



Policy Brief

November 2013

Sudan's Enduring Question: The Role of Shari'ah in the Constitution and Law

THE U.S.
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INTERNATIONAL
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CIA World Factbook, U.S. Department of State image, <https://www.cia.gov/library/publications/the-world-factbook/geos/su.html>

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In December 2010, Sudanese president Omar al-Bashir declared that Sudan's new constitution will be based on his government's interpretation of Islamic (Shari'ah) law. Senior officials continue to repeat his declaration, as opposition parties and civil society representatives insist that Sudan's new constitution be based on universal human rights and reflect Sudan's commitments to international human rights standards, including freedom of religion or belief.

Concerns about Shari'ah being central to a future constitution ignore the fact that Sudan's current legal system already is based on a restrictive interpretation of Shari'ah provisions and corresponding *hudood*, or classes of crimes with set punishments. For the past 30 years, prior governments and today's ruling National Congress Party (NCP) have based many of the provisions of the 1991 Criminal Code, the 1991 Personal Status Law of Muslims, and state-level "public order" laws on their interpretations of Shari'ah and imposed these interpretations on all Sudanese, Muslims and Christians alike. The government's imposition of Shari'ah countrywide in 1983, including on the predominantly animist and Christian South, significantly contributed to the onset of Sudan's 20 year North-South civil war. Further, the issue continues to contribute to the ongoing fighting in Southern Kordofan and Blue Nile states.

Concern about the consequences of incorporating Shari'ah and *hudood* punishments into national law thus require a broader focus on both rule of law reform as well as the constitution. These provisions are at odds with Sudan's previous commitments to universal human rights,¹ including freedom of religion or belief. Addressing this divisive issue and ensuring respect for religious freedom should be a cornerstone of U.S. policy toward Sudan, to both support religious freedom and related human rights and to help stabilize the country.

The U.S. Commission on International Religious Freedom (USCIRF) recommends that the U.S. government take the following actions to address these concerns:

- Before normalizing relations or lifting the IRFA and IEEPA sanctions on Sudan, require the Sudanese government to abide by international standards on freedom of religion or belief, including by amending the 1991 Criminal Act, the Personal Status Law of Muslims, state level public order laws, and other laws and practices which infringe on religious freedom;
- Encourage and support civil society groups to monitor implementation of the public order laws and advocate for their repeal;
- Expand U.S. efforts to help ensure that the new constitution includes provisions protecting internationally guaranteed human rights, including by working to educate relevant parties

¹ Sudan is a signatory to the International Convention on the Elimination of All Forms of Racial Discrimination, International Covenant on Economic, Social and Cultural Rights, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights, Optional Protocol to the International Covenant on Civil and Political Rights, Convention on the Elimination of All Forms of Discrimination against Women, and Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women.

about a constitutional drafting process that incorporates international human rights standards, including regarding freedom of religion or belief; and

- Urge the government of Sudan to hold a transparent and inclusive national constitution drafting process that includes civil society leaders and representatives of all relevant political parties to help ensure that Sudan's new constitution includes protections for freedom of religion or belief, respect for international commitments to human rights, and recognition of Sudan as a multi-religious, multi-ethnic, and multi-cultural nation, and support indigenous efforts to influence the process positively.

Background and History

Great Britain introduced the secular 1925 Penal Code in Sudan to govern criminal matters during the colonial period. The Penal Code remained in place after independence in 1956 until 1971 when legal reforms were instituted. During this period, Islamic law was confined to personal matters such as marriage, divorce, guardianship, and inheritance. After independence, pro-Shari'ah political leaders tried multiple times to incorporate Shari'ah into the criminal legal system and pressed for the adoption of a constitution based on Islamic law. They briefly succeeded in 1969 when the National Assembly passed a Shari'ah-based constitution. However, Major General Gaafar Nimeri's coup on May 25 of that year thwarted these efforts.

However, in 1971, Nimeri's increasing pan-Arab foreign relations policy led him to call for a review of Sudan's laws to bring them into conformance with Shari'ah. This review resulted in the Civil Law Act of 1971 that replaced the 1925 Penal Code. The Act was a compilation of laws from Egypt, Syria, Jordan, and other Arab countries. Legal confusion led to the Act's revocation in 1974 and a return to the 1925 Penal Code.

The 1983 September Laws

Politically weak, President Nimeri sought to extend his power by currying favor with Sudan's growing Islamist movement. In September 1983, he supported a restrictive interpretation of Shari'ah that was successfully and, in retrospect, lastingly incorporated into Sudan's legal system. The promulgation of the "September Laws," the 1983 Sources of Judicial Decisions Act and the 1984 Civil Transitions Act, made certain crimes subject to *hudood* punishments and declared that Shari'ah would be the prime source for judicial rulings in those cases in which no relevant law existed.

Article 3 of the Sources of Judicial Decisions Act states that:

"Notwithstanding what may be envisaged in any other law and with the exception of the criminal cases, in the absence of legislative provision that governs the incident: (a) The judge shall apply what he finds in Sharia provision established by the texts of Holy Book [Quran] and the Sunna, (b) If the judge does not find a text he shall exercise his own thinking and shall be guided in so doing by the following

principles where he shall take them into consideration and shall decide their order of priority on the basis of the following principles:

- 1) The consensus and the requirements of Sharia's holistic and general principles and what its directions guide;
- 2) The Analogy which is based on Sharia's provisions realising its criteria and corresponding to its parallels;
- 3) Bringing of public interests and averting of harm;
- 4) Presumption of innocence, a permissive approach towards human acts and leniency in imposition of God's commandments;
- 5) Seeking guidance from Sudanese judicial precedents provided that they do not contravene with Sharia;
- 6) Consideration of customary law of transactions provided that it does not contravene with Sharia provisions or the principles of natural justice;
- 7) Principles of universal justice prescribed by noble human laws and equity enshrined in good conscience."

Upon implementation of the September laws, floggings and amputations were shown on television, and, in a public relations move, alcohol was dumped in the Nile. In 1985, Mahmoud Mohammed Taha, a Muslim reformer and Republican Brothers leader, was executed for apostasy – the only time this *hudood* punishment has been imposed since the pre-colonial era.

President Nimeri was removed from office in a 1985 coup by then Defense Minister General Abdel Rahman Swar al-Dahab. Later that year, Sadiq al-Mahdi, who was elected prime minister, worked with the National Islamic Front (the precursor to the NCP) to draft a Shari'ah-based criminal code.

National Congress Party and Further Implementation of Shari'ah Laws

Al-Mahdi's efforts never came to fruition because Colonel Omar al-Bashir and what was to become the NCP removed him from power in 1989. Starting in 1991, President al-Bashir and the party initiated their own efforts to expand the application of their interpretation of Shari'ah across the country at national and state levels. These laws, the 1991 Criminal Code, the 1991 Personal Status Law on Muslims, and state-level public order laws, have ensured that the NCP's interpretation of Shari'ah law regulates not only criminal matters, but also personal behavior for all Sudanese, regardless of faith and belief.

The Criminal Code

The 1991 Criminal Code Act is the cornerstone of the NCP government's implementation of Shari'ah in Sudan. The Act identifies and addresses those offenses, including *hudood* offenses

that violate “public order.” According to the Act, *hudood* offenses are defined as “drinking alcohol, apostasy (*ridda*), adultery (*zina*), defamation of unchastity (*qazf*), armed robbery (*hiraba*), and capital theft.” These offenses carry fixed sentences that include death by hanging, stoning, crucifixion, and whipping.²

Drinking Alcohol

Articles 78 and 79 of the Criminal Code prohibit the drinking and distributing of alcohol and provide that any Muslim caught drinking, possessing or manufacturing alcohol will be sentenced to 40 lashes. The Code also states that whomever stores, sells, purchases, transports, or possesses alcohol with the intention of dealing to others or mixing it with food, drink or any substance used by the public, or advertises or propagates it in any way, shall be sentenced to imprisonment not to exceed one year or a fine.

Apostasy (Ridda)

An apostate is identified as anyone who publicly renounces Islam. Articles 125 and 126 penalize insulting religious beliefs and apostasy. Anyone who publically abuses or insults religions or religious beliefs shall be sentenced to up to one year imprisonment, up to 40 lashes, or a fine. A person found guilty of apostasy may be sentenced to death.

Adultery/Illegal Sexual Relations (Zina)

Articles 146 through 154 address the *hudood* offenses of *zina*. Articles 146 and 147 address adultery,³ providing that whomever commits adultery shall be sentenced to execution by stoning⁴ in those instances when the offender is married or 100 lashes when the offender is not married. In addition to whipping, a non-married male offender may be sentenced to one year in prison. The penalty for adultery may be reduced under two circumstances: the offender retracts his confession, or witnesses retract their testimony.

Article 149 concerns sodomy and rape and provides that whomever commits the offense of sodomy shall be sentenced to 100 lashes and imprisonment. If the offender is convicted three

² The Act includes the caveat that no person shall be whipped if he or she is more than 60 years old or if that person is sick and the lashing would endanger his life or aggravate the illness. In these cases, an alternative penalty is determined at the discretion of the judge. A whipping also can be suspended, and resumed at a later time, in case of the health of the offender.

³ According to article 62 of the 1994 Evidence Act, “the offence of adultery shall be proved by any of the following: (a) by express confession before the court, unless there is a retraction before the commencing of the execution of the judgment; (b) by the testimony of four adult men; (c) by pregnancy when the woman has no husband if there is not any doubt; (d) refusal of wife to give “Lian” oath, after husband taking “Lian” oath.”

⁴ Art. 193(2) Suspension of Executing Death Penalty on the Aged, a Pregnant or Suckling Woman provides that the prison director may suspend the execution of a woman sentenced to death for adultery if she is pregnant or breastfeeding. The term of the suspension is until after delivery, or up to two years, after lactation, where the baby is alive.”

times, he may receive a sentence of death or life imprisonment. Article 149 also states that a person shall be deemed to have committed the offense of rape whenever they have sexual intercourse “by way of adultery, or sodomy, with any person without his consent.” Whomever commits the offense of rape shall be sentenced to 100 lashes and imprisonment of up to 10 years. However, if the act of rape leads to adultery or sodomy, the crime is punishable by death.

Prostitution is addressed in article 154, which states that whomever is found practicing or in the place of prostitution shall be sentenced to up to 100 lashes or three years imprisonment.

Defamation of Unchastity (Qazf) - Offenses of Honor, Reputation and Public Morality

The offenses addressed under articles 151 to 153 and 157 and 158 relate to behaviors the ruling party and legal authorities deem indecent, immoral or contrary to public morality. Article 151 addresses the prohibition on “gross indecency” which is vaguely defined as anyone who “commits any act contrary to another person’s modesty, or who does any sexual act with another person not amounting to adultery, or sodomy.” Offenders shall be sentenced to up to one year imprisonment, 40 lashes, or a fine. A person who in a public space has committed an act or conducted himself in a manner contrary to public morality⁵ or public feelings shall be sentenced to up to 40 lashes, a fine, or both, per article 152. Additionally, article 153 states that “whoever manufactures, photographs, possesses or handles any material contrary to public morality” may be sentenced to up to one year imprisonment, up to 40 lashes, or a fine. Whomever “deals in materials contrary to public morality, or manages an exhibition or theatre, or entertainment club, or show house, or any public place that presents such materials” shall be sentenced to up to three years imprisonment, 60 lashes, or both.

Articles 157 and 158 also prohibit false accusations of unchastity, with offenders sentenced to up to 80 lashes. In cases in which the penalty is reduced, the offender shall be punished for defamation and sentenced to up to six months imprisonment, a fine, or both.

Armed Robbery (Hiraba)

Articles 168 and 169 address armed robbery and provide that if the robbery results in murder or rape, the offender shall be sentenced to death, or death and then crucifixion. If the robbery results in grievous injury, the offender shall be sentenced to the amputation of the right hand and left foot.⁶ People sentenced to other cases of robbery shall receive sentences of imprisonment of up to seven years. The sentence for armed robbery may be reduced if, for example, the offender declares his repentance before arrest. However, the victims of the robbery may still be entitled to

⁵ According to the Article an act is deemed contrary to public morality “if it is so considered in the religion or the doer, or the custom of the country where the act occurs.”

⁶ Art. 194 Health Condition of Sentenced Person to be Regarded: “(2) Every sentence of amputation, as a hud, or retribution, shall be preceded by medical examination of the sentenced person, by a physician. Execution shall be made by a competent person, and the amputated person shall remain, under medical care, at the States expense, until he is cured.”

compensation (*dia* or blood money) and the offender shall be sentenced to up to five years imprisonment.

Capital Theft

Capital theft is addressed in articles 171 and 173 and provides that an offender have his right hand amputated. Offenders convicted for a second time receive sentences of up to seven years imprisonment. If the penalty is reduced for either the first or second offense, the offender shall be sentenced to up to seven years imprisonment, up to 100 lashes, or fined.

Personal Status Law of Muslims

The 1991 Personal Status Law of Muslims or “Family Code” codified into the state legal code Shari’ah law provisions on personal matters such as marriage, divorce, child guardianship, and inheritance. While these provisions were respected during the colonial era and before 1991, the Family Code marks the first time they were codified into national law and established a discriminatory system that limits the rights of women based on a particular understanding of Islamic law.

Marriage

The Personal Status Law permits consensual marriage between a man and a woman when she reaches puberty, which could be well under 18 years of age. The woman’s guardian must approve the marriage for it to take place. The guardian also can dissolve the marriage due to a husband’s lack of *kifa’a* (religion and morals). Should the guardian refuse without justification to allow the marriage, a *qadi* (an Islamic court judge) may intervene. During the marriage, the wife is granted financial and medical support (should she be deemed obedient) and the right to visit parents and other close relatives. Polygamy is permitted.

Judicial Divorce

A wife may divorce her husband on several grounds, including if he: has an incurable and physical or mental illness that makes him a danger to the wife; is impotent; absent for at least one year; or has been sentenced to prison for at least two years. If the court determines that the wife has been disobedient, the husband may seek a divorce. Following divorce, the wife is entitled to a maximum of six months’ alimony.

Child Custody and Guardianship

A divorced mother retains custody over boys until they are seven years old, and girls until they are nine years old, although this period of time may be extended. A remarried woman may retain custody of her child, while a divorced mother loses custody after five years if her religion differs from her husband’s. A father provides child support until a daughter marries and a son earns his own living.

Inheritance

The Family Code sets fixed rules for inheritance that cannot be changed even in a deceased's will. The amount of inheritance a woman can receive is half the man's share. A man whose wife has no descendants receives half the inheritance and in those cases in which there are descendants, one quarter of the inheritance. If it is a polygamous marriage, the women equally share the inheritance and a man receives twice the proportion designated to each woman.

Public Order Laws

The public order laws are state-level laws that regulate the social behaviors of all Sudanese and are based on the government's interpretation of Shari'ah law. In practice, they disproportionately impact women and young girls, especially those from marginalized religious and ethnic communities. The most extensive is the Khartoum Public Order Act of 1998 (KPOA) which restricts the activities (in both public and private) of all of the over seven million people who live in Sudan's capital, Khartoum. The Act restricts behavior that authorities, based on their particular interpretation of Shari'ah, deem offenses of honor, reputation and public morality, including and expanding those crimes listed in Articles 151 to 153 of the 1991 Criminal Code. As defined in the Criminal Code, penalties for offenses include imprisonment, whipping and fines.

The KPOA includes enforcement mechanisms, including a special public order police, the Police of Society Security, and special public order courts. While the KPOA is a state law, the public order police are a special arm of the national Sudan Police Force. The public order police frequently employ "sweep and arrest" operations that usually target women from marginalized communities. The public order courts enforce the KPOA as well as relevant national laws, including the Shari'ah provisions of the 1991 Criminal Code. Defendants before the public order courts are not afforded due process rights, including legal assistance or time to prepare a defense. Defendants' arrest, detention, hearing, sentencing, and penalty imposition can take less than 24 hours. And records of court proceedings are scant.

Restrictions on Public or Private Parties with Music

Article 7 of the KPOA requires government permission for parties and restricts the following: parties lasting beyond 11 p.m., dancing between men and women or women dancing in front of men, and the "singing of trivial songs."⁷ Article 8 prohibits musical parties, cinema or theatre shows, exhibitions or other such events.

Restrictions on using public transportation

Article 9 of the KPOA restricts the seating of women in public transportation. Every public transport vehicle must have a separate entry for women and at least 10 seats and/or one quarter of all seats reserved for them. The article also prohibits "writing any expression, or sticking

⁷ Defined in the Act as "songs that use words or expression contradicting religion morality good taste and good conscience."

any picture or sketches, that contradict religion morals and good taste" on public transportation, or darkening or shading of public or private vehicles.

Women's Hairdressing Businesses

Articles 13 through 17 of Chapter 5 require a license to open a hairdressing business and mandates a number of restrictions once a permit is issued. These restrictions include prohibiting employing men as hairdressers and their starting or managing (but not owning) hairdressing businesses. They also require that businesses are located in a public place with entrance/exits facing the street; female employees are "righteous" and have a good reputation; managers are at least 35 years old; and license authorities and Public Order Police are allowed at any time to enter and inspect businesses.

Miscellaneous Provisions

The Act also mandates the following restrictions: women's clothing tailors must be righteous and of good reputation; men and women must form separate lines; businesses must close on Fridays from midnight to 2 p.m.; and restaurants and cafes must close during the day during Ramadan.