National And Co-Basin Approach, Ministry of Irrigation and Water Resources. Tehran: Regional Centre on Urban Water Management, 2010; *Ahmed M. S., Ribbe L.* Analysis of Water Footprints of Rainfed and Irrigated Crops in Sudan // *Journal of Natural Resources & Development*. 2011. Vol. 1. P.9 ff; *Ashok S. M.* Mission Not Yet Accomplished: Managing Water Resources In The Nile River Basin // *Journal of International Affairs*. 2008. Vol. 3. P.201–214.

<sup>23</sup> The term *damân* generally corresponds to guarantee, insurance. It, here, certainly replaces the corresponding term *tâ'amin* usually used to translate the insurance contract, considered *harâm* (forbidden) by Muslim law due to the alea (*gharar*) it entails. On *gharar* and its prohibition in Islamic law, see: *Santillana D.* Istituzioni di diritto malikita con riferimento al sistema sciafiita. P.56. — There is alea, according to Ibn 'Arafah, whenever it is uncertain whether one of the contracting parties will receive the equivalent of what he has given or the thing he intended to obtain by concluding the contract. Random contracts (*'uqud al-gharar*) are invalid (*fâsid*). The notion of *mughârasa* can be understood in this sense. In this contract, a certain period must elapse for the partnership between the landowner and the worker to be established. This period corresponds, in reality, to the time of growth of the plant that is the subject of the contract so that there is no uncertainty in the constitution of a society around a tree that does not exist at the time. This rule is found, in a much more analytical form, in Art. 535 of the UAE Civil Code of 1985 (which came into force in 1986). Another typical form of contract outside the prohibition of *ribâ* and *gharar* is the *salam* contract. It consists of a *pretio* sale which constitutes an *emptio rei sperata* and not an *emptio spei*. This

#### 4. The types of associative contracts

In the chapter dedicated to the *ijàra*, as we have said, the Sudanese code provides for three other types of contract that, from the Islamic point of view, are traditionally considered associative forms of capital and labour and that, at a closer look, remain true associative contracts rather than assuming the characteristics, which would seem more consistent with their collocation, of *locatio operarum* contracts: the *musàqàh* is explicitly defined, by Art. 337, as a company contract ('*adq shirka*). On the other hand, according to the discipline of the code, it seems that the land is granted by the owner to the other contracting party, as in the contract of *ijàra*, with all the rights and that, therefore, a partnership relationship is not established on it. Here, too, we are dealing with mixed contractual figures in which elements typical of both *shirka* and *ijàra* combine and merge.

The *muzàra'a* (Arts 329–336), the *musàqàh* (Arts 337–347), and the *mughàrasa* (Art. 348) are institutions that are very similar to each other and differ only in terms of the object of the contract (*ma'qud 'alayhi*). In all cases, it is a contract between the owner of a land or the person who has the right to dispose of it and another person who provides his labour in order to divide the harvest or the profit derived from it in a percentage established at the time of the contract (Arts 329, 337 and 348).

What characterises each contract is, as noted, the subject matter around which the contracting parties agree. In the *muzàra'a* (from *zara'a* which means to cultivate, to sow)<sup>24</sup> it is the exploitation (*istighlâl*) of a fund (Art. 329), generally not yet cultivated, which the *muzàri'* (he who furnishes his work) simply undertakes to cultivate — in which case, we have a form of partial colony<sup>25</sup> — or for which he also furnishes the seed and the means necessary for his work — configuring, therefore, a sowing society — on the basis of the agreements made with the owner of the land itself (*sàhib al-ard*).

The *musàqàh* (from *sàqà*, to irrigate, which Santillana<sup>26</sup> translates as irrigation contract) is a company contract that has as its object, instead, the exploitation of an already existing plantation (*shajar*) that the *musàqi* must cultivate and take care of and whose fruits are divided between the contracting parties in the agreed percentage (Art. 337)<sup>27</sup>.

Finally, the *mughàrasa*<sup>28</sup> (Art. 348) is a form of *musàqàh* and consists in the agreement between the owner of the land and another person to whom the land itself is con-

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contract, governed by Arts 217–222 of the Sudan Code, is defined as the sale of a good (*mâl*) with deferred delivery for immediate payment of the price (Art. 217). It is therefore comparable neither to a forward sale (where the mere consent of the parties is sufficient to perfect the contract, whereas here the immediate payment of the price is required) nor to a loan. The object of the contract must not be determined except generically and quantitatively, while the payment and the counter-performance promised must be equivalent, otherwise there would be a repudiatory and therefore invalid contract. See: Santillana D. Istituzioni di diritto malikita con riferimento al sistema sciafiita. P. 168–178. — See also: Arts 380 ff. of the Ottoman *Mejelle*.

<sup>24</sup> Santillana D. Istituzioni di diritto malikita con riferimento al sistema sciafiita. P. 303–309. — Translates *muzàra'a* as sowing companies.

<sup>25</sup> Ibid. — The author notes that among the different forms that the *muzàra'a* contract can take, there is a variant that can be assimilated to the contract of partial colony.

<sup>26</sup> Ibid. — The author translates as irrigation contract and reports the definition of the institution given by Ibn 'Arafah according to which the *musàqàh* contract is the agreement by which one of the parties undertakes to perform the agricultural work required by the plants of a given fund by means of a share of the products themselves (of the plants), provided the agreement is not expressed with the words meaning the sale or lease of works (*ijàra*) or the promise of reward (*ju'l*).

<sup>27</sup> Wallach B. Irrigation In Sudan Since Independence // The Geographical Review. 1988. Vol. 1. P. 417–434.

<sup>28</sup> Santillana D. Istituzioni di diritto malikita con riferimento al sistema sciafiita. — The author translates with planting contract. According to the author, the *mughàrasa* can be a lease of work or piecework (*locatio operis – ju'l*), or a lease of works (*ijàra – locatio operarum*), or an association. The first two are improper forms of *mughàrasa*. Properly speaking, it is a form of agrarian society, that is, the contract by which



signed to carry out the planting, cultivation and care of it and provide all the necessary means within a set period of time, after which the land, the plantation and the resulting works are in partnership between them according to the agreement. In this latter form of contract, the fusion brought about by the Sudanese legislature between elements of the *ijàra* and elements of the, *shirka* appears more evident, conferring, as already stated, originality and interest on the contracts under consideration.

Conditions for the validity of the contract (Arts 330 and 338) are the determinacy of its subject matter, i.e. the cultivation or planting, and that the share must be established in a manifest percentage (*nisba shà'iyya*), and cannot consist in a fixed quantity of harvest or in the harvest of a determined part of the fund or in something other than the produce. The rules of the *musàqàh* apply to the *mughàrasa* insofar as they do not conflict with its nature (Art. 348).

The duration of the contract must be fixed at a period suitable for the realisation of what has been established by the contracting parties and in the absence of the term this is understood to be fixed in a single agricultural season, in the *muzàra'a* (Art. 330(4)), or, in the *musàqàh*, at the time of the first harvest obtained during the year (Art. 340)<sup>29</sup>.

Once the contract is concluded, the harvest is common between the parties who divide it in the agreed percentage (Art. 331(1)). Arts 331(2)–(4) and 343 provide for the effects of an action of claim (*istihqàq*) brought against a property, e. g. granted in usufruct, or against the plantation or its fruits<sup>30</sup>.

The owner of the land, in the *muzàra'a*, is obliged (Art. 332) to hand over the land suitable for the cultivation of what is foreseen in the contract together with the rights of servitude (*huqùq irtifàqiyya*) and to repair the agricultural implements keeping them suitable for the work of the *muzàri'*<sup>31</sup>.

In the *musàqàh* and the *mughàrasa*, the owner of the plantation (Art. 341) is responsible for the expenses necessary for its exploitation (e. g. the cost of fertiliser) and its customary care (e. g. the need to eradicate insects) until the harvest ripens, in addition to the expenses for fixed works that are not carried out every year (e. g. the drilling of wells)<sup>32</sup>. All post-harvest expenses are to be borne by both parties in proportion to their share. The

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the owner grants his bare land to a colonist, who undertakes to plant it and to provide the necessary care for the plants, with the agreement that, once the plants have reached a certain age, or when they are able to bear fruit, the same and the land will be divided in certain determined proportions between the owner of the land and the worker. Note the similarity between this notion and that, reported in the text, contained in the Sudanese code.

<sup>29</sup> See, in particular: *Gordon N. C. Recent Development in the Land Law of the Sudan...* P. 163. — The author states that, according to Civil Transactions Act, 1984, section 340(1), “[i]f the duration of the arrangement is not specified in the contract, the period of the agreement shall be considered to last until the first fruits are collected in the year of the contract unless there is a customary practice to the contrary”.

<sup>30</sup> *Santillana D. Istituzioni di diritto malikita con riferimento al sistema sciafiita.* — The claim takes the form of an assignment of the contract, in which the claimant (*mustahiqq*) may substitute himself, if he approves the contract, for the person who had granted the land in *muzàra'a* (*dàfi' al-ard*) or the plantation in *musàqàh* (*dàfi' al-shajar*) in all the rights and obligations arising from the contract. In this regard, there is a very detailed casuistry providing for different solutions, from continuation to termination of the contract, in the case — that one or both parties to the contract are in bad faith knowing the cause (*sabab*) of the claim (Arts 331 and 343).

<sup>31</sup> *Gordon N. C. Recent Development in the Land Law of the Sudan...* P. 163. — The *muzàri'* must do the work and provide for the irrigation expenses up to the harvest and the custody of the land and its appurtenances with the care of the ordinary person.

<sup>32</sup> *Ibid.* — The *musàqi* or *mughàris* (respectively, the one who has received the fund in *musàqàh* or *mughàrasa*) is obliged, for his part, to carry out the work necessary to attend to the planting, increase the harvest, improve it and preserve it until it ripens (e. g. watering, pruning and dressing the plants). If he is unfit for work or unreliable (Art. 344) the landlord may terminate the contract by paying the settler the consideration for the work done up to the time of termination.

labourer is not allowed, without the consent of the landlord, to enter into sub-contracts, substituting others in his work. In such a case, the latter may terminate the contract or withhold from its counterparty, upon expiry, the consideration for the subject matter of the contract and a sum as compensation for the damage suffered<sup>33</sup>.

The contract ends with the expiry of the term provided for therein (Art. 334). If it expires before the harvest is ripe (Arts 334 and 345) the person who performs the work may continue it for the necessary time obtaining, in the *musàqàh*, or owing, in the *muzàra'a*, a share of the harvest, in proportion to the additional time and his share<sup>34</sup>.

If the contract of *muzàra'a* (Art. 336) is rescinded or annulled or is null and void, the harvest accrues to the owner of the seed. If the other party is the labourer, he is entitled to the consideration for his labour; if he is the owner of the land, he is entitled to the rent or rental value (*ajr al-mithl*) of it. In any event the consideration or rent may not exceed the value of the share of the person to whom it is to be paid<sup>35</sup>.

## 5. Conclusion

The contracts examined so far, one may conclude, are a clear example of the circulation of regulatory models in contemporary Arab countries.

The interest that arises from their analysis and that requires further study, in the broader field of private law, is a clear indication of the effort of originality that contemporary Arab legislators are making with respect to pre-established Western models.

The framework of the re-Islamisation of law in these countries is becoming more and more defined: not only civil law, but also criminal, financial and commercial law are affected by the desire to recover the rules, principles, and the general spirit of *Shari'a*, which has already become evident in this brief examination of the agrarian contracts of the Sudanese *Qànùn al-mu'àmalât al-madaniyya* — adapting them in form and, as far as possible, in substance to the contemporary needs.

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<sup>33</sup> Santillana D. Istituzioni di diritto malikita con riferimento al sistema sciafiita.

<sup>34</sup> Gordon N. C. Recent Development in the Land Law of the Sudan... P. 163. — The death of the owner of the land or the plantation does not extinguish the contract and the other party must continue his performance even against the will of the heirs of that party (Arts 335(1) and 346(1)). If it is the *muzàri'* who dies it is up to the heirs to continue the work even against the owner's will. In the *musàqàh*, on the other hand, the heirs (Art. 346(2)) may choose either to continue the work — unless the *musàqi* was obliged in the contract to perform it personally (Art. 346(3)) — or to terminate the contract, obtaining, when the fruits accrue, the share of the deceased in proportion to the work performed by him up to the time of his death.

<sup>35</sup> Ibid.

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## Сравнительный обзор сельскохозяйственных контрактов в Судане

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Судан, как и другие африканские страны, столкнулся с проблемами, связанными с владением землей, что усугублялось его прежним статусом крупнейшей страны в Африке до отделения Южного Судана. Традиционно земля в Судане находилась в коллективной собственности племен, управляемых старейшинами или вождями племен в соответствии с обычными правилами. В этой системе право человека на землю вытекает из его принадлежности к сообществу или племени. Определенные области для общего пользования зарезервированы исключительно в соответствии с обычным правом, где люди могут получить к ним доступ как к общему ресурсу. Эта концепция согласуется с понятием изначального общего блага в современных терминах, как описано в экономическом анализе права, где право собственности не позволяет отдельным лицам исключать других. Право на исключение других в этом случае не применяется. Эти традиционные обычаи остались в основном не затронутыми колониальными и постколониальными правительствами, которые ввели отдельную систему землевладения, основанную на полномочиях государства по распределению земли. Наряду с этими обычаями ислам как религиозная вера также играл важную роль, обеспечивая принципы и положения, которые переплетались с обычными традициями, образуя обязательный свод законов. Однако сами религиозные нормы являются лишь одной из составляющих живого права, содержание

которого формируется во взаимодействии с обычаями. Официальное земельное законодательство в Судане, находящееся под влиянием колониальной практики, претерпело изменения при сменявших друг друга правительствах, но остается основанным на колониальном земельном законодательстве. Эти законы были первоначально приняты для конфискации больших земельных участков для коммерческого земледелия, особенно для производства хлопка, а также для регулирования проживания в городах в поддержку безопасности колониального режима. Один из фундаментальных вопросов, связанных с землевладением в сельской местности, проистекает из принципа, введенного британскими колониальными властями в 1898 г., который предполагает, что незарегистрированная земля принадлежит правительству, если не доказано обратное. Учитывая предпосылки, целью данной публикации является анализ земельного законодательства Судана, и в частности основного типа аграрных контрактов.

*Ключевые слова:* Судан, аграрное право, шариат, обычное право, аграрные договоры.

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