



FACULTY OF LAW
University of Lund

Matilda Arvidsson

Ijtihad
Reformation of Islamic law in the 21st
century.
The case of the Sudan

Master thesis
20 points

Aleksander Peczenik
Moulana Dafalla El-Hag Yousif

Comparative Religious Law/ Philosophy of Law

Autumn 2002



In the name of God, the merciful, the compassionate.

Contents

I INTRODUCTION	5
1 Introduction	6
1.1 Aim of the study	6
1.2 Problems and questions	6
1.3 Hypothesis	6
1.4 Why ijtiḥad is an interesting subject to study	7
1.5 Scopes and delimitations	8
1.6 Theoretical and methodological framework	10
1.6.1 Theoretical position	10
1.6.2 Methodological framework	10
1.7 Disposition	11
1.8 Material	13
1.8.1 The respondents	13
1.9 Definitions of some key words and concepts	14
1.9.1 Important definitions within the Islamic context	14
1.9.2 Reformation of Islamic law	15
1.9.3 Human rights	16
1.10 Language and standards of transcription	17
1.11 Placing this study in a context	17
1.11.1 Studies on Islamic Law in the Sudan	17
1.11.2 Studies on Ijtiḥad	19
2 Methodology	21
2.1 Case study methodology	21
2.2 Interview methodology	22
3 A theoretical tool for analysis of contemporary ijtiḥad	23
3.1 Semantics	23
3.1.1 Traditionalist position on semantics	23
3.1.2 Modernist position on semantics	24
3.1.3 Postmodernist position on semantics	24
3.2 Ontology	25
3.2.1 Traditionalist position on ontology	25
3.2.2 Modernist position on ontology	25
3.2.3 Postmodernist position on ontology	25
3.3 Epistemology	25
3.3.1 Traditionalist position on epistemology	26
3.3.2 Modernist position on epistemology	26
3.3.3 Postmodernist position on epistemology	26
3.4 Taxonomy of contemporary philosophical positions on ijtiḥad	27

4	Historical introduction to the subject of ijtiḥād	28
4.1	Defining the historical meaning and purpose of ijtiḥād	28
4.2	Ijtiḥād during the 8 th century C.E.	30
4.3	Ijtiḥād during the 9 th century C.E - The closure of the gates of ijtiḥād	31
II THE FIELD STUDY		33
5	Introduction to the Sudan	34
5.1	The Sudan	35
5.2	Islam, Islamic law and ijtiḥād in the Sudan	36
5.2.1	7 th to 17 th century	36
5.2.2	The Turkiyya 1820-1884	37
5.2.3	The Mahdiyya 1884-1898	38
5.2.4	Islamic law under British colonial rule 1898-1956	39
5.2.5	Independence and Islamisation 1956-1968	40
5.2.6	Numairi 1969-1985	41
5.2.7	The democratic period 1986-1989	44
5.2.8	National Islamic Front 1989-	45
6	The field study	51
6.1	Background on the respondents	51
6.1.1	The major categories	51
6.1.2	Age and gender	52
6.1.3	Education	54
6.2	Definitions on ijtiḥād	59
6.2.1	Islamic law as continually fixed in a changing world	60
6.2.2	Islamic law as continually changing in a changing world	61
6.3	The limits of ijtiḥād	62
6.3.1	No limits	62
6.3.2	Few limits	63
6.3.3	Comprehensive limits	64
6.3.4	The crucial argument deciding the limits of ijtiḥād	66
6.4	Requirements and qualifications for to exercise ijtiḥād	67
6.4.1	Traditional requirements and qualifications	67
6.4.2	Requirements and qualifications in the contemporary Sudan	69
6.5	Levels of ijtiḥād and the requirements and qualifications for exercising ijtiḥād on those levels	75
6.5.1	The levels and sublevels	76
6.5.2	Personal ijtiḥād	76
6.5.3	Ijtiḥād for the purpose of others	76
6.6	Human rights and ijtiḥād	81
6.6.1	The levels and sublevels	81
6.6.2	Human rights can be implemented through ijtiḥād	81
6.6.3	Human rights can not be implemented through ijtiḥād	83

III ANALYSIS	87
7 Analysis and conclusions	88
7.1 Levels of issues and arguments	88
7.2 Positions represented in contemporary Sudan	89
7.2.1 The traditionalists	89
7.2.2 The modernists	92
7.2.3 The postmodernists	94
7.3 The general philosophical position in contemporary Sudan	96
7.4 Conclusions	97
8 Discussion and further research	99
8.1 The purpose of ijtiḥād in the contemporary world	99
8.2 Law and Religion	100
8.3 The link between knowledge and education	102
8.4 Further research	102
8.4.1 The subject to study	102
8.4.2 Refining the theoretical and metodological tools	102
8.4.3 Developing the hypothesis into a theory	103
Arabic – English glossary	105
Tables	107
Table 1 Different forms of interview structures	107
Table 2 Sudanese population growth 1956-2001	108
Table 3 Definitions on ijtiḥād	109
Table 4 Requirement and qualifications of the mujtahid	110
Table 5 General philosophical positions of the respondents	111
Map of the Sudan	112
Interview questions	113
Version 1	113
Version 2	114
Bibliography	116
Laws, draft laws, and Ordinances	116
Agreements and Protocols	116
UN Documents	117
Literature and Articles	117
Webpages	123

Summary

In the study I monitor contemporary philosophical positions on *ijtihad*, reformation of Islamic law, in the Sudan. The hypothesis for the study is that such different semantics, ontologies and epistemologies are used intentionally or unintentionally in some, if not all, cases as meta-sources in contemporary *ijtihad*, that one must consider talking about different Islamic jurisprudences, and Islamic laws within different Islams. In other words—by the use of *ijtihad* there are emerging divergent Islamic jurisprudences, and Islamic laws. They are emerging because different philosophies find their way into Islam by the contemporary use of *ijtihad*. The hypothesis is supported by the findings of the field study in the Sudan; hence the findings of the study are the fundament on which to further develop a theory.

Key words: *ijtihad, reformation of law, Islamic law, the Sudan*

Preface

A special thanks to the following institutions and individuals without whom the study would not have been possible:

The respondents:

Dr AbdelRahim Ali Mohammad Ibrahim, Director of Khartoum International Institute for Arabic Language, Khartoum, the Sudan, *Professor Moulana Dafalla El-Hag Yousif*, University of Juba, Advocate, and Former Minister of Justice, Khartoum, the Sudan, *Dr Homayoun Alizadeh*, International Human Rights Advisor, United Nations High Commissioner of Human Rights (UNHCHR), Khartoum, the Sudan, *Dr Hasanat Awad Satti*, Dean of the Department of Female Students, International African University of Khartoum, Khartoum, the Sudan, *El Waleed Mohammed El Bashir*, Program Manager, Save the Children, Khartoum, the Sudan, *Moulana Mohammed Siddig* Advocate, and Director for the Governmental Institute for Legal Reform, Department of Woman's and Children's Rights, Khartoum, the Sudan, *Samia Ahmed*, volunteer at SECS (Sudanese Environment Conservation Society), Khartoum, the Sudan, *Dr Umsalama Mohammed Salih*, Director of Islamic Department, Faculty of Arts, University of Khartoum, Khartoum, the Sudan, *Professor Hafiz ElSheikh ElZaki*, Former Chief Justice of the Sudan, Professor of Law, Faculty of Law, University of Khartoum, Khartoum, the Sudan, *Amir Abdallah*, Advocate, Human Rights Activist, Lecturer of Human Rights, Faculty of Law, University of Khartoum, Khartoum, the Sudan, *Dr Belqis Bedri*, Dean of the Department of Gender Studies, Afad University for Women, Omdurman, the Sudan, *Professor Mohamed Osman Salih*, Vice President of Omdurman Islamic University, board member of the Ulama Council of the Sudan, Omdurman, the Sudan, *Abdel Khalig Mohammed Abdel Khalig* Imam of Al Ansar Mosque, Sinnar, the Sudan, *Fathi Khalil Mohammed*, Advocate, President of the Sudan Bar Association, Khartoum, the Sudan, *Huwayda Arabani*, Director for Peace and Development Center, University of Juba, Khartoum, the Sudan, *Dr Seif Mohammed Hussein*, Center for Strategical Studies, Khartoum, the Sudan, *Ilham Tilib*, Law student graduate, Khartoum University, Khartoum, the Sudan, *Rifaat Makkawi*, Human Rights Lawyer, PLACE (Peoples' Legal Aid Center), Khartoum, the Sudan, *Dr Ahmed Ali Hamo*, Advocate, lecturer at Nielin University, Khartoum, the Sudan, and those respondents who chose not to have their name published in this thesis.

Financial support:

Sida (The Swedish International Development Cooperation Agency), The Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Lund, Sweden, and The Nordic Africa Institute, Uppsala, Sweden.

Support and assistance in Sweden:

Dr Ann-Sofie Roald, IMER (International Migration and Ethnical Relations), Malmö University College, Malmö, Sweden, *Professor Kjell Åke Modéer*, Faculty of Law, Lund University, Lund, Sweden, *Professor Jan Hjärpe*, Faculty of Theology, University of Lund, Lund, Sweden, and *SJD Nina-Louisa Arold*, Berlin, Germany.

Support and assistance in the field:

Professor Moulana Dafalla El-Hag Yousif, Khartoum, the Sudan, *Dr AbdelRahim Ali Mohammad Ibrahim*, Khartoum, the Sudan, and *Helena Eriksson*, Food and Agricultural Organisation (FAO), United Nations (UN), Khartoum, the Sudan.



*In the field in Sinnar, the Sudan, 2002.
Imam Abdel Khalig Mohammed Abdel Khalig and the author.*

Abbreviations

C.E.	Common Era
CEDAW	Convention on the Elimination on all Forms of Discrimination
DUP	Democratic Unionist Party
FAO	Food and Agricultural Organisation
FGM	Female Genital Mutilation
ICF	Islamic Charter Front
IMER	International Migration and Ethnical Relations
MP	Member of Parliament
NGO	Non Governmental Organisation
NIF	National Islamic Front
NUP	National Umma Party
PLACE	Peoples' Legal Aid Center
PNC	Popular National Congress
RCC	Revolutionary Command Council
SECS	Sudanese Environment Conservation Society
SPLM	Southern People's Liberation Movement
SPLA	Southern People's Liberation Army
TMC	Transitional Military Council
TNA	Transitional National Assembly
UN	United Nations
UNHCHR	United Nations High Commissioner of Human Rights

I

Introduction

1 Introduction

1.1 Aim of the study

I aim to study *ijtihad* as a means of reformation of Islamic law. *Ijtihad* can generally be understood as a methodology and a source of law in Islamic law. The overarching purpose of the study is to find an understanding of how reformation of Islamic law can be done—in general—and how reformation by the use of *ijtihad*—in particular—can be made in the Islamic world today. I aim to monitor contemporary philosophical positions on *ijtihad* in the Republic of the Sudan. By using the example of the Sudan, I will be able to draw specific conclusions on how *ijtihad* is argued as a theoretical concept in an Islamic law country of today, and general conclusions on how *ijtihad* could be used as a method of legal reformation in the Islamic world of today. The unfolding of the ways in which *ijtihad* is used will able me to draw conclusions on how legal sources are used in modern Islamic law, and with them semantic, ontological, and epistemological concepts.

The main focus of the study is reformation of Islamic law. By taking this focus I acknowledge that reformation of Islamic law is possible and is in fact undertaken today. I also acknowledge that change of society is possible through reformation of law.

1.2 Problems and questions

The problem I have chosen for this study is complex in the way that it goes into many fields of problems that can or should be studied from different perspectives. The problem is: Can reformation of a traditional legal system such as Islamic law validly be undertaken where an outside concept, i.e. human rights, from a presumably different ontology, and created within a presumably different epistemology is subject to implementation? If *ijtihad* can be used for reforming Islamic law, what are the limits and the requisites for doing so? Who is qualified to exercise *ijtihad*? What semantics, ontologies and epistemologies are considered valid when exercising *ijtihad*? What semantics are used? Is it possible to crystallize different philosophical positions on the use of *ijtihad*?

1.3 Hypothesis

In my study I acknowledge that the use of *ijtihad* is closely linked with the individual person conducting the knowledge making, or knowledge finding, based on the monitoring of the legal sources. As individuals' changes with

history, so does the individual or personal input made by individuals conducting *ijtihad*. In the Islamic world of today new sources of law are taken into account with new semantics, ontologies and epistemologies as a result of contemporary use of *ijtihad*. It is my hypothesis that such different semantics, ontologies and epistemologies are used intentionally or unintentionally in some, if not all, cases as sources in contemporary *ijtihad*, that one must consider talking about different Islamic jurisprudences, and Islamic laws within different Islams. In other words—there are by the use of *ijtihad* emerging different Islamic jurisprudences, and different Islamic laws with and within the different philosophical positions on the use of *ijtihad*.

1.4 Why *ijtihad* is an interesting subject to study

During my field study I often got the questions “why do you study *ijtihad*”, “It is a complicated matter, not even I as a Muslim understand it” and “what are you going to do with all this knowledge about Islamic law after you finished your thesis?” The questions are relevant for to understand the study.

Why is it interesting to study Islamic law? The argument that Islamic law guides the daily life of millions of people all over the world, alone is enough to justify a study like this one. Moreover, Islam, and Islamic law have especially after the tragedy on the 11th of September in 2001; become the subject of gross misinterpretation in the Western sphere. Accurate knowledge is therefore a product in demand and is greatly needed.

Why then *ijtihad*? During my studies in comparative religious law¹, I have come across no tool of reformation of law as potentially powerful as *ijtihad*. This alone is not justification for a master thesis, but it says something about the singularity of Islam and the uniqueness of *ijtihad*. *Ijtihad* has been a constant matter of debate since early Islam. As will be outlined later in the study, the gates of *ijtihad* closed in the 9th century, starting a fine balance between tradition and reformation. While striving to preserve the fundamental principles and ethics of Islam, *ijtihad* facilitates the transformation of legal application. It also allows for human knowledge to be a source of law in a legal system based on divine revelation. The latter is maybe the most interesting, and also the most complex question about *ijtihad*. As the historical context change, so does human knowledge—and so does

¹ My comparative religious legal studies have so far been concentrated on “the religions of the book”, i.e. Islam, Judaism and Christianity. I have studied Islamic law under the supervision of professor Jan Hjärpe at Lund University in 1999, under the supervision of Dr Vardit Rispler-Chaim and Qadi al-Natour in Jerusalem in 1999, and under the supervision of Moulana Dafalla el-Hag Yousif, in Khartoum in 2002. I have done my Jewish law studies at the Rothberg School, Hebrew University of Jerusalem in 1999 and 2000, mainly under the supervision of Professor Rabbi David Sinclair. My studies on the Laws of Christianity have been on Canon law of the Latin Church, under the supervision of Professor Theodore Davey, CP, at the Newman Institute, Stockholm in 2002.

also the foundation of one of the sources of law in a legal system of eternal divine revelation. How is it philosophically possible to merge human knowledge and divine revelation?

The questions surrounding *ijtihad* are many, and many times I have been told that a non-Muslim, let alone a non-Muslim woman, do not have the intellectual and spiritual goods for to understand its various implications. As an academic I take that kind of reasoning as a product of ignorance. The complexity of a study matter cannot ever be a reason not to search for answers, even though the answers might not be easily won. Moreover certainty on a philosophical question is not an intellectual challenge, and intellectual challenges are in the end what the academic field is all about.

Knowledge about Islamic law, and about *ijtihad*, is a means of understanding the modern world. As the world becomes one global entity, questions that yesterday concerned people only geographically and mentally far away from us, becomes acutely close to our every day life. Hence, the development of “foreign”—speaking in Swedish terms—legal systems becomes a subject matter interesting to study. The latter of questions that I was so often faced by during my field study can easily be answered in the context of a globalised world. Questions of Islamic law do not only concern Muslims any more—if that was ever the case. Reformation of Islamic law in terms of *ijtihad* is a subject matter for any study of law and development. By this study I aspire to facilitate efforts on development of law and legal implementation, especially on issues of women and human rights within Islamic legal contexts. That is how I intend to use the knowledge I have accumulated throughout my studies.

1.5 Scopes and delimitations

In this study my main focus is semantics, epistemology and ontology of Islamic legal reformation. In order to concentrate on the main subject I have chosen not to give any introduction to Islamic law or jurisprudence. For a comprehensive introduction to Islamic law I recommend Noel J. Coulson’s *A History of Islamic Law*². In the study on *ijtihad*—in it self broad—I have chosen to use women and human rights in Islamic law as an example. It does not mean that I limit the applications of the conclusions of this study to be on *ijtihad* on women and human rights. Neither does it mean that I aim to study human rights or gender issues as such. On the operative level human rights and gender issues serve commodificational purposes only. Hence, for more substantive studies on human rights and gender issues in Islamic law I

² Coulson, Noel J, *A History of Islamic Law*, Edinburgh University Press, Edinburgh, 1964.

redirect the reader to Jonas Svensson's *Women's Human Rights and Islam. A Study at Three Attempts at Accommodation*³.

In my case study of *ijtihad* I have chosen to focus on as a theoretical concept. No further justification for that is needed. For to give the respondents material examples as starting points for their arguments, I have chosen to focus on human rights and Islam, and woman and human rights in Islam. Starting with human rights and Islam, the very concept represents a current relevant debate all over the world. Human rights also represent a Western tradition, in the sense that human rights, as I define them in this study, are products of Western thought. There should be no need for further defending this choice of delimitation. But, human rights cover many aspects of life, and some sort of delimitation is necessary in any in depth study dealing with this subject. I have chosen to limit the field study to woman and human rights as a lead to highlight gender problems in general, and gender and Islam in particular. Woman and human rights are also a topic given much consideration in the Sudanese legal and political debate. It therefore is a relevant delimitation for this study.

I call the study a case study on the Sudan, while more accurately it is a case study on the Sudanese capital Khartoum, Omdurman and Bahari. In limiting the study to include philosophical positions on *ijtihad* in Khartoum, Omdurman and Bahari, I have chosen the political, economical, academic and legal center of the Sudan. While it is true that there are many Sudanese discourses left out of the study, the ones included are the ones closest to power and thus those of most importance for further development and reformation of Islamic law within the present legal system.⁴ There is also a practical reason for the delimitation. The Sudan is a vast country impossible to even try to cover in a six weeks study. Thus, what the study lacks in geographical widths, it gains in academic depth.

I focus the study on *ijtihad* in the 21st century. Though an historical introduction to the early history of *ijtihad* is given—this in order to give an understanding of how *ijtihad* emerged as a theoretical concept, and how the gates of *ijtihad* came to be considered closed, I do not aim to give any outline of the debate on *ijtihad* throughout the whole history of Islam.⁵

³ Svensson, Jonas, *Women's Human Rights and Islam. A Study at Three Attempts at Accommodation*, Lund Studies in History of Religions, vol. 12, Almqvist & Wiksell International and Religionshistoriska avdelningen, Lunds Universitet, Lund, 2000.

⁴ This is of course only true from a perspective that acknowledges development as imposed top-down. Even though I do not adhere to such a perspective in general on development as a concept, in the case of development of Islamic law through *ijtihad* within the legal system of a state I consider it to be a correct delimitation.

⁵ Coulson gives a historical outline up until modern time of what he defines as "neo-*ijtihad*". See Coulson, 1964.

1.6 Theoretical and methodological framework

1.6.1 Theoretical position

The theoretical position of this study is based in postcolonial theoretical school.⁶ I pursue a postcolonial position insofar I analyze the world as an answer to the colonial. Taking that postcolonial theoretical position does not mean that I do not have serious objections to postcolonial theories as comprehensive and coherent theories. Therefore, I do not use any specific postcolonial theory, but I rest the linkage between the study and postcolonial theory with concluding that a postcolonial position is helpful in understanding the problem for this study.

The overarching theoretical position in this study is one of critical postmodern theory, the overarching set of theories that postcolonial theory is a branch of. On the operative level I adhere to the realist-empirical school of theory, i.e. in the operationalisation made in this study I rely on empirical observations as a means of creating knowledge.⁷

1.6.2 Methodological framework

In order to accomplish the aim and purpose of the study, I methodologically split the study in two parts: one theoretical and one empirical study. Both parts are conducted using qualitative methodology.⁸

The theoretical part starts with a further outline of the methodological issues. In order to create an understanding of current positions in the Islamic world on the use of *ijtihad*, I introduce the analytical categories, and a taxonomy on current Islamic philosophical positions based mainly on the writings of John

⁶ Although I am not aiming to pursue a specific postcolonial theory, I especially recognize the importance of the following writings: Said, Edward, W., *Orientalism*, Penguin books, Harmondsworth, 1985, and Edward W. Said, *Culture and Imperialism*, Alfred A. Knopf, New York, 1993, Hall, Stuart, "When was 'the Post-Colonial'? Thinking at the Limit" in Chambers, Iain & Curti, Linda (eds), *The Post-Colonial Question. Common Skies, Divided Horizons*, Routledge, London, 1996, Fannon, Frantz, *Black skin. White Masks*, Pluto Press, London, 1986, Bhabha, Homi K., "Foreword: Remembering Fannon. Self, Psyche and the Colonial Condition" in Fannon, 1986, Nandy, Ashis, *The Intimate Enemy. Loss and Recovery of Self under Colonialism*, Oxford University Press, Oxford, 1983, Mudimbe, V. Y., *The Invention of Africa. Gnosis, Philosophy, and Order of Knowledge*, Indiana University Press, Indianapolis, 1988, Appiah, Kwame Anthony, *In my Father's House. Africa in the Philosophy of Culture*, Oxford University Press, Oxford, 1992, and Mohanty, Chandra Talpade, "Under Western Eyes: Feminist Scholarship and Colonial Discourses", in Williams, Patrick & Chrisman, Laura (eds), *Colonial Discourse and Post-Colonial Theory. A Reader*, Prentice Hall/Harvester Wheatsheaf, Hertfordshire, 1993.

⁷ Alvesson, Mats & Sköldbberg, Kaj, *Tolkning och reflektion. Vetenskapsfilosofi och kvalitativ metod*, Studentlitteratur, Lund 1994, p. 65.

⁸ My definition on qualitative research is based on the definitions given in Merriam, Sharon B., *Fallstudien som forskningsmetod*, Studentlitteratur, Lund, 1994, p.32.

L. Esposito. The major categories are traditionalists, modernists and postmodernists.⁹ While many scholars on Islam, on Political Islam, and on Islamic law choose to analyse epistemology only, I analyse semantics, ontology and epistemology. This since a philosophical position does not only depend on epistemological adherence. Thus the analytical categories of traditionalists, modernists, and postmodernists are based on semantic, ontological, and epistemological adherence. The analytical categories and the taxonomy serve as a roadmap for analysis of the empirical study. They also serves as a base for further developing the hypothesis into what can be the framework for a new theory. After methodology and theory is lined out, a brief introduction to the history of *ijtihad* is made.

The empirical study contains a field study on location in Khartoum conducted September - December 2002. I categorize my study as a case study, and I will use it as a “plausible probe” case, using Ecksteins terminology.¹⁰ The “plausible probe” study neither proves nor refutes a theory, but rather provide support for a hypothesis or theory that is yet to be constructed by the researcher. The choice of conducting only one study could seem somewhat risky. Could findings in the case of the Sudan be generalised to be applicable on other countries as well? The case study attempts to locate its findings in its particular historical and cultural milieu, rather than assuming some degree of isolation of events from their surroundings. As a result of that “embeddedness”, the case study can look directly at the sequence of events that produced the outcome rather than just at the outcome. *Ijtihad* is a process that easily can be studied by its outcomes, i.e. norms in laws, *fatwas*—written legal opinions, and judicial decisions. But, since the interest of the study lies within the process of thoughts within the methodology of *ijtihad*, I find it particularly important to situate the outcomes in its context, thus, the case study.

1.7 Disposition

The study contains eight chapters divided into three major parts: “I Introduction”, “II The field study”, and “III Analysis”. The decision to presentation-technical split the study in three parts is made solely for pedagogical reasons. The three different parts have three different functions: to introduce, to present, and to produce.

As such the three parts correspond to the making of a study. The first part is about problem finding, defining the subject, and understanding the theoretical tools and methodologies. The second part is about meeting with the problem

⁹ Esposito, John L., *Islam the straight path*, 2nd edition, Oxford University Press, Oxford, 1991, p. 196 ff.

¹⁰ See Peters, B. Guy, *Comparative Politics. Theory and Methods*, MacMillan Press, London, 1998, p. 142 ff.

and the subject of study, keeping in mind all the theoretical definitions and tools from the first part. The third part is about putting all together, making conclusions on the basis of the theoretical assumptions made earlier and to produce something independent, new, and to a certain degree personalised.

The main objective of the first third of the study is to introduce. While it might seem as rather lengthy part of the study for to be an introduction, it must be kept in mind that many different subjects necessary must be introduced before the material can be presented, the analysis completed and conclusions can be drawn.

The second part of the study starts with an introduction to the Sudan as a society, and to the history of Islam, Islamic law, and *ijtihad* in the Sudan. The introduction is given in order to facilitate the understanding of the field material. It is necessary for the understanding of contemporary positions on *ijtihad*, to know the references of the respondents. These references are found in the historical development of Islam in the Sudan. The reader will also find references to the historical development, in the presentation of the material. The material from the field study is presented in an introduction to the background of the respondents, definitions on *ijtihad*, the limits of *ijtihad*, requirements and qualifications for to exercise *ijtihad*, levels of *ijtihad* and the requirements and qualifications for those, and human rights and *ijtihad*. The material presented in the study is only a selection of topics from the interview material collected during the field study. The material presented in the study is selected on the basis that it is important and necessary for to support the hypothesis. Thus, much material irrelevant to the study has been left out. There is no inner hierarchy in the order in which the topics are presented. The choice of order is made for pedagogical purposes.

While the presentation of the material in the second part of the study contain a continuous analysis, the analysis in the third part of the study takes a broad perspective and define what is found in the material when applying the analytical categories and the taxonomy. The conclusions are conclusions made on the basis of the findings in the material, taken to a generable level. Thus, the academic aim is that it should be possible to take the second part of the study out, replace it by a case study on a different country, and still be able to find the conclusions valid. After the conclusions are drawn, a discussion is held on the purpose of *ijtihad* in the contemporary world, and on issues related to the study and the findings of the study. Here related research areas are discussed. The findings of the study are put into the context of contemporary research on related areas. In the third part the subject of study, and the research tools, i.e. the theory and methodology used in the study are evaluated and refinements are suggested for further research. As the aim of the study is to prove a hypothesis for to develop a theory, suggestions for to further develop the hypothesis and to prove a future theory are made.

1.8 Material

The material used for this study is of two main categories; secondary sources in the form of literature in English and primary sources in the form of documents, literature and interviews in English. The study suffers from my unfortunate lack of sufficient knowledge in Arabic. The choice of material has thus been limited to material available in English. In a few cases, where no English translations of crucial material have been available, I have let translations be made for the purpose of the study. It must be admitted that translations are mere interpretation of the origin, and thus should be regarded as something other than the original. I have therefore chosen not to rely on translations as far as possible. The limitation of language in the material can be seen as problem. However, considering the nature of the problem and the questions of this study, firsthand information in the form of interviews must be regarded as the better choice even if there was also written material to choose from.

1.8.1 *The respondents*

I have conducted 25 interviews with 22 respondents over a time-period stretching from 2002-10-01 to 2002-11-17. The respondents are chosen according to the following criteria: First of all selection of respondents is limited to Muslims only. A few interviews as well as regular conversations have been conducted with non-Muslims in order to get a broader perspective on the situation of *ijtihad* in the Sudan. Those interviews and conversations have not been taken into the research material. I have divided the respondents into the six major categories of *students*, *activists*, *academics*, *professional active jurists*, *traditional religious legal scholars*, and *political ideologists*. These categories are chosen because persons sorting under them all have professional experience in performing *ijtihad*, or have an academic standpoint on *ijtihad*. In short one can say that they in their professional life have had to thoroughly think about what *ijtihad* is or ought to be. This also applies to the students, who have no professional experience, but is going to form the *ijtihad* of tomorrow. The final choice of respondents in the study is made on the basis of their representativity.¹¹ In the selection of respondents I have had the

¹¹ There are many representative persons within the Sudanese legal context that for various reasons have not been included in the study. Most prominent among those is Dr Hassan al-Turabi. He was moved from house arrest to detention during September 2002, and was held there during the whole of my stay in Sudan. Only close family was allowed to see him, as a part of a strategy to isolate al-Turabi from the national and international political arena. Although being backed by influential people, I was not permitted to visit him in detention. Also, due to student demonstrations in October 2002, several of the Khartoum University Faculties closed down, and remained closed throughout my stay in Sudan. Due to the fact that students were held in detention, and due to a common feeling of insecurity and unrest among students at the time, all interviews planned with students did not become a reality. More information on al-Turabi's case,

advise of my supervisors in field, Professor Moulana Dafalla el-Hag Yousif, and Dr AbdelRahim Ali Mohammad Ibrahim.

The respondents are guaranteed confidentiality under the Social Sciences Confidentiality Clause. Therefore, the interviews have been numbered and are referred to in the text as numbers rather than connected to the names of the respondents.

1.9 Definitions of some key words and concepts

1.9.1 Important definitions within the Islamic context

In this study, “Muslim” is used to denote anyone who confessionally belongs to Islam. “Islamic” indicates any phenomena that have to do with Islam, such as Islamic banking or Islamic education. “Islamism” and “Islamists” are expressions of Islamic activism and Islamic activists. The term “Islamism” has also a reformist connotation.

I have chosen not to use the term “fundamentalist” in the study. It is a commonly used term referring to religious activism, often with political implications. The term “fundamentalism” originates in the context of North American Christianity, where it denoted literal interpretation of the Bible.¹² Its Christian origin makes it inappropriate to use in an Islamic context, or as Esposito puts it “too laden with Christian presuppositions and Western stereotypes, as well as implying a monolith threat that does not exist”¹³. Muslims sometimes use the Arabic word *usuli*, literally fundamentalist, and so will I in this study. *Usuli* has in contrast to the English “fundamentalist” a positive connotation. It denotes someone who searches back to the proper legal sources of Islam.¹⁴

Following the example of Esposito, I use “traditionalism” and “reformism” as divergent terms.¹⁵ “Traditionalism” stands for objective and ever-unchangeable semantics, ontology and epistemology. This means that “traditionalist” reasoning looks to history as a continuum. “Islamic traditionalism” should not be confused with “traditional Islam”. The latter is equivalent to Islamic tradition whereas “traditionalism” rather constitutes a

and on the student demonstrations can be found in the *Human Rights Watch World Report 2003*, available online at: <http://www.hrw.org/wr2k3/africa12.html>

¹² See Appleby, R. Scott & Marty, Martin E. (eds), *Fundamentalism Observed*, vol. I, Chicago, 1991.

¹³ Esposito, John L., *The Islamic Threat: Myth or Reality*, New York, 1992, p. 8.

¹⁴ On the use of *usuli*, see Roald, Anne Sofie, *Tarbiya: Education and Politics in Islamic Movements in Jordan and Malaysia*, Lund Studies in History of Religions, vol. 3, Almqvist & Wiksell International, and Religionshistoriska avdelningen, Lunds Universitet, Lund, 2000, p. 5.

¹⁵ See Esposito’s general usage of the terms in Esposito, 1991.

response to modernity in the sense that it presents a critique of modernity.¹⁶ “Reformism” ontologically indicates the possibility to change. Thus, in “reformist” reasoning semantics, ontology and epistemology to various degrees are subjective. Under “Reformism” sort “Islamism”, “modernism” and “postmodernism”. I, as opposed to Esposito, understand Islamism to be a category of modernism.¹⁷ Hence, I refute the stance that Islamism is a traditionalist position, and argue that philosophically—and I argue that this also can be shown by empirical studies—Islamism is a very clear modernist position. “Modernism”, more than anything else, denotes a belief in the human being as being able to change, to improve and to create something new in the world. The rule of reason, science, and economic development has often been defined as the three key words of modernity.¹⁸ Modernism also denotes objective—though sometimes weak—values. “Postmodernism” is the step towards subjectivity in semantics, ontology and epistemology. The definition of traditionalism, modernism, and postmodernism for the purpose of this study will be further developed in the presentation of the analytical categories, and in the taxonomy.

1.9.2 Reformation of Islamic law

In working with this study, I face a problem recognized by many researchers before me: How to write about historical transformations of law without invoking, however unwillingly, an evolutionary narrative implying that changes toward contemporary Western models are progressive?¹⁹ Here the definition of reformation of law plays a key role. Reformation of Islamic law can be undertaken in many different ways, *ijtihad* being one of these. Reformation is not always promoted as change, but rather as continuation or as a “return to the straight path”. Taking a general grasp on the subject, legal reformation must always be based on a legal argument. The legal argument, in turn, must always be based in a theory on sources of law, or on the sources them selves. In Islamic law, *ijtihad* is the methodology whereby legal questions not yet subject to any, or sufficient, or satisfactory legislation in the other sources of law, are solved. *Ijtihad* means valid reformation from within the Islamic law, rather than for example reformation of the legal system by secularisation of Islamic law. As a religiously valid tool for reformation it is

¹⁶ See Dahlén, Ashk, *Deciphering the meaning of revealed law. The Surushian paradigm in Shi'i epistemology*, Acta Universitatis Upsaliensis, Studia Iranica Upsaliensia 5, Uppsala University Library, Uppsala 2001, p.106.

¹⁷ See for example Esposito, John L., “Woman in Islam and Muslim Societies”, in *Islam, Gender and Social Change*, Yazbeck Haddad, Yvonne & Esposito, John L. (eds), Oxford University Press, Oxford, 1998.

¹⁸ See for example Hatem, Mervat F., “Secularist and Islamist Discourses on Modernity in Egypt and the Evolution of the Postcolonial Nation-State”, in Yazbeck Haddad, Yvonne & Esposito, John L. (eds), 1998.

¹⁹ See for example: Mitchell, Timothy, *Colonising Egypt*, Cambridge University Press, New York, 1991, and Starr, June, *Law as Metaphor: From Islamic Courts to the Palace of Justice*, State University of New York Press, Albany, 1992.

far more likely to be accepted and successful in Islamic law countries than any other method of legal reformation.

Besides *ijtihad* there are of course other concepts of change within the Islamic law and within the Islamic movements. Concepts like *islah*, reform, *tajdid*, renewal, and *sahwah*, awakening, are just a few of these new Islamic movements. Even though they all have something to do with reformation of Islam, they are not fully or directly concerned with law as is *ijtihad*.

Reformation of Islamic law as in the process of *ijtihad* must not be understood as the same as choosing among different opinions on law among the different *madhhab*, schools of law. The latter is not a mean of reformation, but a search for different accepted solutions within different traditions of Islamic law.

So, even though it is possible to talk about reformation of Islamic law from many different perspectives, I choose to focus only on *ijtihad*. I therefore use the terms “reformation of law” and “*ijtihad*” interchangeably in the following.

1.9.3 Human rights

What do I mean by human rights? It is important to stress the fact that the expression “human rights” is not always clear and in much depends on the context where it is mentioned. Human rights as a concept is filled with different meaning in different contexts and for different purposes. It has become a word of fashion. “Human rights”, as an expression has, as Jan Hjärpe argues, positive emotive qualities that make it irresistible for Muslim actors on the international arena to reject it without further discussion.²⁰ It must be defined for to understand the different ways it is used in this study.

When trying to define human rights for the purpose of this study, I have defined three different levels of understanding the concept, rather than working through specific treaties or documents.²¹ The first level is ideological. On this level human rights exist independently of factual practice and formal legality. Human rights can also be understood as legal rights, or in other words rights of formal legal recognition. The perspective of this formal level is one of legal positivism. The third level on which one can understand human rights is the factual level, or the practical level. This third perspective focuses on the sociology of human rights. Does the general public respect human rights in practice, and are human rights locally enforced through institutional legal machinery? These are questions important to the factual

²⁰ See Hjärpe, Jan “Some problems in the Meeting between European and Islamic Legal Traditions: Examples from the Human Rights Discussion” in Forsgren, & Pettersson (eds), *Cultural Crossroads in Europe*, The Swedish Council for Planning and Co-ordination of Research (FRN), Stockholm, 1996.

²¹ I here rely on Jonas Svensson’s levelling, see Svensson, 2000.

level of human rights. This study is mainly concerned with the transformation of human rights from the ideological to the factual level. If not explicitly otherwise referred to, the definition of human rights used in the study is the ideological level.

When I use the term “human rights”, without specifically referring to any other definition, I refer to the content of international human rights documents formulated in the context of the UN.²² “Women and human rights” is used to denote both the general principle of non-discrimination on the basis of gender and the rights that are presented as applying specifically to women.²³ I choose to talk about woman and human rights rather than woman’s human rights. By that choice I want to stress the centrality in non-discrimination, and refute the focus on motherhood as a basis for special rights. Not all women are mothers, and such a focus would only reproduce gender stereotypes.²⁴

1.10 Language and standards of transcription

In the study all Arabic terms used are transcribed according to the standards of The Oxford Encyclopaedia of the Modern Islamic World, vol. 1-4, Oxford University Press, edited by John L. Esposito.²⁵ Every first time an Arabic term appear in the text, a translation follows. The translation will then be repeated only if the Arabic term has not been mentioned for long. A glossary containing all Arabic terms used can also be found in the appendix.

1.11 Placing this study in a context

This study extends into the two major academic fields of Law and of Religion. As for law, the study is one of comparative law and of philosophy of law. As for religious studies, it is a study of Islamic legal philosophy.

1.11.1 *Studies on Islamic Law in the Sudan*

Much has been written on Islamic law, though Islamic law in the Sudan has in much been neglected in academic writings. The classical writings on Islamic

²² See a list of relevant UN documents in the bibliography.

²³ See especially: The Declaration on the Elimination of Discrimination against Women of 1967, The Convention on the Elimination on all Forms of Discrimination against Women of 1979, The Declaration on the Elimination of Violence against Women of 1993, and The 1999 Optional Protocol to the Convention on the Elimination on all Forms of Discrimination against Women.

²⁴ See Tomasevski, Katarina, *Women and Human Rights*, Zeed books, London, 1993, pp. ix and 104.

²⁵ Esposito, John L. (ed), *The Oxford Encyclopaedia of the Modern Islamic World*, vol. 1-4, Oxford University Press, 1995.

law in the Sudan are made by Sir James Norman D. Anderson²⁶ in the 50s and 60s. Also worth mentioning as classical writings are orientalist J. Spencer Trimmingham's *Islam in Sudan*²⁷ from 1949, C. d'Olivier Farran's *Matrimonial Laws of the Sudan*²⁸ from 1963, and Yusuf Fadl Hasan's *The Arabs and the Sudan*²⁹ from 1967. Even though these writings might seem a bit out of date, they still serve as a major source of knowledge. This is especially true since much of the modern research on Sudanese Islamic law relies on the findings of these authors.

Legal anthropologist Carolyn Fluehr-Lobban is the dominant more recent researcher to have made in-depth studies on Islamic Law in the Sudan.³⁰ Other important writers on Islamic Law in the Sudan are Natale Olwak Akolawin³¹, Herve Bleuchot³², Sa'd ed-Din Fawzi³³, J. P. Gorman³⁴, J. J. Gow³⁵, G. Gretton³⁶, R. C. Mayal³⁷, M. A. el-Mufti³⁸, Cliff F. Thompson³⁹,

²⁶ These classical writings includes "Recent developments in Shari'a Law in the Sudan", *Sudan Notes and Records*, XXI, 1, 1950, *Islamic Law in Africa*, Frank Cass, London, 1954 (reprinted in 1970), "The Modernization of Islamic Law in the Sudan", *Sudan Law Journal and Reports*, pp. 292-312, 1960, "The Legal Tradition", *Islam in Africa*, Kritzek, & Lewis (eds), Van Nostrand, New York, 1969, "Modernization of Islamic law", *Northern Africa: Islam and Modernization*, Brett, M. (ed), Frank Cass, London, 1973, and *Law Reform in the Muslim World*, The Athlone Press, London, 1976.

²⁷ Trimmingham, Spencer J, *Islam in the Sudan*, Oxford University Press, 1949.

²⁸ Farran, D'Olivier C, *Matrimonial Laws of the Sudan*, Butterworth, London, 1963.

²⁹ Hassan, Yusuf Fadl, *The Arabs and the Sudan*, Edinburgh University Press, Edinburgh, 1967.

³⁰ Her most important writings on Islamic Law in the Sudan are: *An Anthropological Analysis of Homicide in an Afro-Arab State, the Sudan*, unpublished Ph.D. dissertation, Northwestern University, 1973, "An Anthropological Analysis of Homicide in the Afro-Arab Sudan", *Journal of African Law*, vol. 20, pp 20-38, 1976, "Agitation for Change in the Sudan", *Sexual Stratification*, A. Schlegel (ed), Colombia University Press, New York, 1977, "The Political Mobilization of Women in the Arab World", *Women in Contemporary Muslim Societies*, Jane Smith (ed), Bucknell University Press, Lewisburg, 1980, "Shari'a law in the Sudan: history and trends since independence", *Africa Today, special issue commemorating 25 years of Sudanese Independence*, Fluehr-Lobban and R. Lobban (eds), volume 28, pp 64-77, 1981, "Issues in the Shari'a Child Custody Law in the Sudan", *Northeast African Studies*, vol. 4, pp 1-9, 1982, "Judicial Circulars of the Shari'a Courts in the Sudan 1902-1979" (*Mansurat al-Mahakim al-Shari'a fi Sudan*), translated with Hatim Babiker Hillawi, edited with an historical introduction by Carolyn Fluehr-Lobban, *Journal of African Law*, vol. 27, pp 79-140, 1983, *Islamic Law and Society in the Sudan*, Frank Cass, London, 1987, "Islamization of Law in the Sudan", *Legal Studies Forum*, vol. 10, pp 189-204, 1987, and "Toward a Sudanese law appropriate to Majority and Minority Populations", *Law and Anthropology Yearbook*, Vilenna, vol. 4, 1989, and "The Women's Movement in the Sudan and its Impact on Sudanese Law and Politics", *Afad Journal*, vol. 2, nr 1, 1995.

³¹ Akolawin, Natatle Olwak, "Islamic and Customary law in the Sudan", *Sudan in Africa*, Yusuf Fadl Hasan (ed), Sudan Research Unit, Khartoum University Press, pp. 279-301, 1971.

³² Bleuchot, Herve, "Le code penal Islamique Soudanais de 1983", *Revue de la Recherche Juridique Droit Prospectif 1990-92*, pp. 313-337, Marseille, 1990.

³³ Fawzi, Sa'd ed Din, "The Status of Foreigners in the Newly Independent Sudan", *Civilizations*, vol. 7, pp. 343-56, 1957.

³⁴ Gorman, J. P., *The Laws of the Sudan*, Khartoum, 1941.

³⁵ Gow, J. J., "Law and the Sudan", *Sudan Notes and Records*, vol. 33, pp. 299-310, 1952.

³⁶ Gretton, "The Law and the Constitution of the Sudan", *World Today*, vol. 24, no 8, pp 314-23, August 1968.

Gabriel Warburg⁴⁰, Belqis Bedri⁴¹, Abdel Salam Sidhamed⁴², Michel Hoebink⁴³ and Abdullahi Ahmed an-Na'im⁴⁴.

It must be noted that unfortunately little of the literature in English by Sudanese authors on Islamic law in the Sudan has been spread outside the geographical area the literature treat. Noting that, and remembering that the purpose of this enumeration is to give a glimpse of what literature might be available for the reader, only a few Sudanese authors are represented in this chapter though many more can be found within the Sudanese context.

1.11.2 Studies on *Ijtihad*

The academic writings on *ijtihad* must be dealt with as two major categories. There are academic texts dealing with the theoretical concept of *ijtihad* as a subject of study, and there are academic texts in which *ijtihad* is exercised. The latter is a wide-ranging material, while the first is scarce and mostly in Arabic. The material in which *ijtihad* is exercised has to a great extent been left outside the study.

The use of *ijtihad* within modern legal systems is not as far academically explored as the individual use of *ijtihad* made by philosophers, politicians and practitioners.⁴⁵ Even though not explicitly defined as studies on *ijtihad*, works on legal anthropology such as Ziba Mir-Hossaini's *Marriage on Trial. A study of Islamic Family Law*⁴⁶, give a good record of the use of *ijtihad* in particular countries or settings.

Ijtihad as an academic subject of study has been explored by the orientalist. Although some of the studies were conducted as early as in the 30s, they still

³⁷ Mayal, R. C., "Recent Constitutional Developments in the Sudan", *International Affairs*, vol. 28, no 3, pp. 310-321. July 1952.

³⁸ el-Mufti, M. A., *The Evolution of the Judicial System in the Sudan*, Tadamon Press, Khartoum, 1971.

³⁹ Thompson, Cliff F., "The Sources of Law in the New Nations of Africa: A Case Study from Sudan", *Africa and Law*, T. Hutchinson (ed), Madison, WI: University of Wisconsin Press, pp. 133-176, 1976.

⁴⁰ Warburg, Gabriel R., "The Sharia in Sudan: Implementation and Repercussions, 1983-1989", *Middle East Journal*, vol. 4, pp. 624-637, 1990.

⁴¹ Bedris, Belqis, *Women's Consciousness to their Legal Rights in Islamic Family Law*, DSRC occasional paper, Khartoum University Press, 1989.

⁴² Sidhamed, Abdel Salam. *Politics and Islam in Contemporary Sudan*, New York, St Martin's Press 1996.

⁴³ Hoebink, Michel (ed), *Constitutional perspectives on Sudan: proceedings of the IDF Seminar*, CMEIS occasional paper; 62, 2000.

⁴⁴ an-Na'im, Abdullahi Ahmed, "Sudan and the Paradox of Self-Determination", *Harvard International Review*, Spring 1997.

⁴⁵ For example, Jonas Svensson's study on woman's human rights is a study on three scholars use of *ijtihad*. Svensson, 2000.

⁴⁶ Mir-Hosseini, Ziba; *Marriage on Trial. A study of Islamic Family Law*, IB Tauris, New York, 1997.

remains the most quoted references in contemporary writings on Islamic jurisprudence. The classical works by Noel J. Coulson in *A History of Islamic Law*⁴⁷, by Bravmann in *The Spiritual Background of Early Islam*⁴⁸, and by Joseph Schacht in *An Introduction to Islamic Law*⁴⁹, are especially important to mention here. There are few modern theoretical studies on the legal philosophy of *ijtihad*. Worth mentioning in that field are W. B. Hallaq⁵⁰, and Bernard Weiss⁵¹.

⁴⁷ Coulson, 1964.

⁴⁸ Bravmann, M. M., *The Spiritual Background of Early Islam*. Brill, Leiden 1972.

⁴⁹ Schacht, Joseph, *An Introduction to Islamic Law*⁴⁹, Clarendon Press, Oxford 1964.

⁵⁰ Hallaq, Wael B., "Ijtihad", *The Oxford Encyclopaedia of the Modern Islamic World*, vol. 2, 1995, and *A History of Islamic Legal Theories: An Introduction to Sunni Usul al-Fiqh*, Cambridge University Press, Cambridge, 1997.

⁵¹ Weiss, Bernard, "Interpretation in Islamic Law: The Theory of Ijtihad", *American Journal of Comparative Law*, vol. 26:2, pp. 199-212, 1978, and *The spirit of Islamic Law*, University of Georgia Press, London, 1998.

2 Methodology

2.1 Case study methodology

Case studies are by far the most common method of conducting comparative studies. The idea of applying a theory to a country or a legal case is pleasing, even more so if the case study includes field research where the researcher can claim to have some sort of first hand knowledge. The practical example provides the researcher with a valuable pedagogical tool. But, case studies are problematic in the sense that the cases represent them selves, and general conclusions drawn from even a large number of cases might be misleading. Some attention should therefore be given as to how best fit a single case study into more general analysis, and to some theoretical concerns. A single case study, if properly constructed and researched can be used to expand the analytic knowledge of law. When aggregating the results of single case studies, coherent theoretical arguments can be made for a theory. *One* single case study can seldom produce the whole theoretical argument for a theory, but can produce theoretical arguments in support of a theory.

In legal studies, case studies are undertaken first and foremost within the scope of Comparative Law. The most common starting point in Comparative Law case studies is a “mother system” or a “parent legal family”.⁵² A *tertium comparationis* is then established, choosing between legislative comparison such as norms, institutions, and acts of legislation, and problem comparison. Case study methodology is however not a very precise tool as currently used in Comparative Law, why further definitions and refinements has been made for the purpose of this study. The case study methodology used in this study has been developed for and within social sciences, especially political sciences.⁵³ By using case study methodology as it is used in social sciences in general, I mean to further develop case study methodology specifically for Comparative Law.

I have chosen to study how *ijtihad*; a theoretical concept, a source of law, a methodology used for reformation of law, is argued within a national setting. From what I find in that specific setting, I aim to generalise how reformation can be done in other national and international settings of Islamic law. Hence, the “mother system” is Islamic law, and the *tertium comparationis* is *ijtihad*. The choice of the case for the study becomes crucial. I have chosen the Sudan for my field study as a “possible probe” case. There are many

⁵² See de Cruz, Peter, *Comparative Law in a Changing World*, Cavendish Publishing, London, 1999, p. 26-28.

⁵³ See Peters, 1998.

reasons why the Sudan can serve as a “possible probe” case. The Sudan matches the basic musts of an investigation of the use of *ijtihad* for the purpose of reformation of Islamic law. Firstly, the Sudan is an Islamic law country.⁵⁴ Secondly, it has an interesting and sometimes tumultuous history of legal reformation. It has during the last fifty years gone through a shift from colonial law to Islamisation of postcolonial law, and reformation of Islamic law. The Sudan has fostered many jurist scholars and reformists of different philosophical positions. The recent governments in the Sudan represent not only different positions on reformation of Islamic law, but also answers to the different Sudanese discourses. Thirdly, not much research has been done on the Sudan. The research available on the Sudan does neither fully cover reformation of law, nor does it cover the use of *ijtihad* from a theoretical perspective. The choice of the Sudan as an object of study is thus threefold.

2.2 Interview methodology

Since the material in this study is mainly interviews, a methodology for those must be set out. There are basically four different levels of structure in interview methodology. These four levels are the open, the directed open, the semi structured and the structured level.⁵⁵ For the purpose of this study I use the open *and* the directed open interview structure.⁵⁶ The problem studied here is about quality and meaning, something making an open structure more suitable than an open directed. However, the open structure allows the respondent to decide what concept to discuss, while this study is interested in a rather specific concept. The directed open structure allows the respondent to discuss in depth the qualities and meaning of concept, such as the interviewer has defined it. The more structured interview methodologies, i.e. the semi structured and the structured, focus on the quantitative analysis, something that is not interesting in this study.

Methodologically wise I have started by letting respondents define the concepts in open methodology interviews. After ten interviews I have made a pilot analysis, and based on the pilot analysis I have been working with a set model with predefined concepts in the rest of the interviews. In a few cases complementary interviews have been made with the first ten respondents.

⁵⁴ One of the two, Iran being the other.

⁵⁵ See table 1.

⁵⁶ See Lantz, Annika, *Intervjuteknik*, Studentlitteratur, Lund, 1993, p.21.

3 A theoretical tool for analysis of contemporary *ijtihad*

In order to reach an understanding of how *ijtihad* is used or reasoned about, I will here give the analytical categories, and a taxonomy of philosophical positions on *ijtihad*. The three philosophical positions presented here are the traditionalist, modernist and postmodernist positions. For each position a semantic, ontology and epistemology is lined out. If not otherwise mentioned, I rely on the definitions made in Ashk Dahlén's *Deciphering the meaning of revealed law. The Surushian paradigm in Shi'i epistemology*.⁵⁷ Since the presentation of the analytical categories is of a highly introductory character, and much of the knowledge must be characterised as common goods of knowledge, I have chosen not to refer to the contemporary debate on the definitions of traditionalism, modernism and postmodernism. For an overview of that debate I redirect the reader to Dahlén⁵⁸.

3.1 Semantics

Semantics can be defined as the study of meaning in language. Language and words can be seen as means of transporting meaning from one human mind to another. Thus language, or text, and meaning must be separated in the analysis of semantics.

3.1.1 Traditionalist position on semantics

In traditionalist Islamic thought there is an objectively true semantic meaning. This gives that meaning exist independently from the human mind. The texts, the Qur'an and the sunna, are bearers of meaning, since God gave the meaning to the words. The Qur'an is seen as eternal and an attribute of God's essence. It is, as is stated in sura 9:6 *kalam Allah*, divine speech. Within the traditionalist philosophical setting, traditional legal terminology shall be interpreted according to tradition. The tradition in question is the tradition of the *ijma*, the consensus, of the learned jurists in the different schools of law. It is consequently not possible to apply traditional terminology to modern legal solutions. New legal problems of the modern world can be expressed semantically only within limits in traditionalist semantics.

⁵⁷ Dahlén, 2002.

⁵⁸ Ibid.

3.1.2 Modernist position on semantics

In the view of the Islamic modernist, there is an objective true semantic meaning, but the meaning always has elements of subjectivity. This means that there is interdependency between the human mind and the meaning of the texts, the Qur'an and the sunna. The meaning of the texts, placed there by God, exist independent of the human mind, but meaning is also partly created within the human mind when she receive the text. Though, it is not the mind that is the bearer of meaning, but the texts. In the modernist philosophical position on semantics, traditional legal terminology is given new meaning. This happens when traditional Islamic legal concepts, rules and principles are applied in new legal settings. Transfer of meaning, carried by the traditional terminology, solves the new legal problems that arise within a modern world.

3.1.3 Postmodernist position on semantics

There is no objective semantic meaning within the Islamic postmodernist philosophical position. Semantics is on the contrary subjective; it is the human mind that fills the text with different meanings. The texts are quiet, i.e. they have no answers to what "is" and what "ought to be". Traditional legal terminology is given new semantic meaning. This is a consequence of application of traditional Islamic terminology in a postmodern world with its postmodern legal problems.

A postmodern scholar on Islam once gave the following exercise to his students: "Listen to the Qur'an and tell me what it says". The students became a bit uneasy because this was the first day of a new course, and besides - who could tell in a few words what the Qur'an has to say? "Well", said the scholar, "take the Qur'an and place it to your ears". The students did, feeling by now very uncomfortable. "Tell me now, what do you hear?" said the scholar. The students started to mumble amongst them selves trying to figure out what the scholar wanted them to say. None could come up with a reasonable answer. "The Qur'an is silent," said the scholar, "because it is a text. It is us who are talking about the meaning of the Qur'an, but the Qur'an itself is quiet".⁵⁹ Where the traditionalist says, "listen to the Qur'an", the modernist say, "listen to the meaning of the Qur'an", and the postmodernist say "what do you say about the Qur'an". It is an illustrative example on how semantics is understood in general in the Islamic world, and in particular in postmodern thoughts.

⁵⁹ Professor of Islamology Jan Hjärpe, introductory lecture on Islamic law, Faculty of Theology, Lund University, spring 1999.

3.2 Ontology

Ontology can be defined as metaphysics, i.e. theories that deal with the nature of being. In other words, it the answer to the question: of what does the world exists, or ought to exist?

3.2.1 Traditionalist position on ontology

In traditionalist Islamic philosophy there is a strongly objectivistic ontology. It means that there is an objective true answer to what “is” and what “ought to be”. A static view of the world gives that new legal problems are acknowledged only within limits, since the law must not approach what does not objectively exist. Differences in interpretations of what “is” and what “ought to be” is evaluated from a normative perspective, so that some interpretations are considered to be more objectively true than other interpretations.

3.2.2 Modernist position on ontology

The Islamic modernists analyse the world with an objectivistic ontology. There are objective truths. Differences in interpretations of what “is” and what “ought to be” is firstly evaluated form a normative perspective and secondly from empirics using modern natural and social sciences. This means that the Islamic modernists have a rather weak objectivistic ontology. “What is” or “what ought to be” can sometimes be subject for revision, empiric proof being the tool.

3.2.3 Postmodernist position on ontology

Postmodern Islamic ontology is subjectivist. It means that all human knowledge is hypothetical and that there can be no objective true statement of “what is” and “what ought to be”. The question of what “is” and what “ought to be” can have only hypothetical answers. Differences in interpretations of what “is” and what “ought to be” is evaluated from empirics using postmodernist theoretical tools of natural and social sciences. Normative evaluations become pointless within the postmodernist position on ontology.

3.3 Epistemology

Epistemology can be defined as the branch of philosophy that studies the nature and theory of knowledge, or in other words the answer to the question: what is knowledge and what is not, and how—if at all possible—do we gain knowledge?

3.3.1 Traditionalist position on epistemology

The Islamic traditionalist philosophical position on epistemology is strongly objectivistic. It is God only who gives knowledge. What is not revealed by God cannot be subject of human knowledge. Thus, God reveals the meaning of the texts, the Qur'an and the sunna, to the human mind, i.e. God reveals what is already there in the texts. Any attempts by humans to create knowledge about the texts will not result in true knowledge, but will rest at mere speculation or opinion. Traditionalist epistemology is pre-modern in the sense that it embraces conservation of an ontological position preceding modernism.

3.3.2 Modernist position on epistemology

The Islamic modernists hold a weak objectivistic epistemology with elements of subjectivity. Knowledge about "is" and "ought to be" is possible through the study of history. So, by contextualising, knowledge about the meaning of the texts, the Qur'an and the sunna, can be reached by the human mind. In order to reach knowledge one must have an understanding of the historical context. God reveals knowledge about the true meaning, and the human create knowledge on how to apply the meaning by deducing from historical experience. Modernist epistemology is post-traditional, or even anti-traditional, in the sense that it wants to leave the old paradigm behind, and accommodate religion to scientific structures of modernity.

3.3.3 Postmodernist position on epistemology

The Islamic postmodernist philosophical position on epistemology is strongly subjectivist with relativistic elements. It is not possible to gain knowledge about what objectively "is" or what "ought to be", rather any attempts to create objective knowledge is a mirror of the mind—it says more about the mind than about "what is" or what "ought to be". Islamic postmodernist epistemology is deconstructive and contextualising. It is the continuation of and away from modernist epistemology. No true knowledge can be produced, but all knowledge is seen as hypothetical or speculative.

3.4 Taxonomy of contemporary philosophical positions on jihad

	Traditionalists	Modernists	Postmodernists
Semantics	There is an objectively true semantic meaning. The texts (the Qur'an and the sunna) are bearers of meaning, since God gave the meaning to the words. Traditional legal terminology shall be interpreted according to tradition. New legal problems can be expressed semantically within limits.	There is an objective true semantic meaning, but with elements of subjectivity. The texts are bearers of meaning. Traditional legal terminology is given new meaning.	There is no objective semantic meaning. The texts are quiet, i.e. they have no answers to what "is" and what "ought to be". Traditional legal terminology is given new semantic meaning.
Ontology	Strongly objectivistic ontology. A static view of the world gives that new legal problems are acknowledged only within limits. Differences in interpretations of what "is" and what "ought to be", is evaluated from a normative perspective.	Objectivistic ontology. Differences in interpretations of what "is" and what "ought to be" is firstly evaluated form a normative perspective and secondly from empirics.	Subjectivist ontology. All human knowledge is hypothetical, therefore the question of what "is and what "ought to be" can have only hypothetical answers. Differences in interpretations of what "is" and what "ought to be" is evaluated from empirics.
Epistemology	Strong objectivistic epistemology. God only can give knowledge. What is not revealed by God cannot be subject of human knowledge.	Weak objectivistic epistemology with elements of subjectivity. Knowledge about "is" and "ought to be" is possible through the study of history. In order to reach knowledge one must have an understanding of the historical context.	Strong subjectivist epistemology with relativistic elements. It is not possible to gain knowledge about what "is" and what "ought to be".

Source: Dahlén, 2001.

4 Historical introduction to the subject of *ijtihad*

In understanding the historical theoretical concept of *ijtihad* one has to place the different definitions in specific time periods. Beginning with the very basics, one must differ between the general usage of the term in the Arabic language and the specific-contextual usage of *ijtihad* in jurisprudence. Linguistically *ijtihad* is derived from the lexical root “j-h-d”, the same root as *jihad*, holy war. In general usage, the word *ijtihad* denotes the uttermost effort, physical or mental, expended in a particular activity.⁶⁰ In the technical *legal* context, there are more specific and debated denotations.

4.1 Defining the historical meaning and purpose of *ijihad*

The original and most narrow meaning of *ijtihad* dates from the Medina period, where the use of *ijtihad* is recorded in the *hadiths*, the sayings of the Prophet.⁶¹ Popularly the use of *ijtihad* is derived from the *hadith* of Mu’adh Ibn Jabal, who were appointed by the Prophet as a judge for to go to Yemen. On the eve of his departure to his new office, the Prophet asked him:

“According to what shalt thou judge?” He replied “According to the Book of God.” “And if thou findest nought therein?” “According to the Sunnah of the Prophet of God.” “And if thou findest nought therein?” “Then I will exert myself to form my own judgement.” And thereupon the Prophet said: “Praise be to God Who has guided the messenger of His Prophet to that which pleases His Prophet.”⁶²

It is the italicised passage in the citation above that has been translated and understood in so many different ways. In Arabic it reads: *Ajtahidu ra’yi wala alu*.⁶³ So, for example, Fryzee has translated the passage as “Then I shall interpret with my reason.”⁶⁴ Ramadan, who is the translator of the *hadith* in the citation above, points out “there can be no ‘exertion’ of ‘own judgement’ without a given scope of free thought and individual opinion.”⁶⁵ But free thought and individual opinion can exist only in absence of any applicable text in the Qur’an or the sunna, and as far as it does not contravene those texts. *Ijtihad* in this understanding does not necessarily have anything to do with the application of law, i.e. the legal application of the Qur’an and the sunna.

Schacht gives the following definition of *ijtihad*:

⁶⁰ Hallaq, 1995, p. 178.

⁶¹ Schacht, 1964, pp. 23.

⁶² The *hadith* is cited in Ramadan, Said, *Islamic Law. Its Scope and Equity*, Macmillan Press, London, 1961, p. 64.

⁶³ Ibid, p. 64.

⁶⁴ Fryzee, Asaf, *Outlines of Muhammadan Law*, 2nd edition, Oxford University Press, London, 1955, p. 12.

⁶⁵ Ramadan, 1961, p. 65.

The ancient Medinese use *ijtihād* not in the general sense of exercising one's own opinion, but in the rather more specialized one of technical estimate, discretion of the expert.⁶⁶

However, Bravmann refutes this more narrow meaning, arguing that the exercise of *ijtihād* must be understood in its context:

We feel hat [sic!] the original meaning of *igtahada* (and *igtihad*) as used in the context of legal decisions (or kindred intellectual activities) is "to exert oneself – by the use of one's intellectual faculties – *in behalf of the Muslim community* (or: *in behalf of Islam*)".⁶⁷

Bravmann's understanding relies on studies of the linguistic use of "*igtahada*"⁶⁸, i.e. *ijtihād*, in the legal context as followed by a complement introduced by *li*, on behalf of. Both Schacht and Bravmann find a strong connection to *ra'y*, personal opinion, and *nazar*, investigation, when defining *ijtihād*. *Ijtihad al-ra'y* is an expression that occurs frequently in the early period of Islam. The expression stands in contrast to *'ilm*, knowledge, in the traditional texts.⁶⁹ When the law was not clear, there could be no knowledge, *'ilm*, about it. Only through engaging in *ijtihād*, the qualified jurist could find what was "present but not yet self-evident"⁷⁰.

Bravmann's study gives that the original meaning of *ijtihād* is the intellectual exercise of investigating and expressing opinion on behalf of the Muslim or Islam: Bravmann's linking of *ijtihād*, not only to the knowledge of scholar engaging in it but also to the scholars solicitude for the Muslims and Islam, gives us a understanding of the complexity of the role of the traditional jurist. The jurists concerns do not only lie in giving a wise and well-articulated opinion, but rather he has to consider the religious context the law is part of.

One must be aware of the very close relation between the jurist, the text and the society. Also, important to note is that during the Medinan period, there were much stronger ethical than juridical emphasis in the religious law. The role of the jurist scholar was to listen to the voice of God in the text, to investigate and to arrive at an opinion, *ra'y*. The epistemological position of the time saw knowledge, *'ilm*, as given by God and not possible to gain by human effort. If the legal text were not clear, it was not possible to gain knowledge about the will of God. Therefore opinion was the closest the jurist scholar could get to the meaning of the law. That personal opinion had little validity if the jurist scholar did not consider what was best for the Muslim people and for Islam as a whole. Arriving at a personal opinion was feasible when the Muslim people was homogeneous, and Islam the religion of a few. But, as the teaching of the Prophet spread and Islam concurred new lands, new and more complex legal problems occurred.

⁶⁶ Schacht, Joseph, *The origins of Muhammadan Jurisprudence*, Clarendon Press, Oxford 1950, p. 116.

⁶⁷ Bravmann, 1972, p. 189.

⁶⁸ *ibid* p. 189.

⁶⁹ Hallaq, 1995, p. 178.

⁷⁰ Weiss, 1978, p. 200.

4.2 Ijtihad during the 8th century CE

In the end of the 7th century the Umayyad period begun. Islam became under the Umayyads an important political power. Coulson comments: “While the Medinan Caliphs had been the servants of the religion the Umayyads were its masters”⁷¹. The political strategy of the Umayyads was to preserve the administrative structure of the conquered lands. It is during this time the *qadi*, a special kind of administrative judge, appear. The *qadi* was the delegate of the local governor, and was often appointed among locals. The *qadi* was to uphold the administrative regulations and to apply the local laws. Each *qadi* was in much free to decide the legal dilemmas presented to him according to his individual opinion, *ra’y*. This led to a great diversity in legal application within the Islamic world. *Ijtihad* became a methodology by which the *qadi* added his personal opinion, *ra’y*, to, rather than deducted his findings from, the sources.⁷² In more modern terms one might say that the interpretation of the *qadi* of the 8th century had a modernistic approach, or at least did not see the text of the Qur’an as a bearer of the whole revelation.

When the Umayyads were overthrown in 750, the Abbasids came to power. The Abbasids religious approach to law was much of a reaction to the pragmatic Umayyad position.⁷³ Under the Abbasids the schools of law developed a common doctrine, *sunna*.⁷⁴ The *sunna* was the firm consensus of *ra’y* of different prominent jurist scholars. The *sunna* also included the tellings and sayings of the life of the Prophet, the *hadiths*.⁷⁵ At this time, there are two major trends necessary to note. First of all as the individual opinion *ra’y* was substituted by *ijma*, consensus—the legal doctrine became more systematic and coherent. Furthermore, the *ra’y* was substituted by *qiyas*, analogical deduction. Secondly, the emphasis on the *sunna* grew strong and developed into a system of legitimacy by references to pious persons.⁷⁶ With this development, the methodology of *ijtihad* became more or less obsolete, or restricted to *istihsan*, preference.⁷⁷

⁷¹ Coulson, 1964, p. 27.

⁷² On the linkage between consensus and *ra’y*, see Glenn, H. Patrick, *Legal Traditions of the World*, Oxford University Press, Oxford, 2000, p. 161.

⁷³ Waines, David, *An Introduction to Islam*, Cambridge University Press, Cambridge 1995, p. 46.

⁷⁴ *Sunna* literally means *path taken or trodden (by the Prophet)*. See Glenn, 2000, p. 161 and further notes.

⁷⁵ The noun *hadith* is derived from the verb *hadatha*—to be new. It is most commonly translated as “tradition”, which does not cover the full meaning of the word. For criticism of translation of “hadith” into “tradition”, see Hodgson, *Venture of Islam*, London, 1974.

⁷⁶ Coulson, 1964, p. 75 ff.

⁷⁷ On the usage of *istihsan*, see Waines, 1995, p. 64 ff.

4.3 *Ijtihad* during the 9th century CE - The closure of the gates of *ijihad*

In the 9th century *ijihad* was disassociated from *ra'y*. The first one to theoretically break away from *ra'y* was Muhammad ibn Idris ash-Shafi'i (d. 821 C.E.), the founder of the ash-Shafi'i school of law.⁷⁸ He adopted *ijihad* as a methodology of legal reasoning, synonymous with *qiyas*, analogical deduction. ash-Shafi'i saw *ijihad* as one of four sources of the law. The others were the Qur'an, the sunna, and *ijma*, consensus. In the Shafi'i legal theory *ijihad* meant *qiyas*, analogical deducting, only and the connotations of *ra'y* thus became dissociated. The four *usul*, sources, enclosed in ash-Shafi'i's legal theory and later on in what is known as the classical theory, one text, one written and one oral tradition, and one methodology on how to arrive upon an answers to legal problems. In practical terms *ijihad* was carried out by the *mujtahid*, the learned jurist scholar, by first seeking a solution to the legal problem in the revealed law of the Qur'an and the sunna.⁷⁹ The findings were, if necessary, by analogical reasoning extended to cover the new case. Analogical deduction could only be made within the limits of *ijma*. *Ijma* became in the classical theory the central doctrine, since it legitimised the application of the revealed law.⁸⁰

The decline of the use of *ijihad* in the late 9th century must be seen as a function of the importance of *ijma*. The consensus of authorities progressively restricted the use of independent judgement until there was a consensus on the closure of the gates of *ijihad*. *Ijtihad* was replaced with the duty of *taqlid*, imitation.⁸¹ The learned jurist became a *muqallid*, an imitator, and the *ijma* could be preserved. Today may Muslims and academic scholars argue that there is a common understanding in the Sunni world that there is a restriction, not to say a prohibition, on the usage of *ijihad*. It has become one of the most debated issues in Islamic law, and not all have arrived at the same opinion.⁸² Some scholars argue there is no *ijihad* after the 9th century, some say there is. While scholars like Coulson define post-9th century *ijihad*, as "neo-*ijihad*", indicating a return to a previous position, *ijihad* in this study is considered as *ijihad* in different philosophical paradigms, and thus referred to as "*ijihad*".⁸³

The closing of the gates of *ijihad* occurs in approximately the same time as the Islamic sciences are declining. The decline of Islamic sciences, such as

⁷⁸ Coulson, 1964, chapter 4, pp. 53-61.

⁷⁹ On the role of the *mujtahid*, see Calder, N., *Studies in Early Muslim Jurisprudence*, Clarendon Press, 1993, p. 164, Hallaq, 1997, pp. 117-23, 144-7, and Weiss, 1998, p. 128.

⁸⁰ On the importance of *ijma*, see Glenn, 2000, p. 173, Schacht, 1950, p. 138, and Calder, 1993, p. 198.

⁸¹ *Taqlid* recalls the Byzantine *florilegium*, the copying of previous forms of texts. On the duty of *taqlid*, see Coulson, 1964, pp. 80-82.

⁸² For a summary of the conflicting views, see Pearl, D. & Menski, W., *Muslim Family Law*, 3^d edition, Sweet & Maxwell, London, 1998, pp.14.

⁸³ See Coulson, 1964, chapter 14.

algebra, algorithms, and mathematics in general, has been the object of enormous speculation. It is hard both to know and to explain why the decline occurred at the time given.⁸⁴

If there are doubts within the Sunni community on the closure of the gates to *ijtihad*, the Shiite position is more clear. The closure of the gates to *ijtihad* has never been agreed upon in the Shiite tradition of Islam.⁸⁵ Since the agents of the Imam are to perform religious and legal exegesis until the hidden 12th Imam returns, there has never been a question of arriving on a final consensus among the learned jurist scholars. This “open ended” position of Shiite tradition has continually allowed for *ijtihad* to be performed.

⁸⁴ See Glenn, 2000, p. 177, and Braudel, F., *A History of Civilisations*, Penguin, New York, 1993, p. 84.

⁸⁵ For an extensive work on *ijtihad* in Shiite tradition, see Dahlén, 2001.

II

The Field Study

5 Introduction to the Sudan

The purpose of this chapter is to give a background to the field research presented in the next chapter. For a full understanding of the field material, the implications of the different responses, definitions and the conclusions drawn from the material, a brief introduction to the Sudanese society and Islamic law in the Sudan is necessary.



The main features of Sudanese geopolitics, ethnic and religious composition, and its major problem—the civil war, are introduced in the first part of this chapter. The second part of the chapter is devoted to the historical development of Islam, Islamic law and reformation of Islamic law. The very introduction of Islam to the Sudan, in the 7th to 17th century is dealt with in order to give an understanding of the traditional Islam of the people. This is an Islam that is still very vivid in contemporary Sudan, and it should be seen as the foundation of the Islamic character in the Sudan. The *Turkiyya*, or the Ottoman rule in 1820-1884, is another important time period in the process of shaping contemporary Sudan. The *Turkiyya* is therefore dealt with in the second part of the chapter. The *Mahdiyya*, the Sudanese Islamic state in 1884-1898, is maybe the single most important time-period for modern, and modernistic, Sudanese national identity building. The *Mahdiyya* is therefore dealt with in some detail. The educate elite who rules contemporary Sudan, grew up under the British colonial rule 1898-1956. An understanding of the conditions of the colonial rule is therefore especially important for the analysis of the material in this study. The last part of the second part of the chapter is dedicated to the modern nation building: independence and islamisation 1956-1968, the time period under president Numairi 1969-1985 with a special reference to the September laws, the democratic period 1986-1989, and the rule under the National Islamic Front 1989 up until today. The modern nation building in The Sudan is absolutely necessary to be at least somewhat familiar with in order to comprehend the context in which the respondents in this study give their responses. The respondents are all part of the nation building that has been, and is still the focus of the postcolonial Sudan. Though, the respondents are often on opposing sides of the debate. The analysis of the respondents answers is based not only on the responses them selves, but also on the context in which they are given, hence the necessity of introducing the historical context.

5.1 The Sudan

The name "the Sudan" comes from the Arabic expression, *bilad es-sudan*, meaning "the land of the blacks".⁸⁶ In medieval Islamic literature it referred to as Africa south of the Sahara. In English and Arabic "the Sudan" is used to refer to a territory south of Egypt, which formed the Anglo-Egyptian Sudan 1899-1955, and to the contemporary Republic of the Sudan.

The Sudan is an extraordinary country in many respects. With an area of 967 500 square miles, it is the largest country in Africa and the Middle East. It measures almost 1 300 miles from north to south, and 1 100 miles from east to west. It borders to Egypt, Libya, Chad, the Central African Republic, Democratic Republic of the Congo, Uganda, Kenya, Ethiopia and Eritrea. The Sudan also has a costal frontier on the Red Sea. The geographical boundaries of the country were in much drawn by the colonial powers, and little adjustments have been made since, though the Sudan has border conflicts with more than one of its neighbouring countries.⁸⁷ The political and economical centre of the Sudan is the Three Towns: Khartoum, Omdurman and Bahari—also called Khartoum North. They meet at the confluence of the White Nile and the Blue Nile. It is in the Three Towns the material for this study is collected.

The Sudan is a vast country and population density varies from region to region. Uninhabited desert areas are plentiful, as well as are people in the densely populated Nile Valley. Population has grown dramatically since independence in 1956 as a result of natural population growth and refugee migration from the neighbouring countries.⁸⁸ The Sudan is considered to have the largest proportion of refugees relative to its total population.⁸⁹ Situated geographically as it is, the Sudan prides itself to be the place where Arab culture meet African culture. This also means that the Sudan is a multicultural society as to religion, ethnicity, languages, and history. Its 597 tribes speak more than 400 different languages and dialects, and practice a variety of religions—Islam, indigenous African beliefs, and Christianity being the largest groups.

The size and ethnical diversity of the Sudan provides a challenge to any government. The history of failure of governance in the Sudan does not only lie in bad politics. The Sudan is currently divided into 26 administrative units, or states. The states have, at least in theory, relative extensive autonomy, where the extent of autonomy is under constant debate. The main debate has,

⁸⁶ Fluehr-Lobban, Carolyn, Lobban, Richard A. Jr. & Voll, John O., *Historical Dictionary of the Sudan*, 2nd edition, The Scarecrow Press, London, 1992, p. Ixxi.

⁸⁷ Ongoing border conflicts are in the moment of writing with Egypt and Kenya.

⁸⁸ See Table 2.

⁸⁹ Fluehr-Lobban, Lobban & Voll, 1992, p. Ixxvi.

as has the 19 years long civil war, been on the relation between the south and the north. The issue of course borders to the question of Islamic governance, and the limits of application of Islamic law in the Sudan. The Addis Ababa Agreement of 1972 gave the south relative autonomy, and ended the first part of the civil war.⁹⁰ The most recent peace agreement, the Machakos Protocol, has settled—at least in theory—the terms of north-south relations.⁹¹ In brief the agreement is on a six-year interim period after which there will be a referendum on self-determination for the south. Meanwhile shari'ah law will be applied in the north, but not in the south.⁹² There is however little hopes that the Machakos Protocol will give peace.⁹³ The civil war in much overshadows all other questions in Sudanese politics. As will become evident in this study, the struggle over power of legislation is an important issue, in much connected to the civil war.

5.2 Islam, Islamic law and jihad in the Sudan

In order to understand contemporary positions on Islamic law in the Sudan, a brief introduction to the history of Islamic law in the Sudan is necessary. The aim of the overview is to give an introduction, why for a comprehensive study for to gain full understanding of the history of Islamic law in the Sudan, I recommend Carolyn Fluehr-Lobban's *Islamic Law and Society in the Sudan*⁹⁴.

As will become evident in this study, Islam and Islamic law in contemporary Sudan have many different roots. The flavor and pace of early Islam is present, not to say deeply rooted in the national identity of the Sudanese people. Where contradictions, clashes and polemic are found within the contemporary Sudanese debate, its roots can be traced through the Sudanese history.

5.2.1 7th to 17th century

Islam came relatively recent to the Sudan. Islam rooted in the Sudan starting in the 7th century C.E. but it wasn't until the 17th century that it became an established religion.⁹⁵ Islam did not come as a result of any conquest, but gradually along the Nile with Muslim traders. While the Sudan's neighbor Egypt was Islamised in the 7th century, the Christianised Nuba kingdoms in the northern Sudan stood as a stronghold against Islamisation. As the Nuba

⁹⁰ The Addis Ababa Agreement of 1972.

⁹¹ The Machakos Protocol of 20 July 2002.

⁹² See Adwok Nyaba, Peter, "State of Disunity", *BBC Focus on Africa*, vol. 13, no 4, October to December 2002, pp. 28-29.

⁹³ See Taban, Alfred, "Nothern Divisions", *BBC Focus on Africa*, vol. 13, no 4, October to December, 2002, p. 30.

⁹⁴ Fluehr-Lobban, 1987.

⁹⁵ Arkell, A. J., *A History of the Sudan. From Earliest Times to 1821*, Greenwood Press, Westport, 1955, p. 186.

kingdoms gradually decayed in the 14th century, so did also Christianity in the region and Islam gradually grew stronger.

The kingdom of Sinnar, situated in the southeastern Sudan, known as the “Black Sultanate”, became the first Muslim state in the Sudan and was the most influential between the sixteenth and nineteenth century.⁹⁶ Muslim influences had started in the 10th century with Muslim traders coming to the then Christian dominated Nuba kingdoms. The resulting Islamisation by assimilation, consolidated by the work of Sufi, Muslim mystic, masters spreading their faith and building communities of followers, peacefully interacted with traditional religious beliefs and practices of the region, such as those of Orthodox Coptic Christianity which prevailed in the northern Sudan for many centuries. Learned and holy men from Egypt and the Arabian Peninsula introduced Islamic theology and jurisprudence—most probably the Maliki doctrines that were to set the way of Islamic practice and law in the Sudan.⁹⁷ Maliki traditions were reinforced by the *Hajj*, pilgrimage to Mecca, pilgrims from West Africa on route via the *darb al-Sudan*, the Sudan Road, to perform their religious duty in Mecca. The pilgrims played for a significant time period an important role in forming the Islamic society in the Sudan. Islamic law had no functions of official enforcement during this time. Shari’ah was, when applied at all, implemented as a part of customary laws and local practices.⁹⁸ Islamic ideology and theology spread with the introduction of *turuq*, religious orders. The most important of these are the Qadiriyya, the Tijaniyya, the Shadiliyya, the Mirghanuyya and the Khatamiyya. The *turuq* still plays a role in contemporary Sudanese religious and political life.

Once established, the influences on early Sudanese Islam came less from Egypt and more from the Arabian Peninsula, with a number of learned scholars from Mecca and Medina. The character of popular Islam in the Sudan is however of West African derivation, due to the continuous flow of pilgrims from west to east.⁹⁹ The division of influences has a great historical importance insofar that it has set the major lines of Islamic thought in the Sudan. Still today, it is possible to divide Sudanese Islamic thoughts into categories of popular Islam of West African origin, and learned traditional Islam of Egyptian origin, as it is still taught in famous Islamic University al-Azhar in Cairo.

5.2.2 *The Turkiyya 1820-1884*

With the forces of Mohammed Ali, which penetrated the Sudan in 1820, the Sudan came to be part of the Ottoman Empire. It is under the Turkiyya in

⁹⁶ Fluehr-Lobban, 1987, p. 23.

⁹⁷ Ibid.

⁹⁸ an-Na’im, 1997, third paragraph.

⁹⁹ Fluehr-Lobban, 1987, p. 29.

this time period that Khartoum becomes a legendary center for a slave trade in violation of the Islamic ban on enslavement of Muslims by fellow Muslims. Although a dark period of time for the Sudanese people, it is during the Ottoman period that the modern state of the Sudan is formed. Colonialisation brought, as in most cases, reformations and modernisation. Most important of the legal reforms is the *Tanzimat* reform¹⁰⁰. The *Tanzimat* allowed for an effective administrative system to develop and introduced the system of Islamic law as a law of personal status. As a result of the *Tanzimat*, still today Islamic law has the status of personal law in most Islamic law countries. Colonialisation also brought the Sudan closer to orthodox Islam, in practice meaning that Sudanese legal scholars got their education from Al-Azhar University in Cairo. Hanafi law was introduced, and paved way for the coexistence of Hanafi and Maliki traditions that still today exist in the Sudan. This coexistence of two schools of law has allowed for pragmatic solutions and legal plurality in the application of Islamic law in the Sudan.

5.2.3 *The Mahdiyya 1884-1898*

The Ottomans had ruled the Sudan through indirect rule, meaning that local tribal sheikhs became the instruments of the occupier. The *туруq* also played an important political role, especially the Khatamiyya who supported Egyptian rule. The Mahdist uprising was as much an uprising against the Ottomans, the Egyptians as against their instrumentalists. The Mahdi, literally the expected one, the Sufi master Mohammed Ahmed from Dongola, became the central figure of Sudanese hopes for self-determination and religious deliverance. The Mahdist rule was a “return to the straight path”, to the rules of shari’ah. From 1884 and onwards shari’ah was the law in force, applied within a Judiciary ruled by a *Qadi al-Qudah*, a Chief Justice.¹⁰¹ However, as much as the Mahdist system was a strict imposition of the Qur’an and the sunna, it was also a personal cult. The Mahdi, and later his successor al-Khalifa Abdullahi, held the supreme judicial office. This meant that legal orthodoxy overrode all four *madhhab*, schools of law. The Mahdi also declared himself as Imam, religious and spiritual leader of the state, although the function of the Imam is not known in the Sunni tradition.¹⁰²

Under the Mahdiyya the jurists educated at Al-Azhar found themselves outside the judiciary, since the Mahdi did not necessarily welcome their legalist approach and their adherence to the Hanafi traditions of the Ottoman former occupier.

¹⁰⁰ The most important of the *Tanzimat* reforms was the Commercial code of 1850, the Penal Code of 1858, the Code of Commercial Procedure of 1861, the Code of Maritime Commerce of 1863 and maybe most important of all—the Basic Law of Obligations, codified between 1869 and 1876, known as the *Mejelle*. See Coulson, 1964, p. 151, ff.

¹⁰¹ Omer, al-Fahal al-Tahir, “The administration of justice during the Mahdiyya”, *Sudan Law Journal Reports*, pp. 167-70, 1964, p. 168.

¹⁰² Fluher-Lobban, 1987, p. 33.

Mahdism emerged from within Sudanese Sufi Islam and spoke its language. The Sufi-orthodox that the Mahdi represented followed the pattern of how Islam was introduced in the Sudan: a spontaneous continuous revivalist process. Mahdism was only one—the most influential though—in a row of Sufi revivals starting with the disciples of Sayyid Ahmad Ibn-Idris al-Fasi (1760-1835), and followed by the Khatamiyya revival in 1818.¹⁰³ Still, the Mahdi did not in general impress the *ulama*, the collective of scholars, of the Sudan. It was the more orthodox *turuq* who supported his message of strict adherence to the original undiluted Islam. The Mahdist legislation aimed to Islamise Sudanese popular traditions and customs contrary to Islamic law, or more correct—contrary to Mahdist interpretation of Islam law. During this period harsh regulations were issued on women's freedom of movement and restrictions relating to the contact between the sexes.¹⁰⁴ The Mahdi was not preaching tolerance, especially not after facing hostility from many *turuq*. There are also scholars who argue that the Mahdiyya enhanced existing divisions in society, leading to a weakened and divided society facing the British invasion in 1896-89.¹⁰⁵

The Mahdist state lasted under al-Khalifa Abdullahi, the successor of the Mahdi Muhammed Ahmed, until the Anglo-Egyptian conquest of the Sudan in 1898 and the establishment of a second colonial system. These fourteen years marked the first introduction of an Islamic state in the Sudan.¹⁰⁶ The followers of the Mahdi, the Ansar, still today play an important political role in the Sudan. Mahdism is in general seen as the first Sudanese national identity, and the Mahdi is referred to in the present-day Sudan as *Abu al-Istiqlal*, the Father of Independence.¹⁰⁷ As the Khatamiyya and the Ansar later organised themselves in political parties, Sudanese politics and legal developments in much relies on the *turuq* and their loyal supporters.

5.2.4 Islamic law under British colonial rule 1898-1956

British colonial rule in practice meant imposition of British administrative systems and legal codes. Islamic law under British colonial rule was in general only recognised through out the colonial world as having jurisdiction in personal matters, i.e. family law. There was no comprehensive approach by the British to this question, and it seems like the question of the status of

¹⁰³ El-Affendi, Abdelwahab, *Turabi's Revolution*, Grey Seal, London, 1991, p. 24.

¹⁰⁴ Holt, P. M., *The Mahdist State in the Sudan*, Clarendon Press, Oxford, 1970, pp. 130-131.

¹⁰⁵ El-Affendi, 1991, p. 25.

¹⁰⁶ The Black Sultanate of Sinnar is not seen as a Sudanese Islamic state as to its geographical boundaries.

¹⁰⁷ Fluehr-Lobban, Carolyn, "Islamization in Sudan. A Critical Assessment", pp. 71-89, in Voll, John, O, *Sudan. State and Society in Crisis*, Indiana University Press, Bloomington and Indianapolis, 1991, p. 75.

Islamic law was dealt with independently in different areas of the empire.¹⁰⁸ In the colonial Sudan the Islamic law system was recognised in the 1902 Mohammedan Law Courts Ordinance.¹⁰⁹ The Ordinance gave legislative power to the Grand Qadi in matters of Islamic law. This unique authorisation would affect the development of Shari'ah in the next 77 years. Hanafi law was to be applied except in matters where the Grand Qadi otherwise directed in a judicial circular or memorandum.¹¹⁰ Hence, as to school of Islamic law, it was a continuum of the legal tradition introduced by the Ottoman coloniser. Between 1902 and 1979, 62 circulars were issued. They were the major tools for reformation of Islamic Law. As the appointed Grand Qadis until 1956 were Egyptians, a close legal relationship between the two countries evolved.

Even though the British in general left Islamic law to the Grand Qadi, there was a considerable pressure for reformation in the areas of child marriages, the requirement for women's obedience in marriage, and in distribution of wealth in inheritance.¹¹¹ As a result, improvements in for example the area of right for women to divorce were made.¹¹² The methodology used by the Grand Qadis was mainly *talfiq*, patching, which means that the Qadis were taking opinions from different schools of law, combining them to form a unique view on a particular subject.¹¹³

5.2.5 *Independence and Islamisation 1956-1968*

British officials maintained a close relation throughout the colonial occupation to the Khatamiyya sect, whose leaders had been closely aligned with the Ottomans and who had opposed the Mahdiyya. Not all were loyal to the foreign presence, though. There was a small group of well educated and well-off urban Sudanese youth that had began raising their voices against the colonial rulers. They were educated at the Gordon Memorial College, established in 1902 with the main objective to create a class that spoke English and could assist the British in the administration of the country. The British had also feared the traditional teachings as a plant house for rebellious thinking.¹¹⁴ It proved to be the other way around. With the words of Abdelwahab El-Affendi: "The return to Islam was thus directly related to the power modern education afforded to the rising generation of Muslims" and "the leaders of the most violent groups [came] from comfortable backgrounds"¹¹⁵. In 1924 the British had suppressed the White Flag League

¹⁰⁸ Andersson, 1969, p. 42.

¹⁰⁹ "The Sudan Mohammedan Law Courts Ordinance, May 1902", *The Laws of the Sudan*, vol. II, Haycock Press, London, 1955.

¹¹⁰ Fluehr-Lobban, 1987, p. 37.

¹¹¹ Ibid.

¹¹² Judicial Circular no. 17 of 1915, and Judicial Circular no. 28 of 1927.

¹¹³ Andersson, 1969, p. 48.

¹¹⁴ El-Affendi, 1991, p. 28.

¹¹⁵ Ibid, p. 18.

uprising, inspired by the Egyptian revolution in 1919.¹¹⁶ The British “policy of pacification” of the south, where southerners were seen as primitive pagans who should not be subject of any Arab or educational influence, did not add any stability of the governance.

In 1956 the Sudan became independent from the British colonial occupation. Only hours before the transitional parliament were going to vote on the question of an Islamic constitution and federalism in 1958, a coup d'état took place where Commander-in-chief Major General Ibrahim Abbud took power.¹¹⁷ Abbud's regime had an Islamic flavour, but nothing like the popular uprising against him in 1964. The Muslim Brotherhood, *al-Ikhwan al-Muslimoon*¹¹⁸, in parliament under the name the Islamic Charter Front (ICF) and later under the name of National Islamic Front (NIF), was still a student organisation at this time. Its ideological leader, Hasan al-Turabi was seen as the hero of the 1964 uprising, and gained popularity among the masses. ICF gained five seats in the democratic elections that took place in 1965 and in 1968. Not only ICF, but also the Umma party (hereafter Umma) under the youthful al-Sadiq al-Mahdi—the grandson of the Mahdi, and the National Unionist Party (NUP) leaned towards an Islamic constitution. In much it was a continuation of the Islamisation and Arabisation of the Sudanese national identity that Abbud had started. The draft constitution of 1968 termed Islam the religion of the state, Arabic the official language and shari'ah as the source of civil and criminal law.¹¹⁹ Instead of entering into force, the constitution was put on a shelf by the Numairi 1969 coup d'état.

5.2.6 Numairi 1969-1985

As a result of independence Sudanisation of laws, including Islamic laws, had begun and Egyptian presence within the judiciary were removed. During the early years of the rule of Jaafar Mohammed Numairi, who ruled between 1969 and 1985, when the government was reformist in character, a number of developments of Islamic law take place. Numairi and his Revolutionary Command Council (RCC) initially identified them selves as secular, socialist, and pan-Arab.¹²⁰ For a time period all other political parties were banned, and the political intelligentsia fled the country. A series of coup attempts took place in 1973, 1975 and 1976. Numairi were forced to change his strategy, now letting other parties than his own operate. Among many things, this lead to al-Turabi becoming attorney general and an important member of the

¹¹⁶ Lesch, Ann Mosely, *The Sudan. Contested National Identities*, Indiana University Press, Bloomington, 1998, p. 30.

¹¹⁷ Ibid, p. 38.

¹¹⁸ The Muslim Brotherhood in Sudan was formed by Sudanese students in Egypt. Since the 40s there were a claim of jurisdiction from the Egyptian Muslim Brotherhood over the Sudanese. However, the Sudanese Muslim Brotherhood has always been independent.

¹¹⁹ Lesch, 1998, p. 42.

¹²⁰ Ibid, p. 45.

committee charged with adapting the legal system of the Sudan to conform to Islamic law.¹²¹

It was under the Numairi regime, in 1973, that the Sudan got its first permanent constitution. It was stated in the constitution that “Islamic law and custom shall be the main sources of legislation; personal matters of non-Muslims shall be governed by their personal laws” (article 9)¹²². As a result of the work of the Sudanese Women’s Union, equal pay for equal work and reforms in *nafaqa*, maintenance, were achieved. More important in practice was the abolition of the enforcement of *bayt eta’a*, obedience to the house. Before the reform, men could have their run-away wives returned to the house by the police on the grounds of a court order. In 1970 Justice Najua Kemal Farida, was appointed as the first female judge in Africa in modern times. Another important reform worth mentioning is the full recognition of the Maliki ground for divorce because of cruelty, *talaq al-darar*, in Circular no. 59 of 1973. Following the retirement of the Grand Qadi at the time in 1979, no new appointment on that post was made, and in 1980 the civil and the shari’ah sections of the Judiciary were united under the Chief Justice. The 1980 reform meant that all judges were to apply both secular and shari’ah law. Many justices left in protest.¹²³

5.2.6.1 *The September laws*

In September 1983 President Numairi announced that from now on the state law was shari’ah. The implementation of the decree commenced immediately. The laws had been drafted in secret¹²⁴, and were partly based on the work of al-Turabi’s committee who had so far drafted seven bills on matters such as prohibition of brewing alcohol, and banning of *riba*, usury. In a way the laws of the 1980 had paved the way for a broader application of Islamic law in the Sudan, but Numairi’s move came as a surprise to all parties. The laws were enacted into the Provisional Republican Orders, the most significant being the Sources of Judicial Decisions Act. A new penal code instituted the *hudud* punishments specified in the shari’ah, and the Code of Criminal Procedure, the Civil Procedure Act, and the Civil Transition Act further facilitated implementation of shari’ah.¹²⁵ In practice this meant lashing for brewing alcohol, limb amputation for theft and hanging for adultery. The *hudud* punishments applied to Muslims and non-Muslims alike. Special courts tried the cases in absence of lawyers and without any means of appeal. The new

¹²¹ The special committee *lajnat muraja’at al-qawaning li’tatamasha ma’a al-sharia*, (for the) revision of the laws so that they are in line with shari’ah, worked under al-Turabi from 1977.

¹²² The 1973 constitution translated by Carolyn Fluehr-Lobban. See Fluehr-Lobban, 1991, p. 81.

¹²³ Fluehr-Lobban, 1987, p. 280.

¹²⁴ The codes were drafted in secret by professor al-Mikashfi Taha al-Khabashi, al-Nayal Abd al-Qadir Abu Gurun, and Awad al-Jiid Muhammad Ahmad. See Lesch, 1998, note 25, p. 243.

¹²⁵ Warburg, Gabriel R., “The *Sharia* in Sudan. Implementation and Repercussions”, pp. 90-107 in Voll, 1991, p. 94.

laws, popularly known as the September laws, created an outcry of protests from both Islamic and other countries. Also from within the country voices were raised. al-Sadiq al-Mahdi was detained after denouncing the September laws and Muhammad Uthman al-Mirghani, the spiritual leader of the Khatamiyya *tariqa*, argued that the new laws perverted Islam.¹²⁶

Many of the new judges appointed to implement the new laws were ICF cadres. ICF was now the only party to support Numairi. In 1984 the banking system was Islamised, and *zakat*, the alimony stipulated in the Qur'an and the sunna, were turned into a government tax. al-Turabi and the ICF celebrated the anniversary of the September laws by organising a million-man-march in Khartoum. Numairi saw it as a threat to his power and accused the ICF cadres of being overzealous in their implementation of the shari'ah. In March 1985 al-Turabi was together with several judges and lawyers arrested and detained.¹²⁷

1985 was also the year when civil engineer Ustaz Mahmoud Muhammad Taha, the theologian of the Republican Brotherhood, was sentenced to death for apostasy. He was executed the same year. The Republican Brotherhood is a pacifist movement that advocates a radical reinterpretation of Islam. The teaching is based on Taha's understanding of the Qur'an as ethical rules laid down in the Mecca suras, and contextual application of those ethical rules as in the Medina suras. Taha's message is then that the suras of Medina do not apply to the modern world, but new rules based on the ethical values of the Mecca suras must be taken for the new situation we live in.¹²⁸ The teaching of Taha has been and still is very influential in the Sudan, as well as in the rest of the world. The execution of the seventy-six years old Taha was something of an awakening for many people, even among those who did not agree with his interpretation of Islam. Within 18 months of what Esposito calls the Sudan's Islamic experiment¹²⁹, massive demonstrations were the countdown to an overthrow of the Numairi rule by an uprising in 1985. A Transitional Military Council (TMC), headed by Jazuli Dafa'allah took power the 6th of April 1985. The very same day al-Turabi was released from prison.

¹²⁶ Lesch, 1998, p. 55.

¹²⁷ Warburg, 1991, p. 101.

¹²⁸ Taha, Mahmoud Mohammed, *The Second Message of Islam*, Syracuse University Press, Syracuse, 1987. See also the writings of his student and follower, Abdullahi Ahmed an-Na'im, in exile since 1989, currently holding a professor chair in Human Rights at the Law and Religion programme, Emory University, Atlanta, USA.

¹²⁹ See Esposito, John L., "Sudan's Islamic experiment", *The Muslim World*, vol. 76, nos. 3-4, 1986.

5.2.7 *The democratic period 1986-1989*

Within two weeks after the uprising, 40 political parties declared they wanted to take part in the upcoming elections.¹³⁰ Elections were held in 1986. The outcome, where the Umma had to rely on Democratic Unionist Party (DUP) for majority in parliament, was a highly unstable government. Islamic law continued to be the issue at stake. al-Sadiq al-Mahdi, who was the prime minister, failed to alter the September laws even though that was one of his political promises.¹³¹ The small modifications done were protested by the National Islamic Front (NIF, previously under the name ICF) as to being secularising, and by the African parties and the Sudanese bar association as not going far enough. Not until 1987 did the government change the September laws in any significant way. Then, the administrative detention was abolished and the maximum number of lashes was set to ten.¹³² A number of big demonstrations, orchestrated by NIF, broke out in Khartoum after these modifications of the application of shari'ah. al-Mahdi's answer was a retreat that satisfied no one. NIF exerted pressure on al-Mahdi to implement shari'ah, with the result being the draft laws of 1988 saying that southerners should be exempted from *hudud* only temporarily.¹³³ Moreover, while a trial under shari'ah law was to be optional Muslims living in the south, all Muslim and non-Muslim alike were to follow shari'ah in the north.

In 1988 al-Mahdi, as a mean of checkmating the DUP, appointed al-Turabi as attorney general and in charge of drafting new laws. The secular and African parties raised great concerns about al-Turabi's mandate, but al-Turabi himself saw that his draft laws might "stir up a controversy, but eventually assembly is likely to endorse them by a large majority"¹³⁴. In his opinion the Sudanese people had longed for Islamic law since Independence. As things had turned DUP now turned against Islamisation, since that had become a tool of out-maneuvring them in the parliament. Eventually DUP resigned from government, and Umma formed a government with NIF. al-Turabi now became foreign minister. Consolidation of Islamic law was once again on the agenda. This meant no compromise on the issue of Islam governing the whole country or not, and an inevitable continuation of the civil war.¹³⁵ The judiciary found them selves taking orders to drop cases against several of Numairi's officials who were charged of misuse of funds and fraud. Law and legal application had become highly politicised.

¹³⁰ Warburg, 1991, p. 100.

¹³¹ al-Madhi had, as been pointed out before in this study, been jailed by Numairi for his opposition to the September Laws. His ambiguous stance when at power thus seems like a sign of political weakness.

¹³² Lesch, 1998, p. 78.

¹³³ Worth noting is that Hassan al-Turabi is al-Sadiq al-Mahdi's brother-in-law.

¹³⁴ al-Turabi, 3 June 1988, cited in Lesch, 1998, p. 80.

¹³⁵ Warburg, 1991, p. 102.

Things would turn once more so that Umma were forced to reorganise and broaden the basis for the government. This resulted in replacing NIF ministers by DUP alike; implementing the peace accord that DUP had negotiated with SPLM (Southern People's Liberation Movement), and revoking the September laws. In June 1989, a committee was given the mission to draft the laws that would have abrogated the remains of the 1983 laws. The initiative never become a reality, instead a military take-over did.

Concluding the democratic period, one of its significances is that it failed to produce a constitution. It might be said that al-Mahdi were more occupied with personal power than with democratisation and reformation of the legal system. What brought down the government was the question over shari'ah.

5.2.8 *National Islamic Front 1989-*

NIF took power in 1989 only minutes before parliament were to vote on freezing shari'ah laws and setting up a committee for to formulate a new constitution.

al-Turabi's ideology, and so also the NIF ideology, is—as they them selves formulate it in their ideological programs—one of democratic values within the Islamic setting, i.e. a modernistic approach to Islamic law. Then, one must ask how people ideologically devoted to democracy could take power through a coup d'état?¹³⁶ Also keeping in mind that NIF at that time had a fairly strong position in parliament, 17 percent of the seats, and most likely would have gained more seats in a new election. The answer lies partly in the international context. At that time there was a fear among the Islamist groups around the world that they would be denied political power gained through democratic elections, as was the case in for example Tunisia. Another explanation might lie in al-Turabi's own words: that he would have preferred a peaceful transformation to an Islamic system of governance, but “If you are blocked completely [-] then through jihad. Just fight it out”.¹³⁷

The takeover meant major changes in the Sudanese society, so also within the judiciary. Up to 80 percent of the judges in office at the time of the 1989 coup lost their positions within the first two years of the new governance. The dismissed judges were replaced by junior, often professionally unqualified, supporters of the NIF.¹³⁸ The political changes within the judiciary lead to massive discontent. For the application of law, it meant a new paradigm where the intellectual and philosophical home of *ijtihad*

¹³⁶ It is now widely recognized that the coup d'état had support from NIF. This has also been confirmed by a member of the inner circle of advisors of al-Turabi in an interview in Khartoum, 2002-10-30.

¹³⁷ Hassan al-Turabi cited in Lesch, 1998, p. 114.

¹³⁸ See an-Na'im, 1997.

radically changed. The judiciary became a battleground of philosophies, expressed by the different camps in the judgements.

For people who feared there were no certain limits to the tumultuous changes, or who did not approve to the changes, al-Turabi had an answer:

All this is only transitional. The Muslims themselves sometimes don't even know how to go about their Islam. They have no recent precedent of an Islamic government.¹³⁹

In 1991 the Sudan were declared an Islamic state, and a new Islamic penal code was implemented. Until 1993 NIF operated behind the RCC, but after that a Transitional National Assembly (TNA) was set up. When elections to the parliament and the presidency were held in 1996, no parties other than NIF were allowed to operate.

5.2.8.1 NIF's Islamic ideology

NIF's Islamic ideology is a comprehensive system, *nizam shamil*, covering all aspects of life. Islamic law is to be the full and only base in a society with one national identity. Under the banner of *amr bi-l-ma'rûf wa-nahw'an al-munkar*, to promote that which is good and prevent that which is bad, a reformation of the whole Sudanese society was about to take place after the 1989 take over.¹⁴⁰ The results by the late 1990s were in Esposito's and Voll's words "extremely controversial".¹⁴¹

Now, this takes us to the definition of *ijtihad* in NIF's ideology, because NIF's ideology is *ijtihad* for the purpose of nation building. Since NIF's ideology in much has been manoeuvred by al-Turabi, it is by understanding his ideology the fundamentals of NIF's ideology can be traced. *Tajdid*, renewal, is the most central idea to al-Turabi.¹⁴² The renewal must, in his view, come in every age, and it is an obligation for all faithful believers to take part in it. Over history there is a constant struggle between *tajdid* and *taqlid*, imitation. In al-Turabi's view *ijtihad* is not about going "to old books to dig out bits and pieces that we hope will help us solve today's problem", but "what we need is to go back to the roots, and create a revolution at the level of the principles."¹⁴³ al-Turabi questions the closure of the gates of *ijtihad* and calls for a new *fiqh*, Islamic jurisprudence. The following is a citation in translation made by Esposito & Voll, from al-Turabi's *Tajdid 'usul al-fiqh al-islami*:

Human knowledge has expanded greatly, while the old fiqh was based on knowledge that was restricted [by the conditions of its historical era]... It

¹³⁹ Hassan al-Turabi cited in The Economist, April 18, 1992.

¹⁴⁰ See al-Turabi, Hassan, *Islam, Democracy, the State and the West*, Lowrie, Arthur L. (ed), WISE, Tampa, 1993, p. 22-24.

¹⁴¹ Esposito, John L., & Voll, John O., *Makers of contemporary Islam*, Oxford University Press, Oxford, 2001, p. 135.

¹⁴² See al-Turabi, Hassan, *Tajdid al-fikr al-Islami*, al-Dahr al-Sa'udiyah, Jiddah, 1987, p. 191, cited in Esposito & Voll, 2001, p. 126.

¹⁴³ al-Turabi cited in el-Affendi, 1991, p. 63.

becomes imperative for us to adopt a new position in the fiqh of Islam so that we can utilize all knowledge for the service of God. This is a new construction which unites what exists in the transmitted traditional disciplines... with the rational sciences which are renewed every day and which are completed by experiment and observation. With that achieved and unified knowledge, we can renew our fiqh for the faith and what challenges it time after time in our contemporary life.¹⁴⁴

al-Turabi had been pursuing his position throughout the political changes, and when NIF finally came to power, the time had come for to implement the new *fiqh*.

Following the modernist formula, traditional Islamic concepts like *ummah*, community of the faithful, and *shura*¹⁴⁵, inner consultation, were adopted and given a new meaning in the modern Sudanese context of NIF rule. Islam, and thus also Islamic law, was not seen as a private matter, but embracing every part of life and of the state. Islamic law accordingly must apply to all Sudanese citizens—Jews and Christians, though not adherents to other religions, given communal legal status and exemptions from some of the *hudud* punishments.¹⁴⁶ Other parts of the shari'ah, such as prohibition of adultery and homosexuality apply, in NIF's ideology, to all, since the prohibitions are implemented in the national law without any possibilities to exemptions.¹⁴⁷ Already in 1987, when the NIF charter had been publicised, this official ideology had been lined out.¹⁴⁸ The 1987 charter recognises Muslims as the majority in the Sudan, and Islamic jurisprudence as the general source of law for the whole nation (part II, article B). The unity of a diverse Sudan is one of the centre points of the charter (part III, article A).¹⁴⁹

NIF did not try to build an Islamic nation on only a modernist Islamic basis. Invoking the Mahdist era, the time period in history that is considered as the emergence of the Sudanese national identity, is an important component to

¹⁴⁴ al-Turabi, Hassan, *Tajdid 'usul al-fiqh al-islami*, Maktabah Dar al-Fikr, Khartoum, 1980, p. 7, cited in Esposito & Voll, 2001, p. 130.

¹⁴⁵ *Shura* in short means a ruler consulting with leading community members on state affairs. In the Qur'an *shura* is mentioned in sura 3:159, and sura 42:38. For a commentary on the usage of *shura* as a principle of governance in a modern nation state, see an-Na'im, Abdullahi Ahmed, *Toward an Islamic Reformation. Civil Liberties, Human Rights, and International Law*, Syracuse University Press, New York, 1991, pp. 78-81.

¹⁴⁶ The communal exemption could for example mean that Christians were allowed to consume alcohol in their homes, as long as it did not become a public annoyance. Also, Jews and Christians were not seen as apostates. See Lesch, 1998, p. 131.

¹⁴⁷ Sudan Criminal Act of 1991, section 145, and 146 on adultery. The punishment for adultery by the offender who is not married is currently 100 lashes. Sudan Criminal Act of 1991, section 148 on homosexuality. The punishment for homosexuality is currently 100 lashes. See Hamo, Ahmed Ali, *Legal Terminology in a Nutshell, 2002 edition*, Al-Neelain University, Khartoum, 2002, pp. 12, and 20.

¹⁴⁸ *Sudan Charter: National Unity and Diversity*, Khartoum, 1987.

¹⁴⁹ The Sudan Charter as reprinted in Ahmed, Abdel Gaffar M., & Sorbø, Gunnar, (eds), *Management of the Crisis in the Sudan*, Proceedings of the Bergen Forum 1989, University of Bergen, Bergen 1989, pp. 133-144.

that. One NIF strategy has been to use the same titles, terms or concepts as during the Mahdiyya.¹⁵⁰

All sort of regulations were issued from 1989 and onwards using a new understanding of what is Islamic and what is not. For to give a picture of the emerging problem; a gap between the traditional flavour and pace of Sudanese Islam and the modernist NIF Islamic ideology, a few examples of regulations can be given. The government ruled Sudanese traditional family values and practices, such as for example the rather relaxed and familiar relation between the sexes, to be un-Islamic. Regulations culminated in the 1996 separation of men and women at public places such as public transports, and at picnics in public parks. New York Times reported in October 27th, 1996, on the consequences of the new regulations:

The new law ordered women working in restaurants not to wear jewellery or perfume. Women who do late-night shopping must be accompanied by a male relative. And on buses, women will not be permitted to sit near the driver. Women's sporting events will also be restricted. Under the new law, they must be held in private, and the athletes will not be permitted to wear tight-fitting clothes. Women performing Sudanese folk dances must wear long, loose-fitting costumes.¹⁵¹

The Khartoum State's public order act of 1992 restricted music, dance and wedding celebrations. The regulations were implemented by the police who broke up wedding parties and concerts. Disturbances over the regulations culminated in the stabbing to death of a singer in 1994.¹⁵²

5.2.8.2 The 1998 constitution and its aftermaths

In the name of God, the creator of man and people, the grantor of life and freedom, and the guiding legislator of all society. We, the people of Sudan, with the help of God, cognisant of the lessons of history, and with the help of the revolution of National Salvation, have made this Constitution to establish a public order, which we undertake to respect and protect, so help us God.¹⁵³

The preamble of the 1998 constitution

In 1997 a new constitution was drafted, al-Turabi being the ideological brain behind it. The constitution was promulgated in 1998, and in 1999 steps were slowly taken towards implementation. It had then been ten years of NIF efforts for to create an Islamic nation state. The 1998 constitution is the document through which the TNA and the RCC is substituted by a civilian government headed by the same Bashir who was the head of the RCC. The constitution is a summary the basic ideas of NIF.

¹⁵⁰ This was and is for example the case in defining titles in war, defining warriors and the enemies of NIF.

¹⁵¹ *New York Times*, October 27th, 1996.

¹⁵² See Lesch, 1998, p. 132.

¹⁵³ 1998 Constitution Of The Republic of Sudan. Translation to English by Curtis Francis Doebbler.

al-Turabi's ideology is fully visible in the constitution. God is has supremacy, and the people of the Sudan are represented in governance by *shura* (part I, article 4). The traditional Islamic concepts of *zakat*, alimony (part I, article 10), and *riba*, prohibition of usury (part I, article 8) are there, as is freedom of religion (part II, article 24), and freedom of organisation (part II, article 26). The sources of law are listed in the constitution (part IV, article 65):

The Islamic Sharia and the national consent through voting, the Constitution and custom are the source of law and no law shall be enacted contrary to these sources, or without taking into account the nation's public opinion, the efforts of the nation's scientists, intellectuals and leaders.¹⁵⁴

The latter refers to the *ijma* of the Sudanese *ummah*. The constitution upholds separation of power, although not full separation. The constitution has been greeted in the west as a sign of an orientation towards democratic principles. While Islamists often have been pointed out for not answering to questions of human rights, al-Turabi clearly do position him self on the issue of human rights, and especially women and human rights, among the promoters of Islamic human rights as opposed to universal human rights. Lisa Anderson argues:

Islamists in power lack a coherent reform program and clear answers to individual rights, women's rights, or civil liberties. Their stance on human rights is marked by institutional and procedural ambiguities.¹⁵⁵

While the first proposition is not true about al-Turabi, the latter is. The latter of her propositions is very true about NIF ideology on the formal and factual level. Even though steps have been taken, for example in the 1998 constitution, towards implementation of some of al-Turabi's ideas on a formal level, they today remain mainly or solely on an ideological level or do not remain at all. This is to a certain extent due to the fact that parts of the constitution, as in the moment of writing, are suspended.

Although many hopes were raised when the constitution was promulgated, it was not long before it was partly suspended. As tensions grew stronger between Bashir and al-Turabi, al-Turabi used his position as both speaker of parliament and as secretary-general of his own party, the Popular National Congress (PNC), to slowly whittle away at Bashir's executive powers. On December 12th, 1999, a coup took place on the eve of a vote on constitutional reforms that Bashir had repeatedly tried to postpone. The Economist reported:

The proposed changes are believed to have included abolishing presidential oversight of provincial governors, creating the post of a prime

¹⁵⁴ 1998 Constitution Of The Republic of Sudan. Translation to English by Curtis Francis Doebbler.

¹⁵⁵ Anderson, Lisa "Fulfilling Prophecies: State Policy and Islamist Radicalism", pp. 17-31 in Esposito, Johan L. (ed), *Political Islam: Revolution, Radicalism, or Reform?*, Boulder, Colo: Lynne Rienner Publishers, 1997, p. 19.

minister to head the cabinet in place of Mr Bashir, and granting parliament the power to remove the president with a two-thirds vote.¹⁵⁶

Bashir declared a state of emergency, suspended parts of the constitution and sent troops to take over parliament. Shortly after, al-Turabi was removed from all his official posts.¹⁵⁷ In 2001 al-Turabi was arrested on charges of undermining the constitution and waging war against the state. Charges were brought under the section 31(1) of the National Security Act of 1999, articles that carry the death penalty.¹⁵⁸ Since then al-Turabi, together with many other PNC officials has been held in detention. Charges against him have many times been changed and no trial has been set. In November 2002, Presidential Emergency Order renewed the charges, and al-Turabi was transferred from house arrest to the Kober Prison in Bahari.¹⁵⁹

The tumultuous recent developments have less to do with philosophical positions on *ijtihad*, and more to do with struggle over power and control over the Sudanese political and legal scene. While the NIF ideology under al-Turabi had a clear modernist scope, the post-al-Turabi ideology has a less coherent ideological home. With the civil war still raging, with al-Turabi and other political actors uncomfortable to Bashir still in the Kober Prison, with large parts of the Sudanese political intelligentsia in exile, and with the country still under a state of emergency, the future state of *ijtihad* in the Sudan is hard to predict. The contemporary philosophical positions found in the material will be there whoever is ruling the political and legal scene. However, on the formal and factual level of *ijtihad*, the master of the political and the legal scene plays a major role.

¹⁵⁶ The Economist, December 18, 1999.

¹⁵⁷ Esposito & Voll, 2001, p. 148.

¹⁵⁸ See Rone, Jemera, *HRW denounces year-long detention of Turabi*, Press Release/Commentary by Human Rights Watch, posted on March 19, 2002.

¹⁵⁹ The infamous Kober Prison, beautifully situated among the luxurious palaces along the Bahari side of the Blue Nile in the central cluster of Khartoum/Omdurman/Bahari, is a heavily guarded central prison where most of the important contemporary political prisoners in Sudan are held.

6 The field study

In this chapter I aim to present the material I collected in the field in the Sudan, September - December 2002. The findings of the material will be presented in the analysis chapter. The findings and conclusions drawn from the material will constitute the fundament for the arguments supporting the hypothesis of the study. The chapter will give a general background to the respondents, including age, gender, and education. The different definitions on *ijtihad* made by the respondents are presented and categorised, followed by the qualifications for the one who is to exercise *ijtihad* in general, and for the one who exercise *ijtihad* on its different levels. Last in the chapter, a presentation of the respondents' definitions and positions on human rights and Islam is made.

6.1 Background on the respondents

To give the reader a picture of whom the respondents are, some background data is necessary as an introduction to the material. Here the respondents are presented in main categories, in gender, age and education. These are all explanatory factors when trying to understand the different philosophical positions on *ijtihad* and the arguments used in the different positions. Age positions the respondents within different historical experiences and education positions the respondents within different semantic, ontological and epistemological educational traditions.

6.1.1 The major categories

In the field 25 interviews were conducted with 22 respondents. The respondents are divided into the five major categories of "students", "activists", "academics", "professional active jurists" and "traditionally trained religious scholars". The categorisations are made on the basis of self-definition, though given as alternatives on beforehand. Only one of the respondents (interview nr 21) did not define him self in any of the given categories, why an additional category "political ideologists" were added. Four respondents sort under the category of "students" (interview nr 18, 19, 20, and 23), nine respondents sort under the category of "activists" (interview nr 3, 5, 6, 8, 11, 12, 19, 20 and 24), eight respondents sort under the category of "academics" (interviews 1, 4, 9, 10, 11, 12, 13, 16, and 17), eight respondents sort under the category of "professional active jurists" (interviews nr 2, 6, 7, 10, 11, 15, 17, 20, 22, 24, and 25) and two respondents sort under the category of "traditionally trained religious scholars" (interviews nr 13, and 14).

It must be noted that some of the respondents sort under more than one category, and more than one interview were conducted with some of the respondents. In total 36 will be the number of responses within the six major categories.

6.1.2 Age and gender

6.1.2.1 Students

Among the students all but one are in the age category 20-30 years (interview 20 is in the age category 31-50 years), and they are all women. The age span here can be easily explained as the most common age to study. All of the respondents are in the end of their studies, one graduating from law school (interview 23) and the other three graduating from master studies in social sciences (interviews 18, 19, and 20).

6.1.2.2 Activists

Among the activists one is in the age category 20-30 years (interview 8), seven are in the age category 31-50 years (interviews 3, 5, 6, 11, 19, 20, and 24), and one is over 50 years (interview 12). Among the respondents in the middle age category, three are under 40 (interviews 11, 19, and 20). From this the conclusion can be drawn that activists tend to be rather young, in the beginning of their careers, or at least not yet in any senior positions. The only respondent deviating from the general rule holds a senior position in the academic world, and is considered part of the educated elite of the Sudan (interview 12). The gender balance among the activists is close to equal.

6.1.2.3 Academics

To become an academic, you normally need at least a PhD degree and many years of experience. This means that the average age for an academic normally is relatively high, something that is also true about the respondents in this study; one is in the age category 31-50 years (interview 11) and the rest are 51 years or older (interviews 1, 4, 9, 10, 12, 13, 16, and 17). Gender balance among the academic respondents is equal, something that quite well represents the broader picture of the academic scene in the Sudan. Even though men are over-represented in academics in the Sudan as everywhere else in the world, women are not at all uncommon as professors, assistant professors, deans or lecturers.

6.1.2.4 Professional active jurists

The professional active jurists are all over 30. Four are in the age category 31-50 years (interviews 6, 11, 20, and 24) and four are 51 or over (interviews 2, 7, 10, 15, 17, 22, and 25). Only one of the eight respondents is a woman.

This gender balance follows a general pattern within the judiciary, where traditionally few women are appointed to higher positions. Female lawyers are not at all uncommon, and the only female respondent in this study is a lawyer (interview 20). Of the eight respondents two are mainly active as judges (interviews 6, 10, and 17) and the other six as lawyers (interviews 2, 7, 15, 20, 22, 24, and 25).

6.1.2.5 Traditionally trained religious scholars

Traditionally trained religious scholars are relatively old, for quite obvious reasons. To become a scholar you need a long life of training and experience. The respondents who sort under this category are men in the age category 51 or over (interviews 13, and 14). Religious training has traditionally been for men only, though today it is not necessarily so. Despite the fact that traditional religious training is more open to women today than it used to be, very few women trained in a traditional religious way can be found in the Sudan. The respondents therefore well represent the Sudan of today.

6.1.2.6 Political ideologists

In the category of political ideologists only one respondent, a man, is found (interview 21). From this small number of respondents within a category, very few general conclusions can be drawn. The very fact that there is only one respondent in the category is however of some interest. There are two explanations to the small number of respondents in the category. The respondent did not, by his own opinion, fall in to any of the categories predefined for the study. Nevertheless he is a valuable respondent for the study, why a new category of political ideologists is added. Consequently, the first explanation is that the category is something of a special case. The second explanation is that not many people in the Sudan are happy to discuss their political stance and therefore tend not to define them selves as political ideologists.

6.1.2.7 Age and gender in all categories

All in all close to half of the group of respondents are women, something indicating that Sudanese women play a noticeable role in forming ideas about the society. No further conclusions on how and to what effect they take part in forming ideas about the society can be drawn on the findings made here. It can however be stated that women to a large extent take part in the discourses on *ijtihad* in contemporary the Sudan. The women are also spread in an even way in the major categories, indicating that women in all ages take part in the discourses on *ijtihad*.

6.1.3 Education

The Sudan is a hierarchical society. It does matter from where and what family you are. It matters if you have money or not. There are few at the top and many at the bottom of society. During the colonial time, education through the Gordon College, and further studies at the European Universities became a way of improving ones life. It also meant improving the lives of the extended family. Education meant a chance of getting employment within the colonial administration. As very few had the opportunity to study, an educated elite emerged. The contemporary Sudan, and especially Khartoum, has several Universities, most of them private. Education is still considered the major way to improving ones life and the lives of ones extended family. Today, though, the generation after the educated elite has transformed into an educated middle-upper class.

With education follows new semantics, epistemological ideals and new ontologies. For this study the meaning of language, worldview, and the scopes of knowledge becomes an interesting problem. For to understand the philosophical positions on *ijtihad* in the contemporary Sudan, it is important to understand what ideals the respondents are familiar with. It is also important to understand what philosophical stances their reasonings are products of, and how they them selves see the purpose of gaining and using the knowledge they and others have acquired.

Proposing that education exclusively form the semantic, epistemological and ontological boundaries of a person is reductionism and nonsense. However, it is possible to state that education play a major role in forming those boundaries. Studies within different institutions and different cultural settings open up for new ways of evaluation. Therefore all respondents have been asked if they have studied abroad, the goal and purpose of the studies and if they recommend others to study abroad.

6.1.3.1 The educated elite

The educated ruling elite, those who are today the main politicians, teachers at the universities, high court justices, etc grew up in a very different Sudan from what we see today. They are all products of the British colonial rule, though their responses to the colonial past differ. As the educated elite I count the academics, the professional active jurists, traditionally trained religious scholars, and the political ideologists. With a few exempts they all went to school in Khartoum, and most of them were students at the Gordon College, or Khartoum University as it is called today.

There is, as have become evident in the paragraphs above, a close link between belonging to a certain age-span and the position you have in the Sudanese society. This also applies to what level of education you have.

Among the respondents who are 51 or older, a stunning two third hold PhD degrees (interviews 1, 2, 7, 9, 10, 12, 13, 17, 21, 22, and 25). They all have their higher education from Great Britain, except two who obtained their PhD degrees in USA (interviews 21, and 25). The PhD studies are in social sciences and humanities: Islamic thought (Interview nr 9), Islamic philosophy (interview 9), comparative religion (interview 13), gender studies (interview 12) and law (interviews 2, 7, 10, 17, 22, and 25). The one exception is the political ideologist who holds a PhD degree in mathematics (interview 21). Of the remaining respondents who are 51 or older, two have High Diplomas from British universities (interviews 4, and 16), and one is educated at the famous Islamic University Al-Azhar in Cairo (interview 14).

There is one interesting exception to rule that has crystallised above, i.e. the rule that power and education goes together in the Sudanese society. One of the respondent in the age category 51 years or older, do not hold any higher degree than a law degree (interview 15). At the same time he qualifies into the group of the educated elite, since he is over 50 years, and sort under the category of professional active jurists. His position can be explained as a product of the political reality in the Sudan as they have developed in the last 20 years. Power does not only come with education, but also with your political home.

As a conclusion of the above, it can be said that the elite in the Sudan is either very well educated abroad, or—not as common—made it through politics.

All respondents who have done studies abroad were asked if they recommend others to do the same, this to determine the goals for achieving education in a different cultural setting than the contemporary Sudanese. Among the educated elite, all but three respondents recommends studies abroad. The most commonly mentioned argument for studies abroad is the need for young students to gain experience and learn new languages (interviews 1, and 4). Of those who explicitly did not recommend studies abroad the most commonly held argument is that there is no longer any need for studies abroad since the academic standards in the Sudan today are fully satisfactory (interview 9).

A distinct line should be drawn between on one hand the Western education in humanities, social and natural sciences, and on the other hand the traditional religious education in the Islamic sciences. There is a fundamental difference in semantics, epistemology and ontology between the two. Not only that, but the purpose and goals of gaining knowledge is fundamentally different. One of the academics remembers her time in Edinburgh in the late 50s:

There used to be weekly seminars where all the PhD students met with the professors and discussed. There the Muslim students could correct the professors' understandings, and eventually the professors started to

understand things in a different way. Before I came to Edinburgh I expected the professors there to be somewhat, well... some of them were objective, but sometimes you did find those with their own agendas. It was good to find some to be sincere in finding the truth. We who were students learned a lot about how to direct a dialogue, and how to reach understanding between Islam and the west. (Interview 9)

The purpose of the education was in part to correct the west in its misunderstanding about Islam (interviews 4, and 9). The political ideologist gives another purpose for Western education in general, and for studies abroad in particular:

In the [Islamic] movement they made it their business to know the world that they were living in, because you must know the world [i.e. Western education] very well in order to apply Islamic thought through it. So we studied sociology, economy, political sciences, mathematics etc. (Interview 21)

What the respondent in the citation above is lining out is the Islamist modernist strategic use of Western sciences and education for to form the modern Sudan as an Islamic state. The respondent is referring to the Islamic movement who were formed and educated in the colonial and early postcolonial era, a movement who are today—if not the same as, so to a large extent identical to—the ruling educated elite. In other words, this purpose of education is to use one epistemology for to promote ontology from a different realm.

The Sudan traditionally has sent talented students abroad to study subjects that could be useful and of interest for the state. The policy started during the colonial time, when the British policy was to form an educated Sudanese colonial administration. Many of the respondents in the educated elite are children of that colonial educational policy (interviews 1 2, 4, 7, 9, 10, 13, and 22) or the immediate continuation of the policy within the early Sudanese nation building, while others are scholarship holders and children of the more recent political developments and needs (interviews 16, 21, and 25). There are no major swifts in the field of study between the groups. It can be noted though, that the latter group is more oriented towards natural sciences and less towards Islamic studies. This fit well with the purposes of studies as exemplified in the citation in the above paragraph. As the modernist state of the Sudan emerged, so did education in natural and social sciences on the cost of humanities and traditional education in Islamic sciences.

6.1.3.2 The activists

The activists are those who are professional active in the Sudanese society, but have not yet reached any senior positions, though one respondent is deviating from that rule, holding a senior academic position (interview 12). In the study, the categories of age category 31-50 years correlate with the major category of activists to the extent that all but two (interviews 8, and 12) activists are between the ages of 31 and 50. The activists are found in the international arena of the Sudanese society, i.e. international and national

NGOs, Non Governmental Organisations. The educational and geographical background of the activists is different from that of the Khartoum-oriented educated elite. Among the activists Kosti, Kassala and Port Sudan are represented as palaces of origin and basic education (interviews 19, 20, and 24).

The activists are all well educated. One respondent hold a PhD degree (interview 12), five of the respondents hold Master degrees (interviews 3, 5, 8, 11, and 24) and two are currently enrolled in Master programs (interviews 19, and 20). The eighth respondent holds a law degree (interview 6). The respondent with a PhD obtained the degree in Great Britain (interview 12). Four of the respondents with Master degrees obtained their degree abroad: in Saudi Arabia (interview 8), in South Africa (interview 11), and in Great Britain (interview 3, and 24). The Sudan is the country of study for the fifth respondent with a Master's degree, as for the respondents still enrolled in their Master studies, and the responding holding a law degree. Besides law, the fields of studies are development studies (interviews 8, 19, and 20), and Human Rights (interviews 3, 11, and 24).

The activists who have done studies abroad all recommended others to do the same. The most commonly held argument for studying abroad is that education as such is important, and that some education cannot be obtained in the Sudan (interviews 8, 11, 12, and 24). The goals and purposes of the studies are oriented towards developing the Sudanese society on a factual level. The respondents use the international standards obtained through the education as standards for the Sudanese society. Five of the eight activists work with education about, and implementation of different UN documents in their every day work (interviews 3, 5, 8, 11, and 24). Two respondents, who are also professional active jurists, works with human rights standards, although, not linked to any particular UN documents (interviews 6, and 20), and a third works with gender-related projects (interview 19). The activists are trying to put the Sudan on an international map, both by educating the Sudanese people about their rights by international standards, and by bringing international attention to the situation in the Sudan.

Who funded the activists' education? Again there is an international perspective. Three respondents studied on scholarships. Two of them were given scholarships on the basis of their merits as activists (interviews 3, and 24) and one on his academic merits (interview 11). In all three cases foreign Western governments were funding the education. The three respondents are indicators of a change in the educational pattern in the Sudan. Interests linked to the nation state funded the education of the educated elite, while interests concerned with a global community funded the education of the activists. The activists were educated as a strategy from the international

community to change the Sudanese society by international standards from within.

6.1.3.3 *The students*

Students in the contemporary Sudan are faced with a reality of few employment opportunities. Still, education is considered among most to be the best way of improving ones life and the life of the extended family. Many Sudanese go the Gulf for to work, where employment opportunities are better and wages higher. As a result many Sudanese youth are brought up in the Gulf, together with the children of other work migrants from all over the Arab world. Among the respondents one got her basic education at a public school in the United Arab Emirates (interview 18), one in the USA at a private Islamic school (interview 23), and two got their basic education in the Sudan (interviews 19, and 20). All respondents are currently enrolled in university studies at private universities in Khartoum. The two respondents who received their basic education abroad were both sent home to the Sudan for their higher education.

Of the four respondents only one have done higher studies abroad (interview 18), and another respondent was admitted to a Masters program abroad but lacked the economic means for to go (interview 19). A third respondent would like to do higher studies abroad but have a husband and children to support, and must therefore work after she finish her Master studies in the Sudan (interview 20). The fourth respondent in the category of students has been thinking about studies abroad, but she is now engaged to get married, and her husband to be is not likely to allow her to study abroad (interview 23).¹⁶⁰ All of the respondents recommend studies abroad. The most commonly held argument is the opportunity to gain experience (interviews 18, 19, and 23). The respondent who have done higher studies abroad commented:

It made me think critical about my own life and culture. You cannot travel without learning. I learned much about culture, most about my own culture. (Interview 18)

Three of the respondents see education as a necessary mean for to improve life, not only for them selves but also for the Sudanese society in general (interviews 18, 19, and 20). Among the students, the goals and purposes of education are not as distinct as among the educated elite and the activists. Among the students, two respondents are also activists—why an activist approach to education can be found (interviews 19, and 20). However, an orientation towards self-fulfilment as the purpose of education can also be found (interviews 18, and 23). The latter is a change in relation to the purposes as understood by the educated elite and the activists. The citation in

¹⁶⁰ Sudanese laws do not allow a married woman to travel if her husband, her legal guardian, does not allow her to.

this paragraph is an indicator of the new orientation towards the individual experience of education, and that education in general, and education abroad in particular gives you an understanding about your own cultural identity.

6.1.3.4 Education in all categories

Concluding the field research on the educational background, it is not very surprising to see that the type, the purpose and the goals of education differ according to age. As have become evident, all respondents have at least one university degree. One third of the respondents hold a PhD degree as their highest education, four respondents hold a Master's degree as their highest education, three respondents are enrolled in their Master degree studies, one respondent hold a High Diploma as her highest studies, one respondent hold a Diploma of Religious Studies as his highest studies, three respondents have a law degree as their highest studies, and one respondent is currently enrolled in her law studies. They are all well educated by any standards, and *very well* educated by Sudanese standards, if by Sudanese standards we mean the average education among the average Sudanese. More than two thirds of the respondents have studied abroad.

A few trends in education have been evident. These trends are in the purpose and goals of the education, and in the funding of the education. Education follows the historical-political development of the Sudanese society. Purpose of education, especially abroad, has gone through the metamorphosis of correcting the West in its interpretation of Islam, to building a new nation state, to changing the Sudan according to international instruments, to the individual experience. Today all four ideas about education seem to be at work simultaneously but separately in different age categories. Funding has gone from one principal actor to many different actors with different agendas. This is in part a result of more people gaining access to education and therefore a greater need of funding that cannot be met from the Sudanese state. It is also possible to analyse the change as a result of a greater interest from different actors in developing the Sudanese society in specific directions.

6.2 Definitions on *ijtihad*

All the respondents were asked to define what *ijtihad* is. Defining a complex concept like *ijtihad* is not an easy task. What the definitions of *ijtihad* more than anything else show is what semantics the respondents use. *Ijtihad* is, as has been shown earlier in this study, a traditional concept within Islamic law. The definitions of such a traditional concept reveal the semantic homes of the respondents. It also says something about the ontological positions of the respondents.

In total 46 responses were given by 17 respondents. The 46 responses enclose 21 different definitions. The following is a compilation of all the different definitions given:¹⁶¹

The most commonly mentioned definition of *ijtihad* is “change for to fit new conditions and demands”, mentioned by eight respondents (interviews 1, 4, 9, 14, 15, 18, 19, and 20). Seven respondents mention “interpretation” (interviews 7, 10, 15, 19, 20, 23, and 24), four respondents mention “applying general rules of the Qur’an to specific problems” (interviews 7, 10, 13, and 23), four respondents mention “reformation” (interviews 7, 9, 15, and 19), two respondents mention “finding the inroads to justice” (interviews 6, and 24), two respondents mention “*ijtihad* is part of a system” (interview 9, and 14), two respondents mention “adaptation to modern conditions” (interviews 13, and 20), two respondents refers to *ijtihad* as “the methodology of the formative years [of Islam]” (interviews 20, and 21), two respondents mention “going back to the sources” (interviews 14, and 15), two respondents mention “exertion of off all efforts from a jurist” (interviews 7, and 10), one respondent mention “applying principles of the Qur’an” (interview 6), one respondent mention “tool for to legitimize reinterpretation by other sources” (interview 12), one respondent mention “understanding context” (interview 13), one respondent mention “struggle to find a solution” (interview 21), one respondent mention “rethinking terminology” (interview 19), one respondent mention “implementation of Islamic law” (interview 16), one respondent mention “analogy” (interview 6), one respondent mentioned “Islamic revivalism” (interview 21), one respondent mention “interpreting according to personal preference” (interview 24), and one respondent mention the *hadith* of Mu’adh Ibn Jabal where the Prophet sends the judge to Yemen¹⁶² (interview 2).

The responses are not easy to divide into categories. There are however two main categories of responses: those who see Islamic law as continually fixed in a changing world, and those who see Islamic law as continually changing in a changing world. The latter category is divided in two different subcategories.

6.2.1 *Islamic law as continually fixed in a changing world*

There is only one definition (two responses by two respondents) in the material that clearly falls under the category of Islamic law as continually fixed in a changing world: “going back to the sources” (interviews 14, and 15). It is a traditionalistic semantic, where *ijtihad* is limited to only *furu al-fiqh*, the branches of law, and not the *usul al-fiqh*, the sources of law. Going back to

¹⁶¹ For a more comprehensive overview of the answers, see table 3.

¹⁶² The *hadith* is referred under the chapter introducing the history of *ijtihad*. Also, See Ramadan, 1961, p. 64.

the sources is then going back to the objective true meaning of Islam, abrogating existing law on the formal level, through the use of *ijtihad*. The respondents in the category are a traditionally trained religious scholar (interview 14), and a professional active jurist (interview 15), both over 50. In the case of the traditionally trained religious scholar, his definition is set as a critique against the current political interpretation of Islam, an Islam he understands as having deviated from the true sources (interview 14). The other respondent, the professional active jurist, argue the opposite position. In his view, going back to the sources, finding the true Islam is just what the current political interpretation of Islam is about (interview 15). Since the number of respondents and responses are so few, no further conclusions can be drawn on their profile.

6.2.2 Islamic law as continually changing in a changing world

A majority of the responses in the material are oriented towards change of Islamic law, as the world continues to change. Both modernistic and postmodern positions sort under the category. In common of the both philosophical positions is that *ijtihad* is seen as a tool, an instrument for Islamic law to fit modern conditions.

The in total most commonly held argument in the material “change for to fit with modern conditions” is a modernist definition of *ijtihad* (interviews 1, 4, 9, 14, 15, 18, 19, and 20). Other clear examples of modernist definitions are “adaptation to modern conditions” (interviews 13, and 20), “rethinking terminology” (interview 19), and “the formative years” (interviews 20, and 21). The definitions are modernist insofar that they define *ijtihad* semantically as outside its traditional scope. A traditional concept is applied in new legal settings. The last example “the formative years” (interviews 20, and 21) is a good example of how modernist epistemology deduce from historical experience. What must be noted is the profile of the respondents. All the major categories of respondents are represented within the modernist category of arguments on the definition of *ijtihad*. Three respondents are students (interviews 18, 19, and 20), two of them also being activists (interviews 19, and 20). Four of the respondents are academics (1, 4, 9, and 13), two respondents are professional active jurists (interviews 15, and 20), two respondents are traditional trained religious scholars (interviews 13, and 14) and one is a political ideologist (interview 21). All age categories are represented; one respondent being under 30 (interview 18), two respondents being between 31 and 50 (interviews 19, and 20), and seven respondents being over 51 years old (interviews 1, 4, 9, 13, 14, 15, and 21). It will become evident to the reader after reading through all the material presented in the study, that this is a very unusual profile.

The postmodernist position is represented by arguments like “interpreting according to personal preference” (interview 24), and “tool for to legitimise reinterpretation by other sources” (interview 12). The respondents define *ijtihad* as the instrument for legitimisation of positions already arrived upon by the one exercising *ijtihad*. Semantically the traditional Islamic concept *ijtihad* gains a new meaning. The definitions stay close to “interpretation”, or opinion rather than objectivistic knowledge. Thus, in the postmodernist definition on *ijtihad*, the use of *ijtihad* says more about the person exercising *ijtihad* than the concept itself, or Islamic law for that matter. The respondents using postmodernist arguments are activists, one also being a professional active jurist (interview 24) and the other also being an academic (interview 12). The latter of the two belongs to the educated elite; being over 50, while the first of the two respondents belong to the category 31-50 years old.

6.3 The limits of *ijtihad*

The limits of *ijtihad* are about to what extent *ijtihad* as a traditional Islamic concept can be applied in a modern world with modern legal problems. Hence, in defining the limits of *ijtihad* the respondents tell us something about their positions on semantics and ontology.

First, and foremost it must be noted that all respondents considerer the gates to *ijtihad* to be open, i.e. no respondent considers *ijtihad* to be restricted to historical use only. The respondents must then be divided into two categories: those who do not see any limits at all to *ijtihad* (interviews 8, 18, 19, 20, and 24) and those who do se limits (interviews 1, 4, 6, 7, 9, 10, 11, 12, 13, 14, 15, 17, 21, 23). The latter category set very diverse limits, why they have been subdivided into the categories “few limits” and “comprehensive limits”.

6.3.1 No limits

The respondents who do not see any limits to the use of *ijtihad* are students (interviews 18, 19, and 20), activists (interviews 8, 19, 20, and 24) and professional active lawyers (interviews 20, and 24). All of them are under 51 (only one is over 40).

There are two major lines of argumentation in the responses. Firstly no questions, however small or big, should be excluded from *ijtihad*. This means that everything in Islamic law is open for reformation. Examples given by the respondents are the right for women to sterilisation (interview 20), and freedom of religion (interview 18). All respondents within the “no limit” category see *ijtihad* as a possible tool for to implement human rights in Islamic law. The “no limit” category represents half of all the respondents who argue that human rights can be implemented trough *ijtihad*. Secondly, since there are

no limits to how *ijtihad* can be used, it all depends on who is using it. Therefore Islamic law can change in whatever direction someone is taking it—and it will still be valid. The respondents within the “no limit” category use postmodernist semantics insofar that the traditional concept of *ijtihad* is continually given new meaning, i.e. the text and the word it self is disconnected from meaning. Also a postmodernist ontology and epistemology is pursued, since *ijtihad* is seen as valid no matter the evaluation of the norms behind.

The “no limits” respondents are fairly young, something indicating that young people see *ijtihad* as a possible tool for to reform Islamic law in accordance with their own ideas. The responses also indicate that the respondents understand *ijtihad* as being used not only on an ideological level, but also on a factual level for various purposes in the contemporary Sudan (interview 24).

6.3.2 *Few limits*

Two respondents argue that there are very few limits to the way *ijtihad* can be used (interviews 6, and 12). The limits are however there, indicating that some reformation of Islamic law cannot be done through *ijtihad*. The limits given by the respondents are freedom of religion (interview 6), freedom of sexuality, and equal rights for homosexuals (interview 12). The respondents argue that it in general is possible to use *ijtihad* for to change Islamic law. Areas specifically mentioned by the respondents as areas where *ijtihad* should be used are women’s absolute right to divorce, ban on polygamy, ban on FGM, female genital mutilation, the *hijab*, the female headscarf, as a obligation only for the wives of the Prophet and not for women of today, and abolition of the rules forcing a wife to obey her husband (interviews 6, and 12). The respondent commenting FGM suggest it to be banned on the basis of analogy to legal guardianship of property, where the guardian is not allowed to change, improve or destroy the property (interview 6). The areas where the respondents see a possibility for to use *ijtihad*, are quite challenging insofar that they are commonly held as not open to *ijtihad* (*e contrario* interviews 1, 4, 7, 9, 10, 11, 13, 14, 15, 17, 21, and 23).¹⁶³ Both respondents argue that human rights can be implemented trough *ijtihad*.

It is no coincidence that the “few limits” respondents are activists, also sorting under the categories professional active jurists in the case of interview 6, and academics in the case of interview 12. The “no limits” and “few

¹⁶³ This is also true outside the Sudanese context where we cannot find any legislation giving women absolute right to divorce, though for example a Moroccan woman can get a divorce far more easy than a Sudanese woman can. On the other hand polygamy is banned in most countries where Muslims are governed by Islamic family law. Examples are Egypt, Israel and Morocco. Yet another example showing that the ideas of the respondents are not totally far fetched, is that a few minor changes have been made in the Sudanese laws obliging a wife to obey her husband.

limits” respondents have in common that they understand *ijtihad* as a tool for to reform Islamic law in accordance with human rights. Many of the respondents in the two categories who are also activists use according to their respective definitions *ijtihad* in their every day life (interviews 6, 12, 20, and 24).

The major lines of argumentation in the “few limit” responses are similar to those of the “no limit” responses. The areas that are excluded from *ijtihad* are so on the basis of inconsistency with the Qur’an (interview 6 on freedom of religion, and interview 12 on freedom of sexuality and equal rights for homosexuals). The respondents further argue that it is impossible to implement the excluded areas on a factual level in the Sudanese society, because of its traditional outlook (interview 12 on equal rights for homosexuals). The respondents within the “few limits” category use postmodern semantics and epistemology. *Ijtihad* as a traditional concept is filled with new meaning in a new historical context, and knowledge about the limits of *ijtihad* is seen as function of different theoretical positions. However, the respondents within the “few limits” category use a modernist ontology, implying in their responses that there are some objective truths that cannot be changed through *ijtihad*.

One of the respondents gives an interesting example of *ijtihad* in the contemporary Sudan: the Machakos agreement¹⁶⁴ (interview 6). The example is too specific to be generalised, but is still worth a few words of discussion. In the Machakos agreements it is stipulated that shari’ah should not be implemented in the south, but only in the north of the Sudan. Consequently shari’ah in the Sudan is then not personal but territorial. However, according to Islamic law, shari’ah governs a land ruled by a Muslim leader, and it cannot be a territorial jurisdiction for only a part of the country. The respondent argues that *ijtihad* in this case is done in a way that contradicts Islam. Still he considers it as valid *ijtihad*. The example and the arguments presented by the respondent shows that *ijtihad* is seen as purpose oriented. The purpose can obviously be understood as contradicting Islamic law, and still *ijtihad* is considered valid.

6.3.3 *Comprehensive limits*

The respondents who argue that whole areas, or complete set of values are excluded from the use of *ijtihad*, sort under the category of “comprehensive limits” (interviews 1, 4, 7, 9, 10, 11, 13, 17, 21, and 23). Negating responses, i.e. respondents arguing that *ijtihad* cannot be used but under certain circumstances, also sort under the category of “comprehensive limits” (interviews 9, 10, 13, 14, and 15). All in all 11 respondents (12 responses) sort under the category. The respondents in the category “comprehensive

¹⁶⁴ The Machakos agreement of 2002.

limits” can all be found within the category of the “educated elite”, the only exception is one respondent who is a student (interview 23).

Family law is specifically excluded from the use of *ijtihad* by five of the respondents (interviews 7, 9, 10, 13, and 23). Family law is an area of Islamic law that holds many of the features mentioned by the respondents in the category of “comprehensive limits”. It is an area where there are many rules (interview 10), and the text is commonly considered to be clear (interviews 13, and 15). Another area of clear rules specifically mentioned by one respondent is *hudud* (interview 17).

Besides family law, “the core values of Islam” are excluded from the area of *ijtihad* by many respondents (interviews 1, 4, 11, 17, and 21). Thus, application of the law might vary from country to country, and from time to time, but there are some values that can never change. Two respondents limit the use of *ijtihad* insofar that changes “must fit into the system of Islamic law”, thus referring to Islamic law as a coherent legal system (interviews 9, and 10). The latter respondents also define *ijtihad* as a part of the legal system (interview 9) and as a way of interpreting and applying the existing law to new legal problems (interview 10). Two respondents limit the use of *ijtihad* close to nothing (interviews 9, and 14).

Among the respondents in the category “comprehensive limits”, no one sees *ijtihad* as a possible tool for to implement human rights in Islamic law. Of the 12 respondents in total who do not understand *ijtihad* to be a tool for to implement human rights in Islamic law, 11 respondents set up comprehensive limits for the use of *ijtihad*.

When asked about areas where *ijtihad* can be used, the responses can be divided in three major categories: the functionalist, the ideologist and the traditionalistic response. The most common answer is Sudanese banking law, the so-called Islamic banking (interviews 13, 17, and 22). One respondent mention the *Ulama* Council as a good example of *ijtihad* in the contemporary Sudan, i.e. taking the Islamic concept of *ulama* and turning it into a political institution is an example of how *ijtihad* can be used (interview 15). One respondent argue that the Sudanese system of *shura*, inner consultation—often translated as Islamic federalism, is the greatest example of *ijtihad* in the contemporary Sudan (interview 21). The same respondent refers to the nation building by the NIF, 1989 and onwards as serious *ijtihad* (interview 21). Another respondent argue that there are no good examples at all of *ijtihad* in the contemporary Sudan (interview 14).

The three answers represent three very different perspectives in the Sudanese society. The first perspective is the one of the professional active jurists who also happens to be banking lawyers (interviews 13, 17and 22). The

professional active jurists take a functionalist approach where *ijtihad* is used because there is an economic need for to change contemporary Islamic law. The second approach is the ideological approach, where the political ideologists—primarily concerned about nation building, take a traditional concept of Islamic law and fill it with new meaning (interview 21). The third perspective is the perspective of the traditionally trained religious scholar who argues that what is often seen as reformation is mostly just going back to the sources and old knowledge that has been forgotten about in the modern and postmodern paradigm (interview 14).

The first line of argument is that since certain values and rules are clear in the Qur'an, these can never change. However, it is possible to change the law as long as the core values are not changed. Abrogating the Qur'an is never possible; no clear rules can ever be changed. Redefining the understanding of certain concept according to changing circumstances is possible, as long as it does not contradict the words of the Qur'an. The outcome can thus be that the actual meaning of the words, the semantics, changes, but not the letter. This is a clear modernist position on semantics. The ontology is objectivistic with weak elements of subjectivity, thus either weak traditionalist ontology or modernist ontology with traditional elements. The admittance of historical change indicates a modernist epistemology. The second line of arguments is that over history the core values of Islam have wrongfully been changed in their application, or badly interpreted. Thus, *ijtihad* is needed for to restore the core values in a modern setting on a broad scale. The limits of *ijtihad* is restricted to the bigger issues, and at the same time restricted from the minor issues. This line of argument is an example of a very typical modernist use of semantics. The traditional concept of *ijtihad* is given new meaning in a new context. The ontology and epistemology is also strongly modernist. The third line of argument is that there is no need to use *ijtihad*, since the law is all clear if we go back to the sources. The line of argument is a typical case of traditionalistic semantics, ontology, and epistemology. The three lines of arguments are quite different; though they all have the same result, i.e. limiting the area where *ijtihad* can be used.

6.3.4 *The crucial argument deciding the limits of ijtihad*

In focus of all the arguments given on the limits of *ijtihad* is “need”. If there is an understanding of a need for to change Islamic law, *ijtihad* is the tool. In the study only one of the respondents who see a great need for change within the Sudanese society argue that *ijtihad* is not the tool for reaching the goals. He instead argues that Islamic law should be abandoned for a fully secular law that embraces all the human rights standards necessary for a modern state (interview 3). Apart from that one respondent, all respondents level the limits of *ijtihad* according to what necessities of change they see in the Sudanese society. The “no limits” and “few limits” respondents see a need for massive

change, where the “comprehensive limits” only see partial need (banking law), and a need for to reverse changes already done.

6.4 Requirements and qualifications for to exercise *ijihad*

Who is considered qualified to exercise *ijihad*, and for what purpose, tells much about what semantics, epistemologies and ontologies are considered valid in different philosophical positions on *ijihad*. Maybe most of all, it shows what epistemological positions the respondents adhere to, this since qualification of the *mujtahid* is about standard of knowledge for to be able to create knowledge about the texts.

Traditionally it is the *mujtahid*, the qualified jurist, who exercises *ijihad*. Today opinions on the requirements and qualifications of the one exercising *ijihad* differ, as will be evident in this chapter, very much depending on who gives the answer. In order to give a roadmap to the responses in the field material, a short introduction to the traditional requirements and qualifications of the *mujtahid* is made. First after that, the field material on the issue is presented. Using the introduction as a background, the answers given by the respondents will stand in a more clear light and provide more information. This as the respondents often uses the traditional requirements and qualifications of the *mujtahid* as a reference in their responses.

6.4.1 Traditional requirements and qualifications

There are eight general traditional requirements for to become a *mujtahid*. The following presentation is based on the enumeration in Said Ramadan's *Islamic Law. Its Scope and Equity*,¹⁶⁵ and the clarifications made in Mahdi Zahraa's article “Characteristic Features of Islamic law: Perceptions and Misconceptions”¹⁶⁶.

The first requirement is knowledge in the Qur'an. Here the requirement is not to know it by heart, but to understand the legal issues. Legal issues can be divided in general principles and rules found in suras in the Qur'an. The suras in the Qur'an that state these strictly legal rules are called *alaai haqam*, verses of rules.¹⁶⁷ The legal principles of the Qur'an are derived by analogy and are subject of traditional interpretation of *ijma*. The second requirement is knowledge about the sunna. Most important is to know which parts of the sunna are authentic, i.e. historically correct, and which are not. This is usually determined on the basis of the *sanad*, chain of reporters. In other worlds it is knowledge about the validity of the *hadiths*. The *mujtahid* must know the

¹⁶⁵ See Ramadan, 1961.

¹⁶⁶ Zahraa, Mahdi, “Characteristic Features of Islamic law: Perceptions and Misconceptions”, *Arab Law Quarterly*, pp. 168 - 196, 2000, pp. 185 - 186.

¹⁶⁷ How many of the Suras in the Qur'an that are of legal matters is a question open for debate.

historical context of the *hadith* in order to determine if the rule in the *hadith* can be generalised or not.

Knowledge in the Arabic language is the third requirement. The *mujtahid* must be able to determine the linguistical meaning of the text in the Qur'an or the sunna. The Arabic language has richness in semantics that able a complexity that is not always helping when determining the exact legal meaning. Therefore a general knowledge of Arabic is not sufficient, but rather the requirement is about scientific knowledge in semantics and sensitiveness towards the context and meaning. A *mujtahid* must also know about the situation on *ijma*. This is the fourth requirement. Matters of consensus are in general not open to *ijtihad*. There is of course a great variety of opinions on whose *ijma* should be taken into account. Traditionally, one is to follow the *ijma* of one of the schools of law. The concept of the *ijma* has however in its' modern setting found new ways of expression. So, for example, in the Sudan there is the *Ulama* Council who advises the National Assembly on matters of Islamic law. On matters of national lawmaking the council are by some, but not by all considered as representing a valid *ijma*. Outside that specific context the question of validity of the *ijma* of the *Ulama* Council becomes more problematic.

The fifth requirement is knowledge in *usul al-fiqh*, the sources of law. This means that the *mujtahid* must be familiar with Islamic jurisprudence, and the different schools of law. This in order for the *mujtahid* to be able to arrive at an opinion that is supported in the history of Islamic law and is coherent with development of its jurisprudence. Following the knowledge in *usul al-fiqh* and the understanding of the rules and principles of the Qur'an and sunna, the sixth requirement is understanding the purposes and aims of the Shari'ah. The *mujtahid* must understand what the Shari'ah is protecting in the in the individual case. The seventh requirement is knowledge about the social context in which the *mujtahid* lives in. This means good knowledge about the customs and traditions of the society wherein the *mujtahid* lives and works. The requirement has also sometimes been interpreted to mean academic knowledge in both sciences and applied sciences.¹⁶⁸ The last, eighth requirement is that the *mujtahid* must be a person that is known to be good and trustworthy.

The qualifications of the *mujtahid* can be summarized as someone who is thoroughly educated in Islamic sciences, possess some kind of position in society and is wise. Worth mentioning is that here is no requirement for a *mujthaid* to be a man. Justice Najua Kemal Farida, appointed as the first female judge in Africa in modern times in 1970, has been pointed out as an example of a female *mujtahid* in the contemporary Sudan.

¹⁶⁸ For a concurring interpretation, see al 'Awani, Taha J., "The Crisis of Thoughts and Ijtihad", *The American Journal of Islamic Social Sciences*, vol. 10, nr 2, 1993, p. 235-237.

6.4.2 Requirements and qualifications in the contemporary Sudan

All the respondents were asked to give the requirements and qualifications for the one who exercises *ijtihad*. The responses refer to *ijtihad* in general. The more specific requirements and qualifications for different levels of *ijtihad* are presented under the next heading. 15 respondents in 63 responses mentioned 35 different requirements and qualifications. The following is a compilation of the responses:¹⁶⁹

The most commonly mentioned requirement is the first traditional requirement of the *mujtahid* “good knowledge in the Qur’an”. Six respondents mention it (interviews 7, 10, 13, 14, 20, and 23). Five respondents mention the second traditional requirement: “good knowledge in the sunna” (interviews 7, 10, 13, 14, and 23). Four respondents mention “bring in specialist in lawmaking”, i.e. a negative definition meaning that the one who exercises *ijtihad* do not have to be a specialist in all areas (interviews 6, 9, 10, and 20). Three respondents mention the “good knowledge in the historical sources”, i.e. the Qur’an, and the sunna (interviews 7, 14, and 23). Three respondents mention the third traditional requirement “linguistic and scientific knowledge in the Arabic language (interviews 10, 13, and 23). Three respondents mention “knowledge about all the previous views on Islam and knowledge on *ijma*”, something that traditionally fall under the fourth requirement of the *mujtahid* (interviews 7, 10, and 23). Three respondents mention “scholar”, referring to all the traditional requirements of the *mujtahid* (interviews 6, 7 and 9). Three respondents mention “knowledge about what is going on in the world” (interviews 8, 15, and 23). Three respondents mention “critical” as a requirement (interviews 6, 18, and 19).

Two respondents mention “free from influences, an independent character” (interviews 10, and 13). Two respondent mention “flexible” (interviews 8, and 18). Two respondents mention “sensitive” (interviews 8, and 23). Two respondents mention “the traditional requirements are gender biased” (interviews 12, and 18). Two respondents mention the fifth traditional requirement of the *mujtahid*; “knowledge in *usul al-fiqh*” (interviews 10, and 15). Two respondents mention “knowledge in modern sciences”, something often interpreted as the seventh traditional requirement (interviews 7, and 21). Two respondents mention “they should be lawyers and not Imams” (interviews 20, and 24). Two respondents mention the sixth traditional requirement of the *mujtahid* “knowledge about the purposes, aims and interests behind the rules” (interviews 10, and 20).

The following responses are mentioned once each: “know a lot about things” (interview 18), “know customs of the land”, i.e. the seventh traditional

¹⁶⁹ For a more comprehensive overview of the responses, see table 4.

requirement of the *mujtahid* (interview 10), “knowledge about how to derive and apply” (interview 23), “righteous” (interview 13), “accommodate and see how people think” (interview 8), “trained in Islam” (interview 21), “exposed to Islam” (interview 21), “deep knowledge about religion” (interview 8), “experienced” (interview 7), “someone who do not politicise religion” (interview 8), “truly Muslim at heart” (interview 21), “knowledge and understanding about the formative years” (interview 21), “general knowledge and wisdom” (interview 23), “a mind that is not colonialised” (interview 21), “knowledge about people and social life”, the seventh traditional requirement of the *mujtahid* (interview 10), “a council of scholars, an *ulama* council” (interview 9) “know the world we are living in” the seventh traditional requirement of the *mujtahid* (interview 21), “honest, good person, trustworthy” (interview 10), and “sensitive to gender issues” (interview 12).

6.4.2.1 *Traditional requirements and qualifications traditionally interpreted*

There is a consensus in the responses sorting under the first, second, third, fourth, fifth, sixth, and eight traditional requirement of the *mujtahid*, i.e. all the traditional requirements but the seventh.¹⁷⁰ They all stay within the traditional Islamic concepts of requirements. The references to the six first and the last traditional requirements of the *mujtahid* is a very good example of a traditionalistic semantics. A traditional Islamic concept is interpreted traditionally and applied only within limits.

It is a distinct group of respondents who appear and reappear with responses sorting under the first, second, third, fourth, fifth, sixth, and eight traditional requirements of the *mujtahid*. In interview 7, six responses sorting hereunder are given, in interview 10 seven responses are given, in interview 13 three responses are given, in interview 14 six responses are given, in interview 15 two responses are given, in interview 20 only one response is given—making the respondent not really fit into the group, and in interview 23 eight responses sorting hereunder are given. As the respondents are homogeneous in their answers it is not farfetched to assume that there are other commonalities among them as well. Of the seven respondents, five are over 50 years old and belong to the educated elite (interviews 7, 10, 13, 14, and 15), one is an activist and student in the age category 31-50 years (interview 20), and one is a student under 30 (interview 23).

¹⁷⁰ To the first requirement counts “good knowledge in the Qur’an” and “good knowledge in the historical sources”. To the second requirement counts “good knowledge in the sunna” and “good knowledge in the historical sources”. To the third requirement counts “knowledge in the Arabic language”. To the fourth requirement counts “know all the previous views in Islam and *ijma*” and “good knowledge in the historical sources”. To the fifth requirement counts “knowledge in *usul al-fiqh*” and “good knowledge in the historical sources”. To the sixth requirement counts “understanding the purposes and aims of the shari’ah”. To the eighth requirement counts “good and trustworthy”.

If generalising, traditional interpretation of the qualifications and requirements for to exercise *ijtihad* is made by someone over 50, who is well educated and has some sort of senior position in society (interviews 7, 10, 13, 14, and 15). To be more specific, she or he is a professional active jurist (interviews 7, 10, and 15) or a traditionally trained religious scholar (interviews 13, and 14). However, it must be noted that far from all professional active jurists do traditional interpretations on the requirements and qualifications of the one exercising *ijtihad* (*e contrario* interviews 6, 11, 24, and 25). Hence, traditional interpretation does not come with being a professional active jurist. Evidently, traditional interpretation does not come with age either (*e contrario* interviews 1, 2, 9, 12, 16, 21, and 25).

I already mentioned that one of the respondents did not really fit into the group, depending on the comparatively very low rates of responses—only one response sorting under the first traditional requirements of the *mujtahid* (interview 20). Not even here is her answer fully traditional: ‘Know the Qur’an—all Sudanese people knows’ (interview 20). By adding “all Sudanese people knows”, the respondent shows that she is using a modernist semantics. She takes the traditional concept of the requirement of the *mujtahid* and gives it a partially new semantic meaning. Yet another feature of that respondent does not fit into the general picture of the group—she is an activist, and activists relate to the traditional requirements of the *mujtahid* in a very distinct way. In general, activists are criticising the traditional requirements. So, for example two of the activists hold that the traditional requirements of the *mujtahid* are gender biased (interviews 12, and 18), and another activist respondent question if the one engaging in *ijtihad* must be anything at all like a traditional *mujtahid* (interview 8).

Yet another of the respondents stands out of the group, and must therefore be commented. The respondent is frequently represented among responses sorting under the first, second, third, fourth, fifth, sixth, and eight traditional requirements (interview 23). Though she is the respondent who is closest, in total both qualitative and quantitative, to a traditionalist interpretation of the qualifications of the *mujtahid*, she is a student, and she is under 30. Her response profile does not fit the general profile of the students (interviews 18, 19, and 20), nor does it fit the general profile of the age category 20-30 years, to which she belongs (interviews 8, and 18). She definitely does not fit into the general picture of someone who does traditional interpretation, i.e. over 50, and professional active jurist or traditionally trained religious scholar. When looking at her educational background, her position on the requirements and qualifications of the one exercising *ijtihad* makes more sense. She, as opposed to the other students and the other respondents in her age category, has a traditional religious education, not to dissimilar to religious education of the respondents in the oldest age category (interview 23).

6.4.2.2 Traditional requirement interpreted in three different ways

The respondents interpret the seventh traditional requirement "knowledge about the social context in which the mujtahid lives in", in three different ways.

First of all the traditionalist interpretation, namely knowledge in the "custom" of the people and "knowledge in people and social life", is represented (interview 10). The meaning of the traditional concept is interpreted according to tradition, hence traditionalistic semantics. Secondly, two respondents pursue a modernist interpretation, in much connected to modern nation building: "knowledge in modern sciences" (interviews 7, and 21), and "know the world we are living in" (interview 21). The traditional concept is given a new meaning in a modern world. A third way of interpreting the seventh traditional requirement of the *mujtahid* is post modernist "accommodate and see how people think" (interview 8). It is post modernist insofar it changes the law according to the person and not the other way around. Semantically the meaning of the concept is transferred from a traditional context into a new historical situation. There is no normative evaluation.

The last response sorting under the seventh traditional requirement is "knowledge about what is going on in the world" (interviews 8, 15, and 23). Even though defined with the exact same words, the responses must be categorised differently. Two respondents are giving modernist interpretations (interviews 15, and 23), while the third respondent is giving a postmodernist interpretation. The first proposition is supported by the fact that the respondents are referring to modernising the Sudanese legal institutions, while keeping its Islamic character (interviews 15, and 23). Hence, the respondents pursue modernist semantics and ontology. The second proposition, i.e. the third respondent being postmodernist in her response, is supported by the fact that the respondent is referring to *ijtihad* based on a deconstructivist analysis of world politics after September 11th and a deconstructivist analysis of Palestinian suicide bombers (interview 8). Hence, the respondent is pursuing a postmodernist ontology.

Who then are giving the three types of answers? Too few responses are given and too few respondents are represented for to draw any further conclusions. However, the traditionalistic interpretation, already dealt with under the previous heading, is confirmed (interview 10). Only a few characteristics of the modernist interpreter can be lined out. The modernist respondents are both over 50, and they belong to the educated elite. One is a professional active jurist (interview 7), and the other is a political ideologist (interview 21). Also, very few characteristics of the postmodernist interpreter can be lined out. The respondent is under 30, and she is an activist (interview 8).

6.4.2.3 *The general requirement of wisdom*

A general requirement, summarising the traditional requirement of the *mujtahid* is the general requirement of wisdom, mentioned by two respondents: “know a lot about things” (interview 18) and “general knowledge and wisdom” (interview 23). The question for this study is what kind of knowledge and wisdom that is, why I let the two responses rest.

6.4.2.4 *Qualities, skills and ideology*

After categorizing all the responses referring to the traditional qualifications of the *mujtahid*, a group of various requirements and qualifications are found among the responses in the study. These various requirements and qualifications can be divided in three different categories.

The first category is about qualities or essences of the person: “critical” (interviews 6, 18, 19), “flexible” (interviews 8, and 18), and “sensitive” (interview 8, and 23). The responses are given as examples on how someone engaging in *ijtihad* should be, but is generally not today, nor in a historical perspective (interviews 6, 8, 18, and 19). The responses are rather than anything else, arguments against a traditionalistic interpretation of the role of the *mujtahid*. “Critical” is, for to give an example, referred to as “not forcing Islam [-], but critically examine the reason behind the rules” (interview 19). Yet another example is “In *ijtihad* we need to address different problems with flexibility. Values are not constant. If we don’t fit religion to the lives of people, religion will fade away” (interview 18). The latter argument is clearly postmodernist while the first can pass as both modernist and postmodernist. The profile of the respondents is fairly clear. They are either activists (interviews 6, 8, and 19) or students (interviews 18, and 19), and they are all under 50. One respondent has been left out of the profile, since she is an example of a different profile. She mentions “sensitive”, and argues that the one engaging in *ijtihad* must be sensitive towards historical change of law. To be more precise the respondent argues that change must be slow, limited and carefully pursued not to abrogate historical interpretations (interview 23). The respondent belongs to the traditionalist profile.

The second category is about the craftsman’s work, the practical skills of the one engaging in *ijtihad*: “experienced” (interview 7) and “knowledge about how to derive and apply” (interview 23). The responses are functionalist arguments, in much explained by the respondents being one professional active jurist (interview 7) and one graduate student of law (interview 23).

The third and last category is about ideology. Although all responses can be said to be ideological in some sense, these responses stand out. Two ideologies are represented: feminism (interviews 12, and 18) and nationalism (interview 21). Starting with the responses on feminist ideology, they stand as

a criticism towards traditionalistic interpretation of the qualifications of the *mujtahid*: “the traditional requirements are gender biased” (interviews 12, and 18) and the requirement that the one exercising *ijtihad* must be “sensitive to gender issues” (interview 12). The responses are argued from a modernist position on semantic, ontology—feminist values are seen as normatively true—and epistemology. Yet, postmodernist elements are there. Feminist theory as used in their arguments, is deconstructionist. The profile of the respondents is clear: they are modernist activists, with postmodernist elements in their arguments. The response on nationalist ideology: “a mind that is not colonialised”, stands as a criticism against the Sudanese postmodernist stronghold (interview 21). The response is specifically aiming at the academics who were educated under the British, and those who have embraced Western deconstructionist theories. The respondent argues that “a colonialised mind” is secularised and therefore not capable of exercising *ijtihad* (interview 21). The fundament of the argument is modernism. Semantically, the concept of *ijtihad* is given a new, and specific meaning, negatively defined. Epistemology in the response is normatively evaluated. The respondent argues against deconstructive—and as he argue secularised—theories, pursuing a modernist position since he argue that objectively true values are to be continually developed according to historical change (interview 21). The profile of the respondent is a modernist political ideologist.

6.4.2.5 *The office of the one exercising ijtihad and the requirements of religious character*

Who is the person that is exercising *ijtihad*, and what is his or her office? The specific conditions of *ijtihad* on different levels are dealt with later in the study. The presentation here is about office and religious qualifications on a general level.

It is clear, although nowhere in the material stated, that being a Muslim is a general requirement and qualification for to exercise *ijtihad*. One respondent goes beyond, holding as a requirement not only knowledge in Islam, but in religions in general (interview 8). Among the responses on the office and requirements of religious character there are two important and different ways of categorising the responses. Starting with the character of the office there are four categories: those who argue that the office is mainly of traditional religious character (interviews 13, and 14), those who argue that the office is of both political and religious character (interview 21), those who argue that the office is mainly of legal nature (interviews 6, 7, 9, 10, 20, and 23), and those who argue that the office is mainly not of traditional religious nature (interview 8, and 18).

The respondents who see the office as of mainly traditional religious character clearly criticise political Islam, or Islamism: “someone who do not politicise religion” (interview 14), and “someone who is free from influences,

not belonging to any party” (interview 14). Not being part of the political system is thus an additional requirement to the traditional requirements of the *mujtahid*. The respondents sorting under this category are traditionally trained religious scholars. They hold a traditionalistic position. It is also noticeable that the most clearly vocant respondent belongs to the *Ansar tariqah*. The political ideologist, who sees the office as both political and religious, pursues a divergent position (interview 21). He is adding a specific outlook on Islam to the traditional requirements of the *mujtahid*, where for example “knowledge and understanding about the formative years” becomes especially important for the political construction of a nation state (interview 21). Hence, the political ideologist holds a modernist position. The respondents who see the office as mainly of legal nature take a functionalist modernist position. Not surprisingly, the respondents are mainly professional active jurists—lawyers. They argue that the office should be “scholars” (interviews 6, 7, and 9), but also “lawyers, not Imams” (interviews 20, and 23). The most significant feature of the respondents’ position is that they limit the requirements of the office by the following argument: since the area of knowledge of the office is vast— including modern sciences—the person exercising *ijtihad* must “bring in specialists” (interviews 6, 9, 10, and 20). The fourth and last category of the character of the office turns away from the traditional requirements of the *mujtahid*: “I have always questioned if you must be a traditional *mujtahid*” (interview 8), and “It should not be only the traditional qualifications. Whatever the *mujtahid* say should not become holy” (interview 18). Here the respondents, both under 30—one activist (8) and one (student), are taking a postmodernist stand. The position is postmodernist insofar it has relativist ontological and epistemological elements.

The second way of categorising the responses on office and the requirements of religious character, is about if the one engaging in *ijtihad* is to act on his own or not. While most respondents seem to hold that *ijtihad* should be performed individually, there are those who see it as a requirement to exercise *ijtihad* together with others: either with the help of specialists or within a council. The first has already been dealt with above. The latter is the traditional concept of *ulama*, a “council of learned jurists” (interview 9). Adding to the traditional requirements of the *mujtahid* is consequently the forum.

6.5 Levels of *ijtihad* and the requirements and qualifications for exercising *ijtihad* on those levels

With the background knowledge of the respondents general positions on the requirements and qualifications of *ijtihad*, an additional qualification follows here of the levels on which *ijtihad* are used in the contemporary Sudan. When qualified in different levels, the definitions of, the limits of, and the qualification in general for *ijtihad* becomes more clear. Further, by defining

the qualifications for *ijtihad* on different levels in the contemporary Sudan the respondents give further details about their philosophical positions. This since it clearly reviles how they apply a traditional Islamic concept to the legal problems on different levels of a modern nation state.

6.5.1 *The levels and sublevels*

When leveling and subleveling *ijtihad*, one must first of all separate *ijtihad* for personal purposes and *ijtihad* for the purpose of others. The latter must then be further divided into the categories of personalised *ijtihad* and *ijtihad* on a generable level. The generable level is subcategorised into three categories: the ideological, the formal and the factual level of *ijtihad*. The factual level of *ijtihad* can also be seen as personalised since it is about application of norms in both the generable and the personalised cases.

6.5.2 *Personal ijtihad*

There is no doubt wither or not *ijtihad* for personal purposes is used in every day life. One respondent gives the following example:

Every morning I go up from my bed and I have to make decisions. Some of those decisions are *ijtihad*. For example, I have to decide on how to wash my feet before prayer. That is a form of *ijtihad* where I use my best knowledge on a matter of religious duty. (Interview 2)

Defined like this *ijtihad* becomes something Muslims worldwide exercise every day, as a tool for to organise their daily life. It can be the practical question of how to wear the *hijab*, the headscarf—or not to wear it at all, how to perform the prayers when on an airplane, or something else of personal nature. The responses in this study are unison: there are no requirements and qualifications other than being a Muslim for to exercise personal *ijtihad* (interviews 2, 4, 6, 11, 13, 18, and 20). This means that the outcome of *ijtihad* varies very much. Moreover it also means that the sources of interpretation vary to its extremes.

6.5.3 *Ijtihad for the purpose of others*

6.5.3.1 *Fatwa - the personalised level*

When giving a *fatwa*, a written legal opinion, *ijtihad* is exercised on a personalised level. A *fatwa* is a legal opinion given for a specific question and a specific problem. A *fatwa* is an opinion and is therefore not formally binding the person who asked the question the *fatwa* is trying to solve.¹⁷¹ The specific character of the *fatwa* is that it is personalised and not generable. In the Sudanese legal context a *fatwa* can be presented in court supporting a legal opinion, but it can never in itself have or gain legal enforcement. Even

¹⁷¹ Waines, 1995, pp. 86-89.

though not enforced through the formal judiciary system, a *fatwa* can have a great impact on society on a factual level. The Sudanese people tend to listen to their religious leaders, and they follow the *fatwas* given by them.

Among the responses in the material, no general requirements are mentioned for being able to give a *fatwa* (interviews 13, 15, and 22). One respondent argue:

It is up to the one who ask for the *fatwa* to chose from whom to seek advise. Accordingly you can request a *fatwa* from your neighbour, but most people would seek the advise of a scholar. (Interview 15)

Most commonly a lawyer or a religious scholar is the one giving a *fatwa*.

6.5.3.2 Ideological level of *ijtihad* - the generable level

The second level, first subcategory of exercising *ijtihad* is when you exercise *ijtihad* for the purpose of others on a generable level. This means that no question has been posed and the answer is not personalised to either you or anyone in particular. This level of *ijtihad* can be found on an ideological level and on a formal level. To a certain extent it can also be found on a factual level. The ideological level means exercises of *ijtihad* where one seeks to find general rules on how life in the inner and outer forum should be organised.¹⁷² The ideological level can be about for example political debates, academic writings and religious speeches. Ideological *ijtihad* is often exercised to face problems within the Islamic nation state. When the respondents mention *ijtihad* on an ideological level, they often refer to *ijtihad* made by religious and political leaders (interviews 1, 7, and 21).

6.5.3.3 Formal level of *ijtihad* - the generable level

The formal level of *ijtihad* for the purpose of others is when you exercise *ijtihad* that will result in general norms that others are obliged to follow. This level of *ijtihad* is mostly about lawmaking in modern Islamic nation states.

How then do the qualifications and requirements of the one exercising *ijtihad* meet with the modern concepts of lawgiving? Exactly who is it or should it be within a process of lawgiving that exercise the process of *ijtihad*? The responses in this study can be divided in two categories: those that talk about specialists and experts (interviews 6, 7, 9, and 20), and those that talk about collective *ijtihad* (interviews 9, 10, 13, 14, 15, 19, and 21).

In the first category the respondents argue that since not all can be specialists in all fields, experts and specialists should be taken into process of making

¹⁷² Inner forum stands for the inner life, i.e. the relation between man and God, and the outer forum stands for interactions with other persons or institutions based on the religious ethics. The legal distinction of the inner and the outer forum is taken from Catholic Canon Law, therefore somewhat unsuitable for this context.

the law. The experts and specialists are not to form the laws themselves, but their role is to provide the proper knowledge in specific fields.

In the second category, the respondents talk about different groups of people who together are qualified to exercise *ijtihad*. It is possible to say that all democratically elected representatives, or MPs, Members of the Parliament, are engaged in the process. But, is it then so that all members of the National Assembly must be *mujtahids* in order for the laws to become valid? The respondents are divided on the issue. One respondent argues that the collective action and participation of all the political parties in the Sudan makes the law giving process valid (interview 19). Since not all political parties, and consequently not all MPs, are Muslim this means that participation in the lawmaking process by non-Muslims is a requirement for *ijtihad* for the purpose of lawmaking. Semantically, the traditional meaning of *ijtihad* has been changed and put into a new historical context. Hence, the respondent holds a modernist position. Yet another respondent agrees to the conclusion that *ijtihad* by all MPs is necessary, with the substantive reservation that besides Muslims, only Jewish and Christian MPs could validly exercise collective *ijtihad* for the purpose of law making.¹⁷³ This since:

Also for Christians or Jews the basics of religion are the same [as in Islam]. What is right and wrong in those religions are basically the same. It is the same basic beliefs. But in the case of the atheists [they] cannot change the system [of Islamic law] but [they have to] obey the majority's beliefs. (Interview 14)

The argument must still be considered as modernist, though not as boldly modernist as the respondent who wants all MPs to participate.

The other seven respondents argue that the *ijtihad* of the MPs is valid because it rests on the collective *ijtihad* of the *mujtahids* (interviews 9, 10, 13, 15, and 21). Of those, three respondents specifically refer to the Sudanese *Ulama* Council, an advisory council within the National Assembly (interviews 9, 13, and 15). The Sudanese *Ulama* Council, as such, is a good example of how meaning of a traditional Islamic law concept is transferred from its traditional home to a modern institution. Thus all the responses referring to the *Ulama* Council carries a modernist semantics.

The majority of the respondents who argue that collective *ijtihad* is the valid *ijtihad* for lawmaking, also argue that the validity of the National Assembly in terms of Islamic law rests on the principle of the *ummah*, the Muslim nation, and the principle that no Muslim ruler can take power without the peoples consent (interviews 9, 10, 13, 14, 15, and 21). One respondent specifically refers to the Islamic principle of *shura* (interview 21). These responses use yet

¹⁷³ Worth noting is that the Christian communities take a role in political life, while the Jewish community—with its in total two members in the whole of Sudan—do not take part in any public political life.

again application of traditional concept of Islamic law in modern a setting, consequently using modernist semantics.

6.5.3.4 Factual level of *ijtihad* - personalised and generable level

The factual level means implementation of general norms in practice and in the individual case by the use of *ijtihad*. This level of *ijtihad* is institutionalised in the judiciary, the police and the administration of the modern Islamic nation state. Requirements and qualifications for the person exercising *ijtihad* is much more problematic on the factual level, than on any other level. Realistically, on the factual level not everybody can be *mujtahids*, be it in the traditional sense or by any other definition. Yet, everybody that works with application and implementation of law will have to do some sort of *ijtihad*. However clear laws and regulations are they will still be open to interpretation, and to *ijtihad* in some sense.

Seven respondents mention *ijtihad* on a factual level within the judiciary (interviews 2, 6, 10, 16, 21, 23, and 25). Of those, four argue that *ijtihad* is validly undertaken by judges in order to accommodate in the individual cases (interviews 2, 6, 10, and 23). The argument is modernistic since “accommodation” is about applying traditional meaning in a modern context. One respondent argue that *ijtihad* should be exercised within the judiciary, but is not today (interview 21). The respondent argue that judges should examine the true meaning of Islam, as in the formative years, and apply in modern context. The respondent is clearly pursuing a modernist argument. Another respondent argue that *ijtihad* today is exercised so that *hudud* is not properly applied. The respondent considers this “anti *hudud ijtihad*” as invalid (interview 16). Where all the other respondents in this study consider the *hudud* punishments to be somewhat problematic, difficult or wrong to fully implement in a modern society, this respondent take a traditionalistic position. A third respondent argue that judges should not exercise *ijtihad* since they should only abide to the letter of the national law (interview 25). The argument is functionalistic and modernist.

To get a picture of how *ijtihad* on the formal level within the judiciary is exercised in practice, the following citation might be helpful. In the citation a contemporary Sudanese judge reasons about the concept of justice in the Sudanese penal code, and the concept of justice in Islamic law. The citation also alerts questions about the function of the judge vis-à-vis the lawgiver, and Islamic law as a whole:

There is an unjust section in the penal code. As a judge you must follow the law, but you must also go out of your way to find the inroads to justice. It is important for every judge to find those inroads to justice. This is a case that came to my desk when I was a judge: A woman was charged for committing adultery. She was married. She confessed the crime. From an evidential point of view it was established that she had committed the crime. The case came to me and I knew that the penalty for the crime was death. I tried to find a way for the lady. I talked to a senior judge, and

together we came up with a solution. The woman's husband was living abroad, outside of the Sudan. This means that she was in practice not *ashan*, literary "inside the fortress of marriage". *Ashan* comes from the same root as the word for fortress. So, the legal conclusion was that she should not be treated as if she was in a marriage, but as if she was unmarried. The punishment was still hard, but the lady was to keep her life. I made *ijtihad* and put the reasoning into the case. (Interview 6)

The example of *ijtihad* in the citation alerts many questions. For example, is it not so that the judge in the example is exercising *ijtihad* for to abrogate the penal code? One of the respondents in the study argues that this is so, and that no judge stands above the law, however qualified she or he is to do *ijtihad* (interview 25). If the judge is free to exercise *ijtihad* that abrogates the law, how can we be sure that there will be a fair trial with a predictable outcome? In short—what about legal security?

One way of getting around the problem of qualification for the one exercising *ijtihad*, given by one of the respondents, is to create possibilities for appeals within the judiciary:

Nowadays we don't have *mujtahids* so, instead we have appeal courts. Since the judges can not be knowledgeable in all fields, people can appeal to someone who will know more or other things. This means that different judges should be specialised to specialised courts. (Interview 10)

So, if you are not satisfied with the judgement or the individual judge, you can always appeal and get your case reviewed by a hopefully better qualified judge, or a judge who will exercise *ijtihad* in a different mode (interview 10). Another solution is to let judges call in experts (interviews 6, 9, 10, and 20). Whichever way you choose, the meaning of the traditional concept of the *mujtahid* has been changed, contextualised, and applied in a modern setting. Semantically, the respondents thus take a modernist position.

These solutions of appeals and experts apply only to the judiciary, and however reassuring it sounds it might not work as well in practice as in theory.¹⁷⁴ In the administration and in the police forces it is not at all possible to talk about *mujtahids*. At this level of administration, inevitable it will be unqualified *ijtihad* (interviews 3, 6, 7, 10, and 25).

¹⁷⁴ An example highlighting the problems is the much-debated Nigerian case of Amina Lawal. Amina Lawal was sentenced to death by stoning by a lower court for committing the crime of adultery. The Sudanese Bar Association sent a delegation of lawyers supporting her lawyer for an appeal. The delegation of Sudanese lawyers found that from an evidential point of view the case was clear. According to the Nigerian law—in this case Islamic law—she was to be sentenced to death by stoning. However, they also found that during the time-period when the crime had been committed, Islamic law was not the law of the land. Amina Lawal could therefore not be sentenced for an act that at its full duration was not a crime. The Nigerian court of appeal did not consider the arguments valid, and the appeal was dismissed. Interview with the president of the Sudan Bar Association Fathi Khalil Mohammad, Khartoum 2002-10-26. The case of Amina Lawal can be followed on Amnesty Internationals website: http://web.amnesty.org/web/content.nsf/pages/gbr_nigeria

6.6 Human rights and *ijtihad*

Human rights is a living debate in contemporary Sudan. It is a matter of concern on the ideological, formal and factual level. As this study shows, there is a great disunity in contemporary Sudan on the place and role of human rights in Islam.

All the respondents were asked if human rights could be implemented in Islamic law through *ijtihad*. They were given the example of CEDAW, the Convention on the Elimination on all Forms of Discrimination against Women. In answering that question, the respondents had to qualify how they understand human rights, and give arguments for their positions on how *ijtihad* can be exercised using a material example. Human rights and Islam, and especially women and human rights and Islam, is a subject matter where the question of clashes of philosophical systems perhaps becomes more evident than in any other subject matter studied within this particular study.

6.6.1 *The levels and sublevels*

Starting on the most general level, the responses to the question “can human rights be implemented in Islamic law through *ijtihad*” can be divided into the two categories “yes” (interviews 5, 6, 8, 12, 18, 19, 20, and 24) and “no” (interviews 1, 3, 4, 9, 10, 11, 13, 14, 15, 21, 22, and 23). These categories will be further divided in definitions and levels of human rights, Islam and human rights, and semantic, ontological and epistemological questions.

6.6.2 *Human rights can be implemented through ijtihad*

We find the respondents in the yes category among the activists (interviews 5, 6, 8, 12, 19, 20, and 24) and the students (interviews 18, 19, and 20), though not all activists and students are yes people (interviews 3, and 11, respectively 23). This also means that the respondents in the yes category are fairly young: only one is over 50 (interview 12), five are between 31 and 50 (interviews 5, 6, 19, 20, and 24), and two are under 30 (interviews 8, and 18). As already stated before in this study, the activists work with issues on human rights (on different levels) in their every day life.

6.6.2.1 *Definitions and levels of human rights*

All respondents who see *ijtihad* as a possible tool for to implement human rights in Islamic law define human rights as international declarations. The definition is in much explained by the respondents being activists and students working with international declarations in their every day life.

Most respondents refer to human rights on all levels—ideological, formal, and factual—in their responses (interviews 5, 8, 12, and 24). The factual level of human rights is specifically mentioned by three respondents (interviews 6, 8, and 18), the formal level by one respondent (interview 6), and the ideological level by one respondent (interview 19). This means that the respondents do not only comment on what has sometimes been referred to as “window dressing”, i.e. nice and promising words on an ideological and formal level but no implementation on the factual level.

6.6.2.2 *The relation between Islam and human rights*

Keeping in mind that all respondents in this category agree on *ijtihad* to be a possible tool for to implement human rights, it is important to understand the great differences in the arguments supporting that unified position. The respondents must first of all be divided into two categories: those who prefer *ijtihad* as the tool for implementing human rights (interviews 5, 6, 8, 12, 18, 19, and 20), and those who do not prefer it, but who see it as a more realistic alternative than the more preferable system of secular national laws (interview 24)¹⁷⁵.

Are human rights as defined in international declarations the same as the rights defined in Islam? The majority of the respondents see some commonality between the two different sets of rights. One respondent argue “Islam and human rights are the same in essence” though “human rights in the West is individual. In Islam it is the rights of the state, the community and the individual” (interview 12). Three respondents argue “human rights goes against the current interpretation of Islam, but not the values of Islam” (interviews 8, 18, and 19). Two respondents argue “it is possible to interpret Islam as human rights” (interviews 6, and 12), indicating that human rights are something external and that Islam must and can change for to host human rights. Five respondents argue that it is possible to combine Islam and human rights (interviews 5, 6, 8, 18, and 19), though one respondent continue the argument:

In some areas we experience great difficulties in reconciling the Qur’an and human rights, because the latter are secular. A good example is freedom of religion. But, there are some scholars who argue that the Qur’an gives freedom of religion. They argue that the Qur’an talks about conviction and not about compulsory. So, it can be difficult to combine Islam and human rights, but it is not impossible. (Interview 6)

One respondent argue that there are “no problems between human rights and Islam [on an ideological level], but tradition is the problem [i.e. human rights on the factual level]” (interview 19). Two respondents argue “human rights do not exist in Islam, but it is better to change Islam than to change human

¹⁷⁵ A very similar position is held in interview 3 by an activist who sees it as possible in theory, but not very likely in practice, that *ijtihad* can be used as a tool for to implement human rights. He arrives at a “no”, since he believes that secular laws are the only way for to fully implement human rights. The position is further discussed later in the study.

rights” (interviews 18, and 24). The same respondents also argue “human rights are universal, not Western” (interviews 18, and 24).

To all the respondents human rights are something desirable, and on an ideological level possible to combine with Islam, though two respondents argue that Islam then has to change. On a formal level human rights are not seen as fully implemented, and on a factual level even less so.

There are two major positions represented in the arguments. The modernist argument—that traditional concepts of Islamic law can be given new semantic meaning in a new historical context—is represented in many of the responses (interviews 5, 6, 8, 12, 18, and 19). The postmodernist arguments are represented by the two respondents who interpret Islam from a strong subjectivist position on ontology (interviews 18, and 24). There is no clear explanation available indicating any differences in age, gender, or education between the respondents pursuing modernist arguments and the respondents pursuing postmodernist arguments.

6.6.2.3 Semantics, ontological and epistemological questions

Only two respondents explicitly mention semantics, ontological and epistemological questions triggered when Islam meets with human rights. One respondent argue that Islam and human rights belong to different but not contradicting semantics, ontologies and epistemologies (interview 12). The other respondent also see it as different semantics, ontologies and epistemologies, though he does see them as contradictory (interview 24). The two respondents well represent the two major positions on how to work with human rights in an Islamic law setting among those willing to do so. There are those who see no clashes of philosophical systems and those who do. The argument for the first position is modernist. By contextualising, by drawing conclusions from historical experience, and by applying modern sciences—not only including producing sciences—as empirical proofs, the modernists come out with a valid giving and taking of semantics, ontologies and epistemologies. The postmodernists, here represented by the second respondent, do not have to countercheck with any objectivistic norms. Islamic law is to change according to the current need of the society.

6.6.3 Human rights can not be implemented through ijihad

In the no category the respondents can best be described as belonging to the educated elite, with two exceptions: one activist (interview 3) and one student (interview 23). This means that a majority of the respondents are over 50, and that they hold senior positions in the contemporary Sudanese society (interviews 1, 4, 9, 10, 13, 14, 15, 21, and 22).

6.6.3.1 Definitions and levels of human rights

The respondents who do not see *ijtihad* as a possible tool for to implement human rights in Islamic law define human rights as international declarations, that is in the same way as the respondents who do see *ijtihad* as a possible tool for to implement human rights in Islam (interviews 1, 3, 4, 9, 10, 11, 13, 14, 15, 21, 22, and 23). Although only one of the respondents works with international declarations in his every day life (interview 11), the awareness and knowledge about international declarations on human right in general and about CEDAW in particular is high.¹⁷⁶

Most respondents refer to human rights on all levels—ideological, formal, and factual—in their responses (interviews 4, 9, 10, 13, 15, and 23). Four respondents define human rights on an ideological level (interviews 11, 14, 21, and 22), and one respondent defines human rights on a formal level (interview 11). Worth noting is that none of the respondents specifically mention human rights on the factual level. As have been shown before in this study, the Sudanese debate on human rights has mainly been at an ideological level. The respondents in this category all belong to the educated elite who is a dominant part of that debate.

6.6.3.2 The relation between Islam and human rights

There are two very different arguments behind arriving at a “no”, when answering the question if human rights could be implemented in Islamic law through *ijtihad*. The first argument is: “human rights should not be implemented in Islamic law” (interviews 1, 4, 9, 10, 13, 14, 15, 21, 22, and 23). The second argument is “human rights should be implemented, but not through Islamic law” (interview 3). One respondent is ambivalent, but arrives on a vague no (interview 11).

Most respondents within the no category understand human rights as a narrower concept of rights than the concept of rights found in Islam (interviews 4, 9, 13, 14, 15, 21, 22, and 23). An exception is of cause the respondent who wants to abandon Islamic law and implement human rights through secular laws. He takes the exactly divergent position (interview 3). Among the majority of the “no” respondents, Islamic law is seen as a comprehensive and coherent system of rights and duties, where human rights as defined in international declarations do not fit in (interviews 9, 13, and 23). The following citation clearly shows the line of argument:

¹⁷⁶ In a study done in 2002, on top level decision makers’ knowledge and attitudes towards CIDAW, 68 percent of the respondents suggest they know CIDAW exactly, while 32 percent of the respondents suggest they know CIDAW to some extent. The top-level decision-making respondents are close to the educated elite in the study carried out here. Salih, Amel Mohamed, *Sudanese Men and Women’s Knowledge and Attitudes towards CIDAW*, unpublished Masters Thesis, Gender and Development Programme, Afad University for Women, Omdurman, 2002, p. 30.

Most of the human rights are the same as the principles in Islam: the right to life, the right to wealth, the right to not to have you honor offended, and right to religion. In Islam all these rights are safeguarded by *hudud*. *Hudud* safeguard the most important rights. (Interview 13)

The rights are already there—safeguarded, hence no need for to try and fit in human rights as defined in international declarations.

Three respondents see a problem in international human rights being a secular concept (interviews 10, 11, and 15). One of them argues, “human rights are secular, and not everything secular fit with Islam” (interview 10). Another respondent sees it as a different historical experience:

Reform has taken centuries in the West, starting with Luther. The debate in the West has taken all that time in order to discuss human rights, gender equality, and the principles of children’s rights. It is a different historical experience. It is not always easy to talk about these issues in the Islamic legal context because it is a different historical experience. (Interview 22)

The respondent is arguing that international human rights developed in the West as a process of secularisation, starting with the Reformation. Since Islam is a much younger religion, secularisation has not yet come; hence there is no historical room for to take international human rights into Islam (interview 22). The same line of thought is followed by one respondent who argue, “Human rights developed because of a lack of something. It developed in the West. In Islam we do not have a lack.” (Interview 9)

Taking a more factual approach, three respondents argue “We don’t have any problems with human rights in Islam” (interviews 4, 13, and 14). Two respondents argue, “We never felt a need for human rights. We have rights in Islam” (interviews 4, and 14). One respondent mentions Sudanese customs and Arab tradition as being the reason why there are problems with human rights in the Sudan today (interview 15).

The only two respondents who see no connection between human rights and Islam is the activist who wants to abandon Islamic law for human rights (interview 3), and the academic who sees no point in trying to fit in the concept of human rights into Islam when it is not already there—for the reason that it should not be there (interview 9).

The main position represented in the arguments is the traditionalist. Human rights are seen as concept from a different and secular ontology. An exception is of course the activist, who pursues a secularist position.

In general it can be said that the respondents in the no category, excluding the activist (interview 3), understand human rights as a subject of little interest to Islam. It can best be explained by the findings from the chapter above on the limits of *ijtihad*—namely need. The respondents see no need on a factual level

for human rights as defined in international declarations, hence no need for change.

6.6.3.3 *Semantics, ontological and epistemological questions*

Two respondents mention semantics, ontological and epistemological questions triggered when Islam meets with human rights. One respondent, him self being against the use of *ijtihad* for the purpose of human rights, comment on the subconscious use of clashing philosophical positions:

If we understand the different worlds of West and Islam as different pillars, a certain amount of integration can take place and eventually a new form of culture will take place. But when you start mixing things you always risk that something might break. The response might be total refusal. Philosophically I believe that what people do is that they mix two different worlds, they transform the both and they adapt. But the major values and the core dogma are not likely to change. If people intentionally take from two different philosophies the result comes out deformed. But they do it subconsciously. (Interview 1)

The citation shows a traditionalistic line of argument, with modernistic elements. Even though traditionalists do not intentionally try to change the Islamic law, they do it subconsciously argues the respondent. Eventually with history Islamic law will change—a modernist thought.

The respondents in the no category see it as a clash between the philosophical belongingness of Islam and that of human rights, and they evaluate it normatively from an objectivistic ontology. They take a clear traditionalist position, with a few modernistic elements. Also the respondent who wants to abandon Islamic law and implement human rights through secular laws, sees the clash and evaluate it from a normative ontology (interview 3).

III

Analysis

7 Analysis and conclusions

Can reformation of Islamic law validly be undertaken where an outside concept, i.e. human rights, from a presumably different ontology, and created within a presumably different epistemology is subject to implementation? From the presentation of the material in the chapter above, it is evident that within certain philosophical settings, it is possible to use *ijtihad* as a tool for reformation of law, at least within limits. Sometimes those limits reduce the area open for reformation to close to nothing. The material presented above has also shown that there are different philosophical positions on the use of *ijtihad* in contemporary Sudan. In the analysis the findings of the material—the field study—will be lined out. What has already become apparent from the material will be presented in a methodological way in the analysis, so that conclusions can be drawn.

First an outlining of the issues of the study is made. This is to determine the different levels the arguments given by the respondents. As will become evident, the levels of the arguments in much decide what philosophical position the respondent take. After outlining the levels, an analysis of all the responses is carried out. The respondents are then categorised according to their main philosophical positions. The different positions, and their respective respondents profiles are presented and analysed. After that, the general philosophical position in contemporary Sudan is dealt with.

7.1 Levels of issues and arguments

The issues at stake, and hence the arguments given by the respondents, can be divided in the three levels: ideological, formal and factual. Defining *ijtihad*, and defining the general requirements and qualifications of the one engaging in *ijtihad* are both exercises on the ideological level, although the latter has elements of the factual level. It means that the respondents give arguments based on a theoretical analysis. Defining the limits of *ijtihad*, and the requirements and qualifications for different levels of *ijtihad* are both exercises on an ideological and factual level. It means that the respondents first perform a theoretical analysis using one set of arguments, and then precede to apply the theoretical concept to reality using another set of arguments. Defining human rights and *ijtihad* is both an ideological, formal and factual exercise. It means that the respondents make a theoretical analysis using one set of arguments, and then precede to apply the theoretical concept to both the formal and the factual level using, sometimes the same but most often two different sets of arguments.

7.2 Positions represented in contemporary Sudan

The material is very clear; there are three major philosophical positions and three rather distinct groups of respondents on the use of *ijtihad* represented in contemporary Sudan. The three groups have quite distinct profiles of respondents as to age, education, and position in the Sudanese society. First a compilation of the responses:¹⁷⁷

All responses taken together, makes 176 arguments possible to analyse with the help of the analytical categories and the taxonomy of philosophical positions as presented earlier in the study.¹⁷⁸ 87 responses qualify as mainly traditionalist, 73 responses qualify as mainly modernist, and 16 responses qualify as mainly postmodernist. The respondents can be categorised in thirteen categories, according to the 176 responses. Two respondents are traditionalist (interviews 11, and 16), three respondents are traditionalists with a few modernist elements (interviews 4, 14, and 23), four respondents are traditionalists with modernist elements (interviews 2, 7, 9, 10, 13, 17, and 22), two respondents are traditionalists/modernists (interviews 1, and 15), two respondents are modernists (interviews 5, and 25), one respondent is modernist with a few traditionalist elements (interview 6), one respondent is modernist with a few traditionalist and postmodernist elements (interview 21), one respondent is modernist with a few postmodernist elements (interview 20), one respondent is modernist with postmodernist elements (interview 12), one respondent is modernist/postmodernist (interview 19), one respondent is postmodernist/modernist (interview 18), and one respondent is postmodernist (interview 24).

However, the quantitative approach in the enumeration in the paragraph above must be modified for a full analysis of the philosophical positions of the respondents. Hence a more comprehensive and qualitative approach is pursued in the following analysis.

7.2.1 *The traditionalists*

The Sudan is a traditional society, with its Islamic flavor and pace originating in West African Islamic tradition. Most people lead a traditional life outside of the cities. The ordinary man on the street rather follows the sheikh of his

¹⁷⁷ For a more comprehensive overview, see table 5.

¹⁷⁸ 16 arguments on definitions on *ijtihad*, 28 arguments on the limits of *ijtihad*, 66 arguments on the general qualifications for to exercise *ijtihad*, 27 arguments on the levels of *ijtihad*, and 39 arguments on the relation between human rights and *ijtihad*. For various reasons, not all arguments given by the respondents have been possible to take into the analysis. Some arguments are not clear enough to analyse, and some arguments the analytical categories and the taxonomy used in the study do not cover its full philosophical position. Yet a large category of arguments found in the material has not been taken into the analysis. This since the arguments are about other, often related, issues than those taken into the presentation of the material.

tariqah than national laws that besides are neither fully nor correctly implemented in many cases. The life of the ordinary man is governed even less by international law, than it is by the national laws. Popular Islam, traditional Sufi Islam and the form of educated Islam that arrived to the Sudan during the Turkiyya, are the fundament of what is traditional Islam in contemporary Sudan. As has become evident when presenting the material, it is not the un-educated *peuple* who hold a traditionalist stance. Traditionalism is present in all age categories and in the top levels of society, as well as at the bottom of the pyramid of society. The philosophical home of the Sudanese people in much rests in the Sudanese history and its traditional values.

7.2.1.1 *Where to find the traditionalist arguments*

In the study it has become evident that traditionalist arguments are quite common in contemporary Sudan. However, traditionalist arguments are more common on some issues than others. There are five issues in total where the respondents' arguments have been presented in this study. Two respondents define *ijtihad* using traditionalist arguments, eleven respondents define the limits of *ijtihad* using traditionalist arguments, nine respondents define the general requirements and qualifications of the one engaging in *ijtihad* using traditionalist arguments, three respondents define the requirements and qualifications for different levels of *ijtihad* using traditionalist arguments, and eleven respondents define human rights and *ijtihad* using traditionalist arguments.

Traditional arguments are held on all issues. The respondents tend to give traditionalistic arguments under two specific circumstances: when defining what *ijtihad* cannot be used for—or as, and when definitions are not on a factual level. The latter can be explained by the fact that many respondents start by giving traditionalistic arguments on a general ideological level, and then continue by giving modernistic arguments when they apply their definitions on a formal and factual level. However, as soon as the respondents give negative or limiting definitions on the formal and factual level on the use of *ijtihad*, they use traditionalistic arguments. The latter becomes especially evident in the responses given on the use of *ijtihad* for the purpose of implementing human rights in Islamic law.

7.2.1.2 *The profile of the traditionalist respondent*

Traditionalist arguments are present throughout all the material in this study, and it is possible to say that all the respondents have some element of traditionalist philosophy in their arguments although the arguments as such are not mainly traditionalist. All the respondents are brought up and educated in a society where the traditionalist arguments have been and are present in all aspects of life. The respondents know all the traditionalist arguments and

they often use the traditionalist position as a point of reference when arguing other positions.

Who then is the traditionalist respondent? There is a quite clear profile in the material. The typical traditionalist has either few modernist elements (interviews 4, 14, and 23), or more clearly modernist elements (interviews 2, 7, 9, 10, 13, 17, and 22). There are also a few respondents who appear to be both traditionalists and modernists (interviews 1, and 15). The respondents who appear in this study with exclusively traditionalist arguments are represented with too few responses for to add anything material to the profile of the traditionalist respondent (interviews 11, and 16).

Starting with the traditionalists with few modernist elements as one category, the three respondents are one academic (interview 4), one traditionally trained religious scholar (interview 14), and one student (interview 23). Two of the respondents are over 50 years (interview 4, and 14), and the third is under 30 years (interview 23). They all have a thorough Islamic education, though from different countries and time periods (interviews 4, 14, and 23). The traditional Islamic education stands out as the strongest link between them. They hold relatively high academic degrees: two of the respondents hold a diploma (interviews 4, and 14), and the third holds a master of law degree. Even if it, due to their age differences, seems like they should not form a coherent profile, I argue that they do. The youngest respondent is maybe the most interesting in the group. The fact that she is very much younger than any of the other respondents sorting under the broad traditionalist category, and yet stands out as the most firmly traditionalist of them all, makes her an interesting phenomenon. It indicates an interdependency between traditionalist Islam and Islam of other philosophical stands on Islam—as the world stand today historically one position will not occur without the others. It also indicates a traditionalist revival among young people in contemporary Sudan.

The traditionalists with modernist elements are two professional active jurists and academics (interviews 2, 7, 10, 17, and 22), one traditionally trained religious scholar and academic (interview 13), and one academic (interview 9). The group has a clear profile: they are over 50, they are very well educated—they all hold PhD degrees, and they hold senior positions within the Sudanese society. The traditionalist modernists are one academic (interview 1), and one professional active lawyer (interview 15). They are both over 50, one of them is very well educated (interview 1), and the other made it through politics (interview 15). They both hold senior positions in the Sudanese society.

There is an interesting sliding scale in the broad traditionalist category. It is a sliding scale in type of education, and of political participation. In very

general terms there are two types of traditionalists: The first type is the traditionalist who is educated in Islam by the traditional standards. The second type is the traditionalist who is thoroughly educated in Western secular institutions, and who took and takes part in the ideological revolution after independence. The respondents who are educated in Western secular institutions tend to have more modernist elements than those who have their education from religious institutions. The respondents who took and take part in the post independence political scene have more modernist elements in their philosophical stance than those who do not.

7.2.2 *The modernists*

The Mahdiyya was the pre modern application of Islamic law in the Sudan. It was also the Mahdiyya that stood as a model during the uprising against the British. The modernists of the Sudan often look to the Mahdist era for an example to follow, this since the modernist position in the Sudan in much is about nation building. What is distinct about the modernist position in the Sudan is its broad variety. The NIF modernist stance is of course very present, if not by immediate presence so by mediate presence. The NIF ideology on education has embraced natural social sciences, something that is evident among the modernist responses and the modernist respondents. Sudanese Islamic modernism has its own flavor, a flavor that seems to suit many although the flavor comes in many different varieties.

7.2.2.1 *Where to find the modernist arguments*

Nine respondents define *ijtihad* using modernist arguments, eight respondents define the limits of *ijtihad* using modernist arguments, twelve respondents define the general requirements and qualifications of the one engaging in *ijtihad* using modernist arguments, twelve respondents define the requirements and qualifications for different levels of *ijtihad* using modernist arguments, and eight respondents define human rights and *ijtihad* using modernist arguments.

Where the modernist arguments are found must be explained by the close link between modernist arguments and the factual level, and as an extension to that: the close link between modernist arguments and the contemporary political Sudanese scene. Even though modernist arguments can be found throughout all the material, it is especially frequent when the respondents define the qualifications and requirements for different levels of *ijtihad*. If generalizing, it follows when a traditionalist concept is applied in a new and modern legal setting, that the arguments supporting such application must be modernist or post modernist, while those who do not support such application can use either traditionalist, modernist, or postmodernist arguments. The Sudan is an Islamic state, governed by Islamic law on all levels of society. Hence, it follows that the application of Islamic law, and the

arguments supporting an application of Islamic law, must to a various degree be modernistic.

7.2.2.2 *The profile of the modernist respondent*

The modernists are divided in the categories of those who hold modernist arguments only (interviews 5, and 25), modernists with a few traditionalist and postmodernist elements (interview 21), modernists with few traditionalist elements (interview 6), modernists with few postmodernist elements (interview 20), modernists with postmodernist elements (interview 12) and modernists/postmodernists (interview 19).

The “modernists only” are both represented with too few answers for to draw any further conclusions. However, it can be noted that they are both thoroughly educated in Western secular institutions. One of them is an activist, between 31 and 50 years old (interview 5), and the other is a professional active lawyer over 50 (interview 25).

The modernist with a few traditionalist and postmodernist elements is a political ideologist (interview 21). Although he gives arguments sorting under all the three philosophical positions, the clear majority of his arguments are modernist. His profile is very much like the profile of the traditionalists with modernist elements: he is thoroughly educated in Western secular institutions, he holds a senior position in the Sudanese society, and he took and take part in the post independence political scene. Although also educated in Islam, he does not hold a traditionalist stance. The political ideologist being modernist is about application of traditional Islamic legal concepts in a modern context, as lined out under the heading above. To apply traditional Islamic concepts to a modern context it is necessary to use arguments that to a varying degree are modernist. The everyday life of the political ideologist is about applying traditional Islamic concepts to modern society, both on an ideological, a formal and a factual level. It is possible to talk about the political ideologist as a *usuli*, someone searching for the fundamentals of Islam when applying traditional concepts to a modern context.

The modernist with a few traditionalist elements is a professional active lawyer, and an activist (interview 6). He, just as the modernist with traditionalist and postmodernist elements, has something in common with the traditionalists with modernist elements. He is thoroughly educated in Western secular institutions, he is between 31 and 50 years old (though closer to 50 than to 31), he holds a senior position in the Sudanese society, and he took and takes part in the post independence political scene. As an activist he has a political agenda where traditional concepts are defined in a modern context, hence the modernist arguments. The traditional elements are there since the respondent at the same time as he is an activist, also is a part of the Sudanese educated elite who in general—an as shown earlier in the analysis—takes a

more traditionalistic stance. The respondent is a professional active lawyer. Respondents sorting under that category are either mainly active as judges (interviews 6, 10, and 17), or as lawyers (interviews 2, 7, 11, 15, 20, 22, 24 and 25). Of those the judges more frequently use traditionalist arguments than the lawyers. The respondent being professionally active as a judge might have something to do with the traditionalist elements in his profile.

The modernist with few postmodernist elements (interview 20), the modernist with postmodernist elements (interview 12) and modernists/postmodernists (interview 19) will be dealt with as one group. To start with the commonalities, they are all activists. They are all well educated, though the modernist respondent with postmodernist elements is more educated than the other two. She is also an academic; she holds a senior academic position and is over 50 years. The other two respondents are both students between 31 and 50 years old, one of them is also a professional active lawyer (interview 20). All the three respondents take part in political life, as they are activists. Again, the modernist arguments are, as are the postmodernist arguments, necessary when applying traditional Islamic concepts in a modern context. How then can the postmodernist elements be explained? The respondents tend to give their postmodernist arguments referring to an ideological level, and modernist arguments when referring to a factual level. It might be that the academic environment fosters postmodernist arguments on an ideological level, though postmodernist arguments cannot be traced among the other respondents holding senior academic positions (*e contrario* interview 1, 4, 9, 10, 11, 13, and 16). Rather than generalising Sudanese academic institutions, it is possible to single out the specific academic institution of the respondents as being a postmodernist academic stronghold.

The general profile of the broad modernist category is, as in the case of the traditionalist profile, a sliding scale. Modernist arguments are closely connected to political participation, be it on an ideological, a formal or a factual level. There are two general modernist profiles. The modernist is a *usuli* thoroughly educated in Western secular institutions, or a less educated activist, though one respondent make an exception—she is thoroughly educated in Western secular institutions and an activist (interview 12). When compared with the traditionalist profile, the modernist tends to be somewhat younger. The modernist is also to a larger extent than the traditionalist, politically active on the contemporary Sudanese political scene.

7.2.3 *The postmodernists*

Postmodernism as a theoretical stance is younger than the traditionalist and modernist stance, consequently the stance is also younger in the Sudan. Its introduction has been encouraged by the modernist reformation, and it is a

product of education in a global society rather than anything else. Islamic postmodernism is, as opposed to Islamic modernism, not rooted in the thought of the creation and maintenance of the nation state, but its main interest lies within the individual. Thus, postmodernism in the Sudan link with the Sufi traditions, deeply rooted in the Sudanese tradition and culture.

7.2.3.1 *Where to find the postmodernist arguments*

Two respondents define *ijtihad* using postmodernist arguments, four respondents define the limits of *ijtihad* using postmodernist arguments, three respondents define the general requirements and qualifications of the one exercising *ijtihad* using postmodernist arguments, one respondent define the requirements and qualifications for different levels of *ijtihad* using postmodernist arguments, and two of the respondents define human rights and *ijtihad* using postmodernist arguments.

Postmodernist arguments are present, though not so frequent throughout all the material. Due to the low but rather constant rate of postmodernist arguments, it is hard to single out any specific question, or any specific aspect to be typical for postmodernist arguments. However, it is more likely to find postmodernist argument on an ideological than a factual level. This is specifically the case when defining *ijtihad*, and when defining the general qualifications and requirements of the one exercising *ijtihad*. Many of the arguments defined in this study as modernist, have elements of postmodernist philosophy. However, the postmodernist only is hard to find in contemporary Sudan, and only one is found in this study. The home of the postmodernist is less likely to be found in answering “where?” than in answering “who?”

7.2.3.2 *The profile of the postmodernist respondent*

Only three respondents sort under the broad postmodernist category. One is a postmodernist, activist, professional active lawyer between 31 and 50 years old (interview 24). One respondent is a postmodernist with few modernist elements, activist and 30 years or younger (interview 8). One respondent is a postmodernist/modernist student 30 years or younger (interview 18). Two of them are educated in Western secular institutions (interview 18, and 24).

The postmodernist/modernist respondent has many commonalities with the three modernist respondents who have postmodernist elements to various degrees. Just as them, the postmodernist/modernist respondent is part of an academic postmodernist sphere. The postmodernist/modernist respondent holds in common with the postmodernist respondent with few modernist elements, that they are educated in more than two different countries. Hence they have both on a factual level been exposed to different cultures and ways of Islam.

The “postmodernist only” hold some commonalities with one respondent who falls out of the analysis, since he pursues secularist arguments (interview 3). They are both professional active lawyers, activists, they work with international human rights documents in their every day life, they are between 31 and 50 years old, and they are educated in Western secular institutions. Even though secularist as a philosophical position falls outside the scope of this study—and therefore nothing can be said about secularists—it is interesting to note that the only respondent who gives postmodernist responses only, when talking about traditionalist, modernist, and postmodernist arguments, also gives secularist arguments. Yet, secularist arguments are not even close to present in the arguments of the other respondents in the postmodernist category. It indicates a possible, but not necessary, relation or connection between postmodernism and secularism. However, this is not the place to further discuss such possibilities.

The general postmodernist profile is young and educated abroad. It is a weak profile since all respondents who fit the profile are not postmodernists. One possible explanation is that this study is unable to find a profile that in fact is there. Another explanation is that the postmodernist position is not as common as the other two positions, and therefore harder to describe in general terms.

7.3 The general philosophical position in contemporary Sudan

In quantitative terms, most arguments in the study are either traditionalist or modernist. Also, most respondents are either mainly traditionalists or mainly modernists. There seems to be an interdependency between traditionalism and modernism, rather than an either/or relation.

The Sudan in general is a both traditionalistic and modernistic society. If using the metaphor of a pyramid, the base of society is the popular, Sufi, and traditional Islam, while the top of the pyramid is the modernist elite. In other words: the fundament of the modernist top is its’ traditional base. The postcolonial development in the Sudan has been about finding a national, and an Islamic national, identity. With Islamic nation building, and in building a national Islamic identity, follows modernist philosophy. Therefore, the general philosophical position in contemporary Sudan has a modernist flavor. This is only true when talking about the Sudan this study is monitoring, i.e. those who have a professional stance on *ijtihad*.

The link between educational background and philosophical position is evident. Those who have studied within a traditionalist educational paradigm, formulate their arguments using traditionalist philosophy. Those who have studied social and natural sciences within a predominately modernist educational paradigm, also use modernist philosophy when formulating

arguments within the Islamic setting. Those who have studied social and natural sciences within a later educational paradigm, where the postmodernist theories are present, they—as well as the ones before them—use their acquired knowledge for to formulate arguments within the Islamic setting. Having said this, education is not necessarily the independent variable, the philosophical position then being dependent variable. It is outside the scope of this study to say anything about independent and dependent variables. It is possible to see a connection between education and philosophical position on *ijtihad* in contemporary Sudan, and possible to leave it at that.

7.4 Conclusions

The answer to the problem in this study is “yes, but”. Nevertheless it is a yes. It is a yes, depending on philosophical position.

The overarching purpose of the study has been to find an understanding of how reformation of Islamic law can be done in general and how reformation by the use of *ijtihad* in particular, can be and is undertaken in the Islamic world of today. For this purpose I have monitored contemporary philosophical positions on the use of *ijtihad* within the specific settings of the Sudan, finding that one must consider talking about different Islams, different Islamic jurisprudences, and different Islamic laws, all depending on different philosophical positions. *Ijtihad* is a source of law within Islamic law that allows for, or opens up for the specific individual semantic, ontological and epistemological position of the one exercising *ijtihad* to find its way into the revealed—or simply the—law. Thus, the philosophical position of the one exercising *ijtihad* is a meta-source of law. If the Islamic world of today embraces diverging philosophical positions, one must consider it a possibility that the *ijtihad* of a global Islamic community will reform law divergently, simultaneously, and globally. That is why one must consider talking about different Islams, different Islamic jurisprudences, and different Islamic laws. A conclusion following that line of argument is a possibility to change Islamic law, and Islamic societies, by changing the philosophical position of the one exercising *ijtihad*. In the case of the Sudan, examples of especially epistemology as a strategy for to change society from within, are found. Here education is the key.

Are the findings from the Sudanese case generable? The Sudan as a nation has a very specific historical experience of Islam. That also includes the contemporary Sudanese experience of Islam. Islamic law governs the Sudan as a nation state, something that makes Islamic law in the Sudan predominantly modernist. Accordingly the modernist presence in Sudanese philosophical positions on *ijtihad* might not be of the same character if *ijtihad* were to be monitored in a setting where Islamic law is not at all, or only partially the law of the nation state. Still, I argue, modernism, as well as

traditionalism and postmodernism will be present as philosophical positions on the use of *ijtihad*, whatever case study you chose. The degrees of presence of different positions will obviously vary from case to case—the positions will be there. This cannot be proven in this study, but need further confirmation by more case studies.

Do the philosophical positions reach further than the ideological level, i.e. can the findings of this study be generalised to all levels of *ijtihad*? For reformation to be comprehensive and to reform not only the mind but also the act, it must be a reformation reaching outside the ideological level. The Sudan is an example where human rights have been debated on the ideological level. Ustaz Mahmud Muhammad Taha and Hassan al-Turabi are two examples of distinguished Sudanese scholars, whose *ijtihad* on human rights on an ideological level has not only added to the Sudanese debate, but also to the global discussion on Islam and human rights. On the formal level, the 1998 Sudanese constitution is seen as *ijtihad* in the direction of strengthening human rights. But, there is a gap between on the one hand *ijtihad* on the ideological and formal level, and on the other hand implementation on the factual level. Although the question of how to implement *ijtihad* on the factual level falls outside the scope of this study it is not a question that can be left out without discussion. If *ijtihad* is seen, as in this study, as a means for to reform society, the conclusions depend on reformation on all levels. At the end of the day, is it possible to draw so far reaching conclusions as an emergence of divergent Islamic jurisprudences, Islamic laws, and Islams, on the basis of divergences on an ideological level? Do we not need evidence on a factual level for to know that this is truly what is happening in the contemporary world? While there might be something to the argument, I argue that the ideological level is the most important level for to monitor trends in Islamic jurisprudence in the contemporary world. However, the argument is yet to be confirmed by case studies on *ijtihad* on the formal and factual level.

8 Discussion and further research

8.1 The purpose of *ijihad* in the contemporary world

Reformation of Islamic law is a delicate issue, balancing tradition and modernity. The responses to historical change are as many the respondents throughout history. When the orientalist tried to translate *ajtahidu ra'yi wala alu*, and when they tried to define *ijtihad*, they were faced by the same problems as were facing the *mujtahids* in the different *madhhab*, as are facing scholars on Islamic studies of today: Where does revelation end and where does interpretation begin? On who's mission are we trying to find solutions to a legal problem? What are the purposes and goals for our findings? What and why do we want to find?

If the gates to *ijtihad* are, as the findings of this study proposes, again open—if they at all were ever closed—what does it mean for the contemporary world? If *ijtihad*, as is argued in Bravmann's linguistic analysis of early textual usage of *ijtihad*, is to be exercised on behalf or and for the purpose of the Muslim community, *ijtihad* faces a culturally diverse diaspora. If Islamic jurisprudence moves away from its traditional and traditionalistic home, do we then know the end of its journey, and can we be sure that it will be Islamic jurisprudence, and not something else? Of course we cannot know, and of course we are not be sure. The findings of this study suggest that in the move away from traditionalistic philosophy something is lost and something else is found. Eventually in a global community of culturally diverse Muslims, Islam, Islamic jurisprudence and Islamic law inevitable will develop in different directions.

The findings of this study suggest that the purpose of *ijtihad* in the contemporary world is to continually take Islam into new paradigms. The move, or the change, or the accommodation of Islam, Islamic jurisprudence and Islamic law is not something unknown in previous history. Islam changed in the move from the servants of religion—the Caliphs of Medina—to Umayyad masters of religion, and Islam further changed under the Abbasids doctrinal development, and yet further under the systematisation of law during the 9th century. Divergent positions taking place at the same time is not a new occurrence in the history of Islam. When looking at the *tafsir* literature, the literature on exegesis of the Qur'an, there are both traditionalist and rationalist schools of *tafsir* up until the 14th century. The rationalist *tafsir* has in much been a source of inspiration for contemporary modernists. What is new in the findings of this study is the concurrent continuous divergent development. It might also be that the three philosophical positions are

interdependent and therefore must occur at the same time. The exact dependencies and interdependencies are not fully clear from the findings of the study, and no conclusions can be drawn.

Yet another line of thought worth following starts when Greek logic enters into the Islamic world. Here the same kind of questions can be found that are facing contemporary Muslim holding contemporary philosophical positions on the use of *ijtihad*. In the words of Oliver Leaman:

There was a long debate in Islamic philosophy as to whether logic is a part of philosophy or a tool to be used by it, and if the former is the case, then logic will be inevitably infected by the presuppositions of the system of philosophy itself. If it is a tool then there is scope for arguing that it could be independent of that to which it is applied.¹⁷⁹

In the debate on logic, the same arguments over the usefulness of theoretical tools and their applicability to the Islamic realm are found as are found in this study regarding the usefulness of theoretical realms other than traditionalist Islamic. Logic, and especially Aristotelian logic with its gradual build-up of facts, has become an overall accepted way of acquisition of knowledge. The comparison with the debate on logic indicates that the debate over contemporary competing philosophical positions on *ijtihad* will eventually fade out, and into acceptance of one pluralist unit of divergent Islams, Islamic jurisprudences, and Islamic laws. Thus, divergent philosophical positions, and different Islamic jurisprudences, Islamic laws, and Islams, does not necessarily mean a move away from Islam to something else.

Be it as it may with the question of historical reoccurrences. *Ijtihad*, it must be concluded, is a strong tool in use in the contemporary world. Its purposes and scopes are dependent on the one exercising it. Thus, the purposes of *ijtihad* in the contemporary world are best analysed by analysing the realms forming and guiding its users.

8.2 Law and Religion

On the arrival to Madinah, the Prophet observed some Madinites pollinating their palm-trees. He made the remark: "Perhaps it would be better if you did not do it." The people concerned took his remark as an order, and the result was not what he had expected. This being reported to him, he said: "I am but a human being. Only when I order you something of your religious duties will you have to abide by it. But if I issue an instruction upon my personal opinion, then it is a mere guess and I am only a human being. Rather, you may better know your worldly affairs."¹⁸⁰

¹⁷⁹ Leaman, Oliver, "Islamic Philosophy and the Attack on Logic", *Topoi*, no 19, pp. 17–24, 2000, p. 17.

¹⁸⁰ The *hadith* is cited in Ramadan, 1961, p. 67, using the sources of Muslims' *Sahih*, Al-Qasimi's *Qawa'id al-Tahdith* and Khallafs' *Usul al-Fiqh*.

For the scholar of law, as well as for the scholar of religion it is a problematic line that somewhere is, and maybe has to be, drawn between religious duties and worldly affairs—between law and religion. The *hadith* cited above, illustrates the problem. How do we find the characteristics of a religious duty, so that the duty can be carried out properly while the instructions on worldly affairs can be subject to critical evaluation and assessment using whatever qualities of knowledge at hand? As have been pointed out by many scholars, the definition of what religion is varies among different realms of religions, but also among the various philosophical positions. Religion considered being a public matter or religion considered a solely private matter, changes in much the understanding of what religious law is about. A common Protestant (mis)understanding of religion is that religion must be a private relation between the individual and God, exercised on the basis of human conscience. In this definition religion becomes a private ethics, on which the individuals' acts then are based. Understanding the ethics becomes the primary goal in leading a religious life. But, if religion instead is defined as a social ethics, the primary goal is to exercise religion through the social acts. The relation between God and man is then not exclusively private, but a concern of the whole social community. There are many more ways of defining religion, and the point here is not a complete enumeration, but to show that a difference in defining religion makes a difference in understanding the functions of religious law.

The three philosophical positions found in this study represent three ways of defining religion. Generalising, traditionalistic and modernist positions are oriented towards an understanding of religion as a social ethics, while postmodernism is oriented towards an understanding of religion as a matter of private conscience. The Sufi traditions, an orientation in Islam commonly categorised as traditional, are oriented towards the individual relation between man and God. During the fieldwork it became evident that some of the respondents pursuing the strongest postmodernist positions also exercised their religious lives within the Sufi orientation of Islam. A conclusion of that is that while modernism orients Islam towards politics, postmodernism orients Islam in the opposite direction—away from politics and towards the individual ethics.

The further understanding of Islamic law, or any religious law, relies on the study of the relation between man, God, and society. A deeper understanding of law and religion, as it becomes a more acknowledged academic field of study, will enhance the understanding of the functions that guide millions of people every day around the world.

8.3 The link between knowledge and education

In the study the linkage between knowledge-making and education has been stressed. Through education the realms in which knowledge is produced, and on which our actions are based, is formed. As Ann Sofie Roald points out in her PhD thesis *Tarbiya: Education and Politics in Islamic Movements in Jordan and Malaysia*¹⁸¹, (*tarbiya* being Islamic education), Islamic and Western education is often understood as antithesis. This is partly due to a theologisation of the geographical concept of “the West”.¹⁸² The differences in philosophical positions on education in general, and Islamic in particular, Roald finds are to be traced in the geographical home of the education received. Hence, the conclusions Roald makes of her field studies in Jordan and Malaysia supports parts of my hypothesis. She finds a distinct opposition between those educated in the West and those educated in their own non-Western countries, this opposition is parallel to the opposition between the shari’ah educated *ulama*, and the natural and social scientists. While her study is on strategies of education, the concept of valid knowledge, and epistemology as a strategy, it clearly targets some of the issues raised in this study. A conclusion to be drawn is that dynamics of reformation of law must be studied keeping the educational aspect in mind.

8.4 Further research

So many questions have been alerted in this study that need to be addressed by further research, they cannot all be discussed here. The following discussion is about refining the methodology and theory for an extended research on the same questions that have been addressed in this study.

8.4.1 *The subject to study*

In this study *ijtihad* has been studied as a general understanding of reformation of law. What needs to be further addressed is the differences between *ijtihad* of *usul al-fiqh*, and *ijtihad* of *furu al-fiqh*. It is an interesting and maybe necessary distinction to make; whether the subject to study is *ijtihad* on the Qur’an, *ijtihad* on the sunna, or *ijtihad* on Islamic law as implemented in national laws.

8.4.2 *Refining the theoretical and methodological tools*

The theoretical tool for the study, the analytical categories and the taxonomy, embraces only philosophical positions within Islam. As such the analytical categories and the taxonomy have served its purposes. It has been possible to

¹⁸¹ Roald, 1994.

¹⁸² Roald, 1994, p. 93.

explain the philosophical positions on *ijtihad* in contemporary Sudan. The question of whether or not Islamic secularism should be included in the analytical categories and in the taxonomy, has been alerted. The question of whether or not Islamic secularism is a philosophical position within or outside Islam needs to be addressed when refining the theoretical tool. Another question that needs to be addressed when refining the theoretical tool is the level of the tool. It might be that the three categories traditionalism, modernism, and postmodernism needs to be subcategorised in order to better reflect contemporary philosophical positions in the Islamic world. For example: the need to qualify different types of traditionalism and modernism has been alerted in the study.

Methodologically, to get more valid and reliable results the empirical studies—the interviews—must be balanced with studies on written empirical material. Moreover, the results from a single case study are hard to generalise and still to argue that the results are valid and reliable for a larger context. Therefore more case studies need to be carried out on the subject, together forming a few-case study. While the Sudan as a case first and foremost represent a modernist philosophical home, and the specific conditions for a nation state governed by Islamic law, it can be doubted if the findings from the case of the Sudan are fully generalisable. Additional case studies in a few-case study, would then have to be selected on the basis of “most divergent cases”. Which cases are the most divergent is a whole separate discussion, but geographical, demographical, and cultural differences as well as differences in levels on which Islamic law are implemented as law of the land, or not at all, plays an important role in choosing the correct cases.

8.4.3 Developing the hypothesis into a theory

The hypothesis of this study has, at least to some extent, been confirmed, and it is thus feasible to begin constructing a theory using the hypothesis as a fundament. Such a theory could be developed in many different directions. A good place to start is to ask what the definitions of different Islams, Islamic jurisprudences, and Islamic laws are. What constitutes differences between laws, in contrast to commonalities between laws? Also, it would be necessary to ask about the limits of inside and outside Islamic jurisprudence and Islamic law. Cannot Islamic jurisprudence and Islamic law embrace different philosophical positions without being defined as Islamic jurisprudences and Islamic laws?

The quality of a theory in its making must be tested. Falsification or corroboration is one possible way of testing the validity of a theory. Considering the fact that the theory is not yet fully constructed, such a tool is not suitable. Rather, by adding numbers of cases on which to test and

develop the hypothesis into a full theory, or/and by testing the theory on a “crucial case”, a valid and reliable theory can be developed.

Arabic – English glossary

<i>abu al-istiqlal</i>	father of independence
<i>alaai haqam</i>	verses of rules
<i>ajtahidu ra'yi wala alu.</i>	then I will exert myself to form my own judgement
<i>amr bi-l-ma'rûf wa-nahw'an</i>	<i>al-munkar</i> to promote that which is good and that which is bad
prevent	
<i>bayt eta'a</i>	obedience to the house
<i>darb al-Sudan</i>	the Sudan road
<i>fatwa</i>	written legal opinion
<i>fiqh</i>	jurisprudence in Islamic law
<i>furu al-fiqh</i>	the branches of Islamic law
<i>hadiths</i>	the tellings and sayings of the Prophet
<i>haji</i>	pilgrimage to Mecca
<i>hijab</i>	the headscarf
<i>hudud</i>	punishments specified in the shari'ah
<i>ijma</i>	consensus
<i>ijtihad</i>	
<i>al-Ikhwān al-Muslimoon</i>	the Muslim Brotherhood
<i>'ilm</i>	knowledge
<i>imam</i>	title indicating leadership
<i>istihsan</i>	preference
<i>islah</i>	reform
<i>jiḥād</i>	holy war
<i>kalam Allah</i>	divine speech
<i>li</i>	on behalf of
<i>madhhab</i>	schools of law
<i>mahdi</i>	the expected one, the divinely guided one
<i>mujtahid</i>	qualified jurist
<i>nafaqa</i>	maintenance
<i>nazar</i>	investigation
<i>nizam sham</i>	a comprehensive system
<i>qadi</i>	judge
<i>qadi al-qudah</i>	Chief Justice
<i>qiyas</i>	analogical deduction
<i>Qur'an</i>	Koran
<i>ra'y</i>	personal opinion
<i>riba</i>	prohibition of usury
<i>sahwah</i>	awakening
<i>sanad</i>	chain of reporters
<i>shari'ah</i>	God's law in its' quality as divine
<i>shura</i>	inner consultation
<i>sunna</i>	path trodden (literally)

<i>tafsir</i>	exegesis
<i>talaq al-darar</i>	divorce because of cruelty
<i>tajdid</i>	renewal
<i>talfiq</i>	patching
<i>taqlid</i>	imitation
<i>tarbiya</i>	Islamic education
<i>tariqah</i>	religious order, (pl. <i>uruq</i>)
<i>ulama</i>	the collective of scholars
<i>ummah</i>	community of the faithful
<i>usul</i>	sources
<i>usuli</i>	fundamentalist (literally)
<i>usul al-fiqh</i>	the sources of law
<i>urf</i>	custom
<i>zakat</i>	alimony stipulated in the Qur'an

Tables

Table 1 Different forms of interview structures

Character of the interview	The open interview	The directed open interview	The semi structured interview	The structured interview
Starting point	Pre-understanding.	A model defines concepts.	A model defines concepts and the relations between them.	A theory defines concepts and the relations between them.
The problem is concerned with:	The individual persons experience about the <i>qualities</i> and <i>meaning</i> of a phenomenon. The interviewer seeks contextual knowledge of the qualities of a phenomenon.	The individual persons experience about the <i>qualities</i> of a phenomenon. The interviewer seeks contextual knowledge about the qualities the interviewer defined.	The individual persons experience about qualities and quantities. The interviewer seeks knowledge about the <i>quantities</i> of concepts, and their possible relations.	The interviewer seeks knowledge about the <i>relation</i> between concepts.
The context is decided:	Empathically.	Empathically within the aspects the interviewer finds meaningful.	Formal.	Formal.
Interview strategy	Starting with a wide question. The interviewer follows and gives follow up questions to deepen the understanding of what the respondent wants to highlight. Open answers. The interviewer follows in depth what the respondent finds meaningful.	Groups of questions highlight a wide question. The interviewer follows in depth within the different groups. The respondent follows in depth what the interviewer finds important.	Groups of questions in a specific order and in within these sub questions. A combination of open and closed answers. The respondent gives his view on what the interviewer finds meaningful. The interviewer gets an understanding about how meaningful the questions are to the respondent.	Groups of questions, questions and closed answers in a specific order. The respondent gives his opinion about what the interviewer finds important.
Analysis	Multiple same theme interviews show differences, something considered as an advantage in the qualitative analysis. Possibilities to a qualitative analysis on the quality and meaning of a phenomenon.	Multiple same theme interviews show partial differences, something considered as an advantage in the understanding of the qualities of the phenomenon. The qualitative analysis is restricted to the qualities of the phenomenon.	Multiple same theme interviews show often to be comparable, a prerequisite for a quantitative analysis. Open question answers give limited possibilities for quantitative analysis on the quality of the phenomenon.	All interviews are comparable and quantitative analysis possible.

Source: Lantz, 1993, p. 21.

Table 2. Indonesian population growth 1956-2001

Year	Population
1956	10,262,536
1973	14,872,000
1983	21,103,000
1999	28,900,000
2002	37,090,298

Sources: Fluehr-Lobban, Lobban & Voll, 1992, *Länder i fickformat*, 2000, and CIA World Factbook, 2002.

Table 3 Definitions on jihad

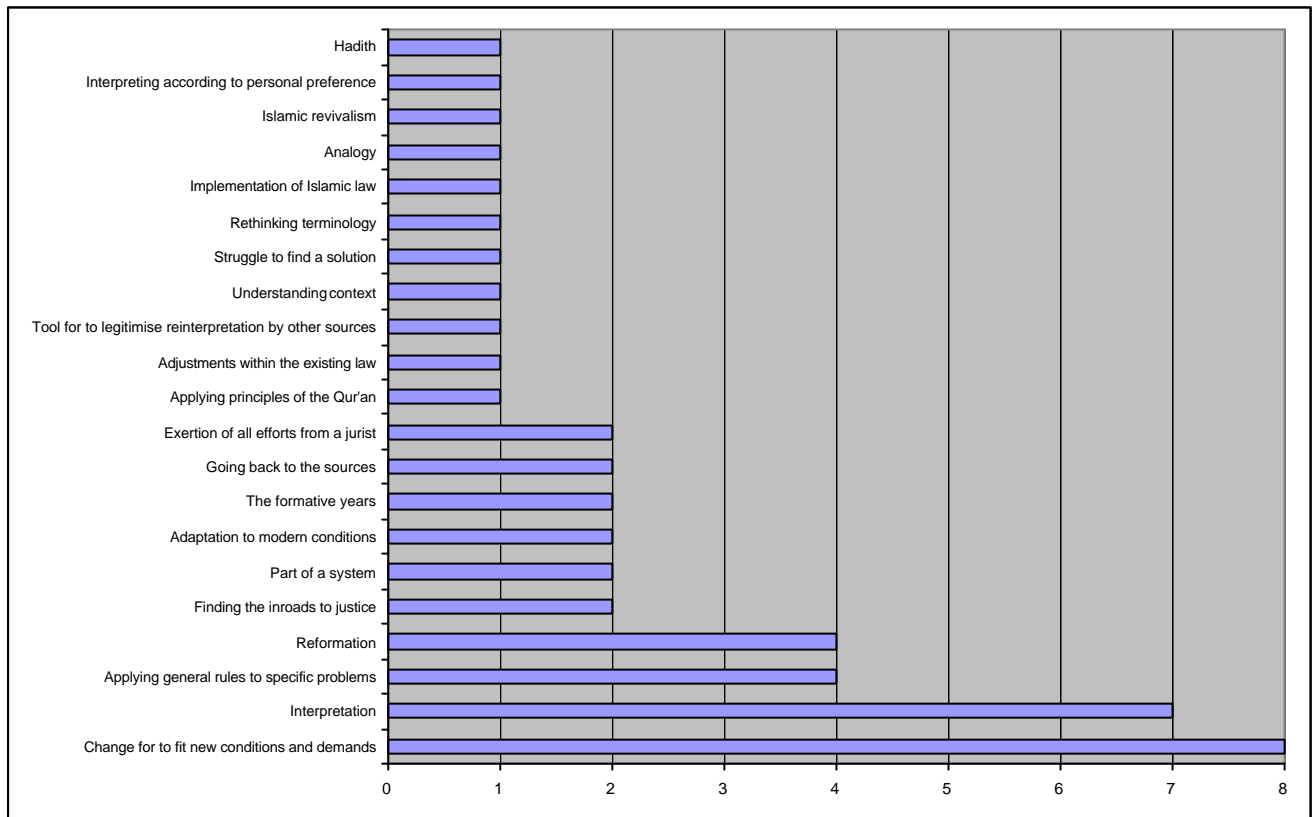


Table 4 Requirement and qualifications of the mujahid

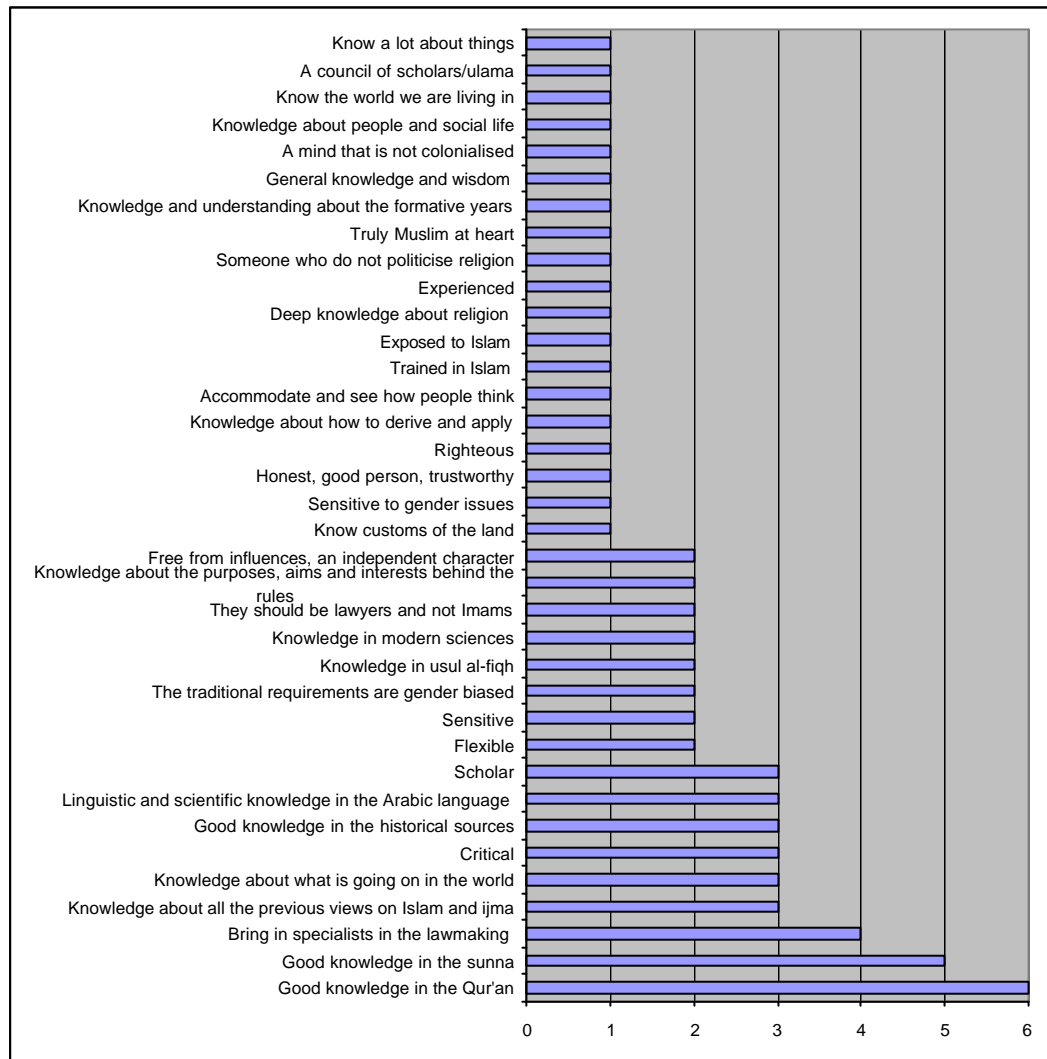
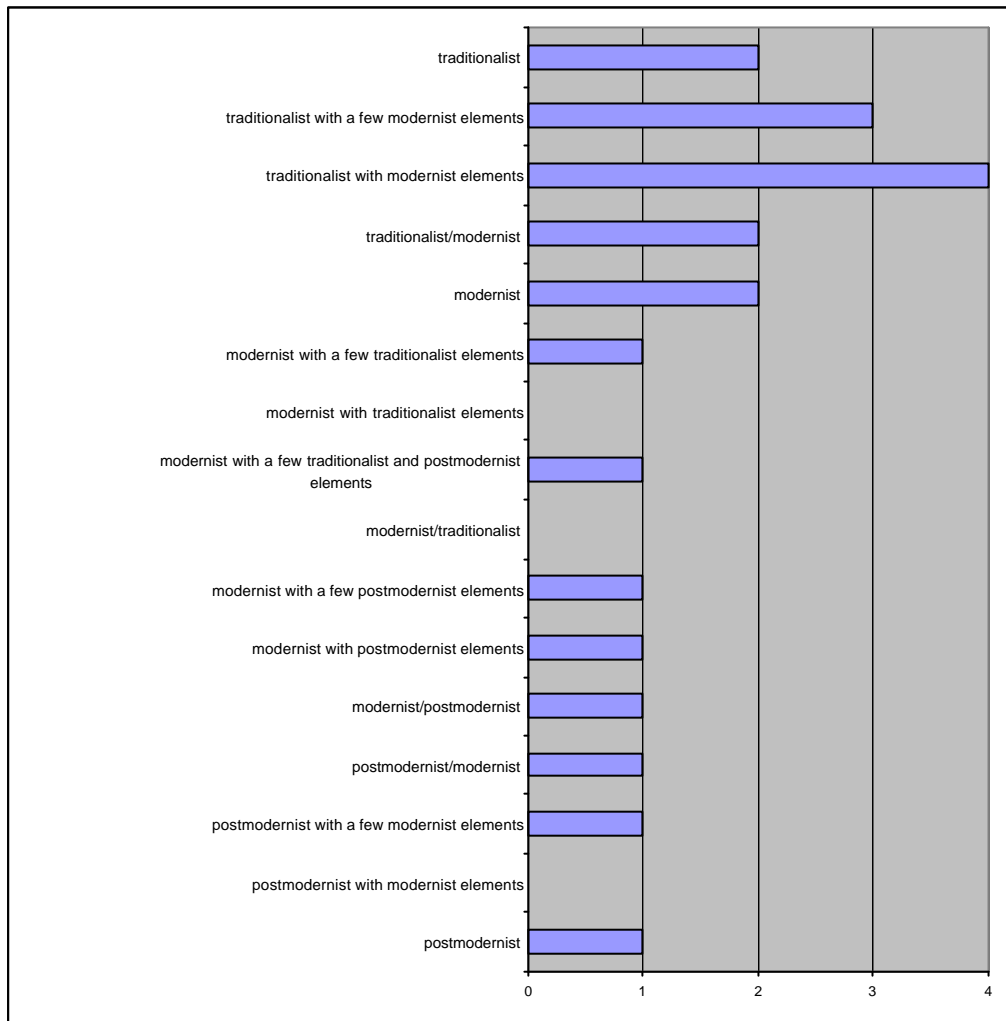


Table 5 General philosophical positions of the respondents



Interview questions

Vision 1

2. Education/Background

- 2.1 I was told that you are...?
- 2.2. I Also heard that you take a great interest in?
- 2.3. You went to school in?
- 2.4. And university in?
- 2.5. Your parents, or family, are they into law as well?
- 2.6. Was there anything special that made you decide for law?
3. Everyday working life/ school life
 - 3.1. For me this world is totally new and unfamiliar. Would you describe an average working day at the?
 - 3.2. What books do you read in classes/ in the daily operation?
 - 3.3. What qualifications ought a person to have in order to work in your position? What education, what personal qualities, what do they need to read or understand?
 - 3.4. Do you feel happy/content in your present work/study situation?
 - 3.5. Have the studies/work been like you thought it would be?
 - 3.6. Course literature, commentaries, what books do you use in your courses? What books on Islamic law would you recommend? Are those the best?
 - 3.7. Is it noticeable that some professors/judges have had their training in the west? And how can you notice that? Do you feel that there is an influence in their arguing? Would you recommend future professors/ judges to go abroad?
 - 3.8. Have you thought about going abroad studying? Why/where .. any special professor you would like to study for?
 - 3.9. How did you understand differences in understanding law when you were studying in the west? Did you understand your position to be different from the other Western students?
 - 3.10. What surprised you most during your studies in the west?

4. Law

- 4.1. How is Islamic law understood in your institution?
- 4.2 As I understand it the general understanding of law in (courts, university, etc) is How would you differ from this? Can you help me understand the differences?
- 4.3. What are the major developments in Islamic law in the Sudan?
- 4.4. Do you see this as an ongoing process?
- 4.5. Help me understand what brought about these changes.
- 4.6. Help me understand, what role in transforming Islamic law does (the other categories) have.
- 4.7. The core changes?
- 4.8. And what about the debate on human rights? I heard that there are some that advocate Islamic human rights, and some that advocate general or universal human rights. Others say that some human rights are ok, but others are not. Is that correct or can you help me understand?
- 4.9. There is now a debate on women's human rights, and the women's convention, CEDAW. What do you think about the debate and the convention? Can you help me understand how, for example equal rights in marriage and divorce relate to Islamic law?
- 4.10. When you reason about Islamic law and change, how do you practically reason? Do you go back to the Qur'an, or do you read the sunna? What kind of process are you engaging in?
- 4.11. When you think about ijthihad, is it a concept that can be used or is used for reforming Islamic law in the Sudan?
- 4.12. Help me out here... When thinking about the sources of law, and how they can help us create modern laws, what qualifications (qualities) and what knowledge do "you" need as a person to understand the sources? What are the most important, what is acceptable? What happens if a person lacks....? What happens if you do like this? Or that? Is it possible to reason

like this? Who is the qualified interpreter of the sources of law? How would you describe the perfect interpreter?

4.13. When I am trying to understand Islamic law, I have been thinking about the sources, and I would like some help in defining the sources. So what is the Qur'an, sunna, *ijma*, *qiyas*, *ijtihad*, *urf*? Are there any more important sources as you see it?

4.14. In the current law do se any influences from the outside (outside the Islamic law)? What are these influences?

11. Tendencies in the current society

11. 1. In the west there is a debate on enhancing women's participation in Islamic societies. What is your impression on that?

11.2. Is there a debate here as well?

11.3. Is that a Western problem, or do you see it as a problem in the Islamic society?

11.4. In the west there is a huge debate where a lot of people say that human rights are not universal, and in fact some say that it is a strictly Western concept. Would you agree on that, or do think that it is possible to understand it in a different way?

11. 5. The latest change in the constitution, and the debate that followed... talking about fundamental rights, how would I have to understand the debate?

11.6. What would you identify as outside sources effecting everyday life for the muslim in Sudan?

Vesion 2

1. Questions about education

1.1. Where did you go to school in?

1.2. And university ...?

1.3. Have you thought about going or did you go abroad studying? Why/where .. any special professor you would like to study for?

1.4. Would you recommend future professors/ judges/ professionals to go abroad?

1.5. How did you understand differences in understanding law and Islam when you were studying in the west? Did you understand your position to be different from the other/ Western students?

1.6. What surprised you most during you (legal) studies in the west?

1.7. If/when you engaged in discussion with Western students/professors. What arguments about Islam, women, and Islamic law surprised you the most?

1.8. Your parents, or family are they judges/lawyers too?

1.9. Was there anything special that made you decide for law/field of professional activity?

2 Law, sources of law and reformation

2.1. As you know I am interested in reformation of Islamic law. Tell me, what in your opinion is the definition of reformation of Islamic law?

2.2. When you reason about Islamic law and change, how do you practically reason? Do you go back to the Qur'an, or do you reed the sunna? What kind of process are you engaging in?

2.3. Is that the same as *ijtihad*? Or how do you define *ijtihad*?

2.4. What are the limits of *ijtihad*?

2.5. Where does revelation end and interpretation begin?

2.6. Who would you say is qualified to exercise *ijtihad*? What are the necessary qualifications? Who is the perfect interpreter?

2.7. How does *ijtihad* fit in with the other sources, the Qur'an, sunna, *ijma*, *qiyas*, *urf*? Are there any more important sources as you see it?

2.8. What would you identify as outside sources effecting Islamic law?

2.9. Would you say that there are additionary sources used in Islamic law in the Sudan, ore elsewhere?

2.10. Who is qualified to exercise *ijtihad* for the purpose of a whole state/nation?

2.11. What would you say are the major recent changes in Islamic law in the Sudan?

2.12. Are they changes of reformation?

2.13. Do you see this as an ongoing process?

2.14. Help me understanding what brought about these changes.

2.15. Help me understand, what role in transforming Islamic law does your institution have.

3. Human Rights and Islamic law

3.1. And what about the debate on human rights? I heard that there are some that advocate Islamic human rights, some advocate general human rights. Others say that some human rights are ok, but others are not. Is that correct or can you help me understand?

3.2. In the west there is a huge debate where a lot of people say that human rights are not universal, and in fact some say that it is a strictly Western concept. Would you agree on that, or do think that it is possible to understand it in a different way?

3.3. In your opinion, can human rights be implemented in Islamic law with the help of *ijtihad*?

3.4. Do you understand it as adding a new source of law, when a "foreign" concept like human rights makes its way into Islamic law?

3.5. There is now a debate on women's human rights, and the women's convention, CEDAW, especially art 16. What do you think about the debate and the convention? Can you help me understand how, for example equal rights in marriage and divorce relate to Islamic law?

3.6. In the current law do you see any influences from the outside, (outside the Islamic law), what are these influences?

4. Tendencies in the current society

4.1. In the west there is a debate on enhancing women's participation in Islamic societies. What is your impression on that?

4.2. Is that a Western problem, or do you see it as a problem in the Islamic society?

Bibliography

Laws, draft laws, and Ordinances

The Ottoman Commercial code of 1850

The Ottoman Penal Code of 1858

The Ottoman Code of Commercial Procedure of 1861

The Ottoman Code of Maritime Commerce of 1863

The Ottoman Basic Law of Obligations, codified between 1869 and 1876, and known as the *Mejelle*.

The Sudan Mohammedan Law Courts Ordinance, May 1902

Judicial Circular no. 17 of 1915

Judicial Circular no. 28 of 1927

The draft constitution of 1968

Judicial Circular no. 59 of 1973

The 1973 Constitution of the Republic of the Sudan

The 1983 Sources of Judicial Decisions Act of the Sudan

The 1983 Penal Code of the Sudan

The 1983 Sudan Code of Criminal Procedure

The 1983 Civil Procedure Act of the Sudan

The 1983 Civil Transition Act of the Sudan

The 1991 Sudan Criminal Act

The 1992 Khartoum State's Public Order Act

The 1998 Constitution Of The Republic of Sudan. Translation into English by Curtis Francis Doebbler.

The National Security Act of 1999

Agreements and Protocols

The Addis Ababa Agreement of 1972

The Machakos Protocol of July 20^h 2002.

UN Documents

Available at www.unhchr.ch/html/intlinst.htm

The Charter of the United Nations of 1945

The Universal Declaration on Human Rights of 1948

Convention on the Elimination on All Forms of Racial Discrimination of 1965

International Covenant on Civil and Political Rights of 1966

International Covenant on Economic, Social and Cultural Rights of 1966

The 1967 Declaration on the Elimination of Discrimination against Women

The 1979 Convention on the Elimination on all Forms of Discrimination against Women

The 1993 Declaration on the Elimination of Violence against Women

The 1999 Optional Protocol to the Convention on the Elimination on all Forms of Discrimination against Women

Literature and Articles

- Ahmed, Abdel Gaffar M. & Sorbø, Gunnar, (eds) *Management of the Crisis in the Sudan*, Proceedings of the Bergen Forum 1989, University of Bergen, Bergen 1989.
- Adwok Nyaba, Peter "State of Disunity", *BBC Focus on Africa*, vol. 13, no 4, October to December 2002, p. 28-29.
- El-Affendi, Abdelwahab *Turabi's Revolution*, Grey Seal, London, 1991.
- Akolawin, Natatle Olwak, "Islamic and Customary law in the Sudan", *Sudan in Africa*, Yusuf Fadl Hasan (ed), Sudan Research Unit, Khartoum University Press, pp. 279-301, 1971.
- Alvesson, Mats & Sköldberg, Kaj *Tolkning och reflektion. Vetenskapsfilosofi och kvalitativ metod*, Studentlitteratur, Lund 1994.
- Anderson, Sir James Norman D. "Recent developments in Shari'a Law in the Sudan", *Sudan Notes and Records*, XXI, 1, 1950.
- *Islamic Law in Africa*, Frank Cass, London, 1954 (reprinted in 1970).
- "The Legal Tradition", *Islam in Africa*, Kritzek, & Lewis (eds), Van Nostrand, New York, 1969.
- "Modernization of Islamic law", *Northern Africa: Islam and Modernization*, M. Brett (ed), Frank Cass, London, 1973.
- *Law Reform in the Muslim World*, The Athlone Press, London, 1976.
- Appiah, Kwame Anthony *In my Father's House. Africa in the Philosophy of Culture*, Oxford University Press, Oxford, 1992.

- Appleby, R. Scott & Marty, Martin E. (eds) *Fundamentalism Observed*, vol. I, Chicago, 1991.
- Arkell, A. J. *A History of the Sudan. From Earliest Times to 1821*, Greenwood Press, Westport, 1955.
- al 'Awani, Taha J. "The Crisis of Thoughts and Ijtihad", *The American Journal of Islamic Social Sciences*, vol. 10, nr 2, 1993.
- Bhabha, Homi K. "Foreword: Remembering Fannon. Self, Psyche and the Colonial Condition", in Fannon, Frantz, *Black skin. White Masks*, Pluto Press, London, 1986.
- Bedris, Belqis *Women's Consciousness to their Legal Rights in Islamic Family Law*, DSRC occasional paper, Khartoum University Press, 1989.
- Bleuchot, Herve "Le code penal Islamique Soudanais de 1983", *Revue de la Recherche Juridique Droit Prospectif 1990-92*, pp. 313-337, Marseille, 1990.
- Braudel, F. *A History of Civilisations*, Penguin, New York, 1993.
- Bravmann, M. M. *The Spiritual Background of Early Islam*, Brill, Leiden 1972.
- Calder, N. *Studies in Early Muslim Jurisprudence*, Clarendon Press, 1993.
- Chambers, Iain & Curti, Linda (eds) *The Post-Colonial Question. Common Skies, Divided Horizons*, Routledge, London, 1996.
- Coulson, Noel J. *A History of Islamic Law*, Edinburgh University Press, Edinburgh, 1964.
- Cruz, Peter *Comparative Law in a Changing World*, Cavendish Publishing, London, 1999.
- Dahlén, Ashk *Deciphering the meaning of revealed law. The Surushian paradigm in Shi'i epistemology*, Acta Universitatis Upslensis, Studia Iranica Upsaliensia 5, Uppsala University Library, Uppsala 2001.
- Darian-Smith, Eve & Fitzpatrick, Peter (eds) *Laws of the Postcolonial*, University of Michigan Press, Michigan, 2002.
- *The Economist*, April 18, 1992.
- *The Economist*, December 18, 1999.
- Esposito, John L. "Sudan's Islamic experiment", *The Muslim World*, vol. 76, nos. 3-4, 1986.
- *Islam the straight path*, 2nd edition, Oxford University Press, Oxford, 1991.
- *The Islamic Threat: Myth or Reality?*, New York, 1992.
- "Woman in Islam and Muslim Societies", in *Islam, Gender and Social Change*, Yazbeck Haddad, Yvonne & Esposito, John L. (eds), Oxford University Press, Oxford, 1998.
- (ed) *The Oxford Encyclopaedia of the Modern Islamic World*, vol. 1-4, Oxford University Press, 1995.

- Esposito, John L. & Voll, John, O. *Makers of contemporary Islam*, Oxford University Press, Oxford, 2001.
- Fannon, Frantz *Black Skin. White Masks*, Pluto Press, London, 1986.
- Farran, C. D'Olivier *Matrimonial Laws of the Sudan*, Butterworth, London, 1963.
- Fawzi, Sa'd ed Din "The Status of Foreigners in the Newly Independent Sudan", *Civilizations*, vol. 7, pp. 343-56, 1957.
- Fluehr-Lobban, Carolyn *An Anthropological Analysis of Homicide in an Afro-Arab State, the Sudan*, Unpublished PhD dissertation, Northwestern University, 1973.
- "An Anthropological Analysis of Homicide in the Afro-Arab Sudan", *Journal of African Law*, vol. 20, pp. 20-38, 1976.
- "Agitation for Change in the Sudan", *Sexual Stratification*, Schlegel, A. (ed), Columbia University Press, New York, 1977.
- "The Political Mobilization of Women in the Arab World", *Women in Contemporary Muslim Societies*, Smith, Jane (ed), Bucknell University Press, Lewisburg, 1980.
- "Shari'a law in the Sudan: history and trends since independence", *Africa Today*, special issue commemorating 25 years of Sudanese Independence, Fluehr-Lobban and Lobban (eds), vol. 28, pp. 64-77, 1981.
- "Issues in the Shari'a Child Custody Law in the Sudan", *Northeast African Studies*, vol. 4, pp. 1-9, 1982.
- "Judicial Circulars of the Shari'a Courts in the Sudan 1902-1979" (Manshurat al-Mahakim al-Shari'a fi Sudan), translated with Hatim Babiker Hillawi, edited with an historical introduction by Carolyn Fluehr-Lobban, *Journal of African Law*, vol. 27, pp. 79-140, 1983.
- *Islamic Law and Society in the Sudan*, Frank Cass, London, 1987.
- "Islamization of Law in the Sudan", *Legal Studies Forum*, vol. 10, pp. 189-204, 1987.
- "Toward a Sudanese law appropriate to Majority and Minority Populations", *Law and Anthropology Yearbook*, Vilenna, vol. 4, 1989.
- "Islamization in Sudan. A Critical Assessment", in Voll, John O., (ed), *Sudan. State and Society in Crisis*, Indiana University Press, Bloomington and Indianapolis, 1991.
- Fluehr-Lobban, Carolyn, Lobban, Richard A. Jr. & Voll, John O. *Historical Dictionary of the Sudan*, 2nd edition, The Scarecrow Press, London, 1992.
- Fluehr-Lobban, Carolyn "The Women's Movement in the Sudan and it's Impact on Sudanese Law and Politics", *Afad Journal*, vol. 2, nr 1, 1995.
- Fryzee, Asaf *Outlines of Muhammadan Law*, 2nd edition, Oxford University Press, London, 1955.

- Glenn, H. Patrick *Legal Traditions of the World*, Oxford University Press, Oxford, 2000.
- Gorman, J. P. *The Laws of the Sudan*, Khartoum, 1941.
- Gow, J. J. "Law and the Sudan", *Sudan Notes and Records*, vol. 33, pp. 299-310, 1952.
- Gretton, G. "The Law and the Constitution of the Sudan", *World Today*, vol. 24, no. 8, pp. 314-23, August 1968.
- Hall, Stuart "When was 'the Post-Colonial'? Thinking at the Limit", Chambers, Iain & Curti, Linda (eds), *The Post-Colonial Question. Common Skies, Divided Horizons*, Routledge, London, 1996.
- Hallaq, Wael B. "Ijtihad", *The Oxford Encyclopaedia of the Modern Islamic World*, vol. 2, 1995.
- *A History of Islamic Legal Theories: An Introduction to Sunni Usul al-Fiqh*, Cambridge University Press, Cambridge, 1997.
- Hatem, Mervat F. "Secularist and Islamist Discourses on Modernity in Egypt and the Evolution of the Postcolonial Nation-State", in *Islam, Gender and Social Change*, Yazbeck Haddad, Yvonne & Esposito, John L. (eds), Oxford University Press, Oxford, 1998.
- Hamo, Ahmed Ali *Legal Terminology in a Nutshell, 2002 edition*, Al-Neelain University, Khartoum, 2002.
- Hassan, Yusuf Fadl *The Arabs and the Sudan*, Edinburgh University Press, Edinburgh, 1967.
- Hjärpe, Jan "Some problems in the Meeting between European and Islamic Legal Traditions: Examples from the Human Rights Discussion" in Forsgren, & Pettersson (eds), *Cultural Crossroads in Europe*, The Swedish Council for Planning and Co-ordination of Research (FRN), Stockholm, 1996.
- Hodgson *Venture of Islam*, London, 1974.
- Hoebink, Michel (ed) *Constitutional perspectives on Sudan: proceedings of the IDF Seminar*, CMEIS occasional paper; 62, 2000.
- Holt, P. M. *The Mahdist State in the Sudan*, Clarendon Press, Oxford, 1970.
- Human Rights Watch World Report 2003*, available online at: <http://www.hrw.org/wr2k3/africa12.html>
- Lantz, Annika *Intervjuteknik*, Studentlitteratur, Lund, 1993.
- Leaman, Oliver "Islamic Philosophy and the Attack on Logic", *Topoi*, no 19, pp. 17-24, 2000, p. 17.
- Lesch, Ann Mosely *The Sudan. Contested National Identities*, Indiana University Press, Bloomington, 1998.
- Länder i fickformat nr 301, Sudan*, Utrikespolitiska Institutet, 2000.
- Mayal, R. C. "Recent Constitutional Developments in the Sudan", *International Affairs*, vol. 28, no. 3, pp. 310-321. July 1952.

- Merriam, Sharon B. *Fallstudien som forskningsmetod*, Studentlitteratur, Lund, 1994.
- Mir-Hosseini, Ziba *Marriage on Trial. A study of Islamic Family Law*, IB Tauris, New York, 1997.
- Mitchell, Timothy *Colonising Egypt*, Cambridge University Press, New York, 1991.
- Mohanty, Chandra Talpade "Under Western Eyes: Feminist Scholarship and Colonial Discourses", in Williams, Patrick & Chrisman, Laura (eds), *Colonial Discourse and Post-Colonial Theory. A Reader*, Prentice Hall/Harvester Wheatsheaf, Hertfordshire, 1993.
- Mudimbe, V. Y. *The Invention of Africa. Gnosis, Philosophy, and Order of Knowledge*, Indiana University Press, Indianapolis, 1988.
- el-Mufti, M. A. *The Evolution of the Judicial System in the Sudan*, Tadamon Press, Khartoum, 1971.
- an-Na'im, Abdullahi Ahmed *Toward an Islamic Reformation. Civil Liberties, Human Rights, and International Law*, Syracuse University Press, New York, 1991.
- "Sudan and the Paradox of Self-Determination", *Harvard International Review*, Spring 1997.
- Nandy, Ashis *The Intimate Enemy. Loss and Recovery of Self under Colonialism*, Oxford University Press, Oxford, 1983.
- New York Times*, October 27th, 1996.
- Omer, al-Fahal al-Tahir "The administration of justice during the Mahdiya", *Sudan Law Journal Reports*, pp. 167-70, 1964.
- Pearl, D. & Menski, W. *Muslim Family Law*, 3^d edition, Sweet & Maxwell, London, 1998.
- Peters, B. Guy *Comparative Politics. Theory and Methods*, MacMillan Press, London, 1998.
- The Holy Qur'an
- Ramadan, Said *Islamic Law. Its Scope and Equity*, Macmillan Press, London, 1961.
- Roald, Anne Sofie *Tarbiya: Education and Politics in Islamic Movements in Jordan and Malaysia*, Lund Studies in History of Religions, vol. 3, Almqvist & Wiksell International, and Religionshistoriska avdelningen, Lunds Universitet, Lund, 2000.
- Rone, Jemera *HRW denounces year-long detention of Turabi*, Press Release/Commentary by Human Rights Watch, posted on March 19, 2002.
- Said, Edward *Orientalism*, Penguin books, Harmondsworth, 1985.
- *Culture and Imperialism*, Alfred A. Knopf, New York, 1993.
- Salih, Amel Mohamed *Sudanese Men and Women's Knowledge and Attitudes towards CIDAW*, unpublished Masters Thesis, Gender and Development Programme, Afad University for Women, Omdurman, 2002.

- Schacht, Joseph *The origins of Muhammadan Jurisprudence*, Clarendon Press, Oxford 1950.
- *An Introduction to Islamic Law*, Clarendon Press, Oxford 1964.
- Sidhamed, Abdel Salam *Politics and Islam in Contemporary Sudan*, St Martin's Press, New York, 1996.
- Starr, June *Law as Metaphor: From Islamic Courts to the Palace of Justice*, State University of New York Press, Albany, 1992.
- *Sudan Charter: National Unity and Diversity*, Khartoum, 1987.
- Svensson, Jonas *Women's Human Rights and Islam. A Study at Three Attempts at Accommodation*, Lund Studies in History of Religions, vol. 12, Almqvist & Wiksell International, and Religionshistoriska avdelningen, Lunds Universitet, Lund, 2000.
- Taban, Alfred "Northern Divisions", *BBC Focus on Africa*, vol. 13, no. 4, October to December, 2002.
- Taha, Mahmoud Mohammed *The Second Message of Islam*, Syracuse University Press, Syracuse, 1987.
- *The Laws of the Sudan*, vol. II, Haycock Press, London, 1955.
- Thompson, Cliff F. "The Sources of Law in the New Nations of Africa: A Case Study from Sudan", *Africa and Law*, T. Hutchinson (ed), Madison, WI: University of Wisconsin Press, pp. 133-176, 1976.
- Tomasevski, Katarina *Women and Human Rights*, Zeed books, London, 1993.
- Trintingham, J. Spencer *Islam in the Sudan*, Oxford University Press, Oxford, 1949.
- al-Turabi, Hassan *Tajdid 'usul al-fiqh al-islami*, Maktabah Dar al-Fikr, Khartoum, 1980.
- *Tajdid al-fikr al-Islami*, al-Dahr al-Sa'udiyyah, Jiddah, 1987.
- *Islam, Democracy, the State and the West*, ed. Arthur L. Lowrie, WISE, Tampa, 1993.
- Voll, John O. (ed) *Sudan. State and Society in Crisis*, Indiana University Press, Bloomington and Indianapolis, 1991.
- Waines, David *An Introduction to Islam*, Cambridge University Press, Cambridge, 1995.
- Warburg, Gabriel R. "The Sharia in Sudan: Implementation and Repercussions, 1983-1989", *Middle East Journal*, vol. 4, pp. 624-637, 1990.
- "The Sharia in Sudan. Implementation and Repercussions", pp. 90-107 in Voll, John O. (ed), *Sudan. State and Society in Crisis*, Indiana University Press, Bloomington and Indianapolis, 1991.
- Weiss, Bernard "Interpretation in Islamic Law: The Theory of *Ijtihad*", *American Journal of Comparative Law*, vol. 26, pp. 199-212, 1978.

-
- The spirit of Islamic Law*, University of Georgia Press, London, 1998.
- Williams, Patrick & Chrisman, Laura (eds) *Colonial Discourse and Post-Colonial Theory. A Reader*, Prentice Hall/Harvester Wheatsheaf, Hertfordshire, 1993.
- Zahraa, Mahdi "Characteristic Features of Islamic law: Perceptions and Misconceptions", *Arab Law Quarterly*, pp. 168-196, 2000

Webpages

- Amnesty International http://web.amnesty.org/web/content.nsf/pages/gbr_nigeria
(last visited 2003-03-31)
- CIA World Factbook 2002 <http://www.odci.gov/cia/publications/factbook/index.html>
(last visited 2003-03-31).