Sudanese Personal Status Law of 1991, a new legislation to ongoing human rights violations *

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This article is intended to provide a quick study on the 1991`s Personal Status Law of Muslims in Sudan from a perspective of the affirmed international legitimacy of human rights.

It is worth mentioning that the issue of personal status is considered to be a sealed area to the Islamic Sharia Laws in all countries that emerged on the ruins of the Ottoman Empire, while other areas of law followed the modern legal traditions, both Anglo-Saxon role model or the European role model (the French in particular).

The Islamists tend to portray that process of modernization such as the replacement of Shari'a laws by Man-made Law. What is meant here by Man -made Law is that laws enacted as a result of human diligences, contrary to that enacted by God. Islamists shy away to recognize a very clear fact which is well known to them; that Man-made rules (developed by the pioneer scholars of Islamic jurisprudence), which is metaphorically called Islamic laws, is dominant in the Islamic provisions, which is claimed to be taken directly from the Qur'an or Sunnah, it is not the case, which is taken directly from the Qur'an or Sunnah, and agreed on its validity is an exception. Here, it is good to mention that it is not an intention of this article to go deeply into this issue, but, just would like to clarify, the fact, that the Law of personal status did not subject to many breaks as the case of the other law's arenas. That explained the fact that the Sudanese Penal Code of 1991, despite its Islamic name, follows “the same modern legal traditions” in its language tab and categorization, as it is indicated by Mr. Pero, the Special Rapporteur for human rights situation in Sudan, in one of his reports. The Sudanese Penal Code of 1991 began with a broad subdivision descried the criminal responsibility and related issues, and then followed by a detailed subdivision which defined the crimes and penalties. With the exception of the five rules, the so called "Hudood ordinances", the Sudanese Penal Code of 1991 with its positive and negative sides, follows normal modern traditional standards.

Again, that is not the case with regard to Personal Status Law; the language and categorization are largely related to Islamic traditions of legal writings in the Middle Ages. It can be clearly noted that, even in the modern era, the modern reforms of the laws in regard to marriage and divorce has focused mostly on the search for a compromise in adopting most liberal views of Muslim scholars. Yet, the issue of the civil marriage was never an option in the Islamic countries with few exceptions such as Lebanon.

Herewith, I would like to highlight some important issues, in which the Sudanese Personal Status Law contradict the human rights principles.
Judge's principles of jurisprudence

Personal Status Law of 1991, the current, is very much a codification of what has been the case for the personal status of Muslims since the beginning of the Turk-Egyptian period at the end of the nineteenth century. It has been the personal status laws of Muslims under the jurisdictions of the so-called religious juries headed by a religious judge, called the chief judge. The Personal Status of Muslims in regard to marriage, divorce, inheritance, maintenance and custody being treated according to the paramount of the Hanafi school when there is no established view due to the publications of the chief judge. The codification of law (put it in a blog detailing the various provisions of the issues to be regulated under that law) is a positive step in itself, a well sorted and written law is much easier than to search the old extensive jurisprudence books. As well as to determine the preponderant view of the Hanafi school might lead to a careful study of the many approaches in the Hanafi jurisprudence.

The first problem in the old Personal Status Law (in respect to the dominant view of the Hanafi school), that the judge has the mandate to determining the judgment by his own due to what seen constituting a preponderent views out of many of the Hanafi school. That is considered to be the first violation of human rights standards, as the subordination of the jurisprudence to the Judge means that litigants will not be treated as the law of one. It also violates the principle of separation of powers as the legislative and judiciary authorities become subject to the judge. It was hoped that such mal-situation would be ended in the current law, it is not. However, in Article (4) provided that the judge has to rely on preponderant view of Hanafi school when there is no text in the Law. Again, if a founded text in the Law is not clear, and might need certain clarification or interpretation, the judge can refer to the origin historical sources of the law Hanafi School, that means that the discretion of the judge still plays a role in matters with no texte or explanation or interpretation in respect to textes appropriate to the specific case under consideration.

Marriage contract

Islamic scholars, define marriage as a "pleasure of intercourse due to dowry". The consequences of this definition and some other provisions mean that woman is in fact subject of the contract and not contractor. In the Personal Status Law of 1991 (Article 11) that definition of marriage has been changed, and defined it as "a contract between a man and a woman on the intention of getting together, in legitimate manner in which they practice pleasure of intercourse." However, the law has kept on the same results of the traditional definition, putting dowry in the centre, as significant condition (Article 28). Otherwise, it is permissible for a woman to refrain from consummating the marriage until she fully gets her dowry (Article1-20). If she agrees to consummating the marriage before getting her dowry, it will be debt on the husband's side (article 2.20). Articles 32 to 42 of the law determined marriage status responsibilities. That means that the legislator has kept the condition of the marriage status responsibility, just as it was the case in the past and judging it according to the general guidelines of the superior judge. To keep it short and avoid going in legal arguments; the law makes it clear that an adult woman is not entitled to marry by her own, and if she does, her legal guardian has the right to cancel the contract if he sees the husband lacking efficiency.
Efficiency is defined in the course of the law as "religion and moral of the husband" "at time of signing the contract" (Articles 20 & 21). That means that the legislator has left the efficiency without rules of evidence. The Personal Status Law and its execution by the courts in itself come as clear evidence of the duplication of the judicial system between Sharia's laws on one hand and modern law and judicial bodies on the other hand, which is a repeat of the duplication in the education system in its religious version (religious schools such as middle and high schools and the Islamic University of Omdurman in Sudan and Al-Azhar in Egypt) in exchange for academic schools and modern universities. The courts were keen to follow the old Islamic doctrines, even in matters which have become worthless as a result of evolution in science and knowledge. For instance the courts are keen to apply the rules of evidence, which was applied in the middle ages, such as to investigate the erectile dysfunction of the man, considering an impact of the penis on the sand and not medical evidence.

The duality of the judicial system in Sudan seemed to be ended in 1983, but, instead of subjecting the personal status courts to modern judiciary system, the two systems has been consolidated in one, and without attempting to train judges on the new responsibilities being placed on their behalf. That might be another matter outside the scope of this article. However, it is noted that the law of 1991 had approved the evidence of medical means to prove or deny the erectile dysfunction of the man, which is a welcome development in itself, but again it is required to have a submitted evidence by a Muslim doctor, which means a consecration of religious discrimination, that the same law of Sudan did not require in cases of Christian parties a medical evidence submitted by a Christian doctor!

**Inheritance law**

The Personal Status Law established the rules of inheritance according to Islamic law. The main human rights violation of those rules to international legitimacy of human rights is that the law makes a woman inherits half of the man's share of inheritance when hértitage is shared under the rule of ta’seeb (inheritance by ta’seeb [filiation], is not a fixed amount [it has to be shared], unlike the inheritance based on fixed proportions of the total inheritance [spouses, husbands and parents]). Also, in case the of heirs by fixed proportions, the husband inherits half the legacy of his wife in the absence of descendants at all, and a quarter of the legacy when there is entitled heirs of a legacy. In the case of polygamy, the legacy is divided equally among them, which means that the rule that the male get twice the proportion of the female has been retained even for inheritors having a fixed proportion. Inheritance rules are mandatory; the inherited has no right to change them completely due to his own will; the will would be only applied within the limit of one-third (Article 287), as well as no will for a heir (Article 1-279).

**Conclusion**

There is no doubt that the majority of Muslims, men and women in the Sudan, or in north of Sudan to be exact, would prefer the provision of Islamic rules on the conditions of marriage, divorce and inheritance. However, this does not prevent the legalization of civil marriage as an alternative for those who wish to follow it, especially since the Muslims of South Sudan and the Nuba Mountains
do not care much about these provisions, the marriage of a Muslim woman to non-Muslim man is completely normal in those areas.
A civil marriage law will ensure rights of women in the institution of the marriage, that does not cancel the right of voluntarily wishes to waive some of those rights as a result of her religious faith.