

## Gendered Citizenship in Sudan: Competing Perceptions of Women's Civil Rights within the Family Laws among Northern and Southern Elites in Khartoum

Liv Tønnessen

**WP 2007: 4**



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## Introduction: Gendered Citizenship in Sudan<sup>1</sup>

Because constitutions and laws are written in terms of an abstract gender neutral citizen, they may appear equitable, but recent research has revealed that citizenship in most countries in the Middle East and Northern Africa has been gendered by family, religion, history, or other cultural forces (Joseph 2000). The legislative and judicial autonomy of religious communities in forming and applying family laws has thereby contained state authority (Vikør 2000). In the past decade researchers have questioned the legitimacy of religiously anchored family laws which set limits to women's civil rights (such as marriage, divorce, inheritance, maintenance and financial custody of children, and alimony) (Buskens 2003; Joseph 2000 ; Joseph and Slyomovics 2001 ; Moors 2003 ; Welchman 2004 ; Keddie 2007; Abusharaf 2006). This debate has mainly focused on segments within Islamic family law which disadvantage women and prevents them from participating in society on an equal footing with men within the shari'a. A limitation of the previous research, however, is its exclusive focus on Islam.

I conduct a comparative study of the competing perceptions of women's civil rights within the shari'a and the traditional laws<sup>2</sup> among northern and southern elites respectively in Khartoum, Sudan. In Sudan the state has historically abdicated its legal role in family matters to its Islamic, Christian, and traditional African believing communities (Fluehr-Lobban 1987; Fluehr-Lobban 2004). Sudanese women are therefore granted different civil rights depending on which religious community they belong to, which tends to be Muslim in the north and traditional in the south. *My study reveals that the traditional family laws provide fewer women's civil rights than Islamic family law.* I exclude Christian family law from the study, because my research showed that when it comes to family law, southern Christians turn to traditional laws. Further, to explore the Christian family law as practiced by the small group of northern Christians, primarily the Copts, the Greek orthodox, and some Catholics is beyond the scope of this study.<sup>3</sup>

The inequity of women's civil rights has not gone unnoticed in Sudan. While both northern and southern women opt to maintain the current legal system, they simultaneously advocate changing the Islamic and the traditional family laws from within in to be more gender equitable. Neither side advocates establishing a secular law to address the civil rights of all Sudanese women regardless of religious and tribal affiliation. *Unfortunately, changing the gendered structure of traditional family laws from within will be more difficult for southern Sudanese women than changing Islamic family law from within will be for northern Sudanese women* This difficulty is due to the lack of both codification and the institutionalized practice of reinterpretation (ijtihad).

With the Sudanese coup d'état by the Islamists in 1989, Islam became the sole voice of the state. The government subsequently codified Islamic family law in 1991 for the first time in

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<sup>1</sup> Acknowledgements: This article has been financed by the Norwegian Ministry of Foreign Affairs through two projects, namely *Peacebuilding in Sudan: Micro- Macro Issues* and *Religious Dialogue and Peace-Building in Sudan*. I would like to thank Anne Sofie Roald for conducting fieldwork with me in February-March 2007. The findings presented in this article builds on a report written by myself in collaboration with Anne Sofie Roald (Tønnessen and Roald 2007) An earlier version of this article has been presented at a workshop at Afhad University for Women (Omdurman, Sudan) on peacebuilding in Sudan in November 2006 and a workshop at Chr. Michelsen Institute (Bergen, Norway) on Plural Legalities in June 2007. The author takes full responsibility for any errors.

<sup>2</sup> By traditional law or customary law as southern Sudanese usually refer to it as, "is the expression of the customs, beliefs and practices of the people of southern Sudan. There are over fifty tribes in the region and most have customary law systems, reflecting individual tribal identities. During the past twenty years of civil war customary law has been the principal source of social order and stability within the region; it remains the predominant source of law in contemporary southern Sudan" (Paulino 2006: 1).

<sup>3</sup> By the Christian Family Law I refer to how the northern Christian communities (Coptic, Catholic and Greek Orthodox) form and apply women's civil rights in accordance with the bible texts. For more information about the Christian family law in Khartoum Sudan see (Tønnessen and Roald 2007).

Sudanese independent history. Although the codified shari'a presents a gendered interpretation of women's civil rights, northern Muslim women are provided with formal rights, legal protection and a state with which to negotiate those new rights. In Islam, *ijtihad* enables change through reinterpretation of the sources of the law, as is currently unfolding in the discourse on changing the gendered structure of the codified Islamic family law in Sudan.

The northern political opposition actively challenge the codified "Islamic" family law through *ijtihad* thereby negotiating new rights for women with the state. Women's civil right is thus a political battleground between the Islamic communities and the Islamic state (Hale 1996, 2000, 2001). Conversely, the Islamic state made no attempt to codify Christian or traditional family law in 1991. In effect, the state abdicated its legal protection of southern women's civil rights. Southern women's civil rights went undebated among the northern political parties, which have monopolized political power throughout Sudan's independent history. In effect, the traditional family laws are merely informal networks. Women's civil rights are in the hands of traditional judges who distribute rights and duties within the family unit based on an oral not written law. This leaves no room for reinterpreting it or using the state to challenge it.

This qualitative study is based on primary sources in Arabic and English as well as semi-structured interviews (with varying lengths from 20 minutes to 3 hours) conducted in Khartoum, Sudan, in November 2006 and February-March 2007 with members of northern and southern Sudanese elites. In November 2006, I interviewed parliamentarians, academic researchers, and activists within governmental and non-governmental organizations from both the North and the South of Sudan. I also participated in a Training for Political Leadership workshop organized by UNDP at Afhad University for Women for women lawyers (around 15-25 participants), where I was able to listen and ask questions of the participants. I additionally attended a workshop organized by the Initiative for Inclusive Security during the course of three days (around 40 participants) and conducted small interviews with the participants. In February through March 2007, a colleague and I conducted 35 interviews with the Muslim opposition, Christian church leaders, governmental and non-governmental organizations and government officials. I also attended a meeting at the Norwegian ministry of foreign affairs in June 2007 with a delegation of five northern and southern Sudanese women from the government and two representatives for UNIFEM in Sudan.

## The State, Religion and Legal Pluralism

Legal pluralism in the Middle East and Northern Africa reflects the existence of multiple sources of legislative and judicial authority that regulate and implement family laws applied to citizens according to their religious affiliation. A person's civil status (*ahwal madaniyya*) denotes an individual's rights and obligations in the public sphere that are regulated within civil law (*qawanin al-ahwal al-madaniyya*), a person's relationship within the family or the private sphere is regulated by laws that govern his or her personal status (*ahwal shakhsiyya*). This contrasts classic Western legal thought where there is no conceptual separation between public rights and private rights (Maktabi 2007). The standardization of the legal domain in the Middle East and Northern Africa has therefore historically been divided between a decentralized juridical system which is responsible for the family laws and a centralized state juridical system which manages all other legal areas (Rokkan 1981). The state has abdicated in forming and applying the family laws and thus there has been no state authority over the personal affairs of citizens (Vikør and Utvik 2000). This practise might be traced back to the *millet* system established under the Ottoman Empire. The *millet* system has a long history in the Middle East, and is closely linked to Islamic rules on the treatment of non-Muslim minorities (*dhimmi*). The Ottoman term specifically refers to the separate legal courts pertaining to family laws under which minorities were allowed to rule themselves. The legal pluralities in Sudan are naturally shaped by historical, social and political factors, in terms of



both substance and application, including colonial legacy, a historically Arab and Muslim dominated central government and the long lasting civil wars (1955-1972 and 1983-2005).

In Sudan, religious courts have existed parallel to civil courts since independence in 1956 (and before) (Fluehr-Lobban 1987). Legal practice was ignored during the Anglo-Egyptian condominium as it is by peacebuilders today. After the British gained control of Sudan in 1899, two sets of courts functioned; religious courts dealt with the family laws and the British courts handled what the British chose to call civil law. At that time the shari'a courts were subordinate to civil courts, but after independence an Islamization of the legal system was initiated and in 1967 the shari'a Courts Act was passed. In 1972 the Judicial Authority Act was passed, effectively merging the civil and the shari'a courts (Hale 1996). In the Sudan, the shari'a courts only existed in the capital and in the rest of the country turn to prescriptive law. This contradicts the Islamic ideal where prescriptive law should merely be used where the shari'a law itself is not adequate (Vikør 2003). The history of the shari'a in the Sudan is inseparable from the successive governments which have ruled the country. In the Islamic family law, judicial circulars (manshurat) issued by Qadi al-Quda (first issued in 1916) served to instruct the application of the shari'a since before independence in 1956. The Maliki school (madhab) prevailed until Sudan was consolidated into the Ottoman empire, during which time the Hanafi school became the dominant school. Under the authoritarian rule of Numayri, the shari'a as the sole source of all law was implemented in September 1983. This involved the full application of the hudud (the canonical penalties of the shari'a). However, it was not until the Islamist coup d'état in 1989 and the subsequent Muslim Personal Act passed in 1991 that the Islamic family law was in fact codified and that Muslim women's civil rights were regarded as the responsibility of the Islamic state (Qanun al-Ahwal al-Shakhsiyya lil-Muslimin ). For non-Muslims, there only exists a law regulating marriage from 1926 (Qanun Zawaj Ghayr al-Muslimin (Marriage Law for Non-Muslims) 1926), whereas the other areas of the family laws is not codified. The above-mentioned millet system of the Ottoman Empire might partly explain this. More importantly for Sudan was the continuous civil war. Although there are many underlying and complicated political and economic factors which have fuelled the civil war, religion has become a symbol of everything that identifies the parties and determines their relative position in the power hierarchy (Deng 1995). The policies of the successive governments have been a pursuit of Islamization and arabization. By codifying or even recognizing the traditional laws in the peripheries, the center would simultaneously give up their project to create an Islamic nation.

## Contemporary Interpretations of the Islamic Family Law

In today's Sudan, all the northern-based political parties, including the Sudanese Communist Party, advocate their interpretation of the shari'a, more specifically of the family law. They are all in opposition to the codified law; the Muslim Personal Status Act of 1991 in which a man is allowed to marry up to four wives, but has to treat all his wives justly; a woman needs a guardian (wali) to validate the marriage; the bridegroom must pay the bride a dowry which is the property of the wife; the man is the financial provider of the family; a man can deny his wives to work outside the home, even though he fails his financial obligation; the husband has the unilateral right to divorce (talaq), while the wife has to obtain a divorce in court (tatliq); the mother has the custody (hadana) for the girl until she is 9 years old and for the boy until he is 7 years old; a woman would inherit half of her brother(s) property (Qanun al-Ahwal al-Shakhsiyya lil-Muslimin 1991).

Nonetheless, there is a general perception that "shari'a is good for women".<sup>4</sup> Aziza Hassanein, an expert on shari'a law who lives in Khartoum, poses the rhetorical question "why take

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<sup>4</sup> Interview with Aziza Hassanein, a lawyer and a member of the Women Initiative Group, on the 5<sup>th</sup> of March 2007 in Khartoum Sudan.

the bad interpretation when there is a good one?”<sup>5</sup> Equally, Sonia Aziz Malik from Afhad University for Women does not regard it as a problem with the shari’a as such, but the understanding is that “they [men] take the hardest interpretations and apply it”.<sup>6</sup> These feminist activists demand a total reform of the interpretation of the Islamic family law, but work to reform the legal system from within.<sup>7</sup> Hence they try to “negotiate” an expansion of their civil rights with the state (Al-Mahdi 2003). They thereby try to “react against a state that attempted to usurp some of their rights in law and constitution in the name of Islam” (Al-Badri 2006: 9). Chela Sandoval’s concept “oppositional consciousness” might be used to describe how they are able to “read the current situation of power” and to choose and adapt “the ideological form best suited to push against its configurations” (Sandoval 1991: 15)

What the shari’a says concerning women’s civil rights within the Islamic family law is nonetheless a bargaining area between the northern political parties in Sudan. This is probably because the Islamic family law is the most visible area of applied shari’a in Sudan. Northern Muslim women therefore channel their oppositional consciousness through political parties and male interpreters of the shari’a (mujtahids). This practice of *ijtihad* (interpretation) is an institutional procedure in Islamic legal thought (Vikør 1995). Even Nugud, the leader of the Sudanese Communist Party, states that “Islam cannot be ignored when it comes to the family law” and simultaneously saying that he wants to “modernize the shari’a”.<sup>8</sup> However, it is quite clear that they do not want to keep the shari’a in its present form. Sadiq al-Mahdi, the leader of the Umma Party, describes the codified personal status law for Muslims as “backwards and unacceptable. It treats women as second class citizens and it is based in the old concept of exclusive male control” and demands equality between men and women (Al-Mahdi 2007).<sup>9</sup> Balghis al Badri who is the head of the Institute of Women, Gender and Development Studies at Afhad University for Women describes this as a “dominant ideology” which uses “biological differences, selected religious texts and myths to legitimize the subjugation and subordination of women” (Al-Badri 2006). “[We have to] revise the family law; the interpretation is loose and set by men”, Addam Bashir Rahma from the Popular National Congress told me in an interview.<sup>10</sup> As the political advisor to Hassan al-Turabi, it is somewhat of a paradox that he and Turabi’s female followers<sup>11</sup> voice critique against the Muslim Personal Status Act of 1991, because the law was engineered during Turabi’s reign. In the law, there is little indication of Turabi’s “progressive” views on women’s issues (Al-Turabi 2000; Tønnessen 2005)<sup>12</sup> where he argues that “a believer will not be treated unfairly merely for his gender. God treats all human beings on an equal basis” (Al-Turabi 1973: 6).<sup>13</sup>

<sup>5</sup> Ibid.

<sup>6</sup> Interview with Sonia Aziz Malik, a lawyer and lecturer at Afhad University for Women, on the 18<sup>th</sup> of November 2006.

<sup>7</sup> Interview with for example Balghis al-Badri, member of the Umma Party and the head of the Institute of Women, Gender and Development Studies at Afhad University for Women, on the 18<sup>th</sup> of November 2007 in Omdurman Sudan.; Interview with Mariam al-Mahdi, member of the Umma Party, on the 18<sup>th</sup> of February in Omdurman Sudan; Interview with Samira al-Mahdi, the Democratic Union Party (DUP) in Khartoum Sudan 16<sup>th</sup> of November 2006; Interview with Afaf Ahmed Abdel Rahman, General manager of the Women Center for Peace and Development, on the 14<sup>th</sup> of February 2007 in Khartoum Sudan.

<sup>8</sup> Interview with Mohammed Ibrahim Nugud, leader of the Sudanese Communist Party, on the 5<sup>th</sup> of March 2007 in Khartoum Sudan.

<sup>9</sup> Interview with Sadiq al-Mahdi, leader of the Umma Party, on the 3<sup>rd</sup> of March 2007 in Khartoum Sudan

<sup>10</sup> Interview with Addam Bashir Rahma, political secretary in the Popular National Congress, on the 26<sup>th</sup> of February 2007 in Khartoum Sudan.

<sup>11</sup> Discussion with a group of female followers of Turabi on the 27<sup>th</sup> of February in Khartoum, Sudan [The author’s translation from Arabic].

<sup>12</sup> Turabi recently issued a fatwa saying that Muslim women can marry Christian and Jewish men (Sudan Tribune 2006). This represents a controversial and ‘liberal’ view, which even some of his female followers objected to and deemed “un-Islamic”. He has been proclaimed an apostate in and outside of Sudan for this fatwa. Discussion with a group of female followers of Turabi on the 27<sup>th</sup> of February in Khartoum, Sudan ;Interview with Hassan al-Turabi, the leader of the Popular National Congress, on the 13<sup>th</sup> of November 2006 and on the 26<sup>th</sup> of February 2007 in Khartoum Sudan.

<sup>13</sup> [The author’s translation from Arabic].

Ali al-Sayid, Member of Parliament for the Democratic Union Party and a shari'a judge, interprets the shari'a in a way that enhances their rights when compared to the codified law. Although the current codified law is gendered and does not guarantee Muslim women equal rights with men, al-Sayid illustrates how an *ijtihad* in a feminist perspective facilitates change from within the Islamic family law itself. For example, he stated that in his opinion "a woman should have an equal right to divorce. She does not need a reason to divorce. Both the man and the woman need to go to court to get a divorce". He further believes that when it comes to custody, the man should not automatically get custody after the boy is 7 years old and the girl is 9 years old as the present law stipulates, but "the person best capable to take care of the children should get custody". Moreover, he claimed that the Democratic Union Party "is against polygamy, because this is not shari'a". He goes on to say that, in contrast to the current law, he believes that a woman should be considered equal to a man when being a witness in court. He asked us; "isn't it ironic that a woman can be a judge in Sudan, but she cannot be a witness by herself". Further, he advocates that a woman should get the equal inheritance of a man as stipulated in CEDAW.<sup>14</sup> This contradicts the traditional interpretation, and Ali al-Sayid admits that this is a debated issue within the Democratic Union Party in particular and in Sudan generally: "if you speak about this [inheritance], you will go to hell". Al-Sayid's personal view is that "a woman should get equal inheritance to her brother, because the reality in Sudan is that women are working and contributing to the household, so this should be reflected in the inheritance. The "old" rules are stuck in an ideal world where the man is responsible for maintaining his wife".<sup>15</sup> This shows a inter-legality between Islamic and Western legal thought, thus that they are in fact intertwined with each other, constituting each other dialectically, rather than being the autonomous, or semi autonomous legalities we sometimes see them as (De Sousa Santos 2005). Islam is a discursive religion undertaking continuous change and thus transforms the shari'a in encounters with for instance Western legal norms (Asad 1993).

(Re)interpretations of the Islamic family law for maintaining or changing its gendered structure, is a political battle in the sense that they reflect the priorities of the ruling regime or power holders regarding the distribution of rights and duties within the family unit among the state's citizens. The relationship between the ruling National Congress Party and the Muslim majority is complex and politically inflamed when it comes to women's civil rights: there is a vivid debate within the Islamic communities in defining the Islamic family law in opposition to the codification (Qanun al-Ahwal al-Shakhsiyya lil-Muslimin 1991) presented by the Islamic regime. However, the state does not function as a gatekeeper of the rights of women, but merely defends *their* position on women's civil rights. Women's rights are thereby a battleground, reflecting the different position of the power holders at any given time. However, the reinterpretations of the Islamic family law combined with a political bargain with the state might facilitate the improvement of Muslim women's civil rights in Sudan. The current reinterpretations show that the Islamically defined family law is not in and by itself discriminatory against women. However, there are currently no female interpreters of Islam among the opposition in Sudan.<sup>16</sup> Defining women's rights are

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<sup>14</sup> Article 16 of the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) asserts that states should "take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations" (United Nations 1979). In other words, the conventions impose onto the private sphere of family laws in Sudan. The current regime has not yet ratified the convention and the reasoning behind that decision is in the words of Farida Ibrahim, presidential legal advisor; "[CEDAW is] against shari'a law and it does not represent the government's stance on women's rights. It destroys family values, legalizes abortion and prostitution under the umbrella of family values, gives equality to prostitutes and married women and legalizes lesbianism. It is a disaster for human beings". Farida Ibrahim, in *Osrati (My Family)*, a monthly magazine published in Khartoum, March 2006. Quoted in (International Crisis Group 2006) Her position was confirmed in an interview the 21<sup>st</sup> of March 2007 in Khartoum Sudan.

<sup>15</sup> Interview with Ali al-Sayid, parliament member of the Democratic Union Party and a shari'a judge, on 25<sup>th</sup> of February 2007 in Khartoum Sudan [The author's translation from Arabic].

<sup>16</sup> According to Mariam al-Mahdi there are "no female interpreters because they do not have the time. In fact most of the men who have been interpreting have done this in jail". Conversation with Mariam al-Mahdi, Umma Party, on the 15<sup>th</sup> of

therefore a “man’s game”<sup>17</sup> which is a highly politicized issue. Limiya al-Badri confirmed this: “very few Sudanese men are full hearted for women’s emancipation. We have learnt that we have to make alliances [...] it is about politics. For example, when Sadiq al-Mahdi was in power he was never for CEDAW. Now that he is out of office, he uses CEDAW to come back to power. So, it is all about politics. I am quite sure that Sadiq al-Mahdi will upset the fundamentalists if he wins the elections, he will never go for CEDAW although he now says that CEDAW is not against Islam”.<sup>18</sup>

## Traditional Family Laws

The Muslim and Christian southern Sudanese living in the greater Khartoum area seem to turn to the traditional courts and not to the civil or shari’a courts in family matters. In an interview with the leader of Sudan Council of Churches, this impression was confirmed.<sup>19</sup> There is an overall belief in a “secular” state among southerners, but they wish to uphold the legal system where rights and duties within the family are distributed in accordance to the traditional laws.<sup>20</sup> The Muslim legal authorities seemed oblivious to the fact that Muslim southerners did not use shari’a courts, but traditional courts.<sup>21</sup> The largely dualistic legal structure in Sudan results in a matter passing through several stages before reaching any formal justice institution—if at all. Personal problems are dealt with through a strong traditional laws network. For family disputes, often the father or head of the extended family will resolve matters within the family unit. Beyond the family, people who are party to disputes, whether they are husband and wife or neighbours, will go to the local sultan to resolve the issue. According to Anne Itto, minister (state) of agriculture from Sudan Peoples Liberation Movement (SPLM), “the family is strong, if there is a problem you first go to the family, then to the elders, then to the sultan and then to the statutory courts”.<sup>22</sup> This is a sign of the lack of state control, which is a direct consequence of the lack of standardization within the legal domain; there is no codification of the traditional laws. In fact, the traditional laws is not even a written laws but is transmitted orally from generation to generation. This must be viewed in light of decades of civil war and consequently the center’s lack of penetration of the periphery. According to Rose Paulino, there are more than 50 different traditional laws among the southern Sudanese population. Although there are differences across the traditional laws, they all follow the similar patriarchal and gendered structure, she says. I have interviewed representatives across tribes, such as the dinka, nuer, equitoria, shilluk and the bari.

According to Rose Paulino, the majority of Sudanese traditional laws systems have the same basic discriminatory features which are in conflict with international human rights. Essentially “the status of women [...] is that of property” (Paulino 2006: 7). In an interview with two local court chiefs in Khartoum, the Muslim Sultan Hassan Wijel Shatil and the Christian Sultan Paul, the gendered and discriminatory content of the Nuer law was revealed: “The dowry starts at 40 cows

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February 2007 in Omdurman Sudan. Riffat Hassan is a female interpreter of Islam, originally from Pakistan. She states: “Not only does the Quran emphasize that righteousness is identical in the case of men and women, but it affirms, clearly and consistently, women’s equality with men and their fundamental right to actualize the human potential that they share equally with men. In fact, when seen through a non-patriarchal lens, the Quran goes beyond egalitarianism. It exhibits particular solicitude toward women and also toward other classes of disadvantaged persons.” Riffat Hassan in Åsne Halskau, “Between Tradition and Modernity: A Radical Muslim View on the Interpretation of Gender Roles in Islam” in (Okkenhaug and Mæhle (eds) 2004: 105).

<sup>17</sup> Interview with Samira al-Mahdi.

<sup>18</sup> Interview with Limiya Badri, northern Muslim activist working for the UNDP, in Khartoum Sudan 16<sup>th</sup> of November 2006.

<sup>19</sup> Interview with Mark Abeccien, leader of Sudan Council of Churches (SCC), on the 26<sup>th</sup> of February 2007 in Khartoum, Sudan.

<sup>20</sup> Interview with Alfred Taban, the editor of the Khartoum Monitor, on the 24<sup>th</sup> of February 2007 in Khartoum, Sudan.

<sup>21</sup> Interview with Farida Ibrahim. [The author’s translation from Arabic.]

<sup>22</sup> Interview with Anne Itto, minister (state) of agriculture for the SPLM, on the 21<sup>st</sup> of February 2007 in Khartoum Sudan.

and is given from the husband's extended family to the wife's extended family. If the man or the woman wants a divorce, the dowry is paid back. It is difficult to get a divorce. There are no automatic grounds for divorce like beating and impotence [...] The man gets custody of the children no matter what age they are and who initiate the divorce [...] The widow decides if she wants to stay in the family, if not she will have to give back the dowry. Usually the widow marries her late husband's brother. If a woman's father dies, she will not inherit from him".<sup>23</sup>

Sultan Hassan Wijel Shatil and Sultan Paul told me that a typical case in the traditional revolves around rape: "if an unmarried girl is raped, the court sees to that the boy marry the girl".<sup>24</sup> Violence is socially accepted, a southern Sudanese woman asserted.<sup>25</sup> And rape is a typical way to get married, says Rose Paulino.<sup>26</sup> According to Anne Itto, the traditional laws are discriminatory against women. She stated that "Sudan is a patriarchal society where women become invisible".<sup>27</sup> Hon Mary Kiden, Minister of Gender, Government of Southern Sudan states that "tradition and custom prevent women from change".<sup>28</sup> Philister Baya claims that there are "ideological and psychological hindrances which include the traditional cultural value against the advancement of women"(Khartoum Monitor 2006).<sup>29</sup> According to Suzanne Samson Jambo, a southern Sudanese: "Sudanese women have traditionally suffered from discriminative customs and traditions, which relegate them to the status of lesser beings. Such negative customs and traditions...include forced and arranged marriages, forced wife inheritance, bride prices and relegation of the girl-child to a mere object which must be sold to the highest bidder, preferably at a tender age [...]" (Samson Jambo 2001: 13). According to Agnes Nyoka Peter, a southern parliamentarian "women are the most marginalized of the marginalized in southern Sudan".<sup>30</sup>

## Comparing the Codified Islamic Family Law with the Traditional Family Laws

Clearly, women have different obligations and rights under the shari'a and traditional laws; therefore, citizenship in Sudan is gendered. The delegation of women's civil rights to the Islamic and traditional family laws has thus led to absence of "equality before the law" between not only men and women in general but also between Sudanese women across religious and tribal affiliation. Compared even with the codified shari'a (Qanun al-Ahwal al-Shakhsiyya lil-Muslimin 1991), I found that southern Sudanese women have fewer rights. According to the traditional laws "a man is allowed to take as many wives as he pleases", whereas the shari'a allows only four wives.<sup>31</sup> The dowry is considered a woman's own property in the shari'a, whereas in traditional laws the dowry is the property of the extended family. The dowry rules in the traditional laws make it difficult for a woman to obtain a divorce.<sup>32</sup> Although it might be considered difficult for a woman to get divorce in the shari'a courts, it is far easier than in the traditional courts. Under the shari'a, a woman has the

<sup>23</sup> Interview with Hassan Wijel Shatil and Sultan Paul on the 19<sup>th</sup> of February 2007 in Khartoum Sudan.

<sup>24</sup> Ibid

<sup>25</sup> Interview with an anonymous southern woman (Shilluk) on the 17<sup>th</sup> of February 2007 in Khartoum Sudan.

<sup>26</sup> Interview with Rose Paulino, southern activist in Network for Southern Organization for Peace and Development on the 28<sup>th</sup> of February 2007 in Khartoum Sudan.

<sup>27</sup> Interview with Anne Itto.

<sup>28</sup> Presentation by Hon Mary Kiden, Minister of Gender, Government of Southern Sudan says that "tradition and custom prevents women from change" on the 4<sup>th</sup> of June 2007 at the Norwegian ministry of foreign affairs in Oslo, Norway.

<sup>29</sup> Confirmed in a conversation with Philister Baya, Southern Women Solidarity for Peace and Development on the 12<sup>th</sup> of November 2007 at a workshop organized by The Initiative for Inclusive Security in Khartoum Sudan.

<sup>30</sup> Presentation by Agnes Nyoka Peter, SPLM parliamentarian on the 4<sup>th</sup> of June 2007 at the Norwegian ministry of foreign affairs in Oslo, Norway.

<sup>31</sup> Interview with an anonymous southern woman (Shilluk).

<sup>32</sup> Interview with Anne Itto.

possibility to initiate a divorce, if she has the legal reasons,<sup>33</sup> without paying back the dowry. Within traditional laws, on the other hand, a woman's decision to initiate divorce will effect the extended family's financial situation as they are forced to pay back the dowry whatever the cause for the divorce. Additionally, "there is no 'idda period after the divorce" in the traditional laws as women are entitled to under the shari'a.<sup>34</sup> According to the Nuer salatin, "the man gets custody of the children no matter what age they are and who initiate the divorce",<sup>35</sup> whereas women under the shari'a has the custody (hadana) for the girl until she is 9 years old and for the boy until he is 7 years old (Qanun al-Ahwal al-Shakhsiyya lil-Muslimin 1991).<sup>36</sup> Finally, the woman is entitled to inheritance according to the shari'a, whereas in traditional laws a woman has no right to inheritance whatsoever.<sup>37</sup> In fact, "a woman is property", according to the leader of the Sudan Council of Churches. "If the husband dies, she has to marry someone within the family", he says.<sup>38</sup> In other words, the family inherits her. Lucie Luguga, UNIFEM programme manager for Southern Sudan, says that these traditions and customs turn "a human being into a commodity."<sup>39</sup>

Both Muslim oppositional leaders and government officials revealed little or no knowledge about the discriminatory content of the traditional laws.<sup>40</sup> The authorities find no obstacles in granting more autonomy in matters related to family laws. In fact it is perceived as a "religious right" in the comprehensive peace agreement and the interim national constitution (The Sudan Interim National Constitution 2005; The Comprehensive Peace Agreement 2005). Ahmed Khalid, the leader of the Islamic council of jurisprudence (mujtam'a al-fiqh al-islami), clearly stated that the peace agreement and the interim national constitution were all approved by the council. This means that these documents are considered in alignment with the shari'a. Upon the question of non-Muslim rights he claimed that "non-Muslims' rights are present in the shari'a" referring to the legal domain of the family laws.<sup>41</sup> In the words of a southern peace activist Sudan is effectively, "one country with two systems".<sup>42</sup> However, there is no state authority to negotiate rights with for southern Sudanese women. So, not only is the content of the law gendered, but also the state does not provide legal protection for southern women for the rights which they are entitled to under the traditional laws. Nyaradzai Gumbonzvanda, UNIFEM Regional Director for Eastern and Horn of Africa, says that Sudanese women are not considered citizens with rights.<sup>43</sup>

<sup>33</sup> Under the Personal Status Law for Muslims (1991) a woman can obtain a divorce (tatliq: a divorce granted by the judge) against her husband's will if she can prove that the husband (1) fails to fulfil his obligations to support her (2) does not treat all his wives justly (c) has a defect she did not know about before the marriage (d) is suffering from an incurable mental or psychical illness (e) is impotent (f) behaves in a cruel manner (f) is abroad for more than one year (g) is sentenced to prison for more than two years. The wife can also obtain a divorce if a judge declares her to be disobedient (nushuz) to her husband.

<sup>34</sup> Interview with Hassan Wijel Shatil and Sultan Paul.

<sup>35</sup> Ibid

<sup>36</sup> Anne Itto, told me about a case where one of her friends obtained a divorce from her husband, but "her husband got the custody of all the six children, the smallest one she was still breastfeeding". Interview with Anne Itto..

<sup>37</sup> According to Alfred Taban, the question of inheritance is not a problem "because southerners are poor and do not have anything to pass on anyways". During our conversation, however, he revealed that he himself owns three houses in the greater Khartoum area. Interview with Alfred Taban.

<sup>38</sup> Interview with Mark Abeccien.

<sup>39</sup> Presentation of Lucie Luguga, UNIFEM programme manager for Southern Sudan at the Norwegian ministry of foreign affairs on the 4<sup>th</sup> of June 2007 in Oslo, Norway.

<sup>40</sup> Interview with Farida Ibrahim; Interview with Sadiq al-Mahdi; Interview with Addam Bashir Rahma.; Interview with Rabab Abu Ghazayza, Supreme Court judge and member of the Islamic jurisprudence council, on the 22<sup>nd</sup> of February 2007 in Khartoum, Sudan.

<sup>41</sup> Interview with Ahmed Khalid, the leader of the Islamic council of jurisprudence on the 25<sup>th</sup> of February 2007 in Khartoum, Sudan.[The authors' translation from Arabic]

<sup>42</sup> Conversation with Agnes Nyoka Peter, SPLM parliamentarian on the 11<sup>th</sup> of November 2006 on a workshop organized by The Initiative for Inclusive Security in Khartoum Sudan.

<sup>43</sup> Presentation by Nyaradzai Gumbonzvanda, UNIFEM Regional Director for Eastern and Horn of Africa at the Norwegian ministry of foreign affairs on the 4<sup>th</sup> of June 2007 in Oslo, Norway.

The respected elders who staff the informal popular courts enforce the traditional laws. Due process in traditional courts does not appear to be clearly defined, as the law itself is merely an oral tradition that is according to custom, rendering women vulnerable to arbitrary application of the laws. According to Lucie Luguga, there is no justice in these courts, because it is “not socially accepted for women to go to the traditional courts and the woman often end up being wrongly imprisoned”.<sup>44</sup> According to Anne Itto “many women give up on serious cases such as rape and abusive husbands as they expect no justice to be delivered to her” (Itto 2001: 10). Further, she explains that, “The elders and the chiefs have a set mindset”.<sup>45</sup> In contrast to shari’a courts, there are no female judges or *salatins* in the traditional courts. Sometimes the women elders are consulted concerning marriages.<sup>46</sup> One could argue that such a system where the state has left the responsibility of implementing the family laws, whether regarded as discriminatory toward women or not, is too dependent on the responsiveness of the specific courts and the individual judge’s capability and gender sensitive approach (Gargarella, Domingo, and Roux 2006). Since the law is not a written law, there is little if any room for a flexible interpretation of the text. The customary laws surely have a certain degree of flexibility, but the practice or tool of reinterpretation as historically institutionalized in Islam does not exist. This decreases women’s rights within the current system. It is thus not possible for southern Sudanese women to change the legal system from within by reinterpreting the sources of the law itself as seen in the contemporary reinterpretations of the shari’a.

## Conclusion: Different Religion, Different Rights and Different Battles

In Sudan, a gendered citizenship not only has led to the absence of “equality before the law” between men and women in general but also between Sudanese women across religious and tribal affiliation. My findings suggest that traditional family laws provide fewer women’s civil rights than Islamic family law. In Sudan, Muslim women have more rights even under the codified shari’a (1991) when it comes to, for instance, divorce, inheritance and custody of children. For example, under the traditional laws a woman is not entitled to inheritance, whereas under Islamic law she is entitled to half the inheritance of her brother(s). In fact, in traditional law a woman has so few rights that she is considered property and the family of her late husband inherits her. Whereas this study shows that the legal frameworks concerning the Islamic family law and the traditional laws in Khartoum Sudan are gendered, there is a need for research conducted on mapping litigation processes in shari’a courts and traditional courts from a gender perspective in order to reveal how Sudanese grass root women bargain within the existing gendered family laws to claim their rights.

Despite the fact that this plural legal system “creates difference”<sup>47</sup> the debate on women’s civil rights among northern and southern elites in Khartoum does not translate into a demand about establishing a secular law which includes the civil rights of all Sudanese women regardless of religious and tribal affiliation. Both the northern and the southern women opt to maintain the current legal system, but they simultaneously advocate changing it from within. Different religiously or tribal anchored civil rights for Sudanese women creates different battles to improve their rights. I argue that changing the gendered structure of the family laws will be more difficult for southern Sudanese women, because the state has not codified the traditional laws, which are in effect merely informal networks. Women’s civil rights are thereby in the hands of judges who

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<sup>44</sup> Presentation of Lucie Luguga.

<sup>45</sup> Interview with Anne Itto.

<sup>46</sup> Interview with Mark Abeccien.

<sup>47</sup> Conversation with an anonymous professor at Afhad University for Women on the 1st of March 2007 in Omdurman Sudan.

distribute rights and duties within the family unit based on an oral law. In contrast to Islamic law, oral traditional law leaves no room for reinterpretation and includes no state authority with which to negotiate new rights. The Islamic state find no obstacles in granting more autonomy in matters related to traditional family laws for southern Sudanese women. In fact, it is perceived as an intrinsic “religious right” in the peace agreement and the interim national constitution (Tønnessen and Roald 2007, forthcoming). There is therefore no state control over the discriminatory content of the traditional laws. This must be understood within a context of an Islamic state which continuously has failed to recognize the legitimacy of the traditional laws often describing southerners as such as “uncivilized”.<sup>48</sup> By codifying or even recognizing the traditional laws, the state would simultaneously give up their project to create an Islamic nation.

The relationship between the Islamic state and the Muslim majority is more complex and politically inflamed when it comes to women’s rights: there is a vivid debate within the Islamic communities in defining the Islamic family law in opposition to the codification presented by the Islamic regime. There is a continuous negotiation of rights with the state authorities. However, the Islamic state does not function as a gatekeeper of the rights of women, but merely defends *their* position on women’s civil rights. Women’s rights are a battleground, reflecting the different position of the power holders at any given time. Nonetheless, there seems to be room for reinterpretations of the Islamic family law itself which expands the rights of women and simultaneously shows that the Islamically defined family law is not in and by itself discriminatory against women.

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<sup>48</sup> Interview with Hassan al-Turabi.



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## SUMMARY

In classical political thought, citizenship is a gender-neutral abstract personhood. This concept does not travel well when discussing the citizenship of women in the Middle East and Northern Africa. In Sudan, women's civil rights are formed and applied by the religious communities—Islamic, Christian, and traditional African beliefs – thereby creating a gendered citizenship that not only has led to the absence of “equality before the law” between men and women in general but also between Sudanese women across religious and tribal affiliation. In contrast to the general literature on women's rights and Sudan, which focuses on Islamic family law exclusively, I conduct a comparative study of the competing perceptions of women's civil rights among northern and southern elites who practice Islamic family law and traditional laws in Khartoum. The findings suggest that the traditional laws provide fewer women's civil rights than Islamic family law. I argue further that changing the gendered structure of the traditional family laws from within is more difficult for southern Sudanese women, because traditional laws are oral not written and no associated state authority can negotiate new rights. The lack of codification thwarts change. This qualitative study is based on primary sources in Arabic and English as well as semi-structured interviews conducted in Khartoum in November 2006 and February-March 2007 with members of northern and southern Sudanese elites.

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