



# **Beyond Trousers:**

## **The Public Order Regime and the Human Rights of Women and Girls in Sudan**

### **A Discussion Paper**

**Submission to the 46<sup>th</sup> Ordinary Session  
of the African Commission on Human  
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**Strategic Initiative on Women in the Horn of Africa (SIHA)**



## **About the Strategic Initiative on Women in the Horn of Africa (SIHA)**

The Strategic Initiative for Women in the Horn of Africa (SIHA), is a network of civil society organizations from North and South Sudan, Eritrea, Ethiopia, Djibouti, Somalia and Somaliland. Founded in 1995 by a collection of women's groups with the view of strengthening their capacity, SIHA has grown over the years and is now comprised of 28 member organizations.

SIHA is advocating for social change and gender equality for men and women in the Horn of Africa and working specifically on: gender equality, eliminating violence against women and girls, promoting human rights, peace building and conflict transformation, enhancing women's leadership and political participation and production and dissemination of knowledge. SIHA's biggest campaign is on Violence against Women (VAW); this programme began in 2004 and will end in 2011. SIHA's other projects include: Women access to justice works on mapping women in the Horn of Africa means of access to the justice system , developing strategies and advocacy plans with members across the sub region, The SIHA research on the implications of custom and traditions on women rights is part of the SIHA's programme of documentation of knowledge as well SIHA research on the advocacy strategies against violence against women in the Horn of Africa as well as the documentation of the Somali women organisation work on conflicts Somalia. In Sudan SIHA works on women's rights civic education program working with community groups at the grassroots level in; Blue Nile, Nuba mountings and South Sudan Bahr Al Ghazal and Juba area ; SIHA's Darfur programme which tackles gender based violence and violence against women in the conflict torn region political participation.

The experience of SIHA since it was initiated strongly reflects the commitment of the founders of the network. Since its establishment SIHA has overcome many challenges. Identifying a country location in the Horn of Africa for the Network's Secretariat was one of the main obstacles in an environment where political disputes and stability dominate the politics of the region.

During the period of 2003 to 2006 SIHA managed to gain the trust of many international donors and to develop various programmes as well as to expand its membership.

As an indigenous network SIHA is certainly on the right track. The lessons we have learned from our past experience are: to be highly consistent with our objectives and vision, to directly link our work to the communities across the sub region - thus SIHA has been interested in working directly with groups who has constituencies on the ground, and bring the voices of women across the region to the main international and regional agenda.



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# Beyond Trousers:

## The Public Order Regime and the Human Rights of Women and Girls in Sudan

### A Discussion Paper

#### Abstract

This discussion paper maps the experiences of Sudanese women around the application of what is colloquially known as the “public order” regime in Sudan. It reveals that the public order regime, in all its manifestations—its underlying values, prohibitions, enforcement mechanisms, and penalties—is having a significant impact on the lives of many women from all walks of life in Sudan, most particularly the poor, marginalised and those who challenge the *status quo*. It offers an analysis of these experiences in the context of Sudan’s obligations under the African Charter on Human and Peoples’ Rights (the African Charter) and other African norms and standards and suggests that the public order regime is inherently incompatible with both Sudanese constitutional requirements and international obligations. Taken as a whole the practice of the public order regime undermines profoundly the capacity of Sudan to realise its obligation to ensure the right of *all* its people to “economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind” (article 22, the African Charter).



## A. INTRODUCTION



### 1. Background

The headlines around the world were sensationalist; eliciting gasps of shock from many in the Global North: “woman convicted for wearing trousers”<sup>1</sup>. But the experience of Lubna Hussein and her arrest on 10th July 2009 in Khartoum for the commission of an “indecent and immoral act” came as no shock to the women of Sudan<sup>2</sup>. The section of the criminal law under which Lubna was convicted is only one element of a much broader framework of “public order” laws and mechanisms

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<sup>1</sup> See, for example, BBC News, *Sudan woman ‘lashed for trousers’*, available at <http://news.bbc.co.uk/2/hi/8147329.stm>.

<sup>2</sup> On 10<sup>th</sup> July 2009 the well known journalist Lubna Hussein was arrested at a Khartoum restaurant and charged under Article 152 of the Criminal Code 1991, with “indecent and immoral acts”. 12 other women were also arrested for wearing trousers. 10 immediately pleaded guilty and received 10 lashes—two of them were under the age of 16. A number were from Southern Sudan. See statement by Sudanese women activists of July 28<sup>th</sup> 2009, available at <http://www.thepetitionsite.com/1/end-repressive-laws-targeting-women-in-sudan>. 700 hundred Sudanese men and women have already signed the petition.

in Sudan which impacts the daily life of all women in Sudan, in particular the poor and marginalised<sup>3</sup>. Although not exclusively regulating matters of private or religious life, since the early 90s this framework of “public order” laws and mechanisms has increasingly privatised the public sphere, expanding state control of personal behaviour and expression in areas of public life and resulting in diminished economic, social and political participation of women from all backgrounds. In addition, the framework contains tools which can be deployed proactively to target and control *particular* women—and sometimes men—who threaten the *status quo* or power relations in Sudanese society<sup>4</sup>.

*This briefing paper documents some of the day to day experiences of women with the public order framework in Sudan. It is based primarily on interviews with twenty five women from across Sudan and looks broadly at the effect of these laws and mechanisms on women’s private, social, economic and political lives<sup>5</sup>. The paper offers an analysis of these experiences in the context of Sudan’s obligations under the African Charter on Human and Peoples’ Rights (the Charter)<sup>6</sup> and makes a number of recommendations to the Government of Sudan and the African Commission on Human and Peoples’ Rights.*

## **2. Introduction to the Sudanese public order regime**

*“[t]he public order act is not there in the Koran. It is just made”<sup>7</sup>*

Much of the recent discussion both nationally and internationally in reaction to the prosecution of Lubna Hussein has been framed in terms of “the public order act.” In fact Lubna was not charged under any of the public order acts. She was convicted of a violation of Article 152 of the Criminal Act 1991, the principal national criminal law statute in Sudan. The public order acts are perhaps the most explicit manifestations of a framework of Sudanese laws (criminal and civil), enforcement mechanisms (police and judiciary) and principles which can be said to constitute the public order regime in Sudan (hereafter POR). Regulating aspects of both public and private life, the POR embodies and imposes a particular set of values about the proper place of women within society and the necessity of state engagement in the regulation of personal “morality”. The flexibility of the POR framework also allows it to be deployed strategically to control women or men—and most particularly women—who challenge those in power, whether socially, economically or politically.

Public order laws exist in most countries to lawfully, and indeed necessarily, regulate behaviour in the public sphere. These laws are intended to ensure security, maintain general order and create a

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<sup>3</sup> As the African Centre for Justice and Peace Studies has commented, although, “[t]he case has garnered widespread media attention, [...] unfortunately the only exceptional element is the profile and position of the target of the arrest. Ordinary women, particularly those from Southern Sudan and those who are poor, are regularly prosecuted for such infractions. Specialised courts which prosecute offenders lack procedural guarantees and typically enforce sentences on an expedited basis”. See African Centre for Justice and Peace Studies, *Sudan Human Rights Monitor*, June-July 2009, at <http://acjps.org>.

<sup>4</sup> This briefing note focuses on the experience of women under the public order regime in Sudan. Men are also impacted by its operation, usually men from marginalized communities or in perceived political opposition to the government. There have been recent reports of the death of one man in the custody of the public order police.

<sup>5</sup> There is a need for more thorough research on the experience of the public order regime in Sudan.

<sup>6</sup> African Charter on Human and Peoples’ Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* 21 Oct. 1986.

<sup>7</sup> Woman from Darfur interviewed during focus group discussion.

framework for a mutually rights-respecting public life. Sudanese law is no different. However the POR in Sudan also contains concepts and mechanisms, fuelled by a specific implementation ideology and practice, which go beyond what most states would consider as necessary and proportional in a democratic society. The ideological driver of the POR is that men and women in their social and personal relations are unable to exercise appropriate choices about their behaviour and require constant oversight. The state must therefore continuously interfere to impose a particular version of the “moral” through a regime of draconian criminal sanction and enforcement.

The POR is particularly infused with a conception of women as problematic actors whose movements and presence in public and private life must be subject to the highest scrutiny lest their inherent “dangerousness” infect those around them<sup>8</sup>. As a result of this pervading attitude, even where provisions of POR are not expressed in gender-specific terms, women are easy targets for the application of ill-defined moral standards which have been bestowed with legal characteristics. The *explicit* regulation or pre-emption of personal relations in the public sphere is only one aspect of the POR which women in Sudan experience as disproportionately intrusive. Elements of the POR which have no direct relation to the conception of gender or the constitution of morality—regulation of market trading for example—are also frequently implemented in a way which uses the POR’s embedded conception of women’s proper role in society to achieve other objectives. The POR’s approach to women’s dangerousness is easily manipulated as a flexible tool to control women who present economic or political challenges to the prevailing authority.

Other aspects of Sudanese law are animated by the same values and vision of the place of woman in society which infuse the POR. These compound the difficulties faced by women in Sudan in exercising their rights to participate in the life of their families and communities and to express their capacities and personalities fully and freely. These include the family or personal law which, although ostensibly regulating private family relations, also contains provisions for control of a range of engagements outside the home, including, for example, the right to work.

With its emphasis on criminalisation and control of private relations in the public sphere the POR of today is a cumulative invention of the regime which came to power in 1989. The changes introduced by the Criminal Act of 1991 (including the configuration of offences such as the now notorious section 152 used in Lubna Hussein’s case) consolidated a particular conception of *sharia* which had first been espoused by the Nimeri regime in the September laws of 1983. As one woman said during the research, many question whether the whole approach and impact of the POR is compatible with indigenous Sudanese culture: “this is not our tradition, this is not our culture”<sup>9</sup>. In fact elements of the POR explicitly restrict and prohibit aspects of traditional Sudanese culture: the Khartoum Public Order Act, 1998 for example outlaws the traditional ritual of *zaar* which is undertaken by women to support women’s psychological health<sup>10</sup>. Although approximately 68 % of the population of Sudan are Muslim<sup>11</sup> it is also clear that not all share the particular version of *sharia* which the POR purports to embody. As a prominent politician and member of the Umma Party—a party founded on Islamic religious principles—Maryam al Sadiq al

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<sup>8</sup> See, Nabil Adeeb Abdullah, *The Public Order Law as a Tool of Violence Against Women*, unpublished paper on file with SIHA (hereafter, Abdullah).

<sup>9</sup> Interview woman lawyer, Khartoum.

<sup>10</sup> See the prohibition on the practice of *zaar* in section 22 of the Act.

<sup>11</sup> This figure is highly contested.

Mahadi is reported to have said in reflecting on Lubna Hussein's prosecution and trial: "[a]s a Muslim I think this is an extreme violation of my religion and it intimidates and underestimates women. As a politician I think [it] is a violation of the constitution"<sup>12</sup>. One woman from Darfur consulted in preparation for this paper commented, "[t]he public order act is not there in the Koran. It is just made"<sup>13</sup>.

The ideology expressed by the POR, particularly with respect to the inherent nature or criminal tendency of woman, is not exclusive to any particular religious affiliation. Late last year, for example, the Commissioner of Juba, Albert Redantore issued a decree referencing Christian religious values and prohibiting "all bad behaviours, activities and imported illicit cultures"<sup>14</sup>. The decree was aimed at preserving "the cultural values, dignity and achievements of the people of southern Sudan, checking out the intrusion of foreign cultures into our societies, for the sake of bringing up [a] good generation." Subsequently over 20 women and girls were arrested in raids carried out by the police in Juba, many as they left houses of worship. The majority were beaten, allegedly on the grounds of their wearing trousers or short skirts.<sup>15</sup> Although the Commissioner's order pertained only to Juba, there were reports during 2009 of arrests of women using similar justifications elsewhere in the South.

Overall, the POR contains a mix of criminal and moral prohibitions which blur the distinction between the creation of law in the service of promoting a particular public interest and the imposition of moral precepts based on religious or philosophical conviction. The de-anchoring of the law from a clear standard of general public interest leaves the POR particularly open to exploitation as a tool to express the temporary interests of the authorities in control. As we will see in the section which follows, the POR contains numerous broadly described prohibitions, linked to an enforcement framework with little right of defence backed up by horrendous punishments.

The reality of the POR in Sudan is that while the very nature of the POR's prohibitions lead to their regular contravention, they are not consistently enforced. At the same time, although the most draconian penalties, such as stoning and execution, are rarely applied, lashing, a barbaric and tortuous punishment is frequently employed. Thus the very existence of the POR exerts a tremendous hold on the population—particularly women—who can be arbitrarily and unexpectedly subject to its whim. At any time, and for any reason, the POR can be deployed.

### **3. The legal framework**

There are four principal components of the legal enforcement framework of the POR<sup>16</sup>:

i. The public order laws

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<sup>12</sup> See report of Sudan Radio Service report on Sudan Watch BlogSpot available at <http://sudanwatch.blogspot.com/2009/07/join-cause-on-facebook-to-support-lubna.html>

<sup>13</sup> Darfurian woman during focus group discussion with fourteen women from across the three Darfur states.

<sup>14</sup> Governor's Decree, October 2nd 2008

<sup>15</sup> See Middle East on Line, 22 October 2009 at <http://www.middle-east-online.com/ENGLISH/sudan/?id=35180>.

<sup>16</sup> These four pillars are the tools most commonly deployed by the POR. It should be borne in mind, however, that the ordinary police can be involved in enforcing the public order regime. Similarly cases before the public order courts can be transferred to the ordinary court system. Other substantive laws such as the Criminal Procedure Act, 1991 are also important reference points but cannot be sufficiently explored in paper of this length.

- ii. The Criminal Act, 1991
- iii. The public order police
- iv. The public order courts

(i) The public order laws

*“There shall be no dancing between men and women and women shall not dance in front of men.”<sup>17</sup>*

The public order laws are state level laws which have been adopted by state legislative bodies or issued by state governor decree and intended to govern matters considered essential to public order at local level. Although each state law reflects the particular traditions or political and social imperatives of the state in question, it is understood that most of the public order laws contain a common core of provisions. The experiences recounted by women from different parts of Sudan who were consulted for the preparation of this paper bear out this analysis. One of the better known public order acts is the Khartoum Public Order Act 1998, an Act which governs the behaviour of 7 million Sudanese people in the country’s capital. A brief analysis of this law serves to illustrate the general principles and content of the public order laws in force and impacting the lives of women across the country.

The Khartoum Public Order Act of 1998 (KPOA) regulates a variety of activities, from parties (both private and public) to dancing between men and women, the singing of trivial songs (prohibited at parties), to public transport (reservation of certain seats and a entry for women), to management of queues in public places (separation of men and women) to the regulation of the business of women’s hairdressing, prohibitions on behaviour such as begging, and Ramadan observation<sup>18</sup>. In general the provisions of the KPOA can be understood as directed principally at the control of male and female relations (with a number of exceptions) and animated by a specific conception of women’s moral capacity. A quick glance at three of the prescribed features for the lawful operation of the business of women’s hairdressing in sections 13 to 17 of the KPOA is illustrative: there may only be one entrance to the business; the (female) manager of the business must not be less than 35 (section 16 (c)); and all women employed must be of proven “righteousness and good reputation” (section 16 (a)). Finally it is clearly provided that the “Public Order Police may enter the hairdressing business at any time for the purpose of inspecting and making sure of the compliance with the provisions of this Act” (section 17).

One of the striking features of the KPOA is the general and vaguely worded final penalty provision which provides that “in the case of any contravention of this Act” a person may be punished by a variety of criminal penalties including imprisonment, fine, confiscation of goods and lashing (section 26). The acts which might constitute “[c]ontraventions” of the law are not clearly defined—indeed many of the provisions in the Act regulate matters usually governed by civil/administrative and not criminal law eg., the licensing of businesses.

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<sup>17</sup> The Khartoum Public Order Act, section 7 (1) (b).

<sup>18</sup> See sections 5 – 7, 9, 20, 13 - 17, 10 and 24 of the Khartoum Public Order Act.



Finally, in addition to the public order acts, occasional Governor (Wali) issued decrees may add to the folder of substantive law which forms part of the POR in different states. The public order courts and public order police are generally charged with enforcing these decrees. A notorious edict by the Wali in Nyala in 2007, for example, banned the smoking of *shisa* in public. In another Darfur state young women and girls were recently banned from public markets by decree on grounds that their presence tended to “lead to” prohibited behaviour.

(ii) The Criminal Act 1991

*“offences of honour, reputation and public morality”<sup>19</sup>*

The second pillar of the POR is the Criminal Act of 1991. As would be expected the Act defines a range of offences relating to what is generally understood to be the maintenance of “public order” including, in particular, those set out in Part VIII of the Act, entitled, *Offences against public tranquillity*. At the heart of the POR arrangements, however, is Part XV of the Act, entitled, *Offences of honour, reputation and public morality*. Part XV identifies a series of crimes and penalties which regulate activities which relate almost exclusively to the interaction between men and women in public and private places<sup>20</sup>. Many of the provisions purporting to define the scope of these offences are vaguely worded and leave a broad ambit of discretion to law enforcement and the judiciary. Section 152 of the Act, which was the section under which Lubna Hussein was prosecuted, is illustrative. Entitled, “indecent and immoral acts”, the section reads:

(1) Whoever commits, in a public place, an act, or conducts himself in an indecent manner, or a manner contrary to public morality, or wears an indecent, or immoral dress, which causes annoyance to public feelings, shall be punished with whipping not exceeding forty lashes or with fine or with both. (2) The act shall be deemed contrary to public morality if it is so considered in the religion of the doer or the custom of the country where the act occurs”

When she was arrested Lubna was fully covered, wearing a headscarf and trousers—a common form of clothing for women in Khartoum. Yet she and her companions were arrested by the POP and ultimately convicted of the offence of “indecent or immoral dress”. Engaging in smoking *shisha* (water pipe tobacco) has also been the basis for arresting women under article 152.

Other sections of the Act are open to similarly subjective interpretation. For example in the context of delineating the offence of “practising prostitution,” section 154 (2) defines “a place of prostitution” as: “any place designated for the meeting of men and women or men and women between whom there is no marital relationship, or kinship, in circumstances in which the exercise of sexual acts is probable to occur.” This provision is understood by most women from experience to be amenable to application even to a situation where men and women are found sharing a professional office outside normal office hours. The offence of possession of “materials and displays contrary to public

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<sup>19</sup> Title of Part XV of the Criminal Act, 1991.

<sup>20</sup> The offences defined in this section are: adultery; sodomy; rape; incest; gross indecency; indecent and immoral acts; materials and displays contrary to public morality; practising prostitution; running a place for prostitution; seduction; false accusation of unchastity; defamation and insult and abuse.

morality” (section 153) has been interpreted to encompass receipt of a joke by text message on a woman’s private phone.

It is hard to conceive of all the offences listed in Part XV of the Act as “public order” offences—rape and adultery, for example. But the chapter as a whole is driven by a cohering ideological assumption—the necessity for the state to control inter-personal behaviour in public and in private through criminal prohibition. As has been well documented elsewhere, for example, the offence of rape in the Act can only be proved through proof of commission of adultery or sodomy—the threshold identified relates not to consent but to questions about the nature of the relationship (prohibited or permitted). Rape by a husband of his wife, therefore, is lawful by definition under the Act<sup>21</sup>.

The penalties attached to violations of Part XV of the Criminal Act are severe and range from execution to lashing to imprisonment. Although the harshest penalties are retained for offences which might be considered to lie strictly outside the POR framework (eg., adultery) some offences such as Article 155 are punishable by execution or life imprisonment (upon third conviction)<sup>22</sup>. A person who rents an office therefore which is considered a “place of prostitution” as defined in Article 154 (discussed above), could be subject to this penalty.

### (iii) The public order police (POP)

*“expanding the circle of criminalisation of civilians”<sup>23</sup>*

The public order police (POP)—recently renamed the Police of Society Security<sup>24</sup>—are an essential component of the POR and operate as its feared enforcement arm. Although they form part of the Sudan Police Force (SPF) they are a special unit attached to the public order courts and appear to have developed their own culture (although they do often conduct joint operations)<sup>25</sup>. While coming under the general authority of the Director General of Police, the POP do take some directions from the local ‘safety committees’ and local and state authorities. The fact that at state level the POP are involved also in enforcing governor decrees—such as, for example, the famous, but now suspended, Khartoum governor’s decree which restricted women’s access to employment in certain fields eg., hotels, garages etc.,—serves only to emphasise this connection with sites of local power.

In practice the POP have carved out a huge ambit of action with respect to interpreting and acting pursuant to the POR. When asked about the establishment and management of the POP a number of the women interviewed for this paper were not aware of the formal source of their authority but claimed that members of the POP were recruited from the ranks of “former criminals” and “the

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<sup>21</sup> See REDRESS, *Reforming Sudan’s legislation on rape and sexual violence*, at [http://www.redress.org/documents/POSITION%20PAPER%20RAPE%20SEPTEMBER%20\\_4\\_.pdf](http://www.redress.org/documents/POSITION%20PAPER%20RAPE%20SEPTEMBER%20_4_.pdf).

<sup>22</sup> Adultery, and intention to commit adultery, are accusations used often within the POR.

<sup>23</sup> Abdullah, *op cit*.

<sup>24</sup> Although officially the POP has been given a new name “Police of Society Security” they continue to be known by the public as the POP.

<sup>25</sup> Some of the places of POP interrogation and detention are, however, maintained separately from that of the ordinary police. Up until recently these places were tents or simple huts: increasingly permanent buildings are being constructed to house the POP adding to their sense of institutionalisation.

homeless". The perception at a minimum was that the POP had special training or encouragement to be "tough" and ruthless in their approach to enforcement and were rarely called to account<sup>26</sup>.

The POP have a reputation for physical brutality. They are perceived as being deployed in situations where the ordinary police is expected to be too "soft" or unable to elicit the compliance response required from the public in a particular situation<sup>27</sup>. One of the defining features of the operation and reputation of the POP is the phenomenon of *khasa* or "sweep and arrest". These are operations targeted at particular groups—women tea sellers on the street for example—which are triggered without warning and result in mass arrests, frequent physical assault, and the imposition of POR penalties (fines and lashings). The *kasha* generally does not take place in response to reports about a specific public order disturbance: it is a spontaneous activity, often politically motivated, and usually directed against marginalised groups of persons – refugees, women, particular ethnic groups. The *khasa*, in this understanding, is the epitome of the "kasha mentality," an inherent characteristic of the POP which is grounded in "expanding the circle of criminalisation of civilians"<sup>28</sup>. The *khasa* is a specific tactic of this mentality which enhances the capacity of POP to act as an agent of control of the population at any moment as required.

There are widespread allegations that the POP utilise arbitrary and aggressive modes of implementation of the POR to raise income from which their members personally benefit. It is not just monetary benefit which is alleged. When women are arrested by the POP they reportedly run the risk of being subjected to the kind of treatment from which the POR is ostensibly intended to shield them. A common feature of anecdotes passed from woman to woman and recorded during a number of interviews is the practice of POP bargaining around the imposition of charges under Part XV of the Criminal Act. "Be nice to us and it will be different" they told one woman, letting her know that if she complied with sexual advances the charges would not be brought<sup>29</sup>.

There was a sense among women with whom SIHA spoke, however, that the more extreme practices traditionally associated with the POP had been less in evidence since the signing of the Comprehensive Peace Agreement (CPA). One woman reflected on how before the CPA the POP were notorious for their uncompromising approach to hunting down women suspected of being involved in the illegal alcohol trade in Khartoum—particularly displaced women and women from marginalised areas. One greatly feared practice was the arrest of young girls in the place of their mothers who were suspected of manufacturing alcohol. If the POP entered a house and found utensils which could be construed as tools for the manufacture or distribution of alcohol they would arrest the daughters of the woman suspect. Later when the woman would go to the place of POP detention to surrender herself and seek the liberation of her daughters the POP would refuse. Months later after being returned home the same girls would give birth. A number of girls raped as part of this practice reportedly committed suicide.<sup>30</sup>

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<sup>26</sup> Interview Nuba Mountains woman's rights activist.

<sup>27</sup> See discussion below of the use of the POP to attack and disperse a peaceful demonstration by women in support of Lubna Hussein outside Khartoum North Criminal Court during the third hearing in the case.

<sup>28</sup> See, Nabil Adeeb Abdullah, *The Public Order Law as a Tool of Violence Against Women*, unpublished paper on file with SIHA.

<sup>29</sup> Anecdote told by woman human rights activist from the Nuba Mountains, based in Khartoum.

<sup>30</sup> Interview with Nuba Mountains human rights activist.

Alongside this recognition of some changes in the practice of the POP since the signing of the CPA, there was an acknowledgement that there had been a resurgence in POP activity over the last year. This increase in activity was viewed as reflecting the rise in political tensions more generally in the country, tensions caused by both internal political developments and the direction of international policy on Sudan. There was an awareness among some of the women consulted that the POP was a flexible tool which could be used by the authorities to respond to political exigencies: its deployment was intimately related to the exercise, contestation and maintenance of political power. The expectation was that POP activities and impact would expand over the coming months, particularly in the run up to the elections scheduled for April 2010.

There is little information available on cases where women have successfully sought redress for the excesses of the POP<sup>31</sup>. Only two pending cases were mentioned by the women consulted for this paper: a complaint relating to the death of a Darfurian tea seller in Khartoum<sup>32</sup> (supported by a woman's rights NGO which is providing legal aid) and two challenges to the assault of women demonstrators who had gathered in support of Lubna during her trial. The fear and shame attached to an encounter with the POP was cited by one women's rights activist as the reason for this dearth of legal action<sup>33</sup>. Against the background of a society still very driven by the importance of a woman's reputation for her social survival and personal and professional future, women who have been abused by the POP often desperately seek anonymity. Families may also be deeply reticent to compound the social scar by pursuing the matter.

The lack of oversight and the perceived corruption within the POP has now been catapulted into current political debate, sparked by discussions around Lubna Hussein's case. Yasir Arman the joint Secretary-General of the Sudan Peoples' Liberation Movement reportedly alleged that the POP "tak[e] advantage of the women they arrest and bargain with them for their honour and exploit their fear from their families."<sup>34</sup> He elicited harsh criticism from his government partners and it was reported that the POP had filed a case for criminal defamation and were seeking the lifting of his parliamentary immunity<sup>35</sup>.

#### (iv) The Public Order Courts<sup>36</sup>

*"They leave that place in silence without any resistance"*<sup>37</sup>

The public order courts (POCs) were established by a decision of the Chief Justice in 1995. The POCs are essentially parallel courts outside the central legal system, a tradition which began with the creation of emergency courts during the time of Nimeri. In their various forms since 1983, these

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<sup>31</sup> A report by the African Centre for Justice and Peace does record one case where police officers who arrested a man and his wife for indecency making the assumption that they were not married were subsequently charged with misconduct, dismissed and fined. African Centre for Justice and Peace Studies, *The Case of Lubna Hussein: A Rallying Cry against Sudan's Public Order Legislation?* Sudan Human Rights Monitor, Issue 2, June-July 2009.

<sup>32</sup> See discussion of this case below.

<sup>33</sup> Interview Nuba Mountains woman's rights activist.

<sup>34</sup> Sudan Tribune, *Sudan's SPLM blasts attempts to strip Arman's immunity*, 8<sup>th</sup> August 2009.

<sup>35</sup> United States Embassy in Khartoum, *The Sudan Morning News*, August 10<sup>th</sup>, 2009 at [http://sudan.usembassy.gov/media/morning-news-pdf/mn\\_20090810.pdf](http://sudan.usembassy.gov/media/morning-news-pdf/mn_20090810.pdf).

<sup>36</sup> This section draws heavily on the analysis and information provided by Nabil Adeeb Abdullah in his paper, *The Public Order Law as a Tool of Violence Against Women*, unpublished paper on file with SIHA.

<sup>37</sup> See Abdullah, *op cit*.

parallel courts have been courts of summary jurisdiction with greatly restricted procedural safeguards and generally animated by a specific political objective. The current POCs have jurisdiction over a very wide range of administrative and criminal provisions from national laws relating to alcohol and prostitution to price fixing to classification of intellectual property to forestry and customs. They also enforce a broad collection of local laws and bye laws/regulations and governor decrees relating to diverse matters such as property taxation, aspects of the petroleum and construction industries, trading licenses, price fixing, and of course the public order laws.

The procedures imposed by the POCs take their inspiration from those used in military courts, echoing their institutional origins. The trial process is intended to be swift (a hearing may not take more than a few minutes and the arrest, detention, and imposition of penalty generally occur within 24 hours); there is no requirement to permit the accused to prepare a defence; the right to legal assistance, let alone legal aid, is not provided for; and no records need be kept of the proceedings, save for a noting of the content of witness statements. Once a person has been found guilty of an offence the punishment is immediately imposed: lashing is carried out (in public, and in a way which can cause permanent scars). If fines cannot be paid the person is transferred to prison.

Because of the nature of the ideological context within which POR offences are charged the adequacy of these summary procedures are rarely challenged by women who are brought before the POCs. Neither are appeals against a finding of guilt pursued. In a traditionally conservative society women are not encouraged to ask questions. They may be feeling intensely shamed by the experience and desirous of getting the process over as quickly as possible without involving their families. In addition the women brought before the courts are often poor, uneducated and from marginalised communities. It is only in cases such as Lubna Hussein's where the convergence of position, education, money and immense personal courage come together that the summary nature of the proceedings is challenged. These challenges are rarely successful. Despite all the resources at her disposal, including managing to insist on consulting a lawyer and having the trial postponed and transferred out of the POC system, Lubna was in the end convicted solely on the evidence of POP witnesses and was prevented from calling her own witnesses or even presenting a defense of any kind.<sup>38</sup> It is easy to understand why most women "leave that place in silence without any resistance"<sup>39</sup>.

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<sup>38</sup> See African Centre for Justice and Peace Studies, Human Rights Monitor, Issue 3, August – September 2009.

<sup>39</sup> See Abdullah, *op cit*.



## B. FEAR AND DISORDER: THE PUBLIC ORDER REGIME AND THE DAILY EXPERIENCE OF SUDANESE WOMEN



### 1. Introduction

*“A new colonisation”<sup>40</sup>*

Discussions with women from across Sudan on their encounters with the POR reveal much commonality of experience.<sup>41</sup> It would be expected, for example, that women in urban and rural areas, and in conflict and non-conflict zones would have very different stories. What was striking, however, was the extent to which the POR was perceived by almost all of the women, whatever their background, as a significant obstacle in their daily life which needed to be consistently negotiated—albeit to differing degrees and in relation to different elements. Many of the women remembered vividly their first encounter with the POR and talked of the humiliation and shame surrounding that occasion, but also of the private anger with the POR which animated their activism.

There was a general sense among women interviewed, and particularly those who came from Khartoum, that since the prosecution of Lubna Hussein there had been an increase in the use of the POR against women and girls. “They are trying to bring it back to the early 90s”, said one woman<sup>42</sup>. Although it is impossible to corroborate this allegation what is true at a minimum is that there is now an increased sense of vulnerability and uncertainty among a number of women about their safety in the public sphere in Sudan. There was also a feeling among the women surveyed that women were not talking about their experiences, fearful of exacerbating the familial and social shame of their encounter with the POR regime. One woman spoke about how a friend of hers, a professional dentist, was so traumatised at being hauled off a public bus to the public order courts, that she was unable to go to work for two weeks—and this was in a context where the woman had successfully managed to convince the judge not to convict her of the offence charged<sup>43</sup>.

This growing displacement from public life is fuelled by two factors in particular: the uncertain scope of the relevant laws and the perception that they can be applied arbitrarily, without notice and with little chance of challenge or redress. As one woman said “now I feel I am vulnerable and not protected [...]It adds to the stress of daily life and living.”<sup>44</sup> A point made by almost all women was that the provisions of the POR which were mostly used to target women were in general

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<sup>40</sup> Comment by woman human rights lawyer based in Darfur.

<sup>41</sup> The personal anecdotes shared in this section of the briefing note are based on interviews and discussions with 25 women from across all regions of Sudan conducted during a period of weeks in individual interviews and in focus group sessions. All of those interviewed were human rights or community activists.

<sup>42</sup> Interview woman lawyer and human rights expert from Khartoum.

<sup>43</sup> Interview woman lawyer from Khartoum.

<sup>44</sup> Interview woman lawyer from Khartoum.

incredibly vaguely defined or tied to standards amenable to broad and opportunist interpretation. It was almost impossible to regulate one's behaviour with any precision to accord with the legislation, a situation which created profound uncertainty and fear.

The standard described for determining whether an act or dress choice renders a woman having acted in an "indecent manner or a manner contrary to public morality"<sup>45</sup> as set out in the Criminal Act 1991, for example, is utterly subjective: viz., "if it is so considered in the religion of the doer or the custom of the country where the act occurs" (section 152 (2)). Not only is this a highly malleable description: in practice the determination is never made on the basis of "the religion of the doer" but is grounded in the assessment of the POP and/or the presiding POC judge. The huge discretion entrusted to the POP in particular was recently described by the Director of the POP in an interview reported by the African Centre for Justice and Peace Studies. As reported, the Director confirmed that the POP "had received a formal circular giving them unlimited power to arrest and charge any person whom they perceived, in their personal judgment, to be committing an act deemed to offend public feelings"<sup>46</sup>. Questioned about what kind of criteria would be used by the POP the Director stated that "any dress a policeman judges to be tight, exposing or which might cause sexual arousal" could form the basis of a decision to arrest".

In some respects the POR has itself through its own practice begun to influence the very content of the argument about these standards. One woman noted, for example, how before the conflict in Darfur acceptable styles of dress were many and varied across the region. The coming of the war and the increasing intrusion of state actors—including through the use and abuse of the POR—had resulted in women in Darfur beginning to change their own approach to dressing, contributing thus to the creation of new norms of acceptability, and realms of prohibition<sup>47</sup>. The increasing use of the POR, in addition to the increase in the numbers of national security officers in Darfur, had created in many respects a "new colonisation" of the sub-region.

*During the discussions the experiences of women with the POR today in Sudan were explored through three main spheres of personal expression and public engagement:*

- *personal, religious and cultural expression and private, family and social life;*
- *economic and professional life; and*
- *public and political life.*

## **2. Personal, religious and cultural expression and private, family and social life**

*"women can't dance, only men"<sup>48</sup>*

The impact of the POR on daily personal life and social expression was highlighted by most of the women interviewed. The POR purports to govern a range of spaces within the realm of the private, family and social lives of women: these include the choice of dress; taking public transport; access

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<sup>45</sup> Article 152 of the Criminal Code 1991.

<sup>46</sup> See the African Centre for Justice and Peace Studies, *The Case of Lubna Hussein: A Rallying Cry against Sudan's Public Order Legislation?* Sudan Human Rights Monitor, Issue 2, June-July 2009.

<sup>47</sup> Interview woman lawyer.

<sup>48</sup> Focus group discussion with fourteen women from across the three Darfur states.

to education; religious expression; visiting with friends; developing relationships; pursuing physical adornment; walking on the street; and attending the cinema, private and public parties and dancing.

In Khartoum the massive publicity surrounding the trial of Lubna Hussein had reactivated among many women a fear of being accused of behaviour contrary to Part XV of the Criminal Act of 1991, particularly those relating to modes of dress. The renewed focus on the POR and discussion of the definition of “decency” and “immorality” had also affected how young girls perceived the dangers of engaging socially and how mothers attempt to maintain their realm of freedom. One woman spoke of how her seven year old daughter had been told by her school mates that if she wore trousers out to play she would “be arrested.” She had subsequently become fearful of going out of doors. The woman struggled to discuss this with her daughter in a way which would not undermine her sense of security, personal dignity and confidence. Some commentators have argued that in essence the POR criminalises women and girls simply for being who they are: it is difficult otherwise to interpret the decision to ban young women and girls from the market in one Darfur state simply on the basis that “their presence” would lead to prohibited behaviour.

Another woman told of how her daughter and niece, 28 years old and 12 years old respectively, had been arrested on the street by the POP on the grounds of violating Article 152 of the Criminal Act—they were wearing trousers and tunics—and taken to a police station and detained, just weeks after the initial prosecution of Lubna. Although ultimately they were not charged, the young girl and the woman were harassed aggressively at the police station. A number of the officers repeatedly made remarks about the size of the 12 year old girl’s breasts, claiming that she could not be the age she said she was. The two were deeply affected by their experience, particularly the young girl who has since refuses to talk about the experience.<sup>49</sup> Another women confirmed that she had heard of another “two or three” very young girls, 10 or 12 years old, who had also been recently arrested.<sup>50</sup> As a result of this kind of aggressive harassment many women have taken the decision not to walk on the street at all in Khartoum, insisting on driving even very short distances, or being accompanied.

There were also concerns about how other types of popular social engagement by young girls could be interpreted and exploited by the POP, such as the scrutiny of cell phone messages. The African Centre for Justice and Peace Studies has documented a case from 2007 where a girl initially arrested from a restaurant for wearing trousers and smoking *shisa* in purported contravention of Article 152 of the Criminal Act, 1991 was later charged also under Article 153 (“materials and displays contrary to public morality”). Her cell phone had been found to contain a joke sent to her which was considered “indecent”. For this latter offence alone the girl was imprisoned for one month, fined and received 40 lashes<sup>51</sup>.

The increased use of the POR—or indeed perception of its use—against women and girls has also resulted in families becoming more fearful about encouraging or indeed allowing their daughters to

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<sup>49</sup> Interview Nuba Mountains woman rights office.

<sup>50</sup> Interview woman lawyer in Khartoum.

<sup>51</sup> See the African Centre for Justice and Peace Studies, *The Case of Lubna Hussein: A Rallying Cry against Sudan’s Public Order Legislation?* Sudan Human Rights Monitor, Issue 2, June-July 2009.



engage in public life, affecting not just social development of women and girls but also, by implication, the fabric of Sudanese family life.

The holding of private and public parties is regulated in detail by the POR. The POR requires that permission be sought for any party involving the use of a loudspeaker—and more often than not the payment of a bribe. Although in practice, for example, in Khartoum, the POP usually only interferes to ensure that parties end by the allotted time of 11pm<sup>52</sup> there was an awareness among some of the women that the broad discretion which the POP had been given to interpret other provisions, such as the prohibition on women dancing “in front of men”<sup>53</sup> the offence of “practising prostitution”<sup>54</sup> or “running a place of prostitution,”<sup>55</sup> constituted an ever present threat. In Darfur it was clearly understood by a number of women that the implication of the POR was that that “women can’t dance, only men”<sup>56</sup>.

The combined effect of the POR’s mechanisms and ideology is that men and women who are not related or who are not married can are neither free to live together—nor in many circumstances to even sit together unsupervised. At a minimum men and women must be careful about appearing in either public or private in a way in which any intimate relationship can be implied. In a case earlier this year a journalist who was driving with his wife and baby was stopped, arrested and charged with offences under Part XV of the Criminal Act.<sup>57</sup> The African Centre for Justice and Peace Studies reports that,

“[m]any women and men have been arrested under these articles from the street, public places or their own cars, simply for spending time together without being able to show proof of a recognised, first degree relationship (a wife, sister, mother, etc). This practice continues in public parks, streets and other public places in Sudan. At times, such arrests even occur in private homes”<sup>58</sup>.

Some of the women recounted how at university, boys and girls who sit together can be harassed by the university POP who also tend to more strictly implement controls on styles of dress. This restriction on the learning environment by definition diminishes the university experience, curtailing both the scope of the learning friendships which can be maintained, and, it must be assumed, healthy psycho-sexual and relationship development.

This context of hyper-vigilance and the sexualisation by presumption by the state of every encounter between women and men was recognised by some of the women as having had a serious impact on the physiological, psycho-social and community development of young Sudanese men and women since 1989—let alone the Sudanese social and cultural fabric.

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<sup>52</sup> Khartoum Public Order Act 1998, section 7 (1) (a).

<sup>53</sup> Khartoum Public Order Act 1998, section 7 (1) (b).

<sup>54</sup> Section 154, Criminal Act 1991.

<sup>55</sup> Section 155, Criminal Act 1991.

<sup>56</sup> Focus group discussion with fourteen women from across the three Darfur states.

<sup>57</sup> The case of Dr. Mohamed Sharaf Edeen is described in African Centre for Justice and Peace Studies, *The Case of Lubna Hussein: A Rallying Cry against Sudan’s Public Order Legislation?* Sudan Human Rights Monitor, Issue 2, June-July 2009. Ultimately, Dr Edeen was able to produce his marriage certificate not convicted.

<sup>58</sup> *Ibid.*

Against the background of increasing political tensions, the imposition of the POR and the fear generated by the activities of the POP itself may be deepening fissures within the community. One incident described during the research exemplifies this concern: at the beginning of October two teenage girls at a restaurant in Khartoum were harassed, physically assaulted and then arrested by POP in a very public manner. No member of the public intervened in any way to remonstrate with the police for their behaviour. The woman who told the story expressed deep shock at the fact that not one person in the restaurant had come to the aid of the girls who were clearly very frightened: “This is not normal Sudanese behaviour”<sup>59</sup>.

The perception that the POR may be applied arbitrarily and with vehemence in a way which impacts a woman’s dignity and brings shame to her family and community is also believed to be having an impact on women’s sense of hope for the future. Anecdotal evidence suggests that there is a growing number of women—even from well off economic and social backgrounds—who are considering exploring leaving Sudan. Although a wide range of experiences, political and economic, are driving these feelings, the “heaviness” of the very existence of the POR and the “criminalisation” of women’s presence in the public sphere is adding to the alienation of many women<sup>60</sup>.

### 3. Economic and professional life

*“she ran vastly and they chased her brutally until she fell on a harmful piece of iron and gave up her soul”<sup>61</sup>*

All of the women interviewed mentioned the impact of the POR on their economic and professional lives, whether directly or indirectly. Darfurian women interviewed placed particular emphasis on the effect of application of the POR on the livelihoods of women and children from vulnerable and marginalised communities. In Darfur almost two and a half million people have been displaced from their homes and are now eking out a living in urbanised camps and settlements or in towns and cities, far from their traditional rural way of life. There is a desperate scramble to create new types of livelihoods, particularly among women who are finding themselves as heads of households and principal breadwinners due to the circumstances of the war. The activities engaged in by such women and children include petty trading, food market stalls, tea selling and Marisa and aragi making (the former a local alcohol which is culturally and traditionally part of Darfurian life), all of which activities are subject to the vagaries of the operation of the POR.

According to the women interviewed, the threat of punishment for contravention of the POR—fines, and lashing if fines were not paid—exercised a considerable fear in the lives of many poor and displaced women. In El Geneina, for example, one woman activist felt strongly that the POR was “destroying” the economic capacity of some categories of women and their families. The authorities there had recently forbidden women to sell in the market area in addition to banning young boys from selling their wares from mobile wheelbarrows (In other parts of Darfur the restrictions relate to specific times of day). Not only were the women and children who persisted in trying work subject

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<sup>59</sup> Interview woman human rights activist, Khartoum.

<sup>60</sup> Interview human rights activist, Khartoum.

<sup>61</sup> Darfurian activist on the death of Nadia Saboon Kangi, a tea seller from from Aldalang, in Kordofan. See discussion below.

to arrest for illegal trading, their produce is impounded alongside their owners and spoiled without compensation. Women are also susceptible to arrest under Article 152 of the Criminal Act for infractions relating to improper dress and “immoral acts”. Arbitrariness appeared to a hallmark of the exercise of control of market areas by the POP: for example, where women have paid for and been granted a market space, suddenly they can be told: “sorry, it’s not available because of the public order act”.

Women have also reportedly been forbidden to sell certain kinds of products in certain parts of Darfur—a restriction described by the authorities, however questionably, as founded in the POR. Traditionally women in West Darfur, for example, have traded extensively with Chad, bringing perfumes into Darfur to sell. Through the imposition of restrictions on freedom of movement on the basis of “the public order act” trade in perfume is now only permitted to women who belong to particular ethnic groups or tribes which are associated or aligned with the ruling authorities. This latter is a good example of a more general perception which emerged from discussions with women from Darfur that POR is often used as a catch all to justify a variety of behaviour by the POP and local authorities beyond any possible interpretation of the scope of the framework itself.

The application of the POR in Darfur was also viewed as subject to political or ethnic manipulation—whether deliberately or as an unavoidable consequence of the conflict. The reality is that those trading informally in the markets in the main cities, and therefore those most subject to the POR are often internally displaced persons coming from conflict areas where government allegiance is not perceived not to be strong. Expression of political support for the controlling authorities was a tactic which allowed women to benefit from greater leniency under the POR regime. In El Fasher and El Geniena it was recounted how membership of the National Congress Party (NCP), the majority party of government, was considered a pre-requisite for maintaining a market space. As a result women came under great pressure to confirm their support of the NCP and to carry identity documents reflecting this allegiance<sup>62</sup>. It was also noted that strong alignments with the rebel movements who are now accessing power through the Darfur Transitional Authority would often have the same effect.

It was the understanding many of the women from Darfur consulted as part of the research that the salaries of the POP were paid directly from the collection of fines generated by their application of the POR. The very existence of the POP was thus viewed as dependent on identifying and charging violations of the POR, a situation which naturally encourages an expansive and aggressive application of the laws. Further, some of the women pointed out that it was not just lawful imposition of fines which was a source of income for the POP. In Nyala South Darfur for example, one woman told how despite the fact that manufacture of alcohol is officially prohibited, the POP as a matter of practice would demand 300 Sudanese Pounds from women suspected of making alcohol as the price of non-interference with their trade. Refusal to pay the bribe results in charge and sentence, often to three to four months imprisonment. There is therefore a strong incentive to submit to bribery by the POP.

The impact of the inappropriate use of the POR, including for purposes of monetary or political gain by the applying authorities, is particularly pernicious where people are already experiencing severe

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<sup>62</sup> It is understood that the numbers of party card carriers can assist in proving the credibility of the vote if there is challenge to the outcome of an election.

exclusion from normal life as a result of human rights violations, conflict and displacement. “The public order act is just there to prevent women to have access to their rights,” was the perception of one Darfurian woman<sup>63</sup>.

Such confluence of marginalisation, exploitation and criminalisation is not unique to Darfur. Numerous anecdotes from the interviewed informants and in available materials paint a picture of how the POR is used extensively against poor women who attempt to make a living from tea-selling or other activities in Khartoum (particularly those displaced from the South, the Nuba mountains and Darfur). Violent *kasha* sweeps by the POP are commonplace with women charged, fined and lashed or forced to come to some kind of “arrangement” with the POP, whether monetary or sexual. The reality is that many marginalised women live in perpetual fear and uncertainty generated by their simple need to make a living for themselves and their families.

The cumulative impact of the POR as a *practice* on the lives of poor displaced women desperately trying to eek out a living on the margins of Khartoum is tragically illustrated by the case of Nadia Saboon Kangi a tea seller from Aldalang in Kordofan who was killed in Khartoum Arabic Market (Alsouq Alarabi) earlier this year. Having experienced numerous arrests and punishments by the POP, Nadia was deeply frightened when POP commenced their sweep of the market on 30 April 2009: “she ran vastly and they chased her brutally until she fell on a harmful piece of iron and gave up her soul”<sup>64</sup>. A human rights activist who spoke with eyewitnesses confirmed that the POP prevented others in the market from coming to Nadia’s aid as she lay bleeding. When the POP eventually withdrew she had passed away<sup>65</sup>.

There is another realm of fear which the POR contributes to the life of women in the educated and professional sectors, and particularly with regard to women working with independent civil society or human rights organisations. This apprehension has increased in the months since the statement by the Prosecutor of the International Criminal Court (ICC) that he would be seeking to bring charges against the President of Sudan, Omar El Bashir. One Khartoum based human rights activist spoke of how the confluence of attention by the National Security Service and scrutiny by the POP had had a significant impact on the ability of women in her organisation to conduct their usual activities<sup>66</sup>. The intensification of examination of both personal and professional activities took numerous forms including threatening phone calls/allegations of a personal nature and interventions with friends and family. One of the practical results of this campaign was that she and her colleagues became uneasy working late at the office. Late working hours became only possible if a larger group of men and women both remained. It was feared in particular that section 154 of the Criminal Code would be invoked as a pretext to attack their organisation’s work and their individual reputations, perhaps even resulting in serious penalties.

Beyond particular political tensions, one of the results of the POR is the creation of different playing fields for the pursuit of professional excellence and life for men and women in Sudan, adding to the experience of gender inequality. Women are less free to engage in developing personal

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<sup>63</sup> Darfurian woman in focus group discussion with fourteen women from across the three Darfur states.

<sup>64</sup> Report by the leading Darfurian lawyer and human rights activist, Abdelrahman Gassim, in an email on file with the author.

<sup>65</sup> Interview with woman activist from the Nuba Mountains.

<sup>66</sup> Interview Khartoum based human rights activist.

relationships and networking, particularly outside the office and outside normal working hours, activities which are frequently essential for the expansion and development of careers.

#### 4. Public and political life

*“If there [are] no independent judges then what about the elections and their transparency?”<sup>67</sup>*

The POR is designed to regulate how women present and engage in the public sphere. Those aspects of the POR which have an effect on personal expression and professional life in the public sphere have been described in part 2 and 3 of this section. The discussion in this section focuses on the impact of the POR on women’s political and civic engagement in the public sphere. In fact the practice of POR implementation in Sudan indicates that it is the political value of the POR that is often the prevailing and guiding interest, notwithstanding the declared religious or social basis. It is at times of political tension that the tools of the POR tend to be most vociferously deployed.

As the African Commission on Human and Peoples’ Rights’ Special Rapporteur on the Rights of Women acknowledged on the occasion of Pan African Women’s Day earlier this year, “African women continue to be the real medium of progressive changes in their communities across the continent by pressing for legal reforms and working through legal and political frameworks to improve their status”<sup>68</sup>. Unfortunately the POR is having a chilling effect on the exercise by women of their political rights—and duties. A comment from one woman during the research particularly encapsulated the growing alienation from the state and national authorities of some groups of women. The judgement in Lubna’s case, she said “confirmed from many women our lack of trust in the legal system.”<sup>69</sup> “If there is [are] no independent judges then what about the elections and their transparency?” she asked. Reform of the POR was, she said, “an essential aspect of current pre-election legal reform”.

The experience of the women interviewed indicates that the POR is a flexible tool which can be used to target actors who engage politically in a manner which the authorities do not like. An aspect of the unfolding of Lubna Hussein’s trial, for example, was the humiliation and physical assaults meted out to women demonstrators who appeared at the hearings in support of Lubna and attempted to express their opinion on the legality and morality of her prosecution. At the third hearing at North Khartoum Criminal Court on 7<sup>th</sup> September 48 women were arrested and charged with causing public nuisance and disturbing public peace under Article 77 of the Criminal Act 1991. Some of the women were severely beaten and a number were hospitalised<sup>70</sup>. The sequencing and

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<sup>67</sup> Interview woman lawyer, Khartoum.

<sup>68</sup> See statement from the African Commission on Human and Peoples’ Rights’ Special Rapporteur on the Rights of Women on the occasion of Pan African Women’s Day, 31 July 2009 available at [http://www.achpr.org/english/Press%20Release/Special%20Rapporteur\\_Women\\_Womensday.htm](http://www.achpr.org/english/Press%20Release/Special%20Rapporteur_Women_Womensday.htm).

<sup>69</sup> Interview woman lawyer, Khartoum.

<sup>70</sup> See African Centre for Justice and Peace Studies statement, *ACJPS Condemns Arrests of Women’s Rights Activists*, 7<sup>th</sup> September 2009, at <http://acjps.org/Publications/09-0709ACJPS%20Condemns%20Arrests%20of%20Women’s%20Rights%20Activists.html>. The statement condemned, “the arrest of 48 women protesting in Khartoum in support of Lubna Hussein”. It further noted that “[p]olice and security forces used excessive force during the arrest and eyewitnesses confirm that women were severely beaten and dragged into to a police pick-up. Three of the women were seriously injured [and] transferred to the hospital”.

nature of the response by the authorities to the demonstration provides an insight into how the role and function of POP is conceived with respect to control of women.

According to an eyewitness account it was the ordinary police which were initially present at the demonstration, overseeing its “women only” character and peaceful conduct. As the demonstration grew in strength however the ordinary police were withdrawn and the POP were deployed, banging sticks and making menacing gestures, augmented by dire warnings as to what they would do if the women would not disperse. Other demonstrators in civilian clothes were permitted to intimidate the women with threats that they had Molotov bombs and acid. As they sat on the ground peacefully resisting the order to leave the area, the POP attacked the women brutally.

In the aftermath one women’s NGO, some of whose central committee were involved in the campaign to support Lubna and in the demonstrations, came under increased harassment from the POP. One of their meetings was disrupted and shut down, for example, on the ground that they had not got POP permission for their gathering. As a registered NGO the organisation had received Humanitarian and Voluntary Work Commission clearance for what was a small celebration in honour of International Literacy Day. POP permission had never before been indicated as necessary—let alone provided for in any legislation.<sup>71</sup>

Against the background of a highly charged and chaotic current political reality in Sudan, the POR is having an effect on the impact of women’s’ political participation. The shutting down of a number of local human rights organisations in March 2009 was accompanied by the stepping up of a campaign of harassment against individuals connected with independent civil society, some of which took the form of threats or hints of possible accusations under the POR<sup>72</sup>. The breadth of the provisions of the POR and their capacity to be twisted to apply to completely innocuous situations looms large and frighteningly in the lives of women who attempt to engage politically and who know that their efforts are under close scrutiny by the prevailing authorities.

Concerns were expressed by a number of women interviewed that the POR would impact in particular the freedom of women to engage freely and fully in the upcoming elections. Considerations around the POR were expected to infuse calculations by women *vis a vis* the whole spectrum of election engagement: from the simple exercise of the franchise (including attendance/queuing in public places) to decisions about engaging in political discussions, participation in gatherings and ultimately running for office. One Darfurian woman, for example, specifically spoke of how some women she knew were concerned about seeking public office for fear that the POR could be used against them to besmirch their reputation<sup>73</sup>. Taken together these perceptions and experiences are likely to have a chilling effect on sense of agency and democratic participation as a whole by women in Sudan – creating a “generally non-conductive environment”<sup>74</sup> and diminishing the prospects for elections which respect and reflect the will of the “people”.

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<sup>71</sup> Interview Nuba Mountains activist.

<sup>72</sup> See Darfur Consortium note on the impact of the expulsions of international organisations and the campaign against indigenous human rights organisations, and Sudanese legal obligations, *One Month on in Darfur and Sudan: The Expulsion and Suspension of International and National Human Rights and Humanitarian Organisations*, available at [http://www.darfurconsortium.org/darfur\\_consortium\\_actions/statements/2009/HUM%20and%20HRD%20in%20Sudan.f042309.pdf](http://www.darfurconsortium.org/darfur_consortium_actions/statements/2009/HUM%20and%20HRD%20in%20Sudan.f042309.pdf).

<sup>73</sup> Focus group discussion with fourteen women from across the three Darfur states.

<sup>74</sup> Interview woman lawyer, Khartoum.

At the same time it is acknowledged that the increasing clampdown on women in the public sphere has also galvanised women to try to come together to combat the trend. A number of new initiatives have been created to challenge the POR and encourage women to speak up, including the campaign *No to Women's Oppression* and the *Initiative Against Discriminatory Laws Against Women*.<sup>75</sup>

Finally, the POR has also been used by the authorities to express frustration about the intervention of the international community in the Darfur and Sudanese human rights crises. One Darfurian woman spoke about how in the wake of the issue of an arrest warrant by the ICC for President Bashir there was an increased crackdown on non-national and Sudanese women working for international organisations in Darfur with respect to their mode of dress<sup>76</sup>. In El Fasher, for example, a number of women connected with the United Nations/African Union Hybrid Operation in Darfur (UNAMID) were prevented from travelling by air because of their attire<sup>77</sup>. The POR, she believed, was being used as a tool to record anger, not just with the perceived stance of the international community against Sudan, but also its perceived influence on women in Darfur – whether in terms of the dissemination of new ideas/conceptions or in the generation of well paid and capacitated positions for women within international organisations. The use of the POR in these circumstances was an expression, she said, of social or gendered “jealousy”<sup>78</sup>.

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<sup>75</sup>The first campaign is run by a coalition of women's rights activists from various organisations across Sudan; the second is spearheaded by the Al Khatim Adlan Centre for Enlightenment and Development.

<sup>76</sup> Interview Darfur based woman lawyer.

<sup>77</sup> Some of the women had simply complied and made the adjustments necessary despite their not being obliged to do so either in national law or under the agreements with the relevant international agency. Others had refused and had not travelled. One point made was that international organisations themselves, including UNAMID, had unfortunately *not* taken a strong stance against these discriminatory practices which were clearly contrary to bilateral agreements regulating the presence of the organisations in Sudan, such as for example, the UNAMID Status of Forces Agreement.

<sup>78</sup> Interview Darfur based woman lawyer.



## C. THE COMPATIBILITY OF THE PUBLIC ORDER REGIME WITHIN THE AFRICAN HUMAN RIGHTS FRAMEWORK



This section provides a brief overview of the compatibility of the POR with Sudan's obligations under the African Charter on Human and Peoples' Rights (the Charter). It is important to note, however, that the obligations in the Charter are not only obligations at international law—they are also fundamental building blocks of Sudanese domestic law by operation of 27(3) of Sudan's Interim National Constitution (the Constitution). Article 27 (3) stipulates that the rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of the Sudan "shall be an integral part of the Bill of Rights in the Constitution".<sup>79</sup>

Even without reference to Charter obligations, however, the framework and operation of the POR raise numerous issues of Sudanese constitutional law, from the prohibition on torture, to the right to a fair trial and the principle of equality before the law.<sup>80</sup> As Yasir Arman, the Joint Secretary-General of the Sudan Peoples' Liberation Movement (SPLM), stated in the wake of the proceedings against Lubna Hussein, "we consider the public order act as a law which violates human rights and the constitution itself. [...] [W]e are calling for the cancellation of this law and we think that this trial is a violation of all the rights and freedoms which are stipulated in the constitution". This section therefore also makes reference to the key constitutional questions which may be at issue independently with respect to the lawfulness of the POR.

### 1. The African Charter on Human and Peoples' Rights

All 53 AU member states, including Sudan<sup>81</sup>, are party to the Charter. It guarantees fundamental human rights, including the right to be protected from torture, cruel, inhuman and degrading treatment or punishment, the free practice of religion, the right to equality before the law and the right to a fair trial.<sup>82</sup> Key constitutive characteristics of the POR raise questions in terms of Sudan's compliance with the Charter, aspects of which have already been the subject of communications to

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<sup>79</sup> According to the High-Level Mission on the situation of human rights in Darfur appointed by the UN Human Rights Council, Sudan has ratified the following treaties: International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; and the Convention on the Rights of the Child; the African Charter on Human and Peoples' Rights; and the four Geneva Conventions of 1949. International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 999 U.N.T.S. 171 (18 March 1986); International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 993 U.N.T.S. 3 (18 March 1986); International Covenant on the Elimination of all Forms of Racial Discrimination, G.A. res. 2106 (XX), 660 U.N.T.S. 195 (21 March 1977); Convention on the Rights of the Child (CRC), G.A. res. 44/25, UN Doc. A/44/49 (3 August 1990); the African Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982); *Report of the High-Level Mission on the situation of human rights in Darfur pursuant to Human Rights Council decision S-4/101*, available at <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/4/80&Lang=E>.

<sup>80</sup> Sudanese Interim National Constitution, articles 33, 34 and 31.

<sup>81</sup> The Republic of Sudan ratified the African Charter on the 18<sup>th</sup> February 1986

<sup>82</sup> African Charter, Articles 5, 8, 3, and 7.



the African Commission on Human and Peoples' Rights (ACHPR), the quasi judicial body charged with application of the Charter. These include:

- The criminalisation of behaviour which in most jurisdictions would not be considered appropriate to subject to criminal penalty;
  - The uncertain scope of offences;
  - The arbitrary and discriminatory application of the law;
  - Enforcement by a police and judicial system lacking basic safeguards of due process and oversight;
  - The imposition of penalties which amount to prohibited treatment under the African Charter; and
  - The overall environment created by the public order regime itself which diminishes enjoyment of fundamental rights.
- i. The criminalisation of behaviour which in most jurisdictions would not be considered appropriate to subject to criminal penalty.

The POR criminalises and imposes severe penalties on behaviour which generally does not cause loss or damage to others persons or property—behaviour which would be permissible in most states in Africa. The fact that some of the offences within the POR framework which can be termed as “victimless crimes” attract some of the harshest penalties (eg., execution for adultery)<sup>83</sup> is just one expression of this tension between the POR and the basic components of legal principle in a democratic society. In a democratic order restrictions on fundamental freedoms, in particular through imposition of criminal penalty, must be required by exigencies of security, public safety, health or other clearly defined objectives relating to collective interest. As the African Commission has noted in a communication relating to Sudan, “where it is necessary to restrict rights, the restriction should be as minimal as possible and should not undermine fundamental rights guaranteed under international law. Any restrictions on rights should be the exception.”<sup>84</sup> In addition there should be a relationship of reasonability and proportionality between the goal intended to be achieved and the means undertaken.

The fact that POR offences are amenable to an interpretation which allows for the most innocent of behaviour between men and women to be imputed with sexual and therefore criminal intent—such as, for example, a man and a woman driving somewhere in a car, or two people sitting together in a room for a study group—raises serious questions regarding respect for human dignity, privacy and conscience. Both the Charter and the Constitution recognise that respect for human dignity and integrity of person is a human right (articles 4 and 5 of the Charter and article 28 of the Constitution). Article 28 of the Constitution specifically requires that the “right to life, dignity and the integrity of [the] person” must be “protected by law”. “Freedom of conscience” is guaranteed in Article 8 of the Charter. It is important to note in this regard that the Sudanese Constitution also specifically recognises a right to privacy: “the privacy of all persons shall be inviolable; no person

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<sup>83</sup> See Article 146 of the Criminal Act, 1991.

<sup>84</sup> See joint decision on the merits of four communications against Sudan brought during the 1990s viz: *Amnesty International v. Sudan*, 48/90; *Comite Loosli Bachelard v. Sudan*, 50/91; *Lawyers Committee for Human Rights v. Sudan* 52/91; *Association of Members of the Episcopal Conference of East Africa v. Sudan* (hereafter Four communications case) at paragraph 80.

shall be subjected to interference with his private life, family, home or correspondence, save in accordance with the law” (article 37). These articles are violated frequently in the practice of the POR.

The African Commission has itself called for the immediate amendment of “the Criminal Law of 1991, in conformity with its obligations under the African Charter and other relevant international human rights instruments”.<sup>85</sup>

ii. The uncertain scope of offences.

Sudanese men and women are unable to predict consistently what behaviour, either in public or private, may or may not attract the censure of the authorities. Early this year the journalist Lubna Hussein was convicted of the crime of “indecent or immoral dress” when she wore an outfit which is worn daily by millions of Khartoum’s female residents. Thousands of women are lashed or fined or imprisoned every year for contravention of the same ill-defined provision of the Criminal Act.

The principle of legality is a basic component of law in a democratic society. It requires in essence that a prohibition must be clear and not enforced retrospectively. Article 7 (2) of the Charter provides: “[n]o one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed.” Article 6 of the Charter confirms this with respect to protections for liberty and security of the person: “No one may be deprived of his freedom except for reasons and conditions previously laid down by law”.

The vague descriptions of the public order offences in the Criminal Act and public order acts, tied to completely subjective standards of assessment both in law, and in how the public order police is directed to enforce them, contravene the basic principle of legality in a democratic society, in addition to the right to liberty and security of the person as provided for in the African Charter.

iii. The arbitrary and discriminatory application of the law.

Adding to the uncertainty of the content of the prohibitions in the law is the arbitrary and discriminatory application of the POR.

The ideological foundation of the POR, which conceives of women as having a different function in both private and public life, results in its disproportionate and discriminatory application against women. Different standards are applied to the behaviour of men and women in public and in private, violating a range of guarantees in the African Charter from the right to equal protection of the laws to non-discrimination or distinction in the enjoyment of rights. The result is diminished economic, social and political participation of women from all backgrounds, in particular the poor and marginalised, in Sudanese public life. The African Commission has specifically linked the principle of non-discrimination and equality in the enjoyment of equal rights with the diminishment of the national development of a State: “a country may be deprived of the leadership and resourcefulness such a person may bring to national life.”<sup>86</sup>

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<sup>85</sup> *Curtis Francis Doebbler v. Sudan*, Communication No. 236/00 at paragraph 44.

<sup>86</sup> See *Legal Resources Foundation v. Zambia*, Communication No. 211/98.

The African Charter contains clearly worded guarantees of non-discrimination and equality before the law alongside specific recognition on the need to redress discrimination against women. Article 2 stipulates that “[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.” Article 3 further provides that “[e]very individual shall be equal before the law” (Article 3 (1) and that “[e]very individual shall be entitled to equal protection of the law” (Article 2 (2)). Article 31 of the Constitution also acknowledges the principles of equality before the laws, and equal protection of the laws. In addition to prohibiting discrimination, the Charter also creates an obligation of action by states, “to ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions” (article 18). The Constitution itself requires that the State “shall protect motherhood and women from injustice, promote gender equality and the role of women in family, and empower them in public life”.

The African Charter’s provision on non-discrimination uniquely includes “social origin, fortune, birth or other status” as among the immutable characteristics upon which bases discrimination in the enjoyment of the other rights in the Charter must not be imposed. As described above, the POR taken as a whole tends to be applied to, and has a disproportionate impact on, women and within that category of persons, poor women, socially excluded women and women from historically marginalized communities.

Finally, it should also be noted that the essence of the most controversial aspects of the POR is the enforcement of a particular religious conviction using the criminal law. Article 8 of the Charter guarantees “[f]reedom of conscience, the profession and free practice of religion”.<sup>87</sup> The Constitution further specifically defines the state as a “democratic, decentralized, multi-cultural, multi-racial, multi-ethnic, multi-religious, and multi-lingual country where such diversities co-exist” (article 1 (1)).

iv. Enforcement of the POR by a police and judicial system lacking basic safeguards of due process and oversight.

The POR enforces its prohibitions (primarily) through a specialised police force (the public order police (POP)) and a category of special courts (the POCs). The operation of these organs, both in law and in practice, violate a variety of basic rights guaranteed in the Charter, including the right not to be arbitrarily detained, the right to have one’s case heard, the right to a defence and to legal representation.

As discussed throughout the paper, POP arrests are often based on the broadest conception of suspicion of intent to engage in prohibited activity. For example, when women tea sellers in Khartoum are collectively targeted by the *khassa* it is justified on the grounds that they, *en masse*, simply by their presence on the street and interacting with customers, may be intending to engage

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<sup>87</sup> The Commission in interpreting Article 8 in the context of the Sudanese legal system has found that, “it is fundamentally unjust that religious laws should be applied against non-adherents of the religion”, *Four communications case*, op cit., at paragraph 73.

in prostitution. This is clearly contrary to the Charter's guarantees in Article 6: "every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained". As the Commission has stated in a decision on a group of communications taken with respect to Sudan during the 90s, Article 6, "must be interpreted in such a way as to permit arrests only in the exercise of powers normally granted to the security forces in a democratic society<sup>88</sup>". The Commission went on to say that in that case the "wording" of the decree at issue, "allow[ed] for individuals to be arrested for vague reasons, and upon suspicion, not proven acts, which conditions are not in conformity with the spirit of the African Charter". Arrests based on such ill defined standards are also contrary to the principle of legality as described in Articles 6 and 7.

POP operations are often arbitrary. In *Article 19 v. Eritrea*, the African Commission, referencing a decision of the UN Human Rights Committee<sup>89</sup> case and found "arbitrariness is not to be equated with 'against the law' but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law... remand in custody pursuant to lawful arrest must not only be lawful but reasonable in the circumstances".<sup>90</sup> The Constitution requires that "no person shall be subjected to arrest, detention, deprivation or restriction of his liberty except for reasons and in accordance with procedures prescribed by law" (article 29).

The procedures before the POCs also raise serious issues relating to the protection of right to a fair hearing. The majority of those arrested under the POR are taken very quickly before a judge, generally before the POCs, where they are not advised of their right to seek the advice of a lawyer, and in respect of which legal aid is not available. Because of the shame and fear created by the very nature of the POR offences, compounded by the manner of arrest, and indeed the well documented physical assault and threats for which this particular police force are often associated, women generally plead guilty. Even if a lawyer is permitted to be retained by the accused, presentation of a defense may not be. With only minimal record taken of procedures, appeals are extremely rare.

The Charter is clear on the core components of the right to have ones cause heard in Article 7: (a) the right to an appeal to competent national organs against acts violating fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defence, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal. A detailed discussion of the content of this article, including the content which the Commission has developed to assist in its implementation, is beyond the scope of this paper. With respect to the question of the right of access to counsel, for example, the Commission has confirmed with greater specificity that Article 7 requires that persons must be given access to a lawyer during "all stages of any criminal prosecution, including

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<sup>88</sup> See *Four communications case*, *op cit.*, at paragraph 59.

<sup>89</sup> Human Rights Committee, Communication 458/1991, *Albert Mukong v Cameroon*, 10 August 1994, para.9.8.

<sup>90</sup> Communication 275/2003, *Article 19 v. Eritrea*, para. 93. It should be recalled that Sudan is also a ratified party to the International Covenant on Civil and Political Rights.

preliminary investigations in which evidence is taken, periods of administrative detention”<sup>91</sup> and that Article 7 (2) encompasses the right to be given “adequate time and facilities for the preparation of their defence and to communicate in confidence with the counsel of their choice”<sup>92</sup> The Constitution also contains detailed fair trial rights including the right for an individual, “to defend himself in person or through a lawyer of his own choice and to have legal aid assigned to him by the State where he is unable to defend himself in serious offences” (article 34 (6)).

v. The imposition of penalties which amount to prohibited treatment under the African Charter.

The penalty of lashing, a common punishment for violations of the POR, is unlawful and contrary to the African Charter and the Constitution. In fact the African Commission has pronounced in particular that the lashing as imposed in the context of the Sudanese Criminal Act 1991 (the principal statutory pillar of the POR) is contrary to Article 5 of the Charter: “[t]here is no right for . . . the government of a country to apply physical violence to individuals for offences. Such a right would be tantamount to sanctioning State sponsored torture under the [African] Charter and *contrary to the very nature of this human rights treaty*” (emphasis added).<sup>93</sup> Article 5 outlaws “[a]ll forms of exploitation and degradation [...] particularly [...] torture, cruel, inhuman or degrading punishment and treatment.”

Despite the fact that the language of the Commission could not have been stronger, and that Sudan is obliged to implement its recommendations, no effort appears to have been made to amend the law since that finding. It should also be noted that Article 33 of the Constitution also prohibits “torture or to cruel, inhuman or degrading treatment”.

vi. The overall environment created by the public order regime

The environment created by the existence of the POR undermines the full enjoyment of a range of other rights, particularly their enjoyment by women, from the right to enjoy the best attainable state of physical and mental health (article 16), to access to education and the right to freely take part in the cultural life of this community (article 17), to the right to freedom of assembly (article 11) and political participation (article 13), and the right to “express and disseminate [...] opinions within the law” (article 9)<sup>94</sup>. Sudan’s obligations under Article 22 of the Charter must also be clearly examined *vis a vis* the POR in terms of the right of every individual to, “economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind”. The POR in many respects also restricts the ability of Sudanese women and girls to carry out their duties under the African Charter to, *inter alia*, “to preserve and

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<sup>91</sup> Article 2 (b) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, adopted by the African Commission on Human and Peoples’ Rights. See also Communication Nos. 105/93, 128/94, 130/94 and 152/96 (1998). *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, paras.55, 56 and Communication 250/2002, *Zegveld and Ephrem v. Eritrea*, para.55.

<sup>92</sup> *Resolution on the Right to Recourse and Fair Trial*, adopted at the 11th Ordinary Session of the African Commission on Human and Peoples’ Rights in Tunis, Tunisia in 1992, at Article 2 (e) (i).

<sup>93</sup> *Curtis Francis Doebbler v. Sudan*, Communication No. 236/00 at paragraph. 42.

<sup>94</sup> The violent repression of recent peaceful demonstrations conducted in support of the reform of the public order regime during Lubna Hussein’s trial is an example of how these latter articles of the Charter may be contravened (among many others).

strengthen positive African cultural values in [...] relation[s] with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society” (Article 29 (7)).

## **2. The Great Lakes Protocol on the Prevention and Suppression of Sexual Violence against Women and Children**

Article 60 of the Charter provides that the Commission “shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights”. There are a range of other international and regional instruments which must be explored in considering the compatibility of the POR with African and international norms and standards. In particular it would be important in any reform of the POR to consider carefully the exigencies of the two UN Covenants and the UN Convention on the Rights of the Child which have all been signed and ratified by Sudan. As discussed above, these instruments fulfill the threshold created by 27(3) of the Constitution and form part of the Constitution's Bill of Rights. Space does not permit a detailed discussion here but the particular requirements of the Convention on the Rights of the Child with respect to the girl child and the operation and approach of the POR must be examined thoroughly.

Another instrument which is vital to consider is the Protocol on the Prevention and Suppression of Sexual Violence against Women and Children of the International Conference on the Great Lakes Region (the Sexual Violence Protocol). This instrument was signed and ratified by Sudan last year and is the only international legal instrument specifically dealing with women's rights and gender based violence which Sudan has ratified.

The Sexual Violence Protocol contains a comprehensive set of measures for tackling sexual violence in the Great Lakes region, from prosecution to compensation, and expands the range of acts which can form the subject of criminal penalty in international and national law. Three core objectives of the Protocol are set out in article 2:

- protection to women and children from sexual violence;
- ending of impunity for sexual violence by establishing a legal framework for prosecuting and punishing perpetrators of crimes of sexual violence in the Great Lakes Region;
- establishment of a regional mechanism for providing legal, medical, material and social assistance, including counseling and compensation, to women and children who are victims and survivors of sexual violence in the region.

The Protocol defines sexual violence as including:

“any act which violates the sexual autonomy and bodily integrity of women and children under international criminal law, including, but not limited to . . . grievous bodily harm, . . . harmful practices inclusive of all behavior, attitudes and/or practices which negatively affect the fundamental rights of women and children, such as their right to life, health,

dignity, education and physical integrity, as defined in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa" (emphasis added).<sup>95</sup>

Further it also includes within the scope of sexual violence:

"gender-based violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty, as defined by the United Nations Committee on the Elimination of All Forms of Discrimination Against Women, in General Recommendation 19"<sup>96</sup>.

General Recommendation 19 of the UN Committee on the Elimination of All Forms of Discrimination Against Women elaborates on the definition of "gender-based violence" as encompassing an act "which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions", including such rights as "the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment" and "the right to equal protection under the law".<sup>97</sup> General Recommendation 19 further confirms that the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) "applies to *violence perpetrated by public authorities*". Specific reference to the definitions adopted by CEDAW Committee in General Recommendation 19 in article 5 of the Protocol incorporates this understanding with respect to the Protocol itself.

The ratification of the Great Lakes Sexual Violence Protocol by Sudan last year, and its position constitutionally, must therefore be considered during current discussions on law reform and particularly around the POR. Taken as a whole, the context within which, and the procedures whereby, in particular, Article 151-Article 156 of the Criminal Act, are applied, is likely to constitute treatment amounting to gender-based violence as defined in the Protocol. The core *actus reus* of the definition in the Protocol of gender based violence—"acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty"—appears to encapsulate many women's experience of the POR. There is a strong argument that aspects of the POR and how it is implemented constitute **a state practice** of gender based violence. This possibility must be urgently assessed as part of the current Government of Sudan program of law reform.

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<sup>95</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Article 1. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa sets out state obligations to eliminate "discrimination against women", defined as "any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life". Further, the Women's Protocol prohibits harmful acts, defined as "all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity" as well as violence against women, defined as "acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms". *Ibid*.

<sup>96</sup> Protocol on the Prevention and Suppression of Sexual Violence against Women and Children of the International Conference on the Great Lakes Region (Sexual Violence Protocol), article 5.

<sup>97</sup> General Recommendation 19, paragraph 7, available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19>

A number of the encounters described by the women interviewed in this research with officials and organs of the POR clearly suggest that they have been victims of sexual violence as defined and prohibited by the Protocol, and in respect of which conduct Sudan has undertaken to criminally prohibit and prosecute vigorously. The Protocol, for example, abolishes statute of limitations and encourages the imposition of a maximum sentence of imprisonment for any person convicted of a crime of sexual violence against any woman or child.<sup>98</sup> Recognising the particular vulnerability of victims of crimes of sexual violence and the cultural barriers which may exist to pursuing remedies, the Protocol also requires states to provide for the simplification of procedures for lodging complaints by victims of sexual violence by “women, children and other interested parties”<sup>99</sup> and for the conduct of proceedings which take into consideration the “emotional state” of the victim (article 6 (5)).



#### D. CONCLUSIONS AND RECOMMENDATIONS



*“Sudanese women represent more than half of the Sudan population: their contribution to the society economy and wellbeing is substantial. Women, from street vendors, teachers and farmers, workers are preserving communities and families across the country. The role of the state is to protect them, maintain their dignity and pride and their access to a fair justice system. The degradation of women is affecting our society and self esteem and diminish the respect that we have in our diverse cultures towards women and girls- an aspect of our culture that we do need to promote and enhance”<sup>100</sup>.*

The POR in its constitutive elements and its implementation is inherently incompatible with both Sudanese constitutional requirements and international obligations. In aggregate, the existence and implementation of core provisions of the POR constitutes a continuing violation of the human rights of women in Sudan which damages not just the social, political and economic fabric of life and Sudan’s national development potential, but has a specific and deleterious impact on the psychological and relational development of individual Sudanese women and girls.

There is an urgent need for law reform and the African Commission is a vital partner in this work. As the Commission noted in summing up its recommendations in a communication brought with respect to human rights in Sudan, “to change so many laws, polices, and practices will of course not be a simple matter”<sup>101</sup>. At the same time, as the Commission emphasised, “the people of Sudan deserve no less.”

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<sup>98</sup> Sexual Violence Protocol, article 5(1).

<sup>99</sup> Sexual Violence Protocol, article 6(4).

<sup>100</sup> Statement by Sudanese women activists of July 29<sup>th</sup> 2009, , available on line <http://www.thepetitionsite.com/1/end-repressive-laws-targeting-women-in-sudan>.

<sup>101</sup> See *Four communications* case, op cit., paragraph 83.



## **Recommendations to the Government of Sudan:**

As the Commission held in the first communication to be considered on its merits before the Commission on the general regime of detentions, torture and state of emergency in Sudan in the period post coup, ratification of the Charter, “obliges a State to diligently undertake the harmonisation of its legislation with the provisions of the ratified instruments”.<sup>102</sup> In order to bring Sudan into compliance with the provisions of the African Charter and the Interim National Constitution, and to contribute to an environment which permits a free and fair election, SIHA urges that Sudan:

- 1) Reform the Sudanese Criminal Act, 1991.
  - a. Remove from the criminal law offences which violate the principles of non-discrimination, legality, equality before the law and the equal protection of the laws, and, which by their definition, inappropriately restrict the exercise of fundamental freedoms.
  - b. Sections 151 to 156 must be subject to particular scrutiny.
- 2) Reform the public order laws.
  - a. Criminalisation of behaviour which constitutes the exercise of basic personal freedoms—unless its prohibition can be shown to be necessary and proportionate in a democratic society—must end.
  - b. Civil law procedures and penalties can be used to govern regulation of many public order matters.
  - c. Provisions which restrict the right to work of women on the grounds of public order, either explicitly or implicitly, and in ways which violate the Charter, must be abolished.
- 3) Abolish the public order courts (POCs)
  - a. The summary procedures in operation before the POCs violate fair trial standards, the principle of equal protection of the laws and the right to liberty and security of person.
  - b. In reporting on its obligations under the International Covenant on Civil and Political Rights in 2007 to the United Nations Human Rights Committee, the Government of Sudan claimed to have abolished the public order courts. Sudan must now finally act on its own acknowledgement that these courts operate in violation of its international and constitutional obligations<sup>103</sup>.
- 4) Reform and consider the abolition of the public order police (POP).
  - a. Many in Sudan, and particularly women, perceive and experience the POP, not as guardians of community safety, but as feared and arbitrary abusers of their fundamental freedoms.

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<sup>102</sup> See *Four communications case*, op cit., at paragraph 40.

<sup>103</sup> See Consideration of reports submitted by States Parties under Article 40 of the Covenant, Third periodic report of states parties due in 2001, Sudan, CCPR/C/SDN/3, 10<sup>th</sup> January 2007, at paragraph 30.

- b. The Government of Sudan has itself acknowledged the existence of “abuse of powers or authority by some members of the police”<sup>104</sup>. Efforts at reform to date, however, have been inadequate. Directives to the POP continue to encourage an unlawful level of discretion in their operation.
  - c. Reform of the POP must reflect and embody the basic principles and practice of just and rights-respecting policing in a democratic order, subject to independent oversight. This is an urgent aspect of police reform—and reform of the criminal law—as a whole in Sudan.
  - d. It may be that the history of the public order police and its embedded ideology render it impossible to reform the unit in the context of the need for a complete re-orientation of the basic principles of criminal law and law enforcement in Sudan to accord with constitutional requirements. Abolition of the POP may be the only way forward to recreate a bond of trust between the state, the police force as a whole, and the community.
- 5) Abolish penalties which violate the protections against torture in the African Charter:
- a. The penalties of lashing and of stoning must be immediately removed from the penal framework.
- 6) Take measures to promote and encourage the engagement of women in the public sphere and redress the discrimination suffered by women.
- a. The Sudanese Interim National Constitution provides that the State “shall protect motherhood and women from injustice, promote gender equality and the role of women in family, and empower them in public life” (article 15 (2)). It also commits the State to “promote woman rights through affirmative action” (article 32 (2)). Article 25 of the Charter further obliges States to promote and ensure respect for rights and freedoms through “teaching, education and publication”.
  - b. The public order regime expresses and affirms a view of women as having a fundamentally different role in personal, social and public life than men, with a consequent impact on women’s access to the equal protection of the laws. Reform of the POR must be accompanied by reform of those other realms of Sudanese law and policy which are infused with this conception, from labour law to the law regulating personal and family relations. All national legislation and policy must respect and reflect women’s human rights and the role and potential of women to contribute to national development.
  - c. National budgets must reflect the need to specifically alleviate poverty among women.
  - d. Those aspects of the national education curriculum which undermine women as equal in dignity and capacity, and which deny their participation and contribution to community, social and public life, must be removed.
  - e. New policies and laws must support more effective access by women to the national justice system, in a way which maintains their respect and dignity.

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<sup>104</sup> See Consideration of reports submitted by States Parties under Article 40 of the Covenant, Third periodic report of states parties due in 2001, Sudan, CCPR/C/SDN/3, 10<sup>th</sup> January 2007, at paragraph 30.

- f. Training of law enforcement officers and the judiciary must promote a positive culture and orientation which emphasises respect for the rights and dignity of Sudanese women and girls.
- g. A national dialogue on the role of women in Sudanese society should be opened.

**Recommendations to the African Commission on Human and Peoples' Rights:**

In order to assist Sudan and the Sudanese people in achieving the full enjoyment by women and girls in Sudan of the rights protected in the African Charter, SIHA urges the African Commission to:

- 1) Take into account this submission on the impact of the POR on the rights of women and girls in Sudan in its:
  - a. consideration and preparation of observations in the context of its recent promotional mission to Sudan; and
  - b. consideration of the situation of human rights in Sudan during the examination of state reports in the next reporting cycle.
- 2) Request the Special Rapporteur on the Rights of Women in Africa, in line with Article 45 (1) b of the African Charter, and in furtherance of her mandate under Resolution ACHPR/rs.38 (XXV) 99, to:
  - a. call attention to the impact of the POR in Sudan on the human rights of women and girls; and
  - b. engage with the Government of Sudan to offer assistance in the development of law reform proposals which will ensure more effective promotion and protection of the rights of women and girls in Sudan, particularly with respect to the POR.
- 3) Recall Sudan's obligation to implement the recommendations of the African Commission with respect to reform of the criminal law and enforcement mechanisms in Sudan, including those specifically relating to the operation of the POR which were concluded in the Communication *Curtis Francis Doebbler v. Sudan*.

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