Codifying a jurist’s law: Islamic criminal legislation and Supreme Court case law in the Sudan under Numairi and Bashīr

Köndgen, O.A.

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Codifying a jurist’s law: 
Islamic criminal legislation and 
Supreme Court case law in the Sudan 
under Numairi and Bashîr

ACADEMISCH PROEFSCHRIFT

ter verkrijging van de graad van doctor
aan de Universiteit van Amsterdam
op gezag van de Rector Magnificus
prof. dr. D.C. van den Boom
ten overstaan van een door het college voor promoties
ingestelde commissie,
in het openbaar te verdedigen in de Agnietenkapel
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Olaf Andreas Königgen

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Faculteit der Geesteswetenschappen
Für Lumi, Viktor und Nanami
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Some remarks on transliteration and the use of Arabic terminology

Having written this dissertation in English I have opted for the Arabic transliteration system suggested by IJMES, which is widely used among specialists writing in English and generally understood. I use academic transliteration whenever I transliterate Arabic terminology or quotations in order to render these understandable to the initiated reader. I have not, however,

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1 My first research on the Sudan had been inspired by Prof. Baber Johansen (now Harvard University) in the early 1990s and resulted in an M.A. thesis (see references) published by the Deutsches Orient-Institut in Hamburg in 1992.
transliterated all Arabic proper names. Most of the time I use the respective Arabic terms, such as *zinā*, *qadhf*, *hirāba* etc. when an English translation would be long and cumbersome. For the reader who is not familiar with these terms I have added a glossary of Arabic Islamic legal terms used in the text and their respective English translations. On the other hand, the glossary provides students of Islamic law with translations of Arabic legal terminology. These cannot easily be found elsewhere since Arabic-English dictionaries containing the legal terminology derived from the *fiqh* do not exist to the best of my knowledge.

With regard to the use of the terms *shari‘a*, *fiqh*, and Islamic Criminal Law (ICL) I make a difference between the former two and the latter. I use the abbreviation ICL when modern codified legislation is concerned. Further, I use the combination *shari‘a / fiqh* whenever I want to stress the interrelatedness of the two terms.

---

2 John Wuol Makec was one of the few southern judges at the Supreme Court in Khartoum. He was very helpful during my first visit in 2004 and has risen in the meantime to the post of President of the Supreme Court of Southern Sudan.

3 For example “unfounded accusation of unlawful sexual intercourse” for *qadhf*.
**List of abbreviations**

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
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<tbody>
<tr>
<td>ACHPR</td>
<td>African Charter on Human and People’s Rights</td>
</tr>
<tr>
<td>AI</td>
<td>Amnesty International</td>
</tr>
<tr>
<td>CA91</td>
<td>Criminal Act 1991</td>
</tr>
<tr>
<td>CAT</td>
<td>Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment</td>
</tr>
<tr>
<td>CB88</td>
<td>Criminal Bill 1988</td>
</tr>
<tr>
<td>CCP74</td>
<td>Code of Criminal Procedure 1974</td>
</tr>
<tr>
<td>CCP83</td>
<td>Code of Criminal Procedure 1983</td>
</tr>
<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination against Women</td>
</tr>
<tr>
<td>CIDTP</td>
<td>Cruel, inhuman or degrading treatment or punishment</td>
</tr>
<tr>
<td>CPA91</td>
<td>Criminal Procedure Act 1991</td>
</tr>
<tr>
<td>CPA</td>
<td>Comprehensive Peace Agreement</td>
</tr>
<tr>
<td>CRC</td>
<td>Convention on the Rights of the Child</td>
</tr>
<tr>
<td>DUP</td>
<td>Democratic Unionist Party</td>
</tr>
<tr>
<td>EvA83</td>
<td>Evidence Act 1983</td>
</tr>
<tr>
<td>EvA93</td>
<td>Evidence Act 1993</td>
</tr>
<tr>
<td>FIS</td>
<td>Front Islamique du Salut</td>
</tr>
<tr>
<td>HRW</td>
<td>Human Rights Watch</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>ICERD</td>
<td>International Covenant on the Elimination of All Forms of Racial Discrimination</td>
</tr>
<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Social, and Cultural Rights</td>
</tr>
<tr>
<td>ICF</td>
<td>Islamic Constitution Front</td>
</tr>
<tr>
<td>ICL</td>
<td>Islamic Criminal Law</td>
</tr>
<tr>
<td>INC</td>
<td>Interim National Constitution</td>
</tr>
<tr>
<td>JBRA</td>
<td>Judgments Basic Rules Act</td>
</tr>
<tr>
<td>JPF</td>
<td>Just Peace Forum</td>
</tr>
<tr>
<td>NCP</td>
<td>National Congress Party</td>
</tr>
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4 On the meaning and use of *shari‘a* and *fiqh* see also below paragraph “*Shari‘a* and *fiqh* : why the difference is important”. 
<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>NGSH</td>
<td>National Gathering for the Salvation of the Homeland</td>
</tr>
<tr>
<td>NIF</td>
<td>National Islamic Front</td>
</tr>
<tr>
<td>NISS</td>
<td>National Intelligence and Security Services</td>
</tr>
<tr>
<td>OIC</td>
<td>Organisation of the Islamic Conference&lt;sup&gt;5&lt;/sup&gt;</td>
</tr>
<tr>
<td>PAIC</td>
<td>Popular Arab and Islamic Congress</td>
</tr>
<tr>
<td>PC83</td>
<td>Penal Code 1983</td>
</tr>
<tr>
<td>PC74</td>
<td>Penal Code 1974</td>
</tr>
<tr>
<td>PDF</td>
<td>Popular Defense Forces</td>
</tr>
<tr>
<td>PNC</td>
<td>Popular National Congress</td>
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<tr>
<td>POC</td>
<td>Public Order Court</td>
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<td>POL</td>
<td>Public Order Law</td>
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<td>POLKa</td>
<td>Public Order Law Kassala</td>
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<tr>
<td>POLKh</td>
<td>Public Order Law Khartoum</td>
</tr>
<tr>
<td>POP</td>
<td>Public Order Police</td>
</tr>
<tr>
<td>RCC</td>
<td>Revolutionary Command Council for National Salvation</td>
</tr>
<tr>
<td>SC</td>
<td>Supreme Court</td>
</tr>
<tr>
<td>SCP</td>
<td>Sudan Communist Party</td>
</tr>
<tr>
<td>SDF</td>
<td>Sudan Defense Forces</td>
</tr>
<tr>
<td>SPF</td>
<td>Sudan Police Force</td>
</tr>
<tr>
<td>SPLA</td>
<td>Sudan Peoples’ Liberation Army</td>
</tr>
<tr>
<td>SPLM</td>
<td>Sudan Peoples’ Liberation Movement</td>
</tr>
<tr>
<td>SLJR</td>
<td>Sudan Law Journal and Reports</td>
</tr>
<tr>
<td>SSU</td>
<td>Sudan Socialist Union</td>
</tr>
<tr>
<td>SSLM</td>
<td>Southern Sudan Liberation Movement</td>
</tr>
<tr>
<td>TMC</td>
<td>Transitional Military Council</td>
</tr>
<tr>
<td>UNP</td>
<td>Umma National Party</td>
</tr>
</tbody>
</table>

<sup>5</sup> Now renamed Organisation of Islamic Cooperation.
“...the English law will no doubt continue as the main guidance for our future legal development. But if the trend is to follow opinion and ideas tainted and coloured with sentiment and emotions then any change to a different system will serve no purpose other than the temporary political gain by those who are advocating it.”

"Islamic law is like a pistol in your pocket, you rarely use it”.  

1 Introduction

1.1 The Islamization of criminal law

1.1.1 Islamic Criminal Law in the Sudan: the political background

When as of September 1983 the Islamist so-called ‘September laws’ were promulgated the regime of Sudanese president Ja’far Numairi had come a long way. In 1969, after the coup d’état of the Free Officers the secular leftist leader Numairi was determined to destroy sectarianism, i.e. the political power of the great Sufi brotherhoods of the Sudan such as the Anṣār and the Khatmiyya. The radical phase of the May revolution, as the coup d’état of the Free Officers was baptized, was soon over. Already in 1977 followed the “national reconciliation” with the Anṣār and the Muslim Brotherhood. Ḥasan al-Turābī, the Brotherhood’s charismatic leader went from prison directly to his new post as attorney-general and soon chaired a special committee charged with bringing the Sudan’s legislation into harmony with the sharī‘a. Numairi, however, was at this point not in a hurry to Islamize Sudan’s criminal and other law. Thus, in the first five years of its existence only the least controversial of seven suggested bills, the bill on the religious alms tax (zakāt), was approved. Reconciliation, however, went not smoothly. By 1978 only the Muslim Brotherhood continued to cooperate with Numairi. At the same time Numairi’s domestic problems increased. The Sudanese army, essential for the survival of his regime, became more and more critical of corruption in the president’s entourage. Concurrently, high inflation, several devaluations of the Sudanese pound, a skyrocketing trade deficit and high...

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7 Interview with Jalāl Lutfi, President of the Constitutional Court of Sudan, June 2004.  
8 For a more detailed analysis of the political background of the September laws and its aftermath see chapter 2.  
10 Warburg (1990), p. 627. Other bills dealt with the prohibition of alcohol, the hudūd, the banning of usury and gambling.
foreign debts further undermined the legitimacy of the regime. To aggravate the overall political situation, civil war in the South had broken out again after the 1972 Addis Ababa peace agreement had been gradually dismantled between 1979 and 1983. The last major crisis before the promulgation of the September laws was a strike of judges in the summer of 1983, which led to a total breakdown of the Sudanese justice system. Numairi saw himself forced to make concessions to get a grip on the situation. Already while the confrontation between him and the judges lasted a secret committee had been appointed and charged with the preparation of new Islamized legislation. With Numairi personally being the driving force behind the Islamization process the new legislation was enacted mostly by way of presidential decrees. It comprised a Penal Code, a Criminal Procedure Act, an Evidence Act and other legislation. Given the speed with which the codification was realized and the lack of expertise of its authors a substantial number of the Islamized provisions of the September laws were in contradiction with traditional Islamic jurisprudence (fiqh). Important parts of Sudanese society were opposed to the new laws. Most Southerners rejected their new status as second-class citizens and the fact that the shari‘a, even though this proved practically impossible, was applicable in the South as well. Southerners living in the North, however, were immediately subjected to floggings and amputations. In the North a broad alliance of secular parties denounced the September laws as un-Islamic, anti-women and generally repressive. To quell the resistance against the shari‘a and Numairi’s autocratic rule a state of emergency was declared and a new body of emergency courts was created. These were accountable directly to the president and had jurisdiction over all cases to be judged according to the September laws. Next to this disempowerment of the Chief Justice the Islamization of parts of the legal system also led to a number of laws becoming unconstitutional. A subsequent Islamization of the constitution, as suggested by Numairi, met, however, with fierce resistance in parliament and had to be adjourned. In January 1985 Muḥammad Ṭāhā, the prominent leader of the reformist Republican Brothers' was hanged for apostasy, a crime that hadn't even been codified in the new Penal Code. The highly controversial execution of Ṭāhā, who had strongly opposed Numairi’s introduction of the shari‘a, did not, however, subdue Sudanese society. After the abolition of bread and fuel subsidies a general strike broke out in March 1985 and the military under Siwār al-Dhahab assumed power, while Numairi visited the USA. While the following military regime suspended the execution of amputations, floggings were still administered. Those convicted under the September laws stayed in prison and were joined by others
likewise sentenced to amputation or cross-amputation. This situation did not change substantially under the democratically elected governments of Śādiq al-Mahdī who ruled in various coalitions from 1986 until Umar al-Bashīr's military coup in 1989. Despite continuous lobbying of the National Islamic Front’s spiritus rector Ḥasan al-Turābī for a new Islamized penal code in summer 1989 the political tides turned in favor of a revocation of the shari‘a laws. The day before their abolition brigadier Umar al-Bashīr assumed power in a bloodless coup. It soon became clear that Ḥasan al-Turābī and the NIF were in alliance with al-Bashīr. The constitution was revoked and under the cover of emergency law large-scale purges of the civil service were carried out. In the judiciary hundreds of trained judges were replaced by often unqualified followers of the NIF. A parallel system of courts ensured the complete control of the executive over the majority of cases. Not surprisingly the Islamist-military regime also introduced important new legislation in order to reach its goal of an in-depth Islamization of the Sudanese society. Thus, the draft penal code of 1988, a project which had been devised under the auspices of the then minister of justice Ḥasan al-Turābī, was resuscitated and promulgated in 1991 with few changes. This Criminal Act 1991 included the full range of the qur’anic punishments (ḥudūd) and retaliation (qiṣāṣ) and, for the first time in the history of Sudanese law, apostasy (ridda). Other important legislation include the Muslim Personal Law Act, a codification of personal status law (1991), the Public Order Act (1996) and the 1998 Constitution. The latter was replaced by the Interim National Constitution (INC) of 2005, as a result of the Comprehensive Peace Agreement (CPA) between the government and the Sudan People’s Liberation Movement (SPLM). The INC restricted shari‘a application to the North of the Sudan only. In the capital Khartoum the rights of non-Muslims, at least on paper, are safeguarded. The six-year transition period ended, as stipulated in the INC, with a referendum on the independence of the South of Sudan. An overwhelming majority of Southerners opted in favor of independence, which came into effect in July 2011. With Southern Sudan’s independence in July 2011 the political and most probably the legal situation will change in the North as well. It rarely happens that a country looses a third of its territory. Whether the al-Bashīr regime will politically survive this humiliation remains to be seen. For the time being the regime tries to entrench itself and resorts to the slogans of the past. Faced with the imminent loss of the South president al-Bashīr threatened to adopt an
Islamic constitution if the South splits away. “Sharia and Islam will be the main source for the constitution, Islam the official religion and Arabic the official language”. It is against this historical and political background the present study attempts to answer questions pertaining to Islamic Criminal Law (ICL), more commonly called the *shari‘a*, in the modern Sudan. Before turning to the Sudanese example of ICL legislation and case law we need, however, to turn our attention first to a number of important questions related to the historical development of *shari‘a* application and the tools used when the *shari‘a* is codified.

### 1.1.2. Legal Islamization and its discourse

**Panacea for societal ills**

Islamic Criminal Law (ICL) is arguably the most hotly debated feature of Islamic law today. Some of its more prominent characteristics, especially corporal punishments, e.g. amputations and stoning, but also flogging, are loathed in the West. Cases of (imminent) *shari‘a* application invariably make their way onto the front pages of Western newspapers. Keywords such as „*shari‘a*“, „Islamic law“, „stoning“ or flogging + Islam yield multiple hits in the Internet where also a variety of gruesome videos can be found showing public floggings, lapidations or even limb amputations. Islamic Criminal Law for many epitomizes an archaic backwardness; it is anti-modern, misogynous and turns non-Muslim minorities into second-class citizens. In brief, it is the antithesis of Western modernity, or so many believe.

While *shari‘a*-based criminal law meets general rejection in the West its proponents praise its alleged deterrent effect. Due to harsh corporal punishments crime rates have decreased, we are told. Credible empirical evidence proving this claim, however, is hardly ever presented. At any rate homicide rates in North Africa and the Middle East are among the lowest in the world, whether a country applies *shari‘a*-elements does not seem to have a tangible statistical impact. Peters has pointed out that apologists of the application of Islamic Criminal Law believe that justice based on the *shari‘a* is expeditious and effective, thus leading to a society “where good deeds are immediately rewarded and evil deeds punished right away”.

Another important argument, invariably used by Islamist movements advocating Islamic Criminal Law as well as by the regimes that have introduced it, claims that without the *shari‘a*

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a society cannot be truly Islamic. As a consequence of this a state in order to be able to call itself truly Islamic necessarily has to introduce Islamic law with Islamic Criminal Law as a key element of it. Indeed Islamic Criminal Law is at the center of the discussion and “regarded by many Muslims as the litmus test for a real Islamization of the legal system”.14 While many of the arguments of the proponents of ICL are misleading they make another case, equally appealing to many. The severe punishments for the consumption of alcohol or drugs and a wide variety of sex-related offences is presented as an efficient antidote against a creeping Westernization that is deemed to morally corrupt Muslim societies.

Modern codification cannot recreate the past

None of these, for the most part apologetic, arguments of ICL proponents are satisfactory nor do they, in the opinion of many observers, touch upon the core of the matter which is, also in my understanding, clearly political. Dictatorial regimes that have come to power through popular revolutions or coup d’états introduce Islamic Criminal Law or rather a limited, selective and hybrid version thereof in the hope to gain the legitimacy they cannot obtain at the ballot boxes. Especially when the reintroduction of ICL comes after a longer period of secular colonial and postcolonial legislation the version of ICL introduced can only claim a superficial connection with the legal past it seeks to resuscitate. Modern ICL often does not resemble anything that could be found in the history of the country that claims to go back to its roots. Modern codification techniques and the unavoidable, at times creative, selection of classical solutions to specific juridical problems – and the practical application in the courts - create a body of law that is necessarily a reflection of the needs and motivations of the modern legislator. They are not a mirror image of a past that can be recreated at will.

While in the majority of Muslim countries Western-colonial law replaced legal systems based on the shari‘a / fiqh, in certain countries of the Arab peninsula such as Saudi Arabia, Yemen15 and Qatar, however, the situation is different.16 Here the modern application of ICL, codified or not, has not been interrupted by periods of secular colonial and postcolonial legislation. The fact that the shari‘a / fiqh was applied uninterruptedly does not mean that modernization by codification did not take place. Yemen has completely codified its criminal law, Qatar has

15 On the situation in Yemen after the reunification of North and South Yemen see Shamiry (2000).
a codified penal code, but the uncodified *shari’a* still plays a role. In Saudi Arabia the *shari’a* is the basic norm serving as the main point of reference with regard to crime, personal status, civil matters etc. While there is a criminal procedure code since 2001 criminal law as such remains uncodified and is administered by judges who rely on Qur’an, Sunna and Ḥanbalite *fiqh*.\(^\text{17}\)

**Who applies ICL?**

ICL, at least as far as the “first wave” of re-introduction is concerned (1972-1983)\(^\text{18}\), has been (re-)instated or is applied by authoritarian regimes. Examples are Libya\(^\text{19}\), Iran\(^\text{20}\), Sudan\(^\text{21}\), Pakistan\(^\text{22}\), Saudi-Arabia\(^\text{23}\). More recently militant Islamists have introduced their idiosyncratic interpretation of the *shari’a*, for example in the Swat valley in Pakistan\(^\text{24}\) and in parts of Somalia\(^\text{25}\). While these movements do not represent states they use the application of ICL, however flawed, to gain legitimacy and to subdue the population under their control at the same time. It would, however, be too simple and factually wrong to conclude that the introduction of the *shari’a* can only happen through dictatorial means. First of all there are two important examples, the northern states of Nigeria and the three federal states of Malaysia Kelantan, Terengganu and Perlis,\(^\text{26}\) where regional politicians used ICL as part of their election program and, once elected, kept their promises and introduced elements of Islamic Criminal Law. In both cases, however, the actual application is controversial and in contradiction to the national constitution. Secondly, public opinion polls in the Muslim world have shown that “there is a widespread support for sharia in the Muslim world”.\(^\text{27}\) The same poll, however, also showed that a majority of Muslim respondents are in favor of legal

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\(^\text{16}\) See Peters (2005), pp. 142-143.
\(^\text{17}\) See van Eijk (2010), pp. 166-167.
\(^\text{18}\) During this period Libya (1972), Pakistan (1979), Iran (1979) and Sudan (1983) introduced Islamic Criminal Law.
\(^\text{19}\) E.g. Mayer (1990).
\(^\text{22}\) On Islamic law and its application in Pakistan see for example Mehdi (1994) and Lau (2006).
\(^\text{23}\) On Saudi-Arabia see Vogel (2000).
\(^\text{25}\) See for example “Was die Shabab-Miliz unter Gerechtigkeit versteht”, Neue Zürcher Zeitung, 12.01.2011.
\(^\text{26}\) Harding (2010), pp. 504-505.
\(^\text{27}\) Esposito/Mogahed (2007), p. 35.
equality between men and women.\textsuperscript{28} In brief, with most of the Muslim world ruled by authoritarian regimes, some Islamist, some secular, it is not possible to make a reliable prediction as to what truly democratic elections would mean with regard to a possible introduction of Islamic Criminal Law.\textsuperscript{29}

“\textit{Extreme shar\’a}”- spreading or not?

There is also an ongoing debate on whether the wave of reintroduced Islamic Criminal Law is indeed spreading or whether it is on the decline after having seen its heyday in the seventies and early eighties. The former view is advanced in “Radical Islam’s Rules”, edited by Paul Marshall, and challenged in Otto’s “Sharia Incorporated”.\textsuperscript{30} In order to prove his claim that “in the past twenty-five years, the number of countries and regions being governed by a radical version of shar\’a has increased”, Marshall begins his recapitulatory account with Iran in 1979 (and not, as one could have expected, in 1972 when Libya introduced ICL) and continues until his narrative reaches the “Chechnyan rebels (who) have adopted their shar\’a laws from Sudan” and the Palestinian constitution. His presentation of the historical development is linear and suggests only one reading, i.e. “extreme shar\’a” (ICL including amputations, flogging and stoning) is spreading continuously. From the above enumeration it also becomes clear that Marshall mixes state laws with purported ICL application by rebel movements, criminal legislation with constitutions, states that do apply ICL with states that don’t. It would have been worthwhile to inquire whether the Chechnyan rebels have also established the judicial system that would have to come with an “adoption of shar\’a laws from the Sudan.” This is rather doubtful and Marshall does not provide us with further information. We can therefore hardly speak of ICL application in the same way we use the term in the context of fully operational state-run judicial systems. Certainly, events can be read quite differently than Marshall suggests. The history of the reintroduction of ICL is anything but linear. Authors writing on Iran, Pakistan and Sudan in Otto’s “Sharia Incorporated” suggest that “the era of revolutionary Islamic law reform is past its peak”.\textsuperscript{31} Libya was a forerunner of ICL, but never applied it. Nigeria’s ICL application has, after a first

\textsuperscript{28} Esposito/Mogahed (2007), p. 51.
\textsuperscript{29} The present wave of uprisings in the Arab world might help with an answer to this question if the transformation process hopefully leads to free and democratic elections in Egypt, Tunisia, Libya and possibly other Arab countries.
phase of experimentation, come to a standstill. The original fervor has died down, ḥadd- and qisāṣ-punishments remain unexecuted, the convicts languish in prison. In Indonesia and Malaysia, central governments are pitted against regional ones, with the former ones still preventing the introduction of ICL. However, it is also clear that neither in Iran, nor in Pakistan or the Sudan the abolition of ICL is on the agenda, unless substantial regime changes occur. Otto has argued that the first wave of ICL reintroduction was never followed by a second wave. If “second wave” is understood to be similar to the “first wave”, i.e. the introduction of ICL and other legislation based on the sharī’a by a functioning state as a whole Otto’s assessment is correct. However, the idea of ICL application is far from being dead.

Next to sharī’a application induced by a central government, as in the mentioned first wave, there is also the, more recent, phenomenon of regional governments voted into office on the promise to introduce ICL and others introducing ICL on the strength of their regional legislative autonomy. Examples for the former are the northern provinces of Nigeria and three federal states of Malaysia. An example for the latter is the remote province of Aceh in Indonesia which gained the right to enact their own laws as part of a 2005 peace agreement ending a 30-year insurgency. None of these three regions, however, have seen a full-fledged and continuous application of ICL. In Nigeria large backlogs of ḥadd-and qisāṣ-sentences remain unexecuted. In Malaysia the two federal states that have legislated ḥadd-punishments cannot enforce them because they are opposed by the central government and because they are probably unconstitutional. The Indonesian province of Aceh has introduced Islamic criminal laws on minor crimes since 2001. In 2009 the province passed a law making adultery punishable by stoning. No executions by stoning have been reported so far.

In the context of Marshall’s arguments it must also be mentioned that militant Islamist movements in a variety of countries are using the pertinent slogans referring to sharī’a

34 Apart from these three categories, a fourth one needs to be mentioned: legislative projects that have not come to fruition. There is e.g. an Egyptian project (1982), a project of the Arab Ligue (1996) and a project of the Gulf Cooperation Council (1997). All three codified ICL to various degrees, none of these three projects were enacted. Abu-Sahlieh (2008), pp. 154-155. See also Peters (2005), p. 153, Peters dates the Arab Ligue project 1986.
application for their political gains. In the context of civil wars and military conflicts below the threshold of civil war the cruel and public application of “the shari’a”, preferably filmed by video cameras and made available online afterwards, has become a powerful media tool to gain world-wide attention and legitimacy, at least in the eyes of some of those who are longing for a just society under shari’a law. Floggings in the Swat valley in Pakistan and amputations in Somalia and Iraq are all examples for this appropriation of ICL application by militant Islamists. While, until now, it remains unresearched how these groups administer justice there is so far little or no evidence that they pay much attention to procedural questions. Without proper procedure, however, the administration of justice of the mentioned rebel movements represents nothing more than political abuse.

ICL as a tool of oppression

It has further been suggested that the corporal punishments that are introduced as part and parcel of ICL are used as a tool of oppression. While this assessment by and large is certainly correct it should not be forgotten that authoritarian regimes dispose of a wide range of legal (and illegal) instruments that often are more powerful than ICL. In the case of the Sudan for example oppression took and takes on many forms from clandestine torture centers – the infamous ghost houses - to mass extra-judicial killings. The overwhelming majority of victims of the present regime has not died or suffered torture through the application of ICL.

If ICL were not part of the penal code it would hardly change the abysmal human rights record of the al-Bashir regime. This observation, however, is not necessarily true for other Muslim countries that have introduced ICL. With regard to Iran, e.g., there can be little doubt that ICL serves as a tool of oppression.

1.1.3 Codification: reform of shari’a and the role of the state

Codifying the fiqh: the theoretical framework

How the shari’a / fiqh is being transformed when post-colonial nation states undertake to codify it and how it relates to secular legislation is a question many western scholars working

37 On the controversial points of view on torture among the fuqahā’ see Bleuchot (2002).
38 On ICL in Iran see Peters (2005), pp. 160-164.
on Islamic law have tried to answer for decades with differing results. In the following chapter I shall give a brief introduction to the historical development of sharī’a codification and the main theoretical and methodological issues at stake. This will be followed by the research questions of this work which to a large degree are based on questions pertaining to the process of the codification of the sharī’a / fiqh.

Some preliminary remarks on language and ideology

In a recent critique of Western orientalist discourse Wael Hallaq drew the attention to the heavy ideological baggage in the linguistic representations of Islamic legal history by Western scholarship. Terms such as “law”, “religious” and “reform” are suggested as pertinent examples for legal Orientalism’s inability to recognize its inherent preconceptions which, in Hallaq’s view, lead to misunderstanding, misreading and misjudging Islamic legal history and its underlying concepts. All of these terms can only be understood against their very specific social, institutional and cultural environment within which they were coined. Thus, if the term “law”, understood as “our” (i.e. Western) superior model, is used in the fundamentally different cultural context of Islamic juridical concepts, the analysis frequently adopted a top-down-approach to the detriment of a fair representation of Islam’s juridical forms. This approach was part and parcel of a colonialist discourse but its echoes can still be felt in more recent literature. This discourse which was meant to endorse the gradual replacement of the sharī’a by secular Western legislation and legal institutions invariably came to negative conclusions with regard to the very nature of the sharī’a. The sharī’a was “inefficient” or “paralyzed”. Its penal law especially, as in the words of Uriel Heyd, the erudite scholar on Ottoman criminal law, “never had much practical importance” and was “deficient”. Another negative value judgment concludes that the perceived lack of a distinction between law and morality – unlike in Western law - is a liability rendering the sharī’a inefficient. In general Hallaq attests to Western scholarship an adversity to religion which forestalls a correct

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40 For the following argument see: Hallaq (2009), Sharī’a, pp. 1-5.

41 Heyd, Uriel (1973), these are the very first words of the introduction to his seminal study. See also Heyd (1967), p. 1. In order to understand the context of Heyd’s words it is necessary to understand on what grounds he reached his conclusion. His main reason to call the criminal law of the sharī’a deficient is that on the one hand “fixed penalties are prescribed for a limited number of crimes only” and “its rules of evidence are so strict that a number of offences cannot be punished adequately”.

understanding of the function of morality as a “jural form”.\textsuperscript{42} Further, the term “religious” is understood as the antithesis of “secular” and “rational”. Emphasizing this antithesis to the assumed modernity of Western law scholars focused on the religious (and therefore irrational and non-secular) aspects of Islamic law instead of its interaction with its socio-economic and political environment. “Reform” is another term that is employed to describe an assumed transition from a “deficient”, “religious”, “ineffective” and “irrational” past to a modern legal culture, inspired by an enlightened West. As Hallaq puts it: “...the very term “reform” epistemologically signifies an unappealable verdict on an entire history and a legal culture standing in need of displacement”.\textsuperscript{43}

In summary, the language used by Western scholars writing about Islamic law is, according to Hallaq, charged with ideology and the concepts used by them are, in turn, determined and controlled by language. Modern scholarship on Islamic law, Hallaq claims, is essentialist and fails to admit its “epistemic and cultural relationship to colonialism”.\textsuperscript{44} Hallaq concedes, however, that the qualifications and explanations necessary to render an image truthful to the historical shari’a are so many that they are hardly possible without blocking the writing process altogether. In fact, he thinks that the dilemma is unsolvable.\textsuperscript{45} Hallaq’s analysis, no doubt, has its merits in sensitizing those who write about Islamic law today and want to avoid the pitfalls of an academic language that is unaware of or denies its obvious ideological roots. Large sections of the field, however, have gone through a process of introspection since the publication of Edward Said’s "Orientalism" in 1978. After more than thirty years the weaknesses of Said’s analysis have also become obvious.\textsuperscript{46}

Therefore, the undamped thrust of Hallaq’s apodictic critique, it seems to me, needs to be put in context and qualified. Contemporary scholarship on the Middle East and Islam in general in the last three decades has evolved and changed. This is especially true for studies on Islamic law, if I may still use the term. The times of Marcel Morand\textsuperscript{47} and Christiaan Snouck

\begin{itemize}
\item \textsuperscript{42} Hallaq, Shari’a (2009), p. 5.
\item \textsuperscript{43} Hallaq, Shari’a (2009), p. 4.
\item \textsuperscript{44} Hallaq, Shari’a (2009), p. 4.
\item \textsuperscript{45} Evidence of this unsolvable problem is the fact that Hallaq himself uses “Islamic Law” in several of his book titles.
\item \textsuperscript{46} See e.g. Irwin (2007) who arguably wrote the most scathing critique of Said’s “Orientalism”.
\item \textsuperscript{47} Marcel Morand, leading figure of the French colonial school of Islamic law „Droit Musulman Algérien“. On Morand and his legal theory see Arabi (2001), pp. 121-146.
\end{itemize}
Hurgronje are long gone by and for decades scholars interested in Islamic law have been struggling to apply new approaches to their subject, ranging from cultural anthropology and legal pluralism to Luhmann’s systems theory. None of these new approaches, to my knowledge, can be blamed for following an inherent colonialist agenda or for aiming at "altering the Other’s essence". From the above it has become clear that Hallaq’s critique applies „Saidism“ to Islamic legal studies in a rather cross-the-board and all-inclusive manner. While Hallaq blames modern scholarship for returning an „unappealable verdict on an entire history“ this very assessment is in itself an unappealable verdict on Western scholarship working on Islamic law. However, despite these obvious inconsistencies of Hallaq’s arguments there can be little doubt that no researcher is completely immune against an unintentional use of ideologically charged language and terminology, may this be due to negligence or lack of reflection. It is evident that the lesson for researchers in the field of Islamic legal studies in general and for the author of this dissertation must be willing to scrutinize oneself in the process of writing. Language used must be questioned, terminology employed must be challenged, essentialist „unappealable verdicts“ will have to be avoided.

Shari’a and fiqh: why the difference is important
Before I present a short overview of how Islamic jurisprudence works and how its results have been applied in practice it is necessary to clarify a terminological equivocality to be found in the relevant literature. An important difficulty arises from the lack of clarity or rather the often indiscriminate use of the two terms, shari’a and fiqh, to describe Islamic law. In order to disentangle the two it is imperative to make a clear distinction between them and explain how both are used in this work. The most frequent explanation distinguishes between the shari’a as „God’s divine law“, „an expression of...God’s will“ and the fiqh, being the juridical discipline that interprets Qur’án and Sunna with the help of a range of hermeneutic
tools used in order to determine and formulate the shari’a.\(^{56}\) In other words, while the shari’a is divine, eternal and unchangeable, the fiqh is the fruit of human endeavor. As such it can never be more than „the jurists’ approximation to divine law“\(^{57}\) The interpretation of the fuqahā” depends on human efforts to understand the shari’a. The fiqh, in contrast, is to a certain degree flexible and legal reasoning can change according to historical developments and needs of society. Vikør has pointed out that whatever is applied in real terms is fiqh, i.e. the law formulated by specialized jurists (the fuqahā”), i.e. humans. Even the identification of qur’anic verses with juridical relevance is a result of the fuqahā’s efforts. The Islamist’s slogan „taḥbīq al-shari’a” (application of the shari’a) is therefore a very imprecise usage of the term shari’a at best, if not an impossibility.\(^{58}\) In brief, the shari’a as embodied in the Qur’an and Sunna and the legal reasoning of the fiqh are mutually dependant. Further, the endeavors of the fuqahā” have resulted in a body of texts characterized by diversity in opinion. Based on different interpretations of the revealed texts and diverging application of the various hermeneutical devices the fuqahā” often have come to different conclusions. Indeed, the acceptance of differences of opinions, either between different schools of law (madhhab/madhāhib) or within a given school of law are one of the most prominent characteristics of Islamic law. Peters aptly calls it „the legitimacy of dissent“.\(^{59}\) Another important feature of Islamic law as formulated by the fuqahā” is that it is an uncodified law. The legal handbooks of the four surviving Sunni schools of law (Mālikites, Ḥanbalites, Shāfi’ites and Ḥanafites) are, as to their form, rather different from „modern“ Western (-inspired) codification. They contain scholarly, often controversial, discussions by a class of legal theoreticians, who, when formulating their opinions from the eighth century onwards, were not commissioned by the state but working independently. The fiqh, thus, is a jurist’s law and not a law determined by the state. The fuqahā” alone had the authority to formulate the rules and principles of the shari’a. Peters has explained how the fuqahā” successfully prevented the state’s authorities to break the scholar’s monopoly of shari’a interpretation.\(^{60}\) In a nutshell, the fuqahā” developed over time the doctrine that the „gate of ĭjtihād” (i.e. independent legal reasoning) was closed (bāb al-îjtihād maqfūl). Legal scholars thus had to

\(^{56}\) Peters (2002), p. 84.
\(^{57}\) Peters (2002), p. 84.
\(^{59}\) Peters (2002), p. 86.
\(^{60}\) Peters (2002), p. 86.
follow the teachings of their respective madhhab and could not, unlike the founding fathers of
the four Sunni schools, freely interpret Qur’an and Sunna and suggest innovative legal
opinions. Taqlid, as this necessity to strictly adhere to the traditional views of a given
madhhab is called, had its advantages, but also its downsides. As to the latter, taqlid has
often been made responsible and blamed for the (intellectual) stagnation of the Muslim world.
This point of view has been brought forward by Muslim modernists such as Muḥammad
ʾAbduh and Jamāl al-Dīn al-Afghānī but also by Western scholarship. However, the
obligation to apply taqlid kept the state at a distance and prevented it to effectively question
the monopoly of the fuqahā’. If the traditional guardians of the shari’ā were not allowed to
renovate Islamic law this was even less the case for those who would have liked to gain
authority in the discipline of shari’ā interpretation. Moreover, and possibly even more
important, the application of taqlid provided for a certain stability and uniformity of the fiqh
over time. Had the fuqahā’ of different eras had full freedom to apply ijtihād and formulate
new and innovative legal rules the diversity already inherent in the fiqh would probably have
taken even larger proportions.

The teachings of the founding fathers of the four Sunni schools, and by association their main
disciples, became to be regarded as almost „superhuman“, to a degree that openly challenging
their opinions was simply not an option. The doctrinal stagnation of the schools, however,
was never absolute or complete. Western scholars on Islam had accepted the doctrine of the
closed gate of ijtihād for a long time. However, as Johansen, Hallaq and others have shown
Islamic law has changed over time due to the evolution of the social and political environment
it operated in. It was therefore less static than the doctrine of taqlid suggested.

The „hermeneutic toolbox“: uṣūl al-fiqh

Before I shall discuss the relationship between shari’ā / fiqh and the jurisdiction and
application of the law by the state, a word on the legal methodology, as employed by the
fuqahā’, is necessary. The methodology used when interpreting God’s divine law and

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61 Taqlid is normally seen as intellectually inferior to ijtihād, with the latter being associated “with independant
rational thought”. Fadel 1996 tries to reposition taqlid and give a more nuanced explanation of its social logic.
See Fadel (1996). For other aspects of the taqlid/ijtihād dichotomy see the remaining articles in this special issue
of Islamic Law and Society (Vol.3, June 1996). See also Peters (1980) about ijtihād and taqlid in the 18th and
19th century.

62 On the lifes and works of ʿAbduh and Afghānī see e.g. Hourani (1983), pp. 130-160 and pp. 103-129.

transforming it into legal rules is called *uṣūl al-fiqh* (the „roots of jurisprudence“, i.e. the theoretical and philosophical foundation of Islamic law). The *uṣūl al-fiqh* are based mainly on four elements. Two of these, the Qur´an and the Sunna are textual sources, the two others, *qiyaṣ* and *ijmāʿ*, are methods used to develop and confirm general rules derived from the former two. Vikør aptly pointed out that these four elements represent three stages in the development of Islamic law that can be described as „foundation“, „formulation“ and „confirmation“. Foundation here refers to the two „canonical“ texts, i.e. Qur´an and Sunna. *Qiyaṣ*, mostly described as analogical reasoning or analogical deduction is a process of derivation of general principles from cases found in the two canonical sources. These general principles then can be applied to comparable cases not explicitly mentioned in the Qur´an or Sunna. This process can be described as the stage of formulation. The third and final stage „confirmation“ is represented by *ijmāʿ*, the consensus of the scholars. As Vikør underlines Sunni Islam lacks hierarchization and therefore an authority that could act as the final decision maker as to the soundness and acceptability of a legal rule. By way of *ijmāʿ* this lack of a highest religious or scholarly authority is circumvented in the sense that a given legal opinion is confirmed by the consensus of the scholars.

The „hermeneutical toolbox“ used by the *fuqahā‘*, however, has more tools to offer, some of which have been resuscitated and reinterpreted in the process of modern statutory codification of the *shari‘a / fiqh*. Most important, the consideration of the public interest, *istiṣlah*, is deemed an admissible instrument in order to establish a legal norm by a majority of *fuqahā‘*. However, most jurists agree also that conclusions cannot be based on *maṣlaḥa* only but need to be supported by texts. We shall see below how this principle evolves in modern legislation. Further, customary law (′urf) is accepted as a source of law as far as it doesn’t contradict the shari‘a.

*Application of shari‘a law by the state*

From early on in Islamic history the doctrine of *siyāsa shar‘iyya* gave a Muslim ruler the possibility to issue administrative regulations, provided they were not in conflict with the *shari‘a*. Thus, the Abbasids issued such administrative orders in order to extend their authority

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64 For a history of Sunnī *uṣūl al-fiqh* see Hallaq (1997).
on various domains such as fiscal, land and criminal law. The Ottomans began to issue regulations (qānūn), dealing with fiscal and criminal law, as of the fifteenth century. The main purpose of these regulations was to supplement the shari‘a where it did not provide specific rules or where it was not precise enough. While these regulations were considered by the Ottomans to be inside the Islamic legal order they did in fact, to some degree, supersede the shari‘a and could be considered secular legislation. It must be stressed, however, that in this early stage the state did not yet assume the role of the sole legislator nor did legislation represent the highest level in the hierarchy of laws.

*Was the shari‘a operational?*

Scholars don’t agree to what degree the shari‘a was operational and a fully applied system. Vikør argues that though “operational on some level” the shari‘a was never fully applied. This, according to Vikør, was mainly a result of the need of Muslim states to reassert their authority in the courtrooms (while nevertheless being bound by shari‘a rules) and difficulties in practical shari‘a application (e.g. its procedural rules). Layish in contrast maintains that “In certain domains, such as criminal law entailing Qur’anic punishments, damages entailing retaliation and blood money (homicide and bodily harm), land law and taxes, the shari‘a was a fully applied system.” Heyd insists that “The criminal law of the shari‘a, as is well known, never had much practical importance in the lands of Islam...Since the first centuries of Islam, therefore, criminal justice remained largely outside the jurisdiction of the cadis”.

Peters, however, has shown for nineteenth century Egypt that the shari‘a was applied in criminal cases by a qādī, provided there was a plaintiff and a defendant. If the defendant, e.g. in a homicide case could not be sentenced for example due to procedural problems or because the heirs pardoned him or if there was no plaintiff the civil or military authorities would handle the case. The authorities, however, would also apply shari‘a law but impose

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68 Thus, the qānūn-nāme introduced under Sultan Mehmed II (1451-1481) considered ḥadd-punishments as obsolete and replaced them by ta‘zīr-punishments, beatings and fines. Schacht (1964), pp. 90-91.
taʿzīr- or siyāsa sharʿīyya punishments. This system had already been in place in the 17th and 18th century in Egypt.⁷⁴

In the history of Muslim-dominated lands the role of the sharʿa varied with time and place. In general a system emerged that was determined by the different roles of the Islamic legal scholars and the sharʿa on the one hand and the sultan and the court system on the other hand. While the class of fiqqah and the sharʿa provided legitimacy to legal actions the sultan/the state and the state-run court system had the only power to enforce the law. In this “bipolar system” (Vikør) the court system was the place where sharʿa and state legislation met. Thus, a qādī could be faced by competing or, at times, opposing rules. The system could also be run with different kinds of courts, either under the authority of the sultan and applying siyāsa sharʿīyya or operating in a rather autonomous manner by a qādī applying the fiqh-based regulations. Under siyāsa sharʿīyya the sultan/the state, while deriving its legitimacy from the sharʿa, its complex substantive and procedural rules were not applicable. Thus, crimes that could not be tried and punished under sharʿa / fiqh rules could be handled by a court applying siyāsa sharʿīyya.⁷⁵ Often a case would be judged first by a sharʿa court according to the applicable fiqh-based regulations. If, due to procedural impediments no conviction could be reached, the case would then be retried in a different court according to the lighter procedural rules of the siyāsa sharʿīyya. In these sultanic courts punishments were also often less severe than in the sharʿa courts.⁷⁶

An early precursor of codification were the so called mukhtasarāt, compendia for the legal rules of each school. The mukhtasarāt, however, differed from the legal treatises of the fiqqah inasmuch as they did not represent the entirety of scholarly dissent but concentrated on the leading opinions of a given school. Their main purpose was to guide the sharʿa judge and provide him with an easy-to-use reference work. There are, however, important differences with modern legislation. A qādī was not bound by them, he could base his decision on other sources of the same school or seek the advice of a muftī. A mukhtasar’s authority derives from the agreement it receives within a given school, hence it is informal.⁷⁷

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⁷⁶ This was, however, not always the case. Peters mentions a case of theft in Cairo related by the Egyptian chronicler al-Jabarti. The thieves could not be convicted by the chief qādī according to the sharʿa because their confession did not fulfill all the requirements. They were then tried by the kethūda, the de facto governor of Cairo and sentenced to amputation by way of taʿzīr or siyāsa sharʿīyya. Peters (1999), p. 378.
Law enforcement in practice

While the formulation of legal principles and rules of Islamic law was realized without the state’s participation the actual enforcement of the law was throughout Islamic history the prerogative of the state. The main question was how to translate the scholarly doctrine of the fiqh, with an abundance of often contradictory opinions into a body of positive laws that could be applied in a practical and efficient manner. To be sure, according to the classical shari’ a doctrine it is the prerogative of the state, i.e. the sultan to delimit the scope of the qāḍī’s jurisdiction. The qāḍī is thus not independent but subject to the Sultan’s directives in this regard. Various approaches as to how the shari’ a / fiqh became state law can be found. The state/the sultan might give the qāḍī great leverage in the application of the shari’ a by limiting himself to creating the institutional framework, i.e. the judiciary, within which the qāḍī exercised his functions. In this model there is no state-induced codification, the qāḍī therefore is free to select whatever legal opinion he wants, he might even decide to use ijtiḥād. In a second approach the state/the state the qāḍī is bound by a codification based on a selection of fiqh opinions and thus limiting his freedom of choice. The Ottomans followed a third possibility, they made it mandatory for the qāḍīs not only to follow the Hanafite madhab but moreover the most authoritative opinion within it. Further, Ottoman sultans could determine the kind of cases a qāḍī could deal with or restrict the time span during which cases were admissible. While the sultan could disregard the order of authoritative opinions for reasons of expedience, the qāḍī was strictly bound by this system. If a qāḍī took too much liberty and crossed the boundaries of this system his verdict was to be annulled.

The first codification of the shari’ a

Real codification began in the Ottoman empire during the Tanzimat period (1839-1876) when codified legislation became a key tool for reform, centralization and legal unification. As Peters points out the Ottoman ruling elite adopted the Western idea that fiqh-based law was

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78 For the following see Peters (2002), pp. 86-87. For a comprehensive history of the organisation of the judiciary, covering the different kinds of courts in Muslim countries, the role of the qāḍīs, police etc. see the seminal “Histoire de l’Organisation Judiciaire en Pays de l’Islam” by Emile Tyan (1960).

79 The most authoritative was Abū Ḥanīfa, followed by Muhammad al-Shaybānī and Abū Yūsuf. Peters (2002), p. 87.

“chaotic and inaccessible” and that “codification is civilization”.\textsuperscript{81} Codification during the Tanzmāt period meant on the one hand the introduction of Western codes such as the Commercial Code (1850), and the Penal Code (1858). It also meant the codification of existing fiqh-based law. Examples for the latter are the Penal Codes of 1840 and 1851, the land law of 1858, the Ottoman Civil Code (the Mecelle) promulgated between 1868 and 1876 as well as a Family Code, enacted in 1917.\textsuperscript{82} Handbooks of sharī’ā law, not dissimilar to the mukhasilat were compiled in the same period. The most prominent examples are the Egyptian Muhammad Qadri Pasha’s\textsuperscript{83} compilation of family law, property and contracts law and awqāf law based on Hanafi law. Of similar importance is further the Ottoman Ömer Hilmi’s compilation of the law of homicide and bodily harm. Similar to the mukhasilat these were private collections with a semi-official status in areas still governed by sharī’ā. From the beginning of the twentieth century codification had gained momentum and are, by now, the norm in almost all Muslim countries\textsuperscript{84} Following the Ottoman model Western codes were either introduced without changes or in more or less adapted versions. In the domains of family law, succession and waqf sharī’ā-based codifications were introduced in Middle Eastern and North African countries for the first time ever. A new civil code was promulgated in Egypt in 1948, based mainly on French law, Egyptian court decisions and, to a smaller degree, on the sharī’ā.\textsuperscript{85} Other Arab countries followed the Egyptian model\textsuperscript{86} or opted for civil law codification based on the Mecelle.

\textit{Within our outside of the sharī’ā?}

Layish and others are concerned with the question of whether modern codifications of the sharī’ā or elements of it and the methodologies associated therewith should be considered a development within or outside of the sharī’ā. He argues in favor of the latter forwarding arguments pertaining to the methodologies employed in the codification process. Thus, he identifies statutory codification as such as being outside the sharī’ā. The same is true for the

\begin{itemize}
\item \textsuperscript{81} Peters (2002), p. 88.
\item \textsuperscript{82} Peters (2002), p. 88.
\item \textsuperscript{83} Died 1886.
\item \textsuperscript{84} Saudi Arabia with its uncodified sharī’ā law is an exception.
\item \textsuperscript{85} Layish (2004), p. 90.
\item \textsuperscript{86} For a recent and comprehensive overview of Egyptian civil law and its influence in Muslim countries see Krüger (1997).
\end{itemize}
application of the *shari’a* in civil courts by judges with training only in secular law applying national and foreign principles of law. Layish also rejects the legitimacy of *shari’a*-based legislation as a result of a parliamentary process. He maintains that “Statutes, even if based on mechanisms with traditional *shari’i* connotations, are first and foremost legislative acts of sovereign parliaments and hence cannot be assessed as a development within the *shari’a*”.

Before going into the details of the codification methodologies it is worth questioning some of Layish’s arguments. Some have challenged the legitimacy of Western scholars to determine what the *shari’a* (or Islam for that matter) is. Thus, Ann Mayer opines that “non-Muslims cannot decide on the legitimacy of the conversion of the *shari’a* into statutes or whether the developments are inside or outside the *shari’a*. Such determinations are exclusively for Muslims to make”.

Likewise Peters maintains that “...outsiders are not competent to determine for Muslims what Islam and the *shari’a* is”. Layish clarified his point of view by retorting that he does not intend to judge “...the legitimacy of the codification of the *shari’a*”. He rather thinks that outsiders may participate in a discourse on the meaning and repercussions of *shari’a* codification and argue “from the viewpoint of orthodox *shari’a*”.

Outsiders, however, should refrain from value judgments. It is obvious that Layish here unwittingly contradicts his own argument. On the one hand he insists that the legitimacy of the codification of the *shari’a* is not at stake. On the other hand all the arguments brought forward by him in order to prove that modernist codifications remain outside the *shari’a* necessarily delegitimize the whole process. The assessment “outside the *shari’a*’ as used here signifies no less than “not *shari’a*”. If we are to accept the argument that modern *shari’a* codifications are thus “not *shari’a*” it is clear that they are stripped of the essence of their Islamic legitimacy. What remains is a secular legitimacy at best, conferred by, more or less undemocratic, parliaments. Thus, involuntarily Layish does make a strong value judgment. I strongly believe that a truly scholarly discourse should not depend on the religious beliefs of those who take part in it. Such a discourse should be inclusive and not exclusive. Non-Muslims can, no doubt, take an active part in it and, if it sharpens their argument, argue

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91 At the time of writing (July 2011) there is hope that the recent Arab uprisings will prove to be real revolutions and bring about sustainable democratic change.
within certain, defined paradigms such as the one Layish suggests.\textsuperscript{92} I am convinced, however, that it is indeed not up to the (non-Muslim) Western scholar to give a final “unappealable” verdict on what Islam, Islamic or inside or outside the \textit{sharī’a} is.

\textit{Problems and techniques of \textit{sharī’a} codification today}

In the process of codification of the \textit{sharī’a} / \textit{fiqh}, by itself a modern Western-inspired technique\textsuperscript{93}, modern legislators have made use of a variety of expedients and methods. Some of these can be found in the \textit{fiqh}, others resemble devices used in the \textit{fiqh} but have completely changed their environment. Finally we find approaches that are clearly derived from Western-inspired methods of legislation. Some methods concern substantive law others concern matters of procedure and the way courts and qādīs work. A part of these methods have been suggested by Muslim modernists, others go far beyond their suggestions. Many of these methods have first been employed in modernizing \textit{sharī’a}-based family law and were later extended to the codification of other domains of Islamic law. I shall first discuss the most important devices used when turning the precepts of the \textit{sharī’a} / \textit{fiqh} into modern legislation. Subsequently and in conclusion I shall evaluate the repercussions of this process and assess the transformation the \textit{sharī’a} undergoes.

Two typical methods mostly employed by modern legislators in order to achieve a modernizing effect are the eclectic expedient (\textit{takhayyur}) and the patching together of contradictory doctrines (\textit{talfiq}). \textit{Takhayyur}, the eclectic choice between different opinions does have a certain base in the \textit{fiqh}, particularly in the Ḥanafite and Shāfi’ite schools.\textsuperscript{94} This principle was used in Ottoman law \textit{within} the Ḥanafite school. In Egypt, however, the expedient was pushed further by applying it to \textit{any} opinion to be found in the orthodox schools, or in an extinct school or by using opinions of early jurists formulated even before the orthodox schools came into being. Further, \textit{takhayyur} even included opinions of non-Sunni schools such as the Shi‘ites or the Ibādites. While within the expedient of \textit{takhayyur} opinions remain intact the method called \textit{talfiq} combines parts of opinions of one school with parts of opinions of another school. While the opinions this method draws on can claim

\textsuperscript{92} Layish argues “from the viewpoint of orthodox \textit{sharī’a} as interpreted by its authorized exponents”. Layish (2004), p. 91.

\textsuperscript{93} Layish’s verdict is unequivocal. Statutes are legislative acts of sovereign parliaments, even if they are based on the \textit{sharī’a} and its mechanisms. For him it is therefore clear that such statutes must be considered to be a development outside the \textit{sharī’a}. Layish (2004), p. 92.
authority when taken separately, the result of this eclectic combination is a new one and different from its sources. As Anderson has aptly put it “there can be no doubt that in its most extreme form it (i.e. talfiq O.K.) represents little more than an attempt to draw the veil of tradition over the face of innovation”.  

We have mentioned above that the public interest (maslahah) was only admitted as a source of law if textually well-founded. In modern legislation public interest is used extensively as a source and justification of law and, different from what the fiqh had agreed upon, it is used even despite the fact that the textual basis in Qur’an and Sunna is lacking. Hallaq has shown how ‘Abduh and Riḍā have tried to make a modern interpretation of maslahah “palatable to the orthodox”. They are at the origins of what Hallaq categorizes as “utilitarianism” and “religious liberalism”. Both trends promote the use of maslahah in different ways. The utilitarianists nominally adhere to a set of (hermeneutic) principles of the fiqh but manipulate them “to their own advantage”. The liberals, in contrast, dismiss these principles altogether.  

Modern legislators in the process of codification also refer directly to Qur’an and Sunna in order to find solutions that meet contemporary requirements. Layish claims that the resemblance with classical ijtihad is, however, „purely technical“, due to the fact that modern legal reforms are mostly inspired by Western sources and a result of the societal pressures arising from a Western-inspired modernization process. Moreover, public interest (maslahah) has replaced qiyas as a „mode of resorting to the textual sources“.

Other methods concern procedural matters but are nevertheless effective in limiting or channeling the influence of the sharī‘a. Thus, the legislator can stipulate that sharī‘a-inspired or sharī‘a-based legislation are to be applied by civil courts and not in specialized sharī‘a courts. There we might find judges with only limited knowledge of the sharī‘a and secular legal training from European countries belonging to different legal traditions.

98 This seems to be also the situation in the Sudanese Supreme Court. Judges have studied at the University of Khartoum and other Sudanese universities, Egyptian and Lebanese universities or in different European countries.
Further, *sharī‘a*-inherent principles such as the *siyāsa sharī‘yya* can be used to restrict the jurisdiction of *sharī‘a* courts or even abolish them. It goes without saying that the latter is a contradiction in terms.\(^99\)

The jurisdictional discretion of the judge is often extended. Thus, a judge may be allowed to make exceptions to provisions which, in general, prohibit certain practices.\(^100\) Further, legislation might explicitly allow for a wide range of sources in the interpretation of the law, some of which clearly transcend the *sharī‘a* / *fiqh*. We shall see in the conclusion of this dissertation to what extent this is the case in the Sudan.

*The influence of Ḥasan al-Turābī on ICL codification in the Sudan*

Modern Sudanese Islam’s leading intellectual Ḥasan al-Turābī played an eminent role during decades not only as an advocate of *sharī‘a* application. While excluded by Numairi from the actual drafting of the first Islamized Penal Code 1983 al-Turābī nevertheless had influenced the ICL-related parts of the PC83.\(^101\) His impact on the drafting of the second Islamized code, the Criminal Act 1991 was crucial as well. This code was based on an earlier draft prepared in 1988 under al-Turābī’s guidance as minister of justice. As an Islamist and prolific theoretician al-Turābī has developed his own ideas with regard to how the *sharī‘a* can be translated into a meaningful contemporary codification and application. It is therefore useful to introduce his methodology here.\(^102\)

As will be shown in the historical section below al-Turābī and the Ikhwān, while having been surprised by the introduction of the September laws by Numairi, nevertheless decided to back him. In his thinking the question of Numairi’s motives was hardly relevant. As al-Turābī said „No one would oppose the implementation of shari‘ah law or the banning of alcohol simply because Numairi might not be genuine.“\(^103\) It is clear that al-Turābī considered the introduction of the *sharī‘a*, however flawed, as an important step contributing to the Ikhwān’s strategic goal „the full establishment of all aspects of Islamic life“.\(^104\)

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\(^100\) Layish quotes the general prohibition of polygamy in Syria and Iraq, which can be allowed by way of exception by the judge. Layish (2004), p. 95.
\(^101\) For details see historical introduction.
\(^102\) The final conclusion will explain to what extent his methodology had an impact on the Criminal Act 1991.
Al-Turābī’s methodology is an amalgam of traditional methods and a modernist approach. Thus, along the four traditional sources and methods Qur´an, Sunna, ījmāʿ and qiyyās al-Turābī suggests istiḥṣān105 and ḍarūra106 as well as takhayyur.107 Al-Turābī, however, does not stop at mixing traditional tools and combining different schools, he also recommends using legal methodologies derived from Western sources and backed up by social and natural sciences. Another interesting aspect of al-Turābī’s methodology is the role he reserves for the ʿulamāʾ and the state. Al-Turābī clearly sidelines the ʿulamāʾ whom he holds responsible for the lack of progress in the Muslim world. This backwardness can only be overcome by ʿijtihād which, in turn, is a task for all Muslims and not a monopoly of the ʿulamāʾ. In fact it is not even „a vocation of a specific group of people“ but can rather be exercised by all those who are knowledgeable, at various levels according to the knowledge they have.108 Al-Turābī advocates „maximum freedom for all those who want to contribute to the debate“ 109. It will not be enough to go back to „dig out bits and pieces“ of the „old books“ hoping that they will solve today’s problems. Instead a „revolution at the level of the principles of jurisprudence“ is needed.110 As to the limits of ʿijtihād he suggests that „everything can be reviewed“ with the exception of the „eternal components of the divine message“.111 Even the authority of the founders of the four Sunni schools is relative, their views, as embedded in the fiqh, are time-bound. The contemporary legislation and application of the sharīʿa, however, derives its authority from the state by way of an elected shūrā.112 The shūrā system as seen by al-Turābī is similar to a democratic system inasmuch as both allow people a decisive voice in matters of decision-making in public affairs. Shūrā, however, is based on the sovereignty of God, while a democracy derives its authority from the will of the people.113 What this difference means in practice remains unclear.

106 Necessity.
107 Eclectic expedient.
1.2. Research questions

A memorandum accompanying the Criminal Act 1991 tells us what the authors of the CA91 have done when drafting the code, what they believe they have done and what they want the reader to believe they have done. It is a document that represents a mixture of facts and propagandistic elements. It is, mildly put, doubtful that “the Sudanese masses” have indeed called for an Islamic penal code. Whether the shar’i’a has such a strong pre-colonial history in the Sudan that its “re-“introduction can be claimed to strengthen authenticity is another question that is doubtful and needs closer investigation. It is also worth analyzing to which methodological expedients the authors allude to. Is the shar’i’a really the main source of the 1991 code? The authors claim to have combined ijtihād and the orthodox schools. How and where did they use ijtihād and where are the limits as to the extent of ijtihād used? Which orthodox schools do they draw on? Do they have preferences? Is the selection of opinions taken into account done in a systematic way and showing a clear tendency or is it rather arbitrary? They further claim, rather surprisingly, that orthodox jurisprudential terminology was used only inasmuch as it is compatible with “modern and current (legal) terminology”. In other words “modern and current legal terminology” is the dominant one. How can this be explained if the shar’i’a and its principles are indeed the main source of the code? How can the relation between shar’i’a and non-shar’i’a elements be assessed? In order to analyze the Penal Code 1983, the Criminal Act 1991 and related laws, I shall therefore try to answer three clusters of questions.

Cluster 1: Sudanese ICL and its legal and political history

The main question of this first cluster is what are the historical sources and models of the PC 1983 and the CA 1991. I will examine which articles of the two codes directly derive from the shar’i’a and what articles do not. Whenever they do I will establish the sources in the fiqh, whenever no connection with the shar’i’a can be found I will try to establish their origins by taking a close look at the predecessor codes. I shall further investigate what the relation between the shar’i’a-based parts of the CA91 and its predecessor code, the Penal Code 1983 is. What has it kept in terms of shar’i’a-based elements? Where has it made major changes and what is the general tendency of these changes? In the context of this comparison I will ask in

114 For a more detailed rendering of the memorandum see chapter 3.1.1.1.
how far the Sudanese legislator has succeeded in redressing the flaws of the 1983 code in terms of bringing it more into harmony with the provisions and basic principles developed by traditional *fiqh*. This first cluster will also investigate the (legal-) historical development of (Islamic) criminal law beginning with the Funj and Dār Fūr Sultanates until present but concentrating mainly on the phase which begins with the introduction of the September laws 1983. It will be investigated whether there is any substance to the claim that the modern introduction of ICL is the reconstitution of models that can be found in the past. In order to assess the legal heritage before the introduction of the September laws it will be important to ask what the respective roles of the *shariʿa*, the Common Law and customary law were and whether these have fundamentally changed with Numairi’s “Islamic legal revolution”. Is the *shariʿa* now really dominant with regard to its non-*shariʿa* environment in which it operates? And if not, how can the relationship between the *shariʿa*-based elements and its secular environment be characterized? Cluster 1 further asks whether the Sudanese legislator managed to detach criminal law from its colonial heritage. Does the British heritage continue to exert its influence in Sudanese ICL and if yes where? Comparing the Criminal Act 1991 with the Penal Code 1974 will answer the question whether legislators under al-Bashir have managed to completely do away with the secular legal heritage of the Condominium as it had survived even beyond the September laws of 1983.

*Cluster 2: Law in action: the application and interpretation of Sudanese ICL*

The questions of the second cluster focus on law in action, i.e. the actual application of *shariʿa*-based laws in the various criminal codes. I will do so by examining three aspects: firstly, the interpretation of substantive law in the two *shariʿa*-based criminal codes, secondly, procedure and proof and, thirdly, the actual enforcement of the *shariʿa*-based offences in the judicial practice. With regard to substantive law I shall focus on legislation, i.e. the two Islamized codes of 1983 and 1991 on the one hand and on their interpretation by the Supreme court on the other hand. I shall ask what the general tendency in legislation and Supreme Court case law is, full-scale application or rather only a limited application? If the latter is the case what could be possible explanations? How does the Supreme Court argue in cases where *ḥadd*- or *qiṣāṣ* punishments are not confirmed? I shall further analyze how the Laws of Criminal Procedure 1983 and 1991 and the Laws of Evidence 1983 and 1993 complement the respective criminal codes. Which tendencies can be detected? Has the Sudanese legislator
taken advantage of the procedural mechanisms devised by the īfaqahā to limit the application of the ḥudud? How do these procedures relate to the shari‘a-based criminal law as found in the PC83 and the CA91? How are the roles of the different legal actors defined, especially the role of the Supreme Court? How does the Supreme Court understand its own role as the highest Sudanese court with regard to ICL application? I shall finally try to assess the enforcement of ICL in the actual judicial practice. Which punishments are imposed frequently? Which are not and why? What could be possible reasons for a limited application? Can these tendencies be corroborated through an analysis of independent sources such as human rights reports from Amnesty International and Human Rights Watch? Further, questions pertaining to the political background of ICL introduction and the reasons for the amount of current ICL application will be asked. They seek to explain the contradiction between government rhetoric and the quantitative dimension of de facto ICL application in the Sudan. Why has the Sudan refrained from a high-intensity ICL application after 1989 when a military-Islamist had the power to enforce the very “shari‘a application” it had demanded for decades?

*Cluster 3: Sudanese ICL and Human Rights violations*

Cluster 3 will focus on human rights violations and ask where the present Sudanese ICL is in conflict with the different international human rights covenants and conventions the Sudan is party to or is not yet party to. Covenants and conventions to be looked at comprise the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). It will be asked where ICL in the Sudan violates the principles of equality before the law and freedom of religion, the ban on cruel, inhuman, and degrading punishment and the rights of children. With regard to equality before the law questions pertaining to the role of the citizen and his status as a subject of ICL in a multi-ethnic and multi-religious nation state in contrast to concepts found in Islamic Criminal Law will be asked. How functions the interaction between criminal codes and procedural codes on the one hand and jurisdiction with regard to the rights of non-Muslims and women on the other hand? What is the position of women and non-Muslims in Sudanese criminal jurisdiction and legislation? Do the codes strictly follow leading opinions of the four Sunni schools? Which
role play modern notions of the equality of all citizens? What happens to the concept of equivalence (kafā’a)? Does the concept of inviolability (isma’) in cases of homicide still play a role? Sudanese Constitutions, e.g. the constitution of 1998, guarantee equality before the law and many other rights. Concurrently, I shall therefore ask where ICL is consistent or in conflict with the constitutions in force when ICL codes were introduced and in force and how the Sudanese government dealt with the inconsistencies.

1.3. Earlier Studies of Islamic Criminal Law in the Sudan

The field of Sudanese legal studies is, at least as far as publications in Western languages are concerned, one that leaves a lot to be desired. This is especially true for the period when the Sudanese legal system, including law reporting in the SLJR, was fully arabized under Numairi and most, if not all publications concerning legal matters such as legislation, commentaries, decisions of the appeal, the supreme and, later, the constitutional courts etc. have been published almost entirely in Arabic. While the replacement of English by Arabic is a normal effect of decolonization the study of the Sudanese legal system and its multiple aspects has thus become harder, if not impossible, for Western scholars not mastering Arabic. Consequentially Western literature about the Sudanese legal system, with few noteworthy exceptions, becomes scarcer. Further, the political situation after the 1989 takeover of the military-NIF regime has not been conducive to visits to the Sudan and thus to field work. Researchers have, it seems, concentrated either on historical topics or, when dealing with the 1990s, focused on the ongoing civil war in the South, human rights, the Muslim Brotherhood and its political manifestations, Islamization in general or the political development of the al-Bashir regime. Generally speaking, within the wider field of Middle Eastern studies the Sudan is considered marginal by many. Within Islamic legal studies the Sudan, especially since the end of the Numairi era, has found little attention in the West.

Even though a substantial number of articles have been written about various aspects of the criminal law of the Sudan only a limited number of in-depth monographs were dedicated to it. These can be divided into two main categories: works written by judges and jurists and meant to instruct and advise other legal practitioners and works that examine Islamic Criminal Law

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115 The SLJR still publishes a few of its decisions and studies in English. Some of the few judges of Southern origin do not write in Arabic.
116 Some libraries also stopped collecting SLJR when English was dropped and Arabic was introduced.
in the Sudan from a historical, anthropological, social or political science or other academic approaches. While the former are, for obvious reasons, mainly written in Arabic the latter are mostly in English or other European languages.117

Works on Sudanese ICL by and for legal practitioners

In the field of criminal law two seminal works, published before the introduction of ICL, paved the way. Krishna Vasdev, at the time Senior Lecturer at the University of Khartoum, published in 1978 “The Law of Homicide in the Sudan”, focusing on homicide only and excluding all other aspects of criminal law.118 This was followed in 1981 by a study on the “Law of Evidence” by the same author.119 The former was explicitly meant to “meet the very urgent need of both students and practitioners of Sudanese law for a detailed study of homicide law in the Sudan”. The latter, in the absence of a codified law of evidence at the time, attempted to give a comprehensive survey of the rules of evidence as practiced in Sudanese courts. Both books draw on a large number of court cases from England, India and Commonwealth countries. They are to the best of my knowledge the most in-depth studies with a practical purpose on the matter published before the September laws and are indispensable for whoever is interested in the application of the 1974 Penal Code and the pertinent rules on evidence before 1983.

Probably the first commentary on the new Criminal Act 1991, in combination with the original Arabic text and an English translation has been published by al-Nūr120. His interpretation of how the application of the CA91 should be carried out in practice tries to put the code in an international and historical perspective, relying on the fiqh and comparisons with predecessor codes. An-Nūr is also the author of an earlier study on Sudanese criminal procedure law121 as well as a book on Sudanese criminal law and human rights.122 In the latter al-Nūr sets out to compare Western and Islamic concepts of human rights and their protection

of specific rights, such as the right to life, to liberty, to freedom of expression and others. His analysis, however, is rather weak and its purpose apologetic with regard to the applicability of ICL.

One of the first studies written and published in English in the Sudan by a Sudanese researcher on the Criminal Act 1991 was Hamo’s “Lectures on the Criminal Law of the Sudan 1991”. Hamo, next to criminal responsibility discusses ḥadd- and qiṣāṣ-crimes and diya and concludes with a short section on taʿzīr. Backed up by quotations from the two predecessor codes, criminal circulars and a variety of court cases these “lectures” are a useful introduction to those who are interested in the legal background of the new Criminal Act 1991 and who do not master Arabic.

A prolific author on contemporary Sudanese criminal law is the Supreme Court judge Badriyya ʾAbd al-Munʿim ʿIṣā who has published at least four commentaries on different aspects: the first one, published in 2000 is a general commentary and explanation of the Criminal Act 1991. A year later she published a work on the different kinds of homicide, the ḥudūd and qiṣāṣ, followed by a study on proof of ḥudūd and qiṣāṣ. All studies by ʿIṣā are clearly structured and well documented. Her knowledge of the fiqh and use of court decisions make her works a good point of departure for the student of Sudanese criminal law. ʿIṣā also authored a general commentary on proof which compares the Evidence Act 1994 with the fiqh and Sudanese Supreme Court case law when available. The latter is especially interesting to the researcher because some unpublished Supreme Court cases are used which would otherwise be unavailable.

A colleague of ʿIṣā at the Supreme Court is ʿAbd Allah al-Fāḍil ʿIṣā, who has published commentaries on the Criminal Act 1991, the Criminal Procedure Act 1991.

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127 They are also very well printed and readable which is rather an exception, with small print and a general bad printing and binding quality being the norm.
129 He was also one of my interview partners. I have met him during my first trip, during my second trip to Khartoum ʿIṣā was on a secondment in the Gulf.
130 ʿIṣā, ʾAbd Allah al-Fāḍil: sharḥ qānūn al-jināʿi liʿām 1991 m. n.d.
and the Evidence Act 1993. His commentary of the Criminal Act 1991 is useful because it thoroughly traces the connections and differences of the CA91 with its 1974 and 1983 predecessor codes and also with the fiqh. 'Isá’s analysis of the CPA91 does not make extensive reference to the fiqh but quotes a large number of useful precedents, thus illustrating actual practice. His commentary of the Evidence Act 1991, finally, focuses on a comparison of the EvA91 with its predecessor of 1983, quoting also precedents and the fiqh. With regard to published material there are two more works that need to be mentioned. The first is a detailed commentary on the Criminal Procedure Act by 'Umar Yúsuf. Yúsuf’s commentary provides the researcher with a lot of historical depth concerning earlier laws of Criminal Procedure. Concurrently, its connections with the fiqh are mostly neglected. The second is a booklet with university lectures on the Criminal Act 1991 with a focus on sexual offences, honor and public morals by Ḥāmid. It also contains relevant examples of Court of Appeals and Supreme Court decisions pertaining to the topic.

Other commentaries on the Evidence Act 1993 are al-Ṭāhir and Ismā’īl. Al-Ṭāhir’s commentary was originally a textbook for law students and served as a preparation of their exams. It is also a good example of how precedents and English legal terminology still play an important role in law teaching of law in the Sudan. Ismā’īl’s more concise commentary aims to show how and to what extent the EvA93 is rooted in the fiqh. Ismā’īl is also author of a general commentary on the Criminal Act 1991 which is essentially a collection of lectures held at the International University of Africa in Kharṭūm. As in his commentary on the EvA93 he attempts to show the connection between the CA91 and the fiqh.

A study that takes an approach different from the standard commentaries is al-Amīn’s study of the practical application of the ḥudūd in the fiqh and in Sudanese legislation. Al-Amīn

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133 Unfortunately the printing quality of the copy in my possession left a lot to be desired.
135 It seems that there are hardly any authors who equally cover both fields.
gives a detailed overview on how punishments are meant to be carried out according to the *fiqh* and compares his findings with current Sudanese legislation and actual judicial practice. Very important for the interpretation of Islamic Criminal Law in the Sudan are criminal circulars which used to be difficult to obtain. Muḥammad Khalifa Ḥāmid, a judge who worked for the Technical Office of the Sudanese Judiciary has made circulars relevant to criminal law accessible to judges and researchers alike. They can now be found in the series mausū’a al-manshūrāt al-jinā’iyya. Of special importance is Volume 3, a collection of criminal circulars focusing on *ḥadd*- and *qiṣāṣ*-crimes. The circulars are followed by explanations and cases illustrating the text of the circular.

**Historical, social and political science, anthropological, religious studies and other approaches**

The highly-publicized 1983 introduction of the so-called September Laws generated new interest in Islamic Criminal Law as then applied in the Sudan. As to my knowledge the first (unpublished) Ph.D. dissertation dealing with “The applicability of Islamic Penal Law (Qiṣṭāṣ and Diyah) in the Sudan” was submitted at Temple University in Philadelphia in 1986 by Mohamed A. El-Sheikh. El-Sheikh, while criticizing the haste and the lack of methodology of the codification of ICL in the Sudan, nevertheless believes that proper research and training of the personnel of the judicial apparatus could lead to a just application of ICL in the Sudan. He was followed by Ibrahim M. Zein, also at Temple University, who wrote in 1989 a well-informed, yet equally unpublished Ph.D. dissertation under the title “Religion, Legality, and the State: 1983 Sudanese Penal Code”. His dissertation is, to my knowledge, the first one giving an in-depth account and analysis of Numairi’s institutional and political use of the *shari‘a*-based Penal Code. Zein makes ample use of interviews with key players of Sudanese politics in general and in particular two members of the three-member committee, which codified the Penal Act 1983. Zein’s work is especially commendable because it is a rich and

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detailed source for information on the development of the court system under Numairi, its constant metamorphosis, its main actors, the underlying regulations and laws, and, most important, its political background.

On the role of the Muslim Brotherhood, its political manifestations and its influence and positions with regard to the introduction and practice of the shari’a Osman’s “The Political and Ideological Development of the Muslim Brotherhood in Sudan. 1945-1986” is indispensable. While being intimately familiar with the key players of the Muslim Brotherhood and thus able to provide the reader with insights not to be found elsewhere, the main flaw of this dissertation is its obvious pro-Ikhwân bias. The work, similarly to Zein’s, also benefits from a large number of interviews with key Ikhwân leaders and dissidents.

A MA thesis (in German) and one of the early monographs on the Islamization of the Sudanese penal code was published by Olaf Köndgen in 1992. Köndgen attempted to assess the September laws in their historical, political and legal context, focussing on the legal history of Islamic criminal law in the Sudan, the political background of Numairi’s introduction of shari’ah-based criminal law in 1983 and the relationship of the Penal Code 1983 with the legal reasoning of the fuqahâ’.

The most detailed study on the anthropology of criminal law in the Sudan until today was authored in 1994 by Hervé Bleuchot (in French), until September 2004 researcher at the IREMAM in Aix-en-Provence. Bleuchot traces in minute detail the anthropological and historical development of the Sudanese criminal law from 1820 onwards until the end of the 1980s, concluding with a brief description of the 1991 criminal code. He did not, however, work on the application of the Criminal Act 1991 by the judiciary nor did he analyze court decisions with regard to Islamic criminal law. In Anglo-Saxon academia, Bleuchot’s work is hardly taken into account. It is, however, probably the only study on this scale that has tried a synopsis of the different legal subsystems (Common Law, Islamic law, customary law) important for the practice of criminal law since the advent of the Condominium, while also paying attention to regional differences. The study contains an important bibliography covering the major literature on criminal law in the Sudan until the 1980s.

144 This dissertation was later published in a more concise and edited form under the title “Turabi’s Revolution. Islam and Power in the Sudan. See El-Affendi (1991).
A MA thesis concentrating on the "impact of the application of sharī’a law in the Sudan on the rights of non-Muslims" was submitted at McGill University in 1995 by Siham Samir Awad. Awad outlines the status and rights of non-Muslims under sharī’a and contrasts his findings with the protection of religious minorities given under international instruments. He finally discusses the rules governing non-Muslims under the Sudanese legal system while also taking into account evidence, procedure, constitutional law and other laws.

A criminological study authored by El-Amin El-Bushra and published at the University of Khartoum under the title “Criminal Justice & Crime Problem in Sudan” discusses the criminal justice system of the Sudan, crimes and their causes, crime statistics and crime prevention in general in the Sudan. The study does, however, not deal with the impact of sharī’a-based punishments or with the impact of ICL on the legal system.

The most detailed and as of now unsurpassed study of the Islamization of criminal law under Numairi was researched by Aharon Layish and Gabriel Warburg and published in 2002. This seminal work covers in depth the Islamization of the Sudanese legal system under Numairi 1983-1985. The book begins with a chapter on the background on Islamization between the Mahdiyya and the end of the Numairi regime. The remaining chapters of the book deal with the Islamization of Sudanese law, i.e. with the techniques and methods of the codification of the sharī’a. This is followed by a chapter on the application of the Islamist statutes and legal circulars in the courts and an assessment of the Sudanese legal experiment.

Warburg and Layish do not present their material in the framework of political debates over human rights (with the exception of the introduction) but concentrate instead on the legal methods of the “reinstatement” of Islamic law. They do so, striving to “avoid value judgments” and to “portray the Sudanese experience of reinstating the sharī’a from a purely

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150 I do not agree that the September and following laws should be considered a “reinstatement” of Islamic law. Methods applied in the given context of Western –style law cannot be traced back to any historical model.
The study is unmatched for its richness in details and will most probably remain so for some time to come. Despite its publication in 2002, however, the book does not deal with the Criminal Act 1991 and its application in the Supreme Court or otherwise.

Concerning the Criminal Act 1991 academic articles are scarce. Two articles, however, have to be mentioned. Scholz published an article (in German) on the role of the ḥudūd in the Criminal Act 1991 and Sidahmed analyzed some judgments of zinā-cases dealt with by the Supreme Court.152 Scholz, a German judge and expert on Mālikite law, examines whether and to what degree the sections on hadd-crimes in the Criminal Act 1991 and the Evidence Act 1993 are in harmony with the shari‘a. Sidahmed argues that an accusation of zinā based on pregnancy disadvantages women in comparison to men. In addition, if the pregnancy is the result of rape such accusation might turn victims into offenders facing possible capital punishment.

In 2002 a Ph.D. thesis was submitted in Arabic language at the University of Khartoum with the title “The Influence of Islamic Legislations on the Sudanese Legal System. An Analytical Study”, authored by Aḥmad ʿUthmān ʿUmar under the supervision of the former Supreme Court judge Zakī ʿAbd al-Raḥmān.153 ʿUmar, after having analyzed the relationship between the sources of the law and the actual choices of the legislator examines the influence of Islamic law on criminal law, evidence, criminal procedure, civil law and civil procedure. He concludes with an analysis of the rule of law and its guarantees in Sudanese legislation under the Islamized legislation. In terms of intellectual depth and analysis only few of the publications in Arabic language mentioned above - which are to a large degree of a descriptive nature - can match ʿUmar’s work.

In summary, the functioning of Islamic criminal law under al-Bashīr, apart from ʿUmar’s Ph.D. thesis and the two articles by Scholz and Sidahmed, remains largely unresearched.154 While there is a substantial amount of publications on the pertinent codes in Arabic, these are mainly handbooks for legal practitioners focusing on the possibilities of interpretation of ICL. This is their main purpose and therefore their authors are not interested in historical or

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political questions and they normally do not deal with contradictions between current Sudanese ICL and the *fiqh* either. They are, generally speaking, of a rather apologetic nature. It must be mentioned that most authors of these handbooks are legal practitioners themselves, they are part of the Sudanese judiciary and therefore hardly inclined to contradict the official point of view.

In contrast there are critical studies dealing with ICL from an anthropological or political science or a juridical point of view. These studies could hardly be published inside the Sudan. Indeed, their great majority has been published in the West. None of the publications mentioned here deal with the topic I have chosen as the centerpiece of this thesis, Sudanese Supreme Court case law on ICL matters in general and with regard to the Criminal Act 1991 in particular. Supreme Court case law, while being used by some of these authors, has to the best of my knowledge, never been analyzed as systematically for the period as of 1983 with a focus on ICL. This is especially deplorable since the Sudan is the only Arab state, if we accept this categorization, where Islamist forces successfully have taken over power and had a free hand to Islamize the legal system in general and criminal law in particular. Since the application of the *shari‘a* (*taḥbir al-sharī‘a*), is a central claim of most Islamist movements in the Arab world and beyond it is a highly interesting case study in order to find out how ICL is being legislated and interpreted on the highest level when an Islamist movement has the chance to realize what it has been battling for decades. This study thus hopes to fill a gap in our knowledge on the application of ICL in the Sudan between 1983 and present and the interdependence of codified substantive criminal and criminal procedure law, their relationship with the predecessor codes and the *fiqh* on the other hand.

1.4. **Primary sources used**

The primary sources on which the present work is based are three, two written and one oral. The two written primary sources are the Islamized Penal Codes of 1983 and 1991 and other relevant legislation directly connected to it on the one hand and Supreme Court case law in cases related to the application of ICL on the other hand. Supplementing these two sources I

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155 ‘Umar’s thesis has not been published and only few copies seem to circulate in the Sudan.
156 Exceptions are Sidahmed (2001) and Ahmad ‘Uthmān ‘Umar (2002).
157 Since it is not a recognised state I do take into account the Gaza strip, despite the fact that it is run by Hamas.
have also conducted interviews with Supreme Court judges as well as with Sudanese politicians and observers.

1.4.1. Legislation

Most important with regard to legislation is the question whether the legislators, the parliament or others, are democratically elected and under which circumstances the legislation in question has been effected. In general, the legislation used in this study covers a time span between 1925 until 2009, i.e. from the time when the Sudan was ruled by the British under the Anglo-Egyptian Condominium until the present military-Islamist regime of al-Bashir. After independence the Sudan has known only short phases of democratic rule. The main codes treated in this study were promulgated during the rule of two authoritarian regimes, both of which had come to power through military coup d’états. The so-called September laws of 1983, i.e. the bulk of the laws Islamizing the Sudanese legal system, were promulgated as presidential decrees. None of the major laws of Numairi’s “juridical revolution” (Zein) was the result of the initiative of the Sudanese parliament. After they had already come into force parliament complied with Numairi’s wishes and ratified the September laws, thus avoiding a major confrontation with the president. Neither did the parliamentarians want to risk to be seen as opponents of Sudan’s Islamization, nor did they want to give the president a motive to dissolve parliament, a right the president had according to article 108 of the 1973 constitution.158

The second Islamized criminal code, i.e. the Criminal Act 1991, and all relevant legislation that followed, was equally enacted by a dictatorial military regime under the influence of al-Turābī’s National Islamic Front (NIF). Again, given the far-reaching control of all relevant political and societal institutions by the al-Bashir regime and its NIF supporters and the lack of fair and free elections Sudanese legislation, criminal and other, as of July 1989 clearly lacks democratic legitimacy. It is against this background the legislative material I study has to be understood. We might not agree with the fact that the Sudanese electorate hardly had a say in determining the bodies from where the Islamized legislation emanated. However, whatever its legitimacy might be, these laws are in force, have been for a substantial amount

158 For more details see Köndgen (1992), pp. 40-41.
of time and are likely to remain so for some time in the future. Given their impact on the lives of the Sudanese they deserve academic attention and study.

A major problem the contemporary researcher faces is the difficulty to quantify the application of ICL in the Sudan. We do not dispose of a reliable study mapping the influence of state-induced criminal law. It is clear though, that the *sharī’a/fiqh*-based parts of the Penal Code 1983, due to fierce resistance, were never really enforced in the South and in 1991 the legislator chose to exempt the South from the *sharī’a*-based articles.\textsuperscript{159} It is therefore safe to say that in about a quarter of the Sudan’s territory the legislation under discussion could either not be enforced or was not applicable. The real impact of the legislation under discussion is further limited by the strong position of customary law in the Sudan. Communities might chose to settle a crime potentially punishable by *sharī’a*-based articles, e.g. illegitimate sexual intercourse or bodily harm, among themselves without resorting to the authorities. While customary law is still of major importance in the Sudan, especially in rural areas, we do not dispose of recent, large-scale studies on the application of customary law nor do we have pertinent statistics. It is therefore impossible to quantify its impact in relation to state-induced law.

With regard to legislation access to reliable, i.e. official, versions of the different codes is relatively easy, at least in Khartoum, as far as legislation still in force is concerned. The Ministry of Justice has published all relevant codes and they can be purchased from the Ministry.\textsuperscript{160} Equally published by the Ministry of Justice is the multi-volume series “qawānīn al-Sūdān“, where laws in force can be found. The now defunct “September Laws“, however, were not republished in this series and are more difficult to find these days.\textsuperscript{161} An invaluable source with regard to Sudanese laws is a Compact Disc produced by the Institute of Training & Law Reform (*maḥad al-tadrīb wa al-īslāḥ al-qānūn*) titled “Encyclopedia of the Laws of the Sudan” (*mausū’a qawānīn al-Sūdān*). This CD contains most major Sudanese laws from 1901 until 2003.\textsuperscript{162}

\textsuperscript{159} *hudūd* and *qiṣāṣ*, see art. 5, CA91.

\textsuperscript{160} The Ministry of Justice entertains a little booth facing the street in front of the Ministry where lawyers and those concerned can buy all important laws. Prices are moderate and the printing quality is good when the original editions can be obtained. Fotocopies of current legislation are also being sold.

\textsuperscript{161} I obtained my copies from Dr. Hervé Bleuchot, Aix-en-Provence, to whom I am very grateful for having supported my Ph.D. project in many ways.
1.4.2. Supreme Court case law

The Supreme Court is the highest court in the Sudan and its interpretations of the law are authoritative. Being the highest judicial body where a review of a case can take place its decisions create a corpus of precedents which then serve as reference for lower courts for their future decisions.

Structure and responsibilities of the Supreme Court

The Supreme Court consists of seventy judges. Decisions are taken by simple majority by panels of three judges which are presided by the most senior judge. This is a clear departure from the classical Islamic court system where decisions were taken by one qāḍī only. With regard to criminal matters cases concerning the death penalty, single and cross-amputations are decided by a five-member panel. Normally decisions are final, only when the Chief Justice deems a decision to contradict the shārī‘a or when it contains errors pertaining to the law, its application or its interpretation a panel of five judges will review it. Members of the Supreme Court are appointed by the president of the Sudan on the suggestion of the Supreme Council of the Judiciary. They are normally chosen from amongst members of the courts of appeal. The Supreme Court has departments dealing with civil matters, criminal matters, family matters and religious endowments of Muslims and family matters and religious endowments of non-Muslims. The jurisdiction of the Supreme Court with regard to criminal matters is regulated in the Criminal Procedure Act 1991 which stipulates under the title “confirmation of judgments” that “Every death sentence, sentence to amputation or life imprisonment shall be submitted to the Supreme Court, when becoming final, with the intent of confirmation. In addition, the Supreme Court can review any criminal lawsuit, either of its own accord or upon petition, in order to ensure “soundness of procedure and achievement
of justice”.

It should be mentioned here that the decisions of the *qāḍī* in a classical Islamic court were considered final and could not be appealed against in a formal way. Only the Sultan or the Caliph could review such decisions.

When reviewing a judgment of a lower court the Supreme Court has a variety of possibilities. It can simply confirm the judgment as a whole or it can confirm the conviction, but change the penalty. It can also change from a conviction for a particular offence to a conviction for another offence. Further it can return the decision to the court of first instance for revision. Finally the Supreme Court can quash the decision of the lower court and thereby either annulling the criminal suit altogether or ordering re-trial.

*Supreme Court instrumental in controlling shari’ah application*

The Supreme Court is a key instrument to control the application of Islamic criminal law according to the wishes and needs of the al-Bashir regime. It is a mechanism of control and correction for the lower levels of the judiciary whose decisions concerning executions and amputations will automatically be reviewed by the Supreme Court. While the purges of the judiciary in the early 1990s have created a body of judges who, at least in its great majority, is willing to cooperate, the regime cannot be completely sure to obtain the desired results without additional measures. Especially the lower echelons of the court system have shown some fervor in the application of ICL which needs to be controlled and corrected. It is therefore of vital importance that the personnel of the Supreme Court is to be fully trusted by the political system. The composition of the seventy or so Supreme Court judges is determined by the President of the Republic, who appoints them and the Chief Justice. The Chief Justice in turn selects the judges in charge of specific cases. This is important because judges have different opinions, approaches, might belong to different religions and some might be less amenable than others.

All Supreme Court judges I have interviewed insisted,

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171 Criminal Procedure Act 1991, article 188.
172 Mallat (2009), p. 213.
173 Criminal Procedure Act 1991, article 185 (a-f).
174 One Supreme Court judge who belonged to the small group of Christian Southerners still active related a telling incident: at some point he had been assigned a criminal case which clearly fell into the realm of ICL. Not having received all relevant internal circulars he tried to discuss his handling of the case with the Chief Justice. As a result of this meeting, however, the case was given to another judge. While there was no official rule the Chief Justice was obviously not willing to give ICL related cases to a Christian judge. Interview with Supreme Court judge, June 2004.
however, that there was no political interference in their daily work and that their judicial independence was respected.\textsuperscript{175} While this claim cannot be corroborated\textsuperscript{176} it is clear that the main mechanism to ensure control takes effect at an earlier stage. Here the selection of the judges who work at the Supreme Court in general and the selection of the judges chosen to work on a specific case in particular is vital. There are, however, other filters to ensure a higher visibility and quality control of the Supreme Court’s judgments. In cases concerning ḥadd- and qisāṣ the panel of judges deliberating the case consists of five instead of the normally required three judges. In the unlikely case that such a panel consisting of five judges takes a decision either in contradiction to the (positive) law (qānūn) or the sharīʿa (aḥkām al-sharīʿa al-Islāmiyya) the Chief Justice has the right to constitute another five-member panel.\textsuperscript{177} The majority of this panel have to be judges who had no part in the original judgment. Since the composition of this panel is again determined by the Chief Justice this provision serves as a last resort against ICL-related judgments that are either flawed or not in harmony with the desired general policy. Given the many fronts, political and military, the regime is battling at it is of great importance not to arouse unwanted international media attention. With the different layers of controlling devices, as described here, the al-Bashīr regime has indeed a firm grip if not on details then on the general direction and tendency of the application of Islamic criminal law in the Sudan.

In this context another important instrument of political interference must be mentioned. According to the Criminal Procedure Act 1991 investigations are conducted by the police under the supervision of the Attorney General (wikāla al-niyāba) and not under the supervision of a magistrate.\textsuperscript{178} According to Jalāl Luṭfī the records of all cases are kept by the Attorney General. Magistrates have no access and even the Chief Justice cannot request a certain file.\textsuperscript{179} According to Luṭfī “the government can thus conceal a case”.\textsuperscript{180} The Attorney General can also stay a case at any time after the completion of the inquiry and before the passing of a judgment with the exemption of cases concerning ḥadd- and qisāṣ-offences.\textsuperscript{181}

\textsuperscript{175} Interviews with Supreme Court judges in May 2009.
\textsuperscript{176} Given the results of this study showing that certain ḥadd-punishments are applied and others are not, and that some are mainly applied in certain regions, while not in others, political interference is rather likely.
\textsuperscript{177} qānūn al-ijrāʿāt al-jināʿiyya lisana 1991, article 188 (a).
\textsuperscript{178} See article 39.
\textsuperscript{179} Interview with Jalāl Luṭfī, 7 June 2004.
\textsuperscript{180} Luṭfī voiced strong criticism of this reduction of the role of the magistrates and the possibility of political interference. Interview with Jalāl Luṭfī, 7 June 2004.
\textsuperscript{181} Article 58 (2).
His decision is final and cannot be contested.\textsuperscript{182} It goes without saying that these provisions are in conflict with the right of the Supreme Court to review any case it wishes.

\textit{The meaning of precedents}

It is important to note that the Common Law system of precedents is thus continued, even under a regime that has purportedly Islamized its legal system. Precedents, at times even from before independence are indeed quoted frequently. Thus one can find English quotes of older judgments in the middle of an Arabic text, some are referring to precedents from English jurisdiction. It goes without saying that precedents that date from 1983, i.e. from the introduction of the September Laws or later are also taken into account by later decisions. One could say that within the wider system of precedents in the area of criminal law a new sub-group exists. These are judgments based on the Penal Code 1983 and the Criminal Act 1991. In other words the introduction of \textit{ hudud} and \textit{ qisas} into Sudanese criminal legislation have also given rise to precedents which rely on and derive authority from the \textit{ fiqah} and their legal reasoning. It goes without saying that a Supreme Court wouldn’t deserve its name if \textit{ taqlid} or the (uncritical) imitation of the elders were to be the only method used. Where Supreme Court case law goes beyond the \textit{ fiqah} and where it finds new solutions in order to adapt the application of the law to modern requirements will be shown below.

The judgments that are published are a selection. They are landmark cases that are selected for one special purpose, i.e. to make them known to all in the judiciary who deal in their daily professional practice with similar cases. These legal practitioners have to take them into account, they are bound by them and have no power to overrule them. They can only be corrected by the Supreme Court itself. When read against the background of the underlying legislation it becomes clear that the main function of the published judgments is to either fill gaps in the legislation or to give guidance to judges as to the correct interpretation of the law. The value of this source lies first and foremost in the fact, that the judgments analyzed here emanate from the highest court in the Sudan and as such set the principles to follow for all other (lower) levels in the judiciary. Having decided cases relating to Islamic Criminal Law since 1983 the Supreme Court of the Sudan has gradually created a body of case law that has covered a substantial part of the gaps and problems in interpretation deriving from the 1983

\textsuperscript{182} Article 58 (1).
and 1991 legislations. This process has not been without hiccups. In 1983 ICL was introduced, then the execution of judgments based on ICL was suspended and finally a new completely revised legislation replaced the Penal Code 1983 in 1991. These changes followed political developments. Both factors combined, legislative and political changes, left their mark on Supreme Court case law to some degree.

A remark must be made on the quality of Supreme Court judgments as legal documents. Supreme Court judgments are based on judgments of lower courts which in turn have taken into account testimonies of the plaintiff and the defendant and other records pertaining to the investigation. In its final judgments the Supreme Court judges, however, rarely quote literally from the statements of the different parties. Instead, cases are presented in a formalized manner, typically containing a variety of standard elements. These elements, including terminology and juridical jargon used, can be described as a professional code that is employed in order to be understood and recognized by all those who are dealing professionally with Supreme Court judgments. Writing about a nineteenth century Egyptian criminal case Peters has observed that “during the course of the investigation of a criminal case and in the process of sentencing, the different versions of the facts are transformed into an authoritative account containing almost exclusively the legally relevant elements and presenting a logical and plausible narrative”.

One can safely assume that this observation to some degree is also true for Sudanese Supreme Court judgments. Supreme Court judges have to rely on documents which are produced by lower courts obviously not under the control of the Supreme Court and often geographically remote. It is not their task to conduct their own investigations. The researcher working with Supreme Court decisions is thus in a similar position as the Supreme Court judges themselves. He cannot know or judge to what degree facts and statements as presented in the judgment are reflecting the reality of the case or to what degree testimonies have been unduly reduced or changed by lower courts in order to mould a more coherent narrative. As a researcher one is therefore bound by the case as presented in the judgment he is working on. His task is not to speculate about elements he cannot verify but to analyze the legal reasoning of the different courts involved based on the facts and statements contained in the judgment at hand.

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183 Peters (2008), p. 82.
In the SC decisions published in the SLJR and dealt with in this study we find a large variety with regard to quality, volume, topics dealt with and sources used to back up a decision. With regard to quality we can observe that in general decisions tend to become shorter over time. While in the 80s decisions tended to be longer and more detailed in the 90s the average length of a decision in the realm of criminal law has decreased. As to the quality of the decisions it is not necessarily connected to the length of the used arguments. As mentioned, in the 80s we find longer decisions but often the length of the argument is rather related to the contradictory legislation it has to struggle through than with the richness and perspicacity of the arguments used. One might argue that as of 1991 the necessity for convoluted and lengthy arguments has diminished mainly for two reasons. Firstly, the quality of the underlying legislations has largely increased and made the SC judges’ task an easier one and, secondly, many of the important questions have already been answered and regulated before 1991. While these two arguments are certainly valid, there might be others which point into a different direction. A judges who had to leave the SC for political reasons in the wake of the purges carried out by the al-Bashîr regime pointed out to me that the quality of the judiciary in general and of the SC in particular had decreased substantially due to the fact that many common law trained judges, often with European degrees, had been replaced with regime loyalists. These, according to my informant, were not prone to lengthy legal deliberations and argumentation in their decisions. While this common law centered view is understandable from someone who was forced to leave the judiciary it must be noted however, that the common law tradition, while still being clearly visible and present, has lost in importance through the Islamization measures on the one hand and through the introduction of a new civil code of Egyptian-French-Islamic inspiration. Given the absence of Islamic law in large parts of the legislation before the September laws, the need for judges with a sound background in Islamic law certainly rose with their introduction.

It should also be noted that the mere number of decisions on a given offence highly varies. Two offences, unlawful sexual intercourse and alcohol consumption seem to be handled frequently by the Public Order Police and thus related cases are decided and punished swiftly. There is neither a legal obligation for the SC (or other, lower courts) to review such cases nor

184 Interview with a former Supreme Court judge, June 2004.
185 The question of the relevance of the respective academic background of SC judges would be certainly worthwhile to investigate but goes beyond the scope of the present study.
a practical possibility, even if it wished to do so. Since the Public Order Courts are designed to impose „swift justice“, an appeal stage, let alone a review by the SC, is clearly not part of the system and records which could serve during an appeal are hardly kept. In the case of zinā a review by the SC will only happen if a case is treated by the regular court system and involves the death penalty. If the defendant is punished by the POP (mostly by whipping) there is no death penalty involved and the case will not be referred to the SC for review either. With regard to apostasy it is not clear how many cases are being reviewed annually by the SC. Apart from the notorious Ţâhâ case no other case has been published and this particular case has been published for an obvious reason, to rectify a flawed decision that had made a mockery of the principles of legality and fair process. As to hirāba it is a massive disturbance of the public order and it is not surprising that its respective penalties are more often executed than those of other ḥadd-crimes. It is equally not a surprise that the highest number of published cases with regard to ICL are homicide cases given the high importance of the crime with regard to public order and social peace. With regard to sariqa ḥaddīyya published cases become scarcer in the 1990s. As we have seen the present government is not interested in a high frequency of (potentially widely publicized) amputations, it can thus be safely assumed that given the difficulties to prove ḥadd-theft lead to punishments other than amputation and that therefore these cases do not reach the Supreme Court of the Sudan.

Structure of Supreme Court decisions
The structure of SC decisions is rather fixed and does not show many variations. After the basmala the deciding court is indicated. Then all judges participating in the decision are named with their function, i.e. the presiding, most senior, judge and the other members. This is followed by the title of the decision, e.g. “Government of the Sudan vs....” or “Trial: XY”. Then keywords and the laws concerned indicate the main points of the trial. This is further explained under the next point “principles” (mabādi’) in the form of a summary. As a last point before the text of the decision begins the name of the defendant’s lawyer is given. The text of the decision (al-ḥukm) first gives a summary of the facts and then a more detailed legal reasoning leading to the decision in question. All members of the board normally either give their own reasoning or simply say “I agree with my colleague x” or sign without stating anything. The main part, i.e. the first section of the decision stating the facts of the case and
giving an in-depth-account of the applicable laws and their respective interpretation can either be written by the president of the panel or by one of its members.

Publication of Supreme Court decisions

Supreme Court case law used in this dissertation has been published mainly in the Sudan Law Journal and Reports (SLJR, in Arabic: majalla al-aḥkām al-qaḍāʾ ʿiyya al-Sūdānīyya). I was able to obtain entire volumes\(^{186}\) of the SLJR in their printed form from 1999 onwards during my first visit to the Technical Office of the Sudan Judiciary in 2004.\(^{187}\) Furthermore, the director of the Technical Office (al-maktab al-fannī) kindly provided me with a Compact Disk that proved invaluable for my Ph.D. project. Named „The Sudanese Judgment & Precedents Encyclopedia“ and produced by the Technical Office of the Sudan Judiciary, the CD contains all Supreme Court decisions published in the SLJR between 1970 and 1999. The CD is further equipped with full-text search in English and Arabic and all judgments can be printed. I used this electronic „Precedents Encyclopedia“ for all cases between 1983 and 1999 and printed copies of the SLJR for all cases from 2000 onwards.

The SLJR, published by the Sudanese judiciary (al-hai`a al-qaḍāʾ ʿiyya), began law reporting after independence in 1956 and has continued publication irrespective of the ruling regimes.\(^{188}\) Its volumes contain landmark decisions of the Supreme Court and, at times, the Court of Appeal (maḥkama al- isti`nāf) in the fields of criminal law (qaḍāyā al-jināʾ ʿiyya), family law (qaḍāyā al-aḥwāl al-shakhṣīyya) and civil law (qaḍāyā al-maddaniyya).\(^{189}\) Most of the decisions are taken by the Supreme Court in Khartoum, some concern decisions by branch offices of the Supreme Court in other federal states. Mallat contends that the rule of law in the Middle East is severely hampered by the difficulty to find judicial decisions either because

\(^{186}\) Obtaining SLJR volumes from 1983 and later is very difficult in Europe which partially explains the scarcity of studies on Sudanese Supreme Court decisions. During my visits to European universities and legal institutions I was able to make some fotocopies of the SLJR only at the Institut Suisse du Droit International Comparé. Their collection, however, is not complete. The African Studies Centre of Leiden University stopped collecting the SLJR when the journal started to be published in Arabic only.

\(^{187}\) The Sudan Judiciary shared the same building with the Supreme Court. After my first visit in 2004 a new modern building was constructed for the Supreme Court, opposite the old one. In 2009 some of the judges still had their offices in the old building.

\(^{188}\) During the Condominium two digests with Court of Appeal decisions were published in 1926 and in 1955 respectively. See Lutfi (1967), p. 247.

\(^{189}\) It further contains studies on juridical issues (buḥūth).
law reporting doesn’t exist, is difficult to access or is secret or its publication is simply late.\textsuperscript{190} At least in Khartoum the SLJR can be obtained rather easily. The publication of the SLJR is rather regular with only a few months between the end of a calendar year and the publication of the respective SLJR volume.

1.4.3. Interviews

In addition to the two written sources I have conducted interviews with judges, experts and Sudanese politicians during two trips to Khartoum in May/June 2004 and May 2009. Thanks especially to Dr. ‘Awaḍ al-Kārsanī and Dr. ‘Ālī Sulaimān, both at the time professors at the University of Khartoum, who most kindly made initial contacts with a number of interview partners, I was able to conduct interviews with important representatives of the Sudanese political and juridical establishment. ‘Abdallah Badri, a seasoned member of the Sudanese parliament and activist of the Islamist movement, who regretfully had died about a month before my second trip, especially proved to be an invaluable “door opener” with regard to the Sudanese elite. Without ever questioning my research project he used his seemingly limitless contacts to support my endeavors and helped, e.g. to meet former prime minister Şādiq al-Mahdī and the late Jalāl Luṭfi, at the time of my first visit President of the Sudanese Constitutional Court (\textit{al-mahkama al-dustūriyya}).

My second trip concentrated mostly on interviews with judges of the Supreme Court. Many judges dealing with criminal cases were willing to talk to me. Interviews were conducted in English or Arabic. Since I was probably the first Western researcher who had come to inquire about the criminal legislation as applied in the Supreme Court for many years their openness and willingness to talk was not self-evident. Some were more reluctant than others, but most opened up after I had visited the Supreme Court several times.\textsuperscript{191} During my first visit to Khartoum in 2004 the Supreme Court judges had their offices still in the old colonial building of the Sudan Judiciary. When I returned in 2009 most had moved to a brand-new high-rise edifice across the street. What hadn’t changed was the absence of modern IT tools in the judges’ offices. None of the judges I visited was equipped with a computer or even an electric

\textsuperscript{190} Mallat mentions that the publication of the Egyptian Court of Cassation ran six years behind schedule in the 1990s. Mallat (2009), pp. 214-215.

\textsuperscript{191} One of the judges kindly wrote a „laissez-passer“ stating my status as a Ph.D. student and asking the reception to let me enter the Supreme Court building. Despite the „laissez-passer“ entering the new building
typewriter. Thus they were neither connected to the internet nor were they able to exchange documents via email. Communication is organized along the exchange of traditional cardboard files containing judgments, comments, notes and other documents. Next to the generally Spartan office equipment some judges had small collections of reference books stacked in book shelves. Judging by title and language I noticed that some had obviously a preference for English reference books such as the landmark studies on homicide and the law of evidence by Krishna Vasdev. One judge even had a book on the Indian penal code for reference. Others clearly preferred Arabic language reference books such as the standard synopsis on Islamic Criminal Law by ´Abd al-Qādir ´Awda. With one exception I did not see editions of major works of the fuqahā´ in the judges’ offices.

Not everybody in the SC was as accessible as the judges. Due to time constraints, maybe a lack of convincing wasṭa and, possibly the inconvenience to talk to a Western researcher I have not been able to interview all those I would have liked to talk to. This concerns especially the Chief Justice Jalāl ad-Dīn Muḥammad ´Uthmān who proved as unreachable as his deputy Muḥammad Hamad Abū Sinn. In order to obtain relevant statistical material with regard to the overall volume of shari‘a application I had several meetings with another deputy of the Chief Justice, Dr. Wahbī Muḥammad Mukhtār. In my presence he gave instructions to the head of the Statistics Department of the Sudan Judiciary to provide me with crime statistics of the past years. This, however, did not yield any results. The person in charge of crime statistics first demanded a “letter from my institution” and then claimed that his department had no statistics available. Surprisingly, the Deputy Chief Justice had no leverage on the Statistics Department. This incident was, to some extent, symptomatic for my contacts within the Supreme Court in particular and in Khartoum in general. There were those who generously welcomed the western researcher and tried to help wherever they could. This holds true for the majority of my contacts. And there were others, a minority, who preferred to obstruct my efforts or refused to say anything meaningful. My time constraints were such that inquiring further into the political background of my interview partners was not possible.

proved to be more difficult than entering the old one. Being the only Westerner trying to enter guards outside the building as well as at the reception counter were wary.

192 After having tried during every single visit to the Supreme Court I couldn’t help feeling that they did not wish to speak to the Western researcher.

193 At the end of my interviews one of the judges kindly gave me the Statistical Annual Report of the Sudan Judiciary for the year 2008. The crime statistics of this report are, however, partially deficient or hardly credible. I shall therefore refrain from using them except in a few instances.
However, the different degrees of openness towards my research project at times were clearly connected to their political position. One case in point was Fathi Khalil Muhammad. Being the president of the Sudan Bar Association (*naqib al-muhamin al-Sudaniin*) he is a representative of the al-Bashir regime and a staunch advocate of *shari'a* application, at least on a rhetorical level. He clearly did not want to support my project.\(^{194}\)

On the political level my second visit coincided with a session of the Sudanese National Assembly which made it impossible to meet high-ranking representatives of the ruling National Congress Party. However, I could interview two important representatives of the oppositional Popular Congress Party, in particular its Secretary General Dr. Hasan al-Turabi and its Foreign Relations Secretary Dr. Bashir Adam Rahma. During both trips it equally proved impossible to meet with one of the authors of the PC 1983, Badriyya Sulaiman, who at the time of my visit was heading the Legislative Council of the National Assembly. I had also planned to interview the former judge Mikashfi al-Kabbashi, known by his book describing and justifying his experience as a judge in Numairi’s Emergency Courts. However, time constraints did not allow researching his whereabouts.\(^{195}\) My above-mentioned contacts also tried to arrange a meeting with former president Ja‘far al-Numairi. However, due to his fatal illness a meeting proved impossible. He died shortly after my return to Europe.

What is the value of the interviews I conducted? It goes without saying that interviews have to be understood in their context. Especially statements by politicians are potentially characterized by a self-serving and apologetic bias. This is certainly true for the politicians I interviewed, especially Dr. al-Turabi and Shadiq al-Mahdi. Both shared with me their necessarily subjective view of „what happened“ and their contribution to it. When I asked Dr. al-Turabi about his role in drafting the 1988 Criminal Bill, which was later adopted as the Criminal Act 1991 with minor changes, he denied having had a decisive influence on it\(^{196}\) even though he had been Minister of Justice and Attorney General\(^{197}\) at the time and the

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\(^{194}\) The interview with him was meaningless, the promised help in getting hold of official crime statistics did never materialise.

\(^{195}\) Presumably he was in Saudi-Arabia at the time of my second trip to the Sudan.

\(^{196}\) Interview with Hasan al-Turabi 13.05.2009.

Criminal Bill had been a project of his ministry.\textsuperscript{198} Şadiq al-Mahdî likewise denied that he had had the political leverage to abolish the *shari'â* when he was prime minister.\textsuperscript{199}

With regard to my interviews with jurists the situation is different. My questions concentrated mainly on issues pertaining to legislation and jurisdiction. Here it seemed to me that the reliability of their answers rose when the question concerned the Supreme Court and their work in it. In contrast, when the question directly referred to juridical problems outside their direct professional sphere they seemed to suffer from the same lack of reliable information as the researcher who was interviewing them. In general I have no means to verify neither the veracity nor the truthfulness of their answers. Wherever I quote the judges I indicate this in a footnote. I shall, however, only quote a judge’s statement if it seems plausible to me or if the statement sheds light on their self-perception.

At this point a word on the independence of the judiciary is appropriate. Mallat in his “Introduction to Middle Eastern Law” points out that a general suspicion of the executive toward the independence of the judges weaken courts in the Middle East in general. Sensitive top positions are normally handpicked by presidents or kings, personal interference by rulers or politicians in order to influence decisions is frequent. In addition a multiplication of institutions with conflicting powers is often used to reduce the power of courts and to undermine their effectiveness.\textsuperscript{200} Mallat’s general observations are valid for the Sudan as well. Political interference has been substantial in the past. Massive purges in the 1990s have crushed all opposition against the Islamist project in the judiciary and elsewhere. The chief justice and all Supreme Court judges are appointed by the president of the Sudan. It is therefore not surprising that my interview partners were, at least in the beginning, hesitant to talk to the Western researcher and, when they had overcome their inhibitions, did not make any critical statements with regard to the *shari'â*-based criminal law they are administering on a daily basis.

In order to complement the interviews I shall also take into account commentaries of Sudanese jurists and Supreme Court judges who have interpreted the Sudanese criminal legislation after the 1989 coup d’état. Most of them do take the *fiqh* and its deliberations as a

\textsuperscript{198} The Committee that had drafted the text of the Criminal Bill 1988 consisted of jurists representing the three coalition parties at the time, the Umma, the DUP and the NIF. Given the resistance the project met in the DUP and Umma parties afterwards it must be assumed that the project represented the political will of the NIF only.

\textsuperscript{199} Interview with Şadiq al-Mahdî 9.6.2004.

\textsuperscript{200} Mallat (2009), p. 214.
natural point of reference, an approach that – in their view - does not need any further justification. Reading and analyzing voices from the Sudanese legal profession helps us to understand how those who administer or teach the law contextualize and make sense of the juridical problems they are faced with when exercising their profession. It is hardly surprising that those who are willing to publish and to enter a dialogue with their colleagues and the Sudanese public at large are not those who oppose the Islamization of the law, but those who have accepted to work within the Islamized legal system as devised by the al-Bashir regime. Books written in Arabic by Sudanese authors criticizing the present practice of ICL in the Sudan can be found. However, these titles are scarce, they are normally published in London, Cairo, or elsewhere in the Arab world and their authors are not legal practitioners working within the official legal system.

1.5. Structure of the dissertation

Chapter 1 introduces the present work to the reader by giving a short overview of the background of the introduction of ICL and highlighting some important questions prevalent in the discourse on legal Islamization and the codification of Islamic law. It further explains the research questions of this work and the methodology used when answering these questions, describes the available literature in European languages and Arabic on ICL in the Sudan and critically reflects on the sources used in his study.

Chapter 2 summarizes the main features of the development of legislation and the judicial system throughout the history of Islamic Sudan until the time of writing. The historical chapters will try to capture the essence of each era with regard to the application of Islamic law or versions thereof. This account, however, is obviously not meant to be an exhaustive history of Islamic criminal law in the Sudan. It is rather meant to explain the historical, legal and political scenery preceding, accompanying and following the Islamization of the Sudanese criminal law in 1983 and after.201

Chapter 3 heralds the main part of this dissertation beginning with the objectives of the criminal codes as explained in the explanatory notes and followed by some notes on procedure and the sources of modern Sudanese criminal law. In an extensive chapter on enforcement and procedure the inner workings and institutions of the Sudanese court system

201 Parts of the historical introduction have been published in a previous version by this author in 2010. See Kondgen (2010).
are explained, including the hierarchy of courts, the role and recruitment of judgments and the attorney general. This is followed by a survey on evidence which is illustrated by a number of Supreme Court cases which highlight controversial issues. The concluding part of this chapter then deals with general notions of Islamic Criminal Law as codified in the Sudanese criminal codes and, when necessary contrasted with the corresponding fiqh regulations.

Chapter 4 discusses ḥadd-crimes as stipulated in the 1983 and 1991 legislations. This includes on the one hand ḥadd-crimes proper, i.e. those mentioned in the fiqh such as zinā, shurb al-khamr, ridda etc. On the other hand offences that could be called “quasi-ḥadd-crimes” are also discussed. These comprise crimes that are only more or less similar to ḥadd-crimes and punished as such but do not fulfil the criteria for such crimes as defined in the fiqh. Each sub-chapter on ḥadd-crimes is introduced by an overview on the dominant opinions of the fuqahā of the four Sunni schools. This is followed by a discussion and analysis of the crime in question, firstly in the Penal Code 1983 and, secondly, in the Criminal Act 1991, against the background of the predecessor codes 1925 and 1974 and the Criminal Bill project of 1988. Wherever possible Supreme Court cases published in the Sudan Law Journal and Reports are analyzed in order to illustrate and explain the application of the respective articles in the Supreme Court. Crimes discussed in this chapter are zinā, qadhf, shurb al-khamr, sariqa ḥaddiyya, ḥirāba and ridda, the latter only with regard to the Criminal Act 1991.

Chapter 5 on homicide and bodily harm is organized in a similar manner. I first give an overview of the pertinent fiqh-related rules and opinions and discuss then the 1983 and 1991 legislations, the application of which is illustrated by published Supreme Court decisions. Given the quantity of Supreme Court decisions on homicide cases I have made a selection of the more pertinent cases illustrating points related to the research questions explained above.

Chapter 6 on taʿzīr-crimes highlights in a concise manner the main features of the remaining legislation without going into details. Thus, the main focus of this dissertation is on ḥadd- and qiṣāṣ-related crimes.

Chapter 7 deals with the enforcement of Sudanese ICL, beginning with a survey of Human Rights violations. The survey concentrates on those parts of the Sudanese ICL that are in conflict with Human Rights treaties the Sudan is party to. In a second part on enforcement I

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202 Relevant only in the context of the PC83.
203 Apostasy (ridda) was introduced into Sudanese criminal legislation for the first time ever in 1991. The Criminal Act 1983 did not explicitly mention it.
shall try to analyze the extent of the application of harsh *sharī‘a*-based punishments between 1983 and today. In a third part important developments in legislation, procedure and SC decisions will be highlighted. The chapter closes with some concluding thoughts on historical and political factors that have been important to the Sudanese ICL experience up to date. This is followed by a list of the references used, a glossary of Arabic legal terms, I have come across during my study of Supreme Court case law, a general chronology, a list of interviewees and summaries in English and Dutch.

2  **Historical development of Islamic law in the Sudan**

2.1  **Law in the Funj-Sultanate (1504-1821) and in Dār Fūr (1640-1916)**

The Funj-Sultanate in Sinnār dominated northern Sudan between 1504, after the collapse of the Christian kingdoms of Soba and Dongola, and 1820/21, the year Muḥammad Ḍal’s troops conquered the Sudan. Early jurisdiction under the Funj – who had adopted Islam under their first king Ḍamar Danaq (1504-1534) – was marked by only limited knowledge of the *sharī‘a* and the dominance of customary law. The institution of *qāḍī* was known but rare in the early phase of the kingdom of Sinnār. A salient feature of the Fūnj jurisdiction was that all those the king deemed to be guilty were executed, irrespective of the severity of their crime. Only the king himself could impose the death penalty. Those found guilty of intentional homicide were often handed over to the heirs of the victim for execution. At the end of the 16th and the beginning of the 17th century Shaikh Ḍajīb the Great of Qarrā nominated more often *qāḍī*s from among the *fuqarā*. After his downfall it took almost a century before leading *fuqarā* could take over again the function of a *qāḍī* in Qarrā. During the 17th century Sinnār saw an important economic revival and the ensuing presence of a

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204  Finding precise translations of arabic *fiqh*-related legal terms into English was one of the main challenges in the initial phase of this dissertation. To some degree I was able to rely on glossaries that can be found in earlier works such Layish/Warburg (2002) or Peters (2005). Existing general dictionaries are rather deficient with regard to *fiqh*-related legal terms. Legal dictionaries normally do not refer to *fiqh*-related legal terminology but offer translations of modern legal language. For these reasons it proved necessary and helpful to gradually build up my own glossary.


209  Provincial capital in the North of Sinnār.

210  The double meaning of *faqīh* and faqīr (sg. *fāki/fuqārā*) in Sudanese Arabic expresses the range of their functions, oscillating between mystic and legal scholar. On this double role compare Trimingham (1965), p. 140.
large number of foreign merchants called for the creation of orthodox Islamic institutions. Flogging and execution proved to be unsuitable means for the settlement of conflicts between traders. While there were *muftîs* for all schools, the Mâlikî *madhhab* became the predominant one in Sinnâr,\textsuperscript{212} taught and propagated by scholars from the Hedjas and Egypt and West African pilgrims. Alongside a minority of Shâfi‘îtes existed.\textsuperscript{213} Between 1675 and 1725 Sinnâr experienced a phase of transition during which new cities were growing and a new, local, merchant class came into being. Just like their predecessors, the foreign traders, this new merchant class had a practical need for Islamic legal institutions. This led to the appointment of *qâdis* for the new urban centers in Northern Sinnâr.\textsuperscript{214} After the downfall of the Ünsâb, the leading house of the Fûnj, in 1718 and the de facto rule of the Hamaj (from 1762) the role of Islam as a source of legitimacy became more important. A new pyramidal institution, the “National Qadirate” (Spaulding) came into being. In this new system a chief-*qâdî* was appointed by the Sultan to whom he was responsible. The chief-*qâdî* chose the *qâdîât* of the lower echelons and had the power to revise and annul their decisions and impose a different verdict. An appeal to the king’s justice was still discouraged by the threat of execution of the defeated party. Intentional homicide and other capital crimes continued to be judged by the king himself.\textsuperscript{215} In cases of intentional homicide the *qâdî* would ask the heir of the victim whether he wished “blood or money”. If the heir accepted financial compensation he and the killer would agree on the amount to be paid. Part of the money was to be paid directly to the *qâdî*. If the heir insisted on the execution of the killer the case would be handed over to the king’s justice and the killer was to be executed immediately. Another important feature of the jurisdiction of the National Qadirate were the replacement of corporal punishments by fines. These were paid for theft (if the stolen good could be retrieved), libel, physical assault, adultery and homicide (if the heirs accepted blood money). Brocchi\textsuperscript{216} relates that collective liability was common. If an accused person escaped his relatives were shackled and incarcerated until the accused turned himself in.

In the last years of Sinnâr the relationship between the king’s jurisdiction and Islamic jurisdiction changed. This is documented by two legal proceedings which took place between

\textsuperscript{211} Spaulding (1977), p. 413.  
\textsuperscript{213} O’Fahey and Spaulding (1974), p. 73.  
\textsuperscript{214} Spaulding (1977), p. 413.  
\textsuperscript{215} Spaulding (1977), p. 418.
1800 and 1811. In these law suits the decision was pronounced twofold, once by the provincial king and then by the qādī. The first was confirmed by notables, the second by the ḩulamā’. Thus the prevailing party had obtained a verdict based upon the sharī’a as well as customary law.

In the years before the fall of Sinnār (1800-1820) the king’s jurisdiction was probably limited to the capital and its surroundings.217 It continued to be in competition with the qādī’s. The king, however, had replaced the system of obligatory execution with punishments similar to those imposed by the qādīs.218 The chief qādī was unhappy with regard to the limitations of his authority imposed on him by the king. Brocchi relates that he was eager to take over the king’s last prerogative, i.e. jurisdiction on capital crimes.

Like in Sinnār Islamic law coexisted also in Dār Fūr, the second important Sultanate, with customary law, with the former gaining importance in the higher echelons of Fūr society. The king or a maqṭūm219 dispensed justice normally after having consulted with a group of fuqarā. In contrast, within village communities crimes were solved internally. The most severe sanction was the expulsion from the village. Outside the village community shartays, dimlijīs220 and local landlords administered justice and earned therewith an important part of their livelihood. Fines, which played an important role in the customary law of the Fūr, were to be paid for homicide, theft, adultery, assault, and libel and were split between those administering the law. Judicial proceedings that were meant to restore peace between villages after violent clashes or homicides were considered an affair of the state. In such cases the shartay imposed a financial compensation on the community of the offender called either “big blood” (dam kabīr) or “small blood” (dam saghīr). Those who were guilty of intentional homicide, however, were often sent to al-Fāshir where they were beaten to death or hanged.

At the top of the judicial system in Dār Fūr was the Sultan who was surrounded by a group of advisors, most of whom were fuqarā or, for the smaller part, notables. Rulings of the Sultan were, according to the cases we know, taken in agreement with the ḩulamā’.

216 Giovanni Battista Brocchi (1772-1826), Italian botanist, geologist and orient traveller.
219 The title maqṭūm was used as of 1800 in Dār Fūr for representatives of the king who governed a specific region or had the mandate to wage war. Compare O’Fahey (1980), p. 87 et seq.
220 The four provinces of Dār Fūr were divided into approximately 12 districts (shartayā) and subdivided into smaller local administrative units (dimlijīya), consisting of 2-3 villages each. On the administration of Dār Fūr see O’Fahey (1980), p. 69 et seq.
Until ʿAlī Dinār (1898-1916) restored the Sultanate of Dār Fūr some families of fuqarā provided qādīs for several generations, serving the Sultan and his governors. However, despite the existence of the fuqarā and the qādīs who were recruited from the midst of their ranks, penal law seems to have been entirely a domain of customary law, ‘[…] there is no evidence that the sharīʿa punishments were ever imposed’. The fuqarā confined themselves to advise the shartay in his decisions regarding criminal cases according to customary law.

2.2 Centralization of justice under Ottoman-Egyptian rule (1820-1881)

It was under Ottoman-Egyptian rule (1820-1881) that, for the first time in their history, the North and the South of the Sudan gradually became united. Sinnār and Dār Fūr, which had formed distinct political entities, were now administratively and politically united and ruled by the central government in Khartoum. In harmony with the new administrative centralism, a centralized judiciary was created for the first time with a hierarchical system of local courts of first instance (majlis maḥallī) for each district and a provincial council and a mufti for each province. While the province qādī presided over the province council his decisions had to be confirmed by the mufti of the province. These province councils functioned as courts of original jurisdiction as well as appellate courts. On the highest level was an appeals court in Khartoum (majlis ʿumūm al-Sūdān). Any decision of the appeals court had to be endorsed by the highest muftī and the governor-general and was sent for final approval to the highest judicial body in Egypt, the majlis al-aḥkām in Cairo. Egyptian-Ottoman dominance and the introduction of a unified court system also meant the introduction of Ḥanafite law.

Which laws were actually applied by the Egyptian administration remains to a certain degree unclear, as relevant archives were later destroyed by the Mahdi’s army. According to Mustafa in some instances sharīʿa was applied, in other cases Egyptian military and civil codes appear to have been implemented. In more remote areas, justice was administered

221 O’Fahey (1980), p. 112.
223 Hill (1959), p. 43.
225 The Mālikite madhhab was the traditional school in the Sudan until the introduction of the Ḥanafite school.
227 Hill relates that at the beginning of the Egyptian rule the law was mainly applied to the personnel of the government. In the correspondence dealing with criminal investigations and trials the Sudanese are hardly mentioned. Hill (1959), pp. 43-44.
according to customary law. As of 1858, a new Ottoman penal code was introduced as part of the tanẓīmāt reforms and implemented through a newly created system of secular courts (Nizāmiyye). Whether this code was also applied in the Sudan is not certain. Bleuchot concludes that there is neither evidence of the application of Ottoman criminal legislation in the Sudan nor of the existence of any special codes applicable in the Sudan only. The Egyptian codes would be applied, Sudan being part of Egypt. He also points out that none of the travelers, i.e. western eyewitnesses, of the time report amputations. In contrast, excessive whipping seems to have been the order of the day. What seems to be clear is that justice was dispensed for the majority of the population mainly according to customary laws. If a crime was committed within a tribe the case would be handled by the traditional tribal institutions and be settled with the payment of financial compensation. However, if offender and victim belonged to different tribes and intertribal peace was jeopardized the public authorities had to intervene.

2.3 Shari’a of its own kind: Islamic jurisdiction under the Mahdi (1881-1898)

Ottoman-Egyptian rule ended when the Mahdi’s army conquered Khartoum in 1885. Muḥammad Aḥmad al-Mahdī (1843-1885), a religious renovator, had set out to liberate the Sudan from its ‘infidel’ oppressors, i.e. the Turks, by means of jihād. Consequently, after the conquest all verdicts of the judges of the Egyptian-Ottoman rule, which was equated with the jāhiliya, were declared void. Using the early community of Muslims as a model, he aspired to restore the religious purity of the Prophet Muhammad’s time. The only sources of the Mahdi’s legislation were thus Qur’ān and Sunna in his, often idiosyncratic, interpretation. His large number of legal circulars (manshūrāt qawā’id al-aḥkām) was frequently in conflict with the traditional Sunni schools of law. Thus, for example, he stipulated 100 lashes for women who entered public streets or market places. Hardly in harmony with the fiqh the Mahdi deemed smoking a more severe crime than drinking alcohol. While the former is punishable

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229 Anderson (1960), p. 293.
with a 100 lashes, those guilty of the latter receive 80 lashes.\textsuperscript{233} Who refused to perform his ritual prayers was to be punished by 80 lashes, a week in prison and confiscation of his property.\textsuperscript{234} Curses and insults were to be punished with 80 lashes.\textsuperscript{235} Dancing, the smoking of hashish and the playing of musical instruments was outlawed. For severe crimes such as intentional homicide, blasphemy and adultery capital punishment was prescribed which was executed either by hanging or by a firing squad. Theft was punished with the loss of the right hand.\textsuperscript{236} The payment of financial compensation in cases of (non-intentional) homicide was abolished and \textit{qis\=a\=s} became compulsory.\textsuperscript{237}

The highest power of jurisdiction was held by the Mahdi himself, who delegated his prerogative to hear and decide cases to the \textit{qä\=dî al-Islâm}\textsuperscript{238} and to provincial, district and military judges. The \textit{khu\=latå‘}\textsuperscript{239}, the military governors and the \textit{ashrå‘f}\textsuperscript{240} also administered justice. The \textit{qä\=dî al-Islâm}, being the highest judge in the country, had to ensure that all judgments were based on the Qur`an, the Sunna and the judicial circulars of the Mahdi himself only. To what degree the former authority of the \textit{`ulamå‘} had decreased is illustrated by the following incident: after the governor of Dâr Får had sent some judgments to the Mahdi for confirmation, the \textit{qä\=dî al-Islâm} admonished him for having followed the advice of the \textit{`ulamå‘} in his judicial reasoning. He reminded him that the Mahdi`s decrees had rendered the \textit{fiqh} obsolete.\textsuperscript{241}

After the death of the Mahdi, under the rule of his successor `Abdullå‘hî (ruled 1885-1898) jurisdiction theoretically still followed Qur`an and Sunna, the \textit{fiqh}, as before under the Mahdi, was to be disregarded. In actual practice, however, the double loyalty to `Abdullå‘hî on the one hand and the \textit{fiqh} on the other caused tensions and resulted e.g. in the deposition of the \textit{qä\=dî}

\textsuperscript{233} Holt (1958), p. 115. Mustafa (1971) writes that smoking was punishable by 27 lashes. (p.39). In contrast, Bleuchot relates that drinking alcohol and smoking were equally punished by 80 lashes. According to him 27 lashes was the prescribed punished for the buyer of tobacco (and thus not the smoker). Bleuchot (1994), p. 192.

\textsuperscript{234} According to Bleuchot the prescribed punishment for the refusal to perform the ritual prayers was execution and the confiscation of his property. Bleuchot (1994), p. 192.

\textsuperscript{235} Mustafa (1971), p. 39.

\textsuperscript{236} Safwat (1988), p. 236.

\textsuperscript{237} Bleuchot (1991a), p. 4.

\textsuperscript{238} For ten years this office was held by Ahmad Wad `Alî who had been judge during the Turkiyya. Bleuchot (1994), p. 188.

\textsuperscript{239} The three highest representatives of the Mahdiyya. Holt (1958), p. 158 et sqt.


al-Islām Ḥusain Ibrāḥīm w. al-Zahrā, who had been in office only a short time.\footnote{Holt (1958), p. 243. The first qādī al-Islām had been in office about ten years, his successor was deposed after just approximately one year. No new qādī al-Islām was appointed after that. The successor was called qādī al-ʿumūmī. See Bleuchot (1994), p. 189.} The court structure was modified. Alongside courts dealing with market disputes or claims against the treasury (bait al-māh) a special court (maḥkama radd al-maẓālim) was created which dealt with claims against the corruption and arbitrariness of the ruling elite, e.g. governors, army commanders and princes. Judges in the provinces dispensed justice in cooperation with one or two notables, selected by them. Their decisions had to be submitted to the highest judicial council in Omdurman. Judgments of the members of this council were signed and sealed by the qādī al-Islām, only cases of intentional homicide were dealt with by the qādī al-Islām himself. The more severe cases had to be confirmed by the Khalīfa ʿAbdullāhi himself.\footnote{Bleuchot (1994), pp. 188-189.}

\section*{2.4 The Condominium and the Introduction of British-Indian law (1898-1956)}

Between 1896 and 1899 a joint Anglo-Egyptian army conquered the Sudan and the Anglo-Egyptian condominium was established, which made the Sudan effectively another British dependency. The judicial structures of the Mahdiyya had been centered largely around the Mahdi himself. Their collapse, thus, meant that the ‘Anglo-Egyptian colonial administration had to start from scratch\footnote{Salman (1983), p. 66.} since, or so the British thought, there was no local personnel with suitable experience to run the new administration.\footnote{Mustafa (1971), p. 42.} When planning for the new legislation the new rulers could not ignore that the Sudanese were deeply religious and that the predecessor state had been a theocracy. Therefore, when Lord Cromer, the British Consul General explained British policy to religious notables in 1898 he promised respect and non-interference with the Islamic religion. When questioned he asserted that this would imply the application of Islamic law.\footnote{Salman (1983), p. 66.} This promise, however, had its limits, as was to be seen later.

\textit{Shari`a and penal law after the British-Egyptian conquest}

Shortly thereafter, the colonial administration was to fulfil its promises, at least partially. The Mohammedan Law Courts Ordinance of 1902 and the Mohammedan Law Courts Procedure Act of 1915 provided the basis for the creation and procedures of the Mohammedan Law
Courts. These courts administered the *shari’a* in personal status cases and in litigation regarding pious foundations (*awqāf*). They were staffed by mostly Egyptian and some Sudanese religious notables. Until independence, the Grand *Qādi* was Egyptian. In principle, litigants could appeal to the Mohammedan Law Courts also in other domains of the law, including penal law, provided they had bindingly confirmed to submit to Islamic law. This option can be traced back to Lord Cromer’s promise to allow for Islamic jurisdiction whenever a Sudanese claimant expressly wished its application. However, this regulation remained theoretical and was never applied in practice. Sudanese Muslims appealed to the Mohammedan Law Courts in cases concerning family law and pious foundations only. Decisions of the Mohammedan Law Courts were based on the Ḥanafite *fiqh* which had been introduced under Ottoman-Egyptian rule (1820-1881). The Mohammedan Law Courts Ordinance provided for the Grand *Qādis* to issue legal circulars (*mansḥūrāt*) functioning as provisions and regulating the interpretation of the *shari’a*. Being published regularly, as they were, these circulars constituted a precursor to codification, an innovation “the Egyptian *`ulamā’* appear not to have opposed”. Lord Cromer held the opinion that a simple version of civil and penal law was sufficient for the Sudan. The new civil servants were to be chosen carefully and were to be endowed with far-reaching powers in order to enable them to do justice to the specific characteristics of the country. To apply Egyptian or Islamic law in civil or criminal matters was not considered, the British had no interest in allowing their Egyptian partners a dominant position in legal matters other than those related to family law and *awqāf*. Within the framework of the condominium, the Egyptians were generally kept at bay and only filled the lower ranks in the colonial administration. The first Penal Code and a Criminal Procedure Act were promulgated in 1899. The former was based on Anglo-Indian colonial legislation, the latter on Egyptian military law, which, in turn, had its origins in British military law. Both had been adapted to Sudanese conditions and the penal code had already been applied in the East African protectorates and Zanzibar. The penal code was revised in 1925. With regard to punishments provincial administrators and governors were allowed great leeway in the interpretation of the new penal code. The same crime could be punished

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differently, depending on whether the culprit was a nomad, a Southerner, or an Arab. For intentional homicide e.g. the penal code stipulated capital punishment or a life sentence. If the killing had taken place among nomads, however, these penalties were normally not executed but instead, after a petition to the Governor General commuted into a shorter prison term or the payment of *diya*. Native or tribal courts dispensing justice in the South and among Muslim nomads in the North received recognition only twenty years after the conquest. Under Reginald Wingate, the Sudan’s second governor-general, fear of a regenerated Mahdism led to a resolute suppression of what was perceived as heterodoxy. Thus, Sufi orders were denied recognition and surviving Mahdist leaders subdued. Concurrently, the ‘ulamā’, who had never been very important in the Sudan, were granted pensions and status. In 1912, an institute to train ‘ulamā’, emulating al-Azhar in Cairo, was opened in Omdurman. In addition, mosques were built and repaired and the pilgrimage to Mecca (*hajj*) was promoted in order to pre-empt ‘fanaticism’.

*Refining the system*

This strengthening of the ‘ulamā’, however, did not mean that *shari’a*-based jurisdiction was allowed to gain ground. To the contrary, from 1920 native courts were effectively used to gradually supplant the *shari’a* courts. In order to diminish the status of the *shari’a* courts, native courts were now given concurrent jurisdiction on personal status issues, applying customary law. By 1929, a good number of *shari’a* courts had been suppressed and native courts set up instead. However, even though reduced in number, *shari’a* courts continued to exist throughout the era of the Condominium. Throughout the time of the Condominium, the judicial system of the Condominium consisted of three divisions: *shari’a* courts co-existed with civil courts where justice was dispensed according to British common law and so-called native courts where customary law was administered by tribal leaders.

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254 Wingate replaced Herbert Kitchener as Governor-General of the Anglo-Egyptian Sudan at the end of 1899 and remained in office until the end of 1916.
256 Jeppie (2003), p. 3.
2.5 Discussions on Islamic law before and after independence (1952-1969)

The path to independence and beyond

The Sudan’s path to independence accelerated with a self-government Statute passed in April 1952. In January 1954 it was decided that within a period of three years the Sudanese had to reach a decision between independence and union with Egypt. Immediately after, a Sudanization committee was established and British officials started leaving the Sudan. In December 1955 the Sudanese parliament unanimously voted for independence. The Sudan’s first, transitional, constitution was promulgated a month after the country achieved independence, in January 1956. It guaranteed parliamentary rule, the existence of a multi-party system, and free elections. It was intended to be a transitional constitution, later to be replaced by a permanent one. Instead, however, it survived three military takeovers and was revitalized whenever the military had to step down.257 Three distinct main tendencies dominated the discussion about the future constitution and legislation between the years before independence and on into the seventies. Firstly, proponents of an Islamic constitution and legislation were represented above all by the Umma party, the Democratic Unionist Party, the Muslim Brothers, and some members of Sufi sects.258 Secondly, the camp of the Nasserites, Ba’athists, and Arab nationalists advocated the Egyptianization of the Sudanese legal system, thus harmonizing it with the majority of socialist Arab states and dispensing with the British colonial heritage. Thirdly, a pragmatist camp endorsed the reform of the existing legal system, but rejected its complete replacement by either Islamic or Egyptian legislation. Most of the secular intelligentsia and graduates of the Law Faculty of the University of Khartoum belonged to this camp259, as well as the prominent Sudanese jurist Jalāl Luṭfī who suggested in an article published in 1967 the retention of English law and its further development along the standards set in England itself. Luṭfī in a provident article anticipated later developments and warned of changes for the sake of short-lived political gains: “...if the situation is considered objectively, English law will no doubt continue as the main guidance for our future legal development. But if the tend is to follow opinion and ideas tainted and coloured with sentiment and emotions then any change to a different legal system will serve no purpose other than temporary political gain by those who are advocating it. If

unnecessary change takes place – and I hope not – the result would definitely be a disastrous one".  

As early as September 1956 a committee began to draft a ‘permanent’ constitution. Sufi leaders such as Sayyid ʿAbd al-Raḥmān al-Mahdī and Sayyid ʿAlī al-Mīrghānī, joined by the Muslim Brotherhood, advocated an Islamic parliamentary republic with the *sharīʿa* as the main source of legislation. Khartoum was to be the capital of a centralized system of government with Arabic as the official language and Islam as the religion unifying the nation. Non-Muslims were to be granted all rights envisaged by the *sharīʿa*. Racial or religious discrimination was to be excluded. Within a period of five years the Sudan was to be fully Islamized. Southern objections against Islamization and demands for a federal system were dismissed. Thus, when in November 1958 the military took over under General Ibrāhīm dabbed, a national consensus on the permanent constitution had not been reached and the draft constitution had not yet been promulgated. The junta under dabbed abolished the provisional constitution of 1956, without, however, replacing it with a new one. Kook has pointed out that major developments under ʿAbbūd’s rule laid the foundations, which would have a major influence on the decades to come. Thus, resistance in the South against the dictatorship developed into a full-fledged war for independence. Not least because of its resistance against the regime the Sudanese Communist Party increased its influence and became, until its demise in 1971, one of the most influential communist parties of the Arab world. The Muslim Brothers, while still being a young movement only founded in August 1954, equally widened their influence, especially among intellectuals and students.  

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260 Lutfi (1967), p. 249. Jalāl Lutfi occupied all important positions the Sudanese judicial system has to offer. He was a member of the Supreme Court, Minister of Justice and Attorney General (1965-1967), Chief Justice (1989-1994) and also the first President of the Constitutional Court (as of 1998). When I interviewed him in June 2004 he was still its president. In the interview he maintained his 1967 position, saying that “the British system was the best system” and being critical of the changes of the legal system after 1956, these “were not for the betterment of the law”. He also stated that the “quality of the Supreme Court was very low” and that “the Supreme Court makes many serious mistakes”. Jalāl Lutfi was equally critical of the Criminal Act 1991 because it is in conflict with international human rights conventions the Sudan has signed. He stated that the Sunni schools of law, the *madhāhib*,were obsolete and not applicable today, “precedents are the best source of law”. In summary, Lutfi was by far my most outspoken and critical interview partner. How he reconciled this position with his role as president of the Constitutional Court of the Sudan is unclear. Lending his services to the Islamist regime he had clearly switched camps. During the presidency of Lutfi a digest of Constitutional Court rulings were published. While going beyond the scope of this work it would be an interesting topic for future research to investigate the relationship between Supreme Court rulings and their constitutionality. See *jumhūriyya al-Sūdan, al-maʾkama al-dustūriyya: majalla al-maʾhkama al-dustūriyya fī al-fatra mā baina 1999m-2003m* (al-Khartūm, 2004).


had all political parties banned but allowed the Muslim Brotherhood, being a religious movement, to function. Already at this early stage of their existence, the Muslim Brotherhood was decided to usurp power, if necessary by violent means. In November 1959 it plotted, unsuccessfully, to overthrow the regime by way of an army cell, whose detection effectively ended the Brotherhood’s freedom to act.  

**Sudan’s second democratic experience**

After the downfall of ‘Abbūd’s military dictatorship in 1964, the Sudan lived through its second democratic stage. A slightly amended version of the transitional constitution of 1956 was re-enacted. However, solutions for the constitutional impasse as proposed by the different parties concerned had not materially changed. Thus, southern claims to self-determination and demands for a referendum on their future rapport with the Muslim North continued to fall on deaf ears, even with moderate parties in the North. As of December 1967, a constitutional committee debated anew a future ‘permanent constitution’ and in early 1969 presented a draft defining the Sudan as a ‘democratic socialist republic under the protection of Islam’ (Art. 1). This formulation was meant to placate the left as well as the traditional Islamic right. Falling short of full recognition of the Sudan’s religious plurality, Article 3 stipulated Islam as the state religion. The *shari’a* was meant to be the main source of legislation and all existing laws were to be reviewed in order to bring them into conformity with the *shari’a*. The draft also set forth that the presidency would have been reserved for Muslims only, thus – in constitutional terms – turning Southerners into second-class citizens.

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2.6 **Numairi and the Islamization of the Sudanese legal system (1969-1985)**

At the beginning of 1969, the Sudan’s two largest Sufi orders, Anṣār and Khatmiyya, agreed upon a common political program, providing for the creation of a presidential republic with an Islamist constitution. However, Numairi’s coup d’état in May 1969 averted the ratification of this second constitutional draft. Backed by a coalition of Nasserites, communists and Ba’athists, Numairi immediately outlawed all political parties and revoked the transitional constitutional laws. In an attempt to establish a strong Islamic state, Numairi turned to religious scholars for advice on how to proceed. This resulted in the formation of an Islamic political party and a subsequent constitutional amendment that sought to establish a theocratic state. Despite these efforts, the Sudan continued to face challenges in achieving stability and unity.

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265 Kok (1989), pp. 443-444.
266 See also the revealing dialogue between Hasan al-Turābī and Phillip Abbas Gobosh in An-Na’im (1985), p. 329.
The new secularist and anti-sectarian regime in March 1970 bombarded the Anṣār in their stronghold on Aba Island during a head-on confrontation. Their Imam al-Hādī al-Mahdī was killed when trying to take refuge in Ethiopia so his nephew Šādiq al-Mahdī fled to Libya, where he, together with Ḥasan al-Turābī and Sharīf al-Hindī (Democratic Unionist Party), founded the anti-Numairi-coalition ‘National Front’. Numairi’s honeymoon with the Sudanese Communist Party (SCP), however, did not last long. Disagreements between him and the SCP on the creation of a single-party system and the ensuing power struggle came to a head when a communist coup attempt in July 1971 fell short of sweeping the Numairi regime away. However, with concerted Egyptian and Libyan help, a counter-coup brought Numairi back to the helm. The secretary general of the SCP and hundreds of its members were executed. In the course of the ensuing political reorientation, the United States, Egypt and Saudi-Arabia became the Sudan’s key allies.

Numairi’s early law reforms: an attempt to break free from the colonial heritage

Soon after Numairi’s takeover, a good part of the legal system came under scrutiny, resulting in the enactment of a succession of new laws. Numairi, being himself a proponent of greater Arab unity, decided to bring the Sudanese legal system in line with many Arab states, which, in turn, had adopted important parts of the Egyptian legal system. He thus followed the demands of the pragmatist school, mainly represented by Nasserists, Ba’athists and Arab Nationalists who aimed at eliminating the colonial heritage. It did not seem to matter to the pan-arabist school that the Egyptian legal system was itself mainly based on French law and thus hardly an authentic Arab system that could claim to have overcome the colonial heritage. A Law Reform Commission was appointed in 1970, ignoring the work of several earlier commissions which had been working on law reform since 1968. The new commission composed a Civil Code written in Arabic. The code, hastily drafted by a law reform commission consisting of 12 Egyptian jurists and three Sudanese lawyers, was, unsurprisingly, mainly inspired by the Egyptian Civil Code of 1949 and, thus, meant a radical

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268 Numairi spent three days in prison and later claimed that this experience was the beginning of his “Islamic path”.
269 These commissions, established under Law Reform Commission Act 1968, had been charged each with a specific area of law. The work they had done since 1968 had been considerable and was completely ignored.
shift from common law to continental (French) European law. In the description of a Sudanese jurist, “[…] the commission proceeded to copy with impunity, and with trivial and sometimes absolutely meaningless amendments, section after section and chapter after chapter from the Egyptian Civil Code of 1949, flavoring it here and there with a slightly modified or differently phrased version from the Iraqi, Syrian, or Libyan Civil Codes.”

In the same assembly-line fashion, a Civil Evidence Code (1971), Civil Procedure Code (1972), and draft penal and commercial codes (1972) were expeditiously produced. But Numairi’s ‘legal revolution’ was not to last. The new codes were revoked in 1974, and the common law was restored once the regime’s preoccupation with Arab unity had subsided and given way to other priorities. Kok pointed out that the trend to egyptianize the Sudanese legal system has never really regained the momentum it had in the early 1970s despite a high production of law graduates of the Khartoum branch of Cairo University.

Meanwhile, in February 1972, Numairi’s government and the Southern Sudan Liberation Movement (SSLM) had concluded a peace treaty in Addis Ababa to end the rebellion that started in August 1955 and had continued as a large scale insurgency. The peace agreement, which provided for an autonomous regional government in the South, addressed, among other things, developmental, economic, and human rights questions and was promulgated as the Southern Provinces self-government Act in 1972. In September of the same year, the People’s Assembly was convened to hammer out a new constitution. After seven months of deliberations, in May 1973, a ‘permanent’ constitution was promulgated. Several factors contributed to this success, seventeen years after reaching independence. For one, the non-participation of the sectarian parties, i.e. the Umma party and the DUP, and the Muslim Brothers allowed for an official recognition of the Christian and all other Southern religions. Also, important contentious issues, such as the status of the South and the nature of the executive, had been solved beforehand and the ban on political parties had paved the way for the Sudan Socialist Union (SSU) to operate as the sole remaining party in a single-party system. Article 9 of the permanent constitution stipulated that Islamic law and customary law were main sources of legislation. While many non-Muslims and secularists in 1973

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275 These outnumbered the common-law trained graduates by 1:8 in the early 1990s, Kok (1991), p. 238. On the 1984 Civil Transactions Act and its connections with Egyptian civil law see below.
understood the two to be on an equal footing, many southern politicians were opposed to the new constitution since it gave, in their view, too much weight to Islamic law and made Arabic the official language of the Sudan.\textsuperscript{276} Indeed, article 9 would later, in September 1983, be invoked to justify the introduction of the *shari‘a*. Islam, however, was not declared the religion of the state. In recognition of Sudan’s plurality, the new constitution guaranteed the principles of decentralization (articles 6 and 7) and self-government in the South on a permanent basis (article 8). The permanent constitution also confirmed that all Sudanese were “equal in rights and duties irrespective of origin, race, locality, sex, language or religion”.\textsuperscript{277}

In 1974 the Sudan saw yet another wave of new legislation. With the defeat of the pan-Arabist trend, the pragmatist school this time had its way and neither the *shari‘a* nor Egyptian law played a significant role in the drafting process. Zaki Mustafa, Attorney-General and author of the seminal “The Common Law in the Sudan”\textsuperscript{278} oversaw the drafting of the new legislation, called ‘a legislative revolution’ by president Numairi.\textsuperscript{279} A Sales of Goods Act, a Contract Act, a new Civil Procedure Act, an Agency Act, a Penal Code, and a Criminal Procedure Act were all promulgated in 1974.\textsuperscript{280} While the Civil Procedure Act simply repealed the Civil Justice Ordinance of 1929, the Contracts Act, the Sales Act and the Agency Act were for the most part codifications of the pertinent concepts of English law and the Sudanese precedents. As to the 1974 Penal Code, it was an adaptation of the penal code from 1925 and, likewise, free of *shari‘a* elements.

\textit{“The Islamic path” – Numairi finds new allies}

Meanwhile Numairi himself increasingly advocated ‘the Islamic path’. In his book “al-nahj al-islāmī limādhā?”\textsuperscript{281} (The Islamic Path, why?) he later claimed that his religious reawakening happened in 1971 when he had been imprisoned during a coup d’état and faced an uncertain future.\textsuperscript{282} Indeed, already in 1971 after the failed communist coup, Numairi performed *hajj* to Mecca and seized the occasion to meet Muslim Brotherhood leaders who had escaped to Jidda. This early attempt at reconciliation was, however, subsequently rejected.

\textsuperscript{276} Warburg (2003), p. 166.
\textsuperscript{277} Warburg (2003), p. 166.
\textsuperscript{278} See references.
\textsuperscript{279} The same wording was used by him in 1983 to describe the September laws.
\textsuperscript{280} Köndgen (1992), p. 22.
\textsuperscript{281} Numairi had published two books on his ideas of a truly Islamic Sudan. Both published in Cairo their titles were: al-nahj al-islāmī limādhā? (1980) and al-nahj al-islāmī kaifā? (1985).
by his advisors.\textsuperscript{283} He also met with King Faysal of Saudi-Arabia to discuss “a new Islamic phase in Sudanese politics”.\textsuperscript{284} According to some reports Numairi had promised Faysal that a new constitution would make the Sudan an Islamic state. When the 1973 “permanent” constitution fell considerably short of this promise the financial aid promised by the Saudis was cancelled.\textsuperscript{285} As to the sincerity of Numairi’s religious convictions the interpretations of observers vary. Khalid Mansour, who knew Numairi well after having served as foreign minister under him\textsuperscript{286}, underlines Numairi’s political motives and gives little credit to his religious intentions. He describes Numairi’s beliefs as “an incongruous mixture of Islam, superstition and belief in witchcraft and magic” and claims that Numairi was ignorant of “Orthodox Islam”.\textsuperscript{287} Warburg, a more distant observer, equally stresses the conjuncture between Numairi’s new religiosity and the rise of militant Islam in Iran and other Muslim states such as Egypt where the Muslim Brotherhood and Islamic student organizations had gained considerable importance under Sadat.\textsuperscript{288} The heyday of secular leftist nationalism according to the Nasserist model was long gone by and Numairi had, according to another observer, “tried nearly all possible options, so at one time Islamism simply had to have its turn”.\textsuperscript{289} Clearly, Sudan’s economic plight and the resulting need of financial aid from the petro-monarchies of the Arabian peninsula, especially Saudi-Arabia, made the reconciliation with the different Islamic movements, especially the Anṣār and the Muslim Brotherhood and Islamization in general seem advisable.\textsuperscript{290}

During the seventies new Islamic institutions and events were founded such as the ‘African Islamic Center’, an educational center for African Muslims (1972) and the ‘Festival of the Holy Qur’an’ (1973). The former was an unofficial branch of the Muslim World League, tasked with bringing African popular Islam into line with orthodox Islam before proselytizing in non-Muslim Africa.\textsuperscript{291} After forcing his government and high-ranking civil servants to

\textsuperscript{282} Warburg (1990), p. 626.  
\textsuperscript{283} Warburg (1990), p. 625  
\textsuperscript{284} Warburg (1990), p. 625.  
\textsuperscript{285} Warburg (1990), p. 625.  
\textsuperscript{288} Warburg (1990), p. 626.  
\textsuperscript{289} Durán (1986), p. 576.  
\textsuperscript{290} Warburg (1990), p. 626.  
\textsuperscript{291} Durán (1986), pp. 576 and Schulze (1990), p. 381.
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abstain from alcohol (1976), Numairi gave the ‘Islamic path’ an important role in his 1977 electoral program. The same year saw the establishment of a committee for the revision of Sudanese legislation and the founding of the Faisal Islamic Bank, the first bank in the Sudan working according to Islamic principles. In the meantime, domestic opposition to Numairi did not diminish. After several failed attempts to overthrow his regime between 1970 and 1975, the above-mentioned National Front came very close to toppling Numairi in 1976. This failed coup attempt was followed by a historical compromise with the leading opposition parties. Its leaders, Šādiq al-Mahdī and Ḥasan al-Turābī, were co-opted into the Sudanese Socialist Union (SSU). In turn, the National Front agreed to cease its military resistance. However, the Front proved unable to overcome its internal divisions. Aḥmad ‘Alī al-Mīrghanī, the spiritual leader of the Khatmiyya had rejected an active role in Sudanese politics right at the start of the reconciliation and founded the “Islamic Revival Committee” which demanded, similar to the Muslim Brotherhood, a comprehensive application of the *sharī‘a*. In October 1978, Šādiq al-Mahdī was criticized by parts of the Anṣār because of a perceived closeness to Numairi. He subsequently withdrew from the SSU in protest against Numairi’s support of the Camp David agreement. Many followers of the Anṣār were not convinced of the national reconciliation and had remained in camps outside the Sudan, e.g. in Libya. Southern Sudanese were equally wary of the arrangement and argued that Anṣār and Muslim Brotherhood only had a place for Southerners as second-class citizens in the Islamic state they were striving for. Šādiq al-Mahdī followed a tactic to sideline the Muslim Brotherhood, trying to prevent them from taking a leading role in the National Front and thus made it clear to al-Turābī that the Brotherhood would not gain power through elections nor by way of a violent takeover. The majority of Muslim Brothers nevertheless concluded that backing the Numairi regime was their best option. After the purges of the MB by the regime in the years 1973-1976, the Muslim Brotherhood was in a state of weakness. They believed that a possible loss of credibility in the eyes of the Sudanese public caused by cooperating with Numairi’s dictatorial regime would be outweighed by the strengthening of the organization and the experience their members would gain by working within the government apparatus. A small minority, which was critical of al-Turābī’s modernist views and called for

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292 To secure the success of the Faisal Islamic Bank its operations were exempted from taxation. Köndgen (1992), p. 32.
a closer union with the Egyptian Ikhwān preferred to break off in 1979 and establish their own organization. As a possible explanation for al-Turābī’s willingness to cooperate with Numairi Esposito has suggested that Numairis frequent demonstrations of religiosity had convinced the former of their congeniality. This assessment, however, seems rather doubtful. That al-Turābī himself seems to have had a rather sober view of this cooperation shows an interview where he stated “As long as President Nimairi keeps his word and allows us to function and to propagate Islam, we are satisfied. It is our advantage to support Nimairi, for whoever replaced him might be less tolerant or less religious”. Thus, al-Turābī and the Muslim Brotherhood began to fill government, SSU and other official positions. In August 1977, al-Turābī took over the chairmanship of the mentioned committee reviewing Sudanese laws for their compliance with the shari‘a and a month later he joined another committee reviewing the constitution. The former found 38 out of 286 laws not in harmony with the shari‘a, among them the Penal Code, the Banking Act (because it made charging interest legal) and, interestingly the Southern Provinces Self-government Act, 1972, because it allowed for the development of customary law. The committee further drafted laws banning alcohol, the charging of interest, and on gambling as well as draft laws on alms tax (zakāt), ḥadd punishments, and a law on the sources of legislation. The zakāt draft law was ratified by parliament, but repealed due to difficulties with its application. In 1979 the position of the Muslim Brothers improved further when al-Turābī was appointed Minister of Justice and his close confidant Aḥmad ʿAbd al-Raḥmān Minister of Higher Education. Al-Turābī gained further influence by joining the Central Committee of the SSU in March 1980. In the same year the “Islamic Trend Movement”, the Ikhwān’s student organization controlled, except in Juba in the South, all student councils in Sudanese universities.

293 This view was held e.g. by Bona Malwal, Minister of Culture and Information and editor-in-chief of “Sudanow”.
295 Middle East, September 1979, pp. 71-72.
296 Köndgen (1992), pp. 35-36.
298 Kok claims that these draft laws were promulgated in 1983 with only small modifications. Kok (1989), p. 463. Other authors, however, deny al-Turābī’s influence on the September laws.
A deteriorating economy and rampant corruption

While the Muslim Brothers widened their influence within the regime and in the Sudanese civil society, the political but also the economic situation deteriorated further in the late seventies and early eighties. After an original phase of nationalizations, which lasted until 1971, Numairi had opened the Sudanese economy to foreign investments following the Egyptian model (*infitāḥ*). Studies of international organizations described the enormous agricultural potential of the Sudan which used only 50% of its water reserves and much of its arable land remained unused.\(^{300}\) With the help of international economic aid, which was resumed after the break with the SCP, and Arab oil money Sudan was to become not only an agricultural self-supporter but was to supply food to the entire Arab world (“bread basket strategy”). This, however, proved to be overly optimistic. Mismanagement misguided planning, an underdeveloped infrastructure, and widespread corruption led to the failure of this strategy.\(^{301}\) Concurrently, the Sudanese trade balance worsened rapidly. In order to finance its growing imports the Sudanese debt rose 1978-1983 from 3 bn to 8 bn $. To be able to service and pay off its mounting debts the Sudan subsequently had to reduce subsidies, which led to a 60% increase of the price of wheat. Concurrently, the Sudanese pound was devaluated twice (1978, 25%, 1981 11,1%). The economic situation of the country was further worsened by drought and the influx of some two million refugees from neighboring countries. In 1983 alone, around 640,000 refugees from Ethiopia, Uganda, and Chad entered the Sudan.\(^{302}\) The rampant corruption also eroded Numairi’s power base in the army. While the army had backed him against the Anšār’s attempted coup d’état and other attempted takeovers, leading officers were especially critical of Numairi’s brother in law, Bahā’ al-Dīn Idrīs, nicknamed “Mr.10%”. Numairi, however, was not prone to accept criticism and dismissed the army’s commander-in-chief Khalīl in August 1982 and transferred 22 generals to other locations. Numairi himself took over the command of the army and the Ministry of Defense.\(^{303}\)

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\(^{300}\) Köndgen (1992), p. 29.


Regarding his Southern policy, Numairi in 1979 began to dismantle gradually the 1972 Addis Ababa agreement, which had successfully ended the 17-year southern war of independence. The Addis Ababa agreement has been regarded by many as the most important achievement of the Numairi era. It recognized for the first time in Sudan’s post-independence history the pluralistic nature of Sudanese society, granted the South regional autonomy and “acknowledged that culture, race, religion and economics dictated a new approach to the internal structure of Sudan and to its constitution”. As noted above, the Addis Ababa agreement was hammered out without the participation of the sectarian parties and the Muslim Brotherhood. Kok stresses that many Southerners were well aware that the NIF, the Umma party and the DUP had been and continued to be against the agreement since it turned the South into one federal state constituting an important base of support for Numairi’s (still secular) regime. Therefore, in order to achieve their strategic goal of removing Numairi and Islamizing the state, and the legal system in particular, would only succeed with first weakening the self-governance of the South. It comes therefore as no surprise that al-Turābī, who was Sudan’s Attorney-General during this time, played a leading role in advising and supporting Numairi in his endeavor to dismantle gradually the Addis Ababa agreement. In 1979, Numairi suggested to the National Congress of the SSU a re-division of the South into three, instead of one, autonomous regions, each with its own regional parliament and government. This would have financially overburdened the South and clearly amounted to a dismantling of the “Southern Provinces Regional Self-government Act” of 1972. The regional governments would have been directly responsible to the president, thus effectively ending Southern Sudanese autonomy. A large majority of Southerners, however, opposed the changes and when in March 1981 the Southern Regional Assembly rejected the motion, Numairi dissolved it and installed an interim government in October 1981. A referendum, intended to decide the question of restructuring the South was cancelled in February 1982. An important factor contributing to the South’s readiness for a renewed military confrontation with the North was the striking neglect of the Southern economy by Numairi’s regime.

Government investment in the South promised under the Addis Ababa agreement had hardly materialized and hopes for oil revenues had been foiled. A rather modest 225 mio. $ investment, promised under the six-year plan 1977-1983, was reduced to a meager 45 mio. $ in real terms.\textsuperscript{308} Thus, in early 1983, the Sudan People’s Liberation Movement/ Sudan People’s Liberation Army (SPLM/SPLA) was founded, which, unlike its predecessor Anyanya I\textsuperscript{309}, did not aim at independence but strove to end the economic marginalization of the South, to end Numairi’s dictatorial regime and to conserve a united Sudan guaranteeing Christians and animists the same rights as their Muslim fellow citizens in the North. In late spring 1983 events escalated. In May two battalions in Bor (Upper Nile province) mutinied against their relocation to the North and 5 June Numairi decided to restructure the South by way of a presidential decree, despite strong southern resistance, which had even grown in the meantime. Thus, while the Southern rebels were clearly motivated by the threat of Northern political and economic dominance, the introduction of the \textit{sharīʿa} added yet another motive by fuelling a widespread fear of cultural domination. While Numairi tried to placate Southerners by stating that the rights of non-Muslims would be respected, news of amputations of several Southerners in Khartoum caused immediate outrage in the South and stimulated the rebellion that had started already earlier.\textsuperscript{310}

\textit{Sharīʿa as a last resort: Numairi Islamizes the legal system}

On the domestic front, the situation deteriorated further. In May 1983, Numairi had accused judges of corruption and ebriety and in June, after promising to “clean up” the judiciary, he dismissed 44 judges. In response, others resigned in protest and were promptly supported by other professional groups such as doctors, teachers, and lawyers. Numairi refused to compromise and the full-scale confrontation led to a complete paralysis of the judicial system between June and September 1983.\textsuperscript{311} Jacobs has pointed out that the Sudanese judiciary was one of the few official bodies not under Numairi’s direct control. The judiciary indeed took pride in being an independent professional elite safeguarding the constitution and opposing Numairi’s arbitrary rule.\textsuperscript{312} As shown already months before the promulgation of the

\textsuperscript{308} Köndgen (1992), p. 31.
\textsuperscript{309} Anyanya I fought for Southern independence 1955-1972.
\textsuperscript{310} Jacobs (1985), p. 208.
\textsuperscript{312} Jacobs (1985), p. 206.
September laws the confrontation between Numairi and the judiciary had escalated. Clearly, the dismissals, the Islamization of the legal system and the subsequent introduction of alternative courts were the successful attempt to effectively curtail the autonomy of a Westernized elite, which dared to oppose his high-handed rule. In July 1983, while the confrontation between the regime and the judiciary persisted, Numairi appointed a three-member committee to Islamize the Sudanese legislation. The delicate question of an Islamic constitution, however, was excluded from the agenda. Al-Turābī, whom Numairi wanted to keep away from the process, was ousted as Minister of Justice shortly before the committee began its deliberations. He was replaced as attorney general and appointed first to an advisory post as minister for legal affairs in the presidency. Less than four months later he became foreign affairs advisor in the presidency. The official pretext for shifting al-Turābī to this relatively unimportant post was to use al-Turābī’s language skills and western education to convince the international community of the importance of the legal reform. It is telling that Numairi himself visited Saudi Arabia, Egypt, Kenya, Italy, France, Britain and the US to gain support from the former and convince the others that the Sudan’s Islamization would not lead to an Iranian-style radicalization. The real reason of moving al-Turābī away from his „legal revolution“ was to prevent al-Turābī and the Muslim Brotherhood in general to be able to claim any credit for the regime’s Islamic legal revolution. Ironically, since the Muslim Brotherhood were still part of the government, Numairi’s attempt to disassociate the Muslim Brothers from the new Islamized codes was not entirely successful. There was a general impression that al-Turābī and the Brothers were still pulling the strings behind the scene. The committee charged with the Islamization of the Sudanese laws worked in secret and the only person informed about the ongoing work, apart from the president himself, was al-Rashīd al-Ṭāhir Bakr, the successor of al-Turābī as attorney general. The main reason for keeping the committee’s work secret seems to have been Numairi’s fear of international pressure. The small committee charged with Islamizing the PC83 consisted of al-Nayāl ’Abd al-Qādir Abū Qurūn, the son of a prominent Sufi master of the Qādiriyya brotherhood in Abū
Qurūn, ʿAwaḍ al-Jīd Aḥmad, a former legal assistant of the Attorney General Zakī Muṣṭafā and Badriyya Sulaimān, a province judge.\(^3^{19}\) Abū Qurūn and al-Jīd had earned a law degree at the juridical faculty of the University of Khartoum in the early 1970s.\(^3^{20}\) While the team was relatively junior for the task they were given all three had a legal background and at least two had practiced law for some years. Abū Qurūn, who was known as a singer, during his time as a student at the law faculty had developed into a self-styled religious leader who had made such an impression on president Numairi that he became not only his chief advisor on Islamic affairs but was also appointed Minister of Legal Affairs at the Presidency.\(^3^{21}\) It is important to note in this context that already since the early 1970s Numairi had been spiritually close to the Abū Qurūn Sufi order in general and with the father of Nayal Abū Qurūn, Shaikh Abū Qurūn in particular.\(^3^{22}\) The Abū Qurūn Sufi order believed in a “second coming” of a mahdi who would be a follower of the order. According to Zein al-Jīd claimed that most of the work of Islamizing the penal code was done by him. Neither al-Jīd nor Abū Qurūn seem to have undergone any specialized training with regard to the *fiqih*. His and Nayal Abū Qurūn’s specialization in the common law system would indeed explain the high degree of inconsistency with the *sharīʿa* of the PC83. However, while technical inconsistencies can be explained by their lack of expertise in the *fiqih*, the PC83 shows a general tendency of aggravating punishments and turning the PC83 into a tool of political oppression as a whole. It can be safely assumed that the drafting committee’s intentions in this respect closely followed Numairi’s and that, given Numairi’s rising political problems on the domestic front, the PC83 was meant to serve as a tool of oppression.\(^3^{23}\) In an interview Zein conducted with Abū Qurūn, the latter maintained that the authors were “aware of the shortcomings of the law from an Islamic point of view” and that they introduced a stipulation at the end of each law that confirmed the non-validity of any provision of the law that contradicts the *sharīʿa*.\(^3^{24}\) While it is certainly true that such a provision unmistakably confirms the sovereignty of the *sharīʿa*, Abū Qurūn did not give any convincing explanation why these shortcomings occurred in the first place.

\(^{319}\) Osman (1989), p. 266.
\(^{320}\) I could not find information on Sulaiman’s legal background.
\(^{322}\) Warburg (1990), p. 627.
\(^{323}\) For more details on how the Penal Code was used as a tool of oppression see below.
\(^{324}\) Zein (1989), pp. 247-248. In the PC83 this is article 458 (5).
In September 1983, the first new Islamist laws were enacted as presidential decrees. The Sudanese parliament ratified the ‘September laws’ without further discussion in November 1983. The most important of these statutes were: the Civil Procedure Act (1983), the Civil Transactions Act (1984), the Penal Code (1983), the Criminal Procedure Act (1983), the Evidence Act (1983), the Judgements Acts (1983), the Propagation of Virtue and the Prevention of Vice Act (1983), and the Zakat Act (1984). It is worth noting that all of the more significant laws enacted before the downfall of Numairi in 1985 were initiated by the Sudanese president himself, who was, without any doubt, the driving force of the Islamization process. Durán overstates the responsibility and role of al-Jîd and Abû Qurûn when he writes “...these two jurists bear the full responsibility for the amputations and other brutalities carried out in the name of sharî’a from September 1983 to March 1985” and “Whereas al-Turâbî was the executioner of Numairi’s “Islamization”, its architect was Abû Qurûn. They certainly carried out the technical drafting of the new laws and badly enough for that matter. No doubt, they bear responsibility for the quality of the work they delivered. The political responsibility for the whole experiment lies, however, with president Numairi alone. He chose jurists for the committee, which apparently had little or no training in sharî’a matters, charged them with a task that would have taken even more experienced jurists much more time and then ensured that these badly drafted laws were applied with utmost rigor.

Churned out in very much the same fashion as the Egyptianized legislation of the early seventies, numerous provisions of the September laws were in conflict with traditional Islamic jurisprudence (fiqh). For instance, the Evidence Act required the testimony of four adult men to establish unlawful sexual intercourse (zinâ), but it was in contradiction to the fiqh in allowing that “when it is necessary, the testimony of others may be taken.” The 1983 Penal Code drew heavily on its 1974 predecessor, punishments such as flogging, fines or prison no longer corresponded to the gravity of the offence. As to hadd punishments, the 1983 Penal Code eclectically took its inspiration from different schools so as to aggravate possible punishments. Simultaneously, the use of ‘legal uncertainties’ (shubha), used in the fiqh to restrict the execution of hadd punishments, was rather limited. In combination with the

326 According to The Permanent Constitution of the Sudan (1973), article 155: “The President of the Republic or the Prime Minister or any Minister or member of the Assembly may present any Bill to the People’s Assembly”.
admission of witnesses not approved by the fiqh, the application of hadd punishments was thereby facilitated considerably. Further, the new Penal Code introduced hadd-punishments for (ta’zīr-) crimes that would not have been considered hadd-crimes in the fiqh. Finally, by adding more severe punishments for political offences, the new penal code provided a suitable instrument for the oppression of political opposition.

Reactions to the new laws

When the September laws were publicly announced on 8 September, the whole of Sudan, including the Muslim Brotherhood, was taken by complete surprise. Interestingly, apart from the official announcement which prohibited alcohol and established the hadd-punishments for theft, highway robbery and unlawful sexual intercourse the new, Islamized Penal Code was not made available to the Sudan’s courts for several weeks and the first public amputation of a hand did not take place before December 10. In the meantime, Numairi tried to make full use of the momentum the September 8 announcement had created and tried, through speeches in parliament and spectacular maneuvers, to present himself as an Islamic revolutionary. Thus, on September 24 alcoholic beverages with an estimated value of 11 million $ were destroyed in the streets or poured into the Nile. End of September 13000 prisoners were released to “give them a second chance under Islamic law.” That application of the ṣharī’a was not just a political slogan became clear when two young convicted car thieves had their rights hands severed in front of 3000 cheering spectators.

After intensive discussions, al-Turābī and the Brotherhood decided to back Numairi, despite some reservations and the exclusion of al-Turābī from the process of codification. As Abdelwahab Osman has aptly put it: during their entire existence as a movement the Muslim Brotherhood had been campaigning for the application of the ṣharī’a and there, “out of the blue” it was. “The elation within the movement was indescribable.” In his earlier writings, al-Turābī had advocated a rather modernist approach towards the ṣharī’a, which indeed is very different from what the September laws represents. For al-Turābī the fiqh represents the

329 The 1983 Penal Code stipulated hadd punishments for crimes similar to hadd offences, but not covered by traditional definitions (Köndgen (1992), pp. 42-44.
330 See juridical chapters below.
334 Osman (1989), p. 267
forefathers` quest for an understanding of religious truth. Since their endeavors can only be understood in their historical context al-Turābī argued against a blind imitation of the traditional Muslim jurists (fuqahā) and for an adaptation of Islamic law to the needs of today. He argued in favor of maximum freedom for those who want to contribute to the renewal of Islamic law, as long as their deliberations are based on basic Islamic principles. Al-Turābī himself has acted as a mujtahid and found new and unorthodox solutions for specific problems of Islamic criminal law. He tried thus to prove, with the help of Qur`anic verses, that the stoning of the zāniyya is not obligatory and that the death penalty for the apostate is only compulsory if he actively waged war against the Muslims. This reformist approach tellingly did not find its way into the Criminal Bill 1988 and its copycat successor, the Criminal Act 1991, which were both al-Turābī`s brainchildren. However, different al-Turābī`s theoretical approach to the development of the fiqh might have been, as the last remaining allies of a discredited regime, the Muslim Brotherhood themselves had come under pressure, not only by external critics but also through criticism from within the movement. The sudden introduction of the sharī`a retrospectively vindicated their close cooperation with the regime.

Internal discussions and questions concerning Numairi`s motives were cut short, “what mattered was that the Islamic laws were in place and that a new atmosphere had been created which the movement must exploit to the full.” An important motive for the NIF to back Numairi`s legal Islamization policy was that they profited immensely from new rules for Islamic banking. Already since the early 1970s, the Brotherhood had gradually gained control of the Islamic banking system. Initially this was realized through their connections in Saudi Arabia and, subsequently, through their privileged position as allies of president Numairi. In the early 1980s, the NIF managed to take over all important management positions of the Faysal Islamic Bank of Sudan. The majority of shares of the Tadamon Islamic Bank were equally in the hands of members of the NIF. Given their prominent role in Islamic banking, the NIF further benefited when in 1983 and 1984 the Civil Procedure Act, the Civil

Transaction Act, and circulars from the Bank of Sudan gradually abolished interest-based bank lending.341

While receiving some popular support from “the rural masses and outside the intelligentsia circles generally”342, the September laws were nevertheless rejected by many Sudanese. In the South, demonstrators protested against their second-class status within the new shari´a system. Not surprisingly, the Sudan Council of Churches also rejected the presidential decrees. In the North, a broad alliance of secular parties, labor unions, and liberal Muslims denounced the new laws as un-Islamic, misogynous, generally repressive, and destructive to the unity of the country. As mentioned above, Islamization in general but especially the new penal code was a major factor accelerating and aggravating the still infant war in the South. Now, even in Equatoria, where Numairi´s administrative restructuring had initially been supported, resistance against the central government grew. Theoretically, the new laws were designed to have been administered in the South as well. However, when in spring 1984 the authorities tried to establish a shari´a court in Juba, this plan had to be cancelled due to strong local resistance. Southerners living in the North, however, were subjected to floggings and amputations.343

Ṣâdiq al-Mahdî became an early and outspoken critic of Numairi´s version of shari´a when he gave a critical speech in the mosque of the Anṣār in Omdurman on September 17, 1983. In his sermon he stated “To cut the hand of a thief in a society based on tyranny and discrimination is like throwing a man into the water, with his hands tied, and saying to him: beware of wetting yourself...”.344 Ṣâdiq al-Mahdî has explained his views with regard to an Islamic legal system in two books.345 According to him, the works of the fuqahā´ can only be understood in their historical context. It is important not to confuse the notion of shari´a with the fiqh. The former encompasses the latter and in the fiqh the mujtahid only grasps one aspect of the fiqh which corresponds with his time. Ṣâdiq reproaches especially the Islamists to constantly and unduly merging the two notions “par besoin d´authenticité”.346 Thus, since the traditional fiqh

345 I follow here Bleuchot (1991), Islam, droit pénal et politique. Bleuchot analyzed two of Ṣâdiq´s books. One, “yas´ al-lūnaka´ an al-mahdiyya” was published before the September laws in Beirut in 1975 and the second, “al-uqūbāt al-shar´iyya wa mawajjūfah min al-nizām al-ijtimā´ī al-islāmī was published in 1987 in Cairo, i.e. after the September laws.
is only one possible interpretation of the sharī‘a, a modern interpretation must be different and some of the (more prominent) features of the historical fiqh are incompatible with the requirements of the modern time, including the status of the dhimmī, slavery, the (inferior) status of women, the doctrine of the caliphate, the law against rebellion, as well as the status of the apostate and the stranger (ḥarbi). In all of these matters the solutions that can be found in the fiqh are either too harsh, contrary to the principle of equality (e.g. dhimmī, women, the slave), or not realistic (the caliphate) or dangerous for the freedom of the opposition (law on rebellion) or contrary to the principle of reciprocity and tolerance (apostasy and strangers).³⁴⁷

As to the ḥudūd, Ṣādiq stresses the necessity to apply the fiqh-based principles that avoid ḥadd-punishments such as repentance and legal uncertainties (shubuhāt). According to Ṣādiq al-Mahdī the introduction of Islamic penal law depends on the realization of social justice in a society, where faith and the adherence to the prescribed religious duties by the believers are a living practice. When the whole of society lives in harmony with Islam and complete social justice has been achieved, crimes committed out of poverty and destitution will disappear. When the September laws where introduced, the great majority of the Sudanese society lived neither in harmony with the teachings of Islam nor was social justice achieved. Both factors considerably contributed to the exaggerations of the experiment. Islamic penal law is, according to Ṣādiq not thinkable without an independent and neutral judiciary, which has to be controlled by a Supreme Court. Non-Muslims and women would be admitted to work in such a system. Special courts or emergency courts, and this is certainly a conclusion he has drawn from Numairi’s experiment, should not have a place in an Islamic judicial system. Interestingly Ṣādiq criticizes the legitimacy of the existence of lawyers who he sees as businessmen working on behalf of the rich. Ṣādiq al-Mahdī was arrested 25 September 1983, one day after the new laws had come into force. He stayed in prison until the end of the Numairi era in April 1985. We shall discuss below whether Ṣādiq al-Mahdī’s reformist approach as to the sharī‘a had any bearing on his position and political decisions when, as prime minister between 1986-1989, he was in a position to either abolish Numairi’s version of the sharī‘a or replace it with a reformist code according to the principles explained above.

As to the Anṣār’s rival Sufi brotherhood, the Khatmiyya, it had, thus different from the Anṣār, traditionally shunned an active role in Sudanese politics. This approach had continued under

Numairi and its leader Muḥammad Uthmān al-Mīrghānī, who was also head of the Sufi Islamic Revival Committee, fully backed the September laws. However, after Numairi’s downfall, he changed his mind and now judged the codification and application of the shari‘a 1983-1985 as false, misleading and unjust. He voiced his hopes, though, that with the help of trained ʿulamāʾ and fiqhāʾ the flaws of Numairi’s legislation could be redressed.348 One of the most outspoken critics of the introduction of the shariʿa was Maḥmūd Muḥammad Ṭāhā, spiritual leader of the reformist ‘Republican Brothers’. During a prison term in 1946-1948, Ṭāhā had developed his own legal theory, propagating a liberal version of the shariʿa, adapted to the needs of modern society. Based on his teachings,349 the Republican Brothers, who had never participated in elections as a political party, called for a democratic state with equal rights for Muslims and non-Muslims and for both men and women. When Numairi banned political parties after his May 1969 coup Ṭāhā had already transformed his party into a movement called the “Republican Brothers” which did not oppose Numairi. As a result they were spared and continued to exist. Quite to the contrary, the Republican Brothers were during the first eight years of Numairi’s rule among his closest allies350 or, according to other observers, at least showed passive consent351 to his anti-sectarian and, later, anti-Communist agenda as well as in his endeavors to seek a formula which would guarantee a lasting compromise with the South. Indeed, the jumhūrīyān had called for a federal solution for the South since 1951.352 When Numairi opted for reconciliation with the Umma party and the Muslim Brothers the alliance between the Republican Brothers and Numairi ended. As Warburg points out, both regarded the teachings of Ṭāhā as amounting to heresy.353 Being a rather small movement the Republican Brothers avoided, however, an outright confrontation with Numairi and chose instead to work and publish against the Muslim Brotherhood and al-Tūrābī. In the long run, the confrontation with the regime was, however, unavoidable, if only because the Republican Brothers had not concealed that they were strongly opposed to the introduction of the shariʿa in its rigorous form. When the movement criticized the incumbent head of the Sudanese State Security and Vice-President General ʿUmar al-Ṭayyīb over the

348 Warburg (1990), p. 635.
349 His two most important books are “ṭariq Muḥammad” (The Path of Muhammad) and “al-risāla al-thānīyya min al-İslām” (The Second Message of Islam).
351 Rogalski describes the position of the Republican Brothers as “passives Einverständnis”, i.e. passive consent (with Numairi’s political course). Rogalski (1990), p. 39 et sqq.
case of the radical Egyptian preacher Shaikh al-Muqit\textsuperscript{i},\textsuperscript{354} T\=ah\=a and 50 of his followers were arrested in June 1983 and remained in prison until December 1984 without charges or even an interrogation. Already in March 1984, with their leadership still in prison, the Republican Brothers had started a campaign against the September laws, publishing a booklet and leaflets, criticizing Numairi’s version of the shari’a on grounds of its inherent contradictions with the traditional shari’a and its violation of the Sudanese constitution.\textsuperscript{355} When leaving prison in December 1984 they immediately published another leaflet which strongly criticized the September laws and demanded their repeal: ”The September laws have distorted Islam in the eyes of intelligent members of our people and in the eyes of the world...These laws violate Shari’a (Islamic law) and violate religion itself.... We call for the repeal of the September 1983 laws because they distort Islam, humiliate the People and jeopardize national unity...”\textsuperscript{356}

For his uncompromising opposition he would have to pay with his life in 1985 when he was executed for alleged apostasy.\textsuperscript{357} Interestingly, Numairi’s two major allies in the Arab Middle East, Saudi-Arabia and Egypt did not support the new laws. Saudi Arabia agreed in principle but criticized the methodology of the codification as well as the speed with which it had been realized. President Mubarak of Egypt was interested in a peaceful settlement of the conflict with the South because the Jonglei canal project in the South had great importance for Egypt’s agriculture.\textsuperscript{358} The Secretary General of the Saudi-financed Muslim World League in Mekka, ’Abdallah ’Umar Na’\=if, sent a telegram to Numairi to congratulate him on the introduction of the shari’a and defended its introduction in the League’s publications.\textsuperscript{359} The Grand Shaikh of Al-Azhar J\=a\=d

\textsuperscript{353} Warburg (2003), p. 162.
\textsuperscript{354} Shaikh al-Muqit\textsuperscript{i}, who was held partially responsible for violent clashes between Muslims and Christians in Cairo in 1981 continued his anti-Christian preachings in Khartoum in the Kobar mosque and even on Sudanese television. He also called for the immediate arrest of the Republican Brothers. Warburg (1990), p. 163 and Rogalski (1990), pp. 42-43.
\textsuperscript{355} An-Na\=im (1986), The Islamic Law of Apostasy, p. 205.
\textsuperscript{356} Quoted by Rogalski (1990), pp. 44-45.
\textsuperscript{357} On the juridical aspects of the T\=ah\=a case see An-Na‘im (1986). On T\=ah\=a and his weltanschauung see e.g. Rogalski (1990), pp. 59-121 and (1996). A more recent analysis of T\=ah\=a’s ideas is Mahmoud, Mohamed A.: Quest for Divinity: A Critical Examination of the Thought of Mahmud Muhammad Taha. Syracuse University Press 2006. On the death sentence for T\=ah\=a and the legal problems involved, see O’Sullivan (2001). Warburg also gives a concise summary of the background of the T\=ah\=a case. See Warburg (2003), pp. 160-165.
\textsuperscript{358} Köndgen (1992), p. 48.
\textsuperscript{359} Schulze (1990), p. 381.
al-Ḥaqq supported Numairi’s new Islamic laws but criticized that al-Azhar had not been consulted for its expertise when the text of the legislation was drafted.\textsuperscript{360} Given the mixed reactions after the introduction of the shariʿa cooperation in actual implementation of the new laws was slow and met with resistance in the first phase before the declaration of the state of emergency. Neither the judiciary nor the bureaucracy in general did much more than paying lip service and resistance to the new laws seems to have come even from the People’s Assembly.\textsuperscript{361}

*Emergency courts implement the shariʿa*

In April 1984, the deteriorating economic situation led to a wave of strikes, including by the judiciary. The judges voiced grievances directly connected with the September laws. In order to be able to continue within the new system, some of the most prominent judges saw themselves forced to undergo further training, while others were summarily discharged.\textsuperscript{362} To cope with the crisis, on 29 April 1984 Numairi declared a state of emergency, which he would use in the remaining year of his rule before his downfall to quell any resistance against his regime in general and against the shariʿa in particular. For this purpose, a competing body of emergency courts, which were changed to “Courts of Instantaneous Justice” after three months, was created in Khartoum. In order to speed up and smoothen shariʿa application Numairi made sure that the new courts were staffed with members or sympathizers of the Muslim Brotherhood or other supporters of his legal revolution. While the regular courts had to deal with pending cases, the emergency courts had jurisdiction over all new court cases, thus over all cases to be judged in accordance with the September laws. Each emergency court consisted of three members, one civilian and two military or security officers. The military of security officers who acted as judges in these emergency courts often had no legal training, and neither them nor the great majority of the civilians in the emergency courts had any training in shariʿa law.\textsuperscript{363} Furthermore, Numairi made the presidents of the new courts accountable to him, thus disempowering the Chief Justice and taking formal control of an important part of the judiciary. Osman has given a very vivid account how these new parallel courts, due to the strong influence of Muslim Brothers and their sympathizers, strongly

\textsuperscript{360} Köndgen (1992), pp. 48-49.
\textsuperscript{361} Osman (1989), p. 269.
influenced how the *sharīʿa* was applied and how their fervor led to growing tensions with the old secular guard of the regime and ultimately with Numairi himself. Osman relates that the Brotherhood judges ensured that “ministers and other high officials were routinely dragged in front of the new all-powerful courts to testify and face charges.” According to his version of events, “when it entailed the humiliation of top officials”, the application of the *sharīʿa* received a lot of public support, also because the crime rate in the capital dropped sharply. Osman’s version does not, however, take into account that trials against high-ranking officials or even personalities close to the regime were only one side of the matter. While the public discussion in the media of these cases might have generated some public support for *sharīʿa* application based on a perception of fairness and balance, the flip side of the coin was, however, a rather bloody affair, marked by executions, amputations and floggings. Apart from that, *sharīʿa* application, as Kok has correctly pointed out, was also marked by a strong class bias. Thus, the former Minister for Presidential Affairs, Baha al-Dīn, was rather mildly punished with a fine and a prison term for the embezzlement of 1,180,139$. In contrast, the jobless Siddīq Ramaḍān al-Mahdī was sentenced to cross-amputation for stealing electric wire worth less than 20$ because his theft was considered to be a *hadd*-theft. According to Kok’s evaluation over 98% of the 93 victims of amputation sentences came from poor and marginalized parts of the Sudan and all except one were workers, car washers, domestic servants, unemployed, workers at building sites etc. During the first three months of the functioning of the emergency courts, the defendants were denied the right to appeal against these often harsh, and once carried out, irreversible decisions. The only exceptions were decisions involving the death penalty, which had to be approved by the president. However, when, after three months, the right to appeal was finally reintroduced, the court of appeal in Khartoum was staffed with “the most notorious pro-government judges who had appeared during the experiment”, among them al-Mukāshfī Tāḥā al-Kabbāshī, who in 1986 published in Cairo a personal account and justification of his role as a judge in Numairi’s parallel

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365 Osman does not disclose his sources regarding the alleged dropping of the crime rate. Other authors have been unable to corroborate this argument which was also used by the regime.
367 It is not entirely clear during which time span these amputations took place. He probably refers to the time between December 1983, when the first amputation took place, and April 1985 when Numairi was ousted.
Apart from the fact that the judges of the Court of Appeal were handpicked in order to secure that the new machinery worked smoothly, the three Court of Appeal judges did not give up the seats they held in lower courts. This stood in clear contradiction to article 245 of the Criminal Procedure Act 1983 and meant in practice that defendants would appear in some cases twice before the same judges. In summary, neither the judges nor the legal structures established by Numairi had the quality necessary for a competent implementation of the September laws, which were marked by many incoherences and contradictions with the *fiqh*.

The Muslim Brotherhood in this phase received a “major political and psychological boost” through their role in the emergency courts/courts of instantaneous justice. According to Osman, who generally writes from a pro-Ikhwan perspective, “the general atmosphere favored the Islamists”, Sufi leaders started supporting the *shari‘a* and even left-wing intellectuals announced their “conversion to the path of Islam”.\(^{369}\) That “the language Ikhwan kept speaking in relative solitude (turned) into the language of the majority”\(^{370}\), seems to be doubtful considering the reactions to the introduction of the *shari‘a* described above, especially from the Anṣār and the Khatmiyya. However, growing popular support seems to have emboldened hard-line judges such as the mentioned al-Kabbāshī to defy more and more openly the regime, including the president himself. Al-Kabbāshī e.g. clashed with al-Rashīd al-Ṭāhir, al-Turābī’s successor as Attorney General, when al-Ṭāhir tried to protect some leading SSU figures against charges of corruption. In another case the brother of the First Vice-President ‘Umar Muḥammad al-Tayyib was imprisoned for corruption and his property was confiscated.\(^{371}\) In summary, these and a number of similar cases brought the Muslim Brotherhood and the old guard of the SSU in direct confrontation on the one hand and created a public image of the Muslim Brotherhood as the main driving force behind the implementation of the *shari‘a*. In consequence, this would lead to Numairi’s crackdown against his former allies. He could neither allow the Brotherhood to take center stage as the champions of Islamization, nor could they be allowed to openly challenge his authority or alienate him from the leading old guard of the SSU. Thus, the emergency courts, subsequently renamed courts of instantaneous justice, became a parallel court system, which was clearly

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\(^{368}\) See bibliography, Kabbāshī (1986). The two others of the three-member bench were Fuād al-Amīn ‘Abd al-Raḥmān and Ahmad Mahjūb.


\(^{370}\) Osman (1989), p. 270

preferred by president Numairi as an efficient tool for the speedy and unquestioned implementation of the *sharī’a*. Their decisions were reported on a daily basis in the state-owned media, while the same media (state TV, radio, and press) suggested that the (traditional) judiciary was “less interested in implementing Shari’ā, and even incapable of doing so.”

Being sidelined in this crude manner, the traditional judiciary had to find its role and it was clear that there was no other option but to play along the new rules. Under Chief Justice Daf’allah al-Hājj Yusuf, the judiciary steered a conservative course, which stood in contrast to the radical approach of the emergency courts. Thus, Yusuf issued a large number of criminal circulars, most of them still applicable today, in order to clarify the many gaps and unclarities of the new legislation and at the same time in order to streamline *sharī’a* application, give clear guidance to the judges bound to apply it, ensure the rule of law and protect citizen’s rights. During my interview with Yusuf, the former Chief Justice confirmed his critical stance towards Numairi’s political interference in judicial matters. He insisted that his main achievement during his tenure had been the body of criminal circulars, which were instrumental in creating a clear framework for *sharī’a* application. He also issued a circular explaining the trial of civil cases in the emergency courts. However, since the new courts were under the direct supervision of Numairi himself, attempts to supervise these courts and keep them within the judiciary had only limited effect. It should be noted that Yusuf, while being critical of the emergency courts and their judicial practice, did, nevertheless, not resign until he was replaced in September 1984.

**The failed introduction of an Islamic constitution**

Already in June 1984 Numairi had suggested a long list of constitutional amendments to the People’s Assembly. The Islamization of the legal system under a secular constitution had led to a number of laws becoming unconstitutional. However, with the Supreme Court increasingly filled with supporters of the September laws, no judicial review of such laws took ever place. Now Numairi suggested the Islamization of the constitution to bring it into line with the *sharī’a*-based legislation and, above all, his political interests. Islamic terminology was to replace the secular wording of the 1973 constitution. While the president

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373 Interview with Daf’allah al-Hājj Yusuf, 18.5.2009.
would have become a leader of the faithful (qāʾid al-muʿminīn) for life, the parliament was to mutate into a consultative council (majlis al-shūrā), swearing an oath of allegiance (baiʿā) to whoever the leader of the faithful determined to be his successor. Thus, the president would not have been accountable to parliament, but the new consultative council would have owed their allegiance to him. According to the suggested reforms, Article 1 now declared the sharīʿa to be the sole source of legislation, in contrast to its equal footing to customary law as per the 1973 constitution. The South was to lose its autonomy; all reference to the ‘Southern Provinces Regional self-government Act’ of 1972 had been dropped. Not surprisingly, Numairi’s draft of constitutional amendments met fierce resistance from the national parliament as well as regional parliaments in the South. The September laws had been approved by the parliament in order to avoid its dissolution and, to be sure, due to some genuine sympathy for Islamization of the legal system. Accepting Numairi’s constitutional amendments, however, would have amounted to a near total (self)-disempowerment of parliament. Once Numairi had realized that despite some suggestions for corrections parliament was not to be subdued, he adjourned the discussion.375

Islamic legislation as a tool of political oppression: the execution of Țăhă and other cases
Probably the most blatant abuse of the implementation of Numairi’s version of the sharīʿa was the trial and subsequent execution of Maḥmūd Muḥammad Țăhă.376 In 1984, the Republican Brothers launched a campaign against the September laws, criticizing their unconstitutionality and multiple points of contradictions with the fiqh. Moreover, three constitutional suits were deposited on the grounds that the new laws discriminated against women and non-Muslims and violate certain provisions of the constitution. With the justification that the Republican Brothers were not aggrieved by the September laws all these suits were dismissed. Numairi would not tolerate any further criticism of his sharīʿa: after the Republican Brothers published the leaflet quoted above, the 76-year old Țăhă was arrested again 5 December, and sentenced to death 8 December together with four of his followers after two brief sessions that lasted less than one hour. The sentence was confirmed by the Criminal Court of Appeal and Țăhă was hanged for apostasy on 18 January 1985. The four disciples convicted with him had been

initially given one month to repent, which was reduced to three days by Numairi himself. They repented and their lives were spared. Ţāhā was not given a chance to recant because “he had persisted in advocating his heretical views for many years and refused to heed judicial and other pronouncements”.

His property was to be confiscated and he was denied a proper Muslim burial. Not surprisingly, the notoriously hard-line judge al-Kabbāshī, as a member of the Criminal Court of Appeal, played a pivotal role in the conviction of Ţāhā as well. The indictment was initially construed as offences against the state, there was no mentioning of apostasy. Subsequently, after the president had agreed to the trial, Article 458(3) of the Penal Code and article 3 of the Judgments Basic Rules Act were added by the State Minister for Criminal Affairs. Article 458(3) stipulated that even uncodified hadd-offences could be punished. During the appellate proceedings Ţāhā and his four co-defendants, in addition to the state security offences of the trial, were sentenced for apostasy, based on the 1968, juridically irrelevant, decision of a shari‘a court, which, at the time, had not had jurisdiction in cases of apostasy. The Criminal Court of Appeal further quoted al-Azhar University and the Muslim World League who both had declared Ţāhā to be an apostate. The Muslim World League had called upon Numairi to indict Ţāhā for heresy and for being the Antichrist (dajjāl).

Apart from the highly flawed underpinnings of the judgment, the sentence contravened Article 247 of the Criminal Procedure Act exempting persons over 70 years of age from the death penalty. The Criminal Court of Appeal had dismissed this provision, arguing that it was not applicable in hadd-cases, despite the absence of such a provision in the Criminal Procedure Act 1983. It also violated article 70 of the 1973 Permanent Constitution of the Sudan which clearly states that no penalty can be imposed in the absence of a pre-existing penal provision. In 1986, posthumously, the death sentence for Ţāhā was eventually declared to be null and void. The execution, highly controversial in the Sudan and strongly criticized in the Western press, was only one more step toward the downfall of the Numairi regime. In summary, one cannot but agree with An-Na‘im who correctly came to the conclusion that Ţāhā “was sacrificed in the cause of maintaining President Nimeiri´s personal

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376 If not stated otherwise I follow An-Na‘im (1986), The Islamic Law of Apostasy.
379 For a detailed account of the Muslim World League’s position on Ţāhā see Schulze (1990), pp. 377-386.
drive for Islamization... (Ţāhā) was killed in order to frighten others who might have been contemplating criticism or opposition to Nimeiri’s policies in general, and his Islamization policy in particular”.

Less international media attention was generated by the case of the Indian businessman Lalitt Ratnalal Shāh and his fellow defendants which, similar to Ţāhā’s case, is a striking example of how the new shari‘a laws were abused for political ends. Shāh had been charged of ribā (usury) and “destruction of the national economy” (art. 98 of the PC83) in a court of first instance led by Mukāshifī al-Kabbāshi. Because of contradicting statements of expert witnesses, the charges according article 98 were dropped and Shāh was sentenced to ten years imprisonment and ninety lashes for dealing in foreign currency without a license. However, since this included ribā / interest, and ribā, just like ridda (apostasy) in the case of Ţāhā, had not been codified the court had to rely on article 3 of the Judgments Basic Rules Act which made a decision based on Qur‘an and Sunna possible even if there existed no legislative text. Article 3, however, was in contradiction with the Sudan’s 1973 constitution, which clearly stipulated that no punishment could be imposed without a pre-existing definition of the crime in question in the Penal Code. While this was not the case, the Supreme Court panel judging on the constitutionality of the trial court’s decision dismissed Shāh’s constitutional complaint, because, according to the panel, article 3 of the Judgment’s Basic Rules Act did not violate article 70 of the 1973 Constitution. In fact, this decision meant that the shari‘a replaced the constitution as the highest source of law. While before the “legislative revolution” the secular 1973 Permanent Constitution was the supreme source of law, it played this role after Islamization, at least under Numairi’s rule, only if there was no contradiction with the shari‘a. Apart from the constitutional aspect, which the panel solved by simply not admitting the constitutional conflict, the case has several other aspects. It showed the low level of the legal reasoning of key legal actors and at the same time it exposed that the legal structures of the new courts had moved far away from the sound legal principles guaranteed under the Permanent Constitution of 1973. In this particular case, this was demonstrated by the fact that al-Kabbāshi had had a leading role in all three stages of the lawsuit. He was the trial judge, responsible for the initial sentence, he was the head of the Criminal Court of Appeal that

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confirmed the initial judgement, and in addition, he was a member of the panel of the Supreme Court that dismissed Shâh’s constitutional complaint. While al-Kabbâshî’s ubiquity made the case a travesty of justice, it also had an important political background. The case had clearly demonstrated the contradiction between Islamic principles (prohibition of *ribā* / interests / usury) and the Sudanese banking system based on interests. In consequence and also in furtherance of their economic interests, the Criminal Court of Appeal called upon the government to abolish interest taking of Sudanese banks. The abolition of bank interests after Shâh’s trial clearly demonstrated the power of the new courts with the Muslim Brotherhood being the main driving force on the one hand and the main beneficiaries on the other, through Islamic Banking already dominated by them.

While the above cases illustrate the malfunctioning of the emergency courts/courts of instantaneous justice and their political instrumentalization by the Muslim Brotherhood, at times Numairi also interfered directly. In a case, where seven defendants had stolen 12000 meters of high-voltage wire Numairi specified the crime and the punishment in a public speech before the case had been tried in a court. The case was subsequently transferred to Court no. 5 in Khartoum, which was headed by a judge who was happy to confirm Numairi’s “sound judgment” and follow it. The same judge, ‘Abd al-Raḥmān, was appointed Chief Justice not much later.\(^\text{384}\)

*The regime falls apart*

In September 1984, on the first anniversary of the September laws, the Muslim Brotherhood organized, as a show of force, an International Islamic Conference in combination with a mass demonstration, Osman speaks of a million participants\(^\text{385}\) in the demonstration marking the first anniversary of the introduction of the *shari‘a*, in order to drive home the message of the Ikhwān’s force. Osman describes both events as a decisive turning point in the relationship between Numairi and the Brotherhood. Despite the “national reconciliation” policy their relationship had never been easygoing and rather marked by mutual distrust. Numairi clearly was aware that the Ikhwān posed a potential threat to his regime, a suspicion that was reinforced by domestic and foreign secret service reports on the Brotherhood’s

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\(^{384}\) On this case see Zein (1989), pp. 214-215.

\(^{385}\) The real numbers are probably substantially lower. Nevertheless, it seems to have been an impressive show of force.
clandestine activities and contacts and also leaked strategy papers. In addition, leading members of the SSU in Khartoum but also powerful regime representatives on the regional level repeatedly clashed with the Muslim Brotherhood over corruption, food speculation, and other affairs.\(^{386}\) There were also other groups which were wary of and sought to curb the Brotherhood’s influence such as businessmen who had lost ground due to the ever expanding economic activities of the Ikwān, the security chief and First Vice President ‘Umar Muhammad al-Tayyib who was close to the United States and then finally the US and Egypt which both were discontent with the Muslim Brotherhood’s influence but also with Numairi’s handling of the _shari`a_ application. Numairi first countered the Brotherhood’s influence in the streets, by restoring adversaries of the Brotherhood, who had fallen from grace with him, back to high positions. Whether or not Numairi had planned a harsh crackdown on the Ikhwān or whether it was indeed the result of US and Egyptian pressure, as Osman claims\(^{387}\), in spring 1985 all Muslim Brothers were dismissed from their government and SSU positions. Al-Turābī and 200 Muslim Brothers were imprisoned March 9, among them the president of the People’s Assembly and al-Kabbāshi. As an important representative of the old regime, al-Kabbāshi stayed in prison even after the release of prisoners after Numairi’s fall. For the Muslim Brothers, this last-minute wave of arrests came as a blessing in disguise. Instead of being drawn into the abyss, the Muslim Brothers could now portray themselves as victims of the very regime they had helped to stabilize for so long. When at the end of March 1985 Numairi abolished the subsidies for bread and fuel, political parties, labor unions, and professional associations formed a broad coalition demanding his resignation. Numairi, with few allies left, underestimated the imminent threat to his rule and flew to the U.S. for talks with U.S. president Ronald Reagan. In his absence, bread riots broke out, which escalated to a general strike. On 6 April, while Numairi was already on his way back from the U.S., the Sudanese military assumed power.

2.7  **Procrastination under Siwār al-Dhahab and Šādiq al-Mahdī (1985-1989)**

_Frozen_ shari’a under Siwār al-Dhahab

The new Transitional Military Council (TMC) under Siwār al-Dhahab (April 1985-April 1986) abrogated the 1973 constitution, abolished Numairi’s singular political party, the Sudan

\(^{386}\) For details see Osman (1989), pp. 276-277.
\(^{387}\) Osman (1989), p. 278.
Socialist Union (SSU), and reinstated the ‘transitional’ constitution of 1956, thus guaranteeing religious freedom, political pluralism, and separation of powers once again. The food subsidies were restored. The execution of *hadd* punishments was suspended as far as amputations were concerned, but floggings were still administered. Those convicted under the September laws stayed in prison, joined by others likewise sentenced to single or cross-amputation.\(^{388}\) General Siwār al-Dhahab declared that the future of the *shari‘a* would not be decided by the TMC but would be a task for the government taking over after the end of the one-year transition period. The political forces rejecting the September laws proved too weak to have a decisive influence on its abolition during the one-year reign of the TMC. Moreover, key ministers in the new cabinet, such as the Prime Minister al-Jizūlī Daf‘allah, were either Muslim Brothers or sympathetic to their cause. In fact, the new rulers had liberated Ḥasan al-Tūrābī and other Muslim Brotherhood leaders immediately after the coup and al-Tūrābī was the first political leader to meet al-Dhahab. In this meeting al-Tūrābī expressed his full support for *shari‘a* application with the only reservation that it had not been all-embracing enough since constitutional law, especially the *shūrā* principle had been omitted.\(^{389}\) When the National Gathering for the Salvation of the Homeland (NGSH), a front of the old sectarian parties and several trade unions and professional associations called for the isolation of the Brotherhood, this was refused by the TMC. Al-Tūrābī, directly after his release did not lose time in organizing a demonstration demanding the retention of the *shari‘a*. Using the newly attained political freedoms – more than forty political parties had been founded or resurrected after the TMC takeover – al-Tūrābī established the National Islamic Front (NIF), an alliance of Muslim Brothers, Sufis, tribal leaders, *‘ulamā’*, and former military officers. In May 1985 the NIF presented its program on the question of Southern Sudan. It called for a fast Islamization of the South and portrayed itself as hard-core defender of the *shari‘a* in their political program, claiming that Islamic law also best protected the culture and identity of non-Muslims. The *shari‘a*, the NIF claimed, is “closer than any other legal system to the African cultural heritage, and because it protects the entity and the culture of the non-Muslims, it should be maintained as the law of Sudan”.\(^{390}\) Resistance to Islamization, according to the NIF’s view, is either ‘a Western plot’ or emanates from ‘Southern Marxists’


\(^{389}\) Warburg (1990), p. 634.
such as the SPLA-leader John Garang. It is important to realize that an important motive for the NIF’s enthusiasm for the retention of the *shari‘a* was economic. The banks controlled by the Muslim Brothers had made considerable profits under its Islamic provisions.

**Indecision and procrastination under Ṣādiq al-Mahdī**

When the military ceded power to a civilian government in 1986, none of the Sudan’s urgent problems had been tackled and were thus inherited by the different coalition governments under Ṣādiq al-Mahdī. They would remain unsolved in the three years of civilian rule to come. The economy continued to be in a precarious situation. No peace treaty with the SPLA had been negotiated. And, even though protest against Numairi’s abuse of Islamic law had been a driving force behind the 1985 demonstrations, the September laws, though the application of the *ḥudūd* was suspended, were still in place. Unsurprisingly, the first free elections in May 1986 resulted in a majority of the two largest sectarian parties, the Umma and the Democratic Unionist Party (DUP), who together attained 162 seats out of 301, an absolute majority.\(^\text{391}\) Umma and DUP, together with four Southern parties formed a coalition government with the NIF and left wing parties in the opposition. The NIF, with 51 seats,\(^\text{392}\) proved successful, but was excluded from participation in the new coalition government at this time because it was held partially responsible for the oppression of the Numairi regime. The NIF had especially been successful in the capital Khartoum where it won 42% of the seats. 23 of the 28 seats reserved for university and college graduates were won by the NIF, which was testimony to their popularity in the academic milieu.\(^\text{393}\) Ṣādiq al-Mahdī, as the new prime minister, immediately resumed the quest for an Islamic alternative to the existing *shari‘a* laws. In his first speech in May 1986 al-Mahdī promised to repeal the September laws and commissioned the Attorney-General ʿAbd al-Maḥmūd Ṣāliḥ to draft an alternative Islamic penal code which was meant to be based on sound rules and Islamic notions of equity.\(^\text{394}\) The renewed discussion provoked fierce criticism from the Bar Association and the

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\(^{391}\) However, the elections were a setback for the DUP who gained only 63 seats instead of the 101 seats it had won in 1968. The Umma, in contrast, went up from 72 seats (1968) to 100 seats. See also Kok (1996), pp. 43-49.

\(^{392}\) Altogether, 48 seats remained unoccupied as a result of the war. Kok (1991), p. 45.

\(^{393}\) Salih (1991), p. 50.

Sudan Council of Churches.\textsuperscript{395} The SPLA was equally opposed to any kind of Islamic law and demanded its complete abolition as one of the main preconditions for a peaceful settlement. Despite al-Mahdi’s repeated promises to revoke the September laws and replace them by completely overhauled legislation, only a few minor corrections were ever effectuated.\textsuperscript{396} One of the reasons behind al-Mahdi’s inability or unwillingness to live up to his promises was increased pressure by the NIF. The NIF had withdrawn from their earlier pledge not to oppose the repeal of the September laws as long as a new \textit{sharī’a}-based penal code would replace them. Šādiq al-Mahdī did not want to furnish a pretext to NIF-induced demonstrations nor could he afford to frustrate the expectations of his own constituency. While Šādiq al-Mahdī when I interviewed him, blamed his various coalition partners for his lack of success in abolishing the September laws\textsuperscript{397}, his wavering and lack of clarity on this important issue, however, were rather of his own making. For several decades, the Umma/Anṣār had demanded an Islamic system of government for the Sudan. Šādiq al-Mahdī himself had demanded that Islam should be the religion of the state and the \textit{sharī’a} the main source of legislation. The South was to be fully Arabized and Islamized. On the other hand he agreed with many of the grievances of Southerners against the \textit{sharī’a} turning non-Muslims into second class citizens. Therefore, he proposed that taxation should be based on a unified secular legislation. The \textit{jizya}, the head tax for non-Muslims was not to be applied and \textit{zakāt} was to be paid by non-Muslims only.\textsuperscript{398} However, when the Umma party finally was at the helm of the state they neither moved forward with an Islamic constitution nor did they replace Numairi’s penal code with a new Islamic code, possibly based on Šādiq al-Mahdī’s proposals.\textsuperscript{399} As shown above al-Mahdī, when the September laws had been introduced, had argued that the \textit{sharī’a} should not be applied before social justice was firmly established in the Sudan. However, in 1986 the political context had changed and Šādiq al-Mahdī, short of taking any decisive steps, now argued that the Sudanese people did not want a secular state, the idea of which was “foreign-


\textsuperscript{396} Flogging, used rather summarily under the September laws, had been limited to \textit{hadd} offences.

\textsuperscript{397} Interview with Šādiq al-Mahdī, 9.6.2004.


\textsuperscript{399} Bob (1990), p. 215.
In general, al-Mahdi’s coalition governments were plagued by rivalries between the coalition partners, corruption and instability. In May 1987, his first government collapsed, unable to agree on badly needed solutions and devoid of the strong leadership al-Mahdi could not provide. The successor coalition government, formed again with the DUP and some smaller Khartoum-based Southern parties did not prove to be any more stable and equally fell apart after three months, mainly due to the seemingly insurmountable rivalry between the Umma party and the DUP. This led to a political situation in limbo between August 1987 and May 1988. The Umma and the DUP could not agree on forming a new government. Both parties rejected the dissolution of parliament and the holding of new elections. Instead ministers simply continued to function in their posts. While the Ba’ath and other left-wing parties as well as the Southern parties strongly opposed any cooperation in a government that would include the NIF, the NIF equally strove to exclude its opponents from the formation of a new government. In May 1988, finally, the NIF joined the third coalition government, called the “national unity government” and consisting of the Umma party and the DUP. One of the preconditions for joining the government had been that new Islamic legislation would be enacted within two months. Under the guidance of Ḥasan al-Turābī, who became Minister of Justice and Attorney-General, the Ministry of Justice finally submitted to the Council of Ministers for discussion a draft penal code in September 1988, which was meant to replace the September laws. Hammered out by a group of jurists led, most likely, by the NIF, the draft suppressed to a large degree the politically motivated stipulations of the 1983 Penal Code. The South was to be exempted from ḥadd punishments. A dual system was to be introduced in the sense that the location of the commission of the crime (e.g. North or South), rather than the identity of the perpetrator (e.g. Southerner, non-Muslim, Muslim, etc.), was to be decisive in determining penalties. Highway robbery, thus, was to be punished with cross-amputation in the North and a maximum prison sentence of ten years in the South. On the other hand, non-Muslim Southerners living in Khartoum would have been subject to the shariʿa, while Muslims living in the South could enjoy alcoholic drinks or even become apostates, at least according to a literal interpretation of the letter of the law. The new Criminal Bill met considerable resistance. The SPLA completely rejected the dual system, as well as all other

southern parties, the Communist Party, other left-wing parties and the National Salvation Alliance. They all demanded the complete abolition of the *shari‘a* and the introduction of secular legislation. The Sudanese Bar Association equally rejected the Criminal Bill arguing that it would reinforce separatism.\(^{403}\) Even the Umma party and the DUP, though some of their members had been part of the drafting committee, called for a revision of the draft. Both parties had an unclear position with regard to the *shari‘a*. In their majority in favor of Islamic law, the Umma party remained strangely undecided when it came to taking decisive steps as to its introduction. As to the DUP, its liberal wing increasingly came to the conclusion that a peaceful ending to the civil war needed a return to an autonomous South and a recognition of the multiethnic and multi-religious character of the country by way of a secular unified legislation. This new approach led to successful negotiations with the SPLA conducted by Muḥammad Uthmān al-Mirghānī in Addis Ababa and leading in November 1988 to a cease-fire. The war, at this point, had reached a stalemate. It had become clear that neither side was strong enough to win the war by military means, even though the SPLA managed to advance for the first time into northern territory at the end of 1987.\(^{404}\) Al-Mirghānī had, unlike Šādiq al-Mahdī in earlier negotiations, agreed to suspend the *shari‘a*, one of the main preconditions for a settlement of the conflict, and to exclude any call for its implementation from the government’s agenda.\(^{405}\) Placated, the SPLA agreed to the convocation of a ‘national constitutional conference’ that was to deliberate on a new constitution and a new penal code that would be considered acceptable to the non-Muslim Southern minority. However, Prime Minister Šādiq al-Mahdī did not want to give the credit for having ended the civil war to his political rivals. Siding with the NIF, he deliberately wrecked the DUP/SPLA peace initiative. In protest against his tactics, the DUP left the government coalition. In the new government, formed in January 1989 with the Umma party and the NIF as the sole remaining coalition partners, al-Turābī became foreign minister, with another NIF member heading the crucial Ministry of Justice. Before the government could decide on a new Islamic penal code, an alliance of labor unions, professional associations, and army officers issued an ultimatum, demanding the ratification of the DUP/SPLA peace agreement and the formation of a new government of national unity. Only after Šādiq al-Mahdī had formed a new cabinet, replacing

\(^{405}\) Warburg (1990), p. 635.
the NIF with the DUP and representatives of the labor unions and professional associations, the peace agreement with the SPLA was finally ratified in April 1989. Now the tides had turned in favor of a revocation of the *shari‘a* laws. In mid-June, the al-Mahdī government announced that the *shari‘a* laws would be at last be nullified by the first of July and that a government delegation was to meet SPLA representatives to discuss a permanent end to the civil war. However, one day before the cancellation of the *shari‘a* laws, the military intervened once more and ended another – rather short – era of civilian rule. The draft penal code of 1988 was to be resuscitated less than two years later when it was enacted as the Criminal Act 1991 with only minor changes. In summary, the democratic interlude 1986-1989 under Prime Minister Šādiq al-Mahdī showed clearly that the political elite, at least those leaders and parties who took part in government formation, were unable to deliver solutions to the Sudan’s most pressing problems. Coalition governments were chronically unstable, marked by the rivalry between the Umma and the DUP, their haggling over posts, party factionalism, but also by uncompromising and fierce opposition of left-wing and Southern parties. Economically, the Sudan suffered from its inability to pay off its foreign debts arrears. The government preferred not to respond to the IMF’s demands to remove subsidies on food and apply an austerity program for fear of riots and demonstrations. However, in September 1987 the Sudanese government was finally forced to conclude an agreement with the IMF in order to finance its costly import bill. It committed itself to a four year plan including a reform of public sector companies, substantial cuts on public expenditure and a 44% devaluation of the Sudanese Pound. As feared, the austerity measures led to riots and violent protests in several parts of the Sudan, but did not result in the intended economic recovery.

2.8 A regime with an agenda: al-Bashīr and al-Turābī take over

After the bloodless coup d’état, led by Brigadier ʿUmar al-Bashīr, the Revolutionary Command Council for National Salvation (RCC) was formed. The National Assembly was dissolved and all political parties outlawed. The transitional constitution of 1985, which stipulated that the South was to be governed according to the Addis Ababa agreement, was

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406 The origins of the Criminal Act 1991 seem to be forgotten in the Sudan, many of my interview partners were not aware that the “Criminal Bill 1988” was the original text.

407 Both, the Umma and the DUP suffered from party splits.
revoked and a state of emergency declared. Even though al-Turābī, like other religious leaders and members of the former government, was detained after the coup, it later became clear that the coup was in fact staged with the active support of the National Islamic Front. There is now almost unanimous agreement among observers that al-Turābī colluded with the fifteen middle to lower ranking officers who had staged the coup. As to the motives of the coup, several observations can be made. Most importantly, taking over power in the Sudan by whatever means available had been the goal of the Muslim Brotherhood since al-Turābī won the upper hand in internal power struggles in the late 1960s. Not only was the MB part and parcel of several attempts to depose president Numairi, they also founded in 1972 a secret organization (al-nizām al-sīrī). Its members received training in camps hidden in the Sudan ranging from military, security, propaganda, to intelligence and other training. Next to its underground activities the Muslim Brotherhood, based on the extreme flexibility and pragmatism of al-Turābī’s approach never showed any qualms as to the use of any means that could further their cause. When all coups against Numairi’s rule had failed, the MB accepted to join the “national reconciliation” process. They thus happily collaborated with a regime they had fought for eight years and accepted whatever post was given to them. During Sudan’s third democratic interlude the Naïf’s approach was equally tactical. They agreed to alliances with their sectarian rivals when they thought it conducive to their Islamist agenda and they refused such alliances when their agenda was not accepted by these very rivals. With regard to democracy as a political system, the NIF was content to make use of the possibilities of free speech and propaganda, however, without any deeper commitment to democracy as such. Al-Turābī and the NIF knew that if democratic rules were applied their chances of governing the Sudan were next to nil. Their explanations and justifications after the coup drove this point home. Thus al-Turābī defended the NIF’s alliance with the military and its coming to power by way of a military coup as the only way to establish an Islamic state in the Sudan and to finish sectarianism, “a multi-party system in the Sudan would not be democratic because political parties or a government governed by the House of Khatmiyya

409 In an interview with al-Turābī’s son Şiddiq Hasan al-Turābī, he confirmed that the imprisonment of his father was meant to cover up his involvement in the coup. Personal communication of Şiddiq Hasan al-Turābī, 10 June 2004.
and the House of the Mahdi was a dynastic thing”, al-Turâbî stated.412 While al-Turâbî and the NIF were not choosy with regard to the means of gaining power, the particular point in time chosen for the coup d’état was most probably triggered by Muḥammad ‘Uthmân al-Mirghanî’s draft agreement with the SPLM on the one hand and Ṣâdiq al-Mahdî’s decision to abolish the September Laws by 1 July 1989 without a new Islamist legislation replacing it on the other hand. The NIF had little doubts that its political influence and any chances of an Islamic state would have been severely diminished had a peace treaty been realized. On both accounts the NIF was not willing to make compromises and, consequently, its later Southern “jihād policy” (see below) moved the country as far away from a settlement of the conflict as possible without, however, ever coming close to winning it militarily.

Building new structures, dismantling old ones

Once firmly entrenched, the al-Bashîr/NIF regime followed a systematic approach toward the transformation of all relevant Sudanese institutions, effectively turning them into NIF bastions. Thousands of civil servants, 14000 in 1989 alone, were sacked. More than a hundred career diplomats were dismissed; others resigned in protest and were replaced by NIF loyalists.413 Close to 40% of the officer corps was dismissed, despite the ongoing war in the South.414 400 police officers were fired, thousands forced into retirement later on. The NIF soon controlled key government institutions such as state security, military intelligence, police security, and foreign security which reported on Sudanese living in exile. Next to taking over existing structures the NIF also established and ran its own security apparatus such as the Revolutionary Security Guards, the Guardians of Morality and Advocates of Good, al-Turâbî’s private security detachment and the People’s Police.415 Around 15 of the outlawed political parties founded the National Democratic Alliance (NDA)416 in order to organize their opposition to the new regime from abroad, mainly operating from Cairo and Asmara. Among other laws and a project of a new constitution the

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416 al-tajammu’ al-waṭanî al-dîmûqrâfî. Members were, among others, the DUP, the Umma Party, the Communist Party of Sudan, the Beja Congress, and the SPLM/SPLA.
NDA published their own project of a new penal code in Cairo in 2001. This project, while maintaining the death penalty, did not contain *hadd* or *qišš* punishments.\(^{417}\)

A takeover of educational facilities and the underlying bureaucratic infrastructure was effectuated. The Ministry of Education was purged, teachers and faculty members replaced by NIF members, and the elected faculty unions dissolved. Furthermore, the regime Islamized the curricula, and Arabic became the language of instruction in all public universities. It must be noted that the Arabic language excluded many southern students who often had insufficient knowledge of Arabic to pass the compulsory entry exams.\(^{418}\) To enhance its influence, the NIF founded several new universities and doubled the numbers of students in the existing ones. This was important because NIF understood that a higher percentage of university graduates close to the NIF would ensure greater influence in professional associations in the future. By 1996, hundreds of faculty members had been dismissed or left the country. In fact, the brain drain had been so dramatic that a review by the Ministry of Higher Education found a shortage of teaching staff as high as 80 per cent in some universities.\(^{419}\)

More importantly, the new regime, after having dismantled the major part of the old structures, embarked upon a process of institution building by introducing new structures designed to provide legitimacy to the military-Islamist rule and cement its hold on power. Thus, in 1992 the Revolutionary Command Council appointed a Transitional National Assembly as a legislative authority. In 1993 the RCC dissolved itself and al-Bashîr became president. As of 1991 a so called Congress System was built up from the local and regional to the national levels. This process was concluded in 1995 with the election of a national Congress with the NIF member Ghâzî Şalâh al-Dîn al-´Atabâni at its helm. In 1996 a National (Federal) Assembly was elected and, unsurprisingly, al-Bashîr became the “confirmed” elected president of the Sudan. With the absence of most of the opposition and with the help of rigged elections in 2000 and 2010 al-Bashîr has stayed in power until the time of writing surviving the independence of the South and a major economic crisis so far.

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\(^{417}\) See *al-tajammu’ al-waṭanî al-dimūqrâṭî: mashrû’ dustûr wa qawânîn al-fatra al-intiqālîyya*. al-Qâhira 2001. Amin and Ramadan describe a 1986 project of a new Penal Code by the Sudan Bar Association. While I was not able to get hold of the full text of this project the description Amin and Ramadan give suggests that the NDA project published in 2001 is either very similar or even identical with the 1986 project of the Sudan Bar Association. Compare Amin/Ramadan (2002), pp. 341-345.


\(^{419}\) Lesch (1998), p. 144.
Judiciary and legislation as cornerstones of the NIF’s Islamization agenda

The judiciary was a prime target for the realization of the NIF’s Islamization program. Not any more pliant than the judiciary under Numairi the regime opted for large-scale changes of personnel in order to get a grip on the judicial apparatus. According to estimates, ‘over sixty percent of all judges have been replaced by appointees of the new regime’. Between 300 and 400 judges were dismissed or resigned between 1989 and 1991 alone. Their replacements often lacked proper training in shari’a / fiqh beyond personal status matters or were not qualified at all. While purging the traditional judiciary, the al-Bashir/NIF regime simultaneously built up a parallel system of courts that consisted of Security of the Revolution Courts (later to be re-baptized ‘Emergency Courts’) and Public Order Courts (POC) (see following section). One observer came to the conclusion that ‘[t]he parallel judicial institutions created by the NIF now handle more than 95% of the caseload of the Sudan, and are under the absolute control of the executive branch’. This estimate obviously does not take into account the high number of cases tried under customary law. While Southern law students, not trained in Arabic, were excluded in practice from access to the legal professions, those who did enter were often trained in newly founded law schools, concentrating on the shari’a / fiqh and neglecting the Sudanese common law traditions. Many southern judges were transferred to the North to hold minor positions or left the judiciary to pre-empt dismissal. NIF adherents were appointed in their place to guarantee the application of Islamic law wherever non-military courts in the South were allowed to function. According to some observers, many of the female judges who held positions in the civil and in the shari’a-governed personal status courts were dismissed by the new regime or relegated to insignificant assignments. A 1996 report from the Lawyers Committee for Human Rights indicates that neither southern nor female judges were appointed by the al-Bashir/NIF regime until the mid-nineties. The regime also made sure that any opposition from the legal

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425 This information was confirmed in an interview with a lawyer at the Institute of Training and Legal Reform in Khartoum on 8 June 2004. However, according to the same source, three women were shortlisted for positions as judges in June 2004. During my second visit, in 2009, women were working at the Supreme Court, among them the prolific author and commentator on ICL Badriyya Hassuna.
profession was muted. Thus, the Sudanese Bar Association was first dissolved after the coup and later ‘downgraded to a trade union subject to the controls of the Registrar of Trade Unions and the Minister of Labor’.

Concomitantly, the Bar Association lost some of its traditional immunities, such as the inviolability of a lawyer’s files in his chambers. Not surprisingly, the al-Bashir/NIF regime also promulgated important legislation to further its strategic goal of an in-depth Islamization of the Sudanese society. As of early 1991, an overhauled, Islamized penal code was promulgated and implemented. The new Criminal Act was in fact the Criminal Bill of 1988 with only a few changes. It contained the full range of hadd-offences and punishments and included, for the first time in the history of Sudanese law, apostasy. In the same year, for the first time, a Muslim Personal Law Act codified personal status law.

Other important legislative initiatives include the Public Order Act of 1996 (now the Security of the Society Law), the 1998 Constitution, and the Political Associations Act of 1998. It must be noted that some of the September laws with a bearing on criminal law, such as the Judgment Basic Rules Act and most of the criminal circulars remain in force until the time of writing. With regard to the Criminal Act 1991 it has been concluded that it “appeared to have the potential of subjecting the society to even harsher sanctions than the ones endured during Nimeiri’s sharia experiment”. This assessment, however, seems to be unjustified. While it is certainly true that the potential for harsh sanctions is there the new penal code suppressed not only part of the politically motivated crimes and punishments of the 1983 PC but also most of the articles that had combined hadd-punishments with non-hadd crimes. Further, the de facto application of the new code, the same author concedes, was “lenient”, “ever since its coming to force in March 1991, there were hardly any reports of stoning, amputation or crucifixion”.

The Public Order Laws and the Islamist control of public and private behavior

The Public Order Law (POL), applied by the second pillar of the regime’s alternative court system, the Public Order Courts, are laws adopted by state legislative bodies or state governor

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They must be understood in relation to and in their interplay with parts of the Criminal Act 1991, the Public Order Police (POP) and the Public Order Courts (POC). While each POL reflects particular local traditions to some degree most of the POL share a certain amount of common provisions. The Khartoum Public Order Act 1996, applicable to approximately 7 million people in Sudan’s capital, and the POL of the governorate Kassala can serve as examples of how Public Order Laws control human relations and behavior in the public and private spheres through criminal prohibition. Both laws stipulate that for private and public parties with music a permission of the local authorities (i.e. the POP) has to be obtained. Several restrictions are imposed. The party must end at 11 p.m., dancing between men and women is not allowed and women shall not dance in front of men. Further „shooting“ and „the singing of trivial songs“ are prohibited. Both laws give the police the right to take whatever measures it sees fit in order to stop the infraction, including the termination of the party. Both laws outlaw „parties with music, cinema and theatre shows, exhibitions and similar events on Fridays between 12.00 a.m. and 2 p.m. The chapter on parties with music contradicts Sudanese manners and customs, resulting from its specific ethnic composition in various ways. Due to the massive influx of refugees from the South, the Sudanese capital Khartoum now is a miniature Sudan with most of its tribes represented. Mixed dancing is part of their beliefs and heritage and banning it amounts to outright discrimination. Mixed dancing has also been common among Muslims in the North and they are thus just as affected by the law as are Southerners. It has also been noted that the power of the Public Order Police to stop parties with music after 11.00 p.m. is not in harmony with

431 For this section on Public Order Law compare Strategic Intitiative on Women in the Horn of Africa (SIHA) (2009).
434 POLKh, art. 5.
435 POLKh, art. 7a / POLKa, art. 8a.
436 POLKh, art. 7b.
437 POLKh, art. 7c.
438 POLKh, art. 7d.
439 POLKh, art. 8/POLKa, art. 9.
440 As a guest of a party in Omdurman in the summer of 2004, I could observe that part of the law was not observed. The music did indeed stop at 11.00 p.m. and no alcohol was consumed. However, after a timid beginning with men dancing by themselves (as is indeed allowed by the POLKh), women and children soon joined.
Sudanese custom. „It is one of the character traits of the Sudanese that the quarter joins in celebrations and mourning and during the past years we have not witnessed resistance against long parties lasting until morning“.

The same author also points out, that the Public Order Police is given the right to intervene, notwithstanding the fact that there might not be a claimant or a damaged third party. Both laws also regulate gender separation in public transport. The POL Khartoum specifies: „Each public bus used for public transportation within the state shall specify a door to be used by women and reserve ten seats for women“, „men shall not sit in the seats reserved for women, neither shall women sit in the seats reserved for men“, „writing any expression, or sticking any picture or sketches that contradicts religion, morals and good taste is prohibited on public transportation“. Kassala outlaws the same misdemeanors and in addition the playing of „tapes of obscene songs“ in „public transport and public places“.

Further, „twenty five percent of the total seats in public transportation...shall be reserved for women“. As to gender segregation in hair dresser’s and tailor’s businesses the POL stipulates that “no person shall practice the profession of (women) hair dressing unless a license is obtained from the competent peoples committee and after obtaining the required recommendation issued by the competent people’s authority committee“. „Men may not be employed in a women’s hairdressing business“ in Khartoum. Kassala is less strict. The same rule applies, but, by way of exception, men may carry out „administrative or technical

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441 Al-Sayyid, p. 134.
442 Al-Sayyid, p. 135.
443 POLKh, art. 9 (1) a.
444 POLKh. art. 9 (1) b. During visits to Khartoum in 2004 and 2009 I could observe that gender segregation in public buses was not enforced. Reserving a door for women is not possible in the widely used minibusses, since they only dispose of one (sliding) door. Nor does the personnel operating these busses pay attention to gender separation. Instead, new passengers first fill up seats farther away from the door.
445 POLKh, art. 9 (1) c.
446 Obscene songs (aghānī hābīta) are defined under chapter 1 as: “...songs using words or expressions contradicting faith or morality or good manners and the general taste and sound sentiment, whether accompanied by music or not. POLKh, art. 4g.
447 POLKa, art. 10.1.
448 POLKh, art. 9 (1) d.
449 POLKh, art. 9 (2).
450 POLKh, art. 13 a. Even though the title of the law talks about “women’s hair dressing businesses”, the first article talks about “hair dressing businesses” in general without specifying whether this provision includes men’s hairdressing businesses as well. POLKa, art. 13 does define “women’s hairdressing businesses” only.
451 POLKh, art. 14 a.
tasks\textsuperscript{452} but in both governorates men „may not enter a women’s hairdressing business“ \textsuperscript{453}. How they can carry out their administrative or technical tasks without entering the premises the Public Order Law of Kassala does not explain. To make sure, that men and women alike cannot claim ignorance of these regulations, „a sign explaining the provisions of this subsection must be placed in a visible place“ \textsuperscript{454}. The POL Khartoum allows that „men may own (women’s) hairdressing businesses“ \textsuperscript{455}, but „...to grant a license...the business must be managed by women“ \textsuperscript{456}. Owners and managers of hairdresser’s businesses must be sure of their employee’s „righteousness and good reputation“ \textsuperscript{457}, and „the manager must not be less than 35 years of age“ \textsuperscript{458}. There is no age limit specified for owners of women’s hairdressing businesses. Since the owner often is also the manager, a women who has not reached 35 might not be able to manage her own business. The licensing authority and the Public Order Police have the right to enter any hairdressing business at any time for inspection and in order to make sure of the compliance with this law, provided that the inspection is carried out by women. \textsuperscript{459} The Public Order Police (POP), however, does not have female squads that could carry out this kind of inspections. In general, male POP in full gear raid businesses in question in order to check on the compliance with the POL’s regulations. \textsuperscript{460} The starting of a tailor’s business is forbidden unless a license from the local authorities \textsuperscript{461} has been obtained, which will „prescribe the regulations which shall have regard to the public morality of the employees and the business“ \textsuperscript{462}. Other regulations pertinent to public morals or religion specify that queues before (public) authorities must separate men and women \textsuperscript{463}, „imposture, fraud, magic and Zaar are prohibited“ \textsuperscript{464}, „bathing naked in the Nile is prohibited“ \textsuperscript{465}, the selling of food and drink by restaurants or cafeterias during the day during Ramadan is

\textsuperscript{452} POLKa, art. 14 (1).
\textsuperscript{453} POLKh, art. 14 b, POLKa, art.14 (2).
\textsuperscript{454} POLKh, art. 14 c.
\textsuperscript{455} POLKh, art. 15.1.
\textsuperscript{456} POLKh, art. 15.2.
\textsuperscript{457} POLKh, art. 16 (a), POLKa, art. 14 (6).
\textsuperscript{458} POLKh, art. 16 (c).
\textsuperscript{459} POLKh, art. 17. POLKa, art. 15 - as a reference for this provision - mentions the Law of Criminal Procedure.
\textsuperscript{460} See Al-Sayyid, p. 137.
\textsuperscript{461} POLKh, art. 18. (a), POLKa, art. 16 (1).
\textsuperscript{462} POLKh, art. 18. (b), POLKa, art. 16 (2).
\textsuperscript{463} POLKh, art. 20. In a similar sense POLKa, art. 19. Here not only official authorities but every person (kullu shakh) dealing with the public must separate men and women.
\textsuperscript{464} POLKh, art. 22. POLKa, art. 24.
\textsuperscript{465} POLKh, art. 23 (a).
The POL Kassala regulates also a variety of other issues, beginning with commercial enterprises who are not allowed to operate on Fridays during prayer time from 12.00 a.m. to 1.30 p.m.\textsuperscript{467} No commercial license or a renewal thereof may be issued if the name of a company is in conflict with faith, values and customs.\textsuperscript{468} In addition to hairdressing and tailor’s businesses the Kassala POL also regulates gender separation in telephone parlors. Female employees are not allowed to work in them, unless they have been registered with the responsible authorities and their righteousness and good reputation have been confirmed.\textsuperscript{469} As in the case of hairdressing businesses, telephone parlors are not allowed to have more than one entrance and exit, facing a public street and not covered by a curtain or tinted glass.\textsuperscript{470} Women selling food or drinks in public places are not allowed to do so between the prayer at sunset and morning prayer.\textsuperscript{471} Kassala is also restrictive as to smoking the water pipe: the use of the „shîsha“ is forbidden in public places.\textsuperscript{472} Finally, the POL Kassala, in article 28, makes reference to the Penal Code of 1991: „The laws of the Penal Code 1991 will be applied to who attempts, participates in, abets or cooperates in the perpetration of any of the misdemeanors specified in this law“.\textsuperscript{473} The punishments stipulated in the POL for the above contraventions in Khartoum are severe. They are: a) imprisonment for a term not exceeding five years, b) a fine, c) both of the above d) whipping, e) forfeiture of any instrument used in such contravention f) closure of the premises for a term not exceeding two years. Interestingly, the Kassala Public Order Law, even though it is more restrictive and legislates on more misdemeanors, shows more leniency with regard to punishments. Thus, the Kassala POL contents itself with imprisonment of not more than a month and limits the possible range of the fine to 5000 Dinars.\textsuperscript{474} Since both laws allow for both punishments – imprisonment and fine – to be combined, the Khartoum POL appears especially harsh in comparison with its counterpart in Kassala: an unspecified fine in combination with imprisonment of up to five years in Khartoum and a maximum of one month in prison in combination with a maximum

\textsuperscript{466} POLKh, art. 24., POLKa, art. 20.
\textsuperscript{467} POLKa, art. 17.
\textsuperscript{468} POLKa, art. 21.
\textsuperscript{469} POLKa, art. 23 (1). It is noticeable that good reputation is explicitly mentioned in this context while the Evidence Act 1993 does not stipulate it as a precondition for giving testimony in hadd cases (exception zinā).
\textsuperscript{470} POLKa, art. 23(2).
\textsuperscript{471} POLKa, art. 22.
\textsuperscript{472} POLKa, art. 26.
\textsuperscript{473} POLKa, art. 28.
\textsuperscript{474} Ca. 14,5 Euro (December 2004).
of 5000 Dinars in Kassala. Moreover, the Khartoum POL does provide for flogging, while the Kassala POL does not.

The POL is applied in practice by the Public Order Police (POP)\textsuperscript{475} which is a special police force attached to the Public Order Courts and part of the Sudan Police Force (SPF).\textsuperscript{476} Apart from being under the authority of the Director General of Police, the POP also has a strong connection with and takes directives from local authorities, such as the respective state governor or local “safety committees”. The POP has a reputation of applying physical violence and often targeting marginalized groups such as women, refugees or particular ethnic groups. A standard modus operandi is the so called “sweep and arrest” method which are raids resulting in mass arrests, frequent physical assault and the standard POL penalties such as fines and floggings. Extortion and sexual abuse including rape of those (female) victims who are accused of POL offences seems to be widespread.

Another essential institution of Public Order enforcement are the Public Order Courts which were established in 1995 by decision of the Chief Justice. The POC are a parallel court system exercising summary jurisdiction with very limited procedural safeguards and generally governed by specific political objectives. Next to the POL the POC enforce a wide range of local laws and governor decrees ranging from taxation matters to price fixing and trading licenses. Procedures in the POC are similar to those in military courts. Trials are very swift, arrest and the imposition of the punishment generally happen within 24 hours. The accused normally do not have access to legal assistance or aid and are not permitted to prepare their defense. Except for notes on the statements of witnesses no records in writing of the proceedings are prepared and kept. Punishments are carried out immediately without any prior possibility of appeal. If the accused is not able to pay his fine he will be transferred to prison.

Public order legislation exists in most countries and is normally meant to ensure public security, general order and to create an atmosphere of a “mutually rights-respecting public life”.\textsuperscript{477} From the above it has become clear that the Public Order regime as applied in the Sudan is rather different from what is known from other countries. The methods of control and criminalization of the private and public spheres are clearly an invention of the military-

\textsuperscript{475} The POP has been renamed “Police of Society Security” but continues to be known by its former name POP.

\textsuperscript{476} The following sections on POP and POC follow Strategic Initiative on Women in the Horn of Africa (SIHA) (2009).
Islamist regime which came to power in 1989. Observers have correctly pointed out that the specific application of POL in the Sudan is driven by an ideological agenda that views the presence of women in public life, especially when they are working, and in private life as a source of potential problems. Further, it is assumed that men and women are not able to behave appropriately and morally according to the morality standards required by the authorities. Social relations, in private but especially in public therefore have to be supervised, controlled and disciplined. Women are seen as a particular threat to public morality. Therefore POL enforces gender segregation wherever possible, at least in theory. Such gender segregation comes along with a number of restrictions on business and working women. In combination with the POPs frequent “sweep and arrest” raids on women who conduct business such as selling tea or Marissa the Islamist regime has created a situation where normal business or professional activities are criminalized. While women clearly are the main targets of the Public Order Laws men are victims of the harsh application of POLs as well. Due to lacking documentation and statistics, the number of cases adjudicated upon according to the POL is not known. However, it can be safely assumed that the different components of the Public Order regime have made more Sudanese acquainted with the precepts of the Islamized justice system than regular courts.

The promotion of an Islamist international

Sudan’s “First Islamist Republic” (Gallab) in its first decade not only went through a process of internal Islamization but also turned into a hotbed of international militant Islamism, giving shelter, training and logistical support to a wide array of militant Islamist movements including Ḥamas, al-Jama´āt al-Islāmiyya, al-Qā´ida. Especially in the first half of the 1990s, when all Arabs could enter and leave the Sudan through Khartoum International Airport without a visa, the Sudan offered a safe haven and training facilities for militant Islamists from the Arab world and beyond. Examples are Ḥamas which entertained an office in Khartoum and the Pakistani Islamist Shaikh Mubarak Ali Shah Jilani who “set up a training camp in Sudan for 3000 Pakistani terrorist trainees”.478 International terrorist Carlos “the Jackal” was given shelter in the Sudan between 1991 until he was handed over to the French

477 Strategic Initiative on Women in the Horn of Africa (SIHA) (2009), pp. 6-7.
Islamist Sudan’s most notorious guest, however, was Usama bin Ladin, who relocated al-Qā’ida’s headquarter to Khartoum in 1992. In May 1996, bin Ladin left for Afghanistan, after a failed assassination attempt on Mubarak in Ethiopia and subsequent strong political pressure from the United States, Saudi-Arabia and Egypt. Usama bin Ladin built a new airport in Port Sudan, which was then used as a hub for arms shipments to militant Islamists in Yemen and Somalia. For Afghan mujāhidīn alone 23 camps were constructed in the Sudan with the financial and logistical help of the al-Qā’ida leader. His hosts also benefited from bin Ladin’s financial support for the PDF and the training of NIF students. The Mubarak assassination attempt, undertaken by the Egyptian al-jamaʿāt al-islāmiyya with full support from the NIF, led to growing differences between the NIF and the military, with the latter retaking control of Sudan’s intelligence service after the failed plot. Al-Bashīr was opposed to lending support to al-Qā’ida and bin Ladin and ordered “his officers to stop it”.

Next to supporting international terrorist groups, al-Turābī and the NIF also quickly moved forward to organize an Islamist International regrouping a wide range of Islamist and other movements from the Arab world but also, unlike the name Popular Arab and Islamic Congress (PAIC) indicates, from Iran and Asia as far as the Philippines. To this end al-Turābī organized in April 1991, only a few days after the cease-fire in the Gulf War, the first PAIC meeting which gathered 300 Sudanese and 200 international Islamist leaders from 45 states. Al-Turābī himself became PAIC’s Secretary General, the Secretariat had its seat in Khartoum. PAIC’s foundation and first meeting, heralded by the Sudanese government as “the most significant event since the collapse of the Caliphate”, coincided with the humiliating defeat of Iraq in the Gulf War and al-Turābī’s intention was to seize the momentum. The perceived Western imperialist conspiracy, their Arab collaborators such as Egypt, Saudi-Arabia and Syria, which had all sided with the anti-Saddam forces, and reactionary regimes in Muslim countries in general were the targets of the PAIC’s revolutionary agenda. Consequentially, PAIC was unpopular with most leaders of Muslim

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479 He was transferred to France and now serves a life sentence.
481 For details of the Sudanese involvement in the plot see Burr/Collins (2003), pp. 188-194.
states and boycotted by the Organization of the Islamic Conference (OIC)\textsuperscript{485}, which has its seat in Saudi Arabia.\textsuperscript{486} Subsequently, two more PAIC meetings took place in Khartoum in December 1993 and March/April 1995. The second meeting was again attended by 500 delegates from 85 countries. Prominent Islamists from the Middle East and Asia, such as Husain Fadlallah from Lebanon, Gulbuddin Hekmatyar from Afghanistan, Usama bin Ladin, Rashid al-Ghannushi from Tunisia and other leaders from Russia, Bosnia, Somalia, Pakistan and other Muslim countries came to discuss the situation of Muslims in Kashmir, Myanmar or South Africa, Western human rights concepts as an argument for meddling in internal affairs of different countries, the “phenomenon of the Islamic awakening” or the “New World Order” after the demise of the Soviet Union and the role the PAIC could play in it to promote Islamic hegemony in the world.\textsuperscript{487} The second PAIC was a great success in terms of attendance and influence, by “1994 the PAIC General Assembly was directly participating in most of the evolving Islamist movements from the Atlantic to the Pacific”.\textsuperscript{488} However, first differences among participants appeared. Iran and others wanted to change the name to Popular Islamic Conference (and probably the seat of the Congress to Teheran), more radical groups such as Algeria’s FIS criticized al-Turábí for being too conciliatory instead of confronting the ruling reactionary regimes head-on.\textsuperscript{489} The third and final PAIC meeting was smaller than the second one and marked the beginning of the end of its existence. 300 delegates from 80 countries gathered in Khartoum with many of the more prominent figures missing.\textsuperscript{490} Iran sent no official delegation at all and was only represented by its responsible for East Africa who resided in Khartoum.\textsuperscript{491} Irreconcilable differences came again to the surface with regard to the name of the Congress. African and other delegates insisted “that the word Arab must be removed because it will create racism and discrimination between the Muslim people.”\textsuperscript{492} However, again the PAIC was used by a sizable number of representatives of militant Islamist

\textsuperscript{485} Since 2011 Organisation of Islamic Cooperation

\textsuperscript{486} Warburg (2003), p. 213.

\textsuperscript{487} Ortega (2004), p. 92 and Burr/Collins (2003), p. 137. It seems that “Carlos the Jackal”, as a prelude to his subsequent extradition, was identified by a French secret agent at the second PAIC meeting. Compare Burr/Collins (2003), p. 157.

\textsuperscript{488} Burr/Collins (2003), p. 139.

\textsuperscript{489} Ortega (2004), p. 92.

\textsuperscript{490} Yassir Arafat, Rashid al-Ghannushi, Qalb al-Din Hikmatyar, Nayif Hawatima and George Habbash did not attend. See Ortega (2004), p. 113.

\textsuperscript{491} Ortega (2004), p. 113. Iranian mujáhidin, however, were present.

\textsuperscript{492} Burr/Collins (2003), p. 168.
groups to meet and coordinate plans to “destabilize moderate Arab regimes”. The third PAIC “brought together four of the world’s most influential and effective terrorist organizations: Hizbollah, Hamas, Islamic Jihad, and Al-Qaeda”. A fourth meeting which had been planned for 1996 was first postponed to February 1999 and then cancelled altogether. In February 2000 president al-Bashir had the PAIC shut down and their building confiscated. The deepening rift between al-Turābī and al-Bashīr, who seems to have kept a certain distance from PAIC meetings, also meant the end of the Islamist International PAIC and thus al-Turābī’s role as mentor and mediator of international Muslim radicals.

_Jihād in the South_

Another cornerstone of the NIF’s claim to power was the establishment of parallel military and security forces, meant to gradually replace the existing ones. As mentioned above the new military-Islamist regime dismissed almost 40% of the regular Sudanese army, the Sudan Defense Force (SDF). Gradually replacing the SDF with the PDF, or so was the plan, would have provided the NIF with a strong instrument to cement its power. Accordingly, al-Turābī openly stated that the Popular Defense Forces (PDF) were meant to absorb the regular army and ‘mobilize the public behind the jihād’, as the war against the Southern forces was now baptized. To al-Turābī, at least according to his public statements, the PDF was a means for the Muslim collective to fulfill its obligation to contribute to jihād, portraying the non-Muslim soldiers of the South as an infidel enemy. Thus, while thousands of officers critical of the coup were fired despite the ongoing war in the South, the Popular Defense Forces, meant to reach a number of 150,000 in total, were built up from Arab tribal militias (mainly from Dār Fūr and Kordofan), NIF volunteers, including from its youth movement _shabāb al-waṭan_, drafted students and civil servants – for the last two groups enlistment was made compulsory - and forcibly recruited teenagers. In the meantime, the regime had made sure that a substantial part of the pro-government fighters were Southerners, who were either rounded up in Khartoum and sent to fight for the Sudanese army in the South or belonged to southern pro-

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495 For an in-depth analysis of the different PAIC meetings see also Ortega (2004), pp. 81-122.
government militias.499 Islamic imagery and wording was used more frequently for mobilization purposes as the number of military operations and casualties rose. While the war with the South, which had been going on since 1983, was a jihād, the Popular Defense Forces were called mujāhidīn. The pro-government fighters who died in battle, accordingly, were called martyrs (shahīd/shuhadā) in the mass media and a martyr’s day was introduced. By 1994/1995 the high numbers of victims had forced the regime to increase its recruitment efforts. In the first half of 1995 alone an estimated 9000 Northern soldiers died, 15,000 had been wounded. This led to a situation where any Northern male between 18 and 30 became recruitable. Responses to draft notices were, however, not what the regime had hoped for. Out of 10,000 draftees who had received draft notices from the PDF only 89 responded.500 Moreover, mothers and wives of either killed soldiers or those to be sent to the front protested alongside university professors and political activists against the abuse of the Sudanese youth as cannon fodder in the South.

Islamism and the economy
Regime changes often lead to changes in the distribution of national wealth. The 1989 takeover of the military-Islamist regime is no exception to this general observation. By now, those part of or close to the ruling circles own substantial parts of the Sudanese economy and/or have access to the major sources of the national income.501 Originally, the Muslim Brotherhood only had a very limited financial base, mainly contributions from its members and not comparable to what the Umma and the DUP could muster with their large number of followers distributed all over the country. This situation, however, changed considerably with the introduction of Islamic banking, when the Faisal Islamic Bank of Sudan (FIBS) was established in 1977 with the help of Gulf and Saudi capital. The FIBS’s shareholders originally comprised a variety of prominent representatives of the political elite, e.g. President Numairi, Šādiq al-Mahdī and Ḥasan al-Turābī.502 Within a few years, however, the MB won the battle for control of the FIBS, which in turn helped the Brotherhood’s members to gain easier access to loans. The MB’s financial base was further strengthened by its close ties to

499 Martin (2002), p. 3.
the Tadamon Islamic Bank and the Al-Baraka Investment and Development Company as well as the MB’s investments in the Islamic insurance sector.\textsuperscript{503} After the 1989 coup d’état the NIF held the reins of power and used it to gain unprecedented control of the Sudanese economy. It streamlined Islamic finance which had been watered down by the government of Şādiq al-Mahdi\textsuperscript{504} and when in 1992 the Ministry of Finance was taken over by a NIF member it paved the way to the privatization of formerly state-owned assets. A number of state property including railroads, transport and telecommunication firms, textile and tannery factories as well as large plots of land were bought by Islamist investors.\textsuperscript{505} This process of concentrating wealth in the hands of members of the ruling elite continues unabated until the time of writing. At least 164 companies are owned or controlled by the political and military elite, including the Sudan Armed Forces (SAF), the police and the National Intelligence and Security Services (NISS). The president’s brothers, ministers and prominent Islamists have invested in a wide range of economic activities ranging from petroleum, mobile phones, cement and engineering to hotels, car assembly and arms manufacturing. It is hardly surprising that the ruling National Congress Party (NCP) also has a firm grip on the national press and satellite TV. The close interaction between politics and economy also leads to companies owned by NCP members gaining contracts that are financed by foreign investment or through development assistance, e.g. the building of the Merowe Dam or roads and bridges.\textsuperscript{506} The awarding of contracts and business privileges is, however, not a one way street. Part of the money is channeled back to the NCP and has been used to win elections.

In general the NCP practices a similar mixture of patronage, corruption and resource misallocation as all previous regimes since independence. Patronage traditionally functions with the Riverine elites dominating the periphery.\textsuperscript{507} This is even the case when clan interests become dominant in certain sectors of the economy. Thus, e.g. the energy minister ˚Awad al-Jaz helped his Shaiqiyya tribe to seize part of the oil sector. In a similar way parts of the cement and telecommunication industries taken over by the Ja’aliyya tribe. However, “...NCP members from the periphery rarely participate in this system”.\textsuperscript{508} The annual budget at the

\textsuperscript{504} The streamlining of Islamic banking in order to curb abuses did not lead to an improvement of bank performance. Stiansen (2004), pp. 161-162.
\textsuperscript{506} International Crisis Group, (May 2011), p. 18.
\textsuperscript{507} On the dominant patterns of elite recruitment see Ahmed (2004).
\textsuperscript{508} International Crisis Group (May 2011), p. 18.
disposal of the government is mainly transparent with regard to salaries. As to expenditures for the security apparatus and the military, however, they are kept secret as are their financial sources. For major sources of income such as the oil revenue transparency is completely lacking. It is believed that the oil revenue is controlled by the security services and the military. Transparency and auditing are also absent on the federal level were corruption, with concurrent impunity, is rampant. “Federalism has come to mean, in effect, a decentralized system of political corruption rather than a decentralized system of governance”.$^{509}$ The proportional distribution of national revenue between the center and the periphery remains as imbalanced as it was since colonial times. The capital Khartoum receives 55% and the remaining 45% are distributed between the federal states which use the funds mainly to pay salaries. Their share of development projects is hardly existent, such projects are all concentrated in the center. It hardly needs mentioning that the lack of economic development in and the neglect of most federal states by the central government is one of the key factors behind the multiple conflicts the Sudan is facing at the domestic front.

The split of the Islamist camp and the end of the revolutionary phase

The years 1998 to 2000 saw the escalation of a power struggle between president al-Bashîr and the hitherto ideological and strategical mastermind of the regime al-Turâbî. Their rivalry had been simmering for some time and was eventually won by al-Bashîr. It marked the end of the first, revolutionary, phase of the military-Islamist regime. Other observers have called the end of the al-Bashîr/al-Turâbî alliance “the end of an Islamist experiment” (Burr/Collins) or the end of the “First Islamist Republic” (Gallab). Al-Bashîr had been in the shadow of the Islamist thinker and strategist, intellectual and Machiavellian politician for many years. Al-Bashîr was portrayed by the press as a “faithful and obedient ally”$^{510}$ of Hasan al-Turâbî. Al-Bashîr himself had contributed to al-Turâbî’s personality cult by praising his place in Islamic history and his contributions to the development of an Islamic state.$^{511}$ For years al-Bashîr had tolerated al-Turâbî’s insults and al-Turâbî’s discrediting him and annulling his decisions.$^{512}$ At the bottom line, however, the relationship between al-Bashîr and al-Turâbî was a functional one with one using the other and both regarding each other as a “temporary

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$^{511}$ Gallab (2008), p. 130.
While al-Turābī’s influence was strong in the National Assembly and in institutions dominated by the NIF, al-Bashīr not only had the army behind him but also began to use his presidential prerogatives to outmaneuver al-Turābī and eliminate him from the political scene. As a prelude to the coming showdown al-Bashīr used a cabinet reshuffle in March 1998 to promote NIF stalwarts to the rank of minister. Those chosen, were disillusioned with al-Turābī and proved to be loyal to al-Bashīr. In June 1998 the new constitution, drafted by a presidential committee, came into force. It was approved by a national referendum and strengthened the position of the president considerably. In May 1999 al-Turābī negotiated a secret alliance with Şādiq al-Mahdī in Geneva in order to prepare a regime change towards an NIF/Anṣār coalition, whilst simultaneously engaging in plans to get rid of al-Bashīr and the military. To this end, al-Turābī, as speaker of the National Assembly, contrived a motion suggesting the creation of the position of Prime Minister, thus effectively trying to reduce al-Bashīr to a mere figurehead, stripped of any real power. When al-Bashīr asked the parliament to postpone the discussion of the motion, he was harshly rebuffed by al-Turābī. Being in no doubt about the imminent threat to his regime, al-Bashīr swiftly dissolved the National Assembly, imposed a state of emergency and scheduled new elections for the National Assembly in December 2000. The dismantling of al-Turābī’s power base went further when in January 2000 nine ministers who were close to al-Turābī were dismissed. In February 2000 al-Bashīr had the PAIC headquarter closed and its building confiscated. All reconciliation attempts failed as well as al-Turābī’s attempts to mobilize support from the military and security forces. First Vice President ’Ali ’Uthmān Muḥammad Ţāhā, who also supervised the internal security apparatus, had switched sides and was now loyal to al-Bashīr. Decisive in al-Bashīr’s winning the day was his popularity in the military. The NIF had already before the coup in 1989 begun to infiltrate its ranks and it continued these efforts with some success in the first decade of al-Bashīr’s rule. Al-Turābī’s efforts to create a substitute army with the PDF which was to gradually absorb the regular army had, however, disenchanted many senior officers, who never trusted al-Turābī and Ţāhā. Al-Turābī, however, did not easily accept defeat and instead found another, unlikely, ally. In February 2001 he hammered out a

memorandum of understanding between his new party, the Popular National Congress (PNC), and John Garang’s SPLA, the very same foe his PDF had fought against for many years, with many thousands of Sudanese youth killed. President al-Bashir would not let himself be outmaneuvered. He forestalled the scheme, had al-Turabi and more than thirty senior PNC party officials arrested and held him in detention for two-and-a-half years, until his release in October 2003.517 The offices of the PNC as well as their newspaper were shut down and the remaining al-Turabi loyalists were purged from the government and security apparatus.518 At the end of March 2004, Hasn al-Turabi was arrested anew and remained in prison until June 2005.519 The elimination of the architect of the Sudan’s Islamization program of the nineties did not, however, lead to a complete political realignment. Al-Bashir has made it clear on numerous occasions that adherence to the shar'a was still and will remain to be a pivotal element of the regime’s ideology. At the time of writing, the Islamist statutes are still in force and applied (in the North). The statement that the ‘Islamic experiment’ has come to an end seems therefore premature.520 In retrospect the consequences of the split between al-Bashir and al-Turabi cannot be overestimated. Most importantly, the rift did not limit itself to the two leaders but extended to two factions of what was previously the al-Turabi camp. With the departure of the main thinker and strategist those who decided to side with the intellectually rather colorless al-Bashir are left without a charismatic leader who could provide the Islamist project with meaning and direction. It is rather, as Gallab has baptized it “Islamism without al-Turabi, authoritarianism without Nimairi”.521 Secondly, the end of al-Turabi as a main player on the ruling side also meant the end of the radical phase of Sudan’s Islamist experiment. The jihad al-Turabi-style, Sudan’s backing of Islamist terrorism within and outside of the Sudan, the PAIC have all disappeared with their spiritus rector. Thirdly, in its own understanding the al-Bashir regime is still Islamist and has not ceased to coerce Sudanese society into obedience by a mixture of extensive human rights violations and Islamist legislation. Fourthly, and this is certainly the most momentous legacy of Islamist rule, the regime’s uncompromising policy, continued after 1999, has led directly to the independence

519 During my first visit to Khartoum in May 2004 I was therefore not able to interview al-Turabi himself but talked to his son Siddiq instead.
of the South. The Islamist regime, like their predecessors, has neither been able to win the war with the South by military means nor has it been capable to devise a sustainable compromise formula that would have allowed for a peaceful coexistence of the South and the North in a united Sudan. The regime’s high-handed, culturally and religiously supremacist attitude vis-à-vis the South has thus reached its unintended but unavoidable end.

**From the temporary to the transitory: Islamist constitution making 1998 and 2005**

Constitution making in the Sudan has been an ongoing Endeavor since independence. “Transitional”, “permanent” or “interim” constitutions took turns. Rhythm and direction of the public discourse and the constitution making process have been and continue to be a reflection of regime changes and of the Sudan’s unstable national identity. This has not changed under the current military-Islamist regime which has enacted two constitutions so far, one in 1998, which has neither been called “permanent” nor “Islamic”, and the Interim National Constitution (INC) in 2005, with a third one, probably an Islamized one, in the making. The question of how Islamic (or how secular) the Sudan’s constitution should be has been at the heart of the battle between Islamists and their opponents since 1956. Interestingly, despite, or probably as a result of this discussion and the divergent views on the matter none of the Sudan’s constitutions bore the epithet “Islamic”, not even the 1998 constitution. It is therefore instructive and worthwhile to take a closer look at what constitution making looked like under military-Islamist rule. It should also be noted that the al-Bashir government created new legal institutions: while hitherto constitutional conflicts were decided by the Supreme Court, in 1998, as an institutional underpinning to the new constitution a Constitutional Court was established. It can be appealed to by ‘any aggrieved person for the protection of freedoms, sanctities and rights’ guaranteed in the constitution. The INC maintains the Constitutional Court whose president, a deputy, and five members are appointed by the president of the republic with the approval of two-thirds of the Council of States. The president can, thus, ensure a composition of the court favorable to his interests.

Surprisingly, the 1998 constitution is rather free of Islamic terminology, only 10 of 144 articles make direct reference to Islam. Many of the more delicate questions which were very controversial in earlier constitutional debates are not addressed in a way that would satisfy

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522 See also chapter 7.
Islamist hard-liners. Thus, for example, theoretically a non-Muslim could become president of the state and the rights of citizens are defined by nationality only and not by religion.\textsuperscript{524} Rather problematic was the ambiguity of some articles, especially those pertaining to religion. Thus, article 24 guarantees the freedom of religion to all Sudanese. However, this freedom is being qualified: “This right shall be exercised in a manner that does not harm public order or the feelings of others, and in accordance with law”. Clearly, the wording is ambiguous and in combination with the CA91 and the POL the regime still had all legal means at its disposal for the punishment of unwanted religious expressions. Another case in point is article 18 which states, that “Those working for the state and those in public life should worship God in their daily lives, for Muslims this is through observing the Holy Quran and the ways of the Prophet, and all people shall preserve the principles of religion and reflect this in their planning, laws, policies, and official work or duties in the fields of politics, economics, and social and cultural activities…” What is clear is that the state obliges all government officials to be observant and practicing Muslims. It is unclear what the non-observance of this article was supposed to mean in practice. The 1998 constitution also talks about the freedom to form political associations (article 26) using the rather unusual and voluntarily imprecise neologism of \textit{al-tawalī al-siyāṣī}, which was obviously coined in order to avoid the word \textit{ḥizb}, normally used in Arabic to denote political parties. Article 26, while allowing for the formation of \textit{al-tawalī al-siyāṣī}. Paragraph 2 of the same article, however, makes this right subject to the condition that these political associations function according to the principles of the \textit{shūra} and democracy and they must be based on the constitution. The conditions for the foundation of political parties have been further specified by law in 1999 and it has become clear that parties can neither question the \textit{shari‘a} nor the unity of the Sudan. Consequentially, most opposition parties organized in the National Democratic Alliance (NDA), and not subscribing to the Islamist project, have rejected political participation under the tawalī law.\textsuperscript{525} The 2005 Interim National Constitution (INC)\textsuperscript{526} largely draws on its 1998 predecessor, but also contains provisions for power-sharing on a 70-30 basis with Southern Sudan; establishment of an upper house representing the states; and creation of a first and a second vice-president, with one of the two from Southern Sudan. Article 218 makes it obligatory for

\textsuperscript{524} Seesemann (1999), p. 44.
\textsuperscript{525} Seesemann (1999), p. 45.
\textsuperscript{526} See \url{http://www.reliefweb.int/library/documents/2005/govsud-sud-16mar.pdf}.
any person running in elections to respect the Comprehensive Peace Agreement and to enforce its main clauses.\textsuperscript{527} The INC, not changing the territorial principle applicable before, maintains that the \textit{shari’\'a} is to be effective in the North only, thus posing the problem of the status of non-Muslims living in the North. Article 160 calls for an Interim Constitution for ‘Southern Sudan’, which was promulgated in September 2005.\textsuperscript{528} Only a few of the INC’s articles make direct reference to Islam. Most importantly, the Sudan is not defined as an Islamic republic, nor is Islam the religion of the state.\textsuperscript{529} Article 1 of the 1998 constitution set forth that ‘[t]he State of Sudan is an embracing homeland, wherein races and cultures coalesce and religions conciliate. Islam is the religion of the majority of the population. Christianity and customary creeds have considerable followers.’ In comparison, in the INC references to Islam with respect to the nature of the state have been omitted. Instead, article 1 (INC) states that the Sudan is a multiracial, multi-ethnic, multi-religious, and multi-lingual state. Thus, de jure Islam is not the state religion.

Under the 1998 constitution, pivotal regulations, such as those concerning the sources of legislation, contained ambiguous language. Article 65, for instance, read as follows: Islamic law and the consensus of the nation, by referendum, Constitution and custom shall be the sources of legislation; and no legislation in contravention with these fundamentals shall be made; however, the legislation shall be guided by the nation’s public opinion, the learned opinion of scholars and thinkers, and then by the decision of those in charge of public affairs. While Islamic law was named first in this list of sources of legislation, even for the South, it remained unclear what role the other sources were to play in relation to \textit{shari’\'a}. In contrast, in the 2005 INC version of the constitution, it is clearly stated that the \textit{shari’\'a} is not to play a role in Southern Sudan: ‘Nationally enacted legislation having effect only in respect of the Northern states of the Sudan shall have as its sources of legislation Shari’a and the consensus of the people’ (Art. 5 (1)). While Southern Sudan is to have its own non-\textit{shari’\'a}-based legislation (Art. 5 (2)), the \textit{shari’\'a}-clause for the North would leave non-Muslim Southerners

\textsuperscript{527} The Heidelberg-based Max Planck Institute for Comparative Public Law and International Law (MPI) originally helped to prepare a constitutional framework for the content of the six separate peace protocols. However, the MPI “Draft Constitutional Framework for the Interim Period” was not adopted by the Sudanese government. Subsequently, the Sudanese government, against the wishes of the SPLM, excluded the MPI from the process and instead relied on their own legal experts. See http://www.qantara.de/webcom/show_article.php/ c-476/ nr-593/i.html. The MPI’s draft is downloadable on its website.

\textsuperscript{528} See http://www.cushcommunity.org/constitution.pdf.

\textsuperscript{529} Böckenförde (2008), p. 85
in the North to be subject to Islamic law.\(^{530}\) This situation has been addressed in part by certain safeguards that protect non-Muslims in Khartoum from being subjected to *shari´a* punishments. No similar provision exists, however, for non-Muslims living outside the capital. A fundamental difference with the 1998 constitution is a group of five provisions (Art.s 154-158) protecting the rights of non-Muslims in the capital Khartoum. Next to pledging respect for all religions in the capital (Art. 154), Article 156 outlines the principles that are to guide the dispensation of justice in Khartoum. Apart from the application of tolerance with respect to different cultures, religions, and traditions, Article 156 affirms that: ‘The judicial discretion of courts to impose penalties on non-Muslims shall observe the long-established *shari´a* principle that non-Muslims are not subject to prescribed penalties, and therefore remitted penalties shall apply.’ Article 157, finally, calls for the establishment of a special commission ‘to ensure that the rights of non-Muslims are protected and respected […] and not adversely affected by the application of Shari´a law in the National Capital’. It must be mentioned here that Article 156 contradicts the position of non-Muslims in the Criminal Act (1991) in many ways and that a faithful application of the INC would require a substantial reform of the Sudan’s penal laws. In 1998, Muslim dominance was further ensured by legislators who made Arabic the official language of the Sudan (Art. 3) and also bestowed supremacy (*hÁkimiyya*) in the state upon Allah (God), the creator of mankind (Art. 4). Governance (*al-siyÁda*) was bestowed upon the people of the Sudan, who practice it as worship of Allah. Thus, governance was exercised by the faithful worshippers of Allah, acting as his trustees. This wording essentially excluded secular Muslims and non-Muslims. These articles, however, have been omitted in the INC. According to the INC a non-Muslim could, theoretically, become president of the whole of the Sudan (Art. 53). Equally omitted from the INC are most other articles from the 1998 constitution relating to Islamic precepts and notions, such as alms tax (*zakÁt*), state-based support for martyrs (*shuhadÁ`*), the purging of society from Muslims drinking alcohol, and so forth. It goes without saying that the 1991 Criminal Act and other existing laws (e.g. the Public Order Laws) on the different levels (e.g. state, governorate) still give the Northern Islamists enough leverage to pursue its policy of Islamization and enforcement of Islamic law, at least as long as no substantial legal reforms are undertaken. The INC expressly makes reference to and confirms the death penalty for

hadd- and retribution-related offences (qiṣṣās). It also confirms the applicability of the death penalty for underage (below 18) and elderly (above 69) offenders in hadd or qiṣṣās cases (Art. 36). Concerning religious freedom, Articles 6 and 38 of the INC commit the state to all precepts of religious freedom normally associated therewith. Article 38 stipulates: ‘Every one shall have the right to […] declare his/ her religion or creed and manifest the same […]’. It should be noted here that this right must be seen in the light of the pertinent sections of the Criminal Act (1991), which make apostasy of Muslims punishable by death (Art. 126). Non-Muslims are, thus, free to convert to Islam, but not vice versa. In practice, however, death penalties have not been imposed in cases against converts since the promulgation of the Criminal Act in 1991.531 But, discrimination against Christians and adherents of native religions was and is still commonplace532, irrespective of Article 31, which sets forth that ‘[a]ll persons are equal before the law and are entitled without any discrimination as to race, color, sex, religious creed […] to the equal protection of the law.’ The INC also guarantees men and women equal rights in the areas of civil, political, social, cultural, and economic rights (Art. 32). These guarantees, however, contradict to some degree other Sudanese legislation. Equal rights for men and women are especially relevant with regard to shari‘a-based parts of the Criminal Act (1991) and in consideration of family and inheritance laws, which are known to be unfavorable to women in a variety of ways. Article 15 of chapter II on the ‘guiding principles and directives’ of the INC guarantees that: ‘No marriage shall be entered into without the free and full consent of its parties.’ In the second section of the same article, the state is called upon to ‘protect motherhood and women from injustice, promote gender equality and the role of women in family, and empower them in public life.’ Article 22 of the same chapter, however, clarifies that these provisions ‘are not by themselves enforceable in a court of law’.

In conclusion, the 1998 constitution is a document reflecting one side of a two-pronged strategy. On the one hand, the regime followed a strategy of large-scale and uncompromising
ideological mobilization, necessary to rally popular support for its *jihād* in the South and Islamization measures in the North. On the other hand, legislative measures such as the Criminal Act 1991, which exempted the South from *hadd*-punishments, and the 1998 constitution were presented as a clear sign of the North’s willingness to compromise with Southern interests. ⁵³³ That the 1998 constitution is clearly part of the regime’s effort to avail itself of a democratic veneer is further underlined by the chosen “democratic legitimacy”. The 1998 constitution was not decided upon by parliament or enacted as presidential decree but made subject to a referendum. Unsurprisingly, a large majority of 96% of voting Sudanese voted in favor of the new constitution. ⁵³⁴ In comparison, the INC of 2005 together with the Comprehensive Peace Agreement (CPA) marked the end of a long mainly North-South conflict that had been going on, with an interruption 1972-1983, since independence. This could not be achieved without compromises on both sides mainly pertaining to power-sharing, North-South representation in Sudanese political institutions and certain safeguards for non-Muslims with regard to *shari´a*-application. The INC, however, fell short of international human rights norms which were not mentioned as a source of legislation. ⁵³⁵ Given the fact that there was a second interim constitution for Southern Sudan also promulgated in 2005 the Khartoum government most probably took into account the possibility of South Sudan becoming independent after the scheduled referendum. It therefore wanted to ensure not to lose its grip on where it was poised to rule also after a possible Southern independence, i.e. the North. This was achieved mainly by excluding most of the political parties and civil society from the drafting process ⁵³⁶, holding on to the *shari´a* as a main source of legislation while being vague on the status of international human rights law and, lastly, by not living up to the spirit of the INC in the phase leading up to the referendum. ⁵³⁷

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⁵³³ Seesemann (1999), p. 43.
⁵³⁴ Seesemann (1999), p. 43.
⁵³⁶ As well as the Max Planck Institute which was initially assisting in the drafting process but was then excluded.


*Losing the South*

In May 2004, a protocol on power sharing between the al-Bashir government and the SPLA’s political wing, the SPLM, was signed in Naivasha, Kenya. In this protocol the latter agreed to the application of the *shari‘a* in the capital Khartoum; other provisions of the agreement gave guarantees as to the protection of non-Muslims. In principle, the wording of these provisions was meant to safeguard the rights of non-Muslims in the capital, while simultaneously allowing for the continued application of the *shari‘a* in Khartoum as the government sees fit.

In July 2005, the Interim National Constitution of Sudan was adopted after the National Congress Party, representing the central government and the SPLM, had reached a Comprehensive Peace Agreement (CPA) in January 2005. According to this agreement, the Sudan was to be governed by an interim constitution during a six-year transitional period. At the end of this period, in January 2011, a referendum took place in southern Sudan which resulted in the independence of the Republic of South Sudan (9 July 2011) with the capital Juba. The split between Khartoum and Juba marks the end of at least part of the conflict around the *shari‘a*. The independent South has now its own, *shari‘a*-free, criminal law, the CA91 remains enforceable only in the North. Southern politicians or other Southern pressure groups such as the churches are not party to the discussions around the future of the *shari‘a* any longer. This, however, doesn’t mean that the eternal discussion on the nature of the state will now be solved easily. On the contrary, with the secession of the South the discussion on the next constitution is now in full swing. According to a report of the Umma National Party (UNP) of spring 2011 the UNP agreed in discussions with the National Congress Party to the principle would be implemented on a territorial, not on a personal basis and that *shari‘a* and “local norms” (read: customary law) would be the basis for legislation. 538 It is, however, more than doubtful that the ruling regime is willing to concede the UNP or any other opposition party for that matter a real say with regard to the future constitution of the country. In April 2011, Salah Gosh, who was responsible for the NCP political party negotiations, was suddenly fired by al-Bashir, another sign of the deep rift in the ruling NCP. 539 With regard to the future constitution and *shari‘a* application the al-Bashir government has so far followed its

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539 Ibid. pp. 28-29.
usual two-pronged approach. On the one hand it makes an effort to mobilize its clientele. Before and after South Sudan’s secession al-Bashir has underlined that “he rejects secularism in the Sudan” and “reiterated his commitment to replace the country’s constitution with an Islamic one”. He also defended the flogging of a woman, the YouTube video of which had caused international consternation. According to al-Bashir the NCP’s insistence on shari’a law played no role in the secession of the South. The North is populated by 98% Muslims who are obliged to follow God’s orders and therefore shari’a would be the basis of the new state the NCP was going to build. Vice-President ‘Alī Uthmān Ṭāḥā has warned “that Islamic laws would be applied in the country, especially against those rejecting it and detractors of President Al-Bashir”. Thus, while reasserting its followers it concurrently negotiates with the political opposition, i.e. Umma and DUP, seemingly willing to listen and make compromises. It seems to be unlikely though that NCP and the Umma especially can under the current NCP leadership identify enough common ground that would justify Umma’s co-optation into the political system. The fact that two of the major opposition parties have agreed to enter unilateral negotiations with the regime must be seen as a success of the NCP irrespective of its outcome. The regime clearly wants to present itself as the main bulwark of the Islamic state, also in order to preempt other Islamist groups who now try even harder to pressure the regime to accelerate Islamization. In February 2012 an “Islamic Constitution Front” (ICF) held its foundation conference in Khartoum. Participating Islamist groups comprised the Anṣār al-Sunna, the Muslim Brotherhood and the Just Peace Forum (JPF) all of which threatened “an uprising by Islamists” which would “topple President Bashir if he does not approve the draft constitution” the ICF proposes. While these splinter groups hardly have the power to topple the government, al-Bashir and the ruling National Congress party have come under increasing pressure due to a variety of factors. As a result of the South’s secession Khartoum lost about 75% of its oil income, resulting in a 30% inflation rate in May 2012. The costs of food and other basic necessities have skyrocketed and in June 2012 Arab spring-style protests broke out, triggered by students of the University of Khartoum.

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540 Sudan’s upcoming constitution will be “Islamic” Bashir says. Sudan Tribune, July 7, 2012.
541 http://www.youtube.com/watch?v=PBJRsh4bn3k
542 Sudanese president asserts North Sudan’s Arabic, Islamic identity. Sudan Tribune, February 6, 2011.
543 Sudan’s Taha says country to apply Shariah, warns Al-Bashir’s detractors. Sudan Tribune, August 1, 2011.
544 Not to be confused with the NCP or al-Turābī’s PCP.
546 Has the Arab Spring now spread to Sudan? The Independent, 28 June 2012.
The security forces have swiftly clamped down on the protesters and at the time of writing it seems unlikely that al-Bashir and the NCP will face a similar fate as former Arab dictators Mubarak, Qadhafi, Ben Ali and Salih. It should be remembered that the regime is able to muster considerable forces for its protection. At any point in time approximately 6000 security personnel of a private security force directly under al-Bashir’s command are deployed in strategic areas of the capital and another 12000 are based outside of it. In addition, the army, a plethora of state security services and several police corps are effective instruments to crush the opposition. Also, the NCP is well organized, does enjoy a certain support and disposes of substantial financial means. Thus, while, for the time being, the NCP regime is still capable of winning in the streets of Khartoum its list of political and economic problems is long and further aggravated by fierce infighting in the ruling NCP. One year after the secession of the South the conflicts with its now independent neighbor have neither ceased nor are they likely to do so in the near future. It will be crucial to find solutions for the contested common 1800 km long border, the disputed area of Abyei and a wide array of problems directly related to the split such as citizenship, refugees, nomads affected by the new borders, security arrangements and economic and financial matters. As to the latter it seems that for the most pressing problem, the crucial question of how much the South has to pay in order to be able to pump its oil through Northern territory to Port Sudan for exportation, a solution has been found. The Darfur conflict has still not been solved with the government preferring to continue a divide and rule policy rather than pursuing a credible peace process. While this list could be continued the general situation is further aggravated by the multiple internal splits of the Islamist movement which make reforms or a major change of direction unlikely if not impossible. Thus, the movement not only suffers from the split between the al-Turabi faction, organized as the Popular Congress Party, and the ruling National Congress Party. The past years have also seen severe infighting of different factions in the NCP, mainly between security hard-liners and more accommodating civilians. These conflicts are decided by president al-Bashir who is acting as the final arbiter. The NCP’s

548 20% of the 1800 km long common border are contested.
internal divisions prevent it from developing a coherent vision of what kind of northern Sudan it intends to create after having lost the South. Instead it continues to fuel a multitude of regional conflicts and a political system based on the inherited economic and political imbalances between the center and the periphery.

**Conclusion**

The Sudanese legal history, since the advent of Islam in the sixteenth century, has been shaped and influenced by a variety of sources. By a mix of customary, *shari’a* elements and royal or sultanic law in Sinnâr (1504-1821) and Dâr Fûr (1640-1916), by Ottoman-Egyptian law in the nineteenth century, by a short interlude of Mahdist law, by common law from the beginning of the condominium rule in 1898, by modern Egyptian civil law since the early 1980s, by customary law during the entire history of the Sudan, and by the diverse family laws of different denominations, including *shari’a*-based family law. While the different ingredients have occupied different space at different times, certain tendencies can be filtered out for the post-colonial period. Most importantly, three different tendencies were discussed when the Sudan became independent. These were the Islamization of the legal system, its Egyptianization and an eclectic system choosing the most suitable solutions from different legal systems.\(^{552}\) Our historical account of legal developments across recent history shows that none of the camps can claim complete victory 56 years after Sudan’s independence. Luṭfî’s argument in favor of maintaining English law was contrary to the anti-colonial discourse of the time. Nevertheless English law, or rather its Sudanese version of it, while receding in some areas, has held more ground than the present regime might be willing to admit publicly. After the Mahdiyya, the British had rebuilt the judicial system from scratch, according to their own models, in the case of criminal law British-Indian law was adopted. Despite more than fifty years of legislative, procedural and other changes, introduced by democratic regimes and military dictatorships alike, the main structures of this colonial heritage are still clearly discernible today in several important aspects. First of all, the organization and structure of the judiciary and the continuing importance of precedents and law reporting are doubtlessly strong reminders of the British heritage. Furthermore, certain

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laws of the time of the condominium are still valid, and even more recent legislation can be traced back to the condominium in terms of organization and wording.

The camp advocating Egyptianization of the legal system, however, can, to some degree, claim victory for the important field of civil law. After the failed introduction of a slightly modified version of Egyptian civil law in 1971, a second, though somewhat different, attempt in 1984 was successful. The Civil Transaction Act 1984 (al-qānūn al-muʿāmalāt al-maddaniyya 1984) follows mainly the Jordanian civil code, which in turn is inspired by both, the Mecelle, the Ottoman civil code of 1876 and Egyptian civil law. The Sudan has thus, despite the influence of the Mecelle, joined the large group of Arab states that have adopted Egyptian civil law.

Most significantly, despite efforts of the al-Bashîr government to marginalize it, customary law is still of major importance in the rural areas of the Sudan. Further, since 1983 Sudanese legislation has gone through an accelerated process of Islamization. While this process was not a linear one, for more than twenty years, two autocratic regimes have expanded the influence of the shariʿa / fiqh to the detriment of competing sources of law. The shariʿa / fiqh has substantially influenced criminal legislation, banking laws, taxation laws (zakāt), the 1998 and 2005 constitutions, and, as in most Muslim countries, family and inheritance laws for Muslims and to some degree civil law.

However, with regard to the actual implementation of the hudūd it has been noted that “the new legislators seemed rather keen to give an impression of moderate and considerate application as opposed to the cavalier deployment that characterized the 1983 experiment”. These findings are confirmed by this study.


554 How important the respective influence of both sources is seems to be controversial. Krüger points out that the Egyptian civil code played an important role in the drafting of the Jordanian civil code, while admitting that the Jordanian civil code contains more shariʿa-based elements than the civil codes of other countries strongly influenced by Egyptian civil law. Krüger (1997), pp.98. Layish, in contrast, underlines the strong influence of the Mecelle, and its shariʿa-based elements. Layish (2002), p.114, pp. 205-206.

555 For example, Jordan, Iraq, Syria, Algeria, Yemen, Kuwait, and others. Krüger considers the Sudan to be part of the countries under the influence of Egyptian law (“...gehört der Sudan zum ägyptischen Rechtskreis”). Krüger (1997), p. 100. Witness to the importance of Egyptian civil law for Sudanese jurists are Khartoum’s book shops. Wherever legal literature is available, Egyptian commentaries abound.

556 One of my interview partners estimated that as much as 80 per cent of all cases in the Sudan are judged in accordance with customary law. Interview with Supreme Court judge, Khartoum, June 2004.

557 This is to name the most important legislation of the present regime. It should be noted that systematic research on the influence of Islamic law on the Sudanese legislation from 1989 until present is scarce.

In summary it can be said that the Sudanese legal system remains to be a hybrid patchwork, marked by a high degree of legal syncretism. Sudan belonged to the first wave of countries introducing ICL in 1983, after Libya, Pakistan and Iran had showed the way. The fervent application of floggings and amputations under Numairi was suspended under his direct successors until the present regime came to power in 1989 and subsequently supplanted the 1983 Penal Code by the Criminal Act 1991. Despite substantial non-Muslim minorities in the South and among the refugee population around Khartoum Numairi had decided to introduce ICL for the country as a whole. This was for the most part changed in 1991 when the South was exempted from *shariʿa*-based punishments. The legislation as such, however, was, at least in theory, applicable in the South of the Sudan as well, despite the fact that parts of the South were not under effective government control. It should also be noted that the exemptions pertained to punishments while the definitions were the same for the North and the South. Thus, e.g. *shariʿa*-based definitions for theft, unlawful sexual intercourse and armed robbery were applicable in the South as well without paying any attention to cultural differences.\(^{559}\)

ICL has been an important bone of contention between the North and the South since 1983 but also in the North itself. Its looming abolition was an important motive behind the coup d’état in 1989. While as of 1991 the ḥudūd and qīṣāṣ were not applicable any longer in the South, non-Muslim Southerners living in the North were still subject to *shariʿa*-based punishments. This highly controversial situation only ended, at least on paper, with the Interim National Constitution (INC) in 2005. In 2012 plans for reinforced *shariʿa*-application and an Islamic constitution seem to get a new impetus. The al-Bashir regime seems to be poised to move ahead with an Islamic constitution. Whether the repeated announcements of “*shariʿa* application” mean that the laws in place will be applied in a more draconian manner seems unlikely. The government is fighting at too many fronts and can ill afford to further antagonize public opinion.

\(^{559}\) Kok has rightly pointed out that the CA91 defines *zinā* as unlawful sexual intercourse between a man and a woman without lawful bond between them. Sex within a levirate relationships or in a “ghost marriage” is lawful under customary law in many southern communities, but obviously not under *shariʿa*. Compare Kok (1991), pp. 245-246.
3 Sudanese Islamic Criminal Law: sources, structures, procedure, evidence and general principles

3.1 Criminal legislation

3.1.1 The Penal Code 1983 and the Criminal Act 1991

3.1.1.1 Objectives of the codes

In an explanatory note, the Sudanese legislator justified certain provisions and explained how he wanted the Penal Code 1983 to be understood. An important section of the note deals with the question of different or equal treatment of non-Muslims with regard to 'hadâd- and qiṣâṣ-crimes. As a general rule, the explanatory note states that all humans are equal before the law, regardless of their religion or social status. In consequence, the Penal Code makes no difference with regard to the blood price of a Muslim or a non-Muslim. As to the drinking of alcohol, the Qur’anic punishment is only applicable to Muslims. As to the drinking of alcohol, the Qur’anic punishment is only applicable to Muslims. Members of other religions, however, who consume alcohol or trade in alcohol and offend the sensibilities of “another person” (read: Muslim) or cause disturbance of the public order will be punished as well because these offences harm society. With regard to unlawful sexual intercourse (ziñā), non-Muslims will receive the punishments provided for in their own religions. In analogy, a Muslim must be the injured party of false accusation for unlawful sexual intercourse (qadhâf). If a non-Muslim is accused of ziñā in the same way the Qur’anic punishment shall not apply.

The explanatory note also explains that retribution (qiṣâṣ) will be carried out by the state in the presence of the injured party. The state acts as a general guardian (wilâya ʿāmma), in the same manner it carries out any other punishment, following Sudanese practice since independence. Justifying this inherent shift of retribution from private to public law the note argues that allowing the victim or his heir to carry out the punishment would “strengthen the traditional nature of the qiṣâṣ as retaliation at the expense of punishment”. Interestingly, we can also observe the opposite tendency, i.e. strengthening private law vis-à-vis public law. Thus judges, in the pre-1983 legislation enjoyed immunity with regard to causing unintentional homicide through a wrong judgment. This immunity, the note points out, is abolished in the new Penal Code. Judges in such cases would be liable to blood money (diya).

560 For the following see Layish/Warburg (2002), p. 255, p. 214 and p. 145. Layish/Warburg quote the Sudanese journal al-Ṣahāfa, where the explanatory note was published in October 1983.

The Criminal Act 1991, which repealed the Penal Code 1983, came into force on March 22, 1991. In a memorandum accompanying the CA91 its authors explain in detail what the general guiding principles of the drafting process were and what, in their eyes, it has achieved: The masses of the Sudanese people, says the introduction, have addressed to consecutive governments a call for an Islamic Penal Code. Consequentially, after having secured the country’s safety and unity, the „Revolution for National Salvation“ was the first government to tackle the problem. It confirmed its identity promulgating “authentic Sudanese laws” derived from the *shari‘a* and answering to the aspirations of the Sudanese masses. The authors of the code explain further that not only the criminal laws of 1974 and 1983 have been taken into consideration, but also various projects of *shari‘a* criminal codes of other countries and institutions, such as projects of the Arab League, Al-Azhar, the United Arab Emirates, Pakistan and Egypt as well as a Sudanese project of a new penal code. This project, the Criminal Bill 1988, which had been submitted to parliament in 1989, had passed the first and second reading, but subsequently did not come to fruition due to controversies between the political parties and „foreign pressure“.

Further, the precision of the wording of the 1991 code was improved by taking into account modern criminal jurisprudence (*al-fiqh al-jinā‘ī al-muta‘awwir*). Major flaws which became evident during the application of the predecessor codes were remedied. The rendering of multiple versions of a particular crime has been abandoned especially with regard to theft, robbery, fraud and crimes committed by public servants.

As its main sources the code uses the Islamic *shari‘a*. It is using *ijtihād* and is taking into account the orthodox schools (*madhāhib fiqhiyya*), the latest developments of the time (*mustajidāt al-`aṣr*), the conditions of the country (*ẓurū‘ al-bīlād*). Orthodox jurisprudential terminology (*al-muṣṭalāḥ al-ﬁqḥī*) is used in order to connect the law with the jurisprudential and Arab heritage (*al-turāth al-ﬁqḥī wa al-`arabī*) as far as compatible with modern and current terminology in the Sudan.

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563 The following is taken from: mudhakkira irfāq al-qānūn al-jinā‘ī lisanat 1991 m, n.d.
564 Al-Nūr argues that the Criminal Act 1991 continues an Islamic legal tradition of the Sudan which had been interrupted by colonization and Western influence. Al-Nūr (1991), pp. 1-2.
565 “al-qawānīn al-sūdānīyya al-aṣlīla”.
567 See introduction to the memorandum, p. 1.
568 Paragraph 2: Exactitude, paragraph 1 deals with the arrangement of the chapters.
569 Paragraph 3: Sources (*uṣūh*).
With regard to punishments the authors explain that the new code in general has diminished prison terms and limited whipping – except for crimes that call for special deterrence. It has also introduced the new penalties of banishment and exile (taghrīb wa nafiy) and has separated punishments (ʿuqūbāt) from compensational penalties (al-jazāʾ āt al-taʾwilīyya). Next to the introduction of innovations the new code has also done away with certain features of its predecessor. It has thus abolished the extensive legislation on political offences and introduced wide-ranging amendments on political crimes against the state in favor of freedom (liṣālīḥ al-ḥurriyya). It abolished provisions that contain imprecise meanings that are incompatible with the definitive character of criminal laws and the principle of the rule of law. Finally the code treats the consequences resulting from the suspension of the execution of convictions of ḥadd-punishments dating from before the code was promulgated. This delay of the execution is considered to be a shubha annulling the ḥadd-punishment in conformity with the opinion of Abū Ḥanīfa and taking into consideration the relevant text on a substitutional taʿzīr-punishment.

3.1.2 Codes of Criminal Procedure

The Code of Criminal Procedure 1983 (CCP83) was, to a large extent, inspired by its predecessor, the Code of Criminal Procedure 1974. Many articles were mere translations. With regard to the general principles the CCP83 basically maintained the same rights that were already guaranteed in 1974. Thus, the accused has the right to a fair and speedy trial, there is a presumption of innocence until guilt is proved beyond reasonable doubt, no punishment shall be inflicted beyond that prescribed by law in force at the time the offence was committed and no person shall be subjected to cruel and inhuman treatment. Further, no person shall be subject to double jeopardy and torture. Enticement or intimidation shall not be used in interrogation and the accused had a right to an advocate of his choice. The
CCP83, while maintaining substantial parts of the previous system, made, however, important amendments in order to make it compatible with the new Penal Code and in order to Islamize it. Thus, in an annex the CCP83 stipulated that the Chief Justice will issue occasional criminal circulars deciding upon the school or schools (madhāhib) the courts have to follow in their application of the Islamic shariʿa. These circulars also determine the amount(s) to be paid as diya in homicide cases and cases of bodily harm.\(^{579}\) The necessity to administer justice in conformity with the shariʿa also restricts the powers of the president and the attorney general. Thus, the president has the authority to waive a punishment, commute a sentence or cancel a conviction for a crime only when this does not contradict the Islamic shariʿa.\(^{580}\) Similarly, the attorney general cannot terminate criminal proceedings if this violates the shariʿa.\(^{581}\) In order to ensure that the shariʿa is respected, the Supreme Court and the Court of Appeals may request on their own initiative any file on criminal proceedings of a court subordinated to its authority when they consider the proceedings to violate the Islamic shariʿa.\(^{582}\) With regard to the death penalty, the CCP83, in contradiction to the shariʿa, does not allow for executions of persons who are seventy years of age and older.\(^{583}\)

In analogy to the large-scale changes and streamlining effected in the Criminal Act 1991, its accompanying Criminal Procedure Act 1991 is more concise and shorter. Shariʿa-related issues which previously had not been stipulated specifically were introduced into the CPA91 to bring it more in line with the shariʿa. This concerns e.g. the application of the death punishment, the (public) execution of ḥadd-, qiṣāṣ and whipping sentences and the introduction of a special circuit to revise Supreme Court judgments that may involve contraventions of the shariʿa.\(^{584}\)

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\(^{579}\) These amounts can be applied country-wide or in specific provinces only, as the Chief Justice considers it just (ʿādil) and in harmony with the Islamic shariʿa. See CCP83, annex to art. 307., p. 119.

\(^{580}\) CCP83, art. 257.

\(^{581}\) CCP83, art. 215(2).

\(^{582}\) CCP83, art. 239 (1).

\(^{583}\) CCP83, art. 247 (1). This has been changed in the CPA91.

\(^{584}\) For details of the CPA91 see the following chapter 3.2.
3.1.3 The sources of modern Sudanese Islamic Criminal Law

The main sources of Sudanese criminal law are the common law, the *shari’ā* and customary law.\(^{585}\) The former’s influence is clearly visible in the Penal Code 1983 and the accompanying Code of Criminal Procedure 1983 which both closely followed its predecessor codes. Especially in the case of the Penal Code 1983 the lineage is clearly going back into the days of the Condominium. The Penal Code 1974, which served as a model for most of the PC83, in itself has a close connection with its 1925 predecessor. The common law as practiced in the Sudan before Islamization was composed of the constitution, statutory enactments, such as codes, acts, legislation, rules, orders and precedents etc. Despite the Islamization of the legal system first under Numairi and then under al-Bashîr this array of legislative texts basically subsists. It can be said that the efforts to Islamize the law has not led to the elimination of these inherited structures, neither with regard to forms of legislation nor with regard to judicial institutions (e.g. the hierarchy of the court system). One could have imagined e.g. the application of the uncodified *shari’ā*. This, however, did not happen. To the contrary, in the one instance where the uncodified *shari’ā* had been applied in the past it was replaced by codified statutory law.\(^{586}\) As to the *shari’ā* as a source of law, the Mâlikite *madhhab* was the traditional school adhered to in the Sudan, but Ḥanafite law gained importance under Turko-Egyptian rule and in 1914, well into Condominium rule, a translation of Muḥammad Qadri’s “The Code of Mohammedan Personal Law according to the Hanafite school” was translated and published for the use of the British judges in the Sudan.\(^{587}\) Islamic Criminal Law as introduced in 1983 and revised in 1991 does not limit itself to the Mâlikite and Ḥanafite schools but draws on all Sunni schools and on rare occasions even on Shi’ite law. Customary law is recognized as a source of law in the Judgments Basic Rules Act 1983.\(^{588}\) It instructs the judge in the case of a lacuna to take a decision according to custom after having exhausted *ijtihād* from the textual sources, the principles of the public interest, presumption of innocence and judicial precedents. Relying on custom in judicial decision, however, must not contradict the *shari’ā* or natural justice.\(^{589}\)

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\(^{585}\) To my knowledge there are no studies on possible influences of customary law on modern Sudanese ICL.

\(^{586}\) For example family law was codified in 1991.


\(^{588}\) Art. 3 (b) (vi).
3.1.4 The structures of ICL legislative texts

3.1.4.1 Legislative techniques

The legislative technique predominantly used in the process of shari’a codification is what Layish calls the eclectic expedient (takhayyur), i.e. selecting legal opinions either from different schools (madhāhib), from majority or minority opinions within one school, or even Shi‘ī fiqh. These opinions are subsequently either grafted onto an existing code (PC83) or become part of a new one (CA91). This study will show that indeed all four Sunni schools, majority and minority opinions and at least in one instance Shi‘ī fiqh served as sources for the statutory codification of shari’a law despite the historical predominance of the Mālikite and Ḥanafite schools in the Sudan. The only guiding principle seems to have been expedience, i.e. an opinion was chosen according to the result intended by the legislator. For example pregnancy of an unmarried woman is accepted as proof for zina in the two Islamist Criminal Procedure Acts despite the fact that only the Mālikite school recognizes it. The intention here obviously was to make zina easier to prove.\(^{590}\)

The further development of shari’a law by way of Supreme Court case law must also be understood as a “legislative technique”. While not being legislation proper Supreme Court interpretations of existing legislation often fills gaps, establishes binding precedents and can thus be seen as being equivalent to legislation. Layish has pointed out that Sudanese judges especially in the highest levels of the judiciary (Supreme Court), have used “neo-ijtihād”, i.e. interpreted Qur’ān and Sunna in order to reconcile legal norms with modern requirements. By way of using the doctrine of maslaha, i.e. public interest, the Supreme Court judges in many instances show a liberal attitude in implementing ICL and adapting it to societal needs.\(^{591}\) Cases in point are e.g. the non-application of qisāṣ in cases of bodily harm or an interpretation of the term ’aqīla harmonizing it with the requirements of modern society.

3.1.4.2 Authority of the shari’a

The authority of the shari’a in the Sudanese legal system can be directly derived from the different constitutions in force since 1973. The September laws were promulgated in

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\(^{591}\) This led to important practical problems in cases of rape, when women who were pregnant after having been raped were treated as culprits of zina instead of victims of rape. See below chapter 4.1.
adherence to article 9 of the Permanent Constitution of 1973 which stipulated that “Islamic law and custom shall be the main sources of legislation...”\footnote{\textsc{592} The Permanent Constitution of the Sudan 1973, art. 9. Interestingly, the Penal Code 1974 did not contain any Islamic provisions.} Before the September laws the influence of the \textit{sharī‘a} on Sudanese legislation was very limited, but gained momentum as of 1977 when new Islamic legislation concerning the banning of alcohol, gambling, interests et al. was drafted. It must be noted that the dominant role of the \textit{sharī‘a} as a main source created a multitude of constitutional problems once the September laws were in force. The 1973 constitution guaranteed equal rights\footnote{\textsc{593} Art. 38.}, freedom of religion\footnote{\textsc{594} Art. 47.}, freedom from cruel and unusual punishment\footnote{\textsc{595} Art. 72.} which were in direct contradiction to provisions of the PC83. These contradictions persisted with the 1985 Transitory Constitution which gave similar guarantees while the September laws remained on the statutes.\footnote{\textsc{596} See also Sherman (1989), pp. 295-297.} In the first Islamist constitution of 1998 the authority of the \textit{sharī‘a} as a source of legislation was confirmed, alongside the consensus of the nation by referendum, the constitution and custom. No legislation was to be made in contravention of these fundamentals.\footnote{\textsc{597} Article 65, The Constitution of the Republic of the Sudan, adopted June 1998.} In addition, the 1998 constitution contains various \textit{sharī‘a}-derived elements such as a provision on \textit{zakāt}\footnote{\textsc{598} Art. 10.}, the pledge to purge society from liquor among Muslims\footnote{\textsc{599} Art. 16.} and a provision on the applicability of the death penalty in \textit{ḥadd}- and \textit{qīṣās}-cases.\footnote{\textsc{600} Art. 33 (2).} Despite these provisions, the 1998 constitution has not managed to solve the contradiction between the authority of the \textit{sharī‘a} and the granting of fundamental rights such as freedom of religion\footnote{\textsc{601} Art. 24.}, equality before the law\footnote{\textsc{602} Art. 21}, and non-discrimination by reason of sex or religious creed.\footnote{\textsc{603} Art. 21} In the last constitution, the Interim National Constitution (INC) of 2005, which is still in force at the time of writing, the legislators have tried to find a balance between Northern and Southern interests with regard to the role of the \textit{sharī‘a}. Article 5(1) of the INC stipulates that the Islamic \textit{sharī‘a} and the consensus of the people shall be the sources of legislation having effect only in the Northern states of the Sudan. In the South the \textit{sharī‘a} had no role to play as a source of legislation. As to banking a dual banking system, with an
Islamic system in the North, was provided for. With regard to the Southern refugees living in and around Khartoum the INC stipulates that non-Muslims are not subject to prescribed penalties *shari‘a*-based penalties. A special commission is charged with ensuring that non-Muslims are not adversely affected by or subject to the application of the *shari‘a* law in the National Capital.

### 3.1.4.3 Legality principle

The legality principle “nulla poena sine lege” was firmly established in the constitution of 1973 which was in force when the September laws were promulgated and remained operative until after the downfall of the Numairi regime. The 1973 constitution stipulated that “no person shall be punished for an act which was not an offence at the time he committed that act...” The new Islamist legislation, however, contradicted this principle. Thus, the Judgment Basic Rules Act 1983 stipulates that in the absence of a statutory provision the judge shall apply *shari‘a* rules established by the Qur‘an and Sunna. Further, the Penal Code 1983 provided that when a *hadd*-punished was remitted the judge could impose any *ta‘zīr*-punishment even if such a penalty was not clearly stipulated in the Penal Code. Moreover, the non-existence of a text in the Penal Code does not pose an obstacle to imposing a *hadd*-punishment (‘*uqūba shari‘yya ḥaddiyya*). While the latter two provisions have been abolished when the new Criminal Act 1991 was introduced, the Judgment Basic Rules Act 1983 remains in force and still allows a judge to apply *shari‘a* rules even without a clear provision in the statutory laws.

With regard to practice it is interesting to note the contradictory application of this principle. Layish reports a case in which the Criminal Court of Appeal overruled a sentence of a criminal court with regard to a crime that had taken place before the September Laws were enacted in 1983. It reasoned that the new 1983 legislation could not be applied retroactively and that “everyone is entitled to know the statutory sanctions entailed in any offence”.

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603 Art. 21.
604 Interim National Constitution 2005, art. 156 (d).
606 The Permanent Constitution of the Sudan 1973, art. 70.
609 For cases illustrating this principle in practice see Layish/Warburg (2002), pp. 180 et sqq.
other words, the Supreme Court upheld the principle of “nulla poena, nullum crimen sine praevia lege”, despite the provisions of the Judgment Basic Rules Act and the Penal Code contradicting it. In the highly politicized case dealing with the alleged apostasy of Muhammad Tāhā, however, the uncodified offence of apostasy/ridda led to the execution of the accused despite the non-existence of the offence in the statutes.612

3.1.4.4 Legal circulars
The power to issue legal circulars dealing with the interpretation of the shari`a goes back to the Muhammadan Law Courts Organization and Procedure Regulation of 1915613, which granted the Grand Qādī the leverage to introduce reforms by choosing and combining doctrines mainly of the Ḥanafite but also of other schools. Until the abolition of the office of the Grand Qādī in 1979 more than 60 circulars were issued, partially dealing with administrative matters and partially introducing reforms of substantive law. In 1980 the Sudanese judiciary was reorganized and shari`a courts and civil courts were unified under the Chief Justice. The Chief Justice, who had been hitherto head of the civil judiciary, continued to issue legal, including criminal circulars.614 Given the many loopholes of the September criminal legislation and the existing difficulties in its application around a dozen criminal circulars were issued between October 1983 and May 1984 by the then incumbent Chief Justice Da`ūd al-Ḥājj Yūsuf. The Chief Justice’s power to issue circulars (manshūrāt) is stipulated in article 308 of the Criminal Procedure Act 1983. According to this article he issues circulars in order to determine the school(s) the courts have to follow in the application of the Islamic shari`a.615 The Chief Justice himself has declared that the circulars do not follow any particular school of law and that “he has no inhibitions whatsoever to adopting legal doctrines from any school provided they are `in harmony with the shari`a and the Islamist statutes`”.616 The circulars are complementary to the Islamist legislation and meant to guide the judges in their application of the shari`a. Most importantly, they are meant to

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612 For a detailed survey of the juridical details of the Tāhā trial see An-Na`im (1986) and O’Sullivan (2001).
613 Section 53, for the following see Layish/Warburg (2002), pp. 72-75.
614 See Layish/Warburg (2002), pp. 74-75. For a compilation of criminal circulars of this period see Ḥāmid, Vol. 6.
615 Criminal Procedure Act 1983, art. 308 (a). The article further stipulates that the Chief Justice determines by way of circulars the amounts to be paid as blood money in cases of homicide and bodily harm. See article 308 (b).
mitigate the “harsh consequences of the Qur’anic punishments and retribution”. They are, with some exceptions, still valid and applicable with regard to the Criminal Act 1991. Circulars with regard to ICL continue to be issued since the advent of the al-Bashâr regime in order to fill the gaps left by previous Chief Justices.

3.2 Enforcement and procedure

3.2.1 Law enforcement and the Sudanese court system

Criminal courts in the Sudan consist of eight different types according to the CPA91. On top of the pyramid we find the Supreme Court, followed in descending order by the Court of Appeal, General Criminal Courts (Province Courts), First Criminal Courts (District Courts), Second Criminal Courts (District Courts), Third Criminal Courts (District Courts), People’s Criminal Courts (Town or Rural Courts) and finally any special criminal court established by the Chief Justice under the Judiciary Act 1986 or any other law. The organization of the courts is slightly more differentiated than in the PC83 when the three different levels of District Courts was only one. The Criminal Procedure Act 1983 does not list the People’s Criminal Courts but lists “Councils of Judges” (majâlis al-qu’dât) which in turn have been abolished in 1991.

As to the powers of the different types of courts it is the General Criminal Court that can inflict any penalty or sanction provided for by the law. A First Criminal Court can inflict any penalty other than the death penalty. However, when it considers a criminal suit summarily the penalties it can inflict are limited. For example, a prison term may not exceed one year and whipping may not exceed eighty lashes. The powers of a Second Criminal Court are more limited than that of a First Criminal Court, it cannot, e.g., inflict a prison term exceeding seven years. This decreases to six months or less if it considers a case summarily. A Third Criminal Court has even more limited powers and can consider a criminal suit only summarily. It can only inflict prison terms not exceeding four months and whipping not

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618 With regard to hadd and qisas no new circulars seem to have been issued under the al-Bashâr regime. Hâmid’s collection of circulars, published in 2002, does not report any new circulars with regard to hadd and qisas.
621 The three different levels of the District Courts, however, exists at least as of 1986. See Judiciary Act 1986, art. 10.
exceeding forty lashes. People’s Criminal Courts have the summary powers prescribed for the First, Second and Third Criminal Courts have in accordance with the warrant of their establishment.

3.2.1.2 Judges: qualifications, appointments, discharge

The president of the Republic of Sudan appoints the Chief Justice and his deputies and the judges of the Supreme Court, the Appeal Court, the General Courts and the District Courts. He also relieves them of their posts.\textsuperscript{623} Candidates for vacancies in the judiciary must be Sudanese Nationals, at least 23 years old for an appointment to assistant judge (\textit{musā’id qaḍā‘ī}), 25 years of age if they apply for the post of district judge, 30 years for the General Courts, 35 years for the Appeal Court and 40 years of age to be eligible for a post in the Supreme Court.\textsuperscript{624} Appointees to the judiciary must be graduates from a university recognized in the Sudan and must not be convicted previously even if an amnesty is proclaimed.\textsuperscript{625} Candidates must also be of good conduct and good reputation.\textsuperscript{626}

Judges of the Supreme Court are chosen from among the judges of the Appeal Court.\textsuperscript{627} They can also be chosen from outside the judiciary. In that case the following groups are eligible: former judges of the Supreme and Appeal Courts, legal advisors to the Ministry of Justice, lawyers, law professors at a university recognized in the Sudan. The last three groups must have practiced at least 18 years in their respective professions. Judges of the Appeal Court are chosen from among the judges of the General Courts or, if the candidates are coming from outside the judiciary they can be appointed from former members of the Appeal Court or General Courts or the three other groups which are also eligible for the Supreme Court. They need to have practiced a minimum of 15 years in their respective professions. Judges for the General Courts are either recruited by promotion from among active or former judges of First Grade District Courts or former judges of General Courts. Legal advisors to the Ministry of Justice, lawyers and law professors are also eligible but need to have practiced their respective professions for a minimum of twelve years. District Court judges finally are recruited by promotion from second to first degree courts, from third to second degree courts.

\textsuperscript{622} For this and the following CPA91, articles 9-13.
\textsuperscript{623} Judiciary Act 1986, art.22.
\textsuperscript{624} Judiciary Act 1986, art. 23 (a), (b).
\textsuperscript{625} Judiciary Act 1986, art. 23 (c), (d).
\textsuperscript{626} Judiciary Act 1986, art. 23 (e).
and from among assistant judges to third degree courts. Again they can also be appointed from among legal advisors to the Ministry of Justice, lawyers or law professors. Judges appointed to military courts are selected by the armed forces. The service of judges is terminated either by dismissal, resignation or retirement.

3.2.1.3 Public prosecutor
The Criminal Prosecution Bureau (al-niyāba al-jīnā`iyya) has the power to supervise the criminal suit, to direct the investigation, to determine the charge and exercise prosecution before criminal courts. However, the Minister of Justice can grant the powers of the Prosecution Attorneys Bureau with regard to the investigation to any person or committee if he deems it to achieve justice. The General Crimes Police can initiate criminal suits only with the permission of the Prosecution Attorney. Prosecution Attorneys have various powers. They can transfer investigations to another Prosecution Attorneys Bureau if appropriate, dismiss the criminal suit, if there are no sufficient grounds for a continuation, issue warrants for the arrest of any person or orders to search a place.

3.2.1.4 Rights of the accused
The accused has a number of rights which apply in the pre-trial and/or in the trial stage. These can be found in the Evidence Act 1993 or in the Criminal Procedure Act 1991 and include the following principles:
The accused is presumed innocent until proven guilty beyond reasonable doubt. He has the right to be defended by an advocate or a pleader. If the accused is insolvent and he is accused of an offence that is punishable by imprisonment of ten years, amputation or the death penalty

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627 For this and the following Judiciary Act 1986, art. 25-28.
629 Judiciary Act 1986, art. 72.
630 CPA91, art.19.
631 CPA91, art. 20.
632 CPA91, art.35.
633 CPA91, art.30 (1).
634 CPA91, art.57.
635 CPA91, art.67. Warrants of arrest may also be issued by a judge.
636 CPA91, art. 86 (1).
637 For the following Amin/Ramadan (2002), pp. 379-381, if no other sources are indicated.
638 EvA, art. 5 (b).
the Ministry of Justice appoints a person to defend him with expenses borne by the state.639 Whoever is convicted for a crime has the right to have his conviction and sentence reviewed by a higher court.640 An accused person shall not be compelled to testify against himself or to confess his guilt. His or her confession must be willingly. It is illegal to use force to obtain an admission of guilt, to obtain information or to prevent the accused to convey information. Statements, evidence or procedures have to be translated if the accused is interested in them and does not understand the language in which they are given.641 Where the accused admits to being guilty of an offence punishable by death, amputation or more than 40 lashes the court must caution the accused as to the seriousness of his admission, if an admission is the only evidence against him.642 Nobody shall be liable to a retrial or re-punishment for an offense for which he has already been convicted or acquitted. The Criminal Procedure Act stipulates as a rule that trials are open to the public and that judgments are also pronounced in an open sitting, however, a trial in absentia is possible too.643 After the passing of a judgment and if the sentence is subject to appeal, the court has to inform the accused and other interested parties of their right to appeal and the periods within which appeal may be presented.644 The accused has the right to obtain a copy of the judgment upon request. He will be given a translation in his language, if that is possible and he requests so.645

3.2.1.5 Investigation of crimes
The investigation is conducted by the General Crimes Police, under the supervision and directions of the Prosecution Bureau. The Prosecution Attorney may conduct the whole investigation himself or complete an investigation when necessary.646 If the investigating officer in charge or the Prosecution Attorney is party to an investigation or has a private interest in it he may not conduct the investigation.647 The record of the investigation must be in writing and contain, inter alia, statements of the accused and witnesses, the decision of the charge, a summary of the investigation, the decision of committal for trial or a decision of the

639 CPA91, art. 135 (1), (3).
640 CPA91, art. 183.
641 CPA91, art. 137 (1).
642 CPA91, art. 144 (3).
643 E.g. in cases of offences against the State. CPA91, art. 166, 133, 134.
644 CPA91, art. 171.
645 CPA91, art. 173.
646 CPA91, art. 39 (1), (2).
647 CPA91, art. 44.
Prosecution Attorney’s Bureau to dismiss the criminal suit.\textsuperscript{648} The inquiring authorities shall not influence any party to the inquiry by enticement, coercion or hurt, in order to force him to deliver or omit any statements or information.\textsuperscript{649}

3.2.1.6 Judgments
Judgments shall be passed in an open sitting, in the presence of the accused, except in cases of a trial in absentia and as soon as possible after the termination of the hearing and pleadings.\textsuperscript{650} When the accused is sentenced to death, the judgment must specify how the death penalty is to be executed.\textsuperscript{651} The judgment has to contain the charge, the decision, the grounds and final orders and where the accused has been convicted of more than one offence and penalties of imprisonment the judgment has to mention whether these will be served concurrently or consecutively.\textsuperscript{652} Considering the good reputation and conduct, his age, morals, previous convictions and nature and circumstances of the offence, the court may order suspension of the execution of the sentence on probation period not longer than five years. \textit{Hadd}, \textit{qiṣāṣ}, death and prison sentences for more than five years, are, however, exempted from this possibility.\textsuperscript{653} Judgments shall be executed as soon as possible and a sentenced person must not be prejudiced by waiting or lengthening the time of execution. While judgments are to be executed swiftly, despite appeal, sentences of death, retribution, whipping and amputation are exempted from this rule.\textsuperscript{654}

3.2.1.7 Carrying out sentences
Sentences of whipping, retribution and death are executed in public in the presence of the first instance judge and a number of attendants.\textsuperscript{655} The execution of judgments is to be swift, notwithstanding appeal, with the exception of the death penalty, \textit{qiṣāṣ}, \textit{hudūd} and whipping.\textsuperscript{656} All death sentences and also amputations can only be executed after confirmed

\textsuperscript{648} CPA91, art. 42.
\textsuperscript{649} CPA91, art. 43 (2).
\textsuperscript{650} CPA91, art. 166.
\textsuperscript{651} CPA91, art. 169.
\textsuperscript{652} CPA91, art. 167, (1), (3).
\textsuperscript{653} CPA91, art. 170 (1).
\textsuperscript{654} CPA91, art. 190 (1), (2).
\textsuperscript{655} CPA91, art. 189.
\textsuperscript{656} CPA91, art. 190 (1), (2).
by the Supreme Court. After the Supreme Court has confirmed the sentence and issued an order of execution the execution can only take place after the head of state has given his consent. The exemption to this rule are death sentences by way of ḥadd or qīṣāṣ where the head of state has no say. In non-ḥadd death sentences the head of state may decide to replace the sentence with any other penalty authorized by the law. If a person sentenced to death attains 70 years of age execution shall be suspended. Death sentences by way of ḥadd or qīṣāṣ are exempted from this regulation. If the pregnancy of a woman sentenced to death becomes known before the execution of the judgment execution will be postponed until after delivery or the lapse of two years lactation period, provided the baby is alive. In cases of executing ḥudūd, qīṣāṣ and whipping the health condition of the sentenced person is to be taken into consideration in order to avoid undue additional prejudice. Before the execution of an amputation, by way of ḥadd or by way of qīṣāṣ a medical examination precedes the amputation and the amputated person remains in medical care, paid by the state, until cured. In cases where the health condition of the convicted does not allow for the execution of ḥadd-, qīṣāṣ- or whipping penalties the court which passed the sentence may take a decision on how to deal with the case as it deems fit. The heirs of a victim of homicide or bodily harm may request suspension of the execution of qīṣāṣ, at any moment before the execution of the sentence. As to the execution of whipping the Criminal Procedure Act 1991 is very precise. a man is to be whipped while standing without being tied or bound. A woman, in contrast receives her lashes while being seated. Whipping shall be “...temperate, moderate and non-cracking and non-breaking, distributed, otherwise than on the face, head and fatal places, by a moderate whip, and any other similar tool may be used”. Whipping shall be suspended if the observing judge comes to the conclusion during execution that for health reasons the offender will not bear the remainder of the whipping.

657 CPA91, art. 192 (1).
658 CPA91, art. 191 (1).
659 CPA91, art. 191 (2).
660 CPA91, art. 193.
661 CPA91, art. 194 (2).
662 CPA91, art. 194 (3).
663 CPA91, art. 195 (1).
3.2.1.8 Appeal and cassation

The following judicial matters can be appealed: first instance judgments and judgments that
have not exhausted all stages of appeal, orders restricting the freedom of the appellant with
regard to his person or property and finally all decisions relating to matters of jurisdiction. First instance measures of the First Criminal Court and the General Criminal Court will pass
before the Appeal Court, whose judgment will be final. Measures of the Third and Second
Criminal Courts pass before the General Criminal Court. An appeal or a demand for
judicial measure, either by one of the involved parties or by any other person having
cassation can be lodged, not later than fifteen days after the declaration of the contested
interest. The higher court, considering either confirmation or cassation has a range of
the contested judicial measure. It can confirm the judgment in toto, confirm the decision and change the penalty, modify the conviction decision from one offence to another, return the judgment to the first
instance court for revision according to the directions given by the higher court, or quash the
judgment with or without re-trial. A court with the power of confirmation, appeal or
cassation may pass any suitable order it deems just such as an order to release any person
upon bail, or pass an interlocutory order to detain whoever the first instance court had
released. All death, amputation or life imprisonment sentences must be submitted, when
becoming final, to the Supreme Court with the intent of confirmation. The Supreme Court
also has the competence to consider cassation of judicial measures, passed by the competent
Court of Appeal provided there is a contravention of the law, or an error in application or
cassation can be revised by a special circuit of five judges constituted by the
interpretation of it. In addition the Supreme Court and the Court of Appeal, can decide to
review the record of any criminal suit and of any court in order to ensure soundness of
procedure and achievement of justice. It may take any order it deems fit. Further, even
Supreme Court judgments can be revised by a special circuit of five judges constituted by the

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664 CPA91, art. 197 (c).
665 CPA91, art. 179.
666 CPA91, art. 180.
667 CPA91, art. 183, 184.
668 CPA91, art. 185.
669 CPA91, art. 186.
670 CPA91, art. 181.
671 CPA91, art. 182.
672 CPA91, art. 188.
Chief Justice, when he considers that a SC judgment contravenes the *shariʿa*, or involves a mistake in the law (*khaṭaʿ fi al-qānūn*) or in its application or interpretation.\(^{673}\)

### 3.2.2 Limitation

Limitation (*taqādum*) in the *fiqh* is only mentioned by the Ḥanafites\(^ {674}\), who consider a deferment of testimony and a delay in the execution of an imposed punishment as a legal uncertainty (*shubha*), causing the limitation of the persecution of an offense and the execution of a punishment respectively.\(^ {675}\) The Ḥanafites distinguish between a private claim (*ḥaqq adami*) and a claim of God (*ḥaqq Allâh*). While the former are not subject to limitation\(^ {676}\), for the former prosecution cannot be instituted after a relatively short time span after the commission of the *ḥadd*-crime in question.\(^ {677}\) Little time is admitted for the conviction for alcohol consumption, the sentence must be pronounced before the smell of alcohol has disappeared. Even if the offender is confessing, a conviction at a later date is excluded. *Qadhf*, as a hybrid crime touching upon the claim of God and a private claim simultaneously, is not subject to limitation, as are all other *ḥadd* offences. In the case of apostasy (*rido*), persecution lapses once the culprit has returned to the community of believers. For all other *ḥadd* offences Ḥanafite *fiqh* holds that prosecution can not be instituted after a period of limitation of one month, according to some after 6 months or one year.\(^ {678}\) It is also noteworthy that in the case of *sariqa ḥaddiyya* two periods of limitation are being applied, one concerning the *ḥadd* punishment (a claim of God) and one with regard to compensation for caused damages (a private claim).

In harmony with Ḥanafite *fiqh* the draft penal code of 1988 stipulated that the lapsing of the limitation period is deemed a “doubt causing the “Hadd” or retribution (*Qisas*) to be remitted...” (article 49). However, with regard to the limitation periods the draft does not concur with the relevant legal opinions in Ḥanafi jurisprudence. As to banditry (*ḥirāba*), theft (*sariqa ḥaddiyya*) and homicide the relevant *ḥadd-* and *qisās*-punishments lapse after seven years, while the respective punishments for apostasy, alcohol consumption, *qadhf* and wounds

\(^{673}\) CPA91, art. 188 (A).

\(^{674}\) Peters (2005), chapter 2.2.2.


\(^{676}\) Baradie mentions that later jurisprudence stipulated periods of limitation for private claims ranging from 15 to 33 years. Baradie (1983), p. 204, footnote 377.

\(^{677}\) Baradie (1983), p. 204., for the following see also Peters (2005) and Krčsmárik (1904), pp. 97-98.

lapse after six months.\textsuperscript{679} As has been shown above, the \textit{hadd} punishment in Ḥanafite \textit{fiqh} for \textit{qadhf} does not lapse, because a private claim is concerned, while the \textit{hadd} penalty for alcohol consumption can only be imposed as long as the smell of alcohol is still discernible. Since the court determines the period for repentance given to the apostate without specifying its length, one can deduct from the six month limitation period for \textit{ridda}, that any period for repentance granted by the court has to be less than six months. The relatively long limitation periods for banditry and \textit{hadd}-theft do also not correspond with the short periods provided for in Ḥanafite \textit{fiqh}\textsuperscript{680} but have been considerably extended.

Even though a large percentage of al-Tūrābī’s draft penal code of 1988 has been enacted in 1991, chapter V of the draft, dealing with limitation periods and pardon has been omitted from the CA 1991 altogether.\textsuperscript{681} Stipulations on limitation, however, can now be found in the Criminal Procedure Act 1991\textsuperscript{682} (amended in 2002) according to which a conviction lapses automatically five years (art. 210 (a)) after the passing of the penalty (\textit{min ṭārīkh} \textit{inqiṣād} \textit{al-ʿuqūba}) if the penalty of a prison term does not exceed a year, or in the case of any other crime and provided that the penalty does not concern amputation (art.210 (b)). In the case of any other penalty, the conviction lapses after seven years, provided the convicted is not sentenced for any other crime in the meantime.

Article 210 (a) and (b) of the CA91 takes its inspiration directly from its two predecessor codes of 1983 (art. 259) and 1974 (art. 276).\textsuperscript{683} While in 1974 and 1983 only prison terms up to six months lapsed after five years, this period has been increased to one year in 1991. The Islamized CCP83, being a direct copy of its 1974 predecessor in most respects, did not mention Islamic penalties as an impediment to limitation. This has been changed in 1991. Now, convictions to amputation are explicitly exempted from limitation. As to convictions to a prison term exceeding one year the CA91 is more lenient, they lapse already after seven years instead of the ten years provided for by the 1974 and 1983 codes in case of prison terms exceeding six months. Neither the CA91 nor the CPA91 make any other reference to the provisions on limitation to be found in the \textit{fiqh}.

\textsuperscript{679} Art. 49 (a) and (b).
\textsuperscript{681} The new chapter V is titled “Offences against the State”, equivalent to chapter VI of the draft.
\textsuperscript{682} In 1983 limitation was equally part of the Criminal Procedure Act. See articles 259-260.
3.2.3 Evidence

3.2.3.1 General rules of evidence

General rules of evidence in the fiqh

The burden of proof is on the plaintiff who can prove his claim either by a confession of the defendant or by the testimony of witnesses.⁶⁸⁴ The qāḍī’s own knowledge (‘ilm al-qāḍī) is admitted as proof, which can lead to a sentence only by the Ḥanafites and the Shāfī’ites. There are certain conditions with regard to the validity of testimonies. The witnesses have to be either two male adult Muslims or one male adult Muslim and two female adult Muslims. They must in either case be of good reputation (‘adl). Their testimonies must not contradict each other, contradictions between testimonies, even small ones, invalidate the testimony. While the testimony must be given in the presence of the qāḍī, a testimony to the admission of the defendant as well as a testimony to declarations of two other witnesses out of court (shahāda ‘alā al-shahāda) is admissible. However, the witnesses must fulfill the qualifications mentioned above. An oath can have corroborative force, under specific conditions. If the plaintiff disposes of only one witness, the testimony of the second one can be replaced by the plaintiff swearing an oath. Except the Ḥanafites all schools accept this principle. In reverse, if the plaintiff cannot prove his claim, the defendant swears an oath that he is innocent and the qāḍī will decide in his favor. If the defendant refuses to swear an oath, the claim will be upheld.⁶⁸⁵ These rules with regard to oaths are also applicable in cases resulting in diya but not, however, in cases of hadd- and qiṣāṣ-crimes, where higher standards of proof are applied. An exception with regard to oaths is the qasāma procedure. In the qasāma procedure fifty oaths are sworn in order to determine the liability for a killing where the body of a person is found who is obviously the victim of a violent death and when there is strong suspicion with regard to the killer. Circumstances triggering a qasāma procedure can be the presence of another person close to the victim with blood on his clothes and carrying a blood-stained weapon such as a knife. Or the victim is found lying on the ground after a group of people, which subsequently scattered, has been seen close to it.⁶⁸⁶ The qasāma procedure can also complement other, incomplete, evidence such as a last statement of a dying crime victim or the single testimony of a qualified witness to the killing. The schools differ with regard to

⁶⁸⁴ For the following Peters (2005), pp. 12 - 19.
who has to swear. According to the majority of schools, with the exception of the Ḥanafites, it is the plaintiffs who swear the fifty oaths. Thus, in cases where there is a strong surmise with regard to the identity of the killer, the plaintiffs first have to prove the circumstances which have led to the accusation. The plaintiffs subsequently swear fifty oaths in order to back up their claim, which, in consequence, establishes the right to diya. In the Mālikite and Shāfīʿite schools the qasāma procedure can entail qisās, i.e. a death sentence. In this case, however, the plaintiffs must swear that the killing was intentional. The Ḥanafites hold that the oath is sworn by the defendants. When a body showing the marks of a violent death are found on someone’s land, in a quarter of a city or close to a village (within shouting distance), the plaintiffs can file an action against either the owner of the land or other inhabitants of the quarter or village. If the defendants deny the charges, the plaintiffs can demand fifty oaths of denial, to be sworn either by fifty inhabitants of the village or the quarter or by the owner of the house or land. Once the oath(s) are sworn diya is due. As described above, in Ḥanafite law, the qasāma procedure cannot lead to qisās, i.e. a death sentence. In cases where the dead body is found on private property (outside or inside a house e.g.), according to some Ḥanafites it is the āqila who is liable, according to other Ḥanafites it is the owner or the user of the house.687

The Evidence Act 1983

The Evidence Act 1983 (EvA83) recognizes inter alia the following proof (ṭuruq al-ithbāt): confession, the testimony of witnesses, (supporting) documents, circumstantial evidence (al-qarāʿin), oath, observation (muʿāyina), expertise (al-khibra). This list goes beyond the evidence specified in the fiqh described above. According to the EvA83, a confession in criminal cases (al-masāʿ il al-jināʾiya), is not legally valid if it is the result of duress.688 This principle, however, contradicts another section of the Evidence Act stating that “acceptable evidence” is not rejected for the mere reason that it has been obtained by illegal means as long as the court is convinced that the evidence is sound. This seems to indicate that evidence obtained by torture or other illegal means can be accepted by the court.689 The withdrawal of a confession in civil affairs is not legally valid.690 In criminal cases, however, the withdrawal of a confession is considered a legal uncertainty (shubhā) which makes the confession non-

688 EvA83, article 24 (2).
689 EvA83, article 11.
conclusive evidence (*bayyina ghair qāṭi‘a*). With regard to the qualification of the witness the Evidence Act 1983 simply states that “...is qualified to bear testimony every person with a sound mind (*’aqil*) who is able to distinguish the facts (*mumayyiz*) he is bearing testimony to.” The Evidence Act does neither specify the minimum number of the witnesses in criminal cases nor their sex or religion. The circumstances of the testimony, however, can be taken into account by the court. More specifically, the court has to assess the good reputation (*’adāla*) of the witness, his behavior while giving his testimony and possible contradictions with other evidence. The text of this article does not clearly state that the good reputation of a witness is an indispensable precondition for the acceptance of his testimony by the court. In other words, if we follow the text of the EvA83 alone, testimonies of witnesses with a bad reputation can be accepted in criminal cases. We shall see below how the Supreme Court interpreted the notion of “good reputation” and whether or not this interpretation came close to what the *fuqahā’* originally had intended. Not admissible is the testimony of the person against whom flogging has been carried out in a case of *qadhf*, unless the repentance of the person has been proven. Plaintiff and defendant both have the right to demand the other litigant to swear during any stage of the trial a decisive oath (*al-yamīn al-‘īsima*). If the litigant on whom the oath is due swears, the trial ends in his favor. In turn, everyone, from whom the swearing of an oath is demanded (*wujjihat ilaihi al-yamīn*) and who refuses to do so without, in turn, returning the demand to his opponent (*dūn an yaruddahā ʿalā khaṣnings*) loses the lawsuit as well as every person to whom the demand to swear an oath is returned and who refuses to do so. It is evident that an oath or the refusal to swear an oath, according to the Evidence Act 1983 has not only corroborative force but can decide a case. Since no minimum number of witnesses is specified in the EvA83, the function of the oath is not to replace a missing second witness but to corroborate or decide a case. It is further striking that the requirements for the proof of *qiṣāṣ*-crimes (i.e. homicide and bodily harm) in the EvA83 are not higher than for other crimes. This considerably facilitates the applicability of *qiṣāṣ* and is clearly in conflict with the *fiqh*. The knowledge of the *qādī*, regardless how he acquired it,

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690 EvA83, article 26 (1).
691 EvA83, article 26 (2).
692 EvA83, article 28.
693 EvA83, article 33.
694 EvA83, article 32 (2).
695 EvA83, article 58.
696 EvA83, article 63.
plays an important role in criminal cases relating to *diya* according to the Ḥanafites and the Shāfīʿites.⁶⁹⁷ The 1983 Evidence Act, however, explicitly excludes any usage of the personal knowledge of the *qādī* in his judgments, without regard to whether the case results in the application of *qisāṣ* or in the payment of *diya*.⁶⁹⁸ Noticeably, the *qasāma* procedure, an important element of the Islamic law of evidence, is not mentioned in the 1983 Evidence Act. *Qasāma* did, however, play a limited role in Supreme Court decisions.⁶⁹⁹ The 1983 Evidence Act does not explicitly discriminate against non-Muslims. However, it has reserved itself an “escape clause” by stating that it is “allowed to the court to reject acceptable evidence (*bayyina maqbūla*) when it considers it to be violating the principles of the Islamic *shariʿa* or (the principles of ) justice or public order (*al-nizām al-ʿāmm*).⁷⁰⁰ As mentioned earlier the Evidence Act 1983 did not make any distinction between cases involving *diya* and those involving *qisāṣ*. It left it thus unclear what the minimum requirements for proof in *qisāṣ*-cases concerning homicide and bodily harm were. The following Supreme Court cases clarified this important question to some degree.

*Evidence in the Supreme Court - The qualifications of the witnesses*

As shown above one of the important features of the Islamic law of evidence is the requirement that witnesses in criminal cases are of good reputation (*ʿadl*). How the notion of *ʿadl* is interpreted by the Sudanese Supreme Court and what kind of witnesses are acceptable to the Supreme Court and which are not is shown by the following two landmark cases.

In the first case⁷⁰¹ the original indictment of *ḥadd*-theft, intentional homicide and criminal intimidation⁷⁰² had been changed to one of abetment.⁷⁰³ In his appeal the defense lawyer argued that the court had relied entirely on evidence based on the testimony of professional criminals and that the crime as such had never taken place. In its deliberations on the case the

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⁶⁹⁷ And the Shiʿites.
⁶⁹⁸ Article 16, EvA83.
⁶⁹⁹ In the last decision on *qasāma* I could trace, dating from 1988 (Government of Sudan vs. Badr al-Dīn ʿAbbās Abū Nūra, SLJR 1988, no.1406/69), the Supreme Court decided that *qasāma* - since the Evidence Act 1983 did not mention it - was not admissible as a way of proof in criminal matters. For earlier decisions some of which came to the conclusion that *qasāma* was indeed applicable under Sudanese law, see: 1. Government of the Sudan vs. Ibrāhīm ʿĀdam ʿUthmān a.o., SLJR 1984, no. 1984/83,  2. Government of the Sudan vs. ʿUthmān al-Zubair, SLJR 1985, no. 1405/602, 3.Government of the Sudan vs. Auhāj Muḥammad a.o., SLJR 1985, no.1405/151.
⁷⁰⁰ Article 12, EvA83.
⁷⁰² See articles 439, 251 and 321 of PC83.
⁷⁰³ See articles 82/83 and 91 of PC83.
Supreme Court pointed out that the Trial Court had indeed had its doubts with regard to the
good reputation (‘adāla) of the witnesses. The court had therefore only taken into account
those parts of their testimony which had been corroborated by the testimony of another
witness of the prosecution, a police officer. The Supreme Court held that the testimony of
persons who do not fulfill the minimum requirements of ‘adāla are not automatically rejected
(‘adam radd shahāda al-fāsiq limujarrad al-ḥusūq). Parts of their testimony can be taken into
account if they are supported by other, reliable corroborating evidence. However, the
Supreme Court specified that the testimony of those who obviously lie must not be accepted

In the second case the Supreme Court discusses under which circumstances the testimony of a
drunk person is acceptable or not. In this case the defendant ʿAbd al-Ḥamīd Mūsā ʿĀhmād was
sentenced to death by hanging for intentional homicide (art. 251, PC83) - i.e. for having
knifed to death his victim – after the heirs of the victim had refused to pardon the culprit or to
settle for a financial compensation. The intentional homicide happened close to a place where
Marissa, the traditional Sudanese beer was sold. The lawyer of the defendant argued that two
key testimonies were not admissible. One of the witnesses was - according to the lawyer - a
quarrelsome drunkard (sikkīr ʿirbīd) who could not be considered to have a good reputation
(ghair ‘ādil). According to the lawyer a witness in cases of intentional homicide necessarily
would have to be of sound mind, adult, discerning (rashīd), of excellent behavior, pious and
neutral, without vested interests in the case. Further, the legal representative of the defendant
suggested that the testimony of an underage witness was not to be accepted, because the
witness lacked the required legal capacity (ahliyya). The Supreme Court, however, thought
otherwise. It pointed out that while the necessary number of witnesses was specified by the
Evidence Act 1983 in cases of hadd-crimes no minimum number witnesses was specified for
qiṣāṣ-crimes. Further, the Supreme Court admits that the strict rules of evidence applicable
to qiṣāṣ (and hadd-cases) in the fiqh should apply here as well. The SC underlines that
Criminal Circular 83/88 releases the courts from adhering to a specific school of law in this
matter. In addition, it quotes a Supreme Court precedent where the majority opinion of the
fuqahāʾ had also not been taken into account and where the requirements for proof of a qiṣāṣ-
crime had been lower than for a hadd-crime. Last but not least the Supreme Court quotes the

\[\text{\footnotesize 704 See EvA83, articles 78 and 28.}\]
\[\text{\footnotesize 705 Trial of ʿĀdam Mahdī ʿĀdam, no. 88/36, not published.}\]
relevant article 28 of the Evidence Act 1983 which specifies that a witness has to be of sound mind (áqil) and discerning (mumayyiz) “when enumerating the facts” (of the case). Since the witness in question (and all other witnesses) had been of sound mind and discerning when testifying before the Supreme Court, it deemed the testimony acceptable. The text of article 28 reads, however, differently. It says that “every person of sound mind and discerning with regard to the facts he or she is bearing testimony to is qualified to testify”. In other words it is not enough to appear in a sober state before the court when testifying. The witness has to be able to discern the facts when actually witnessing the crime in question. Whether this had been the case with regard to the contested witness was not discussed by the court. The Supreme Court thus accepted both testimonies, one by a known drunkard and the other one by an underage child. While the court could invoke the Evidence Act, a Criminal Circular and a precedent it clearly contradicted the fiqh by lowering the standards of proof for a qisáś-crime. The death sentence by hanging was confirmed. At the same time the decision specified that the testimony of the drinker of alcohol (shárib al-khamr) is not to be rejected on the grounds that his consumption of alcohol makes such a witness a sinner. In contrast, to be rejected is the testimony of those who are addicted to drinking and whose addiction is obvious to other people (shaháda mudmin al-khamr al-žáhir lilnás).706

Admissibility of an oath as evidence
In a case from 1986 the Supreme Court has decided which role an oath can play in qisáś and ġadd-cases and what the legal consequences of such an oath can be.707 In the case under discussion the two culprits were sentenced to the diminished diya708 (al-diya al-náqiśa) for intentional hurt with a dangerous weapon in addition to a two month prison term and twenty-five lashes.709 According to the testimony of the plaintiff, they had, together with a third perpetrator, assaulted their victim (i.e. the plaintiff) in the early morning, beaten him with a club until he fell from his riding animal and subsequently stolen 5000 Sudanese Pounds from his pocket. All three denied the deed after they had been arrested. While the first two accused were sentenced, the third was released. The appeal was made on two grounds. Firstly – the lawyer of the perpetrators assured – that it was not admissible to base a conviction on the

706 Government of the Sudan vs. Ābd al-Ḥamíd Mūsā Ahmad, SLJR 1991, no. 88/104.
708 On diminished diya see also chapter 3, sanctions.
statement of the plaintiff only. He, as a claimant, is party to the case and not a witness. Secondly, that there was no evidence based on which a conviction was possible. In its review of the case the Supreme Court judges remark that the lower court had rejected two different requests. It had refused the request of the lawyer of the two accused to set them free for lack of evidence. It had equally rejected the request of the lawyer of the plaintiff to demand an oath from the accused, despite the fact that the Criminal Procedure Act 1983 provided for the possibility of an oath.\textsuperscript{710} To the indignation of the SC judge the original court had cited as a justification that an oath could be demanded in \textit{hadd}-cases, even though the crime it judged under article 279 was a \textit{qīsās}-crime. Leaving their decision incomprehensible, the lower court had not provided the Supreme Court with the necessary arguments to substantiate which particular opinion in the \textit{fīqh} they had followed. In addition their conclusions explicitly contradict the provisions of article 200 of the Criminal Procedure Act 1983. Article 200 provides for the possibility to demand an oath of the accused. Should the accused refuse to swear such an oath he can be sentenced on the strength of his refusal.\textsuperscript{711} Subsequently the Supreme Court judge discusses the various opinions he found among the \textit{fuqahā’}, who differ about the question of whether a sentence can be based on the fact that the defendant refuses to swear (\textit{nukūh}) and himself asks the plaintiff to swear an oath.\textsuperscript{712} Mālik holds that this returned oath (\textit{al-yamīn al-mardūda}) is not admissible with regard to crimes, neither in \textit{hadd}- nor in \textit{qīsās}-nor in \textit{ta’zīr}-crimes, no matter whether the punishment is a fundamental (\textit{mabda’})\textsuperscript{713} or a financial one (\textit{māl}). In other words, if there is no other evidence (than the testimony of the victim himself) and the accused refuses the oath there is no need to return the oath to the plaintiff, since such an oath would not have any legal effect (\textit{laisa lahu athar}), according to Mālik. In contrast Shāfī’ī holds that a judgment can be based on a returned oath with regard to crimes, however, only when the rights of men are concerned such as in cases of homicide, beatings and abuse and irrespective of whether the punishment is \textit{qīsās} or \textit{ta’zīr} or the case results in \textit{diya}. In analogy the same applies to \textit{ta’zīr}-crimes related to public affairs such as blocking a public road with rocks or the sabotaging of public wells. \textit{Hadd}-crimes, however, cannot - according to Shāfī’ī - be decided on the basis of a returned oath, except in a few

\textsuperscript{709} Article 279, PC83.  
\textsuperscript{710} As foreseen by article 200, CPA83.  
\textsuperscript{711} Article 200, CPA83.  
\textsuperscript{712} As often the judges quote, among other sources, ’Abd al-Qādir Awda. See Awda (2001), Vol.2, p. 341.  
\textsuperscript{713} In this context \textit{mabda’} refers to \textit{qīsās} punishments.
exceptional cases. Having quoted these controversial opinions, the Supreme Court explains its own view of the legal effects of oaths in criminal matters. It reasons that if there is no other evidence it has no objections if the plaintiff demands an oath from the defendant in ḥadd-, qīṣāṣ- or taʿzīr-crimes. If the aspired goal of the judgment is justice, why would one prevent the accused to make use of the only evidence he has at his disposal, i.e. to make his opponent swear an oath, the Supreme Court asks. In such cases the oath serves as substitute evidence (badīl lildāliḥ) and the plaintiff can only resort to it if there is no other evidence (than his own testimony) available. While the Supreme Court holds that the oaths described above can be used as substitute proof even in ḥadd- and in qīṣāṣ-cases it clearly limits for both cases its evidential value which only pertains to financial rights (al-ḥaqq al-māliḥ) and can only lead to a taʿzīr-punishment. The promulgation of a ḥadd- or a qīṣāṣ – punishment on the strength of an oath is therefore, according to the Supreme Court, excluded. A taʿzīr-punishment for bodily harm, however, as in the case at hand, is possible. The two accused had presented witnesses who testified that they had been together at the time of the crime. This claim, the judge points out, could have been decided, had the two accused been asked to swear an oath. In its final conclusion, for the reasons described above, the Supreme Court abolished the conviction and the penalty (al-īdāna wa al-ʾuqūba) of the two defendants and ordered their release. It decided likewise to annul the release order of the third defendant. All three were to be handed over to the police where they were to swear an oath (of innocence).

The Evidence Act 1993

A comparison with the most important prescriptions of the fiqh on proof in criminal cases with those of the Evidence Act 1993 shows, like its 1983 predecessor, a number of substantial differences. First of all, apart from a special section on the proof of ḥadd-crimes, the Evidence Act 1993 does not make a difference between the proof in civil cases and proof used in criminal, including qīṣāṣ cases. Article 3 (1), EvA93 explicitly states that the EvA is to be applied in civil and criminal matters. The classical means of proof such as testimony, confession and oath are acknowledged with important qualifications, next to supporting documents, circumstantial evidence (al-qarāʾin), observation (muʿāyina) and expert opinions (khībra). The use of evidence based on the personal knowledge of the qāḍī, however, is

714 The SC decision does not define these cases.
excluded, as in the EvA83.\textsuperscript{716} As we have seen above the personal knowledge of the \textit{qāṭī} plays a role in cases of \textit{diya} according to the Ḥanafites and the Shāfiʿites. The \textit{qasāma}-procedure which still played a limited role in jurisdiction, but not in legislation after the introduction of ICL in 1983 has not been introduced in the Evidence Act 1993 either.

A general section on evidence stipulates that evidence violating the principles of the Islamic \textit{shariʿa}, the law (\textit{qānūn}), justice or the public order is not admissible.\textsuperscript{717} The same section, similar to the EvA83, further states that evidence is not rejected merely because it has been obtained by unlawful means (\textit{ijrā` ghair sahiḥ}).\textsuperscript{718} In its ultimate consequence this means that a confession obtained by torture can be used if the court decides that it is acceptable evidence.\textsuperscript{719} Article 20 (b), on the other hand, has explicitly excluded this possibility: a confession obtained by force (\textit{ikrāh}) or instigation (\textit{ighrā`}) is not legally valid.\textsuperscript{720} The EvA93 distinguishes between the judicial confession (\textit{iqrār qadā`) and the non-judicial confession (\textit{iqrār ghair qadā`). The former – with regard to criminal cases\textsuperscript{721} - takes place in a court session or before a judge.\textsuperscript{722} A confession does not constitute conclusive evidence (\textit{bayyina qāṭi`a}) in a criminal case if the confession is made outside a court session or when it is not made before a judge (i.e. \textit{ghair qadā`).\textsuperscript{723} The Evidence Act 1993 explicitly states that the withdrawal of the confession in civil cases is not admissible, in contrast to \textit{hadd}-cases, where a withdrawn confession constitutes a legal uncertainty (\textit{shubha}) and turns the confession into non-conclusive evidence.\textsuperscript{724} The confessor must be sane (\textit{ʿaqil}), free to chose (\textit{mukhtār}), not placed under guardianship and have reached the age of legal responsibility as prescribed by the law.\textsuperscript{725} As to the qualification of the witness, the 1983 text remains unchanged: "Every

\textsuperscript{715} The following refers to the general rules of proof applicable also in criminal cases with regard to \textit{qiṣāṣ} and \textit{diya}.
\textsuperscript{716} EvA93, article 9 (b).
\textsuperscript{717} EvA93, article 9 (a).
\textsuperscript{718} EvA93, article 10 (a).
\textsuperscript{719} Compare a similar provision in the PC83, chapter 5.2.7.
\textsuperscript{720} The latter would be valid in civil cases. See article 20 (3). That torture is indeed common practice is corroborated by human rights reports. Human Rights Watch stated in its 1999 report that “Confessions coerced through torture and ill-treatment were admissible in trials...”. Human Rights Watch World Report 1999. Torture cases are reported in almost all HRW reports since 1989.
\textsuperscript{721} Article 16 (a) also allows for the possibility of a confession before a “semi-judicial authority” without explaining or defining it. In criminal cases, however, a confession before a semi-judicial authority is not recognized. See EvAct, article 10 (b).
\textsuperscript{722} The term is not explained or defined in the EvA93.
\textsuperscript{723} EvA93, article 21 (3).
\textsuperscript{724} EvA93, article 22 (1) and (2). The article is silent with regard to the legal effects of a withdrawn confession in \textit{qiṣāṣ}-cases.
\textsuperscript{725} EvA93, article 19.
person who is able to distinguish the facts he is bearing testimony to is qualified to give testimony.”

No minimum number of witnesses in criminal cases is specified, nor is the sex or the religion of the witness an issue. We have seen above that the requirements for the admissibility of testimonies are rather strict in the *fiqh* where evidence by testimony is only admissible if at least two male adult Muslim witnesses of good reputation testify or one male and two female with the same qualifications. By neither defining a minimum number, nor sex or religion the Evidence Act 1993, like its predecessor, has substantially lowered the requirements of proof in criminal cases in comparison with the *fiqh*. At the same time Muslims and non-Muslims, men and women are now treated on an equal footing with regard to testimonies in non-ḥadd criminal cases.

Just like in 1983, the *qādi* has to consider all circumstances of the testimony: a possible lack of good reputation of the witness, contradictions in his testimony or his behavior while he is bearing witness. As before, the text of the law does not further specify what exactly “good reputation” consists of and in which cases “good reputation” is an indispensable prerequisite for the acceptance of the testimony. It remains largely unclear whether “good reputation” plays a more important role in criminal than in civil cases or whether testimonies of witnesses who lack good reputation are to be rejected in criminal cases. Further, it is not detectable that any difference is made - with regard to the quality of the witnesses - between cases resulting in *qisās* and those resulting in the payment of *diya*. It further remains unclear whether the provision that the judge has to pay attention to contradictions in testimonies means that these testimonies are not admissible. The *fiqh* is unequivocal here, the slightest contradiction in testimonies makes these invalid. The testimony of the person who has been flogged for having committed *qadhf* (*al-majlūd fi ḥadd al-qadhf*) and of the person who has given false testimony (*shahāda al-zūr*) is not admissible, unless their repentance has been proven. With regard to oaths the procedure in 1993 has remained largely the same as in 1983. The plaintiff - upon whom lies the burden of proof - can direct a “decisive oath” (*al-yāmīn al-

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726 EvA93, article 24.
727 The Evidence Act 1993 does not state that a non-Muslim witness can only testify against a non-Muslim witness. Thus a testimony of a non-Muslim witness against a Muslim is possible. See qānūn al-ithbāt 1993, article 24.
728 EvA93, article 34.
730 EvA93, article 33 (2).
731 The following articles on oath seem to go back to similar laws at the time of the Condominium. Since the relevant texts are, however, not in my possession I was not able to verify this assumption.
\( \text{hāsima} \) against his opponent.\(^{732}\) If the party on which it is due swears the decisive oath the trial ends in its favor.\(^{733}\) Who refuses to swear the decisive oath which has been requested from him without returning the demand to swear an oath to his opponent loses the lawsuit as well as every person to whom the demand to swear an oath is returned and who refuses to do so.\(^{734}\) It is further allowed to the Court to demand of its own accord a supplementary oath (\( \text{al-yamīn al-mutammima} \)) of one of the two litigants in order to obtain evidence corroborating the subject of the claim.\(^{735}\) Two important conditions for the admissibility of this oath is that the case is neither devoid of any proof (\( \text{al-dā'wā khāliyya min al-dalīl} \)) nor is there complete and conclusive proof (\( \text{dalīl kāmiḥ} \)) available.\(^{736}\) Unlike the aforementioned oath this supplementary oath, demanded by the court, can not be returned to one’s opponent.\(^{737}\) The \( \text{qasāma} \) procedure which had played a certain role in the early jurisdiction after the introduction of ICL in 1983 (not in the legislation though) was not introduced in 1991 either.

### 3.2.3.2 Evidence in qiṣāṣ- and ḥadd-cases

**Evidence of qiṣāṣ- and ḥadd-cases in the fiqh**

While the above general rules of evidence apply to criminal cases, including those involving \( \text{diya} \), they are much stricter in cases of retaliation (qiṣāṣ). There, the testimony of a witness cannot be replaced by the oath of the plaintiff; neither does the refusal of the oath (\( \text{nukūl al-yamīn} \)) of the defendant constitute admissible evidence. Further, neither the “\( \text{shahāda `alā al-shahāda} \)” nor testifying to the declarations of others are allowed in cases involving qiṣāṣ. Only eyewitnesses are admitted.\(^{738}\) As has been shown above, unlike the \( \text{fiqh} \) the two Evidence Acts under scrutiny here do not make a difference between regular criminal cases and qiṣāṣ with regard to proof. In the realm of ḥadd-crimes the requirements for proof are the highest.\(^{739}\) Next to the above rules applicable in qiṣāṣ cases the qādī’s own knowledge cannot decide a case. The wording of the testimony must explicitly use certain terminology such as, for example, the word \( \text{zinā} \) in a confession to unlawful sexual intercourse and not any other word pertaining to sexual intercourse. Further, the unlawfulness of the act which is the object

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\(^{732}\) \( \text{EvA93, article 54.} \)

\(^{733}\) \( \text{EvA93, article 57 (2).} \)

\(^{734}\) \( \text{EvA93, article 57 (3).} \)

\(^{735}\) \( \text{EvA93, article 58 (1).} \)

\(^{736}\) \( \text{EvA93, article 58 (2).} \)

\(^{737}\) \( \text{EvA93, article 58 (3).} \)

of the confession must be expressed. Testimonies out of court, valid in homicide cases are not valid in hadd-cases. The proof of hadd-crimes is also made very difficult by the fact that a confession can be withdrawn at any time until the execution of the sentence and thus annul the sentence. Judges are even obliged to point out this possibility to the confessor. Circumstantial evidence is not admissible in hadd-cases with two exceptions. The Mālikites accept pregnancy of an unmarried woman, not in the īdda period, as proof of zinā. The same school and the Hanbalites also accept the testimony of two witnesses on the smell of alcohol as proof that this person has consumed alcohol. In order to prove the consumption of alcohol either a confession is necessary – made in a state of soberness - or the testimony of two male witnesses who have caught the culprit while the smell of alcohol was still discernible on him.  

The testimony of a male together with a female witness is not permitted. The judge has to make sure in his interrogation of the witnesses that the culprit neither drank while being in the dār al-ḥarb nor under duress. On the other hand the mere discernability of the smell of alcohol as such does not constitute proof of the consumption of alcohol if the witnesses have not seen the actual drinking of it. As to the confession Abū Ḥanifa and the Mālikites are satisfied with a single confession while Abū Yūsuf – in analogy to the number of witnesses required – requires two confessions made separately in two different sessions. As in other hadd-crimes, again the judge is obliged to ask about the circumstances of the crime, i.e. drinking. Does the defendant withdraw his confession, his withdrawal is accepted and the hādd-penalty averted. If the drunkard in a state of intoxication confesses to having committed a hadd-crime the fiqh distinguishes between the hudūd which are touching upon the rights of God and those concerning the rights of men such as qadhf. In the former case, i.e. in cases of unlawful sexual intercourse, theft and alcohol consumption, his confession is not accepted and he will not receive the hadd-penalty, because his statement is made in a state of intoxication and possibly is a lie. Here the reasoning of the fuqahā’, meant to limit the applicability of hadd-crimes, leads to the curious result that the intoxicated person is not allowed to admit to his own drunkenness. If the drunkard confesses to a hadd-crime touching upon the right of men, such as unfounded accusation of unlawful sexual intercourse (qadhf), the hadd for qadhf will be executed, provided the victim of the accusation files charges. In this case neither

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739 For the following see Peters (2005), pp. 13-16.
limitation (taqādum) applies nor will the withdrawal of the confession avert the ḥadd.\textsuperscript{741} If the requirements of evidence are not fulfilled in a ḥadd-case the judge can nevertheless sentence the culprit to a taʿzīr-punishment if the available evidence suggests that the accused did commit the crime. In this case the general requirements of proof are applicable. With regard to the number and qualifications of witnesses who can testify to a ḥadd-crime, they vary slightly.\textsuperscript{742} In cases of qadhīf, sariqa, hirāba and shurb al-khamr admissible evidence is either a confession or the testimony of two men of good reputation. The testimonies of women are, however, excluded.\textsuperscript{743} The highest requirements are applicable in zinā-cases, which can be proven by two means, either by a confession or through the testimony of witnesses or, according to the Mālikites, by pregnancy of an unmarried woman.\textsuperscript{744} With regard to the confession Abū Ḥanīfa and Aḥmad ibn Ḥanbal are of the opinion that the confession has to be made four times, while Mālik and Shāfiʿi content themselves with one confession only. According to Abū Ḥanīfa the four confessions have to be made in four different sessions, Aḥmad ibn Ḥanbal accepts them to be made either in one session or in different sessions as long as they are four. In order to be accepted the confession must be detailed to a degree that removes any doubt to the soundness of the confession. The confessor also must state explicitly that he committed zinā, i.e. the word zinā must be used.\textsuperscript{745} It is, however, not necessary that the person who committed zinā with the confessor is present in the session of the confession. Thus, if a man confesses to zinā with an absent woman the ḥadd-penalty can nevertheless be imposed on him. The same is true for the confession to zinā if the person zinā was committed with is unknown to the confessor. If a man confesses to zinā and the woman in question accuses him of lying, his confession is valid and the ḥadd is due (...wa huwa maʿkhūdh bi iqrārihi wa ʿalayhi al-ḥadd...) according to Abū Yūsuf, Mālik, Shāfiʿi and Aḥmad ibn Ḥanbal. Abu Ḥanīfa sees in the latter case a legal uncertainty and therefore holds that the ḥadd-penalty on the confessor must lapse. The person who confesses further must confess out of his own free will (mukhtār) and he must be sane (ʿāqil). The confessor can withdraw his confession at any time, either before or after the trial or before or during the execution of the punishment. If he withdraws his confession the execution of the punishment

\textsuperscript{741} Bahnaši, masʿūliyya, pp. 227-228.
\textsuperscript{742} For the following see Bahnaši (1988), al-jarāʾim fī al-fiqh al-islāmiyy.
\textsuperscript{743} The possible testimony of women in cases of qadhīf is controversial among the Mālikites. See Bahnaši, (1988), al-jarāʾim, pp. 173-174.
\textsuperscript{744} Arévalo (1939), p. 89. See also chapter 4.1.2.3 on rape.
is immediately stopped. It should be noted that the withdrawal can be explicit like e.g. a
denial of the former confession. However, the withdrawal can also be implicit (dalālatan), e.g.
when the person who is being punished for zinā runs away from the stoning or the flogging.
The escape (from the execution of the punishment) is taken as an indicator of his withdrawal
of his confession.\footnote{Awda (2001, Vol. 2, p. 438.} In order to prove zinā by testimony four male witnesses have to describe
persons, time, place and order of events of the sexual intercourse in detail and without
contradicting each other. Should the witnesses not fulfill one or more of these conditions they
could be liable for qadhf.


In both laws of evidence, apart from zinā and shurb al-khamr, all other ḥudūd can be proven
in two ways. Firstly, by a confession at least made once and, secondly, by the testimony of
either two male witnesses, or, in case of necessity (‘and al-ḍarūra) one man and two women
or four woman.\footnote{See art. 78, qānūn al-ithbāt 1983 and art. 63, qānūn al-ithbāt lisanat 1993 (m).}
The wording of both articles is almost identical, with a small difference. In
1983 it was sufficient to make the confession, without further qualification, in a majlis al-
qadā’, which represented the lowest level of a five level penal court system.\footnote{See article 8, qānūn al-ijrā’āt al-jinā’iyya lisanat 1983.}
In 1993 the confession has to be made in front of a court (mahkama).\footnote{Which could be any court in a seven-layer court system. See qānūn al-ijrā’āt al-jinā’iyya 1991, art. 6.}
In other words, any confession
out of court is to be considered invalid and can not be held against the defendant. Further, the
EvA93 has specified that the confession has to be an unequivocal one (iqrār ṣarīḥ). Thus, the
EvA93 has improved on the wording and now excludes confessions that might be doubtful
and not unequivocal. These are also not accepted by the fiqhah. More importantly, a
comparison with what has been said above shows that the 1983 and 1993 laws of evidence are
in contradiction with two main principles upheld in the fiqh: they allow for the testimony of
women and they do not make ḍarūra or good reputation a precondition for the acceptance of a
testimony. The law makes the reservation that the testimony of a man and two women or four
women is only accepted in the case of necessity. It does however not specify how necessity
(ḍarūra) is to be understood by the judge. A criminal circular specifies that a case of necessity
occurs simply when a sufficient number of male witnesses is not available.\textsuperscript{750} Likewise a commentary published by the Sudan Judiciary explains that the necessity for the acceptance of female witnesses occurs when either no men or not enough men are testifying. Then the testimony of four women replaces the testimony of (the originally required) two men or, if one man testifies, two women replace the testimony of the second male witness.\textsuperscript{751} In other words, the proof of a *hadd*-crime by means which are not admitted by the majority of the *fuqahāʾ* becomes accepted procedure in the Islamized Sudanese laws of evidence of 1983 and 1993. How does the said commentary of the Sudan Judiciary comment on the textual basis of female testimonies? It rather frankly concedes that the jurisprudents of the four Sunni school and those of the Zaidites and the Twelver Shiʿites are unequivocally of the opinion that the testimony of women in *hadd*-cases are not admissible. It then continues to point out that there is a minority opinion backed by the Ibāḍiyya, Ibn Ḥazm and Ḥasan al-Ḥasrī. Finally the commentary concludes, rather daringly, that „the Law of Evidence has adopted the majority opinion (of the *fuqahāʾ*) in not accepting the testimony of women with regard to the ḥudūd but accepted the testimony of women only or together with (the testimony of) men in the case of the non-availability of (sufficient) male witnesses...“\textsuperscript{752} That the Sudan Judiciary sees itself forced to have recourse to legal opinions of the Ibāḍiyya and the Úḥrīyya - i.e. a legal opinion that is backed by a very small minority of Islamic jurisprudents - is stretching the principle of takhayyur to a limit jeopardizing its credibility.\textsuperscript{753} Next to the acceptance of female testimonies, the inherent possible acceptance of witnesses who do not fulfil the conditions as devised by the *fiqh* – i.e. who are not of good reputation - is at variance with the majority opinion in Islamic jurisprudence.\textsuperscript{754} In order to clarify this obvious lacuna the

\textsuperscript{750} With regard to the acceptability of the testimony of women and non-Muslims this will be discussed in the chapter on proving *sariqa haddīyya* (chapter 4.4.2) below.

\textsuperscript{751} See al-sulṭa al-qadāʿiyya: taʾṣīl qānūn al-ithbāt, pp. 234-235.

\textsuperscript{752} Ibid.

\textsuperscript{753} Ḥassūna in her discussion of the problem quotes three different opinions on the testimony of women in *hadd* cases and simply states that the qānūn al-ithbāt has adopted the – third – opinion allowing for female testimonies. She does not give any further comment on what the possible reasons of the Sudanese legislator could have been for such a decision nor does she expound the problem of the weak textual base of article 63 (b), law of evidence 1993.

\textsuperscript{754} Inexplicably, Ḥassūna, who is one of the most prolific commentators on Islamic law in the Sudan and also a Supreme Court judge, quotes the relevant passage of article 63 (b) as “.....shahāda shahīdain ʿadlain...”. See Ḥassūna (2002) ithbāt jārāʾim al-ḥudūd, pp. 38. I possess three versions of the qānūn al-ithbāt 1993/1994 – both years are given – two published by the Sudan Ministry of Justice and the third published by the Sudan Judiciary. None of the three contains the important qualification of “ʿadl”. Scholz, who is one of the few Western authors who have taken a closer look at the law says “Die Zulässigkeit bescholtener und weiblicher Zeugen widerspricht wiederum der einhellige bzw. herrschenden Auffassung der traditionellen Lehre.” In other words the copy of
criminal circular (manshūr jināʾ) no. 98/1983 on sariqa stipulated that a witness is assumed to be of good reputation until there are indications contradicting this assumption. In effect, the judge can accept the testimony of a witness unless he himself knows, through his own knowledge or other information, that the reputation of the witness is questionable. The wording of the circular follows a minority opinion of the Ḥanafites and the Zāhirites who hold that the good reputation and moral integrity of a witness is to be assumed unless proven otherwise. The Mālikites, the Shāfiʿites, the Ḥanbalites and Abū Yūsuf, the great majority among the Sunni fiqah thus, hold that the judge is required to verify the good reputation of a witness even in cases where it has not been challenged by one of the litigants. With regard to qadhf, however, the problem arises that a witness might have been convicted of qadhf previously, thus gravely impairing his credibility in a subsequent case of qadhf. While Abū Ḥanīfa and Abū Yūsuf forever exclude the convicted qādhi from further testimony in qadhf-cases, Mālik and Shāfiʿī do admit such testimony once the offender has repented. Since both Evidence Acts are silent with regard to this problem one could come to the conclusion that a previous conviction for qadhf has no influence on the admissibility of the testimony. No compromises, however, are admissible as to the amount of witnesses. In a landmark case from December 1983, the Supreme Court had overruled a decision of a lower court that had accepted the testimony of officials. Two defendants had been sentenced to amputation for sariqa ḥaddiya after having allegedly stolen an amount of 250 Sudanese Pounds from their victim at a parking lot. None of the two defendants confessed and both claimed not to know each other. Thus the decision of the lower court which was upheld by the Appeals Court had to be based entirely on witnesses. Three male witnesses were produced by the lower court. The first witness was the officer who had accepted the complaint, the second witness was the victim himself and the third victim was a policeman who had been patrolling the parking lot and who had actually seen the theft. In its review of the decision the Supreme Court made it clear that by law the plaintiff can not testify on his own behalf in a case of ḥadd-theft. It further declined to accept the testimony of the investigator because he had not been a direct

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the law at his disposal did also not mention “good reputation” as a precondition for the witnesses. See Scholz. (2000), p. 457. al-Tāhir also discusses the article on the assumption that ʿadl is a qualification of the witness. See al-Tāhir (2003), p. 222.  
756 As to ʿadāla see chapter on zinā.  
witness of the crime and had only heard about the events in question (shahāda samā’īyya). The Supreme Court thus established at a very early stage after the introduction of ICL in the Sudan that in cases of amputation no other testimony would be accepted but the testimony of direct eyewitnesses other than that of the aggrieved party.\footnote{759}

Like in the fiqh circumstantial evidence is not admitted in hadd-cases under the Law of Evidence 1983. The following case, originally submitted to the Kordofan Appeal Court and subsequently for revision to the Sudan Supreme Court, confirms this principle:

Nine cows, belonging to the plaintiff and attached in their corral went missing and were found later in the possession of the defendant al-‘Awaḍ Markaz Ma’ālī, who, in turn, claimed that he had found them ownerless (sā’iba). The local criminal court indicted the defendant under article 321 for hadd-theft and condemned him to amputation of the right hand from the wrist. After that the Kordofan Appeal Court had confirmed the decision on, as the Supreme Court judges reasoned, dubious grounds with regard to its foundation in Islamic jurisprudence. The Appeal Court opined that even though the investigation could not establish that the defendant had stolen the cows from a īrṣ there was enough circumstantial evidence (adilla zarfiyya) to prove that the defendant had indeed taken the cows from their corral after their owner had tied them with a rope in the night of the theft. The court deemed it improbable that another person had untied the cows and taken them out of the corral so the defendant would find them. The Appeal Court equally found that more than 26 times\footnote{761} the minimum value (nisāb) for hadd-theft had been reached, that no reasons for the lapsing of the hadd-punishment could be established and that the rightful owner of the stolen property had filed charges. It therefore upheld and confirmed the decision which had been reached by the Trial Court. In its revision, however, the Supreme Court came to the conclusion that the provisions of article 70, Law of Evidence, had not been met. The defendant had not only not confessed to the crime but had denied it until the passing of the sentence. He only admitted as much as having found the cows freely grazing, which did not even meet the conditions for a confession to non-hadd theft. In other words there was no confession. Likewise, the second admissible proof of sariqa ḥaddiyya, the testimony of either two men, a man and two women or four women, could not

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\footnote{759} Interestingly the reviewing Supreme Court judge quotes in his deliberations various sources, including Ibn Qudāma and ‘Awda, which all come to the conclusion that a minimum of two males are required to testify sariqa ḥaddiyya. The contradiction with article 78 (2), EvA83, is striking. Compare above. 
\footnote{760} Safe place where movable property is kept. For a discussion of hirz see chapter 4.4.
be established. In conclusion, the Trial Court had built its verdict entirely on the evidence that
the cows were in the possession of the defendant. The Supreme Court, in consequence, stated
that such circumstantial evidence was not sufficient in hadd-crimes such as hadd-theft where
they rather constituted a legal uncertainty (shubha), causing the hadd-punishment to lapse.
The verdict under article 321 (2) – sariqa haddiyya - was thus annulled and modified to
“Criminal Misappropriation” under article 344 PC83.762

Proof of zinā in the Evidence Acts 1983 and 1993763

According to the 1983 Evidence Act zinā was to be proven by 1. either a non-retracted
confession, 2. the testimony of four male eyewitnesses of good reputation, but testimonies of
other persons (shahādāt ghairihim) could also be accepted, 3. by pregnancy if the woman is
not married or, 4. by mulāʿa.764

The stipulations for the proof of zinā differ in important details from those devised by the
majority opinions in the fiqh. Most importantly, next to the testimonies of four men of good
reputation (rijāl udūh) testimonies of women and non-Muslims become admissible.765 Neither
does the EvA83 specify that their testimonies have to be completely consistent with one
another as to persons, time, place and course of events. In addition, the majority of the
fuqahāʾ is of the opinion that the statements have to be made in one single session. The
lacking of these strict rules of evidence counters the intentions of the fuqahāʾ who strove to
limit the applicability of the hadd-punishments as far as possible.766 Secondly, and equally
important, only the Mālikites accept pregnancy of an unmarried woman as proof for zinā, the
majority of schools do not.767 By codifying this minority opinion among the fuqahāʾ, the
Sudanese legislator substantially widened the possibilities to prove zinā.768

761 It remains unclear how the niṣāb has been established.
763 The provisions about proof of zinā are to be found in four statutes: PC83, CA91, EvA 83 and EvA93. A
discussion of landmark Supreme Court cases on zinā can be found in chapter 4.1.
765 See article 77,2, EvA83.
766 To illustrate this: if zinā is proven by four valid testimonies and the offender subsequently confesses and if
this confession is then withdrawn, the hadd-punishment for zinā cannot be executed according to the Ḥanafites
and Ḥanbalites, despite the four valid testimonies. This example of a legal trick (hilāl) stems from a Ḥanbalite
768 As to the consequences see the case studies below and Sidahmed (2001).
Zinā, according to the EvA93 can be proven in four different ways: firstly, by a clear confession before the court, if not withdrawn before the execution of the punishment. Secondly, by the testimony of four male witnesses of good reputation, thirdly, by pregnancy of the unmarried woman if no legal uncertainty arises and, lastly, by the refusal of the liʿān by the wife, after her husband has sworn the oath of liʿān. It is obvious that the legislator has addressed criticism directed at the 1983 Penal Code and improved on the new rules for proof of zinā, in the sense of making them more fiqh-compatible. Following the fiqh, only the testimony of four men of good character is now permitted. The testimony of other witnesses – shahādāt ghairihim – are excluded and thus the testimony of women, non-Muslims or witnesses of doubtful reputation.

Further, the admission of pregnancy of the unmarried has been qualified. Article 62 (c) specifies that pregnancy is only admitted as proof for zinā, if no legal uncertainty occurs. It thus explicitly admits legal uncertainties to avert the punishment for zinā for unmarried women. Lastly, zinā can be proven by mulāʿana (also called liʿān) in cases where the husband accuses his wife of adultery but there are no witnesses, whereby the husband repeats his accusation of zinā four times and swears a fifth time that Allah’s curse be on him if he was not telling the truth. The husband, in this procedure, is not bound to the normal regulations of proof. The legal consequences of liʿān are fourfold: Firstly, the ḥadd-punishment for qadhf for the husband lapses. Secondly, the denial of paternity (nafy al-nasab) of a child borne by the wife during their legally valid marriage. Thirdly, the wife is subject to the ḥadd-punishment for zinā. She can, however, avert the ḥadd-penalty for zinā if she makes an affirmation under oath refuting her husbands allegations. And, finally, the dissolution of the marriage.

669 The wording of the article is “amām al-maṣkhama”, without specification. A confession made before one of the lower courts would thus be valid. For a description of the different court levels see Criminal Procedure Act 1991, article 6. The 1983 Penal Code determined a confession in judicial council (majlis al-qadāʾ), according to article 8 of the Criminal Procedure Act 1983 the lowest level in a system of five levels.

770 EvA 1983, art. 78 (2).

771 The husband himself does not act as a witness in this case.

772 See for this and the following, Schacht, Liʿān, El2, Vol.V., pp. 730-732 and Bahnasi, jarāʿim, pp. 166-171. In that case maintenance for the child whose paternity has been contested will be upon the mother. See Schacht (1964), pp. 165, 168, and 179.

773 Whether or not the divorce is an automatism after the liʿān procedure is subject to ikhtilāf among the fuqahāʾ. For details see Bahnasi, jarāʿim, pp. 170-171.
In order to be valid the *li‘ān* is subject to some conditions. Firstly, the husband pronouncing the *li‘ān* must be sane, adult and free to choose. Being a Muslim, however, is not a precondition. Secondly, the *li‘ān* must be pronounced in the presence of four witnesses.

*Proof of alcohol consumption in the Evidence Acts 1983 and 1991*

The general rules for the proof of *hadd*-crimes are also applicable in cases of alcohol consumption. In addition, circumstantial evidence is admissible, as allowed for by the Mālikītes and the Ḥanbalītes. The reek of alcohol on the accused is acceptable evidence for the consumption of alcohol if two men of good reputation testify to that effect or by way of an expert’s report. Further, a drunk person, according to the *fiqh*, is not allowed to testify against himself in cases where the rights of God are touched upon. However, if one follows the text of article 63, Evidence Act 1993, such a confession would be acceptable under Sudanese law. Neither does the fact that a person is drunk invalidates his testimony, at least in non-*hadd* cases. In a divorce case under scrutiny, the Supreme Court ruled that the testimony of a drunk person was not to be rejected merely because of the state of intoxication of the witness. Drunkenness as such, according to this judgment, does not automatically strip a witness of his good reputation. Rather the credibility of the testimony is the decisive factor whether or not a testimony is accepted or not. If the testimony is credible it will be accepted even if the witness has drunk. Reversely, a testimony will be rejected if it must be assumed that the witness is lying, even if the witness is meeting the (minimum) legal requirements of righteousness.

In another case from 1988 on intentional homicide – closer to our subject matter - the Supreme Court had already come to a comparable decision. A man had been stabbed to death in a place where alcohol was sold and the assassin had been convicted to capital punishment - death by hanging - according to article 251, PC83. In its review the Supreme Court excluded all possible mitigating factors such as self-defense, sudden provocation and sudden fight. It also discussed in some detail the required qualities of the witnesses in a *qišāṣ*-case like this one. The defense counsel had argued that a witness must be a man, sane, adult, reasonable, of good conduct, pious, impartial. He further explained that one of the witnesses was a quarrelsome drunkard dedicated to drinking marissa, the traditional Sudanese beer and

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774 EvA83, art. 79 and EvA93, art. 64.
lacking respectability and a sense of honor. Therefore this witness could not be considered to be of good reputation (shāhid ʿadl). In its deliberations the Supreme Court points out that the provisions for the proof of ḥadd-crimes as specified under article 78, EvA83 are not applicable to crimes involving qiṣāṣ.\(^{776}\) This despite the fact that the majority of the fuqahāʿ are of the opinion that the specifications of the witnesses in ḥadd-crimes and qiṣāṣ are the same.\(^{777}\) To justify its reasoning the Supreme Court invokes the criminal circular 88/83 which gives the judiciary the liberty to independent reasoning within the existing schools without being bound by a particular school (ʿadam al-taqayyud fi ījtihādātinā al-fiqhīyya bimadhhab muʿayyan). Next to an unpublished precedent\(^ {778}\) the SC judgment also refers to article 28, Evidence Act 1983, which neither excludes witnesses who consume alcoholic drinks nor those who have a criminal record. Another member of the court quotes Bahnāṣiʿs book on the theory of proof\(^ {779}\) in order to justify the court’s decision. Bahnāṣi, based on his reading of the fiqh, excludes the habitual drinker (mudmin al-khamr) from giving a valid testimony. According to al-Sarakhsī\(^ {780}\) a necessary precondition for being considered a habitual drinker is that the drinking habit becomes apparent to people or that he leaves the house in a drunken state and the children are mocking him. Since neither had been proven by the defense counsel, the testimony of the witness in question was accepted and the conviction to death by hanging upheld.\(^ {781}\)

Apart from confession and testimony alcohol consumption under the 1983 and 1993 codes can be proven by the smell of alcohol on the defendant if two witnesses of good reputation or an expert (khabīr mukhtaṣṣ) testify as much.\(^ {782}\) It should be noted that the witnesses required here give evidence to the fact that the defendant smells of alcohol, not on his actually drinking it. The majority of the Sunni schools does not recognize this as proof of shurb al-khamr.\(^ {783}\) In another reference to the proof of alcohol consumption, article 443 (2), PC83, states that the “smell is sufficient for the proof of drinking when it is proven to the court that it is the smell of alcohol”. This wording left it open whether indeed two witnesses or an expert are needed

\(^{776}\) The text of article 78 does indeed not mention qiṣāṣ-crimes.

\(^{777}\) “...raghma an raʿ jumhūr al-fuqahāʿ huwwa īthbāt ījārā in al-qiṣāṣ kama al-ḥāl ēf ījārā in al-ḥudūd”.

\(^{778}\) 36/88 Government of the Sudan vs. Ādam Mahdī Ādam.


\(^{780}\) Ḥanafite jurist from Transoxania, died around 1096.


\(^{782}\) EvA83, article 79 and EvA93, article 64.

\(^{783}\) Bahnāṣi, ījārā in, p. 192.
as article 79 of the Evidence Act 1983 suggests or whether the knowledge of the judge (‘ilm al-qāḍī) would be sufficient.

Limitation in cases of alcohol consumption

The Evidence Act 1993 leaves it open whether and when the proof for alcohol consumption is subject to limitation (taqādum). This important question was decided at an early date in 1984 by the Supreme Court. In the case in question the head of a police station had waited for three days after the crime had become known to him before he filed charges for alcohol consumption. Thus the question before the court was whether the ḥadd-penalty for alcohol consumption would lapse due to limitation if a certain amount of time lapsed between the perpetration of the crime and the notification of the concerned authorities on the one hand and the filing of charges on the other hand. The Supreme Court in the justification of its decision points out that there are four different views among the fuqahāʾ as to the acceptability of the testimony on alcohol consumption or the confession to it: 1. Abū Ḥanīfa and Abū Yūsuf reject the testimony and accept the confession. 2. Rejection of the testimony and acceptance of the confession even in cases where a substantial amount of time has passed (ḥattāʾ bi al-shurb al-qādim) (al-Shaybānī). 3. The acceptance of the testimony and the confession, according to the views of al-Shāfiʿī, Mālik and Aḥmad ibn Ḥanbal. 4. The rejection of the testimony and the confession (Ibn Abī Lailā). Motivated by the circumstances of the case – the police did not have a convincing explanation for the delay in filing charges - in its final judgment the Supreme Court annuls the conviction for alcohol consumption and orders the release of the defendant. It based its judgment on Abū Ḥanīfa’s opinion that the smell of alcohol must be discernible at the time of giving testimony and that limitation is effective when the smell has disappeared. In other words, the Supreme Court did not adhere to the majority opinion of the fuqahāʾ, but rather on a minority allowing it to annul the verdict and release the defendant.⁷⁸⁴

⁷⁸⁴ SLJR (1984), Government of the Sudan vs. ḍAbd Al-Wahāb ḍAwaḍ Jāḍīn.
3.3 General principles in Sudanese Islamic Criminal Law

3.3.1 Introduction

Western authors generally agree that there are few general principles in Islamic criminal law. Johansen, e.g., gives an instructive overview of the lack of guiding and consistent rules, taking Hanafite criminal law as an example. Thus, in general, ḥadd-offences are considered to be claims of God and qīṣāṣ-offences (homicide and bodily harm) are private claims. However, within the category of ḥadd-offences a number of inconsistencies can be observed. Some, victimless crimes like alcohol consumption (ṣurb al-khamr) and illegitimate sexual intercourse (zīnā) entail obligatory public prosecution, i.e. if these offences become known to the authorities an official inquiry is compulsory; no private persecutor is needed here because there is no victim, except in the case of rape. On the other hand, there are ḥadd-offences where the authorities can only open a procedure if a private plaintiff has pressed charges. Further, there are ḥadd-offences where – just like in the aforementioned case – private charges are indispensable for the opening of a procedure because the private and the public claim are almost on a par with each other. However, the punishment, in Hanafite law, is considered a public claim (or claim of God/ḥaqq Allah), i.e. satisfying the public legal claim excludes the satisfaction of the private claim. Further, there are ḥadd-offences where the religious status is decisive for the punishment (e.g. ṣurb al-khamr, qadḥ) and others where the juridical status of the slave or the non-Muslim is decisive for the punishment (zīnā). In addition, the legal status of ihšān of either perpetrator or victim and its impact on their respective punishments is another example for a guiding principle. These examples might suffice to demonstrate some of the principles that do exist. They apply to ḥadd- and qīṣāṣ-crimes only, the rules for taʿzīr and siyāsa are less strict. While the books of classical jurisprudence (Fiqh) do not contain chapters on general rules, these general concepts can, however, be found by deduction. How these principles relate to the guiding principles in Sudanese ICL codification will be discussed below.

786 Johansen (1999), pp. 421-422.
787 As mentioned above this is the Hanafite view; the schools differ as to the categorization of the punishment for qadḥ. Compare Bambale (2003), p. 51.
3.3.2 Geographical applicability

Islamic law in general and Islamic criminal law in particular do not claim universal applicability. A Muslim is fully subjected to it within the territory of the Islamic state only.\(^{789}\) For the non-Muslim Islamic Criminal Law is binding only to a limited extent within the territory of the Islamic state.\(^ {790}\) In the Sudan the definition of the area of application of ICL has been a major bone of contention from its inception until now. The PC83 had not exempted the non-Muslim South of the Sudan from \(\textit{hadd}\) and \(\textit{qiṣāṣ}\)-punishments. As a matter of fact its proclaimed applicability to the totality of the Sudanese population as of 1983 turned into one of the driving forces of the civil war with the South. In order to forestall the criticism that had been voiced against the PC83, the CA91 exempted\(^ {791}\) the Southern States from a variety of offenses unless the accused himself requests to be punished according to these provisions or the legislative body of a Southern state decided to apply these provisions. The Southern States were exempted from all \(\textit{ḥudūd}\) punishments. The exemption of the Southern States did, however, not mean that all of these offences were meant to go unpunished, when committed in the South. To some extent the \(\textit{hadd}\)-provisions had been replaced by \(\textit{ta‘zīr}\)-punishments. Whoever drank alcohol in the South, whether Muslim or not, could still be punished under art. 78 (2).\(^ {792}\) There was no alternative punishment for apostasy for non-Muslims. Muslims living in the South could, theoretically, commit apostasy and could not be punished according to the CA91. Unlawful sexual intercourse (\(\textit{ẓinā}\)) and armed robbery (\(\textit{ḥirāba}\)) committed in the South were to be punished with \(\textit{ta‘zīr}\)-punishments.\(^ {793}\) The \(\textit{ta‘zīr}\)-punishments for armed robbery committed in the South were relatively light. For grievous hurt no amputations were imposed, but imprisonment up to ten years and while a Muslim in the North can be punished for rape with the death penalty and subsequent crucifixion in the North, the same crime was to be punished with life imprisonment in the South. The \(\textit{ẓinā}\)-

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\(^{789}\) In the \(\textit{fiqh}\) it is controversial to what extent Islamic Criminal Law can claim (theoretical) applicability outside the territory of the Islamic state. The Ḥanafites e.g., in contradiction to the majority opinion, holds that \(\textit{ẓinā}\) is not punishable outside Islamic territory, because there a Muslim is not subject to the authority of the Khalif. See Baradie (1983), p. 104.

\(^{790}\) Schacht (1964), pp.199. For details with regard to the status of non-Muslims in Islamic Criminal Law see respective chapters below on \(\textit{ḥudūd}, \textit{qiṣāṣ}\) and \(\textit{ta‘zīr}\).

\(^{791}\) Due to Southern independence the parts of the CA91 making a difference between the North and the South are obsolete. No new criminal law, however, has been enacted until the time of writing (spring 2013). The South applies now its own Penal Code.

\(^{792}\) Art. 78(2) does not fall under the exemptions. For an analysis see below.

\(^{793}\) See art. 146 (4) for \(\textit{ẓinā}\) and art. 168 (2) for armed robbery.
offender in the South will also be punished relatively lightly: a maximum of three years imprisonment for the *muḥsan* in the South, compared to stoning for the muḥsan in the North. *Qadhf* in the South could be punished as defamation, with the offender receiving a maximum term of imprisonment of six month or a fine or both, instead of 80 lashes for the offender in the North. *Sariqa ḥaddiyya* committed in the South could only be punished as normal theft (art.174), entailing a maximum prison term of seven years or up to 100 lashes instead of amputation in the North. In addition to provisions pertaining to the ḥadd-offences, art. 139 (1) exempted the South from *qiṣāṣ* for causing intentional wounds. Instead a maximum prison term of five years with a fine or both was provided for. Finally, the South was exempted from art. 85, forbidding the sale of a carcass. Further, it should be noted, that the non-Muslim population living in the North is not exempted from any of the provisions pertaining to Islamic criminal law. This, however, stands in conflict with the Interim National Constitution (INC) promulgated in 2005. The INC contains a group of five provisions (art.s 154-158) protecting the rights of non-Muslims in the capital Khartoum. Next to pledging respect for all religions in the capital (art. 154), article 156 outlines the principles that are to guide the dispensation of justice in Khartoum. Apart from the application of tolerance with respect to different cultures, religions, and traditions, article 156 affirms that: “The judicial discretion of courts to impose penalties on non-Muslims shall observe the long-established *shari‘a* principle that non-Muslims are not subject to prescribed penalties, and therefore remitted penalties shall apply.” Article 157, finally, calls for the establishment of a special commission “to ensure that the rights of non-Muslims are protected and respected (...) and not adversely affected by the application of Shari‘a law in the National Capital”. It must be mentioned here that article 156 contradicts the position of non-Muslims in the Criminal Act 1991 in many ways and that a faithful application of the INC would require a substantial reform of the Sudan’s penal laws, which, in early 2011, after the secession of Southern Sudan, is less likely to happen.

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794 This provision is based on Qur‘ān 5:3, prohibiting the consumption of carrion. See ‘Īsa, sharḥ qānūn al-jinā‘i, p. 84. See also Waines (2001), pp. 291-292.

795 Criminal Act 1991, article 5 (1) - (3).
3.3.3 Criminal responsibility

While generally speaking in ICL persons are punished for their own deeds there are exceptions. In the qasâma procedure under Ḥanafite law, which is such an exception, those living in a house or a village can be collectively held liable for the payment of diya (blood money) if the killer is unknown and the victim has been found in the house or the village. Both Islamized codes 1983 and 1991 have refrained from introducing the qasâma procedure despite its being an integral part of Islamic Criminal Law. The collective liability of the āqila, however, continues to play a role in Sudanese ICL.

As in Western law in the fiqh actus reus (the punishable offence) in combination with mens rea (the guilty mind) are necessary elements of a crime. The fiqh knows a number of cases where mens rea, i.e. the blameworthiness of the defendant is absent and where he, therefore, cannot be punished for the offence committed by him. The most important cases, which will be briefly discussed hereafter are minority, insanity, unconsciousness, legal uncertainties (shubha/shubuhāt) and duress (īkrāh). Further, a per se punishable offence (actus reus) can lose its punishability and be considered to be lawful under certain circumstances such as in a situation of self-defense.

With respect to criminal responsibility a majority of the fiqahā distinguishes whether the intoxication stems from voluntary drinking or coercion. The majority does not recognize drunkenness as a mitigating factor in criminal cases as long as the state of drunkenness results from voluntary drinking. Drunkenness also does not decrease criminal responsibility since the consumption of wine and other alcoholic beverages is forbidden in the first place. However, if drunkenness results from coercion the drunk is not held criminally responsible.

A second, minority, opinion held by some Ḥanafites and some Shāfi`ites invalidates the acts of the drunk person irrespective of the intoxicating substance taken. Ibn Ḥazm even exempts the drunkard from retaliation (qiṣāṣ) and any financial liability for damage caused while being drunk.

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796 For the following compare Peters (2005), pp. 19-30.
798 For more details see chapters 5.1.7. For the role the qasâma procedure has played after 1983 in Supreme Court Jurisdiction see chapter 5.2.7.
799 See chapters on semi-intentional and accidental homicide.
800 Compare e.g. definitions of both terms in Martin (2003), p. 10 and p. 312.
801 See Gräf, (1965), p.16.
A third opinion, equally a minority, considers the legal capacity of the person. If the drunk person is of legal age and sane a verdict is possible whether the alcoholic drink has been consumed voluntarily or by coercion. In consequence the culprit is fully responsible for his acts and also financially liable.\textsuperscript{803}

With regard to the criminal responsibility of the drunk person, the Penal Code 1983 adopted the text of the 1974 predecessor code without change. Both codes distinguish clearly between persons who drink out of their own free will and those who drink under coercion.\textsuperscript{804} While the former “is presumed to have the same knowledge as he would have had if he had not been intoxicated” and is thus fully responsible, the latter “did not possess the power of appreciating the nature of his acts or of controlling them by reason of intoxication...administered to him against his will.” In consequence, he is fully responsible for his deeds. The Criminal Act 1991 follows the same pattern, persons who take intoxicants ,,as a result of coercion, or necessity...“ are not deemed to have committed an offence.\textsuperscript{805} If the intoxicant is consumed voluntarily, however, full responsibility for the deed ensues. In summary, the codes of 1983 and 1991, are fully in line with the majority opinion in the \textit{fiqh}, but in order to be so simply followed the example of their predecessors from 1974 and 1925 for that matter.\textsuperscript{806}

\subsection*{3.3.3.1 Minority, insanity and unconsciousness}

There is no criminal responsibility in the \textit{fiqh} if the perpetrator of a crime is either a minor, insane or unconscious. However, if unconsciousness is the result of alcohol consumption it does not preclude criminal responsibility since drunkenness in itself is an offence. The impossibility to impose a punishment on the minor, insane or unconscious offender does not preclude his financial liability for the damage caused. In the case of torts mere causation, not causation by fault, entails financial liability. In the case of \textit{ta`zir}-crimes the requirements with regard to the offender are lower than in the case of \textit{hadd}- and \textit{qis\=as}-crimes. The offender only needs to possess reason (`\textit{aql}), i.e. he needs to understand that he acted wrongly.\textsuperscript{807} Minors, while not punishable for \textit{hadd}- and \textit{qis\=as}-crimes can be punished with corrective measures (\textit{ta`dib}) for \textit{ta`zir}-crimes.

\begin{flushright}
\textsuperscript{803}See Bahnas\-i (1982), pp. 185-186 and Bahnas\-i, al-mas`\=ulliy\=a al-jin\={a}`\=iya, pp. 225-227.  \\
\textsuperscript{804}See Penal Code Act 1974, articles 42 and 43, Penal Code 1983, articles 42 and 43.  \\
\textsuperscript{805}Criminal Act 1991, article 10.  \\
\textsuperscript{806}See Penal Code 1925, article 50 (b).  \\
\end{flushright}
As to the age of minority the schools agree that it ends with physical puberty. They differ, however, on the age before which puberty cannot be established and with regard to the age after which the absence of puberty cannot be established. Thus, the Mālikites hold that puberty for boys and girls cannot be established before the age of 9. As to the absence of puberty the Mālikites teach that it can not be established after the age of 18, equally for both sexes. The Ḥanafites, also important in the Sudan, are of the opinion that the puberty for boys cannot be established before the age of 12 and for girls not before the age of 9. The same school holds that the absence of puberty cannot be assumed once a man or a woman have reached the age of 15.

The Penal Code 1983 had removed the age limit of its predecessor and replaced it by the notion of puberty (ḥilm). Thus acts of children who have not yet reached puberty do not constitute criminal offences. Unfortunately the chapter 2 “General explanations and definitions” of the PC83 does not provide us with a definition of what “puberty” or “adult” mean in the context of the Code. The age before which puberty cannot be established and the age after which the absence of puberty cannot be established are not defined. This lacuna has been filled in the Criminal Act 1991.

With regard to drunkenness the Penal Code 1983 simply translated the relevant article from its predecessor code. Penal Codes 1974 and 1983 stated that “a person who does an act in a state of intoxication is presumed to have the same knowledge as he would have had if he had not been intoxicated.” If the intoxicating substance has been administered to him against his will or without his knowledge, however, the act is not considered to be an offence. While simply being a translation of its secular predecessor, both articles are compatible with the fiqh.

Acts committed by persons suffering from permanent or temporary insanity or mental infirmity are likewise not considered to be an offence.

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807 ʿaql in this context means reason or intellectual maturity as a precondition for legal responsibility. Compare Rohe (2009), p. 575.
808 Art. 49, Penal Code 1974 stipulated that “No act is an offence which is done: (a) by a child under ten years of age, or (b) by a child of ten years of age or more but under fourteen who has not attained sufficient maturity of understanding to judge of the nature and consequences of such act.
810 See below.
811 Art. 43, PC74/83.
812 Art. 50, PC74/83. For a more detailed discussion of insanity in the fiqh see chapter 5.3.3.5.
In the CA 1991 a child not having reached puberty cannot be deemed to have committed an offence. However, provided it has reached the age of seven care and reform measures can be applied to it as the Court may deem fit.\(^{814}\) An analysis of when the CA91 assumes puberty highlights interesting features distinct from the reasoning of the \(\text{\textit{fuqah\'a}}\). It defines that an adult is “a person whose puberty has been established by definite natural features and who has attained 15 years of age. It further specifies that “whoever attains 18 years of age shall be deemed an adult even if the features of puberty do not appear.”\(^{815}\) The CA91 thus does not make any difference between boys and girls, men and women, unlike some of the schools.\(^{816}\) Secondly, the minimum age of 15 of an adult showing the natural features of puberty is significantly above the age limits provided by the \(\text{\textit{fuqah\'a}}\) where the Ḥanafites hold that for boys puberty cannot be established before 12 and all Sunni schools assume that for girls as of the age of 9 puberty can be established. Thirdly, the CA91 follows the Mālikites with regard to the age after which the absence of puberty cannot be established. All other Sunni schools hold that at the age of 15, boys and girls alike, have reached the age of puberty.

As to persons who are either insane or unconscious both shall not be deemed to have committed an offence because both are not capable of appreciating the nature or consequences of their acts or controlling them.\(^{817}\) With regard to intoxicating substances criminal impunity can only be invoked if they were taken as a result of coercion or necessity, or without knowing that they were intoxicating. Persons who consume intoxicant substances or drugs voluntarily and without necessity are fully responsible for any offence committed by them.\(^{818}\) On both accounts the Criminal Act 1991 is compatible with the \(\text{\textit{fiqh}}\).

### 3.3.3.2 Self-defense

The principle of self-defense (\(\text{\textit{al-dif\‘a `al-shar\‘i}}\)) is recognized in the Criminal Act 1991, no act shall be considered an offence if committed in self-defense. Self-defense by appropriate means is permissible in order to fend off an imminent assault upon one’s own or someone

\(^{814}\) Art. 9, CA 1991.


\(^{816}\) Ḥanafites and Ḥanbalites distinguish between boys and girls with regard to the age before which puberty cannot be established. With regard to the age after which the absence of puberty cannot be established only the Shi’ites distinguish between boys and girls. See Peters (2005), p. 21.

\(^{817}\) Art. 10, CA 1991.

\(^{818}\) Art. 10 (c), CA 1991.
else’s person, property or honor and when recourse to the public authorities is not possible. The right to self-defense is, however, not unlimited and does not extend to resistance against a public servant who acts within the limits of this post and provided that there is no apprehension of suffering death or grievous hurt from the acts of the public servant. The right to self-defense does not extend to willfully causing death, except when the imminent danger to be repelled is feared to cause death or grievous hurt or rape or abduction or kidnapping or armed robbery (ḥirāba) or robbery or criminal mischief or damage to public property or criminal mischief by sinking or by setting fire or by using poisonous, or explosive materials.

The provisions of the Penal Code 1983 on self-defense are literally translated from its predecessor code and do differ in some details from the Criminal Act 1991. Thus, to protect one’s honor could not be invoked in 1983/1974 as a reason for self-defense. The concept of honor for self-defense is an important one in the fiqh and the CA91 obviously makes reference to this (see below). The 1983/1974 codes do not speak explicitly about the specific situation justifying the causing of death in the course of self-defense. They rather speak in a general manner of situations which justify self-defense, i.e. the defense of one’s own and someone else’s body and/or property, specifying that no more harm can be inflicted as self-defense than is needed for the purpose of defense. Thus, while since 1991, judges can rely on rather clear guidance as to when causing death can be invoked as self-defense, in 1983/1974 the only criterion for the use of force in self-defense was that it could not exceed what was necessary to fend off the assault of the offence. Acts of resistance against public servants acting in their official capacity or of persons under directions of public servants, as in 1991, cannot be justified as self-defense.

In the fiqh, one of the important reasons to be invoked in order to avoid punishment for homicide or bodily harm is self-defense. In cases of self-defense no punishment nor any financial liability will be the result of the killing or bodily harm, provided the act is not disproportional with regard to the attack it means to ward off. Impunity can also be the result

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819 Criminal Act 1991, art. 12 (1) and (2).
820 Criminal Act 1991, art. 12 (3).
822 Penal Code 1974 and 1983, art. 56.
824 Penal Code 1974 and 1983, art. 60.
825 For more details on self-defense in the fiqh and in the Sudanese Penal Codes respectively see chapter 5.2.2.
of attacks against one’s honor. Thus, women are bound to defend themselves in cases of rape, provided they are in a physical state that allows them self-defense. If a woman is capable to and does not defend herself she will be considered guilty of voluntary unlawful sexual intercourse (\textit{zin\textbar{a}}). In the \textit{fiq\textbar{h}} a woman who is raped can use force in order to prevent her being raped. If the degree of violence used leads to the death of the attacker, this is permissible, however only if there are no other possibilities to stop the attack. We shall see further down in our chapter on \textit{zin\textbar{a}} that the position of women in a case of rape is a difficult one. It took years of Supreme Court case law to clarify that if a female victim cannot prove that she has been raped she cannot automatically be convicted for unlawful sexual intercourse.\footnote{826 See chapter 4.1.3.3.}

In the context of illicit sexual intercourse a man who catches his wife (or a female relative) red-handed with another man is permitted to kill her (or his relative) and her sexual partner, provided that this is the only way to stop the crime. Stopping a crime in progress and defending one’s honor are the main arguments to exempt the killer from punishment for homicide.

According to the \textit{\textbf{Hanafite}} and the \textit{\textbf{Shafi\textbar{ite}}}, however, the requirement of four male witnesses to sexual intercourse is not lowered. \textit{\textbf{Malikite}} and \textit{\textbf{Hanbalite}} accept a minimum of two witnesses, reasoning that the witnesses only serve to ward off the punishment for homicide and not to punish the fornicator (\textit{zani/zaniyya}). There is a last case where a killing can be justified, i.e. when one’s own property cannot be defended without killing the attacker/thief.\footnote{827 For an example from Egypt see Peters (2005), pp. 26-27.}

\subsection*{3.3.3.3 Duress (ikr\textbar{h})}

The Criminal Act 1991 defines that no person is deemed to commit an offence if the (punishable) act is done by coercion, threat of death or imminent grievous hurt to his person, or family or his property. The victim of duress apprehends that the threat is most probably to occur and it is not in his power to avoid it by any other means.\footnote{828 Criminal Act 1991, article 13 (1).} There are, however, limits to
the invokability of duress. Thus, duress cannot justify causing death, or grievous hurt or any of he offences against the state which are punishable with death.829

The definition of duress in 1991 has departed in some important details from its predecessor in 1983 which, in turn, is a verbatim translation of the pertinent article from the Penal Code 1974.830 Similar to the 1991 definition, in cases of murder and offences against the state punishable with death duress cannot be invoked.831 In 1983/1974 only the apprehension of instant death was invokable, and neither the threat of grievous hurt to the family or the property were valid reasons to invoke duress. Further, the 1974/83 codes caution that duress cannot be invoked if the person has placed himself in the situation (of duress) either by his own accord or by threats short of instant death. This clause is missing in 1991.

In the fiqh duress (ikrāḥ) can be invoked in cases where a ḥadd-crime was committed as a result of a death threat or a threat to inflict major injuries, if these injuries, in case of refusal to commit the ḥadd-crime, lead to the loss of bodily organs. The fiqh assumes a direct connection, i.e. a direct causal chain, between the person who coerced the actual offender and the victim since the person who commits the ḥadd-crime is considered to be a mere tool.832 It is important that the offender when acting under coercion believes that his coercer is actually willing and able to carry out the threat. The mere utterance of the threat (without the coerced being convinced that the threat will be actually carried out) is not sufficient.833 In the light of the above it is obvious that the Sudanese legislator has made an effort and succeeded in bringing the definition more into line with the fiqh. On the one hand a threat of grievous hurt is now invokable, on the other hand the person under duress has to believe that the carrying out of the threat is “most probable”.

3.3.3.4 Necessity (darūra)

The concept of necessity has been introduced for the first time in the CA91, article 15, which states: „No act shall be deemed an offence if done by a person compelled to do it by necessity to protect his person, honor or property or the person, honor or property of another from

829 Criminal Act 1991, article 13 (2). Offences against the state, punishable with the death penalty are e.g. “waging war against the state”, art. 51 and “espionage against the country”, art. 53, CA91.
830 Article 53 in both codes.
831 “Murder” (1974/83) was replaced by “qatl ‘amrd’intentional homicide” (1991).
833 For a discussion of homicide under duress in ICL and the relevant articles in the 1983 and 1991 codes see chapter 5.3.3.1.
imminent grave danger which he has not willfully caused and which he has no ability to avoid, provided that no injury similar to the injury to be avoided or greater injury results; and provided that necessity does not justify causing death except in the performance of duty. In other words, even though necessity can be invoked for a variety of acts it can not be invoked in cases where the injury committed is either similar or greater than the one it intends to avoid, neither can it be invoked in order to justify homicide. However, even though necessity does not lead to impunity in connection to homicide, it clearly does have a mitigating effect as to its punishment in cases of homicide, „where the offender commits culpable homicide in the case of necessity for the protection of himself or any other from death.\\textsuperscript{834} English law does give little authority to the defense of necessity and thus normally necessity can not be invoked in homicide cases.\\textsuperscript{835} Consequentially, the 1925/1974 Penal Codes and the Islamized code 1983 did not contain any provisions as to a possible mitigating effect of necessity.\\textsuperscript{836} Necessity as such is not mentioned in the PC74 and was not introduced in the PC83 either.\\textsuperscript{837} Both codes, however, contain an identical provision on acts “likely to cause injury but done without criminal intent and to prevent other injury or to benefit person injured”. The illustrations contained in article 48, PC74 explain that what is meant here is e.g. acts that cause the loss of life or grave injuries but inferior in scope compared to what would have happened without the act in question. Thus, e.g. a railway employee who switches a moving train into a siding in order to avoid a collision of two trains is not guilty of an offence even if the train derails and lives are lost, because it is highly likely that in the case of the collision more lives would have been lost. This article, despite not explicitly mentioning the notion of necessity can be considered a variety of necessity since the act, despite constituting an offence was committed with the intention to safe lives.

\\textsuperscript{834} CA91, art. 131 (1) (d).  
\\textsuperscript{835} James (1979), pp. 179-180 quotes the precedent of R. v. Dudley and Stephens (1884), where starving shipwrecked sailors killed a cabin boy in order to feed upon his body. Since necessity was not recognized, the sailors were convicted for murder. However, the sentence was later commuted to six months imprisonment. The case illustrates how the courts in the English legal system have the flexibility to mitigate a sentence according to the circumstances despite the non-recognition of necessity.  
\\textsuperscript{836} Compare articles 249 PC 1925/PC 1974 and PC 1983 stating the reasons “when culpable homicide is not murder”. Chapter II, “Of Criminal Responsibility” of all three codes does also not know “necessity” as a mitigating factor.  
\\textsuperscript{837} The extent to which English law accepts necessity as a defense is unclear. Compare Martin (2003), p. 327.


Necessity in the fiqh

Unlike in cases of duress (i ḵrāḥ) in a case of necessity (dārūrā) not a person is forcing another one to commit a prohibited act, rather the perpetrator is caught in circumstances he can only escape from by committing a forbidden act, thus saving himself or someone else from destruction. Examples given by the fuqahā’ for cases of necessity are severe hunger or thirst, driving a person to commit either theft (sawīqa) or to eat or drink forbidden food or drinks. In relation to homicide the eating of human flesh is discussed in extenso. In general, necessity does not have a mitigating impact on homicide, hurt and the cutting off of limbs.

The person in need is not allowed under any circumstance to kill someone else, or to cut off any of someone else’s limbs or to wound another person in order to save his own life. Thus, if e.g. a group of persons in a boat is bound to sink and drown due to the weight of the goods loaded, it is not permitted to any of them to throw anyone else of this group into the water in order to lighten the load of the boat and to save himself and the others from drowning. The fuqahā’ agree that the person whose life is protected against homicide, hurt and the cutting of limbs in a case of necessity is the person enjoying isma, i.e. the living ma’sūm. However, with respect to the muḥdar and the dead ma’sūm the opinions differ; the killing of the muḥdar is not only allowed, it is a duty in most cases. Nevertheless, Mālik outlaws the eating of flesh of a human being in a case of necessity, even if it is the flesh of a muḥdar, i.e. someone whose blood can be shed with impunity. Whether the muḥdar is dead or alive does not matter to Mālik and, for that matter, to the majority of the Ḥanafīs. Shāfī‘ī, Ahmad ibn Ḥanbal and a minority of the Ḥanafīs are of the opposite opinion, they allow the eating of the flesh of the muḥdar, may he be dead or alive. Moreover, Shafī‘ī and some of the Ḥanafīs – but not the Ḥanbalīs - even authorize the eating of the flesh of the dead ma’sūm, i.e. an inviolable person, with the justification that the inviolability of the living is greater than the hurma of the dead. The other fuqahā’ contradict and do not concede a “hierarchy of necessity” in the sense that one person in need (muṭṭarr) takes priority to take from another person in need like himself what is necessary to save his own life. And if he does take from another person in need and this other person dies (because what is necessary to survive has been taken from

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him), then the perpetrator is juridically guilty of homicide.\textsuperscript{841} In addition to the controversies described above, four conditions have to be fulfilled to constitute a case of necessity: 1. That the perpetrator is in a situation in which he fears death and the necessity is a recourse. 2. That the case of necessity is imminent and not just expected. Thus, the hungry one is not allowed to eat the meat of animals not ritually slaughtered (\textit{maita}) before he is suffering severe hunger. 3. That there is no other means to ward off the case of necessity than by committing a crime. If the case of necessity can be repelled by an allowed act then the committing of a forbidden act is outlawed, i.e. will have its usual legal consequences. Thus e.g., the hungry one can not commit sariqa (without punishment) if he is able to buy food. 4. That the necessity is warded off within the limits necessary to do so. Thus the hungry one can not take more food than is necessary to satisfy his hunger.\textsuperscript{842} Necessity thus, in 1991, has been introduced as a concept derived from the \textit{fiqh},\textsuperscript{843} but, however, without fully following its precepts. In the \textit{fiqh} three classes of crimes related to necessity are discussed: 1. crimes upon which necessity has no influence, such as homicide, hurt and the cutting off of limbs, 2. crimes which are permissible in cases of necessity, such as the eating of forbidden food and the drinking of forbidden drinks and finally, 3. offences which are not permissible, but where the punishment lapses in cases of necessity. Examples are the stealing of food and drink by the hungry one or throwing over board of merchandise of other passengers when the sinking of a ship is imminent.\textsuperscript{844} As to the first class of crimes, which concerns us here, the \textit{fuqahāʾ} state clearly that the person who is protected against homicide, hurt and the cutting of limbs is the person who enjoys the \textit{´iṣma}, or the (living) \textit{ma´ṣūm}. As we have shown above there is only one exception to this principle which is the cutting off of limbs of the dead \textit{ma´ṣūm}, which is allowed by Shāfi‘ī and some of the Ḥanafites. As far as the \textit{muhdar} is concerned, it is allowed or even a duty to shed his blood. This general principle is also applicable in cases of necessity, but necessity is not a precondition for its applicability.\textsuperscript{845} In other words, as shown above, the killing of the \textit{muhdar} is not considered to constitute either intentional or semi-intentional homicide by the \textit{fiqh} and this is also true in a case of necessity. The killer of the \textit{ma´ṣum} in a case of necessity,
however, has to face the penal consequences of his act. Necessity is thus not considered to be a mitigating factor by the fuqahā’. Ergo, if a homicide is intentional it shall not be considered to be semi-intentional if committed in a situation of necessity. Here the CA91 differs with the fiqh. While the fiqh, unlike English law and the PCs 1925, 1974 and 1983, as we have seen above, recognizes the concept of necessity as a reason of exemption of criminal responsibility, it does so while relating mainly to situations of severe hunger and thirst and the consumption of human flesh resulting thereof. The CA91, in contrast, does not know the distinction between persons enjoying ḍīmam and those who don’t. It also – and this is a significant difference as to the deliberations of the fuqahā’- recognizes necessity as having a bearing upon cases of homicide. While it does not prevent the act from being considered a crime – as in all cases described in CA91, art.15 – a case of necessity turns intentional homicide into a case of semi-intentional homicide. Paradoxically, the legislator has thus – while claiming to Islamize the Sudanese Penal Law – omitted ḍīmam, an important notion in the fiqh, or the differentiation between those who enjoy the full protection of their lives and property and those who have either forfeited or never had this protection.

In consequence, the legislator has implicitly introduced the notion of equivalence (κατά) in cases of homicide. By abolishing the notions of maṣūm/muhdar the state has confirmed its exclusive right to punishment in one more field within criminal law.

3.3.3.5 Legal uncertainty (shubha)

One of the most important defenses in cases of ḥadd-crimes and homicide are legal uncertainties (shubha, pl. shubuhāt), i.e. an illicit act which resembles a licit one. A shubha is usually invoked to avert the imposition of the harsh ḥadd-penalties, based on a hadāth calling upon the believers to “avert the ḥadd penalties my means of legal uncertainties” (idrāʿa al-ḥudūd bil-shubuhāt).

The Evidence Acts of 1983 and 1991 both recognize legal uncertainties (shubuhāt) and stipulate that ḥadd-punishments are averted by legal uncertainties, both define the withdrawal of a confession, differences in the testimonies of witnesses and the withdrawal of the testimony of a witness as legal uncertainties averting the ḥadd-punishment. Further,
both codes define the *li‘ān* procedure as a legal uncertainty equally averting the ḥadd-punishment.⁸⁴⁹ Beyond the pertinent Evidence Acts, legal uncertainties with regard to specific ḥadd-crimes are defined in legal circulars.⁸⁵⁰

In the *fiqh* there are differences between the schools as to how they categorize the *shubuhāt*. The Ḥanafites know three categories: 1. *shubha fī al-maḥall* (or *shubhat mulk*), 2. *shubha fī al-fī‘l* and 3. *shubha fī al-‘aqd*. In the first category the act is forbidden and the offender might even be aware that this is the case. However, a text with some authority contravenes the general rule and thus serves as grounds for *shubha*. The standard example given is the case of sexual intercourse with the slave girl of one’s own son. The text which makes the ḥadd lapse is the *ḥadīth* “You and your property belong to your father”.⁸⁵¹ In the second category the offender believes that his illicit act is a licit one. An example is sexual intercourse during the waiting period (‘*idda*) with a(n ex-) wife one has repudiated three times. The third category applies especially to *zinā* resulting from an invalid marriage contract, e.g. resulting from a lack of witnesses or from having married a close family member. Ignorance with regard to the law can either be the result of ignorance of the essentials of the law (e.g. the prohibition of illegitimate sexual intercourse or alcohol consumption) or ignorance of details of the law. In the former case the defense is accepted only in exceptional cases e.g. if the offender is a recent convert or came from the *dār al-ḥarb*. If the offender claims ignorance of details of the law such a defense is normally accepted. Examples are the consumption of alcohol for alleged medical purposes or the killing of a person at the request of the victim.⁸⁵²

### 3.3.3.6 Repentance (tawba)

In general repentance (*tawba*) can lead to the lapsing of ḥadd-punishments provided that the claims of men are not touched upon by a criminal offence.⁸⁵³ The details of the impact of repentance on ḥadd-crimes, however, are controversial in the *fiqh*. In the case of banditry (*hirāba*), repentance can make the ḥadd-punishment lapse if the *muḥārib* repents before he is caught and either voluntarily appears before the judge or discontinues his criminal activities

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⁸⁴⁹ Evidence Act 1983, art. 80 (3) and Evidence Act 1993, art. 65 (3).
⁸⁵⁰ Published in Hāmid (2002), *mausū‘ al-manshūrāt al-jinā‘iyya*, al-juz al-thālith. The details of these circulars which stipulate recognised reasons for the lapsing of ḥadd- and *qiṣāṣ*-crimes in general will be discussed in the respective chapters.
⁸⁵² To what degree legal uncertainties are recognized in the PC83 and the CA91 and the ensuing Supreme Court legislation will be discussed below in the corresponding chapters.
and leads a decent life. With regard to apostasy a majority opinion holds that repentance within a certain amount of time, which varies according to the respective school, makes the hadd-punishment for apostasy lapse. However, repentance does not make the punishment lapse in a case of qadhf, unless the aggrieved party pardons the culprit, since the claims of men have prevalence over the claims of god. With regard to illegitimate sexual intercourse, theft and alcohol consumption the leading opinion of the Ḥanafite and the Mālikite school as well as part of the Ḥanbalite and the Shāfī’ite schools reject any general impact of repentance on the punishment of these hadd-crimes. They argue e.g. that the Prophet himself has imposed hadd-punishments against adulterers and thieves despite their repentance. The opposite opinion is held by parts of the Mālikites, the Shāfī’ites and the Ḥanbalites. They defend the general impact of repentance on the hadd-punishments with e.g. the argument that it is taken into account for the much bigger crime of ḥirāba and that it should therefore also apply to “smaller” hadd-crimes.

Repentance, leading to the lapsing of hadd-punishments has no effect on the liability for homicide, bodily harm or theft, since here claims of men are affected. Neither does repentance forestall the criminal responsibility based on ta’zir.

Neither the PC 1983 nor the Criminal Procedure Act 1983 had mentioned tawba as grounds for the rescindment of a hadd-punishment. Notwithstanding its limited practical significance, the CA1991 has not only introduced the notion of repentance. It has also, in the case of hadd-theft, chosen to accept a minority opinion, thus using one of the available tools to mitigate the application of severe hadd-punishments (cross amputation, amputation, death, crucifixion) for apostasy, banditry and hadd-theft. The CA 1991 does not follow the minority opinions acknowledging repentance as a valid grounds for the lapsing of all hadd-penalties. However, in addition to apostasy and banditry – the punishment for theft (sariqa haddiyya) also lapses if the culprit repents.

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853 For the following, see Peters (2005), chapter 2.3.4. and Baradie (1983), pp. 212-222.
854 It is controversial between the different Sunni schools until when exactly a pardon can be granted by the maqḍhūf. Baradie (1983), p. 219.
855 Köndgen (1992), p. 44.
856 For details see below.
3.3.4 Attempt and criminal joint acts

3.3.4.1 Attempt

The Criminal Act 1991 defines “attempt” as the commission of an act which apparently indicates the intention to commit an offence where the offence has not been carried out, due to a cause beyond the offender’s will. The attempt to commit an offence is punishable with a prison term not exceeding half of the maximum term prescribed for the attempted offence. When the prescribed penalty for the attempted offence is capital punishment or amputation the punishment will not exceed seven years of imprisonment.\footnote{Criminal Act 1991, art. 19, 20 (1), 20 (2).}

The definition of attempt in 1983 is a literal translation of its 1974 predecessor code with the exception of the punishment. While in 1974 an attempt to commit an offence punishable with imprisonment or the causing of such an offence to be committed was punishable with a prison term of up to one-half of the maximum term for the offence (had it been carried out), in 1983 the penalty is replaced by the ubiquitous formula “by flogging and fine or imprisonment”. In the \textit{fiqh} a theory on attempted crime does not exist.\footnote{Peters (2005), p. 20.}

3.3.4.2 Criminal joint acts

The Criminal Act 1991 defines that when an offence is committed by two or more persons in execution of a criminal conspiracy between them, each person is equally responsible as if the crime is committed by him alone.\footnote{Criminal Act 1991, art. 20.} Criminal conspiracy is defined as an agreement to commit an offence.\footnote{Criminal Act 1991, art. 24 (1).} If the offence is committed by two or more persons without criminal conspiracy each one of them shall be responsible for his act and punished by the penalty prescribed for it.\footnote{Criminal Act 1991, art. 22.} The criminal conspiracy as such, i.e. the agreement between two people or more to commit an offence, is only punishable in cases of intentional homicide, armed robbery (\textit{hiraiba}) and offences against the state punishable by death or when an attempt has been made to actually commit the offence.\footnote{Criminal Act 1991, art. 24 (2).} In other words, for the three crimes mentioned the mere planning is punishable even if no attempt to carry out the plan has been made.

The Penal Code 1983 defines joint criminal acts similar to its successor in 1991. Here too, the pertinent articles are a literal translation from the Penal Code 1974. A main difference is, however, that in the 1983 (1974) code no crimes were defined where already the agreement to commit the offence (“criminal conspiracy”), i.e. the planning, was punishable.

In the fiqh, in order to impose a hadd-punishment the perpetrator needs to have committed all elements of the crime himself. The hadd-punishment lapses if he has, e.g. in the case of sariqa (theft), taken out a valuable object out of his safe place (hîrţ) but then handed over the object to an accomplice. The exception from this rule is the hadd-crime of banditry (hîrâba): all participants of an act of banditry will be punished with the amputation of the right hand and left foot even though only one of them actually has taken property from the victim(s). It is important to note that this principle works also in reverse order. If the main culprit cannot be convicted, e.g. because he is a minor, the hadd-punishment lapses for all others as well.

With regard to cases of homicide complex rules apply in the fiqh. A majority of schools hold that in a case of multiple perpetrators it has to be established who exactly caused the death of the victim. Can the actual killer not be identified the claim will be dismissed. However, collective criminal responsibility is assumed – and the death penalty for all is possible - where all perpetrators acted simultaneously and where their act would have been lethal had each one of them carried it out separately. If the perpetrators did not act simultaneously criminal responsibility falls upon the offender who attacked the victim first, if the victim dies within a day after the attack. If the victim dies later than that, criminal responsibility lies upon the last attacker. In both cases there is no collective responsibility nor punishment, all remaining attackers will be liable to a taʿzîr-punishment. In opposition to this majority opinion the Mâlikites assume in the above cases collective criminal responsibility. All those who directly took part or assisted in the murder, even if their role consisted in abetting, will be held collectively responsible. This means in practice that not only the person

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863 Except that the notion of “criminal conspiracy” (1991) in 1974/83 is “criminal act...done...in furtherance of the common intention”.
864 Articles 78-81, Penal Code 1983.
865 The illustrating examples of the PC74, however, have been dropped as in all other articles and the notion of “criminal conspiracy” (1991) in 1974/83 is worded “criminal act...done...in furtherance of the common intention”.
866 For this section compare Peters (2005), pp. 28-30.
867 For more details and a comparison with recent legislation see chapter 4.5 on hîrâba.
868 See also chapter 5 on homicide.
who actually shot or stabbed the victim will be subjected to *qīṣās* but also those who had lesser roles in the killing.\(^{869}\)

### 3.3.5 Sanctions

#### 3.3.5.1 Penalties

The PC83 PC doubled the number of punishments and compensation from six to twelve in comparison to its PC74 predecessor code.\(^{870}\) The new punishments introduced in 1983 are punishments that are typically found in the *fiqh*. Thus, crucifixion and stoning were introduced as well as single and cross amputation, full and diminished *diya*, and *qīṣās*. As to stoning, it is on the one hand part of the list of possible punishments but, on the other hand, not the punishment for *zinā* for the *muḥšan* (art. 318 (1), which is punishable by execution (i.e. hanging). According to interviews Zein conducted with al-Jīd, one of the authors of the Penal Code, these were more concerned “with the bad impression...than with perfecting the Penal Code from an Islamic point of view”.\(^ {871}\) Further, al-Jīd did not believe that stoning could be implemented as a punishment for practical reasons. In order to justify that the classical punishment of stoning was not applicable in cases of *zinā*, the Minister of Religious Affairs, ‘Abd al-Mālik al-Ja´lī, issued a *fatwa* explaining that “due to the circumstance(s) under which Islamic laws were restored, hanging could juridically replace the stoning punishment”.\(^{872}\) Imprisonment could also be imposed as imprisonment with exile (*nafy*) or imprisonment with expatriation (*taghrīb*). Fine, forfeiture of property and detention in a reformatory (for minors) stem from the 1974 predecessor and were taken over into the new code. In order to facilitate the application of the new penalties the PC83 contains a number of explanations, e.g. full *diya* is defined to be 100 camels or its equivalent. Whipping, if not specified any further, can range from a minimum of 25 lashes to a maximum of 100 lashes. As to imprisonment the judge has complete discretion according to the circumstances of the case, while the terms exile (*nafy*) and expatriation (*taghrīb*) have to be understood in accordance with the *shariʿa*. Despite a number of explanations and specifications it is surprising to see how many important issues have not been addressed in the chapter on penalties and compensation of the PC83. This is especially true with regard to *qīṣās*. The

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\(^{869}\) For multiple perpetrators in modern Sudanese legislation see chapter 5.3.7.  
\(^{870}\) For the following see article 64, (1)-(12), PC83.  
PC83 does not define qiṣāṣ, does not mention how it is carried out, who inherits it when the victim is dead, under what circumstances it can be carried out in cases of bodily harm nor in which cases qiṣāṣ is remitted. As mentioned above, the terms exile and expatriation are not defined either but would have to be clarified by consulting “Islamic shari‘a”. Furthermore, the multifold questions surrounding diya are not answered, apart from the mentioned definition of full diya (diya kāmilā). We neither learn when, on whom, nor to whom diya is due. Also, the PC83 is silent with regard to diya for specific parts of the body. Altogether, the changes with regard to the PC74 are rather superficial. Most striking is the removal of the minimum and maximum age limits for the execution of the death penalty. While these were 18 and 70 respectively in the PC74, in the PC83 such limits have been abolished.873

The full range of punishments as known in the fiqh is introduced in the PC83 in addition to the notion of blood money (diya). However, given the lack of explanations and detail many questions remained unanswered at least in the initial stage until criminal circulars issued by the Chief Justice and subsequent Supreme Court decisions solved at least part of these questions.

Penalties in the Criminal Act 1991

The following penalties are possible under the CA91: death penalty, retribution (qiṣāṣ), imprisonment and expatriation, fine, whipping, forfeiture and destruction, closing of premises, ta‘zīr-penalty. In comparison, and while maintaining a similar set of punishments as its predecessor, the CA91 presents rather clear definitions and sets out to illustrate the application of complex concepts such as qiṣāṣ and diya. It aims at clarifying a maximum of questions a legal practitioner might have with regard to the actual application of the punishments. It remedies the flaws and fills the gaps of the predecessor code and further succeeds to bring the provisions in harmony with the fiqh to a large extent. With regard to the death sentence it remains limited to hanging (now specified) and stoning (rajm).874 However, the law now specifies the three categories within which according to the shari‘a a death penalty may fall, i.e. by way of ḥadd, qiṣāṣ or ta‘zīr. Since the rights of the heirs but also procedural questions differ between the categories it is rather important to specify into which

873 Compare art. 65 in the PC74 and its changed version in the PC83.
874 For the death penalty see art. 27 (1) – (3), CA91.
category a death penalty falls. It should be noted that the fiqh provides for beheading by the sword as the normal way of execution.\textsuperscript{875} With regard to the minimum and maximum age of the offender who is to be executed, the CA91 makes a clear distinction between hadd and qis\={a}s-offences on the one hand and ta\={z}ir-offences on the other hand. While those guilty of ta\={z}ir-offences can be executed only if they are at least 18 years of age or below 70 years of age, offenders guilty of hadd- or qis\={a}s-crimes can also be executed outside these age limits. The CA91 here returns to the age limits of the PC74 which had been lifted in the PC83, however, with an important qualification. The section further specifies that crucifixion can only be imposed in cases of highway robbery (hir\={a}ba).

Qis\={a}s (retribution) is now for the first time ever in Sudanese law defined as the punishment of “an intending offender” with the same offensive act he has committed.\textsuperscript{876} An attached list enumerates all organs for which there is retribution and also the condition the organ has to be in. For example the loss of an eye can only result in retribution if the eye was sighted.\textsuperscript{877} The conditions of qis\={a}s are strict and aim to ensure that in cases of wounds equivalence (mum\={a}thal\={a}) between the organs (lost as a result of the crime and the one taken as retribution) is secured. They have to be similar in type, soundness and size and where these conditions are not fulfilled retribution cannot take place.\textsuperscript{878} In cases of murder qis\={a}s shall be by hanging and only if the court sees fit in the same way in which the offender has caused death.\textsuperscript{879} The CA91 also stipulates that an individual killer can be executed for having killed a group and, in reverse, a group can be executed for having killed an individual. The right to retribution rests first of all in the victim and if the victim is dead in his relatives, i.e. his heirs at the time of his death.\textsuperscript{880} The state shall act as heir for every person who has no heirs or when the heir is absent or his location is unknown without hope of his return.\textsuperscript{881} The heir of a victim in cases of intentional homicide or intentional wounds has a number of options. He can claim retribution (qis\={a}s) or blood money (diya), settle for a certain amount of money by way of reconciliation or completely pardon the culprit (without financial compensation). With the exception of qis\={a}s the same range of options applies in cases of semi-intentional homicide or

\textsuperscript{875} Peters (2005), p. 36.
\textsuperscript{876} CA91, art. 28 (1).
\textsuperscript{877} See CA91, “Schedule I”.
\textsuperscript{878} CA91, art. 29 (a).
\textsuperscript{879} As to the actual practice of this provision see last chapter.
\textsuperscript{880} CA91, art. 28 (2) and art. 32 (1).
\textsuperscript{881} CA91, art. 32 (3).
bodily harm and accidental homicide and bodily harm.\footnote{CA91, art. 32 (4).} Under certain conditions qīṣāṣ will be remitted.\footnote{CA91, art. 31 (a)-(d).} Apart from a pardon, this is the case when the victim or his relative is an offspring of the offender, bodily harm has been inflicted with the consent of the victim or where the offender becomes insane after the passing of the sentence. As to whipping an age limit, albeit different from the death penalty, applies. No person who is sick or whose life might be in danger or has attained 60 years of age may be whipped, except in cases where the whipping is a punishment for a ḥadd-crime. No age limit applies to minors.\footnote{CA91, art. 35 (1).} With regard to imprisonment the discretion judges had in 1983 has been limited. Similarly to the death penalty, imprisonment cannot be imposed on minors below 18 years of age or persons above 70 years of age. Highway robbery (ḥirāba), however, is exempted from this general rule. The terms “exile” (nafy) and expatriation (taghrīb) have now been defined. Both terms can be traced to the Qurʾān and to a ḥadīth, their meaning, however, is controversial in the fiqh. Only the Mālikites define it as real deportation, all other schools interpret it as imprisonment until the offender repents.\footnote{Peters (2005), pp. 34.} Exile, according to the 1991 definition, is imprisonment far from the place where the offence has been committed and the from he offender’s place of residence. Expatriation is the restriction of the offender’s residence away from the place where the crime was committed.\footnote{CA91, art. 33 (1) and (2).} Lastly, the CA91 provides some important definitions on the possibility of pardoning an offence. Thus, the execution of ḥadd-penalties cannot be remitted by a pardon while the execution of a qīṣāṣ-penalty can be remitted only by the pardon of the victim or his heirs.\footnote{CA91, art. 33 (1) and (2).}

\subsection*{Special provisions on taʿzīr - penalties}

In Islamic law, next to ḥadd- and qīṣāṣ-crimes there is a third category of crimes. These, called taʿzīr-crimes, comprise all forbidden acts, which are not ḥadd, or qīṣāṣ and which are punishable by a discretionary punishment. While ḥadd- and qīṣāṣ-crimes consist of a limited number of clearly-defined crimes, the majority of crimes fall into the category of taʿzīr. While before Islamization in the PC74 the term taʿzīr did not play a role, it is surprising to note that the Islamized CA83 did also not contain any specific provisions with regard to taʿzīr-offences.
In the CA91, however, we find a number of provisions, which are specific to \( \text{\textit{ta'zir}} \)-offences. Thus, the court is bound to take into consideration mitigating and aggravating circumstances when determining the appropriate \( \text{\textit{ta'zir}} \)-penalty as well as the degree of responsibility, motives of the offender, the seriousness of the act, the grievousness of the injury and other circumstances surrounding the deed such as the dangerous nature of the offender and his previous convictions.\(^{888}\) Where a single act constitutes more than one offence these are considered to be overlapping and only the most severe penalty shall be inflicted. If, in a case of multiple offences, the most severe penalty is the death penalty it excludes all other penalties, except forfeiture.\(^ {889}\)

### 3.3.5.2 Blood money (\textit{diya})

**Blood money in the Penal Code 1983 and judgments of the Supreme Court**

In the \textit{fiqh} accidental and semi-intentional homicide or bodily harm result in a liability for blood money. Cases of intentional homicide or bodily harm can also result in blood money under certain conditions, e.g. when a sentence for \textit{qis\=\={\'a}sa\={\'a}} cannot be imposed because the blood price of the victim (e.g. when the victim is a woman) is lower than the killer’s or because the heirs of the victim agree with the killer on blood money. It is important to note that \textit{diya} is not a punishment. Peters has pointed out that in general it is not the offender but the solidarity group, \textit{\'aqila}, which is liable to pay the blood money, a clear indication of its being a financial compensation. Interestingly, the notion of \textit{diya}, so important and central to Islamic Criminal Law has not been defined as such in the PC83, nor has the PC83 tried to explain and determine any of the many questions pertaining to it. No guidance was given to judges who were trying to apply the law. While most of these gaps were filled, and inconsistencies remedied, by the successor law in 1991, in the meantime judges between 1983 and 1991 had to resort to Criminal Circulars addressing some of the gaps and to successively emerging Supreme Court case law. With regard to \textit{diya} it remained unclear to whom \textit{diya} was due, in which cases it would be applied, in which cases the offender and in which cases the \textit{\'aqila} would pay \textit{diya} and how much the full \textit{diya} or fractions of it payable in cases of bodily harm was. In fact, the PC83 mentions \textit{diya} only briefly in article 64 (1) (e) and 64 (e). In article 64

\(^{887}\) CA91, art. 38 (1) and (2).

\(^{888}\) CA91, art. 39.

\(^{889}\) CA91, art. 40.
(1) (d) it lists full *diya* (*al-diya al-kāmilā*) and the diminished *diya* (*al-diya al-nāqiṣa*) among other punishments to be applied. Secondly, it defines in article 64 (2) the full *diya* (*al-diya al-kāmilā*) as amounting to a hundred camels or its equivalent in Sudanese currency. There is no mentioning of the enhanced *diya* (*al-diya al-mughallaza*), which plays an important role in the *fiqh*, nor does the list of possible punishments give an idea of what is to be understood by *diya nāqiṣa* or diminished *diya*. Compared to majority opinions of the *fuqahā’* with regard to blood money the PC83 interestingly makes no distinction between men and women as to their respective blood price. The dominant opinion of the *fuqahā’* is that the blood price of a woman is half the price of a man.\(^\text{890}\) Other criteria which play a role in the *fiqh*, such as religion and legal status is not mentioned either in the PC83.\(^\text{891}\)

**Diya for a policeman who has killed while exercising his duties**

A case of homicide\(^\text{892}\) from the mid-eighties highlights the understanding of the nature of *diya* in the interpretation of the Sudanese Supreme Court. A policeman had shot dead his victim without justification (*dūn mubarrīr*) during a pursuit. A provincial court (*maḥkama mudiriyya*) sentenced him under article 253 PC 1983\(^\text{893}\) to pay a *diya* of 25,000 Sudanese Pound or a prison term of seven years in the case of the non-payment of the *diya*. The legal representative of the private prosecutors appealed and requested to apply article 251 PC 1983 – intentional homicide – instead, since in his view mala fide was firmly established. He also requested a review of the prison term because a non-payment and the subsequent prison term would have left the private prosecutors without their due financial compensation. However, the Supreme Court in its discussion of the decision concurred with the original sentence for semi-intentional homicide. It agreed that the policeman fell under a special clause,\(^\text{894}\) protecting civil servants committing homicide in good faith while performing their duties. Consequentially it also rejected the claim of mala fide, especially since the young man only recently had joined the police force and should not have been given a weapon to protect a residential quarter. However, the judges continued to stress that even though the policeman might not bear the responsibility or had misunderstood the instructions this should not impair


\(^{891}\) Peters (2005), p. 51.


\(^{893}\) Article 253 PC 1983 punishes semi-intentional homicide with the death penalty or *diya*.

\(^{894}\) Article 249 (3) PC 1983.
the rights of the family of the victim. He had to pay the price for using his gun without justification and compensate the victim’s family. However, the Supreme Court criticizes the lower court’s equation of the diya with a fine. The diya, the SC specifies, is a due compensation which does not lapse by a prison term or any other ta’zīr punishment. It only lapses by the pardon of those who inherited it or when it has been paid. In conclusion the SC confirmed the sentence of the lower courts as to the payment of the diya and ordered the defendant to stay in prison until the diya was paid or the victim’s family pardoned him. The seven year prison term, erroneously replacing the diya, was abolished.

No diya for minors

In 1985 the Supreme Court had to decide whether diya could be imposed on minors. It reasoned that diya is a punishment imposed with the objective of prevention and deterrence (’uqūba al-zajr wa al-rad). The punishments imposed on minors, however, are corrective (ta’dib), such as floggings (jald) and arrest (ḥajz) in a reformatory (ıslāhiyya). It therefore decided that minors, who have not yet reached 18 years of age or do not show the physical signs of adulthood in the light of the Islamic sharī’a could not be sentenced to the payment of diya. It is noteworthy that in the case in question the punishments for the underage perpetrator of intentional homicide became lighter with each revision. While the original court of first instance had imposed the death sentence, the court of appeal abolished the death sentence and sentenced the culprit to five years in a reformatory and 25,000 Sudanese Pounds of diya. The court of appeal specified that if the defendant would not pay; he would remain in the reformatory until payment. Further, the heirs should make their claim heard through civil jurisdiction (bil-ṭuruq al-madaniyya). After the final review by the Sudanese Supreme Court, the payment of diya was annulled, because the culprit was underage. Thus – the Supreme Court did not mention the possibility of claiming money in the civil courts - the heirs did not receive any financial compensation for the death of a family member.

As mentioned above minors and the insane - while they cannot be held criminally responsible - are liable to pay diya in cases of homicide under the sharī’a / fiqh. No fault is required. While the Court of Appeal had taken this principle into consideration the Supreme Court seems to have confused criminal responsibility and civil liability. Taking the former for the
latter it acquitted the minor from his obligation to pay financial compensation and thereby contradicted the *sharī'a / fiqh*.

*Protection of the rights of minors, absent heirs and legally incapable heirs*

A case of fratricide from 1985 shows that settlements for *diya* can lead to the payment of amounts higher than the specified *diya*, while a lower amount is only possible if there is no infringement upon the rights of minors and other groups of heirs.897

A man had killed his aged brother by causing a skull fracture with a hatchet after a brawl about land rights. Two eyewitnesses of good reputation had testified to the details of the case and the killer had confessed to having committed the deed. The Trial Court did not deem applicable any of the mitigating circumstances of article 249, PC83, that can change an indictment for intentional homicide into one for semi-intentional homicide. The defendant was therefore sentenced to death by hanging under article 251, PC83.

Two months after the verdict the private prosecutors, i.e. the wife of the victim and the underage children, reached a settlement with the culprit in exchange for the payment of *diya*. According to this settlement the defendant had to forego his share of the inheritance from his father in general and especially the land and 41 date palm trees the defendant had cultivated on the land of his father. In its review the Supreme Court came to the conclusion that the foregoing of his inheritance by the killer as described above was legally valid (*sahīḥ*) because *qiṣāṣ* is remitted through a settlement against the payment of any amount of money, even if the amount to be paid is higher than the *diya* (which would normally have been paid under the circumstances of the case). This under the condition that the culprit accepts if the amount to be paid exceeds the normally payable *diya*.898 Since part of the heirs were minors the Supreme Court further explained that it is important that a settlement does not diminish the due share of the minor (*al-qāṣīr*), the absent (*al-ghāʾib*) or the person who has lost his legal capacity (*fāqid al-ahliyya*) in view of the *diya* imposed by the court (*al-diya al-muqarrara*). In the case at hand it is the duty of the court of first instance to evaluate the value of the land and the date palm trees, the right to which the culprit has foregone. The court must ascertain that the total value of the land and the trees, in combination with what the adult (i.e. the mother) has waived, is not less than the *diya* specified by the court. This, because the mother is not in a

897 Government of Sudan vs. Muhammad Ḥusain Muhammad Khair, SLJR 1985, no.1405/81.
position to forego part of the share which is due to her under age child only, because she is an adult. If the total sum of the *diya* actually paid - including whatever amount the adult(s) have foregone - is less than the *diya* specified by the court (*al-diya al-mugarrara*), then the killer shall have the obligation to pay the difference.

As a final conclusion the Supreme Court accepted the settlement, abolished the earlier death penalty and decided to keep the culprit in prison until his payment of the *diya*. It further specified that the file was to be returned to the Trial Court for a calculation of the *diya* along the lines described above.

*Diya in the Criminal Act 1991*

In comparison with the PC83, the Criminal Act 1991, articles 42-45 (supplemented by Criminal Circular no. (1), 2000)\(^{899}\) concerning *diya*, the amount due, the recipient and its applicability are far more specific and detailed.\(^{900}\) The legislator clearly remedied many of the flaws and omissions of the PC83. The CA91 specifies that (full) *diya* equals one hundred camels of different ages or its equivalent in money to be determined by the Chief Justice.\(^{901}\)

In fact, unlike in the PC83, two lists are attached to the CA91, the first one listing body parts such as the seeing eye (no *diya* for the blind one), the nose, the sound ear, arm, leg, penis and so forth, for the loss of which *diya* is due. The second list determined the amount of *diya* for specific wounds and *ghurra*, i.e. financial compensation for the loss of a fetus.\(^{902}\) Wounds mentioned for which the normal i.e. the full *diya* is due are the loss of all teeth, the loss of two limbs which exist in pairs or the loss of all fingers or all toes. Other wounds entail the payment of only half of the normal *diya*, such as the loss of one limb that exist in pairs. The list also defines smaller fractions such as 1/3, 2/3, 1/10 or 1/20 depending on the gravity of the wound or the loss of a limb, teeth or a capacity. We notice here an important difference with the stipulations of the *fiqh* with regard to equivalence (*katā‘a*). The CA91 does not stipulate different blood prices for Muslims and non-Muslims or for men and women. While in the *fiqh*, according to the majority opinion the blood price of a woman is only half of that

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\(^{900}\) The provisions described below have been taken over verbatim for the larger part from the Criminal Bill 1988.

\(^{901}\) CA91, art. 42 (1). Criminal Circular (1), 2000 e.g. fixed the full *diya* at two million Sudanese Dinar and the amount of the enhanced *diya* (*al-diya al-mughallaza*) at three million Sudanese Dinar.

\(^{902}\) CA91, art. 42 (2).
of a man no such distinction is made by CA91. With regard to the blood price for the non-Muslim victim, the CA91 follows the Ḥanafites and the Ḥanbalites who hold that it does not differ from the blood price to be paid for Muslims. The Criminal Act 1991 has thus implicitly established the equivalence not only of the sexes but also of citizens of different religions in this important domain of Islamic Criminal Law.

Article 42 further specifies that no other compensation shall be imposed alongside *diya* for homicide and wounds,\(^{903}\) a stipulation which plays a role in subsequent Supreme Court case law (see below). In cases of accidental homicide and wounds the amount of *diya* shall be decreased proportionally to the offender’s participation in causing the offence.\(^{904}\)

*Diya* becomes applicable, in accordance with the list mentioned above, in cases of intentional homicide and intentional bodily harm if *qisās* is remitted, in cases of semi-intentional homicide and semi-intentional bodily harm, in cases of accidental homicide and accidental bodily harm and, finally, in cases of homicide and bodily harm caused by a minor or by someone who has lost his clear judgment (*fāqid al-tamyīz*).\(^{905}\) Criminal Circular (1), 2000 specifies more precisely that when *qisās* lapses in cases of intentional and semi-intentional homicide the enhanced *diya* (*al-diya al-mughallaza*) is due.\(^{906}\)

The CA91 further determines that *diya* is due in the first place to the victim, then the right to *diya* passes on to his heirs according to their shares in inheritance. Where the victim has no heirs, “*dia shall vest in the state*”.\(^{907}\)

Finally the question on whom *diya* is due is addressed in article 45. In accordance with the *fiqh*, in cases of intentional homicide or intentional bodily harm *diya* is due upon the offender alone. In contrast, in cases of semi-intentional and accidental homicide or wounds *diya* is due upon the offender and his clan (*ʿaqila*).\(^{908}\) The Criminal Act remains, however, silent on whether the ʿaqila remains responsible for the payment of *diya* also when the culprit has confessed to the semi-intentional or accidental killing or bodily harm or when he has agreed to a financial settlement (*ṣulḥ*) with the heirs.

While not specifying the distribution of financial responsibility between the offender and his clan, the next article (45 (3)) gives a fairly detailed definition of what it deems to be the

\(^{903}\) CA91, art.42 (4).
\(^{904}\) CA91, art. 42 (5).
\(^{905}\) CA91, art. 43. (a)-(d).
\(^{906}\) Ḥāmid, masūʿa al-manshūrāt al-jināʿī, al-juz al-thānī, p. 5.
\(^{907}\) CA91, art. 44.
Áqila. Thus, the Áqila includes the paternal relatives of the offender, or his insurer (al-jiba al-
mu’ amman ladaihá, i.e. his insurance company),
persons who are jointly liable with him, and his employer financially if the offence is committed during the course of employment.910

As we have seen in our discussion of the definition of the Áqila in the fiqh above, the Sudanese legislator in 1991 has adopted a definition, which has been derived from the Ḥanafī approach. The Ḥanafīs hold that any group that shows solidarity towards its members can be considered an Áqila.911 In the light of this open definition the Sudanese legislator has developed the concept of the Áqila according to modern requirements912 and thus included insurance companies, and employers under specific circumstances. Thus the Supreme Court declared the General Security Apparatus (jihāz al-amn al-‘āmm) to be the Áqila of an officer who had shot dead a suspect after a car chase.913

Further, the article regulates how diya shall be paid. Thus, the diya for intentional homicide or intentional bodily harm is due immediately (after the sentence). Its payment may be postponed or it may be paid in installments with the consent of the victim(s) or his relatives. Diya for semi-intentional homicide or accidental homicide or bodily harm of the same categories may be due immediately or paid by installments.914

While qisás lapses with the death of the killer, the right of the heirs to receive diya does not lapse with the death of the killer but is inherited, according to a decision of the Supreme Court.915

**Financial compensation in addition to diya**

With regard to the important question of whether the heirs of a victim of homicide can, in addition to diya, claim financial compensation a Supreme Court ruling from 1992 exists.916 In a case of intentional homicide the culprit was originally sentenced to death by hanging

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908 CA91, art. 45 (2).
910 CA91, art. 45 (3).
911 For a detailed overview of definitions of the term ‘Áqila in the fiqh, see Bahnasī, al-diya fī al-shari‘a al-
islāmiyya, pp. 61-66.
912 One commentary calls this approach fiqh mu‘āṣir (contemporary fiqh). See Ḥāmid, mausū’a al-manshūrāt al-
914 CA91, art. 45 (4). This provision was not included in the Criminal Bill 1988.
according to article 251, PC83.\textsuperscript{917} The Supreme Court supported the sentence and requested the original Trial Court to summon the private prosecutors and to suggest to them to either pardon the culprit or to settle for \textit{diya}. While the widow of the victim couldn’t be heard (she was not present in the city of the hearing), both parents said during the hearing that they would forego \textit{qiṣāṣ} in exchange for the payment of \textit{diya} and the defendant’s covering the costs of the trial. The Supreme Court accepted the waiving of \textit{qiṣāṣ} by the parents, but held that a financial compensation (the trial costs) in addition to \textit{diya} was not admissible according to the Criminal Act 1991 which stipulates that “No other compensation shall be imposed alongside \textit{dia} for homicide and wounds”.\textsuperscript{918} The above article, however, does not mean that there is no place at all for the heirs to seek financial compensation for damage incurred in connection with homicide or bodily harm. They are, according to article 46, CA91, rather obliged to make their claims heard while the case is heard by the Trial Court, according to the provisions of the Civil Transactions and Procedures Acts.\textsuperscript{919} Since the parents (and the other heirs) of the victim had not requested financial compensation initially and the Trial Court had not decided to this effect, the Supreme Court applied article 42 (4) which rules out financial compensation \textit{alongside} \textit{diya} for homicide and wounds. The texts of articles 42(4) and 46, at first sight, seem to be rather contradictory. The first article negates the possibility of a compensation, the second one explicitly allows for it. None of the two specifies that claims have to be made during a specific stage of the trial. The sentence discussed here has, however, made it clear that any claim for compensation by heirs of a victim have to be presented at an early stage of the trial, i.e. before the official hearing during which the question of a possible pardon or \textit{diya} is being discussed. Once judgment has been passed on the culprit and the heirs decide to accept \textit{diya} and forego \textit{qiṣāṣ} no further financial claims are admissible. While this judgment harmonizes two, at first sight, contradictory texts, it seems rather unfair that the costs of the trial would have to be shouldered by the heirs of the victim.

\textsuperscript{917} The date of the original sentence was the 21.1.1985. It remains unclear why it took until the early 90s to take a final decision of the case.
\textsuperscript{918} Article 42 (4).
\textsuperscript{919} Art. 46, CA91 stipulates: “The court shall, upon conviction of the accused, order the restitution of any property or benefit obtained by the offender, and it may, on application by the victim of his relatives, order compensation for any injury resulting from the offence, in accordance with the provisions of the Civil Transactions and Proceuces Act.”
4  Ḥadd-crimes

4.1  Unlawful sexual intercourse (zīnā)

4.1.1  Introduction

Zīnā is arguably a subsection of Islamic Criminal Law that has drawn a lot of attention not only with regard to the Sudan but with regard to other countries where ICL has been codified as well. Concerning Sudanese jurisdiction especially the blurred distinction between rape and zīnā and the ensuing difficulty for women to prove their innocence has been discussed and criticized. This chapter will describe and analyze relevant Supreme Court decisions with regard to zīnā. It will determine to what extent and how Supreme Court decisions have developed over time and where this development stands. Next to the rape/zīnā/proof of zīnā complex special focus will also be given to liwāf (buggery), another area that is controversial in the fiqh and whose codification had left some questions unanswered. The arrangement of the material is as follows: after a short account of the definitions and treatment of the main concepts of zīnā and related terms in the fiqh follows a synopsis of the treatment of zīnā in the 1983 and 1991 codes. Wherever available Supreme Court decisions will serve to highlight and explain the application of the law on zīnā and the interpretation of lacunae left by the legislator.

4.1.2  Zīnā and related offences in the fiqh

4.1.2.1  Zīnā

4.1.2.1.1  Definition of zīnā

Zīnā and acts understood as zīnā are mentioned on several occasions in the Qur’an. Thus Q 4:15 commands that “those of your women who are guilty of lewdness, call to witness four of you against them. And if they testify (to the truth of the allegation) then confine them to the houses until death takes them or (until) Allah appoints for them a way” (through new legislation). Q 4:16 “And as for the two of you who are guilty thereof, punish them both. And if they repent and improve then let them be. Lo! Allah is Relenting, Merciful”.

920  For the Sudan see Sidahmed (2001).
921  It must be noted here that the Christian/Western concept of adultery is unknown to Islamic law. Extra-marital intercourse is punished as a crime against religion not as neglect of marital duties. Compare Schacht (1964), p. 179. Zīnā is always transcribed in this form, another possibility is zīnā’.  
922  The word used here is al-fābishā (sin), not zīnā.
The majority of interpreters maintains that both verses were abrogated by Q 24:2, which defines a punishment of 100 lashes for the *zānī* and the *zāniya* if the deed has been witnessed by four witnesses. Some interpreters believe that verses Q 4:15 and 4:16 target homosexuality.\(^{923}\) The Qur’an does not specify the marital status of those culpable of *zinā* and sentenced to lashing, nor does it mention at all the punishment of stoning. Stoning is only mentioned in the *sunna*, where two *hadīths* testify to the Prophet himself condemning those committing *zinā* to stoning.\(^{924}\)

In a more general sense the *fiqh* understands by *zinā* any unlawful sexual intercourse, i.e. committed by two offenders who are not lawfully married to each other. As far as the act of *zinā* is concerned, not the punishment, it does not matter whether the offenders are married, i.e. to someone else, or not. According to a majority opinion in the *fiqh* at least the glans must have penetrated the vagina\(^{925}\), an ejaculation is not a precondition for *zinā*. Neither is the exchange of caresses equivalent to *zinā* nor other sexual acts not constituting the kind of penetration described above.\(^{926}\)

4.1.2.1.2 Legal uncertainties with regard to *zinā*

In cases of legal uncertainties, the *ḥadd*-punishment for *zinā* lapses. Among these is the *shubha fi al-fi’l*, a legal uncertainty with regard to the act, e.g. someone has sexual intercourse with his legally divorced wife during the *ʿidda*, believing that a legal rule justifying his deed exists. A second legal uncertainty is the *shubha fi al-ʿaqd*, i.e. a legal uncertainty concerning the marriage contract. What is meant here are contracts that are void, such as a contract with a fifth wife, with one’s own sister or a fictitious marriage. Unlike the other schools Abū Ḥanīfa is of the opinion that such a contract averts the *ḥadd*-punishment, even if the culprit knows the unlawfulness of the contract in question.\(^{927}\) A third category of legal uncertainties is the *shubha fi al-dalāl*, a legal uncertainty with regard to the legal sources, i.e. the Qur’an and the Sunna. Thus, if someone believes that sexual intercourse with a person is permitted, based on an erroneous interpretation of Qur’an, Sunna or the legal methods of *uşûl al-ḥiqh*, a legal

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\(^{923}\) Abu-Zahra (2001), p. 28. What is probably meant here is *liwāṭ*, i.e. penetrare per penem in ano. Compare below.

\(^{924}\) As to the details of these *hadīths* see Peters, *zinā*, pp.509. The wording of one of them can be found in Peters (2005), p. 60.

\(^{925}\) For anal intercourse see below.

\(^{926}\) The Shi’ites make an exception, according to them petting is punishable by a 100 lashes. See Peters (2005), p. 61.
uncertainty is established and the ḥadd-penalty is averted. A fourth legal uncertainty called shubha al-milk can be invoked with regard to property (milk), e.g. when a husband practices sexual intercourse in an unlawful way believing that this is part of his rights as a husband.

4.1.2.1.3 Punishment of zinā

The four Sunni schools concur in punishing zinā with stoning (rajm) if the ṣānī or the ṣāniyya are muḥṣan. Muḥṣan means, the offender is free, adult, a Muslim and has enjoyed legitimate sexual relations previously in matrimony. This marriage does not need to exist at the time the crime is committed. The Shāfiʿites do not require the muḥṣan to be Muslim, a dhimmī can be muḥṣan as well. Moreover, Ḥanbalites and Ḥanafites require that both offenders are muḥṣan for the punishment to be imposed. Offenders who are not muḥṣan are to be punished by 100 lashes if they are free and with half of that if they are slaves. All schools, with the exception of the Ḥanafites, have this punishment followed by a banishment of one year. A provision of some consequence is the rule that the offence has to be committed out of one’s free will. As a corollary, a woman who has been raped (mustakraha) cannot be punished of zinā. We shall see below how the controversy on how she has to prove her having been raped has led to severe problems in modern Sudanese legislation and jurisdiction.

It is controversial in the fiqh whether, with regard to the applicability of the penalties for zinā, it is necessary to be a Muslim. The Ḥanbalites, the Shāfiʿites and Abū Yūṣuf maintain that being a Muslim is not a precondition, since the Prophet himself ordered the stoning of Jews and this was the first stoning in the history of Islam. In other words, zinā by a dhimmī or a mustaʿmin is punishable by ḥadd according to these opinions. However, the Ḥanafites – with the exception of Abū Yūṣuf – and the Mālikites, are of the opinion that neither a dhimmī nor a mustaʿmin can be punished by the ḥadd-penalty because the Ḳiṣān is a precondition for the ḥadd-penalty for zinā. Dhimmīs and mustaʿmins, however, cannot be muḥṣan according to these two schools. They further reason that the punishment of stoning for zinā constitutes

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927 Baradie (1983), pp. 103-104.
929 For an example see chapter below “Liwāṭ within marriage”.
932 For an explanation of the terms of Ḳiṣān muḥṣan see below.
a purification from sin (taḥīr min al-dhanab). Dhimmīs and other non-Muslims can never obtain purification except by burning in hellfire.\textsuperscript{934}

It is equally controversial whether dhimmīs who commit zīnā with each other are subject to the hadd-penalty.\textsuperscript{935}

4.1.2.2 \textit{Liwāṭ} (buggery)

4.1.2.2.1 \textit{Liwāṭ} between males

Another bone of contention among the fuqahāʾ is the question of whether liwāṭ, meaning here anal intercourse between males\textsuperscript{936}, is to be subsumed under zīnā and is to be punished accordingly or not.

Among the Ḥanafites it is disputed whether liwāṭ falls under zīnā or not. Abū Ḥanīfa does not consider liwāṭ a hadd-crime and therefore imposes a taʾzīr-punishment on both offenders, the active and the passive one. Kāsānī equally advocates taʾzīr for liwāṭ among males. Other Ḥanafites, however, disagree. Abū Yūsuf and Saibānī both are in favor of the hadd-penalty for zīnā for both offenders. Both are to be stoned if they are muḥṣan and flogged if they are not.\textsuperscript{937}

The Shāʿī’ites compare liwāṭ among males to zīnā. As to the punishment opinions differ. According to some the muḥṣan is to be stoned (or killed by the sword), and the non-muḥṣan punished by flogging and banishment. Others hold that the offender is to be killed under the heading of taʾzīr under all circumstances, either by having a wall collapsing on him or by forcing him to jump from great height. Some hold that the hadd is not applicable and that flogging is the due punishment.\textsuperscript{938}

Among the Ḥanbalites opinions differ lightly. Ibn Taimiyya holds that both offenders, the active and the passive one, irrespective of their being muḥṣan or not, are to be executed by stoning. Ibn Qudāma subsumes liwāṭ among males under zīnā and consequently prescribes stoning for the muḥṣan and flogging for the non-muḥṣan.\textsuperscript{939}


\textsuperscript{935} Baradie (1983), p. 104.

\textsuperscript{936} Short for penetrare per penem in ano. Anolingus, penetratio per digitum and penetratio per artefactum are not meant by liwāṭ, neither are homosexuality or pederasty correct translations of liwāṭ. See Schmitt (2001/02), pp. 51-52. Compare also Schmitt (1992), p. 13 et sqq.

\textsuperscript{937} Schmitt (2001/02), pp. 73-74.

\textsuperscript{938} See Peters (2005), p. 61 and Schmitt (2001/02), p. 82.

\textsuperscript{939} Schmitt (2001/02), pp. 84-85.
Mālik and all Mālikites advocate the penalty of stoning for the muḥṣan and for the non-muḥṣan offender, whether passive or active. 940

Arno Schmitt, who has provided us with a thorough and detailed treatise on liwāṭ in the fiqh, points out that liwāṭ must not only be defined as the penetratio per penem in ano of boys, men and eunuchs but also of women. 941

4.1.2.2.2 Liwāṭ outside marriage

Liwāṭ with women one is not married to is controversial among the Ḥanafites. According to Abū Ḥanīfa a taʿzīr-punishment is due, al-Saibānī and Abū Yūsuf hold that the ḥadd-penalty for zinā is applicable. 942 Among the Shāfiʿites the punishment for liwāṭ with a woman one is not married to is disputed. The different opinions are the same ones as those concerning liwāṭ among males. 943 In analogy to liwāṭ among males the Ḥanbalite Ibn Qudāma subsumes liwāṭ with a woman ‘hors mariage’ under zinā. The punishment is accordingly: stoning for the muḥṣan, flogging for the ghair muḥṣan. The Mālikites hold that stoning is the due punishment irrespective of whether the offender is muḥṣan or not. 944

4.1.2.2.3 Liwāṭ within marriage

Liwāṭ is punishable even if one is married to the passive partner and therefore enjoys certain sexual rights. These, however, do not extend to anal penetration. All schools agree to the principle that liwāṭ with one’s wife, however, is not punishable by ḥadd because the wife is the object of sexual intercourse (al-zauja maḥall lil-wāṭ) and the husband possesses the right to intercourse with her. The fuqahāʾ differ, though, as how to qualify the act as such. Abū Ḥanīfa does not qualify liwāṭ with one’s own wife as zinā. It is rather to be considered a minor offence (maʿṣīyya) punishable by taʿzīr. 945 Ahmad ibn Ḥanbal and Abū Yūsuf opine that the act basically constitutes zinā and is to be punished by ḥadd. Yet, the ḥadd is averted by a legal uncertainty arising from the fact that the husband enjoys certain rights as to sexual intercourse with his wife (shubha al-milk). The offender, therefore, is to be punished by

940 Schmitt (2001/02), p. 79.
941 This is similar to buggery. See Oxford Dictionary of Law (2003), p. 58.
942 Schmitt (2001/02), p. 73.
943 See above.
944 Schmitt (2001/02), p. 79.
The Mālikites consider liwāṭ with one’s spouse forbidden and prescribe a taʿzīr-penalty. The Shāfīʿites hold that first-time offenders are not to be punished. Recidivists of liwāṭ within a legally valid marriage, however, are to be punished by flogging.

4.1.2.3 Rape (ighṭiṣāb)

Circumstantial evidence taken into account as proof of zinā is the pregnancy of a woman who is unmarried or who is not known to have a husband. Pregnancy, however, is not a conclusive evidence (qarīna qāṭiʿa) for zinā for the majority of schools, for a pregnancy without valid marriage does not lead to the ḥadd-penalty because the ḥadd becomes necessary only through valid testimony or a confession („...al-ḥadd așlan la yajib ilā bi bayyina aw bi iqrār“).

Mālik, however, has a different view on pregnancy as proof for zinā, which – as we will show below – plays an important role in the Sudanese Penal Codes. He is of the opinion that the pregnancy of an unmarried woman is sufficient proof of zinā, making the ḥadd-punishment compulsory on her. Her claim that she has been raped does not suffice in itself to avert the ḥadd. In order to avert the ḥadd on these grounds she must provide direct evidence (e.g. the confession of the perpetrator or testimony) or circumstantial evidence for the plausibility of her defense. Circumstantial evidence accepted by Mālik for her defense could consist e.g. in witnesses who saw her calling for help after the rape, with blood stains on her clothing caused by her loss of virginity.

4.1.3 Zinā and related offences in Sudanese criminal legislation and case law

4.1.3.1 Zinā

4.1.3.1.1 Introduction

In comparison with the 1983 and 1991 legislation, their secular predecessor codes in 1925 and 1974, provided for relatively mild punishments for adultery. Interestingly, even though chapter XXV of the 1974 Penal Code is an almost verbatim takeover of its 1925 precursor it changes it in one important aspect. In the 1925 code adultery was only punished – relatively mildly with a prison term not exceeding two years or a fine or both – if the respective husband

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had not agreed to his wife having sexual intercourse with another man. Had he given his consent, the adultery remained unpunished. While this clause gave a husband e.g. leverage to save his unfaithful wife from prison, in 1974 this clause disappeared. While the penalties remained the same, adultery, when committed with or by a married woman, with or without the consent of the husband, was punishable. In contrast, neither adultery committed by a married man with an unmarried woman, nor sexual intercourse between consenting, unmarried, adults was punishable. In both codes, thus, the legislator focuses on the rights of the husband. A wife had to bear with an unfaithful husband, as long as he did not infringe upon the rights of another husband or had intercourse with a girl under the age of 18. Neither code, unlike their successors 1983 and 1991 in the case of *zinā*, gives a definition of what “sexual intercourse” actually means.

Anal intercourse - “carnal intercourse against the order of nature” -, however, is subsumed under “Unnatural Offences” and punishable by up to 14 years (1925) and 12 years (1974) in prison, if committed without consent, i.e. if it constituted anal rape. With respect to anal intercourse the 1974 code has introduced more severe legislation: while in 1925 anal intercourse between consenting adults was not a crime at all, the 1974 PC stipulates a prison term of up to two years for both consenting partners, heterosexual and homosexual alike.

Both codes, however, do not accept the consent of the minor as a defense. In 1925, a minor below the age of 16 cannot give his consent to anal penetration, in the 1974 Penal Code the age as of when consent is accepted is increased to 18 years. However, as mentioned, anal intercourse among consenting males is now a crime regardless of their ages. In an explanatory note “penetration” is said to be sufficient to constitute “carnal intercourse”.

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951 The PC74 made sexual intercourse with girls under 18 punishable. Sexual intercourse with girls under 16 was considered to be rape which was punishable with imprisonment for up to 14 years and possibly a fine (art. 316, PC74). If the girl was between 18 and 16 her consent was also meaningless, the punishment for the adult man was, however, lighter. He may have been punished with imprisonment for up to two years or with fine or both (art. 316 A).
953 It should be noted here that British law at the time was not quite so liberal. Homosexual practices between two consenting males over twenty-one in private were only legalized by the Sexual Offences Act, 1967. See James (1979), p. 199. In the meantime buggery has become legal if committed by consenting males in private who are at least 16 of age. See Martin (2003), ‘homosexual conduct’, pp. 233 and ‘buggery (sodomy), p. 58.
954 However, even if consent is given, punishment is due nevertheless. See above.
It is unclear whether anilingus, penetratio per digitum and penetratio per artefactum are included in this definition or whether only penetrare per penem in ano is meant.\footnote{Compare footnote 5, Schmitt (2001-2002), p. 52.}

4.1.3.1.2 Definition of \( \text{zînā} \) in the Penal Code 1983

In the 1983 code \( \text{zînā} \) was defined as inserting one’s penis or glans, or the equivalent of its length of a penis from which the glans has been cut of \((aw \ mā \ yu` \ ̀ādiluhā \ mīn \ maqtū` \ ̀īhā)\) into the vagina of a person\footnote{The term used here is mutiq meaning a woman or a girl capable of sexual intercourse. According to many scholars does the status of mutiq not necessarily coincide with majority (\textit{bulū gh}, i.e. beginning of menstruation). Girls can reach the status of mutiq before coming of age.} or into his anus without legal bond or by allowing another person to do so to himself.\footnote{PC83, article 316 (1).} This definition seems to subsume \( liwāt \) - committed either with a man or with a woman - under \( \text{zînā} \), following a majority of schools and ignoring the minority opinion of the  Hànafites, who punish \( liwāt \), whether perpetrated with a woman or a man, by \textit{ta`zīr} (lashing).\footnote{Compare Peters (2005), p. 61.} The 1974 predecessor code, art. 318 had punished “carnal intercourse against the order of nature” in comparison rather lightly with a maximum prison term of two years and possibly a fine. If the act was done without consent the punishment was a maximum prison term of 12 years. Since rape was punishable by a maximum prison term of 14 years, anal rape was punished more lightly with two years less than vaginal rape. This differentiation has been abolished in the Penal Code 1983.

The legislator also deals with the unlikely case of someone committing \( \text{zînā} \) with a mutilated penis.\footnote{This case can be found in the classical \textit{fiqh} books. Communication by R. Peters.} Therefore, if the classical definition does not apply because the glans is missing, \( \text{zînā} \) can still be committed by inserting an equivalent part of the penis in its mutilated or cut form.\footnote{Since the legislator wants to define \( liwāt \) with woman and men in one article, the neutral formula used is “...into the vagina of a...person...” instead of “woman”.}

As shown above one of the necessary preconditions for \( \text{zînā} \) is that the act is committed out of one’s own free will. If a woman is raped (\textit{mustakraha}), she cannot be punished for \( \text{zînā} \). As will be shown below, the intricacies of rape and its proof resulted in an important set of decisions by the Sudanese Supreme Court. The Penal Code 1983 stipulated without further explanations or examples that if someone had sexual intercourse as stipulated under article 316 (\( \text{zînā} \)) with a minor (\textit{shakhṣ ghair bālīgh}) that this act constituted rape and the offender...
was to be punished with the punishment for zinā.\textsuperscript{961} This definition of rape (ightiṣāb) was curious for two reasons.

Firstly, it does not mention the notion of coercion, which is generally an intrinsic part of the definition of rape.\textsuperscript{962} Therefore, sexual intercourse between an adult man and an underage girl consenting to such intercourse automatically constituted rape. This provision on rape is another example how the introduction of Islamic precepts into the Penal Code led to incongruities. Not only was the stringent definition of rape as stipulated in the 1974 Penal Code jettisoned without necessity. The 1983 code also incoherently combined the 1974 provision on “sexual intercourse, with girls between 16 and 18” (art. 316 A) with the crime of rape, thus leading to an imbroglio. While the 1983 legislator - in accordance with the \textit{fiqh}\textsuperscript{963} - did not take into account the notion of the free will of a minor\textsuperscript{964} it remained unclear why sexual intercourse with a consenting minor would be defined as rape.

Secondly, the 1983 definition of rape effectively leaves an important lacuna since the crime of raping an adult woman is not defined. In other words, only minors, female or male, consenting or not, could be raped, vaginally or anally. Due to the fact that vaginal and anal rape of an adult person was not punishable by the Penal Code 1983 it logically had to be treated under zinā. As will be shown below, it was left to the Sudanese Supreme Court to sort out the legal consequences for both offenders.

As in other instances the Penal Code 1983 not only widened the applicability of ḥadd-offences with regard to the \textit{fiqh}, it also subsumes related crimes under the respective ḥadd-offence and introduces ḥadd-punishments for offences which, under the \textit{fiqh}, would not fulfil the qualifications of a ḥadd-crime. Thus, article 318 (a) stipulates that “Whoever runs a locality where zinā is being committed (maḥallan li al-zinā) or (destined) for the practicing of forbidden sexual acts, be that place immobile or movable, or whoever helps or instigates or abets to committing these acts, will be punished by flogging and fine and imprisonment. And in the case of a second conviction the offender will be punished by capital punishment and crucifixion or cross-amputation”. It should be noted that the notion of “forbidden sexual acts”

\textsuperscript{961} See article 318 (1).
\textsuperscript{962} It should be noted that in the US this is called statutory rape: since the consent of a minor is legally irrelevant, coercion is assumed by law.
\textsuperscript{963} See Peters (2005), chapter on mens rea, pp. 20-21.
\textsuperscript{964} Which even in 1974 had no impact on the punishability of sexual intercourse with a minor as such. If the minor consented to the sexual intercourse, however, the maximum sentence of two years imprisonment was rather light in comparison to a maximum sentence of 14 years imprisonment for rape (article 317).
includes the rather vaguely defined “shameless/sinful acts” \( (fi‘l fāhish) \) with a human being or an animal as stipulated in article 319, PC83. Further, it goes without saying that running a brothel is different from committing \( zinā \). Thus, all schools agree that the repeated offender can be punished with the capital punishment by way of \( ta‘zhir \).\(^{965}\) Crucifixion and cross-amputation, however, are \( hadd \)-punishments and are reserved for the respective \( hadd \)-crimes only.

4.1.3.1.3.3 \( zinā \) in the draft Criminal Bill 1988 and in the Criminal Act 1991

The definition of the draft Criminal Bill 1988, reconfirmed in 1991, endorses most basic elements of the 1983 definition. Thus, \( zinā \) is defined as sexual intercourse\(^{966}\) between a man and a woman without there being a lawful bond between them. As in 1983 the glans or its equivalent has to penetrate into the vulva. One of the most important innovations in 1988/91 is the separation of \( liwāṭ \) from \( zinā \). \( Liwāṭ \)\(^{967}\) is no longer subsumed under \( zinā \) but is now separately defined as a man penetrating the anus of a woman or another man (at least) with his glans or its equivalent. As in the case of \( zinā \) proper, the passive partner permitting penetration is also guilty of the crime if the crime is committed out of one’s own free will. It should be noted here that this article makes \( liwāṭ \) among consenting spouses a crime, while in 1983 \( liwāṭ \) within a legally valid marriage was not punishable. In the \( fiqh \) we can find opinions which can serve as a justification of both solutions (see above).

With regard to rape, the 1988/1991 codes improve by abolishing the earlier definition of rape as sexual intercourse with a minor and by introducing a new definition, which, however, poses other problems. Rape is now committing sexual intercourse with a person either “by way of \( zinā \) or by way of \( liwāṭ \)” without the consent of that person.\(^{968}\) In a further qualification the article states that “consent shall not be recognized where the offender has custody (\( qiwāma \)) or authority (\( sulṭa \)) over the victim”\(^{969}\). This definition solves several problems: Firstly, the vaginal and anal rape of female and anal rape of male adults thus becomes punishable. Under the Penal Code 1983 it had to be treated as \( zinā \). Secondly, this


\(^{966}\) Sexual intercourse here means vaginal intercourse; see below.

\(^{967}\) The official translation translates \( liwāṭ \) with “homosexuality” which leads to the curious notion that a man penetrating a woman’s anus with his penis is committing the offence of homosexuality. \( Liwāṭ \) as explained earlier, merely means the act of penetratio per penem in ano, not a sexual attitude.

\(^{968}\) Article 149, CA91.

\(^{969}\) Article 149 (2), CA91.
definition includes minors. Thirdly, the notion of coercion, conspicuously absent in 1983, has now been introduced into the definition. Here the qualification comes into play, stipulating that a person in the custody of or under the authority of the perpetrator of the rape is legally incapable of consenting to sexual intercourse. Put differently, sexual intercourse between an adult man and his ward will automatically be classified as rape, since the ward’s consent to the intercourse is not recognized. While minors who are raped fall under the term „person“ as defined by paragraph of article 149, the case of the consenting minor, male or female, not under the custody of the adult he or she is having sexual intercourse with, was left undefined by the 1991 legislator. No Supreme Court decisions are available that clarify whether sexual intercourse between an adult and a consenting minor, with the latter not being the ward of the former, would have to be treated as rape, in analogy with sexual intercourse between custodian and ward.

Fourthly, vaginal and anal rape of a wife by her husband becomes punishable – at least theoretically, since it can hardly be proven (except by confession) - for the first time ever in the history of codified penal codes in the Sudan. The 1925/74 codes had exempted rape within marriage from the definition of rape and left the perpetrator unpunished. In 1983 rape among adults was not properly defined at all.

With regard to the punishment of rape it should be noted that the Sudanese legislator in 1988/91 distinguishes between two different cases. The first case, punished by a hundred lashes and a prison term up to ten years, is rape not amounting to zinā or liwāt. The second case, rape constituting the offence of zinā or liwāt under coercion, is punishable with the capital punishment (i’dām). If we follow the wording of the text as given in article 149 (1) and (2), a hundred lashes and a maximum term of ten years are thus due to whoever has sexual intercourse, vaginal or anal, the latter with a female or male, with a “person”, or put differently, with an adult or a minor who do not consent to such intercourse. The second group of offenders liable to such punishment are those who have sexual intercourse with their consenting wards. As pointed out above it remains unclear whether the consent to sexual intercourse of minors not being the ward of their adult sexual partner falls under the same punishment. As to the second possible punishment, capital punishment if the rape constitutes zinā or liwāt, no Supreme Court cases clarifying its meaning are available. It remains

970 See the discussion of the case “Maṣ’ab Muṣṭafa Ahmad” below.
therefore rather unclear which cases are described by this rather imprecise description. The following interpretations of article 149 (3), when rape constitutes either zinā or liwāț – and is thus punishable by execution - are suggested here. Since zinā according to the CA91 describes sexual intercourse between a man and a woman not connected by a legal bond, rape constituting zinā, in the sense of article 149, would have to be interpreted as rape of a woman who is not married to her rapist and which is proven by the similar means as zinā, i.e. either a confession or four male witnesses of good reputation. While zinā cannot be committed by a man and a woman who are married to each other, rape, according to art. 149 (1), can and would not be punishable by capital punishment but by hundred lashes and a prison term of up to ten years, because rape within a marriage by definition can not constitute zinā.

As to the second case mentioned here, rape constituting liwāț, it can be construed as forced anal penetration of either a man or a woman. While zinā and liwāț, according to articles 145 and 148 can only be committed by adult men and women, rape can also be committed against minors. It remains thus unclear whether “rape constituting zinā and liwāț includes minors or not. It should also be noted here that zinā and liwāț as such may also be committed by the consenting partner.971 In the case of rape, however, there is no “partner in crime”, only victims. The Criminal Act 1991 leaves it open whether liwāț is to be considered a ḥadd-crime or not and it is therefore not clear whether the stricter rules of evidence for ḥadd-crimes apply in a case of rape constituting liwāț.

The Penal Code 1983 had also drawn the offence of incest into the orbit of zinā. While its predecessor 1974 had made incest punishable with a relatively harsh maximum prison term of seven years, compared to a maximum of two years for adultery. The definition of incest as in article 432, PC74/PC83 includes sexual intercourse with male/female ascendants and descendants, sisters/brothers, their daughters and sons and aunts and uncles.972 In 1983 the non-Muslim was to be punished by lashing and fine or prison. The Muslim, in contrast, was subject to the ḥadd-penalty for zinā. This led to the paradoxical situation that non-Muslims were subject to the prescribed punishments for unlawful sexual intercourse but faced a taʿzīr-punishment only in cases of forbidden sexual intercourse with relatives while Muslims for the same offence were liable to the ḥadd-punishment for zinā. In 1991 the legislator has rectified

971 Compare articles 145 (1) (b) and 148 (1), CA91.
this situation inasmuch as no distinction between Muslim and non-Muslim offenders is made any longer. Secondly, the definition of incest now has been fine-tuned to include unlawful sexual intercourse (zina) with and anal penetration (liwāt) and rape of blood relatives and relatives related by marriage. The latter two offences have been codified here for the first time. Both, Muslims and non-Muslims alike are now liable to the respective punishments designated for zina, liwāt and rape (ighitsāb) and an additional maximum prison term of five years in cases where the death penalty is not imposed.

The Criminal Act 1991 has also done away with the indiscriminate usage of ḥadd-penalties in the realm of sexual crimes. Thus, instead of facing the death penalty and crucifixion or cross-amputation for a second conviction for running a place for prostitution, the CA91 has now differentiated between the second and third offender. While the former faces a maximum whipping of a 100 lashes and a maximum prison term of 10 years, the latter can be punished with either the capital punishment or life imprisonment, in combination with forfeiture of premises. Concurrently, the CA91 has introduced a distinction between “practicing prostitution” and “running a place for prostitution”, not existent in the 1983 code with the former being punished with a maximum number of lashes of 100, i.e. equivalent to the ḥadd-punishment for zina for the offender who is muhsan.

4.1.3.2 Liwāt: The Supreme Court and anal intercourse between males

How the ambiguous wording of article 316, PC83, on zina/liwāt created insecurity among judges demonstrates the following case, which dealt with a case of anal intercourse. In January 1989 a 20-year old male student was sentenced to a prison term of three years under article 319 („Indecent acts“) of the Penal Code 1983 by the First Degree Criminal Court in Khartoum Bahri East. The sentence was pronounced for a “crime contrary to nature,” meaning anal intercourse between males. The lawyer of the defendant appealed to the

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972 The definition of the PC74 includes “relatives of the half blood and relatives whose relation is not traced through a lawful marriage”. Art. 432, PC74. Art. 432, PC83 adds “milk relatives” to the definition of relatives. This part of the definition, however, is restricted to Muslims. Compare PC83, article 432.

973 On the geographical applicability of the CA91, see chapter 3.3. Geographical limits.

974 CA91, article 150 (2).

975 CA91, article 155 (2) and (3).

976 For reasons of expediency I use the abridged notion of “anal intercourse”, which needs to be read “penetrare per penem in ano”. For a lucid and detailed discussion of the semantic field of liwāt and the pitfalls in translating it, see Arno Schmitt (2001/2002), pp. 52-53.

Province Court, which in turn changed the indictment to be under articles 318, punishment of zinā, and 458 (3), ta‘zīr-punishment in cases where the ḥadd-penalty is averted even in the absence of a specific legal text. Despite the more serious charges it reduced the punishment to a prison term of two years, thus pronouncing a ta‘zīr-punishment in a case where the ḥadd-punishment lapses (art. 458 (3)). A second appeal by the lawyer of the defendant led to a judgment by the Court of Appeal, which upheld the modified judgment of the province court. Subsequently the Supreme Court reversed the modified conviction under the zinā-paragraph 318, arguing that the Penal Code 1983 defines zinā exclusively as unlawful sexual intercourse between a man and a woman and does not comprise any kind of sexual acts between members of the same sex. This despite the ambiguous definition of zinā in article 316 which does not explicitly mention women as the passive partner, but talks instead of a „person“ (shakhṣ) being vaginally or anally penetrated. As a clear indicator that anal intercourse between members of the same sex is not covered in article 316 the Supreme Court quotes the expression „without legal bond“ (bidūn ribâ shar‘ī), which according to Sudanese family law and Islamic law cannot exist between partners of the same sex. The Supreme Court further points out that the fuqahā’ have differed on whether anal intercourse falls under the meaning of zinā or not. Mālik, Shāfi‘ī and Ahmad ibn Ḥanbal as well as the Twelver Shi‘ites and the Zaidites put anal intercourse and zinā on the same footing, in the sense that anal intercourse between members of the same sex is not covered in article 316 the Supreme Court holds that anal intercourse does not fall under zinā, regardless of whether the penetrated person is female or male, since anal penetration has its own denomination „liwāţ“, which is evidence for the difference of meaning. And „no ḥadd shall be imposed on those who commit the acts of the people of Lūṭ“ (wa lā ḥadd ‘alā man ‘amil ‘amal qaum Lūṭ). The difference in opinion between the fuqahā’ and the fact that liwāţ does not destroy the lineage – one of the negative effects of zinā justifying a severe punishment - are the main arguments that bring the Supreme Court to the conclusion that liwāţ is not covered by article 316 (definition of zinā) but rather falls under article 319, PC83 (indecent acts/ fi‘l fāhish). Accordingly, since the offence in question is not considered a ḥadd-crime, but a ta‘zīr-crime, the high requirements for the proof of the ḥadd-crime zinā do not apply in this case. However, the medical report and the

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978 Punishment of zinā.
979 The punishment for indecent acts is flogging, a fine or prison, art. 319, PC83.
confession of the defendant convinced the Supreme Court that the defendant perpetrated the crime in question.

In conclusion of its decision and after having quashed the modified decisions of the Province Court and the Court of Appeals, one of the three judges of the Supreme Court who dealt with this case came to the conclusion that the prison terms - of three and two years respectively - of the lower instances were not proportional to the dangerous deed the defendant committed and were to be considered rather light punishments. He argued that anal intercourse between males is condemned in the Qur’an and that the companions of the prophet agreed to punish it by execution, e.g. by stoning. In order to further underline the need for a severe punishment the SC judge refers to the abolished 1974 Penal Code which stipulated a prison term of up to 12 years for practicing anal intercourse with a young boy. His two colleagues, among them the president of the panel, agreed with their colleague as to dealing with the case under article 319 Penal Code 1983. Both, however, deemed the prison term of three years as promulgated by the trial court as sufficient given the clean police record of the defendant and his being 20 years of age only.

The second case under discussion deals with the overlapping crimes of *zinā*, *liwāt* and rape of a minor. The facts of the case can be summarized as follows: an eight year old boy was sent by his mother to a shop in order to fetch some necessities. The boy returned to her crying and when she asked him what had happened it turned out that he had been sexually assaulted and raped. When she examined him she found traces of the forced intercourse on his anus. She filed a complaint and the child was brought to a doctor. The medical report confirmed forced anal intercourse. The owner of the shop, Maṣʿab Muṣṭafā Aḥmad, was brought to trial and convicted under article 149 (rape) of the Criminal Act 1991 to a hundred lashes and a prison term of three years. Subsequently the Court of Appeals supported the decision under article 149, CA91, but lowered the penalty to eighty lashes and two years of imprisonment. It should be noted that the text of article 149 defines a hundred lashes as a compulsory, not a maximum, punishment while the prison term is limited to ten years.

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980 The SC is refering to art. 318, PC74 which stipulates that a person below 18 cannot consent to “carnal intercourse against the order of nature”. Such intercourse is therefore treated on a par with anal rape which was punishable with imprisonment which may extend to twelve years.

981 Panels of the Supreme Court each consist of three judges presided over by the most senior member thereof. Their decisions are reached by the majority of opinions. Thus the vote of the panel’s president has not more weight than the vote of his colleagues.

The father of the defendant contested the decision of the Court of Appeals, demanding the annulment of the conviction and the release of the defendant. In particular the father of the defendant was claiming that: 1. There was no evidence for the charge and that the court(s) had relied on the testimony of the victim’s mother who had not been an eyewitness, 2. The court had not listened to the testimony given by the doctor, 3. The court had not accepted the results of the examination of the clothing of the accused even though the result of this examination had been in his favor.

The Supreme Court accepted the father’s request to review the original verdict and decided that the trial court’s judgment had been correct and confirmed the original punishment of a hundred lashes with a prison term of three years. In their deliberations the SC judges allude to several obscure wordings of the CA91 with regard to the definitions of zinā, liwāṭ in connection with rape. These definitions of zinā and liwāṭ are important in the context of rape, because article 149, CA91 explicitly refers to them. In order to understand what constitutes rape, thus one must read its definitions in the context of the definitions of zinā and liwāṭ. Article 149 (rape) gives us a rather ambiguous definition of who is a possible victim of rape. On the one hand the more neutral term „person“ (shakhṣ) is employed. On the other hand the text stipulates that rape is committed when someone “…has sexual intercourse with a person by way of zinā (zināʾan) or by way of liwāṭ (liwāṭan) without consent of that person“.

The words used here are “woman“ (imraʿa) and “man“ (rajul) and thus leave no room for any other interpretation. In consequence consenting minors are not covered by the wording of articles 145/146 (zinā) and 148 (liwāṭ). As to the interpretation of the term „person“ (shakhṣ), however, the judges came to the conclusion that it includes as well minors and that the definition given in article 149 indeed comprises “all forms of vaginal or anal sexual intercourse with a person under compulsion“. In its final conclusion the Supreme Court

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983 This on the basis of article 188, Criminal Procedure Act 1991. The article allows the Supreme Court and the Court of Appeals to review criminal cases upon request. The text is rather general and also allows family members to make such a request, as is the case here.

984 What is probably meant here is that the results of the examination of the clothing of the accused did not corroborate the charges.

985 Art.3, CA91 defines “man and woman” as follows: “Man” means the adult male, and “Woman” means the adult female.
therefore found that the case at hand was fully consistent with the definition of the crime of rape as given in article 149 and therefore annulled the decision of the Court of Appeals.

4.1.3.3  Proof of zinā by confession in the Supreme Court

The question of who exactly has to confess to zinā came up in a case in 1984. In the case at hand the defendant had admitted to theft from a house and to zinā with a woman who had been in the house. The two crimes were dealt with separately and he was indicted for zinā before the Province Court of Al-Fāshir, under article 318 (1), PC83. He was convicted to death by hanging after having confessed three times to the crime. The woman, however, supposedly his “partner in crime”, denied that she had ever met or seen the defendant nor committed zinā. In consequence of her denial the court considered her innocent and she was acquitted. In his appeal, the defendant retracted his confession and claimed that it had been obtained under threat and after he had been beaten. The Supreme Court finally commuted the ḥadd-penalty to a taʿzīr-penalty of eighty lashes and one year in prison. The ḥadd-penalty lapsed on the grounds that the confession had been retracted – based on article 77, Law of Evidence – and further on the grounds that the woman – allegedly involved in the crime – had accused the defendant of lying.

This judgment is noteworthy for several reasons. Firstly, because the woman’s allegation that the defendant had lied and the ensuing inconsistency have been construed by the Supreme Court as a legal uncertainty averting the ḥadd for the defendant. The court followed here the opinion of Abū Ḥanīfa who holds that, in such cases, the ḥadd is averted and taʿzīr is compulsory. Secondly, the case aptly demonstrates certain inconsistencies concerning the legal grounds for punishment of those involved in a ḥadd-crime. While the defendant was sentenced under article 319 – indecent acts (afʿāl fāḥīsha) – his female partner in crime went unpunished. In other words, the court held that a sexual act of some sort had indeed taken place, despite the fact that the only proof available, the defendant’s confession had been retracted. It deemed this sexual act punishable as an obscene act, since zinā could not be proven. Neither did it explain the nature of this act nor how this obscene act could have been committed by one person alone – there is no allegation of rape or coercion - nor did the court specify what the proof of this act was, after the confession had been retracted. It appears that

987 According to the EvA83 one confession was enough to prove zinā. See EvA83 article 77 (1).
the Court simply followed Abū Ḥanīfa who, in such cases, made a taʿzīr-punishment compulsory when the hadd-punishment has been averted.

4.1.3.4 Pregnancy as proof of zinā in Supreme Court Judgments

The following three cases will demonstrate how the Supreme Court dealt with zinā cases where pregnancy was one of the key elements for the conviction for zinā by a lower court.

Case 1

In the first case a certain Ahmad Muḥammad Ḥabdallah from Dār Fūr accused his wife Marīm Muḥammad Ḥabdallah of illegitimate sexual intercourse with another man during his 12-months absence in Khaṛṭūm.988 As a consequence, upon his return to his village, he had found her pregnant. Upon questioning she had named a certain Ibrāhīm Jār al-Nabīy to have been her sexual partner. Criminal charges against al-Nabīy were brought forward under article 429 (2)989 and 430 (2)990. A medical examination of the first defendant established that she was in the seventh month of her pregnancy. The criminal court decided to release the second defendant al-Nabbī for lack of evidence and to convict Marīm Muḥammad Ḥabdallah under article 318 (1)991, PC83 to death by stoning, due to her confession to zinā, and under article 434 – qadhf– to eighty lashes. After having reviewed the case the Supreme Court upheld the sentence for zinā of a muḥsana, i.e. execution by stoning. The conviction for qadhf was quashed since the slandered party (al-maqdhūf) did not file a complaint. In its deliberations the Supreme Court judges explained that the conviction was based on the one hand on the confession and the defendant had upheld her confession during all stages of the trial procedure. Secondly, the conviction was based on the pregnancy. While an unretracted confession is indeed valid proof for zinā, it should be noted here that the defendant did claim that she had been forced to commit zinā against her will. The court could easily have construed this claim as an implicit retraction of her confession on the one hand and constituting a legal uncertainty on the other hand. This claim of rape, however, was dismissed by the Court who held, in harmony with an opinion of Mālik, that it was upon the accused to

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988 Government of the Sudan vs. Marīm Muḥammad Ḥabdallah, SLJR (1985), no. 21/1405.
989 Zinā of a Muslim with a married woman.
990 It is unclear why the court indicted the defendant under this article. While article 429 is geared towards male offenders who commit zinā with married women, article 430 is geared towards married women who commit zinā.
provide evidence as to her defense. Sidahmed, in addition, points out, that the denial of the charges by her alleged partner should also have shed doubt “on the integrity of her confession and should have been treated as a shubha remitting the ḥadd”.\textsuperscript{992} Pregnancy, according to article 77 (3), is only taken into account if the woman is not married (\textit{bi al-ḥaml idhā lam yakun lil-mar’a zau`). In this particular case, however, the Supreme Court reasoned differently, and in contradiction to an unequivocal legal text. Since it had been proven that the husband of the defendant had been absent for more than a year and the accused had admitted that she had menstruated after the departure of her husband more than once, it had been proven that the defendant had not been pregnant at the time of the departure of her husband. The Court therefore compared the situation of the married woman whose husband is absent for a long time with the non-married woman who becomes pregnant illegally.

\textit{Case 2}

In a second case\textsuperscript{993}, and in contrast to the previous case, the Supreme Court came to the conclusion that pregnancy is not unequivocal proof for \textit{zinā}. The facts of the case can be summarized as follows: in 1984 a certain Máriam Muḥammad Sulaimān was denounced by a hospital for having given birth to an illegitimate child. A criminal court convicted her under article 318 (1), PC83, in conjunction with article 77 (2), Evidence Act 1983, in view of the fact that she had been divorced for three years before the charges against her were brought forward and also in view of the fact that the crime of \textit{zinā} is proven by pregnancy if the woman has no husband. The court considered that the defendant was in the status of \textit{muḥšana}, despite her being divorced.\textsuperscript{994} The defendant admitted in all stages of the investigation and the trial that she was divorced and that she had become pregnant through illegitimate sexual intercourse with a certain ʿAbd al-Raḥīm Muṣṭafā. The latter, after denying the charges, had been released in an early stage of the investigation for lack of evidence. On the grounds of her pregnancy and her confession she was sentenced to execution by hanging until death.\textsuperscript{995} In

\textsuperscript{992}Execution of the \textit{muḥšan} for \textit{zinā} and 100 lashes for the person not \textit{muḥšan}.
\textsuperscript{993}Sidahmed (2001), p. 195.
\textsuperscript{994}This view is in clear contradiction to the earlier judgment Government of the Sudan vs. ʿĀmina Bābikr Ahmad, SLJR (1985), no. 118/1405, which had established that the status of \textit{muḥšan} was linked to an existing marriage. See discussion in more detail below.
\textsuperscript{995}Stoning had been introduced as a possible punishment into the PC83 (article 24b). Article 318(1) however, specifies execution as the punishment for \textit{zinā} for the \textit{muḥšan}. This contradiction with the \textit{fiqḥ} has been rectified in the CA91 (article 146 (1) (a)).
May 1985 the lawyer of the defendant requested to review the sentence based on the withdrawal of her confession. She also stated that she had not been married previously and that her admitting to a previous marriage had been the result of a psychological condition she was suffering from. She had also stated that she had been forced to commit zinâ. Unlike the trial court the Supreme Court in its final decision came to the conclusion that pregnancy is not to be considered unequivocal evidence for zinâ. Evidence that proves that the pregnancy has not been caused by zinâ (e.g. by rape) is admissible. It further reasoned that when the probability appears that pregnancy was the result of sexual intercourse by force (rape) or by mistake or if the pregnancy happened without penetration to maintain virginity, the hadd-punishment is averted. Thus, the defendant had retracted her initial confession to being divorced and no other proof for this previous marriage had been presented but the earlier confession of the defendant. Further, on the strength of her claim of rape and her retraction of her confession to zinâ the Supreme Court did not endorse the conviction under article 318 (1) – punishment for zinâ – but ordered the release of the defendant. The almost five years the defendant had spent in prison were considered a sufficient ta’zîr-penalty.

Case 3

In a third case, a decision already based on the Criminal Act 1991, the Supreme Court again came to the conclusion that the claim of rape is to be considered a legal uncertainty precluding the hadd-punishment for the victim who reported the rape.996 This, even if the defendant had admitted to zinâ during the investigation and the trial stages and claims that the sexual intercourse has happened by force only during appeal.

A second issue at stake in this trial was the question of when exactly a woman was to be considered muhšana and which effect the discontinuation of a previous marriage had on the status of ihšân.

The facts of the case unfolded as follows: the accused Kalthûm Khalîfa ‘Ajabna had sexual intercourse with another man, allegedly a police officer with the name Al-Tâj, who had not been indicted, nor even arrested. She had not been married to this man at the time zinâ had been committed, became pregnant from him and buried the new born baby inside her house997 in order to keep her pregnancy a secret and avoid a scandal. The defendant had been legally

997 The precise circumstances of the pregnancy and the birth remain unclear.
married before but was divorced after having given birth to a son. During all phases of the investigation and the trial she confessed to *zinā* and admitted to being divorced from her former husband. She was convicted to stoning for *zinā* by the criminal court.

However, during the appeal stage her lawyer claimed that she had not been a *muḥṣana* when she committed *zinā*. Likewise, the defendant denied in a first memorandum sent to the Supreme Court that she had been married before. In a second memorandum she claimed to have been raped by a policeman after having been drugged by him by means of a bottle of Pepsi Cola containing a soporific. In its deliberations on whether the defendant was to be considered a *muḥṣana* the Supreme Court referred to article 146 (3) of the CA91 which, unlike its predecessor code, unequivocally states that the term *ihšān* means the existence of a legally valid marriage at the time of the commitment of the crime, on the condition that penetration between the spouses has been performed (i.e. in this marriage). While the text of this article seems to be clear the Supreme Court, nevertheless, asks the question whether a divorced *zāniya* or *zānī* are to be considered *muḥṣan*. For lack of textual evidence in the *fiqh* the answer of the SC judges is negative. It thus came to the preliminary conclusion that the crime in question was not *zinā* between a man and a *muḥṣana*, punishable by stoning but rather *zinā* between a man and a non-*muḥṣana*, punishable with the *hadd*-penalty of a 100 lashes. However, the Supreme Court considered her claim of rape to constitute an implicit retraction of her earlier confession resulting in the lapsing of the *hadd*-punishment.

In its final conclusion the Supreme Court thus overturned the conviction for *zinā* of the criminal court on the grounds that the defendant had implicitly retracted her confession during the appeal stage by claiming that she had been drugged and raped. As a consequence the Supreme Court averted the *hadd*-punishment and sentenced the defendant to a two-year *taʿzīr*-punishment, which equaled the period of her custody. It goes without saying that the acceptance of a claim of rape as a legal uncertainty averting the *hadd* contradicts the judgment against Marīm Muḥammad Ḥabdallāh discussed above.\(^998\) It is also noteworthy here that the Supreme Court considered the appropriate criminal law to be applied to be the Criminal Act 1991 even though the offence had been committed in 1990 when the CA91 had not yet been enacted. It thus applies the CA91 retroactively. The Supreme Court thus implicitly refers to

\(^{998}\) This contradiction was stated openly in the verdict itself in the form of a “remark of the editor”, preceding the text of the sentence. Compare Government of the Sudan vs. Kulthūm Khalīfa `Ajabnā, SLJR (1992), no. 48/1992, pp. 129-130.
chapter two of the Criminal Act 1991 dealing with the retroactive effect of the CA91. Article 4 (1) clearly states that “notwithstanding the provisions of sub-section (2), the law in force at the time of the commission of the offence shall be applied”. However, sub-section (2) of the same article, obviously applied to this case, states that “In case of offences in which no final judgment has been passed the provision of this act shall be applied where they are beneficial to the accused.” The same article also would have provided the Supreme Court with a different justification for the remittance of the *hadd*-punishment, since “The non-execution of a *hadd*-punishment before the coming into force of this act shall be a legal uncertainty (*shubha*) which remits the *hadd*-penalty...” (article 4(3)). It must also be noted that while the SC could apply the new Criminal Act 1991 to the case, the new accompanying Law of Evidence was only enacted in 1993, thus after the case in question. It therefore had to refer to the Law of Evidence 1983. As to pregnancy as a means for the proof of *zinā*, both laws do not differ much. The 1993 Law of Evidence, unlike its predecessor, explicitly mentions that the pregnancy must happen outside an existing marriage and that this state must be free of legal uncertainties.

4.1.3.5 When rape is considered to be a form of *zinā*

How difficult it is to prove rape and how this plays into the hands of the rapists, at least under the PC83, illustrate the following two cases. Both cases also show once more how the hurried, and in many instances flawed, Islamization of the penal law in 1983 caused multifold insecurities by not clearly distinguishing between crimes, here between *zinā*, rape and mere indecent acts and the evidence necessary to prove these offences.

Case 1

How difficult it is for a woman to prove that she has been a victim of rape and what the consequences of this difficulty are shows the following case. In this case, al-Ḥājja al-Ḥusain Sulaimān, the accused, together with her stepmother, had gone to a garden in order to collect dates.

When being in a different part of the garden, and separated from her stepmother, two men appeared, tied her hands, threw her to the ground, and raped her. Even though she screamed nobody came to her help. Subsequently she returned to her family without

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999 Government of the Sudan vs. al-Ḥajja al-Ḥusain Sulaimān, SLJR (1988), No.84/1406.
informing them of the rape for fear of a scandal. When being pregnant for four months she
turned herself in to the police in order to find protection from her family. Instead of being
secure, as she had hoped, the police turned her over to the Criminal Court which indicted her
for zinā and sentenced her to stoning under the assumption that the divorcee al-Ḥāija al-
Ḥusain Sulaimān was to be considered a muḥṣana. The Criminal Court rejected her claim of
rape for lack of evidence and therefore lack of credibility.
In its revision the leading opinion of the Supreme Court, however, accepted her claim of rape
and considered it a legal uncertainty averting the ḥadd-punishment of stoning. The court,
however, reasoned that despite the lapsing of the ḥadd-punishment a taʿzīr-punishment was
due on the grounds that there are two kinds of legal uncertainties (shubha), strong ones, and
weak ones. While the former annuls the essence of the crime the latter only makes the ḥadd-
punishment lapse. In that case a taʿzīr-punishment is still possible. As in most other cases
discussed in this chapter the time the offender had spent in detention - almost three years -
was considered a sufficiently long taʿzīr-punishment. The Supreme Court therefore ordered
her release. While in this decision the ḥadd-punishment lapsed, the accused was nevertheless
considered guilty, based on the above reasoning. A minority opinion of the same Court
differed with that opinion, having come to the conclusion that al-Ḥāija al-Ḥusain Sulaimān
was innocent of zinā altogether and therefore did not support the conviction of the accused,
neither by way of ḥadd nor by way of taʿzīr.
This case shows again that a pregnancy is taken by some courts as strong proof of having
committed zinā against a woman even in cases of rape or when rape is a strong possibility.
The cases available and discussed in this work show a strong tendency among the lower
courts to reject claims of rape as baseless and not averting the ḥadd-punishment, if the woman
cannot produce strong proof for the rape. However, it can also be noted that in the majority of
cases these decisions have been overturned by the Supreme Court. But even though in most
cases the worst, either stoning or execution by hanging, was avoided, the accused women
were punished in several ways. The fact that they have given birth to children out of wedlock
served as strong evidence against them and none of them\textsuperscript{1000} was completely cleared of the
charges. On the one hand Supreme Court judges have a tendency to avoid stoning or
execution in cases of zinā, on the other hand they do support the conviction as such. In most

\textsuperscript{1000} Compare other cases discussed in this chapter.
instances, the female defendants not only had to see their rapists being released or not even indicted. In addition they spent several years in prison, and in almost all of these cases the *ta´zīr*-punishment, i.e. the prison term the accused had to serve, consisted of the same or a similar number of years they had spent in prison until the judgment of the Supreme Court. In other words, they were acquitted but punished at the same time. This is certainly an approach that helped to avoid the worst, i.e. stoning. At the same time it helped the Sudanese judicial system to save face.

Case 2

In the second case a certain al-Sirr Muḥammad al-Sanūsī lured a six-year old girl away from her comrades by promising to buy her sweets. The medical examination proved that the girl indeed had been raped. The Criminal Court sentenced him under articles 307 (kidnapping or abducting a woman to compel her to marriage) and 317 (rape). The court set aside the punishment under article 307 because it wanted to impose on the accused the harsher punishment for rape under article 317, PC83. Al-Sanūsī initially was sentenced to a *ta´zīr*-penalty of a prison term of ten years for having committed an offence identical to a *ḥadd* crime but proven under the ordinary means of evidence and not meeting the strict standards required proving *ḥadd* crimes. This decision was confirmed by the Court of Appeals, which added 100 lashes, based on “direct and circumstantial evidence” connecting al-Sanūsī to the crime. This circumstantial evidence included the accounts of the victim and other witnesses in addition to the existence of traces of blood of the same blood group as the victim on the clothing of the defendant. He also had been present at the location of the crime at the time of the crime and had been identified by the victim and her playmates that had played with her before the crime was committed.

In its revision the Supreme Court, however, thought otherwise and came to the conclusion that the crime in question was not rape but rather the crime described as “attempted zinā or rape or indecent acts” in article 319, PC83. This article reads: ”Whoever commits an indecent act on the body of another person or animal, compels a person by force or threats to join him in committing this act, or attempts to commit zinā or rape or any indecent act on the body of a person or animal, shall be punished by flogging and a fine or imprisonment”. As the main

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1002 It remains unclear why article 307 was deemed applicable in the first place.
reason for changing the applicable article the Supreme Court mentions that the necessary legal evidence proving rape had not been provided. Neither had the accused – who denied the crime - made a complete, unequivocal and unretracted confession nor had there been witnesses to the crime itself. The main reason, which led the Court to believe that rape proper, as stipulated under article 317, PC83, had not been proven was the assumption that rape, has to be proven by the same means as zinā. In fact, article 317 reads as follows: “Whoever has sexual intercourse with an underage person in the way stipulated in article 316 is considered to have committed the crime of rape and will be punished with the punishment stipulated in article 318”. It is evident that the element of duress is completely missing in the definition of rape. Consensual sexual intercourse between an adult and a minor automatically is considered to be rape. Secondly, this definition entirely omits the crime of rape among adults. It thus remains unclear how rape among adults is supposed to be punished. And, finally, the definition refers the reader back to zinā for a definition of the crime in question. The Supreme Court, closely following the legislator, thus interprets rape as zinā with a minor and in consequence deems the minimum requirements for the proof of rape the same requirements as those for the proof of zinā. These are, we recall, an unequivocal confession, four male witnesses of good reputation, pregnancy of the unmarried woman or the mulā ‘ana-procedure in the case of a married wife. Since the latter two are impossible and the former two are not available, the Court is of the opinion that the minimum requirement for proving a ĥadd-crime (i.e. rape, or zinā with a minor) is not provided. However, if a crime is proven with proof other than the proof necessary for the proof of a ĥadd-crime, i.e. either by staying below the nişāb or by circumstantial evidence as in the present case, the applicable crime changes to a (related) taʿzīr-crime. In this particular case the conviction was changed to be under article 319, PC83, “attempted zinā or rape and indecent acts” (al-shurūʿ wa al-afʿāl al-fāḥisha).

It must be acknowledged that the different courts faced a considerable dilemma in this particular case. Whether they have found the appropriate solution to that dilemma is a different question. The root of the problem lies in the close association of the definition and punishment of rape with the definition and punishment of zinā. In fact, the punishment of

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1003 Article 316, PC83, stipulates zinā.
1004 Article 318, PC83, stipulates the punishments for zinā.
1005 E.g. the minimum number of witnesses is not reached.
both crimes in the PC83 is identical. Their definition only differs as to who commits the crime. While \( \text{zinā} \) is committed by adults, rape is committed by an adult against a minor, at least if one follows the Penal Code 1983. The conclusion of the Supreme Court that both crimes necessarily require the same proof, i.e. that they have to reach the minimum requirements for the proof of \( \text{zinā} \), follows the inherent logic of their close association with each other. Nevertheless, the outcome of this case is not satisfactory. Since the available circumstantial evidence such as bloodstains and testimonies prove beyond doubt the guilt of the accused the rather light punishments provided for under article 319 seem hardly appropriate. Some authors have correctly criticized that it is unrealistic to demand the testimony of four male witnesses in order to prove rape.\(^{1006}\) It goes without saying that such testimony is close to impossible to obtain and that, as a consequence thereof, rape can not be punished as such. However, it should not be overlooked that the punishments for rape are the same ones as for \( \text{zinā} \) under article 318, PC 318, i.e. either execution for the Muslim \( \muḥṣan \) or a hundred lashes for the non-\( \muḥṣan \) Muslim.\(^{1007}\) The Penal Code 1983 thus left judges only with the choice to punish rape either with the excessively harsh punishments stipulated for \( \text{zinā} \) or with the rather light punishments intended for indecent acts if, as in the case under discussion here, the minimum requirements for the proof of \( \text{zinā} \) are not met.

In conclusion, the close association of the definition and punishment of rape with \( \text{zinā} \) leads a) to a quandary as to the available options for the punishment of rape, b) to a near-impossibility to prove rape and c) to an exacerbation of the plight of the victim who sees her tormentor being let off with a rather light punishment. As in other instances, the Islamization of the penal law in 1983, has resulted in important contradictions, here with regard to the provability of the severe crime of rape. The consistent definition of the 1974 Penal Code has been dropped as well as its corresponding punishment\(^{1008}\) without providing judges with a coherent replacement. Disconnecting the crime of rape from \( \text{zinā} \) in terms of its definition as well as well as its punishment would have been an appropriate solution. In the Criminal Act 1991, however, this quandary has not been solved.

\(^{1006}\) Compare Sidahmed (2001), pp. 200-201.
\(^{1007}\) Non-Muslims are not subject to the hadd-punishment according to art. 318 (2), PC83 but rather to those punishments provided for in their “heavenly religions”. In the case that no such punishments are stipulated in that religion (or the accused does not belong to a “heavenly religion”), the punishment is a maximum of eighty lashes and a fine or a prison term of at least one year.
The 1988/1991 codes have corrected most of the incompatibilities with the *fiqh* of their 1983 predecessor. Firstly, they have reverted to the punishment of stoning as provided for in the *fiqh*, if the offender is *muḥṣan*. Secondly, they provide us with a clear definition of the term *muḥṣan*/*iḥsān* as meant in the code. Being *muḥṣan* now means „having a valid persisting marriage at the time of the commission of *zīnā*, provided that such marriage has been consummated.“ In other words, since widowers and divorcees do not fall under the definition of *muḥṣan* the group of those who are liable to one of the harshest ḥadd-punishments stoning is reduced and confined to married adulterers. While departing from the classical definition of *muḥṣan* the applicability of the ḥadd-punishment of stoning has thus been reduced. Thirdly, while dissociating *liwāṭ* from *zīnā* definition-wise, punishment-wise the first and second time offender of *liwāṭ* faces an even harsher punishment than the non-*muḥṣan* offender of *zīnā*. Where the latter faces 100 lashes and, if he is male, expatriation of one year, the former will be punished by 100 lashes and a prison term of up to five years. The third-time offender of *liwāṭ* even faces execution or a life sentence. In the majority opinion of the *fuqahā*’ - with the exception of the Mālikites - a taʾzīr-crime cannot be punished with a ḥadd-penalty. Thus, the maximum number of lashes for a taʾzīr-offence must be under the minimum number of lashes for the corresponding ḥadd-crime.

Fourthly, it has made *zīnā* punishable for non-Muslims in the North and exempted non-Muslims and Muslims alike in the South. Thus, while the so-called heavenly religions (Christians and Jews) in the North had enjoyed a certain protection from the punishment for *zīnā*, they were now treated on a par with Muslims.

In 1997 in an important case the Supreme Court tried to establish a procedure concerning a possible taʾzīr-punishment whenever the ḥadd-crime could not be proven. A case of alleged *zīnā* under article 146 CA91 had been dismissed by the criminal court of first instance and both defendants had been set free initially for lack of evidence. When the case was reviewed by the Supreme Court an initial confession of one of the defendants to one of the

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1009 CA91, article 145 (3).
1010 It should be noted here that this constitutes one of the few instances in the Sudanese Penal Code where a man faces a harsher punishment than a woman.
investigating policemen, as registered in the diary of the investigation, was invoked as sufficient evidence to prove zinā. This argument was rebuffed by the Supreme Court because confessions in criminal cases not made in front of the judge or his delegates do not constitute unequivocal proof according to article 21 of the 1993 Evidence Act. By invoking the initial confession the appeal aimed at a taʿzīr-penalty for the defendants on the grounds of the principle that the lapsing of a ḥaddin-punishment (suqūṭ al-jarīma al-ḥaddīyya) does not mean that an accused cannot be punished with a taʿzīr-penalty. The Supreme Court, however, reasoned, that this principle, in turn, does not mean that a taʿzīr-penalty is obligatory after the ḥadd-penalty has lapsed. Whether or not a taʿzīr-penalty is due depends on whether the ḥadd-crime has been proven in the first place or not. In other words not proving zinā in the manner mentioned in article 62 of the Evidence Act 1993 does not automatically mean the execution of a taʿzīr-punishment when the ḥadd-offence has not been proven originally beyond reasonable doubt. In reverse, the execution of a taʿzūr-punishment occurs when the ḥadd-crime is proven beyond reasonable doubt, but the ḥadd-punishment is averted by a legal uncertainty, such as the retraction of a confession or not reaching the minimum value (niṣāb) in the case of theft etc.

The Supreme Court has tried to draw a firm line between ḥadd-crimes that will remain unpunished for lack of evidence and those that will entail a taʿzūr-punishment because they have been proven. It remains doubtful whether this line is as firmly drawn as the wording of the judgment suggests. The judges have not given a clear definition in this judgment what exactly they mean by “proven beyond reasonable doubt.” E.g. one could speculate whether not reaching the minimum number of testimonies would subsequently lead to a taʿzūr-punishment or not. The judgment does not give an unequivocal answer to these questions.

4.1.3.7 Legal uncertainties with regard to zinā

As outlined above, traditional fiqh has developed a large variety of legal uncertainties (shubuhāt) in order to foreclose the implementation of ḥadd-punishments. The possibility to wave a ḥadd-punishment, has been recognized by the Evidence Acts 1983 and 1993. Apart from this the lapsing of the ḥadd for zinā as of 1983 was governed by a criminal

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1014 For details see above.
circular listing a rather extended number of reasons. The circular recognized that the ḥadd lapsed when the confession of the defendant or the testimony of the witness was retracted. Further, the ḥadd lapsed when the virginity had been left intact, the zānī married the woman he had committed zinā with, when it was proven that the sexual intercourse had been committed within a defective marriage (zawāj fāṣid) and, finally, when the sexual intercourse had been committed within a void marriage (zawāj bāṭil).

Of this list only the retraction of the confession of the defendant and the retraction of the testimony of a witness are mentioned in the CA91. With regard to the first possibility the Criminal Act 1991 now specifies that the retraction of the confession can take place before the execution of the punishment. In analogy, the withdrawal of the testimony of the witness also until the execution of the punishment also leads to the lapsing of the ḥadd, provided it lessens the niṣāb of the testimony. The EvA 1993 explicitly mentions altogether four reasons that make ḥadd-punishments lapse: the two mentioned above and in addition if the witnesses cannot agree on their testimony. Further, the ḥadd-punishment for zinā is averted for the wife, when an oath is sworn as part of the liʿān-procedure (fī mulāʿ ina ḥilfihā) (art.65 (3). The text of article 65, EvA 1993 is phrased in a way that suggests that the list of legal uncertainties (shubuhāt) is not limitative but that other legal uncertainties, not included in the list, can also be invoked.

The fiqh knows more legal uncertainties than are recognized by the CA91. Thus, the Ḥanafites know the shubha fī al-dalīl (uncertainty as to the textual sources of the law) occurs when the defendant thought that sexual intercourse was legal on the strength of a wrong interpretation of the sources of the law. Further, under a shubha fī al-fāʾl (uncertainty with regard to the act) it is presumed that sexual intercourse was believed to be legal on the base of an assumed legal prescription that does not exist. A shubha fī al-ʿaqd (legal uncertainty as to the contract) occurs when a contract similar to a valid marriage contract exists, which is not recognized but cancels the ḥadd-punishment. Art. 145 (3) explicitly states that a marriage bond, which by consensus is ruled void, shall not be deemed a lawful bond. Thus, a possible

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1016 Evidence Act 1993, art. 65 (1) reads: “The ḥudūd are averted by legal uncertainties”, literally the same as art. 80(1) of its predecessor 1983.
1018 CA91, art. 148.
shubha, the shubha al-

aqd, considered to preclude the ḥadd-punishment for zinā, is not recognized as a tool to avoid the severe punishment for unlawful sexual intercourse if the defect of the marriage is based on ḫimā’. There are, however, also defects, which are not recognized by all schools. In that case it is a shubha. An example is a marriage concluded by a legally capable woman herself and not by her wali. Such a marriage would be considered to be defective by all schools but valid by the Ḥanafites. In addition to the legal uncertainties mentioned in the EvA1993, the CA 1991 specifies that in a case of zinā the ḥadd-penalty will not be executed if the offender retracts his confession when the conviction is based on the confession of the defendant only.1022 As to zinā, the uncertainties preventing a ḥadd-punishment remained as they were in the EvA 1983, other possibilities to avert the draconian ḥadd-punishment for zinā, as devised by the fuqahā’ have not been used.

How a legal uncertainty (among other arguments) can foreclose the imposition of capital punishment in a case of zinā shows a zinā-case from 1984. This case also aptly illustrates how difficult convictions of zinā can be or be made if a court wishes to exhaust all remedies available in ICL preventing the actual execution of a ḥadd-punishment.1023 A certain Ḥādam Mūsā Muḥammad pressed charges against his wife Amīra Ḥabd Allah Åḥmad Ḥādam claiming that his wife was pregnant due to fornication with another, unnamed man. When interrogated the woman initially confessed to having had sexual intercourse with another, who, when questioned, denied and was subsequently released. Since the woman had confessed to the truthfulness of the allegations of her husband the necessity of the li’ān procedure lapsed and so did a possible ḥadd-punishment for qadhf for the husband. In the first instance the woman was sentenced to death by hanging under article 430, PC83 (zinā by a married woman).

When the file reached the Supreme Court it included a plea for mercy from the husband. He accused himself of lying with regard to his initial accusation against his wife and now claimed that he was responsible for the pregnancy of his wife. In its final reasoning the Supreme Court argued that the ḥadd-penalty was to be replaced by a ta’zīr-punishment. It based its opinion on Abū Ḥanīfa who holds that if a person confesses to zinā and her or his partner in committing zinā denies the charges the ḥadd-punalty has to lapse due to legal uncertainty (shubha). Secondly, it criticized the promulgation of the capital punishment by hanging since according

1022 CA91, art. 147 (a).
to the *fiqh* the capital punishment for the *muḥṣan* is stoning. It goes without saying that the Supreme Court criticized, not for the first time, the superficial and imprecise wording of the Islamized parts of the PC83. The Supreme Court thus decided that the *ḥadd*-punishment “death by hanging” had to be annulled and convicted Amīra ‘Abd Allah Aḥmad’Ādam to a *taʿzīr*-penalty of thirty lashes to be executed on her after the delivery of the child. Interestingly, the SC convicted the husband to the same *taʿzīr*-penalty of thirty lashes and not, as one could have expected, to the *ḥadd*-punishment for *qadhf*. Its argument for not doing so was her initial confession to the charges he had brought against her. It seems that the court took the husband’s plea for mercy in which he had retracted his initial accusations as a sign of reconciliation between the two spouses. Had the court convicted the husband for *qadhf* only the *liʿān*-procedure with a subsequent divorce would have saved him from the eighty lashes prescribed for *qadhf*. In other words, the *taʿzīr*-punishment of thirty lashes saved the husband not only from a much more severe lashing, it also saved his marriage.

That a legal uncertainty can lead to the cancellation of a *ḥadd*-punishment for *zinā* is also demonstrated by another case brought before the Supreme Court in 1987. In this case a certain ´Āʾishah ´Ādam Ibrāḥim had run away from her husband and married another man, the second defendant of the case. She had told her new husband that she was divorced from her first husband and subsequently had sexual intercourse with him. She was found culpable under articles 430 (2) (married Muslim woman having sexual intercourse with another person) read in conjunction with article 318 (punishment of *zinā*) and condemned to death by hanging for *zinā*. In its deliberations the Supreme Court came to another conclusion. It held that according to the *fiqh* – among other elements – *zinā* is committed without legal bond (*ʿaqd*) or the suspicion of a contract (*shubhat ʿaqd*) and without ownership or the suspicion of ownership (*shubhat milk*). In the case under discussion, however, the defendant could invoke that she had relied on her conviction that sexual intercourse was allowed to her. Thus, the marriage contract between her and her second husband, despite being void, created a legal uncertainty as to the permissibility of sexual intercourse. On the grounds of this legal uncertainty the SC decided to abolish the capital punishment, to recognize the more than two years she had spent in prison as a *taʿzīr*-penalty and to release her immediately.

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1024 Government of the Sudan vs. ´Āʾishah ʿĀdam Ibrāḥim. SLJR (1987), no. 80/1405.
4.1.3.8 Punishment of zinā

Unlike the ḥaḏr, the PC83 punishes zinā with the capital punishment (iʿdām)\(^{1025}\) and not with stoning (rajm), if the offender is muḥšan. Stoning (rajm) is one of the possible punishments listed in article 64, PC83. Since no other ḥadd-crime allows for stoning the question arises why the Sudanese legislator has not used it as the standard punishment for the non-muḥšan offender of zinā. The term muḥšan has not been defined in 1983, nor has the term bikr (virgin), which serves as its counterpart.\(^{1026}\) The female virgin is to be punished by 100 lashes, the male virgin with prison and banishment of one year in addition to the 100 lashes. For certain groups of non-Muslims article 318 (2) made a reservation. Whoever belonged to a “heavenly religion“ (dīn samāwī)\(^{1027}\) which has legislated any other punishment for zinā the offender was to be punished with that punishment. If such alternative punishment did not exist, the non-Muslim offender was to be punished with a maximum number of 80 lashes and a fine or a prison term of up to one year. The wording “heavenly religion“ clearly alludes to Christians and Jews and does not include any of the animist creeds present in the South and in the refugee camps around Khartoum. Believers of such creeds thus were subject to the same punishments for zinā as Muslims.

The majority of schools, as described above, is of the opinion, that muḥšan means, that the offender is free, adult, a Muslim and has enjoyed legitimate sexual relations previously during a valid marriage. The Supreme Court, however, in a 1985 decision came to a different judgment.\(^{1028}\) The facts of the case can be summarized as follows: the father of the defendant denounced his divorced daughter for having become pregnant by fornication (sifāḥan). The daughter was arrested and charges were pressed against her under article 318 (1), PC83 (punishment of zinā). A second defendant, who had been accused by the woman of having been her “partner in crime,” was released due to lack of proof against him. A medical exam of the woman showed that she was in her thirtieth week of pregnancy. Subsequently the woman was sentenced to stoning (rajm bi al-ḥijāra) under article 318 (1), PC83, to be carried out after a two-year breastfeeding period.

\(^{1025}\) According to the 1983 Criminal Procedure Act, the execution will be by hanging (shanqān ḥattā al-maut), see CPA83, article 229.

\(^{1026}\) While the dichotomy mostly used in the ḥaḏr is muḥšan/ghair muḥšan, the PC83 choses muḥšan/bikr (virgin).

\(^{1027}\) While no precise definition can be found most likely the term “heavenly religion“ concerns Christians and Jews only.

\(^{1028}\) See Government of the Sudan vs. Āmina Bābikr Āhmad, SLJR (1985), no. 118/1405.
In its deliberations the Supreme Court focused on the question whether the defendant was to be considered *muḥṣan* or not. It first briefly discussed the opinions of the four Sunni schools, which unanimously hold that the *muḥṣan* in the context of *zinā* must be free and legally capable and must have had sexual intercourse in a legally valid marriage (*nikāḥ ṣahīḥ*). The Ḥanafites and the Mālikites further require the *muḥṣan* to be a Muslim. However, for lack of a conclusive text in the four Sunni schools, determining that a divorced woman or man or a widower were to be considered *muḥṣan* as well, the judges came to the conclusion that the status of *iḥsān* was connected to an existing marriage only. Should the marriage end either by divorce or by death so would the status of *iḥsān*. For lack of textual evidence in the Sunni schools the Supreme Court, based its reasoning on opinions of al-Imām ʿĀdām of the Twelver Shiʿites, Rashīd Riḍā and Shaikh Abū Zahra. Rashīd Riḍā, e.g., had argued that the *muḥṣana* by marriage (*al-muḥṣana bi al-zawāj*) is called *muḥṣana* because she has a husband who is bestowing upon her the status of *iḥsān*. Once the husband divorces her she can thus not be called a *muḥṣana* any longer. The Supreme Court further quoted an Egyptian project of a codification of Islamic Criminal Law which likewise had stipulated that a person was only to be considered *muḥṣan* when he/she had had sexual intercourse during a legally valid marriage still existing when the crime (of *zinā*) is committed.

Therefore in its final verdict the Supreme Court supported the sentence as such but abolished the capital punishment by stoning. It further sentenced the defendant to two years in prison beginning with the day she was arrested. As has been mentioned above the dichotomy used in the Penal Code 1983 was *muḥṣan* / *bikr*, not, as one could have expected *muḥṣan* / *ghair* *muḥṣan*. Following this wording the Supreme Court argues that - despite the fact that *zinā* had been proven by pregnancy – the punishment for the virgin (*bikr*), a 100 lashes, is not applicable because the defendant was not a virgin due to her previous marriage. Therefore the ʿḥadd*-punishment of flogging became possible.

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1029 Jaʿfar ibn Muḥammad al-Ṣādiq (702-765) is the sixth Imam of the Shiʿa branch of Islam. He is the founder of the Jaʿfaryya, adhered to by the Twelver Shiʿites.

1030 Muhammad Rashīd Riḍā (1865-1935) was a reformist intellectual. He blamed the uncritical imitation of the past, the stagnation of the *ulama* and Sufism for the failure of Muslim societies to achieve technological and scientific progress.

1031 Muhammad Abū Zahra (1898-1974) was a conservative Egyptian legal scholar and public intellectual. He authored more than forty books on Islamic law and theology. Abū Zahra taught at al-Azhar's faculty of theology and was a professor of Islamic law at Cairo University.
4.1.4 Summary and Conclusion

The Penal Code 1983 introduced a set of – partially overlapping - laws covering *zinā*, *liwāṭ* and rape that left a lot of questions open to interpretation by the Sudanese courts. Especially the definition of rape was rather imprecise since it did not mention the notion of coercion. It also defined sexual intercourse between a male adult and a consenting underage girl as rape while at the same time the crime of rape committed by a male adult against an adult woman was entirely omitted in the Penal Code.

The close association of rape with *zinā* in the PC83 suggested the former required the same proof as the latter. This difficulty of the victim to prove rape while at the same time pregnancy was admitted as proof for *zinā* left female victims of rape, especially when they became pregnant as a result of a rape, in an unfavorable situation.

In an important decision the Supreme Court clarified that rape can be committed against minors who are not the ward of the rapist. The latter case had been explicitly mentioned in article 149 (2), CA91, while the rape of minors in a more general sense had not been defined in an unequivocal manner. Article 149 (1) rather spoke of sexual intercourse with a person by way of *zinā* or *liwāṭ*, thus leaving doubts as to whether the word *person* (*shakhṣ*) was meant in a more general sense or in the sense defined in the respective articles on *zinā* and *liwāṭ*. The latter two clearly referred to adults only. In its decision the Supreme Court came to the conclusion that the more inclusive meaning of the notion of *person*, as used in article 149 (rape) had precedence over the more restrictive wording of the articles defining *zinā* and *liwāṭ*. This decision thus made it clear that the rape of minors in general is to be judged under article 149. It did not, however, solve the problem of the consenting minor. Since the consent of the ward is explicitly not recognized in article 149 it remains unclear whether minors other than wards could consent to sexual intercourse or whether, in analogy with article 149 (2), such consent would be rejected and the act construed as rape.

The definition of rape in 1991 becomes more precise by including adults and minors alike and thus closing an important lacuna in the 1983 codification. It also introduces the notion of coercion which had been absent in 1983. The ambiguous wording of the respective article, however, still uses the terms „by way of *zinā* or by way of *liwāṭ*“ and thus connects rape to these crimes in terms of proof. In terms of punishment no difference is made between

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offenders who are *muḥṣan* or non-*muḥṣan*. Rather, the death punishment awaits those offenders who either admit to forced vaginal or anal intercourse or when the act is proven by the necessary number of witnesses. While this number in the case of *zinā* follows article 62 (b), Evidence Act, it remains unclear whether *liwāṭ* and in consequence anal rape is considered to be a *ḥadd*-crime, on a par with *zinā* or not, or a *taʿzīr*-crime. The number of witnesses necessary for the proof of anal rape and therefore the applicability of the death penalty (*ʿidām*) remains therefore unclear.

Next to abolishing the indiscriminate use of *ḥadd*-punishments to sexual offences other than *zinā*, *liwāṭ* and rape, the Criminal Act 1991 also puts Muslims and non-Muslims on a par with regard to incest. While in 1983 non-Muslims faced only a *taʿzīr*-punishment for incest, in 1991 they are liable to the respective punishments for *zinā*, *liwāṭ* and rape, when these crimes are committed with relatives and proven. No separate article is dedicated to *liwāṭ* in the Penal Code 1983. *Liwāṭ* is rather subsumed under the definition of *zinā* in article 316 which talks of a „person“ as the passive partner. However, since the same article also speaks of the absence of a legal bond (*ribāṭ sharī‘*) the Supreme Court, in a landmark decision came to the conclusion that despite obvious ambiguities article 316 does not cover *liwāṭ*. *Liwāṭ*, before 1991 was rather to be treated under article 319 – indecent acts. In consequence those accused of *liwāṭ* did neither face a possible *ḥadd*-punishment nor did, on the other hand, the strict rules for the proof of *zinā* apply to them.\(^{1033}\)

The Criminal Act 1991 introduces reforms with respect to its predecessor and provides now a definition and punishment for *liwāṭ*. Independent of *zinā*, *liwāṭ* cannot be punished by stoning and the notion of *ihšān* has become irrelevant for *liwāṭ*. As to the necessary proof the Criminal Act leaves it open whether the strict procedures for the proof of *zinā* still apply or rather the lighter requirements of a *taʿzīr*-crime. *Liwāṭ* within a legally valid marriage in 1991 became punishable again while it had not been punishable in 1983.

With regard to pregnancy as proof of *zinā*, the three published Supreme Court decisions discussed above\(^{1034}\) argue around several key concepts such as the definition of *ihšān*, the legal effect of (alleged) rape, the consequences for the „partner in crime“, i.e. men, the role of

\(^{1033}\) See Government of the Sudan vs. al-Ṣādiq Aḥmad ʿAbdallah, SLJR (1989), No.149/1989, discussed above.

\(^{1034}\) See chapter “Pregnancy as proof of *zinā* in Supreme Court judgments”.
circumstantial evidence and, finally, the applicability of a ta’zīr-penalty in case of remittance of the hadd-penalty.

A central role with a view to the applicable punishment plays the concept of ihṣān. It is therefore of utmost importance and consequence especially for female defendants which definition of the state of ihṣān is adopted by the legislator and the courts. In the first case the situation was unequivocal – the woman was married when zinā was committed – and thus the punishment of stoning was due. In the second case the Supreme Court was able to treat the defendant as a non-muḥsana because she had retracted a confession to a previous marriage and the factual existence of such marriage could not be established by any other means. In the third case, however, the Supreme Court - relying on article 146 (3) - defined the concept of ihṣān in a restrictive way. After consulting the fiqh it came to the conclusion that no conclusive texts on the matter could be found and therefore a divorcee (and by extension a widow) must be considered non-muḥsana. Interestingly the Court did not confine itself to simply resorting to the unequivocal definition given in article 146 (3) of the Criminal Act 1991 but rather consulted the fiqh before taking its decision.

As to the legal effects of rape or the allegation of rape we can also notice progress. In the case Marīam Muḥammad ’Adbdallah the Supreme Court insisted that (alleged) rape could not be construed as a legal uncertainty remitting the ḥadd-punishment, unless proof of rape was provided by the defendant. While thus misconceiving the very nature of the concept of shubha it corrected this decision in later cases.1035 It subsequently recognized in two consecutive instances that a mere claim of rape – and even without any conclusive proof – constitutes a legal uncertainty averting the ḥadd-punishment of either stoning or a hundred lashes.

However, once rape is unequivocally proven against a man by evidence that does not reach the niṣāb for zinā, judges between 1983 and 1991 were hard pressed to find the applicable article. In the case al-Sirr Muḥammad al-Sanūsī the guilt of the accused was proven beyond doubt. However, the Court held that article 317 (rape) was not applicable since that article makes explicit reference to zinā and, implicitly, to the pertinent proof for it. Since rape was proven and with the only article defining rape unavailable, the Court decided to apply article 319 – indecent acts and attempted zinā and rape to reach a conviction for this especially

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1035 See e.g. cases al-Hajja al-Ḥusain Sulaiman, Marīam Muḥammad ’Abdallah and Kalthūm ’Ajabna, discussed above.
reprehensible crime (rape of a minor). Taken this lacuna into account, the 1991 legislator explicitly provided for cases of rape not amounting to *zinā* or *liwāt.*

Concerning pregnancy as a proof for *zinā* the Supreme Court in the case Marīm Muḥammad ʿAbdallāh also stated that pregnancy could be proof of *zinā* even within a marriage, if the husband had been absent for a longer period, while *zinā* was committed. It must be noted here that this decision directly contradicts the Law of Evidence, article 77 (3), which restricts pregnancy as proof for *zinā* to unmarried women. While the 1983 and 1993 Laws of Evidence leave relatively little room for maneuver the Supreme Court made it clear in 1989 (case Marīm Muḥammad Sulaimān) and 1992 (case Kalthūm ʿAjābnā) that pregnancy is not to be considered as unequivocal proof for *zinā* but rather leaves room for either the proven or the unproven claim that the pregnancy was caused by other means than consensual illegitimate sexual intercourse. While it could not reinterpret the fixed status of the Law of Evidence, it thus opened a way out for women who would otherwise face a conviction for *zinā* based on pregnancy.

With regard to the “partners in crime,” i.e. the male partners of the alleged illegitimate sexual intercourse in none of the cases available any of them was punished. In three cases the partners of the defendant were released in an early stage of the investigation, ostensibly for lack of evidence. In the case Kalthūm ʿAjābnā her partner was not even summoned, let alone indicted or convicted. Even though his identity was not disclosed to the court by the defendant because the man, a police officer, had threatened the defendant, even if his identity had been known a conviction remains quite improbable. In the absence of four male witnesses of good reputation the confession of the male partner is the only possible means of proving *zinā* left to the courts. Since none of the men confessed none were convicted. It goes without saying that the Penal Code 1983 and the Criminal Act 1991 disfavor women with regard to the proof of *zinā* by admitting pregnancy as a means of proof while at the same time the proof of *zinā* against men is virtually impossible, short of a voluntary confession.

The question of whether the naming of her male partner automatically would have to lead to a conviction for *qadhf* seems to have puzzled courts at least in the case Marīm Muḥammad

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1036 Compare article 149 (3), CA91.
1037 I refer to the cases available in the Sudan Law Journal and Reports.
1038 See cases Marīm Muḥammad ʿAbdallāh, Amīna Bābikr ʿAḥmad and Marīm Muḥammad Sulaimān discussed above.
'Abdallah (1985). While the criminal court convicted her for *qadhī* – *zinā* of the man could not be proven – the Supreme Court annulled the conviction on the grounds that the aggrieved party, i.e. the victim of *qadhī*, had not brought forward charges. Probably based on the case Marīm Muḥammad 'Abdallah, neither the criminal court nor the Supreme Court considered a conviction of the defendants for *qadhī* in the other cases discussed above.

In contrast it must be noted that in all Supreme Court cases studied, where pregnancy was a decisive or at least an important element in the proving of *zinā* the indicted women were convicted. Marīm Muḥammad 'Abdallah was convicted of *zinā* and was to be executed by stoning while in the remaining cases *taʿzīr*-penalties, i.e. prison terms were pronounced. In other words, even if the *ḥadd*-punishment for *zinā* lapses, a hefty *taʿzīr*-punishment and possibly years of fear of execution are due. It goes without saying that it does not seem logic that on the one hand the *ḥadd*-punishment lapses because the defendants were raped or claim to have been raped. Then, despite this inherent recognition of rape or the possibility of rape, a *taʿzīr*-punishment is imposed anyway. It remains unclear what the lapsing of the *ḥadd* really means. It does not seem to mean that the court prefers to assume innocence in order to avoid the conviction of a woman who might have been raped. Since the women are punished anyway – despite a probability that they have been forced to illegitimate sexual intercourse - the message rather reads differently. A woman does not get away lightly if a pregnancy either outside a legally valid marriage or with another partner than her own husband occurs. While her male partner remains free and cannot be punished unless he confesses, a woman can hardly ever clear herself completely of the charges of *zinā*. While the two more recent decisions establish rape as a legal uncertainty averting the *ḥadd*, it does not save women who have become pregnant outside marriage from the ordeal of a possible execution and years in prison.  

In 1997 the Supreme Court tried to give guidance with regard to the relation between an averted *ḥadd*-punishment and when, in such cases, a *taʿzīr*-penalty was to follow. The Supreme Court came to the conclusion that a *taʿzīr*-penalty is not obligatory when a *ḥadd*-penalty has lapsed. Whether or not a *taʿzīr*-punishment is due rather depends on whether the *ḥadd*-crime has been proven beyond doubt or not. If the *ḥadd*-crime has been proven and the *ḥadd* is averted because the proof has not reached the *niṣāb* or legal uncertainties, a *taʿzīr*-

1040 Compare also Sidahmed (2001), pp. 194-197.
penalty, however, is due. This decision is unsatisfactory because it does not take into account
the important group of cases where the proof is not based on circumstantial evidence but on
either a confession or witnesses. If sufficient circumstantial evidence such as bloodstains etc.
is available the case is clear, even though a hadd-punishment might not be possible, the
accused can be convicted to, e.g., a prison term. Most cases discussed above, however, were
not based on such circumstantial evidence but rather confessions, which were retracted later,
and on pregnancies, in many instances possibly caused by rape. It remains to be seen whether
this 1997 precedent will, in the future, lead to an acquittal of those women who are pregnant
because they were victims of rape.

4.2 Unfounded accusation of unlawful intercourse (qadhf)

4.2.1 Qadhf in Islamic jurisprudence (fiqh)

The hadd-offence qadhf as discussed in the fiqh is based on the Qur’an (24:4-5): “And those
who accuse honorable women but bring not four witnesses, scourge them (with) eighty stripes
and never (afterwards) accept their testimony- They indeed are evil-doers. Save those who
afterwards repent and make amends. (For such) lo! God is forgiving, Merciful. As for those
who accuse their wives but have not witnesses except themselves; let the testimony of one of
them be four testimonies, (swearing) by Allah that he is of those who speak the truth...And it
shall avert the punishment from her if she bear witness before Allah four times that the thing
he saith is indeed false...”.

In order to qualify as qadhf the defamer (qadhif) has to use certain expressions or accusations
such as the unfounded accusation of unlawful sexual intercourse, i.e. zinā’, or the negation of
a person’s legitimate descent (nafy al-nasab). This has to happen in a clear and unequivocal
wording, such as: “you have committed zinā’,” or “I have seen you committing zinā’.”1041 It is
not enough that the accusation refers to forbidden intercourse (waṭ’ harām), since this kind of
intercourse might not amount to zinā due, for example, to legal uncertainties. The insinuation
of an accusation of zinā without words and with gestures (ishāra) only does not qualify as
qadhf. Neither does such an accusation if it is in writing only since it has to be made within
earshot of a listening public.1042 Differing with this majority position of the Ḥanafites,

1041 Bahnasī, jarā’im, p. 150.
1042 Bahnasi, jarā’im, p. 152.
Hanbalites and Shafi’ites, in Malikite jurisprudence, the using of indirect or metaphorical expressions is sufficient for the imposition of the hadd for qadhf.\(^{1043}\)

The fiqh devises some important qualifications as to the offender (al-qādhiĩ) and the victim of qadhf (al-maqdhūf). The offender needs to be sane (āqīl) and of age (bālīgh). The Malikites, however, hold that a woman does not need to be adult but just capable of sexual intercourse.\(^{1044}\) Being a Muslim or free, however, is not a necessary precondition of the offender. A slave\(^{1045}\), a dhimmī and a musta‘min who are guilty of qadhf will also be punished by the hadd. Abū Ḥanīfa, however, originally taught that a musta‘min could not be punished with a hadd. However, he later was of the opinion that a musta‘min is subject to the same punishment with regard to qadhf as the Muslim.\(^{1046}\) If a father or a grandfather commit qadhf against one of their direct descendants, opinions differ. According to the Hanafites, the Hanbalites and Shafi’ites the hadd does not apply in such case. Malik, in contrast, proposes their punishment, based on the general meaning of the underlying qur’anic verse.

As to the victim of qadhf (al-maqdhūf) other regulations apply. The hadd for qadhf is only applicable to the offender if the victim is muhsan. In contrast to the meaning of muhsan in relation to zinā, the state of iḥsān is defined here as the free, adult, sane and chaste Muslim\(^{1047}\), i.e. he or she has not been convicted of zinā earlier, according to the majority opinion (with the exception of Abū Ḥanīfa).\(^{1048}\) The victim also must not have been the subject of a li‘ān procedure.\(^{1049}\) Further, the victim of qadhf must be known and identifiable. Thus, if the qādhiĩ addresses a group of people and says: “only one of you committed zinā”, this would not lead to the hadd for qadhf. On the other hand, it is not necessary that the maqdhūf is alive. The applicability of the hadd-penalty must be considered with regard to the state of iḥsān of the victim during his lifetime and the iḥsān will not be changed by his death.\(^{1050}\)

\(^{1043}\) Peters (2005), p. 63.
\(^{1044}\) Peters (2005), p. 63.
\(^{1045}\) The punishment of the slave is only half of that of the free person, i.e. 40 lashes.
\(^{1046}\) Krcsmárik (1905), p. 320.
\(^{1047}\) A few authors are of the opinion that the victim of qadhf can be a dhimmīyya, provided she has given birth to a Muslim child. See Bahnasi, jarā‘ im, p. 160.
\(^{1048}\) Abū Ḥanīfa differs, see the more detailed discussion of the meaning of chastity among the different schools below in chapter 4.2.2. The victim of qadhf must also not be mute nor a hermaphrodite. See Bahnasi, jarā‘ im, p. 162.
\(^{1049}\) Peters (2005), p. 63.
\(^{1050}\) Bahnasi, jarā‘ im, pp. 163-164.
The burden of proof as to the lack of chastity lies upon the qāḍhīf and not the defendant. This is the case because he is the plaintiff who has to prove his case. Should the victim of qadhf commit unlawful sexual intercourse (zinā) or an otherwise forbidden sexual intercourse (wat‘ harām) before the punishment has been executed on the offender of qadhf, the ḥadd-punishment on the qāḍhīf will lapse.

There are two additional conditions to make the ḥadd-punishment for qadhf applicable. Firstly, the victim of qadhf has to request its application and, secondly, that the accusation is not proven through a confession of the victim of qadhf, who would then be guilty of zinā, or through the testimony of four witnesses.

Further, the person culpable of qadhf shall not be punished if the accusation of unlawful sexual intercourse (zinā) is made by way of li‘ān (see above).

As usual in ḥadd-offences qadhf is proven by testimony or confession. For a valid testimony according to the majority opinion two men are necessary. It is controversial, however, among the Mālikites, whether an oath or the testimony of a woman is valid proof in qadhf cases.\(^{1051}\)

As to the validity of the testimony of a person who has previously been convicted for qadhf (al-maḥdūd ṭī al-qadhf) and then repented, the opinions of the fuqahā’ differ. Abū Ḥanīfa and Abū Yūsuf hold that the testimony of the qāḍhīf is only acceptable in ḥadd-cases other than qadhf. Even if he has repented the testimony of the person previously convicted of a ḥadd-offence is not to be accepted. Mālik and Shāfi‘ī, in contrast, accept the testimony of the person convicted for qadhf if he repented.

The confession has to be made by a sane person who is of age and it has to be by word of mouth (bi al-khiṭāb) with clear expressions. A written one or a confession expressed in signs (al-ishāra) is not valid. The person who confesses can be a non-Muslim, a woman or a slave, it does not have to be made at a certain point of time, even confessions made long after the fact are valid. The withdrawal of the confession, which only has to be made once, on the other hand, is not accepted, because the ḥadd-punishment of the offender is the right of the victim. In other words it is not a right of God, but a ḥaqq adami, the right of a human. If two men or one man and two women testify to the confession of the victim of qadhf to unlawful sexual intercourse the ḥadd-punishment on the offender will be averted.

\(^{1051}\) Compare Bahnaši, jarā‘im, p. 173.
If qadhf is finally proven there are three legal consequences: a ḥadd - punishment of eighty lashes, the invalidity (buṭlān) of his testimony and his being declared a sinner (tafsīq) until he repents.

There is no limitation for qadhf because, according to the interpretation of the fuqahā’, the delay in giving testimony does not indicate malevolence. The victim of qadhf does not have a real choice, he is rather forced to prevent shame for himself by filing charges for qadhf. Would he not take action belatedly the case against him would be verified.  

4.2.2 Qadhf in the Sudanese Penal Codes 1983 and 1991

According to article 433 of the Penal Code 1983 committing qadhf means to accuse a person of zinā, either through a public statement or a pronouncement made known in another way, also in writing or by publication, be it through gestures or visible expression. An explanation to this article expounds that any of the declarations as defined above were to be deemed qadhf if the victim of qadhf was absent or dead. This under the condition that such declaration was qadhf if the absent or the dead were present or alive and that the intention (of the qādhif) was to hurt the feelings of the family of the maqdhūf. In a second explanation the legislator states that the conditions of qadhf are also fulfilled by an unambiguous, deceitful picture (ṣūra mudāwira ṣariḥatan fī al-uslūb) or an explicit mockery (tahakkum ṣarīḥ).  

The survey of qadhf in the fiqh has shown that an accusation in writing, or, in analogy, as a publication, does not qualify as qadhf. The same is true for an accusation by way of a deceitful picture, gestures (ishārāt) or visible expression (taʿbīr marʿī). In other words, the Penal Code 1983 substantially widens the definition of qadhf, now covering related offences which would fall under taʿzīr according to the fiqah. Further, the definition of article 433 omits that the accusation of zinā necessarily has to be unfounded in order to qualify as qadhf. The wording chosen does not leave room for actually proving that the accusation is justified, whoever accuses a person of zinā in the manner described was punishable by qadhf – if one follows the text - even if he could produce the four witnesses necessary for the proof of zinā. If the qādhif had already been convicted for qadhf previously or the maqdhūf for zinā, another conviction for qadhf is possible, at least the relevant sections of the Penal Code 1983 do not

1052 For unfounded accusation of unlawful sexual intercourse in the fiqh see Bahnašī, al-jarāʾim, pp. 147-180.
1053 Article 433 and explanations 1 and 2, Penal Code 1983.
contain any provision indicating the contrary.\textsuperscript{1054} With regard to the stipulation that the \textit{maqdhūf} can also be dead, article 433 follows the \textit{fiqh}.\textsuperscript{1055} The wording of the explanation, however, is directly inspired by PC 1974, article 433 defining defamation. Apart from referring to \textit{qadhf}, the only difference is that the absent person (\textit{shakhṣ ghā'ib}) now can be the object of \textit{qadhf} as well.

\textit{Qadhf}, as defined by the CB 1988\textsuperscript{1056} and the CA 1991, is committed by falsely accusing a person, expressly or by implication, of unlawful sexual intercourse or \textit{liwāṭ} or commits the offence of negation of lineage, against a chaste person, even if this person is dead.\textsuperscript{1058} A chaste person is someone who has not been convicted of unlawful sexual intercourse, homosexual intercourse (\textit{liwāṭ}), rape, incest or prostitution.\textsuperscript{1059} The provision for \textit{qadhf} in the CA1991 follows article 433 of the PC1983 with a few important differences. The rather wide definition of Numairi’s code has not been changed. \textit{Qadhf} by gestures, signs or in writing is still part of the definition. The absent person has been eliminated from the definition of the \textit{maqdhūf}. Most importantly, the CA91 widens the definition of \textit{qadhf} even further by adding an unfounded\textsuperscript{1060} accusation – the word unfounded has now been included – of \textit{liwāṭ} and a negation of lineage. While the latter is covered by the classical definition of the \textit{fuqahā’}, the first is more problematic. Whereas it is controversial in the \textit{fiqh} whether \textit{liwāṭ} falls under the definition and punishment of \textit{zinā}, the CA91 itself makes a clear distinction. While the first time offender in a \textit{zinā}-case will be stoned if \textit{muḥsān}, the \textit{iḥsān}-principle does not enter the definition of \textit{liwāṭ} nor is stoning a possible punishment. In other words, if \textit{liwāṭ} is subsumed under \textit{zinā}, based on the pertinent opinions of the \textit{fuqahā’}, logically a false accusation of \textit{liwāṭ} must follow the rules for the punishment of \textit{qadhf}. However, if the legislator decides to distinguish the two offences, as the CA91 has done, unfounded

\textsuperscript{1054}For further \textit{qadhf}-related articles see below chapter “Punishment of \textit{qadhf}”.
\textsuperscript{1055}Compare Bahnaš, jarā’im, pp. 163-164.
\textsuperscript{1056}There are a few minor differences between the 1988 draft code and the 1991 legislation. In order to qualify as \textit{maqdhūf}, the 1988 draft code stipulated that “a person is deemed to be chaste when he has not been convicted of adultery, homosexuality or any of the other sexual offences”. This wording has been formulated more precise in 1991 (see above).
\textsuperscript{1057}\textit{Liwāṭ} is not translated here as homosexuality. As has been shown by Schmitt the notion of \textit{liwāṭ} is limited to anal intercourse. In contrast, the notion of homosexuality, in Western culture, does encompass far more. See Schmitt (2001-2002).
\textsuperscript{1058}Art. 157 (1).
\textsuperscript{1059}Art. 157 (2).
\textsuperscript{1060}In the original Arabic \textit{kidhban}.
\textsuperscript{1061}Compare article 148, CA91.
accusation of *liwāt* should not fall under *qadhf*, since according to the *fiqh* the accusation only consists of *zinā* and no other offence.

Further, we can observe other important changes in comparison to the 1983 code. While in 1983 the victim of *qadhf* was only defined with regard to religious affiliation, the CA91 has omitted this important notion. It has become irrelevant whether the *maqdhūf* is a Muslim or not. While in the case of the *qādhi* the *fiqh* supports this irrelevance, the victim of *qadhf* can not, by definition, be a non-Muslim. Non-Muslims are thus, as can be observed in other instances, incorporated into the realm of Islamic law in contradiction to its own rules. Since the unfounded accusation of *liwāt* is punishable with the punishment for *qadhf*, *liwāt* now also enters the definition of chastity. A chaste person, and only such a person can be the object of *qadhf*, is thus someone who has not been convicted of either *liwāt*, rape, incest nor prostitution. What are the opinions of the *fuqahā* concerning the meaning of chastity and which crimes do make one unchaste in the sense relevant to *qadhf*? According to Abū Ḥanīfa the *maqdhūf*, in order to qualify as a possible victim of *qadhf*, must not have had in his lifetime any forbidden sexual intercourse, i.e. without lawful marriage or concubinage with a slave or in a legally invalid marriage (*nikāḥ fāsid*), when the reason of the invalidity is agreed upon, or without property rights (*fi ghair milk*). It thus does not matter to Abū Ḥanīfa whether the sexual intercourse amounts to *zinā* or not. If the victim of *qadhf* has had forbidden intercourse as described chastity of the *maqdhūf* is not assumed any longer and, therefore, the *qādhi* will not be punished with the *ḥadd*-penalty for *qadhf*. Mālik also holds that the *maqdhūf* must not have been convicted of *zinā* either before he was accused nor afterwards. In contrast to Abū Ḥanīfa he does not consider forbidden sexual intercourse, not amounting to *zinā*, as removing the status of chastity. Shāfiʿī agrees with Mālik that the *ḥadd*-punishment for *zinā* makes the *maqdhūf* lose his chastity. As to other forms of forbidden sexual intercourse not amounting to *zinā* he distinguishes two kinds. In the first kind the man holds no possessory rights in the woman he has sexual intercourse with. Therefore the status of chastity and *ihšān* are eliminated as if the intercourse would amount to *zinā*. In the second kind the sexual intercourse does not require the *ḥadd*-punishment, e.g. when a man has intercourse with his menstruating wife. In this case his status of chastity is not changed. Aḥmad ibn Ḥanbal, however, differs with Abū Ḥanīfa inasmuch as he does not call for an

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absolute chastity (*al-*i*ffâ al-*mu*taqa*) nor for chastity with regard to *zinâ* as envisaged by Mâlik and Shâfi‘î. According to Aḥmad it is sufficient to be chaste with regard to *zinâ* in a strictly legal meaning (*al-*i*ffâ al-*zâhira ʿan al-*zinâ*). In other words, if *zinâ* has not been proven to the *maqdhûf* by a confession or testimony and the *ḥadd*-penalty has not been imposed on him he must be presumed chaste. If the *maqdhûf* has committed *zinâ* and is repentant before the crime has been brought to court it will not affect his status of chastity.

Coming back to our discussion of article 157, CA91 and its definition of chastity we observe that the Sudanese legislator has stipulated a rather wide range of offences eliminating the status of chastity of the victim of *qadhf*. He followed the minority opinion of Abû Ḥanîfa and to some degree Shâfi‘î who are of the opinion that a victim of *qadhf* who is guilty of forbidden sexual intercourse not amounting to *zinâ* can not be considered chaste. In other words the punishment of the *qâdhif* has become more difficult, since the pool of possible victims of *qadhf* has been diminished. This decrease, however, is far outweighed by the fact, that non-Muslims can now sue for unfounded accusation of unlawful sexual intercourse or *liwâṭ* or negation of lineage. The bottom line is, however, that by adding *liwâṭ* to the sex crimes which make up *qadhf* – if the accusation cannot be proven – and by adding non-Muslims to the pool of possible victims, the overall applicability of *qadhf* in comparison to its stricter rules in the *fiqh* has been substantially widened.

4.2.3 Punishment of *qadhf*

The *ḥadd*-offence *qadhf* was unknown to the 1974 penal code which knew only the offences of defamation, injurious falsehood and the printing of defamatory matter, all of which were punishable by a prison term of up to two years or fine or both.\(^{1063}\) While thus the maximum punishment was two years for defamation, its successor in 1983 kept the offences as such but replaced this punishment with the less precise formula “to be punished by lashing and fine or prison.” It must be noted here that this lack of precision gave enormous latitude to the judge. “Prison“ meant any prison term the judge saw fit without any maximum number of years.\(^{1064}\) “Lashing“ meant any number of strokes ranging between 25 and 100.\(^{1065}\) The precise range of

\(^{1063}\) See The Penal Code Act 1974, articles 434, 435, 436. Art. 437 stipulates the same punishments for the sale of printed or engraved substance containing defamatory matter.

\(^{1064}\) Art. 64 (3), PC83.

\(^{1065}\) Art. 64 (8), PC83.
“fine” also remained essentially unspecified. Next to these defamation-related offences, the PC83 introduced *qadhf* and – following the *fiqh* – punished it with eighty lashes. The Criminal Bill 1988 and the Criminal Act 1991 preserved this punishment. Concerning the 1983 code we can assess a disequilibrium between crime and punishment, caused by the introduction of the *hadd*-offence *qadhf*. Thus while the Qur’anic offence’s punishment was limited to eighty lashes, other non-Qur’anic variations of defamation could be punished with up to a 100 lashes and possibly with a fine. As mentioned an unspecified, possibly long, prison term was also an option available to the judge. In other words, the *ta’zīr*-penalty for related offences could have been more severe than the *hadd*-penalty for the *hadd*-crime. Secondly, there is an important difference as to the religion of the offender. The PC 1983 stipulated eighty lashes only if the victim of *qadhf* was a Muslim. If the *maqdūf* was a non-Muslim, the punishment stipulated was the ubiquitous formula „lashing and fine or prison.”

As our overview of the pertinent rules in the *fiqh* have shown there is indeed a difference between the *qādhif* and the *maqdūf* with regard to religion. A non-Muslim can be punished for *qadhf* just like a Muslim. He cannot, however, be the object of *qadhf*, because he is not *muḥṣan* as required in cases of *qadhf*. Even though the legislator stipulates a *ta’zīr*-penalty – which can be even more severe than the *hadd*, as we have shown – it would have been more appropriate to subsume the defamation of a non-Muslim for unlawful sexual intercourse under a different header, avoiding the term *qadhf*. A usage rather remote from the *fiqh* was also applied by the Sudanese legislator in other instances. Thus we find two more offences, basically taken over from the 1974 code, but now transformed into *hadd*-offences related to *qadhf*. Firstly, “printing or engraving matter known to be defamatory” and, secondly, “sale of printed or engraved substance containing defamatory matter” are both punishable with eighty lashes for the Muslim and lashing and fine or prison for the non-Muslim. The PC83 thus follows, as to the punishment the logic set in the article punishing *qadhf* proper. Again, comparing with the reasoning of the *fuqahāʾ* we find that the printing of matter known to be defamatory does not fall under the definition of *qadhf* since the unfounded accusations have to be made within earshot of a listening public and not in writing. The sale of printed defamatory matter is just as far from the definition of *qadhf* and therefore would not be

1066 Art. 64 (5), PC83.
1067 Art. 436, PC83.
1068 Art. 437, PC83.
punishable by a ḥadd-penalty. Again in both cases the non-Muslim possibly faces a more severe punishment than the Muslim.

Most of these incongruities, flaws and superficialities have been rectified in the draft CB88 and the CA91. Thus, most importantly, the ḥadd-punishment for qadhf is indeed limited to qadhf proper and no qadhf-related and similar offence is punished with eighty lashes while its definition does not concur with the fiqh. Further, the prison terms for these offences have substantially been lowered to a level that is even undercutting the punishments of the PC74. Defamation proper is now being punished with a maximum prison term of six months or a fine or both. Those guilty of insult and abuse face a maximum prison term of one month or a whipping of up to 25 lashes or a fine. Remarkably, the differentiation between Muslims and non-Muslims with regard to the victim has been completely abolished. In other words, even if the victim is a non-Muslim the ḥadd-punishment applies. While this means in practice that a non-Muslim’s reputation with regard to unfounded accusation of unlawful sexual intercourse is protected in the same way as the Muslim’s, it also means that non-Muslims are incorporated into ICL in a way not envisaged by the fiqh.

4.2.4    Lapsing of qadhf

The reasons for the lapsing of the ḥadd-penalty for qadhf were first regulated by criminal circular 99/1983 as follows: 1. Withdrawal of the testimony by the witnesses. 2. Confirmation of the statement of the slanderer by the slandered. 3. Denial of the statement of the aggrieved party by his witnesses, based on an opinion of Abū Ḥanīfa. As in other instances a taʿzīr-punishment was possible after the ḥadd had lapsed, even if such a punishment had not been stipulated explicitly in the law. However, the reasons for the lapsing of the ḥadd for unfounded accusation for unlawful sexual intercourse changed almost completely in the CA91. The ḥadd now lapses for the following reasons: 1. By a mutual unfounded accusation of unlawful sexual intercourse (taqādhu), when the slandered person or the plaintiff has answered the slanderer (al-qādhif) with the same words (bimithli qaulihi). 2. By pardon of the victim or the complainant of the unfounded accusation or the claimant pardons before the execution of the ḥadd-penalty. 3. By liʿān between the two spouses. 4.

1069 Art. 159, CA91.
1070 For the following see Hāmid (2002), mausū’a, pp. 33-34.
1071 Compare article 458 (3), PC83.
Where the defamed person is a descendant of the defamer. While in 1983 an unspecified taʿzīr-penalty had been made possible by article 458 (3)\textsuperscript{1073} in cases where the hadd-penalty was remitted, in 1991 it is stipulated that a remittance of the hadd for qadhf according to the reasons given in article 158(1) (automatically) leads to the penalty for the offence of defamation. Defamation is punishable by a prison term not exceeding six-month or with a fine or with both.\textsuperscript{1074} The punishment for defamation despite the lapsing of the hadd has different effects in the different cases quoted above. In the case of mutual defamation, both parties have used the same defamatory statements against each other. However, their statements do not neutralize each other, rather both are considered guilty and punished for defamation. In the second case a pardon should have the consequence that the punishment is dropped. However, taʿzīr will take place, even though the aggrieved party has given up its right to have the hadd executed. In the third case – liʿān – the marriage will be dissolved\textsuperscript{1075} which seems to make further punishment unnecessary. It is also unclear whether the penalty for defamation will apply to both (ex-) spouses. In the fourth case, finally, the defamer is accusing his own offspring of zinā or doubting his or her pedigree. Ironically, in the latter case the defamer would doubt his own paternity.

### 4.2.5 Summary and conclusion

The definition of qadhf as introduced in 1983 substantially widened its applicability in relation to the fiqh. It now also covered related offences such as an unfounded accusation in writing or as a publication. Next to a rather deficient wording, which omitted that the accusation of unlawful sexual intercourse had to be unfounded, prior convictions of the qādhiʿ for qadhf or for zinā of the maqdhūf did not have an impact on the applicability of the provisions for qadhf in the PC83.

The successor code 1991 does confirm some of the incompatibilities of the 1983 Penal Code, but also tries to improve it. It thus confirms the inclusion of gestures and written accusations into the definition of qadhf, but, on the other hand introduces the notion of chastity. Even though chastity according to a majority of fuqahāʾ is an important element of the definition of

\textsuperscript{1072} Article 158, CA91.
\textsuperscript{1073} This article also allowed for hadd-punishments despite the non-existence of a text in the Penal Code 1983 prescribing such a punishment. This article was invoked during the apostasy trial against Maḥmūd Muḥammad Tāḥā.
\textsuperscript{1074} Article 159(3), CA91.
the *maqdhūf*, the CA91, again applies a rather wide definition by including *liwāt*. Since *liwāt* is covered by the definition of *zinā* according to the majority opinion, its inclusion into the definition of chastity seems to be justifiable. However, this inclusion contradicts the distinction between *zinā* and *liwāt* chosen by the CA91 itself. Further, by adding a false accusation of *liwāt* to the sex crimes which fall under the definition of *qadhf*, the Sudanese legislator, while providing a stricter protection against slander, substantially widens the applicability of *qadhf* in comparison to the rules supported by the majority of the *fuqahā’*. The CA91 also introduces an important change concerning the religion of the victim of *qadhf*. While in 1983, and in concurrence with the *fiqh*, the *hadd*-punishment for *qadhf* was only applicable if the victim of *qadhf* was a Muslim, the CA91 abolishes this distinction. This could be construed as giving non-Muslims the same status as Muslims which, in this particular case is meant to be an efficient protection of their rights. However, it draws, once more, non-Muslims into the realm of ICL, and this against its own prescriptions.

In relation to the qualities of the witness of *qadhf*, the 1983 and 1991 codes do not prescribe explicitly that the witness be of good reputation. Good reputation is simply assumed unless the opposite is proven. Whether or not someone who has previously been convicted for *qadhf* can testify remains unclear, the texts are silent concerning this problem.

The 1983 code also introduced a grave imbalance concerning offences related to slander but not falling under the definition of *qadhf*. Those could be punished even harsher than the *hadd*-offence. Two of these offences are simply punished with eighty lashes for the Muslim and thus, de facto, subsumed under *qadhf*. Again, Muslims could be punished even more severely. These incongruities have been abolished in 1991. The *hadd*-punishment is now restricted to *qadhf*-proper. All other, related, offences are now unequivocally punished by *ta’zīr*-penalties and the balanced relation between crime and punishment of the Penal Code 1974 has been restored in most cases.

The reasons for the lapsing of the *hadd*-penalty for *qadhf* have changed almost completely from 1983 to 1991. The relation between the two sets of reasons for the lapsing of the *hadd*, however, remains unclear. While the Criminal Circular 99/1983 simply states that the reasons given in 1991 are in conflict with those given in the PC83, the latter can hardly be considered abrogated by the promulgation of the former. At least the withdrawal of the testimony or the

confirmation of *zinā*, committed by the *maqdhūf* would still be remain valid reasons for the lapsing of the *hadd*. It thus remains more probable that the reasons given in the two codes have to be understood as complementary.

### 4.3. Alcohol consumption (*shurb al-khamr*)

#### 4.3.1 Introduction

Alcohol consumption and, in extension, the dealing in alcohol respectively are certainly the two (*hadd*-) crimes that take a special position in the process of the Islamization of penal law in the Sudan. It should be noted here that no other *hadd*-penalties introduced in 1983 and reconfirmed in 1991 have been applied more widely and affected more people. Based on reports one can safely assume that many thousands of Sudanese have received a lashing and or a prison term for either consuming or selling alcohol or other alcohol-related offences. Evidence to the importance the Sudanese regime attributes to the eradication of brewing, drinking and selling of alcohol are the many campaigns announced to that effect. For example, in one of these campaigns in June 1994, in 16 days 657 people were brought to court for alcohol-related offences. In Khartoum and its adjacent refugee camps many displaced Southern women make a living by brewing and selling alcohol. According to article 79, CA91, non-Muslims who deal in alcohol are not subject to flogging but to a prison term not exceeding one year or shall have to pay a fine. However, there are many reports, that these women were given 40 lashes for brewing alcohol. In other words, they received the same amount of lashes given as a *hadd*-punishment to Muslims. Human rights reports also are evidence to the fact that the punishment of flogging for alcohol consumption is often used to intimidate critics of the Islamic regime.

#### 4.3.2 Definition and punishment of alcohol consumption in the fiqh

The consumption of intoxicants was gradually forbidden in the Qur’an but not declared punishable. Qur’anic terminology refers to expressions for strong alcoholic drink only. In their majority, by way of *qiyyās*, Islamic jurisprudents interpret the meaning of *khamr* to represent every intoxicant (*muskīr*), including alcoholic drinks other than wine, opiates,

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1077 Idem, p. 43.
narcotics and other drugs. Its punishability is based on the Sunna of the Prophet according to which the drinking of intoxicants were punished by lashing.

Islamic jurisprudence, however, is split into two schools of thought with regard to the punishability of the consumption of alcoholic beverages. Both have in common that they outlaw the drinking of wine made of grapes (shurb al-khamr al-mustakhrajā min al-`inab), whether drunk in small or large quantities, whether causing drunkenness or not. They do, however, differ as to the drinking of intoxicating drinks other than that.\textsuperscript{1080} According to the majority opinion of the fuqahāʾ the consumption of all intoxicants is punishable by a ḥadd-punishment. In the Shāfiʿite school and the majority opinion of the Ḥanbalite school the punishment for the free person is 40 lashes, according to the Mālikites 80 lashes. The Ḥanafites differ. As in the three other schools the drinking of wine is completely forbidden and punishable by 80 lashes for the free person. However, in contrast to the other schools, the drinking of other alcoholic beverages other than wine is only punishable if one becomes drunk.\textsuperscript{1081} With regard to the difference between the mere drinking of alcoholic beverages and being drunk by them, Abū Ḥanifa is of the opinion that a punishable state of drunkenness occurs when the drinker has reached a state disabling him „to distinguish a man from a woman and the sky from the earth“.\textsuperscript{1082} In other words merely being tipsy would not qualify the drinker for a ḥadd-penalty, a delirium or a state of complete intoxication would.

According to the fuqahāʾ in order to be punished the drinker of wine and/or intoxicants must be sane (ʿaqil) and adult (bālīgh), the insane and the minor, like in the rest of ICL, are not held criminally responsible. Thirdly, the culprit must be a Muslim according to the great majority of jurists. The dhimmī and the mustaʿmin will not be punished as long as he does not cause any public nuisance since alcohol consumption is not punishable in Christianity or Judaism (mubāḥ ʿand ahl al-dhimma).\textsuperscript{1083} Public nuisance caused by the dhimmī or the mustaʿmin in a state of intoxication can only lead to a taʿzīr-punishment, not to the ḥadd. The drinking must be voluntary, drinking under duress or out of necessity (darūra) does also not entail the ḥadd. Finally, in order to be punished by a ḥadd-punishment the culprit’s criminal intention (qaṣd jināʿ) has to be established. Thus, who does not know that he is drinking wine or who does

\textsuperscript{1079} E.g. sakar, sukāra, rahīq, khamr etc. See Karic (2002), p. 556.
\textsuperscript{1080} Karic (2002), pp. 556-557.
\textsuperscript{1081} Peters (2005), p. 64; Baradie (1983), p. 122.
\textsuperscript{1082} Bahnasi, jarāʾīm, p. 187.
\textsuperscript{1083} Bahnasi, jarāʾīm, pp. 189-190.
not know that the drinking of wine or the getting drunk on other alcoholic beverages is forbidden in the *sharī‘a* is not subject to the *ḥadd*. The same holds true for who drinks while being unaware that he is in fact drinking an intoxicating liquid.\(^{1084}\)

4.3.3  **Definition of alcohol consumption in the criminal codes of 1983, 1988 and 1991**

The PC83 defines the meaning of *khamr* to be any drink intoxicating when drunk in larger (or smaller) quantities (*kull sharāb yuskir kathāruhu*).\(^{1085}\) In other words the quantity consumed does not make a difference as long as the consumed liquid is of an intoxicating nature.\(^{1086}\) In comparison, the Criminal Bill 1988 and the Criminal Act 1991 is much more precise. It gives, in accordance with the majority opinion, the definition of *khamr* as „any intoxicant intoxicating in small or large quantities, in pure or mixed form.“\(^{1087}\) The 1991 definition for “*khamr*” has thus reformulated the 1983 definition by including also drinks mixed of wine/alcoholic and non-alcoholic beverages. This precision is important since the *fuqahā‘* discuss the applicability of the *ḥadd* in such cases. A majority opinion thus holds that no *ḥadd*-penalty applies if the mixture contains more water than wine. If the mixture contains more wine or if wine and water are contained in equal parts the *ḥadd* applies.\(^{1088}\)

4.3.4  **Punishment of alcohol consumption in the criminal codes of 1983, 1988 and 1991**

The Penal Code 1974 knew the two offenses of drunkenness in a public place punishable with a maximum prison term of seven days or a fine\(^{1089}\) and drunkenness in a private place and failing to leave such place upon request, punishable with a maximum prison term of one month or a fine.\(^{1090}\) The recidivist of one of these two offenses who had been convicted twice previously faced a prison term of a maximum of three month.\(^{1091}\)

The Islamized Penal Code 1983, in contrast, increased the number of articles related to alcohol from three to seven, introducing lashing as a standard penalty, often in combination with a prison term and a fine. It also introduced for the first time a – not very stringent -

\(^{1084}\) Bahnasā‘, *jarā‘īm*, p. 191.

\(^{1085}\) Art. 445, PC83. The text of the article refers to a *ḥadīth* saying: *kull mā yuskir kathāruhu faqalīluhu ḥarām*.

\(^{1086}\) For punishments for alcohol consumption in practice see Layish/Warburg (2002), pp. 233-235.

\(^{1087}\) Art. 3, CA91.

\(^{1088}\) Bahnasā‘, *jarā‘īm*, pp.183-184. It is unclear whether the usage of *khamr* in this context includes stronger drinks such as whiskey, wodka and the like. Bahnasā‘ also discusses the use of alcohol when cooking or baking or through injections. In the latter case, no ḥadd applies because the alcohol has not been drunk or eaten.
distinction between Muslim and non-Muslim offenders. Thus, under the PC 1983 alcohol consumption by a Muslim (only) was, and still is, under the CA91, punishable with 40 lashes. The punishment follows the majority opinion in the Shafi’ite and Hanbalite schools. Both codes have thus – since Hanafites and Malikites allot 80 lashes - chosen the milder option.

In its effort to streamline and condense the PC83, its successor 1991 has reduced the number of articles dealing with alcohol to three, the first of which not only makes the drinking of alcohol but also the possession and manufacturing of it by a Muslim punishable with 40 lashes. Possession and manufacturing of intoxicants do not fall, however, under the hadd-punishment according to the fiqh, even though buying, selling and presenting it is considered haram and can be punished with a ta’zir-punishment.

In the 1983 code the dealing with alcohol, i.e. producing, selling, buying and transporting it was punishable with lashing, a fine or a prison term for Muslims and non-Muslims alike.

A glance at the pertinent provisions on lashing shows that the number of strokes can range between 25 and 100. In other words, a Christian dealing with alcohol could have received a higher number of lashings than a Muslim for drinking alcohol. According to the majority opinion a ta’zir-penalty, as in this case designated for the non-Muslim culprit, must not be harsher than the hadd-penalty for a comparable crime. The definition of “prison term” is even less precise and basically gives the judge the latitude to decide a term as long as he sees fit.

Most probably due to the highly symbolic meaning the banning of alcohol consumption has among the Islamist forces in and outside the government, the legislator has not made use of possibilities – e.g. by way of takhayyur or tal’iq – to restrict the applicability of the hadd-

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1089 Penal Code 1974, art. 443.
1090 Penal Code 1974, art. 444.
1092 PC83, art. 443 (1).
1094 Baradie (1983), pp.22. See also Peters (2005), p. 64.
1095 CA91, art.78 (1).
1097 PC83, art. 449.
1098 PC83, art. 64 (7).
1099 The reason for the harsher punishment is that it is expected that the Christian abets Muslims to drink alcohol.
1100 For an account of convictions for alcohol consumption under Numayrī, see Layish/Warburg (2002), p.233-235.
punishment for alcohol consumption.\textsuperscript{1101} Further, in addition to the \textit{hadd}-offense, art. 78 (2) CA91 provides for “imprisonment for a term not exceeding one month or with whipping “not exceeding 40 lashes” or a fine for whoever drinks alcohol and “thereby provokes the feelings of others or causes annoyance or nuisance thereto or drinks the same in a public place or comes to such a place in a state of drunkenness”. As mentioned above the \textit{fiqh} is not interested in non-Muslims drinking alcohol, unless they cause a public nuisance.\textsuperscript{1102} The CA91 however leaves room for the punishment of the drinking of non-Muslims beyond cases of public nuisance. It does not explicitly allow the drinking of alcohol by non-Muslims in private places, thus the provocation of feelings of others could take place in a private gathering of Muslims and non-Muslims. Further, lacking a precise definition in article 3\textsuperscript{1103}, it remains unclear when a place has to be considered public. Finally, the text of the provision allows for up to 40 lashes even for non-Muslims. In combination with the imprecise wording of the text, the legislator has in fact left enough leeway for judges to impose de facto the \textit{hadd}-punishment for \textit{shurb al-khamr} on non-Muslims. Since 78 (2) allows that to the 40 lashes a fine may be added, a non-Muslim could even be punished harder than a Muslim who receives the \textit{hadd}-punishment only. As for Muslims, article 78 (2) represents a qualified \textit{hadd}-offense\textsuperscript{1104}, which entails the imposition of up to 40 lashes, i.e. a number of lashes equaling the \textit{hadd}-penalty, possibly, in combination with a fine. In other words, the qualified \textit{hadd}-offence can be punished even harsher than the original \textit{hadd}-offence. The PC83 (art. 444) distinguished for the same offence between Muslims and non-Muslims. While the former were punished with 40 lashes and prison, the latter had to expect whipping and a fine or imprisonment. A highly practical meaning has further article 79, CA91, punishing, “whoever deals in alcohol by storing, sale, purchase, or transport...with a prison term not exceeding one year or with a fine”. The same offence in a slightly different wording was punished by the PC1983 by whipping, fine and imprisonment (art.449) without further specification. If any of the offences described above and punishable under the Criminal Act 1991 is committed for the third time, punishment is harsh. Muslims who are caught drunk for the third time (art. 78 (1), Muslims

\textsuperscript{1101} The wide applicability of alcohol-related offences is, however, contrasted by the milder punishment of 40 lashes instead of 80.

\textsuperscript{1102} Baradie (1983), p. 122. “Persons, who do not belong to the Muslim religion...can not be held responsible for an infraction of the ban on drinking (alcohol)”, Kresmárík (1905), p. 324.

\textsuperscript{1103} Article 3, CA91 explains the most important definitions and meanings of terms used in the Criminal Act.
and non-Muslims alike who create a nuisance in public places while being drunk for a third time (78 (2) or are convicted for dealing in alcohol for a third time (art. 79) receive a prison term of up to three years and/or 80 lashes and “the means of transport and tools used in the commission of such offence shall be forfeited...” (art. 81, CA91). The latter provision gave reason to a Supreme Court judgment correcting an earlier decision by a Court of Prices and Public Order (maḥkama al-asʿār wa al-nizām al-ʿāmm). The court had sentenced a woman, who had been dealing in alcohol to a one year prison term, a fine of 10,000 Sudanese Pounds and to the confiscation of her house under article 81 of the Criminal Act 1991. The Supreme Court confirmed the prison term and the fine. The confiscation of the house, however, was annulled, not only because the woman had been convicted only twice and not three times as stated under art. 81, but because a house is an unmovable good and thus not covered by the definitions of article 81. The terms used there are “means of transport” (wasāʾil al-naql) and “tools used in the commission of the crime” (al-adawāt al-mustakhdama fī irtikāb al-jarīmā). The meaning of tools thus, according to this judgment, does not include real estate used for the storage of alcohol or used in any other way for selling alcohol.\footnote{1105}

4.3.5 Lapsing of the ḥadd-penalty for alcohol consumption

The Criminal Circular 92/8\footnote{1106} defines the cases leading to the lapsing of the ḥadd-penalty for alcohol consumption: the withdrawal of the confession when the crime has been proven by confession only (and not, e.g. by circumstantial evidence). Secondly, the withdrawal of the testimony by the witnesses, provided there is no proof confirming this testimony. Thirdly, when the witnesses differ in their testimony. However, the circular specifies that the lapsing of the ḥadd does not mean that the culprit goes unpunished. He is rather subject to a taʾzīr-punishment.

\footnote{1104} Scholz (2000), p. 455.  
\footnote{1107} These are also applicable with regard to other ḥadd-crimes. For a detailed account of reasons which make a ḥadd-crime lapse see the respective chapters.
4.3.6 Conclusion

On the legislative level the Sudanese legislator has, in 1983 and 1991 alike, banned all alcoholic and other (potentially) intoxicating beverages, including wine, in whatever quantity and regardless of whether they are causing intoxication or not.

Concerning proof the requirements for witnesses, as prescribed by the fiqh, are substantially lowered in the relevant Evidence Acts 1983 and 1993. Both codes allow for female and non-Muslim witnesses and are thus in contradiction with Islamic jurisprudence.

Both codes also blur the distinction between the relevant hadd-punishment and a ta’zir-punishment applicable either for related crimes or to non-Muslim offenders. Thus the 1983 code punished the producing, selling, buying and transporting of alcohol with lashing, a fine or a prison term. Since the judge had the latitude to chose any number of lashes between 25 and 100, a non-Muslim offender could, instead of receiving a lower ta’zir-punishment, be subjected to twice as many lashes as the Muslim convicted for alcohol consumption. In 1991 this contradiction remains. A non-Muslim who causes public nuisance or provokes the feelings of others shall receive also a maximum number of 40 lashes, i.e. the exact number applied to Muslim offenders subject to the hadd. In the case of the recidivist this disproportion is even accentuated. He will be punished with a prison term of up to three years and/or up to 80 lashes.

Given the strong attitude of the Sudanese government against alcohol consumption and dealings in the great majority of cases connected to these crimes is dealt with swiftly by Public Order Courts applying the pertinent articles of the Criminal Act. Since convictions to lashing for alcohol-related offences are executed immediately an appeal in most cases makes little sense. This situation is also reflected in the scarcity of Supreme Court decisions on this matter. A few decisions, however, have delineated some of the pertinent questions related to alcohol consumption. Thus, the Supreme Court has decided that the mere fact that a witness has drunk alcohol does not disqualify him as a witness or, for that matter, destroys his good reputation - ‘adāla – which is a precondition for giving testimony in hadd- and qışāș-cases. According to the same judgment, the ‘adāla is only forfeited if the witness is a habitual drinker known to the community or publicly laughed at for his drinking. The court’s leniency with regard to the alcohol consuming witness here served in proving a case of intentional homicide and convicting the murderer. Since the heirs of the victim had insisted on their right to qışāș the court weighed the protection of the rights of the heirs, a haqq adami, higher than a
possible legal uncertainty (*shubha*). The latter could have been invoked in order to invalidate the testimony.

Another Supreme Court decision clarified that the punishment for the recidivist dealer in alcohol is limited – next to prison, lashing and fine – to the confiscation of the means of transporting the alcohol and the tools used in the perpetration of the crime. The dispossession of the house of the culprit is thus not covered by the law.

Finally, the Supreme Court ruled, that the passing of several days between the actual happening of the crime and the initiation of legal procedures makes the *hadd*-punishment lapse. Following the legal opinion of Abū Ḥanīfah, the SC ruled that it is a precondition for the validity of the testimony that the smell of alcohol is still discernible at the time of the testimony and that with the disappearance of the smell limitation (*taqādum*) takes effect. With this judgment the Supreme Court secures a swift persecution of cases related to alcohol consumption. It forestalls at the same time the possibility of retroactively filing charges with regard to the most frequent *hadd*-crime, alcohol consumption.

### 4.4. *Hadd*-theft (*sariqa ḥaddīyya*)

#### 4.4.1 Definition of *hadd*-theft in the fiqh

Muslim jurists included *sariqa ḥaddīyya* or *hadd*-theft into the small group of *ḥudūd* based on the Qur’ānic verse 5,38 – “as for the thief, whether male or female, for each, cut off the hands in punishment for what they did, as an exemplary punishment from God”. Since the Qur’ān does not specify which hand is to be cut, neither what happens to the recidivist nor any other legal rule pertaining to *hadd*-theft, the elaboration of the details was undertaken by Muslim jurisprudence. In consequence, the uncertain meaning of *sariqa* in the Qur’ān and *ḥadīth* led to numerous controversial opinions amongst the *fuqahā*.

The *fuqahā* define *sariqa ḥaddīyya* as the surreptitious removal of legally recognized property (*māl*) in the safe keeping (*ḥirz*) of another person of a definite minimum (*niṣāb*) to which the thief has no right of ownership and which has not been entrusted to him. The offender has to be adult (*bāligh*) and sane (*ʿaqil*) and must have the intention of stealing, i.e.

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1109 A list of *ḥadīths* concerning *sariqa* can be found in Bahnasī, mausū’a, Vol.3, p. 264 et sqq.
1110 This definition tries to reflect all important elements of the different definitions given by the *fuqahā*. Compare Baradie (1983), p. 109.
he is not acting under duress. All of these elements have to be fulfilled in order to make the hadd-punishment amputation (qatʿ) applicable. We shall therefore explain in some detail the meaning of the different elements of the definition of sariqa. What exactly is thus the meaning of legally recognized property (māḥ)? The property must be capable of being owned, moveable (manqūl), valuable (mutaqawwam) and protected (maʾṣūm). Anything forbidden in Islam such as pigs or alcohol cannot be owned by Muslims and can therefore not lead to the Qur’anic punishment for sariqa. Only movable property that can be legally owned can thus be the object of sariqa. The fiqhçı́ agree that the stolen good has to be physically moved from the possession of the aggrieved party into the possession of the perpetrator. Land and buildings are non-moveable and can therefore not be stolen in the sense of the definition of sariqa. Something is considered valuable if it is storable and reaches the minimum value – niṣāb - of 10 Dirham (equivalent to the value of 4.25 gr. of gold) according to a majority opinion. Five groups of things are controversial among the fiqhçı́ as to whether their stealing constitutes sariqa: 1. The stealing of perishable foodstuffs such as fresh meat, fruits or milk does not lead to amputation according to a majority opinion backed by Abū Yūsuf, Mālik and Shāfiʿi, but not the Ḥanbalites. 2. Things and animals which are ownerless (mubāḥ) such as wood, grass, fish, birds, including ducks and pigeons. Nevertheless, fiqhçı́ differ here. Even though they generally agree to this rule they hold that if such animals have been stolen from a ħirz, a legal uncertainty can not be invoked and thus amputation is due. 3. Things whose consumption or use are forbidden in Islam such as pigs or wine or animals not slaughtered in accordance with the ritual requirements of Islam or musical instruments which are considered instruments of sin (ʿala lil-maʾṣūm). 4. Children and slaves. The free youth can not be owned and therefore is not possibly an object of sariqa, even if he wears a piece of jewelry (which is stolen with him). Abū Yūsuf advocates amputation if the

valuables carried by the youth reach the *niṣāb*. The stealing of the under-age slave, however, entails amputation, except in the opinion of Abū Yūṣuf, because a slave is an ownable good (*māl mutagawwam*). 5. copies of the Qur’an, candles from a mosque or their doors and the like. Especially the stealing of copies of the Qur’an has been discussed by the *fiqahā’* in some detail. Some - among them Abū Ḥanīfah - argue that the Qur’an contains the word of God for which a financial compensation is not permissible (*lā yajūzu akhdh al-‘iwaḍ ‘anhu*). Mālik and Shāfi’ī advocate the necessity of amputation because they consider copies of the Qur’an an ownable good. Inviolable and protected (*ma’sūm*) is the property of Muslims, *dhimmīs* and *musta‘mins*, but not the property of the *ḥarbīs*.

The stolen property must further belong entirely to someone else (*mamlūk lilghair*), i.e. it must be neither ownerless nor should the thief be the sole owner or co-owner of the property in question. Important with regard to our discussion of modern Sudanese law the category of co-ownership includes public property or things to which the thief holds a title. This is based on the assumption that stealing public property constitutes a legal uncertainty with respect to the ownership (*shubha al-milk*). The Ḥanafites and the Shāfi’ites adhere to this opinion while the Mālikites hold that amputation is obligatory, even if the stolen good is public property.

Further, the stolen property must have been taken from a safe place where the specific good is customarily kept (*ḥirz*). A *ḥirz* can either be constituted by a place – then called *ḥirz bil-makān* or through the surveillance of a guardian, called *ḥirz bil-ḥāfīz*. In the former case the property in question is kept in a closed room which can only be entered by authorized persons. The room must be suitable to protect the valuables against theft such as a house or a stable. However, the protection – *ḥirz* - can only be established if the good is kept in a suitable place. The *ḥirz* for cattle can be in the barn but not in a house and, conversely, money hidden in the stable is not considered to be in a *ḥirz*. *Ḥirz* is neither constituted when the front door of the house is open or when guests are allowed into the house where the valuables are kept.

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1117 Compare Awad (2001), vol.2, pp.552. While Schacht (1964) and Baradie (1983) for the sake of conciseness refer to a majority opinion in their discussion of the ownability of goods, Bahnaši and Awda dig deeper. See also Bahnaši, mausū’a, vol.3, pp. 278-279 and Bahnaši, al-jarā’īn fī al-fiqh al-islāmī, pp. 36-43.
1118 Compare also 4.4.7.
A case quoted by the Sudan Supreme Court judge and prolific commentator on ICL Ḥassūna illustrates this point. A Sudanese court convicted two defendants for non-ḥadd theft because the object of the theft was a camel that had been attached outside a house, but in a corral intended to keep the camel. The court, however, decided that the front side of a house can not be considered a ḥirz, even if the stolen good (i.e. the camel) was inside a corral intended for it as a ḥirz.\textsuperscript{1120}

The theft of money by guests would be considered khiyāna (embezzlement)\textsuperscript{1121} but would not qualify as ḥadd-theft. As mentioned, ḥirz can be constituted when a guardian protects the property against theft (ḥirz bil-ḥāfiz). In that case the guardian must either be awake or physically touching the property in a way that he would wake up if the good is taken from him.

Finally, another important criteria in order to constitute sariqa ḥaddiyya is that the property has to be stolen surreptitiously. If it is taken openly the thief is called a ghāṣib, usurper; if it is taken by force the act shall be deemed nahb, robbery and the thief is a muntahib, a robber, but he is not guilty of ḥadd-theft.\textsuperscript{1122}

\textit{Proof of ḥadd-theft in the fiqh}

In the fiqh, ḥadd-theft is proven either by a confession of the culprit or by the testimony of witnesses.\textsuperscript{1123} It is controversial whether a single confession is sufficient for a condemnation for sariqa or whether the confession has to be made twice. Abū Ḥanīfah and Shāfīʾi are content with a single confession, while Abū Yūsuf and the Ḥanbalites preclude an amputation unless the culprit has confessed twice in two different sessions.\textsuperscript{1124} If the confession is withdrawn before the actual execution of the amputation, the punishment lapses (see details below).

For the testimony to be counted two men of good reputation have to testify. Not accepted are the testimony of women, the testimony of those not meeting the legal requirements of righteousness or the testimony on the testimony (shahāda ʿalā al-shahāda). The qaḍī has to show great caution and must ask the witnesses about the details of the ḥadd-theft with regard to place, time and circumstances in order to avoid mistakes. This is especially important since

\textsuperscript{1123} For the following see, Bahnasī, al-jarāʾ im fī al-fiqh al-islāmī, pp. 75-80.
\textsuperscript{1124} Compare Bahnasī, al-jarāʾ im fī al-fiqh al-islāmī, p. 76.
the punishment is severe. The qadi is bound to pay special attention to who the victim of the theft is (al-masrāq minhi) and whether it is a foreigner or a relative or a spouse. Any doubt concerning the nature of the victim should be eliminated. All schools agree that amputation can not take place if the witnesses disagree either on the place, the time, the stolen good or the victim.

As to circumstantial evidence in ḥadd-theft cases, it is not admitted by the fiqh or by Sudanese jurisdiction as proof of sariqa ḥaddiyya.

**Punishment of ḥadd-theft in the fiqh**

The punishment the fiqh devise for the first commitment of ḥadd-theft is the cutting of the right hand. The punishments for recidivists are severe: the severing of the left foot for the second sariqa ḥaddiyya. As to the third repetition, Ḥanafites and Ḥanbalites allow for imprisonment, while Shāfiʿites and Mālikites envisage the amputation of the left hand for the third ḥadd-theft and the remaining right foot for the fourth theft.1126

The victim of the theft has the right to the restitution of the stolen good and the thief is obliged to return it. If the stolen good has vanished the thief has to indemnify the victim of the theft.1127 However, opinions differ as to whether indemnification is due if the ḥadd-penalty is executed. The Ḥanafites opine in such case that the financial compensation (ḍamān) lapses.

**Legal uncertainties and the lapsing of the punishment for ḥadd-theft in the fiqh**

Once all conditions for the execution of the ḥadd-penalty are fulfilled it must be executed. However, under certain circumstances the ḥadd-punishment will lapse. According to the Ḥanafites this is the case when the victim of the theft denies either the correctness of the confession of the thief or the correctness of the testimony of the witnesses. It does not matter whether the denial of the correctness of the confession or the testimony happens at the beginning or after the lawsuit and the claim of sariqa. Mālik does not see here a reason for the lapsing of the punishment as long it is firmly established that the purpose of the denial is to help the culprit (al-takdhīb qaṣd bihi musāʿada al-jānī) and the denial does not concur with reality. Shāfiʿī and Aḥmad ibn Ḥanbal are of the same opinion as long as the denial takes

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1125 Compare the exeptions of proof of shurb al-khamr and zinā.
place after the legal proceedings (ba’d al-mukhāṣama). If it takes place before the proceedings and the claim of hadd-theft, amputation is not obligatory.

A pardon of the victim of the theft makes the hadd lapse only if happening before the case has been reported to the authorities.\textsuperscript{1128} Being a hadd-crime hadd-theft is not a private matter and has to be prosecuted once it has been made known to those responsible for its prosecution. According to the Sunni schools the pardon does not have to be given by all the victims of the theft, it is enough if one of the victims pardons the culprit for the pardon to be effective.\textsuperscript{1129}

The hadd also lapses according to a majority opinion of the schools – with the exception of a minority of the Shāfiʿīs - if the proof is based on a confession only and this confession is withdrawn either explicitly or implicitly. If the hadd-theft has been committed by two persons and only one of them withdraws his confession, only his hadd lapses according to Mālik, Shāfiʿī and Aḥmad ibn Ḥanbal. Abu Ḥanifa, however, holds that the withdrawal of the confession of one of the culprits creates a legal uncertainty on the crime as such and therefore advocates the lapsing of the hadd on both suspects. Likewise, if only one of the two confesses sariqa is not proven.\textsuperscript{1130}

Further, according to the Ḥanafites, the hadd lapses if the thief returns the stolen good before the legal procedure begins (qabl al-murāfaʿa) because the existence of a lawsuit is a precondition for the appearance of the crime of hadd-theft (zuhūr al-sariqa). Thus the return of the stolen goods before the beginning of the procedures invalidates the lawsuit. Abu Yūsuf, in contrast, holds that the return of the stolen goods before or after the legal procedure does not change the fact that sariqa entailing amputation has occurred. As to other three Sunni schools, Mālik, Shāfiʿī and Aḥmad ibn Ḥanbal do not consider the return of the stolen good a reason for the non-application of the hadd. Mālik, as shown below, does not give much room to the lawsuit in his deliberations and for Shāfiʿī and Aḥmad ibn Ḥanbal the lawsuit is a precondition for a judgment and not for the amputation.\textsuperscript{1131}

The Ḥanafites, with the exception of Abū Yūsuf, further hold that if the thief legally acquires the stolen good (tamalluk al-masrūq) before the trial the amputation lapses and if he acquires the stolen good after the judgment and before the execution of the punishment the hadd also

\textsuperscript{1128} Peters (2005), p. 57.
\textsuperscript{1129} `Awda (2001), Vol.2, p. 630. The Zaidites hold that the hadd-punishment has to be executed if only part of the victims of hadd-theft pardon the thief.
\textsuperscript{1130} `Awda (2001), Vol.2, pp. 630-631.
lapses. The Shāfiʿites and the Ḥanbalites, in contrast, hold that the punishment lapses only if
the defendant – who in effect in this case is not a thief – has legally acquired the “stolen”
good before the complaint (qabl al-shakwā). If the defendant acquires the good in question
only after the complaint of theft has been made, the punishment does not lapse. Mālik only
considers the time when the ḥadd-theft has been committed (not the time of the complaint,
lawsuit or judgment). If the good in question has not been the property of the thief he will be
subject to amputation.  

Moreover, the fiqh knows a range of cases when the ḥadd-punishment for ḥadd-theft lapses.
Their primary occupation is with cases of various degrees of (blood) relationship. There are
three opinions on the consequences of sariqa between spouses. The first opinion holds that the
sāriq is to be amputated. The second opinion deems that none of the two spouses is to be
punished because the wife has a right to alimony, while the husband is entitled to prohibit her
free movement which is considered to be a shubha according to some fiqahāʾ. Finally, some
opine that the husband is liable to ḥadd when having stolen from his wife, but not the wife
when she has stolen from her husband, because she has the right to alimony and he has not.  Ḥadd-theft between ascendants and descendants is equally controversial. The
Ḥanafites hold that who steals from his parents or from his child will not be subject to the
ḥadd for ḥadd-theft because of a legal uncertainty concerning property between them and
their mutual right to enter a place where valuables are safely kept (dukhūl al-ḥirz). Mālik
however is of the opinion that a father who steals from his son will not be liable to the ḥadd-
penalty based on the ḥadīth “you and your property belong to your father (anta wa mālak
liʿabīka)”. A son, however, does not have any right in the property of his father and therefore
will be punished with the ḥadd.  Ḥadd-theft between close relatives (mahārim). Mālik, Shāfīʿ and the Ḥanbalites hold that there is no legal uncertainty
pertaining to property and therefore they deem amputation obligatory. Abū Ḥanīfa and Abū
Yūsuf are of the opinion that theft between close relatives cannot be punished by amputation
since they have the right to enter their respective houses thus creating a legal uncertainty as to
ḥirz.  Another case discussed in the fiqh is the stealing of the dhimmī or the ḥarīf. Muslim
and dhimmī alike receive the ḥadd for sariqa for stealing from either a Muslim or a dhimmī

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according Shafi’i and the unanimous opinion of the other schools. The same holds true for the ḥarbī who enters Islamic territory as a mustā’min. Abū Ḥanifa, however, holds that ḥadd-punishment for sariqa is not applicable to the ḥarbī in analogy with the non-applicability of the ḥadd for zinā in such case.\footnote{Bahnasī, al-jarā’im fī al-fiqh al-islāmī, p. 57.}

4.4.2 The introduction of ḥadd-theft (sariqa ḥaddiyya) in the Penal Code 1983

A codification of sariqa ḥaddiyya, like all other qur’anic punishments, has first been introduced in the Sudan by the Penal Code 1983. The codification of theft in article 320, however, was not entirely new, since it almost\footnote{Bahnasī, al-jarā’im fī al-fiqh al-islāmī, p. 58.} literally adopted the definition of theft of its predecessor code but added two more clauses\footnote{New in the definition is only the notion of sū’ qāṣd – evil intent.} defining sariqa ḥaddiyya and the minimum value (nisāb) respectively. The new definition of ḥadd-theft (sariqa ḥaddiyya) was worded as follows: “Whoever, with evil intent, takes from the possession of a person, without his consent, movable, valuable property, belonging to someone else, with a value not less than the nisāb is considered to commit ḥadd-theft.”\footnote{Articles 320 (2) and (3).}

With regard to the notion “belonging to someone else” (mamlūkan lilghair) Ḥassūna quotes a court decision from 1990. In this case it was proven that the defendant had entered the house of the plaintiff without her permission when committing the theft. However, at other times the defendant was present in the house of the plaintiff, also in her absence but with her permission. At such an occasion he had entered the room of the plaintiff because it was open. The court therefore was of the opinion that the house was not to be considered a hirz because the defendant was in general allowed to enter it and in consequence “he became like someone who lived in the house” (aṣbaḥa ka’ahl al-dār). Therefore the ḥadd was deemed not applicable and he was punished with the taʿzīr-punishment for non-ḥadd theft.\footnote{Íassūna (2001), pp. 310 quoting alif sin şe/141/1991 Trial İbrāhîm Mūsā al-Ḥiwâr.}

While the nisāb, defined as a quarter gold dinar or three silver dirhams or its equivalent in Sudanese currency\footnote{Art. 320 (3).} clearly is based on the opinions of Shafi’i and Mālik,\footnote{Hassūna (2001), pp. 310 quoting alif sin ḥa/141/1991 Trial İbrāhîm Mūsā al-Ḥiwâr.} the definition of sariqa ḥaddiyya and subsequent articles extending the scope of its application, pose a variety of problems with regard to their being based on the fiqh. Conspicuously, the definition
of sariqa PC83 ignored essential features of sariqa as agreed upon by the fiqahā’. Most notably the notions of hirz and the exigency of surreptitiousness were missing.\textsuperscript{1143} In consequence, the applicability of sariqa ḥaddiyya was initially broadened to a degree that can not claim faithfulness to the teachings of the fiqahā’, if not outright contradicting their intentions. Only the case law of the Appeal and Supreme Courts would fill this gap and subsequently define hirz and thus give guidance to the lower courts.

Thus, instead of adhering to a clearly defined set of instruments, meant to delineate and limit its application, the Sudanese legislator 1983 stripped the classical definition of sariqa ḥaddiyya of some of its vital prescriptions. In consequence, the lack of hirz as a precondition meant that thefts outside houses, barns or other safe places where movable property normally is kept now fell under the definition of sariqa. Further, thefts which according to the fiqh would qualify as ghasb / usurpation, ikhtilās / snatching something without the owner noticing, khīyāna / embezzlement or nahb / robbery, i.e. the taking of property in the open or with force, could also qualify as sariqa ḥaddiya. In the fiqh these crimes are not punished with ḥadd-penalties.\textsuperscript{1144}

In fact, a comparison of the old, translated, definition of theft / non-ḥadd sariqa and the new, added one of sariqa ḥaddiyya do not show many differences. Only two notions, niṣāb and ownable, have been added to the definition taken over from the PC74. However, while the niṣāb is defined, the notion of ownable is not. It remained thus unclear which legal opinion the Sudanese legislator meant to adhere to and which kinds of stolen property would fall or not fall under sariqa. The interpretation of article 320 is further made difficult by the fact that all illustrations of the 1974 code have been omitted.\textsuperscript{1145} In contrast, five explanations have simply been translated to Arabic, however without giving any hint to whether these explanations were referring to the old definition of sariqa or to sariqa ḥaddiya or possibly both. After having distinguished between theft and ḥadd-theft in article 320, article 324 introduces amputation as a punishment for (regular) theft in conjunction with preparations made for causing death or hurt. As in other instances\textsuperscript{1146} the PC83 extends the applicability of

\begin{footnotesize}
\textsuperscript{1142} Compare preceding section.
\textsuperscript{1143} Köndgen (1992), p. 113.
\textsuperscript{1144} Compare also Layish (2002), p. 119.
\textsuperscript{1145} Based on English legislative style the old PC74 in many instances illustrated the meaning of an article by giving model cases thus helping the judge in his interpretation and jurisdiction. Its successor codes have omitted these illustrations, thus forgoing an important instrument in guiding the judiciary.
\textsuperscript{1146} See e.g. chapters on hirāba and zinā and footnote 215.
\end{footnotesize}
*hadd*-punishments to crimes, which might have a remote resemblance with *sariqa ħaddiya* but do not qualify as such under the definitions proposed by the *fuqahā’*. In order to impose the *hadd*-penalty amputation for *hadd*-theft it is essential that *sariqa ħaddiya* has indeed been committed.\(^{1147}\) Thus, a whole range of crimes which are related to (but by definition different from) *sariqa ħaddiya* and *ḥirāba* and taken over almost literally with few additions or changes from the PC 1974 have in 1983 been complemented with a variety of *ḥadd*-punishments.

**Initiating legal proceedings**

It is important to note here that even if the thief confesses or the theft is proven by the testimony of witnesses, the *hadd*-penalty can only be imposed if the person whose property was stolen, i.e. the owner of the stolen good, institutes legal proceedings against the thief. The official lawsuit pursued by the victim of the theft is considered to be a precondition for the appearance of theft (*liżuhūr al-sariqa*) and for the execution of the *hadd*-penalty.\(^{1148}\) This principle is also maintained in Sudanese criminal law as the following two cases demonstrate:

In 1985 two thieves stole a considerable amount of clothing and a sum of 940 Sudanese Pounds from a house. The culprits, a certain al-Amīn Saʿīd Umm Dabaka and his accomplice Āmad ʿUthmān were quickly found and both confessed to the theft. The responsible local penal court convicted both of them for *hadd*-theft based on article 322 (2) – *hadd*-theft from residential premises – in conjunction with article 320 (2) – *hadd*-theft – PC83. In its review, however, the Supreme Court, remarked that even though the owner of the stolen goods had been firmly established to be a certain Buthaina Ḥajj ʿUthmān, she, being the aggrieved party, did neither attend the trial of the case at the Trial Court (*maḥkama al-maudūʿ*), nor did she file an action against the culprits. The Supreme Court, quoting a legal opinion held by Abū Ḥanīfa, therefore decided to revoke the decision of the lower court and return the file to the Trial Court in order to impose a *taʿzīr*-punishment according to article 322 (1) – non-*hadd* theft from residential premises.\(^{1149}\)

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\(^{1147}\) Compare also Köndgen (1992), p. 115.


\(^{1149}\) See SLJR (1985), Government of the Sudan vs. Al-Amīn Saʿīd Umm Dabaka.
In a comparable case the Supreme Court confirmed this reasoning: in 1990 the defendant Muhammad Bârûd Akul found the plaintiff sleeping on the ground in a parking lot.\textsuperscript{1150} He took advantage of the situation, ripped the pocket of his victim, stole 325 Sudanese pounds and fled. The following day, after missing his purse, the plaintiff informed the police, who, after finding evidence leading to the culprit, arrested Akul. Akul confessed to the theft. However, when the plaintiff did not appear at the trial, the court had to contend itself with the testimony of the two policemen who had been responsible with the investigation. It deemed the defendant, who had confessed, guilty of \textit{hadd}-theft and convicted him to amputation of the right hand. In its review the Supreme Court followed the Hanafites, the Shâfi’îtes and part of the Ḥanbalites who hold that the testimony of witnesses is not to be accepted if there is no lawsuit (\textit{khuṣūma}) and that there is no lawsuit if the aggrieved party who has the right to sue is not present during the legal proceedings. Consequentially, the \textit{hadd}-penalty of amputation lapsed and the Supreme Court applied article 321 (1) - referring to non-\textit{hadd} theft - convicted Akul to three and a half years in prison instead.\textsuperscript{1151}

\textit{The possibility of a private settlement (ṣulḥ)}

Further, the thief will not be amputated – if proven guilty – as long as the rightful owner of the stolen good does not demand his amputation before the judge and reclaims the restitution of the stolen property. This rule is the leading opinion among the Hanafites, the Shâfi’îtes and Ḥanbalites.\textsuperscript{1152} The Mâlikites do not make the claim of restitution and the initiation of a lawsuit by the owner a precondition for the amputation. What the effect of a private settlement (ṣulḥ) between the aggrieved party and the \textit{hadd}-thief is has not been solved originally by the Sudanese legislator. A decision of the Supreme Court, however, shows, that a private settlement does not exempt the culprit from punishment:

On November 20, 1987 the plaintiff Mîrghâni Aḥmad Maḥjûb reported to a police post that the defendant Burhân Silâṣî and others had stolen from him gold jewelry worth 90,000

\textsuperscript{1150} The Arabic reads: “...\textit{fī ārā’ī fī mawqūf \textit{arabāt}...}”\textsuperscript{1151} See SLJR (1990), Government of the Sudan vs. Muhammad Bârûd Akul. Conspicuously, the court chose not to discuss the question of whether the money was indeed stolen from a \textit{hirz}. The absence of \textit{hirz} could certainly have served as a second line of argument in defense of the lapsing of the \textit{hadd}.\textsuperscript{1152} Compare ’Awad (2001), vol.2, pp. 614-615 and Peters (2005), p. 57. ’Awad quotes a second opinion among the Ḥanbalites concurring with the Mâlikites. There is also a discussion among the \textit{fuqahā‘} on who can initiate the legal proceedings (\textit{man yamluk al-khuṣūma}). All schools agree that the rightful owner (\textit{mâlik al-mâl}) can do so. It is controversial, however, whether other persons having property in their custody on behalf of the rightful owner may start legal proceedings for \textit{sariqa haddiya}. See ’Awad (2001), vol.2, p. 614.
Sudanese Pounds. After the arrest of the accused it appeared that part of the gold had been sold to the second defendant Qarib Allah Bashir and the third defendant Sadiq Abd al-Karim Bashir Mustafa after the charges had already been filed. In a subsequent court hearing the defense lawyer argued that the plaintiff had given up his rights with respect to the second and third defendant. The responsible court, however, refused to acknowledge this settlement (ṣulḥ) on the grounds that the case touched upon public rights (ḥaqq ‘āmm) and that no private person was authorized to renounce such rights. After the case had been appealed the Supreme Court finally decided that in cases of sariqa and crimes related to it a private settlement is not permissible (lā yajūzu al-ṣulḥ fihā) because they are being considered crimes against the public order and the interests of the society. Such crimes, as well as crimes against the state, are exempted from settlement under the meaning of article 270, PC83. In all other crimes private settlement is permitted as long as it does not contradict the sharī‘a. In other words, such settlement, in cases of sariqa and related crimes does neither stop criminal proceedings nor a possible conviction. It must be noted here that according to criminal circular 98/1983 the ḥadd-penalty in ḥadd-theft cases only lapses if the thief has returned the stolen goods before charges have been filed. This concurs with the general rule in the fiqh that once a case has been made known to the authorities concerned and the aggrieved party has asked for the application of the ḥadd-punishment the victim of the theft cannot pardon the defendant.

Legal uncertainties and the lapsing of the ḥadd in the Penal Code 1983

The Penal Code 1983 foreclosed the ḥadd-penalty when the victim and offender are ascendants and descendants, close relatives whose marriage is precluded (maḥārim) or spouses. No ḥadd was to be promulgated either when there was doubt about the ownership of the stolen good (shubhat al-milk). However, the code left it to the judge to interpret what constitutes shubhat al-milk.

The short and deficient list of reasons to remit the ḥadd-penalty for ḥadd-theft, as given by the legislators of the Penal Code 1983, moved the Sudanese Chief Justice to supplement it and emit a criminal circular specifying more valid reasons in such case, based on various ḥadīth.

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1153 SLJR, 1989, Government of the Sudan vs. Burhān Qabr Silāṣī and others.
1154 This necessarily includes sariqa ḥaddiya.
The circular\textsuperscript{1157} added the following reasons for the remittance of the ġadd-penalty: 1. if the crime has been proven by a confession of the culprit only and he withdraws his confession. 2. if the witnesses withdraw their testimony. 3. if the victim of the theft denies the confession of the thief to having committed sariqa or he denies the testimonies of the witnesses. 4. if the stolen good comes into the possession of the thief either by way of gift (hiba) or inheritance or any other way that transfers the rights of possession (upon him). 5. if the thief returns the stolen good before the notification of the qāḍī (balāgh). 6. if the thief is forced to take the stolen good by necessity (darūra). 7. if the victim of the theft (al-masrūq minhi) pardons the thief before the notification of the qāḍī.

This criminal circular is important inasmuch as it clearly shows how criminal circulars are not only giving guidelines to the judges for the interpretation of the laws. The supplementary character of the criminal circular in question moreover demonstrates that criminal circulars are used as a quasi-legislative tool to correct the obvious flaws and omissions of the Penal Code 1983.

Two cases of necessity (darūra) entailing the remittance of the ġadd-penalty

With regard to the notion of necessity (darūra), two judgments of the Supreme Court define what can be assumed as constituting a state of necessity and what can not. In the first case\textsuperscript{1158} from 1984 the guest of a hostel in a village in Eastern Sudan had forgotten to take his trouser with 140 Sudanese Pounds in its pocket when checking out of the hostel. When he returned to the hostel the money had been taken. Subsequently the police arrested several suspects and found the money in the bag of one of them. The suspect admitted in a court session (fī majlis al-qāḍī) to having stolen the money and was sentenced by the province judge to a taʿzīr-punishment on the grounds that he had not eaten his breakfast that day and that he was unemployed without any source of income. The Supreme Court did not find the statements of the defendant convincing. After consulting various sources of the fiqh, it came to the conclusion that the state of necessity had not been convincingly proven, based on contradictions in the statements of the defendant. The documents submitted to the Supreme Court did also not clearly give sufficient information on the state of unemployment of the

\textsuperscript{1156} Compare art. 323, PC83.
defendant and when and whether he had eaten the day of the crime. The Supreme Court thus
decided to uphold the conviction as such, but to nullify the punishment. It ordered the
documents to be returned to the Province Court (maḥkama mudirīyya) in order to search for
further evidence, which possibly would establish a state of necessity beyond doubt.
The judgment seems problematic on account of the original conviction under article 322 (2)
that necessarily would have been amputation and not the prison term promulgated by the
lower court and upheld by the Court of Appeals. If the court decides that the ḥadd-punishment
amputation lapses due to one of the reasons given in the criminal circular 98/1983 – in this
case necessity (darūra) – then automatically the conditions for the ḥadd-crime have not been
fulfilled. In consequence another article such as e.g. article 322 (1) - non-ḥadd theft - should
have been applied.1159 Secondly, the question of whether taking money out of a trouser found
in a hostel constitutes the violation of ḥirz is not even discussed. The mere act of finding
money and taking it – in contrast to surreptitiously taking it with criminal intention from a
ḥirz - would not be regarded as fulfilling the conditions for ḥadd-theft by the majority of
Sunni schools. There is thus no need to search for reasons to have the ḥadd-punishment lapse
if the conditions for it are not met in the first place. Finally, with respect to the question of
necessity, the judgment or, rather the lack of a final judgment in our particular case, shows
that criminal circular 98/1983 is taken seriously by the Supreme Court. However, the
Supreme Court did not accept the mere claim of necessity as sufficient grounds for the
remittance of the ḥadd-punishment without further and convincing substantiation.
In a second case from 19851160 the Supreme Court once more dealt with the notion of
necessity (darūra) in a case of ḥadd-theft.1161 The details of this case are as follows: the
defendant, a certain Shuʿaibū Saʿīd Muḥammad hid in the shop of the plaintiff, i.e. the
shopkeeper, shortly before closing time. After the shop owner had left his shop the defendant
made a hole into the cash register (khazīna al-qurūsh) and took 4993 Sudanese Pounds. He
then waited until morning and sneaked off after the owner had reopened his shop, believing
that the defendant had entered after him. The defendant then concealed the stolen money in
his house where the police found it.

1159 Compare with other cases in this section where this rule has been applied.
1160 The case falls into the reign of the Transitional Military Council under Siwār al-Dhahab. Under al-Dhahab,
those convicted under the September Laws remained in prison. Ḥadd-penalties such as simple and cross-
amputations continued to be imposed but their execution was suspended. See Köndgen (1992), p. 61.
On the strength of the facts the Province Court of al-Qaḍārif convicted the thief under article 322 (2) – *hadd*-theft - to amputation of the right hand. The convicted, however, appealed and the case was referred to the Supreme Court via the Court of Appeals Kassala. The convicted justified his appeal on the grounds that he was a carpenter who owned a workshop and that the tools necessary to earn his livelihood had been stolen from him. In consequence of his ensuing plight he had had to divorce his wife because he was unable to provide for her. He further brought forward that he was responsible for five sisters and brothers still going to school and a father unable to move and therefore earn a living.

In its review the Supreme Court remarks that the defendant had not cited as evidence any of the above-mentioned arguments during the proceedings of the court of first instance, nor, in consequence, any proof of it. On the other hand the court of first instance had not inquired about any circumstances that would have made the *hadd*-penalty lapse. Article 170 of the Code of Criminal Procedure, giving the defendant the right and the opportunity to produce witnesses in his favor, had also not been applied. After reviewing the conditions proposed by the fuqahā’ with respect to the state of necessity and its impact on criminal responsibility and the ensuing penalty the Supreme Court comes to the conclusion that the defendant cannot convincingly assert his claim of necessity. Even if he could establish a state of necessity, the court argues, this would neither justify his deed nor lift the punishment on him. This because according to the *fiqh* the punishment is only removed in cases of theft of food or drinks and only if not more is stolen than what is necessary to satisfy the need. In other words, the Supreme Court deemed that all conditions for *sariqa ḥaddiyya* had been met.

Nevertheless, despite all conditions being fulfilled, the Supreme Court found a loophole to avoid amputation. Quoting ʿAbd al-Qādir ʿAwda it states that the thief who is not in a state of necessity (*ghair muḍṭarr*) will be punished with a *taʿẓīr*-punishment only in a year of famine. Thus, the thief will not be amputated on the condition that he does not find anything (i.e. food or drinks) to buy or that he does not find the necessary means to buy it with. In order to establish that the theft had been committed in a year of famine, the Supreme Court quotes the head of state during the time in question, Siwār al-Dhahab, president of the Transitional Military Council, who had announced in April 1985 that the Sudan was suffering from a famine. In consequence, the Supreme Court reasons, the famine at the time of the theft can be

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1161 See Government of the Sudan vs. Shaʿbū Saʿīd Muḥammad. SLJR (1986).
accepted to be common knowledge (‘ilm ‘āmm) and therefore judicial knowledge (‘ilm qāḏā‘) to a degree that no further proof was needed. Further, the court argues that the crime had happened six months after that announcement and that the state of Sudan had not, at the time of the revision by the SC, announced that the state of famine had indeed ended. In conclusion, the Supreme Court abolished the penalty of amputation and ordered the court of first instance to promulgate a tażūr-penalty after giving the defendant an opportunity to explain his specific circumstances further.

This surprisingly lenient judgment seems to be rather far-fetched with regard to its fiqh-based justification. While someone who steals food and/or drinks is held to limit his theft to what he needs to survive, the culprit in this particular case had stolen several thousand Sudanese Pounds. It can hardly be argued that he committed the theft to buy the edibles necessary to secure his physical survival. However, survival could be understood here in a different sense. The thief had told the court how his tools, necessary to make a living, had been stolen from him, how the absence of these tools were the root cause of his plight and how he had tried before to find the money to buy new tools. In other words, the fact that the culprit stole far more than he needed to buy food can only be justified if survival is understood as long-term survival through securing one’s livelihood. The Supreme Court does not go that far in its justification and keeps silent as to the rather high amount of money stolen. It should be noted here that this rather lenient judgment was taken under specific political circumstances. The introductory phase – September 1983 until the deposition of Numairi – had seen the bulk of all ḥadd-punishments ever promulgated in the Sudan. The frequency and its underlying political motivation had met with substantial criticism in the country. Thus, under the Transitionary Military Council the frequency of ḥadd-punishment already started to subside. It is thus not unlikely that the Supreme Court’s decision was influenced by the political atmosphere in the Sudan in the years 1985-1986.

Developing new reasons for the remittance of the ḥadd in Supreme Court case law

In another case1163 the Supreme Court decided to remit the ḥadd-penalty for ḥadd-theft and thus extended through its case law the list of reasons for remittance proposed in article 323 PC83 and in the criminal circular 98/1983. The facts of the case can be summarized as

follows: three young thieves, who had confessed to their crime in a court session, had climbed over the outer wall of the plaintiff’s shop, broken its inner door, smashed the strongbox and stole its content whose value exceeded by far the nisāb. Two of the defendants were 16 and 15 years of age respectively and thus deemed under age. Both were convicted under article 67, PC83, to detention in a reformatory for five years. The third defendant, however, was convicted to amputation of the right hand since he was considered to be of age. The court also ordered that the stolen goods had to be returned. After the third defendant had appealed his conviction it was medically established that he was 20 years old and not 17 as he had claimed before. In other words, it was not possible to deem him a minor and thus have the hadd-penalty lapse. However, in analogy to other similar cases a solution was found in the fiqh. While Mālik and Shāfi‘ī hold that in cases of joint hadd-theft the adult thief has to be amputated even though the minor is not, Abū Ḥanifā and Imam Zufar both are of the opinion that the hadd-penalty on the adult thief must lapse because it lapses on his under age fellow. Even though, the court reasons, it cannot decide which of the two different opinions is the legally sounder one, a legal uncertainty is established. On the base of this legal uncertainty and the well-known hadīth “avert the fixed penalties with legal uncertainties” the court decided to avert the hadd imposed on the third defendant by the court of first instance and to commute his sentence, under article 322 (1) to thirty lashes, a fine of thirty Sudanese Pounds and a prison term of two and a half months. Regarding the other two, minor, defendants the Supreme Court decided their immediate release since article 67 PC83 provides for a term in a reformatory for the minor recidivist only and both had been first-time thieves.

Punishment of hadd-theft in the Sudanese Penal Codes since 1983

The PC83 stipulates that whoever commits sariqa haddiyya is punished with amputation (qat’) without further specifying which limb is to be amputated, which side of the limb, nor what happens to someone who is convicted for the same crime a second or even a third time. Its successor codes become more specific. The draft Criminal Bill 1988 specifies that the hand from the joint is to be amputated and in the Criminal Act 1991 hadd-theft is punished with the

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1164 The Supreme Court decision does not give any further information on whether they had been undergone a medical examination as to physical signs of adulthood.
1165 See PC83, article 321.
amputation of the right hand.\textsuperscript{1166} Whoever is convicted for *sariqa ḥaddiyya* for a second time will receive a prison term of a minimum of seven years in both codes.\textsuperscript{1167} The CA91 has thus chosen to mitigate the severe consequences for the recidivist of ḥadd-theft as provided for in the *fiqh*. At the same time it has substantially improved on the rather imprecise wording of the predecessor code 1983. As mentioned art. 321 (1) had neither specified which limb was to be amputated\textsuperscript{1168}, nor had it formulated a provision to punish the recidivist. The judge thus had little choice but punishing each *sariqa ḥaddiyya* with amputation of a limb.\textsuperscript{1169} Both codes cannot, however, escape the inherent imbalance between the severe punishment of amputation for theft, if fulfilling the conditions of a ḥadd-crime, and – in comparison – the rather lenient punishments of other, related crimes. Extortion by death threat, for example, was punishable with a prison term of up to seven years according to the PC74.\textsuperscript{1170} This punishment was replaced by the ubiquitous formula “will be punished by flogging and fine and a prison term” in 1983. In the CA91, finally, the legislator has chosen to readopt a prison term of up to seven years, as in 1974, as a punishment for extortion by threat of death.\textsuperscript{1171}

Punishment of the accomplice

One of the problems pertaining to ḥadd-theft is the question to what degree the co-perpetrators of *sariqa ḥaddiyya* are guilty and punishable. The Penal Code 1983, being in most of its parts a faithful translation of its 1974 predecessor, stipulates in article 78: “When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone”. In other words, the general principle of the Penal Code 1983 is that little distinction is made as to those who committed the different elements of the act and their effect on the ensuing criminal liability. Such reasoning is not compatible with the *fiqh* with regard to ḥadd-theft. In the deliberations of the fuqahāʾ it is extremely important who has committed which act, precisely

\begin{itemize}
  \item \textsuperscript{1166} Art. 171 (1).
  \item \textsuperscript{1167} CA91, art.171(1) and (2).
  \item \textsuperscript{1168} The Qurʾān (5:38) leaves it open whether the right or the left hand is to be cut off. See also Heffening (1997), p. 62.
  \item \textsuperscript{1169} Scholz (2000), p. 450.
  \item \textsuperscript{1170} PC83, art. 329.
  \item \textsuperscript{1171} And possibly a fine. CA91, art. 176 (3).
\end{itemize}
because it has a decisive influence on the criminal liability of each culprit. A 1990 decision of the Supreme Court delineates the intricacies of this problem with regard to hadd-theft.\textsuperscript{1172}

In September 1986 a court in Atbara sentenced the defendant Khalafallah `Abd al-LaÔÐf `Abdallah to a prison term of five years and a fine of a thousand Sudanese pounds under article 322 (1) – theft from residential premises - in conjunction with article 458 (3), which allowed for a ta’zir-penalty, even without explicit text, in cases where the hadd had been averted by a legal uncertainty. In the same trial a second defendant, a certain Yüsuf `Abdallah Sâlim, was sentenced under article 322 (2) – hadd-theft from residential premises – to amputation of the right hand from the wrist. The case can be summarized as follows: in July 10, 1986, at night, both defendants had broken into the shop of the plaintiff by way of opening a whole in the shop’s roof through which the second defendant entered and left after stealing a certain amount of money and two packs of cigarettes. `Abdallah Sâlim was caught the same day and in his possession the amount of money in question and the cigarettes were found. He confessed to the theft as such and upheld his confession throughout all stages of the trial. In its review the Supreme Court judges considered the conviction under article 322 (2) of the second defendant to be incorrect. It reasoned that the committed crime rather fell under article 395 PC83, dealing with “lurking house-trespass or house-breaking by night.” This on the grounds that the conviction had relied on the unretracted confession of the second defendant according to which he had helped his accomplice to make the hole in the roof of the shop but had not entered it. In fact he blamed his accomplice who had received a prison term as punishment for having entered the shop and taking the money. The Supreme Court accepted the account and decided that the defendant `Abdallah Sâlim could not be convicted to amputation because he had not entered the hirz and not cooperated in taking the stolen money out of it. According to the fiqh\textsuperscript{1173} there is agreement that the helper in a case of hadd-theft will only be amputated if he helped to take the stolen property out of the hirz. If the help consisted in something else such as breaking the door or opening it with a counterfeit key or breaking the walls in order to enter the hirz or help in carrying the stolen property after it had been taken out of its hirz, then the helper is not liable to amputation on the grounds of a legal uncertainty (shubha) but to a ta’zir-penalty. In application of these rules the Supreme Court

\textsuperscript{1172} See SLJR (1990), Government of the Sudan vs. Khalfallah `Abd al-LaÔÐf and others.

\textsuperscript{1173} The SC judges quote `Awda, vol. 2, p. 251.
decided to change the conviction of the second defendant to be under article 395 PC83, choosing a lifelong prison term in conjunction with banishment as a punishment. This final judgment aptly illustrates the various problems the introduction of *shari‘a* / *fiqh* elements into the Sudanese Penal Code and its subsequent application pose: a closer look at article 395 PC83 shows that it belongs to the set of articles which, in the PC74, under the title “Of Criminal Trespass” had regrouped a variety of crimes related to trespass and punishing these crimes with prison terms corresponding to the weight of the crime and/or fine. Basically, as in most other cases, the PC83 has simply translated these articles but – as a token of Islamization - replaced the old punishments with new ones taken from ICL. Thus, the old article 395 moderately punished “whoever commits lurking house-trespass by night or house-breaking by night” with imprisonment for a term up to three years and possibly with a fine. As in the cases described above, the Sudanese legislator had added extremely harsh punishments and makes the same crime now punishable with the capital punishment or cross-amputation or a life sentence with banishment. In other words it punishes a crime that does not qualify as a *hadd*-crime as if it were one and thus disregards the definitions of the *fiqah*.

With regard to our particular case the Supreme Court judge meticulously applied the rules of proof for *hadd*-theft and correctly reached the conclusion that amputation must lapse because of a legal uncertainty. The judge subsequently chose another article whose wording was closer to the crime in question. Paradoxically, the chosen article 395 is also punishable with two different *hadd*-punishments - capital punishment and cross amputation - and harsher ones for that matter than the one originally chosen. In order to avoid a more severe punishment than the original amputation the judge was forced to impose a life sentence with banishment.\textsuperscript{1174} However, article 395 offers a range of punishments, ostensibly applicable according to the severity of the case. Apart from the necessity to find a non-*hadd* punishment, the judge does not explain how the severity of the crime relates to the life sentence with banishment. It is also disputable whether a life sentence with banishment is a “lighter” punishment than amputation. Moreover, it remains unclear, why only one of the two defendants would be judged under article 395 and not both since there were no witnesses and the individual degree of participation in the crime of each one of the defendants could not be established beyond doubt. According to article 239, Criminal Procedure Act 1983, the

\textsuperscript{1174} The judge Yūsuf Da‘allah might have had qualms when he formulated “... wa hiyya ‘uqūba mulzīma lā khiyār lanā fīhā”.
Supreme Court and the Court of Appeal had the right to revise any decision of a lower court and correct it when it was in contradiction to the *sharīʿa*. The revision process in this particular case obviously only concerned the second defendant who was sentenced to amputation. However, by making the *hadd*-penalty lapse, the punishment of the first defendant and the article under which he was sentenced should have been revised as well. A moderate prison term in analogy with the one given to the first defendant would have also been possible in accordance article 458 (3) PC83 – invoked in the judgment itself - and with the criminal circular 98/1983.1175

4.4.3 Ḥadd-theft in the Criminal Bill 1988 and the Criminal Act 1991

The 1988 Criminal Bill, even though it was never accepted by the Sudanese parliament, served as a kind of test run and became - in a slightly modified version - in 1991 the new Criminal Act1176, taking into account criticism which had been directed against the lack of faithfulness to the *sharīʿa*.1177 The text of article 170 CA91 now reads: “There shall be deemed to commit the offence of Ḥadd-theft whoever covertly takes, with the intention of appropriation, any moveable property belonging to another, provided that the property shall be taken out of its *ḥirz* and be of a value not less than the *niṣāb*.”

It strove to remedy most of the flagrant flaws of the PC83 and thus vastly improved in comparison with its immediate predecessor.1178 While 1983 the stolen property had to be taken with an evil intention (*bīṣūʿ qaṣdīn*), 1988/91 the wording has changed to “with the intention of appropriation” (*qaṣd al-tamalluk*) and has thus become more precise and closer to the *fiqh*. Most importantly, the two codes introduced the notion of *ḥirz*, which had been conspicuously absent in 1983, providing a definition of *ḥirz* which covered both, the *ḥirz bil-makān* and the *ḥirz bil-ḥāfīz*.1179 While the notion – inherent in the *fiqh* - that the theft has to be committed covertly was still absent in the 1988 Criminal Bill, it has been introduced in the

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1175 See Ḥāmid, mausūʿa, al-juz al-thāliḥ, manshūr jinaʾi raqm 98/1983, musaqīṭāt ḥadd al-sariqa. Article 458 (3) gives the judge a lot of latitude. It reads “If the ḥadd is averted by a legal uncertainty, the imposition of any other *taʿzīr*-punishment is allowed even if it is not explicitly stipulated in this law...”
1176 As to my knowledge no Criminal Procedure Act, nor an Evidence Act had been prepared by the same committee in 1988.
1178 Concerning the intentions of its authors see, mudhakiraʾ irfāʾ al-qānūn al-jinaʾi lisana 1991 (m).
1179 Art.173 (1) and (3), CB1988, art. 170 (1) and (4), PC83.
CA91 into the definition of *sariqa ḥaddiyya*. The definition of surreptitiousness, however, now includes covertly violating the *ḥirz* and the seizure of property openly (*akhḍh al-māl mujāhiratan*) or forcibly (*mughālibatan*). Both notions do not fall under the meaning of “covertly” as defined in the *fiqh*. In the *fiqh* the entire theft has to be carried out in a surreptitious manner, not only the violation of the *ḥirz*.

Both codes have further introduced a provision to the effect that “property belonging to another includes public property, property of religious endowments (*auqāf*) and places of worship”.

In the case of public property the two codes have codified a minority opinion of the Mālikites (see above). As to the property of places of worship, the Penal Code 1991 equally adopts the opinion of the Mālikites who hold that the mosque must be considered a *ḥirz* because of its door (*al-masjid ḥirz libābihi*) and therefore anyone who steals mosque property such as candles, mats and carpets is liable to amputation if the *niṣāb* is reached. The *niṣāb* is now in concordance with the teachings of the Ḥanafites set at one gold dinar of 4.25 gr. or its countervalue in money.

*A Supreme Court case defining ḥirz.*

Concerning the meaning of *ḥirz*, an important case can be found in the Sudan Law Journal and Reports (SLJR). Two defendants, on August 9, 1991, had entered an uninhabited government-owned building in New Halfa and had stolen a double bed, a closet, and other household items. Subsequently to the theft they had sold or given the stolen goods to three different persons who all were indicted under article 181 CA91 for having received stolen property. In a first decision the Trial Court in New Halfa had convicted the two defendants under articles 21 (criminal joint acts in execution of criminal conspiracy and (174 (2) (punishment for non-*ḥadd* theft). At the Court of Appeals Kassala the sentence of the lower...
court was rejected and the papers were sent back for revision in order to reach a conviction for joint ḥadd-theft, since, in the opinion of the Court of Appeals all conditions of sariqa ḥaddiyya were met in the case. In its deliberations the Appeals Court remarked that in his definition in article 170 (4) the legislator stipulated that a ḥirz is to be understood as a ḥirz al-makān, i.e. a safe place “where property is kept or the manner in which the particular property or similar types thereof are normally kept, or that of the custom of the people of the country or the particular profession”. In other words, the court specifies, the ḥirz bil-makān, which is normally a secure room in a more general sense, is more specifically defined here as a ḥirz al-mithl or a safe place where a particular good or property is normally kept, e.g. money inside a room and a riding animal inside a stable. However, in its last passage, article 170 (4) says: “…and property shall be deemed to be in ḥirz whenever it is guarded” (yuʿadd al-māl fī al-ḥirz āithumā kāna maḥrūsan). This passage is not meant to be either limiting (muqayyidan) nor explaining (mufassiran) the meaning of the notion of al-ḥirz bil-makān as stated in the beginning of the article. Rather it is to be understood as a supplement. Therefore it is not possible, so the Court of Appeals tells us, to understand the text – as the lower court did whose decision it is correcting - in the sense that property has to be guarded (maḥrūs) in order to be deemed to be in a ḥirz. In other words, all guarded property (māl maḥrūs), is to be considered in a ḥirz, even if it is not in a ḥirz bil-makān. Reversely, if all conditions of ḥirz bil-makān are fulfilled, the property does not have to be guarded to be considered to be in a ḥirz. After the retrial at the lower court both defendants were sentenced to amputation of the right hand from the wrist for ḥadd-theft under article 171(1) CA91 on the strength of their confessions.

The Supreme Court, in its revision, raises two pivotal questions. Firstly, on the establishment of the nišāb and, secondly, on the nature of the ḥirz. Decisive for its own decision was the first one with respect to how the minimum value of the stolen good, the nišāb, as a necessary precondition for a conviction for ḥadd-theft can be established. The New Halfa prosecution had estimated the value of the stolen goods to be 11.985 Sudanese Pounds and had backed up its assumption by invoices and declarations of the respective shops. Importantly, the two

1186 In the Hanafi school the nature of the ḥirz is controversial. Some believe that a ḥirz must be the safe place normally used for the good in question. Thus a house is a ḥirz for money and jewellery, a fence is a ḥirz for sheep and a stable is a ḥirz for riding animals. A second opinion among the Hanafites holds that a ḥirz can serve as such for all kinds of property, e.g. while a stable is obviously a ḥirz for riding animals it can also serve as ḥirz
defendants did not confess to the value of the stolen property and the first court \((\textit{ma\'hkama kubr\=a})\) acquitted those who had either bought or otherwise received the stolen goods while it convicted the two main defendants for non-\(\textit{hadd}\)-theft.

Interestingly, the Supreme Court reasoned that the confession of the two defendants, while it is to be considered a vital element for a conviction for \(\textit{hadd}\)-theft, was deficient in this particular case in the sense that the defendants had not admitted to reaching or exceeding the minimum value \((\textit{ni\=s\=ab})\) in what they had stolen. Moreover, they did not, as expressed in their confession, even understand this value, “...and normally the thief does not understand the value of the property he is stealing, unless the stolen property is equivalent to money he can calculate and compute”. The judge further backs his reasoning by quoting a \(\textit{hir\=aba}\)-case from 1986 where the SC had decided that the \(\textit{hadd}\)-penalty could not be imposed if the defendants did not confess that the value of the stolen goods was equivalent or higher than the minimum value.\[1187\] The court also rejected the validity of the invoices and other documents produced by the prosecution - and accepted by the Court of Appeals. None of these documents and invoices had been assessed by two witnesses of good reputation under oath and acting as evaluating experts \((\textit{muthammin})\). It would have been the task of the prosecution to employ such experts in order to produce such indirect evidence \((\textit{shah\=ada ghair mub\=ashira})\). Had the value of the goods been evaluated, it would have been necessary, the court opined, to take into account the price at the date when the goods were bought and not the value when they were stolen. This because the original selling price had been moderate and did, at the time, not exceed the \(\textit{ni\=s\=ab}\), the judge reckons. The latter assumption seems to be contradicting the Supreme Court’s own reasoning since it categorically excludes the knowledge of the judge based on what he has seen, heard, deduced from or based on his impressions as a base on which the value of the stolen good can be determined.

In other words, the Supreme Court interprets the nature of the confession in a sense that makes it compulsory on the defendant(s) to not only confess to \(\textit{hadd}\)-theft in general but also to confess to having had knowledge as to the value of the stolen property reaching the \(\textit{ni\=s\=ab}\). Whether each single element of \(\textit{hadd}\)-theft as defined by the \(\textit{fuqah\=a}\)’ needs to be part of the confession remains unclear. The judgment does not mention whether the thieves confessed to

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\[1187\] See Government of the Sudan vs. Ishaq Muhammad Arb\=b and others. SLJR 1986.
having known that they stole from a *hirz* for example. Rather, the SC seems to have come to its conclusion with regard to the *hirz* by assessing the facts without further corroboration through the confession. Thus, in order to prove *sariqa ḥaddiyya* the prosecution is not only bound to prove all necessary elements, such as stealth, criminal intention, the movability of the good, that the stolen property had been taken from a *hirz* etc.; in order to reach a conviction – under the condition that the conviction is based upon a confession - the culprit has to confess that he has known and has been aware, during the execution of the crime, that the value of the stolen property reached or exceeded the minimum value for *ḥadd*-theft.

The lower court, in the justification of its judgment had come to the conclusion that the condition of *hirz* according to article 170 (4) had not been fulfilled, because the government premises in question had not been inhabited and thus had not been guarded. The Supreme Court, however, reasoned otherwise and saw the *hirz* as firmly established. The culprits had confessed that they had entered a closed government building after climbing a wall, opening the outer door with a screw driver, unbolting a second door and finally taking the stolen property out of a room. The Supreme Court thus followed the opinion of the Appeals Court in the question of the *hirz*, while pointing out that the two defendants had not confessed to a vital element in the constitution of *ḥadd*-theft. It therefore returned the case to the Trial Court in order to impose a *taʿzīr*-punishment under article 174(2) for non-*ḥadd*-theft.

*Legal uncertainties and the lapsing of the ḥadd in the Criminal Bill 1988 and in the Criminal Act 1991*

The 1988 draft code improved on and widened the rather short list of reasons for remitting the *ḥadd*-penalty for *ḥadd*-theft. It also served, as in most other instances, as a model for the Criminal Act 1991. In fact, the wording of the draft code and the CA91 as to reasons for the remittance of the *ḥadd* for *sariqa* are almost identical and will therefore be quoted here once only.188 Theft between spouses, ascendants and descendants and those relatives who cannot marry (*arḥāmi*) still does not fall into the *ḥadd*-category.189 Neither can be punished with amputation who “is in a case of necessity (*darūra*) and does not take from that property more than what is sufficient to satisfy his need or the needs of his dependents...and not exceeding...

188 The text quoted is the version of the CA91.
189 Compare CB88, art. 175 (1) (a) and CA91, art. 172 (a).
the minimum (\textit{nisāb}).\textsuperscript{1190} Where the offender has or believes in good faith to have a share in stolen property, and such stolen property does not exceed that share with what amounts to the \textit{nisāb} the \textit{ḥadd}-penalty is remitted.\textsuperscript{1191} The same is true “where the offender has an unsatisfied debt by the victim of the theft and the victim is unwilling to pay, or is dilatory, and the debt is due before the theft and the amount of money stolen by the offender is equal to or more than his debt by more than the \textit{nisāb}”.\textsuperscript{1192} The \textit{ḥadd}-penalty is remitted where the offender restitutes to the victim his alleged stolen property before being brought to trial and declares his repentance or becomes the owner of the alleged property in question and, in addition to that, he is not previously accused or convicted of offences against property.\textsuperscript{1193} A retraction of the confession by the offender before the execution of the penalty entails the remittance of the \textit{ḥadd} if the theft has been proved by confession only.\textsuperscript{1194} Finally, the \textit{ḥadd}-penalty also lapses when the offender is permitted to enter the \textit{ḥirz} or when the amputation threatens the life of the offender or if his left hand is amputated or paralyzed.\textsuperscript{1195} Despite a rather differentiated list of legal uncertainties important inconsistencies with the \textit{fiqh} can be observed. Most importantly, stolen property in the sense of article 170 includes – for reasons of political expedience - public property and property of \textit{awqāf} and places of worship. In the \textit{fiqh}, however, stealing public property is not considered to be \textit{sariqa haddiyya}, but \textit{ghasb} (usurpation).\textsuperscript{1196} In the prevailing opinion of the \textit{fuqahā}’ the \textit{ḥadd}-penalty for \textit{sariqa} lapses even if the creditor takes property surpassing the debt in value and regardless of whether the debt was due or not. Article 172 (d) CA1991 in comparison allows for the lapsing of the \textit{ḥadd}-penalty only if a creditor steals from his debtor after the debt is due.

Other legal uncertainties found in the \textit{fiqh} have not been taken into consideration. Ḥanafites and Ḥanbalites teach that the \textit{ḥadd}-punishment lapses for a group of offenders who conjointly committed \textit{sariqa} and if a close relative of the victim is among them. The Ḥanafites even hold that the punishment lapses if a minor or a mentally ill person is part of the group.\textsuperscript{1197}
importantly, according to all schools, the total value of the stolen property must reach the *niṣāb* for each of the thieves.\(^{1198}\) However, the CA91 stipulates that if the total of the value of the stolen property accumulates to the *niṣāb* the *ḥadd*-penalty is due.\(^{1199}\) Furthermore, 1983 and 1991, the general provisions about joint criminal acts provide for equal punishment of each of the offenders.\(^{1200}\) There are some other points, discussed in the *fiqh*, but omitted in the CA91. Thus, the stolen good must be capable of being owned\(^{1201}\) and – according to the Ḥanafites - must be storable. The stealing of non-storable items, even if their value surpasses the *niṣāb*, does not result in the *ḥadd*-punishment.\(^{1202}\)

In the case of the remittance of the *ḥadd*-penalty the offender can be punished with a prison term of up to seven years and a fine and possibly a whipping of up to 100 lashes.\(^{1203}\)

*Measuring the* *niṣāb* *with respect to collective theft*

Finally, both codes introduce a new provision clarifying that if a group of thieves has stolen collectively, not the value of what each individual thief has taken will be taken into account in order to establish the *niṣāb* but rather the total sum of the stolen property.\(^{1204}\) The *fuqahā’* agree that if the *ḥirz* has been violated by every single thief and all other conditions of *sariqa ḥaddiya* are fulfilled and if each one of them has stolen what amounts to the *niṣāb* for each individual thief, then all of them will be subject to amputation.\(^{1205}\) However, in the case that the *niṣāb* is only reached by the group of thieves collectively Islamic jurisprudents differ. The Ḥanafites and the Shāfi‘ites hold that each thief must be judged according to his individual guilt and since the individual thief does not reach the *niṣāb*, the conditions for amputation are not met. The Mālikites are of the opinion that amputation is due if the thieves had to cooperate in the stealing. If the theft would have been possible for each one of them (without cooperation with the others) opinions differ. The first opinion maintains that they still should

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\(^{1199}\) Art. 170 (6).


\(^{1201}\) Kidnapping of a free person does not entail the *ḥadd*-penalty because free persons cannot be owned. The stealing of goods from Muslims which they are not allowed to own in the first place – e.g. wine or pork -, does also not entail the *ḥadd*-punishment. However, the stealing of the same goods from a non-Muslim, can amount to *sariqa*. See Peters (2005), chapter 2.6.2. and Baradie (1983), p. 110.

\(^{1202}\) Peters (2005), chapter 2.6.2. and Baradie (1983), p. 110.

\(^{1203}\) Art. 173 (5) CB88 and art. 170 (6) CA91.

\(^{1204}\) For the opinions of the four Sunni schools on joint theft, see Al-Jazīrī (2004), vol. 5, pp. 151-152 and ʿAbd al-ʿAzīz (1997), pp. 368-370.
all be amputated, while the second opinion holds that if each of the thieves took part of the booty none of them should be amputated unless it reached the nisāb. The Ḥanbalites, finally, advocate the amputation of all of the thieves, even if the nisāb is reached collectively only, in order to protect the society against criminal gangs. In other words, the Sudanese legislator has chosen to codify a minority opinion based on the Ḥanbalites and to some degree on the Mālikites. It goes without saying that the reaching of the nisāb and a conviction of sariqa ḥaddiya thus has been greatly facilitated. Not only does this run contrary to the principle of restricting the application of the ḥadd-punishments, it also simply applies the provisions on “criminal joint acts in execution of criminal conspiracy” which provide for joint responsibility and therefore an equal punishment of all who partake in the act.

4.4.4 Summary and conclusion

In summary, the Penal Code 1983 had introduced offences related to theft and punishable by amputation which according to the classical fuqahā´ would not have amounted to sariqa. By creating a virtual class of new ḥadd-crimes, it had thus – as in other instances – considerably expanded the potential applicability of ḥadd-punishments. At the same time, the code had omitted important notions of sariqa ḥaddiya in its definition of the crime and only admitted a small number of legal uncertainties as grounds for the lapsing of the punishment. In comparison, the successor code 1991 has improved on most accounts in terms of reflecting majority opinions of the fiqh and its spirit more faithfully. It has introduced in its definition the important notions of surreptitiousness and ḥirz, which are pivotal elements in the classical definition. It has further largely augmented the number of recognized legal uncertainties causing the ḥadd-penalty for sariqa to lapse. However, in two important provisions the code conflicts with the fiqh. It does not insist on a second amputation for the recidivist offender and, of larger consequence, it explicitly makes theft of public property punishable by

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1206 Some Western authors simply quote the “herrschende Lehre”, thus – possibly involuntarily - giving the impression that a certain provision has no base in the fiqh. However, whether or not a certain prescription is derived from the fiqh can only be said with certainty when majority and minority opinions of all (Sunni) schools are shown in a synopsis. To illustrate my point compare above with Scholz (2000), p. 450.

1207 See art. 80 PC83, art. 21 CB88 and art.21 CA91. Generally speaking, in the fiqh “persons are punished for their own acts, except in exceptional cases such as e.g. the qasāma procedure, collective punishment is not allowed. Compare Peters (2005), p. 20.

1208 Art. 324 provides for amputation of whoever commits a theft and previously prepares for the killing, hurting or kidnapping of the victim. See Köndgen (1992), p. 115, art. 4.1.

1209 Art. 318, a allowed for the death penalty and crucifixion or cross-amputation of brothel proprietors or souteneurs caught a second time. See Köndgen (1992), p. 106.
amputation if all prerequisites are fulfilled. While the former, most likely, has little practical importance, the latter, for reasons of political expediency, substantially widens the definition of thefts punishable by amputation. Further, the meaning of surreptitiousness as defined in the CA91 has been restricted to the violation of the hirz, while in the fiqh the entire theft has to be carried out covertly. The applicability of hadd-theft, thus is widened. Inconsistent with the majority opinion in the fiqh is also the provision that establishes in cases of collective theft the nišāb to be the total sum of the stolen property. In other words, by codifying a minority opinion – of the Mālikites – the establishment of the nišāb in cases of joint theft has been considerably facilitated. In a landmark decision the Supreme Court solved several questions as to the establishment of the nišāb and the nature of hirz. It decided that invoices as such, without further testimony by experts, were not admissible in proving that the nišāb has been reached. However, if experts do confirm that the stolen amount has reached or exceeded the nišāb such indirect evidence is admissible. Secondly, the defendant(s) have to admit to having had knowledge that they stole an amount equivalent or higher than the nišāb. The hadd-penalty can only be imposed if the culprits admit to having known at the time of the theft that they were stealing an amount reaching the nišāb. With respect to the notion of hirz, the same decision clarified a misreading of 170 (4) of a lower court. It stated that property does not necessarily have to be guarded in order to be in a hirz. Thus, even an uninhabited building can be deemed constituting hirz.

With regard to proof the relevant laws 1983 and 1991 have not specified the important notion of “good reputation” for witnesses in hadd-cases. However, a criminal circular clarified that a witness is assumed to be of good reputation until there are indications contradicting this assumption. In effect, the court does not bear the burden to gather information as to the trustworthiness of a witness in hadd-cases. The admission of women and non-Muslims as witnesses in cases of hadd-theft is not backed by scholars of the four Sunni schools. It strongly enhances the likelihood that hadd-theft can be proven, even though a missing male witness has to be replaced by two women. The admission of non-Muslim witnesses has a special relevance with regard to the particular ethnical structure of Sudanese society. Obviously the Sudanese legislator feared that in cases were only non-Muslims were concerned or the witnesses were non-Muslims, hadd-theft would regularly go unpunished.

The Supreme Court has further ruled that no hadd-penalty can be imposed when the aggrieved party has either not instituted legal proceedings against the defendant or is not present during
the trial. However, the prosecution of the crime as such is deemed to be in the public interest and in such case a taʿzîr-punishment is due. Public interest also takes precedence over a private settlement. A private settlement (ṣulḥ) between plaintiff and defendant does not exempt the latter from punishment since cases of sariqa and cases related to it are deemed to harm the public interest.

The Criminal Act 1991 has only partially managed to improve its provisions with respect to the punishment of ḥadd-theft. While the recidivist is now spared a second amputation – in contradiction to the majority opinion of the fuqahāʾ - it also suppressed most if not all of the newly created ḥadd-crimes the PC83 had proposed. These had been diametrically opposed to the spirit of the fiqh and the limited number of ḥadd-crimes recognized by Islamic jurisprudence. However, a gross imbalance between the severe punishment of ḥadd-theft and related non-ḥadd crimes, especially in relation to sariqa, remained also in the CA91. These contradictions had led to serious inconsistencies in the emerging body of case law, especially in the period prior to the introduction of the CA91.

Since the PC83 provided judges only with a very limited list of reasons for the remittance of the ḥadd-penalty a subsequent criminal circular supplemented this list. Next to the criminal circulars Supreme Court decisions filled other gaps. Thus the Supreme Court came to the conclusion that a state of necessity can be invoked in years of famine even if the stolen goods far exceeds what is needed to satisfy one’s immediate needs. In a case of joint theft the SC decided that the ḥadd lapses for all offenders if part of the group is minor and thus criminally not responsible.

Most of the reasons for the remittance of the ḥadd in cases of ḥadd-theft which had been regulated earlier by criminal circular found their way into the CA91. Thus, correcting the above-mentioned SC decision, a case of necessity can now only serve as a reason for the lapsing of the ḥadd, if not more is stolen than what is necessary to satisfy one’s needs. While the CA91 improves in terms of introducing a wider list of reasons for the lapsing of the ḥadd, the shubha al-milk of stealing public property is not among them. Most probably for reasons of upholding public security and order, the stealing of public property can entail amputation if all conditions of ḥadd-theft are otherwise met.

This synopsis of case law and legislation concerning the crime of ḥadd-theft as it developed as of 1983 has highlighted an, often contradictory, array of laws and SC decisions. The selection of provisions derived from Islamic jurisprudence is highly diverse. At times a
majority opinion is codified, at times a strong minority opinion among the four Sunni schools of law and in one case even opinions of non-Sunni schools are codified. While after 1983 case law and criminal circulars served to supplement a deficient legislative body, many of the flaws of the September laws have been rectified in the Criminal Act 1991. However, even though the importance of criminal circulars and the case law of the Supreme Court regarding hadd-theft seem to have gradually subsided in the 1990s and after, landmark decisions of the SC still continue to fill important gaps left by the CA91 and the EvA93 to some degree. Given the multitude of provisions and legal opinions in the fiqh which have not been codified but which can nevertheless serve as a frame of reference, this process is likely to continue for years to come. Conspicuously, a large majority of the published cases discussed here, and these are available in the courts of the country and serve as guidance, have ended with the remittance of the hadd-penalty. Layish, analyzing mainly the years 1983-1985, has correctly stated that judges of the Court of Appeals and the Supreme Court applied ICL in a more restrained and liberal manner than judges of the lower courts. Thus, judges of the lower courts have in these years, in most cases, treated pickpocketing (nashîh) as hadd-theft and sentenced the thieves to amputation under article 321 (2) PC83. Indeed, in the case of hadd-theft his conclusion still holds true for the years including 1986 and after on the level of the SC. Not only does the majority of the discussed decisions end with the remittance of the hadd, the Supreme Court judges also at times go out of their way to avoid amputation. In the absence of regulations concerning many of the more subtle details of ICL they use their pivotal position to facilitate the lapsing of the hadd-punishment amputation and to exacerbate the proof of sariqa haddiyya. Whether or not Supreme Court case law has a tangible influence on the quantity and quality of the promulgation of the hadd-punishment amputation by the lower courts is, however, beyond the scope of this study.

4.5 Highway robbery (hirâba)

4.5.1 Hirâba in the fiqh

The crime of hirâba, as expounded in the fiqh, is based on Qur’an 5:33-34: “The only reward of those who make war upon Allah and His messenger and strive after corruption in the land will be that they will be killed or crucified, or have their hands and feet on alternate sides cut

off, or will be expelled out of the land. Such will be their degradation in the world, and in the
Hereafter theirs will be an awful doom. Save those who repent before ye overpower them. For
that Allah is Forgiving, Merciful.”

In the *fiqh hirâba*¹²¹¹ is a rather complex offence and divided into five different crimes
entailing varying punishments.¹²¹²

1. In its most simple form *hirâba* or *qat’ al-ṣarîq* consists of a hold-up on a public road in order
to take away property from passers-by by force. However, despite the criminal intention of
robbing, in this particular form of *qat’ al-ṣarîq* no property is actually being stolen and nobody
gets hurt. Therefore, no *ḥadd*-penalty is imposed, the crime is classified as a *ta’zîr*-offence.

2. A second form of *hirâba* or *qat’ al-ṣarîq* consists in the hold-up described above in
combination with the scaring of passers-by (*ikhâfa al-sabîl*) on a rural road, i.e. outside a city
or settlement. The attackers who must be stronger, use arms and prevent their victims to
continue their journey.¹²¹³ Again, nobody gets killed and no property is taken away.

According to the majority opinion in the Ḥanafite and Ḥanbalite schools this crime is
punishable by banishment. The Shâfiʿites give the judge the freedom of choice between
banishment or a *ta’zîr*-penalty. The Mâlikites allow for the most severe punishments based on
Qur’ān 5,33. Here the *qâdî* has the choice between capital punishment, crucifixion, cross-
amputation and banishment.

3. Robbery, i.e. the taking away of property during a hold-up in a remote location where help
can not be expected, is punishable by cross-amputation. The Mâlikite school allows for one of
the punishments mentioned in Qur’ān 5:33 – execution, crucifixion, cross-amputation, but not
banishment. 4. Homicide in the context of a hold-up without property being taken away is
punishable by execution with the sword. Since the death penalty is a *ḥadd*-punishment here
the pardon of the victim’s heirs is without effect. The Mâlikite school allows for crucifixion
before the execution. 5. The most aggravated form of *hirâba* is the hold-up combining
homicide and robbery. This will be punished by the draconian punishment of execution and
crucifixion, the order of which is controversial, as well as whether cross-amputation should
take place before execution.¹²¹⁴

¹²¹¹ Also *muhârâba* or *qat’ al-ṣarîq*.
¹²¹² I follow the classification suggested by Baradie (1983), pp. 118-119. See also Peters (2005), pp. 57-59, El-
being arrested, the ḥadd-punishment lapses and the crime will be treated like a qisās-offence. The heirs of the victim can either insist on the execution of the offender or demand the payment of diya. Since the heirs can also forego the diya, the qadhī still has the right to impose a taʿzīr-punishment.\footnote{Köndgen (1992), p. 118.}

Finally, the fiqh recognizes legal uncertainties in the context of ḥirāba. Is among the victims a close relative of the perpetrator or has the deed been committed against a mustaʿmin, the ḥadd-punishment lapses. The majority opinion rules that ḥirāba is punished collectively and whoever takes part in it is liable for the consequences, independent of what his actual part in the crime was. The Shāfīʿites, however, opine that each of the perpetrators can only be held responsible for his contribution to the crime.\footnote{Baradie (1983), p. 121.} According to Abū Ḥanīfa the collective liability also takes effect in the reverse, i.e. the ḥadd-penalty lapses for all, if it can not be imposed on one of the offenders.\footnote{Baradie (1983), p. 121.} Further, the ḥadd-penalty can not be imposed, according to the Ḥanafites, if the victim or his heirs are not present in court to have their claims heard.\footnote{Baradie (1983), p. 121.}

\textit{Proof of ḥirāba in the fiqh}

In analogy to sariqa the proof for ḥirāba can consist in a confession or in a testimony following the same conditions.\footnote{Compare Bahnasā, jarāʿīm, pp. 75-80.} There is dissent on whether a confession has to be made once or twice. While Abū Ḥanīfa and Shāfīʿī are content with one confession, the Ḥanbalites and Abū Yūsuf require two. If the confessor withdraws his confession before amputation - and the conviction is based on that confession only - the amputation lapses.\footnote{Bahnasā, jarāʿīm, p. 76.} The Mālikites accept the testimony of the agrieved party, i.e. the victims, against those who robbed them.\footnote{Compare Supreme Court cases quoted below.}

\textit{Further conditions concerning offender, victim and deed}

The offender must be adult and understanding (ʿāqil). Some fuqahāʾ stipulate that he must as well be male, since ḥirāba normally is not committed by women due to the gentleness of their
hearts (\textit{riqqat qulūbihinna}) and the weakness of their physical constitution.\footnote{Bahnasī, \textit{jarā’im}, p. 85.} As to the victim of \textit{ḥirāba} he can be either a Muslim or a \textit{dhimmī}, since the property of both is protected (\textit{ma’sūm}). If the victim is a \textit{musta’īmin}, however, some hold that his property is not protected and in consequence of that the \textit{ḥadd} is not due. Further, the victim must either be the owner of the stolen good or his authorized representative or his trustee. Finally, there must be no kinship between the offender and the victim. As to the deed itself, it is necessary that the conditions of \textit{sariqa} are fulfilled. The stolen good must be valuable (\textit{māl mutaqawwam}), it must be inviolable (\textit{ma’sūm}), and the \textit{muḥārib} must not have any claim to it. The stolen good also must have a minimum value (\textit{nīṣāb}) and be kept in a safe place (\textit{ḥirz}) by its owner.\footnote{Bahnasī, \textit{jarā’im}, pp. 85-86.}

\textbf{4.5.2 Definition and punishment of \textit{ḥirāba} in the Penal Code 1983}

In the Penal Code 1983 the \textit{ḥadd}-crime \textit{ḥirāba / muḥārabā / qaṣ’a al-ṭarīq} has not been codified consistently with the opinions of the \textit{fuqahā‘}. As a matter of fact, the three terms are not being used at all in the relevant section of the PC83. Instead, as in other instances, the PC83 adopts to a large degree the pertinent texts of the 1974 predecessor code and, in an effort to Islamize the inherited material, simply changes its echeloned prison terms and fines to either a selection of the severe punishments designed for \textit{ḥirāba} or to the ubiquitous formula „flogging and fine or prison“. The legislator seems to have reasoned that the chapter „Of Robbery and Brigandage“ (articles 332-346) of the 1974 Penal Code sufficiently covered the different crimes banditry (\textit{ḥirāba}) is composed of. However, a comparison of the \textit{fiqh}’s prescriptions with the Penal Code 1983 reveals a certain number of important differences as to the definitions of the crimes. Further, as will be shown below, in most cases the Islamic punishments attached to the different forms of robbery and brigandage are rather problematic in several respects. In order to identify the main differences between the \textit{fiqh} and the Penal Code 1983 we shall take a close look at the five different crimes (see above) \textit{ḥirāba} consists of. Beginning with the first form of \textit{ḥirāba}, i.e. its most simple form, a hold-up on a public road without property taken away nor homicide nor grievous hurt, we observe that it is as such not codified in the PC83. Neither is the same crime in its second form, i.e. in combination with the scaring of passers-by (\textit{īkhāfā al-sabīl}). The first form, in a sense being
the least common denominator of ḥirāba, is to be punished by a taʿzīr-penalty only in the fiqh. Even though the most simple form of ḥirāba devised by the fuqahāʾ was not explicitly defined in the PC83, it was covered to some degree by the article defining „Attempt to commit robbery“\(^\text{1224}\). While the Penal Code of 1974 punished attempts to commit robbery with imprisonment for a term which could extend to seven years and possibly also a fine\(^\text{1225}\), the punishment for the same offence in 1983 changed to the mentioned formula “flogging and fine and prison term”. It should be noted here that the 74/83 formula of attempted robbery lacks - despite some similarities – important elements of the two simpler forms of ḥirāba as described above. Thus the attempt of robbery does not have to be committed on a public road and it is not necessary that weapons have to be drawn to scare the victims. Attempted robbery as defined by the PCs 74/83 can also take place inside a city. The opinion of the fuqahāʾ concerning this matter is divided. Abū Ḥanīfa does not allow for a ḥadd-penalty if the crime happens within a city, unlike Mālik and Shāfiʿī who make the ḥadd-punishment compulsory in such cases.\(^\text{1226}\)

The second form of ḥirāba, including the scaring of passers-by without the taking away of property is not explicitly defined in the PC83 either. It would also have fallen under “attempt to commit robbery” (art.335, PC74/83) even though the element of “scaring passers-by” is not explicitly mentioned in the pertinent definition. Again, in the fiqh the majority holds that the hold-up has to take place outside a city, i.e. on a rural road, that the attackers must be stronger and use arms. None of these elements are to be found in 1983. Containing an aggravating element this second form of ḥirāba consequentially entails a more severe penalty in the fiqh. The Mālikites even allow for capital punishment, crucifixion, cross-amputation and banishment.

We shall look now at the third kind of ḥirāba, the taking away of property during a hold-up in a remote location where help cannot be expected. Ironically, robbery committed on a highway between sunset and sunrise had been defined and made punishable as an aggravated form of robbery by article 334, PC74. It would have been obvious to adapt its wording to make it even more compatible with the form of ḥirāba under discussion here. However, the legislator of the PC83 chose to suppress any further specification and to turn the original header “Robbery”

\(^{1224}\) PC83, article 335.
\(^{1225}\) PC74, article 335.
\(^{1226}\) Bahnasi, jarāʾim, p. 88.
into “Punishment of robbery” (\(\text{`uq\text{"}bat al-nahb}\)), stipulating the maximum punishment for robbery to be execution or execution with crucifixion or cross amputation or life sentence with banishment. The definition of the crime itself is to be found under the headers “When theft is robbery” and “When extortion is robbery” (article 332). Both definitions had been adopted almost verbatim from the PC74 and lack – in order to make them \(\text{fiqh}\)-compatible - similar ingredients as “attempted robbery” described above. The definitions of theft as robbery and extortion as robbery do not refer to theft/extortion on a highway, outside a city where help can not be expected, a precondition specified by a majority of the \(\text{fuqah\text{"}a}\), with the exception of the M\(\text{\'alikites}\).\(^{1227}\) Not specified are the use of weapons or whether the crime must be committed at a certain time of the day or night respectively. However, it should be noted that all of these points are disputed in the \(\text{fiqh}\).\(^{1228}\) Importantly, the definition of robbery in the context of \(\text{"hir\text{"}a}\) necessarily must include all conditions of \text{sariqa \text{"}addiyya}. In other words, the stolen good must be valuable (\text{mutaqawwam}) and inviolable (\text{ma\text{"}\text{"}um}), its value should reach the \text{ni\text{"}\text{"}ab}, that the \text{mu\text{"}\text{"}arib} must not have any claim to the stolen good and so forth.\(^{1229}\) Since the Arabic text of article 332, PC83, “when theft is robbery” does not mention \text{sariqa \text{"}addiyya} but simply refers to “theft” (\text{sariqa}), an important element of \(\text{"hir\text{"}a}\) is missing.

Concerning the fourth form of \(\text{"hir\text{"}a}\) – homicide in the context of a hold-up without property taken away – it can be found under the article “brigandage with voluntary homicide”\(^{1230}\) only. If committed as part of a hold-up of a group, the whole group, i.e. each one of the perpetrators of the robbery will be tried for the crime, which is punishable by execution with crucifixion or cross amputation. The range of possible punishments is thus reduced to the two harshest ones. Neither can the culprits be sentenced to execution only nor to a lifelong prison sentence.

In comparison to its 1974 predecessor the 1983 text does not specify the minimum number of culprits which make up a “group.” In 1974 in order to commit “brigandage with murder” the minimum size of the group had to be five persons who were held collectively responsible. They all would have received either the death punishment or receive as a maximum a life sentence. The absence of a clear definition of “group” in 1983 means in fact that the minimum number of perpetrators in 1983 has gone down to two. Just like in 1974 they are

\(^{1227}\) See Bahnas\text{"}i, \text{jar\text{"}im}, p. 82.
\(^{1229}\) Bahnas\text{"}i, \text{jar\text{"}im}, p. 86.
held collectively responsible, irrespective of who actually committed the homicide. Conspicuously, robbery in conjunction with voluntary homicide committed by a single perpetrator is not covered by the PC74 and, in consequence, has also been omitted in the PC83. It was thus left to actual jurisdiction to decide whether a single robber/murderer would be liable to the harshest punishments as prescribed by article 332 and the fiqh respectively.

Last but not least it is important to mention that “brigandage” (1974) or in its 1983 version “nahb bi al-ishtirāk” cover joint robbery as well as attempted joint robbery. In other words the severe punishments of execution in conjunction with crucifixion or cross amputation apply irrespective of whether property has indeed been taken away. If no property has been taken away the crime likened to the fourth form of hirāba as described above. However, it seems that a single perpetrator is not covered by the definition of the article and it remains unclear which article of the PC83 was meant to be applied in cases of single perpetrator robbery or hirāba. The same uncertainty occurs if property has been taken by a single perpetrator and a voluntary homicide has occurred during the robbery. If one is to follow the wording of article 338, PC83, a single perpetrator can not fall under the definition of brigandage/joint robbery with voluntary homicide. It seems that the 1983 legislator has left an important lacunae and simply omitted to define one of the severest crimes in the fiqh.

**Hiṭāba-related hadd-punishments stipulated for other crimes**

Some other property offences in the PC83 entail the same hadd-penalty as the one for robbery (nahb). Thus, each recidivist in cases of theft, robbery and fraud will be punished with the capital punishment or capital punishment with crucifixion or cross amputation or a life sentence and banishment, even though fraud is not a hadd-crime in the fiqh and theft would not be punished by penalties reserved for aggravated forms of hirāba. The same severe punishments which the fuqahā’ reserved for hirāba apply in cases of (attempted) hurt or (attempted) homicide during a burglary. They also apply to all accomplices of a nocturnal burglary in the course of which an (attempted) intentional homicide or an (attempted) intentional assault happened. For both crimes the PC74 had stipulated a maximum prison

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1230 Article 338, PC74/83.
1231 For the following also compare Köndgen (1992), pp. 122-123.
1232 See article 362 (e), PC83.
1233 Article 398, PC83.
1234 Article 399, PC83.
term of 14 years. It is also noteworthy at this point that, with the exception of capital punishment and crucifixion, all of these punishments were also applicable to a range of other crimes which are clearly not ḥadd-crimes as meant in the fiqh, e.g. burglary with the intention to commit theft.\textsuperscript{1235} The latter crime was punishable by a prison term of up to ten years in the PC74.\textsuperscript{1236} Further, the most severe punishments such as capital punishment with or without crucifixion, cross amputation or life imprisonment can be imposed on whoever belongs to a criminal gang formed in order to contravene the Sudanese Penal Code (of 1983) or “any other Sudanese law“ or whose deeds are a danger for people, property, public peace or are corrupting public life (iššādan lil-hayāt al-ʿāmma). It goes without saying that the legislator had thus widened the definition of a criminal gang to an extent that also political groupings can be punished with the harshest punishments in ICL, originally reserved by the fiqhah for certain forms of hirāba. Similar to other ḥadd-crimes – see e.g. the article on the promotion of prostitution - we thus observe that ḥadd-penalties are being introduced for offences which do not belong to the group of classical ḥadd-crimes. It should be noted that the extended applicability of ḥadd-punishments also has the effect of reducing the great difference in the punishment of ḥadd and non-ḥadd-crimes of a similar nature. In addition, besides sharply contradicting the provisions of the fiqhah, this assimilation often led to unduly harsh punishments, with little regard to the severity of the crime. At the same time illustrations provided in 1974 to direct the application of certain articles were neither adopted nor replaced in 1983, thus eliminating a useful tool for guiding the interpretation of ambiguous texts.\textsuperscript{1237}

**Ḥirāba-cases in the Supreme Court as of 1983**

With the above-described incongruities the legislator of the Penal Code 1983 had created a veritable juridical maze. It was left to the Supreme Court to interpret legislation concerning robbery and try to make sense of the multifold contradictions between its pre-1983 heritage and its newly added Islamic punishments. However, as the following decisions of the Supreme Court will demonstrate, reconciliation between secular and Islamic law was hardly possible once they combined within the same article.

\textsuperscript{1235} Article 393, PC83.

\textsuperscript{1236} Compare also articles 394 and 396, PC83.

\textsuperscript{1237} See for example the illustrations of articles 323 and 344, Penal Code Act 1974, omitted in 1983.
First case

In the first case of 1984, while the plaintiff was sitting in a corral for cattle in the presence of two witnesses, a person managed to snatch away the plaintiff’s Samsonite case with 19000 Sudanese Pounds inside. The thief subsequently entered a car where four or more accomplices were waiting for him. The car then was pursued by several other cars driven by witnesses of the crime, who, in turn, were shot at by the passengers of the thief’s car. When the thief’s car finally broke down all passengers - except the defendant, who was overpowered by his pursuers and some bystanders - managed to escape. The case, the money and weapons were retrieved from the car and the defendant was indicted under article 339 (joint robbery or robbery with the attempt to cause death or bodily harm) and sentenced to a life term and banishment. Subsequently, the verdict was reviewed by the court of appeals (mahkama istinâf), which annulled the decision and turned it back to a regional court (mahkama mudiriyya). The regional court then sentenced the defendant under articles 339 to be read in conjunction with article 333 to cross amputation.

In its review the Supreme Court tried to answer three questions. Firstly, whether the crime joint robbery (nahb bi al-ishtirâk) was indeed to be considered ḥirâba here and whether thus the punishment cross amputation was justified. Secondly, if indeed the case was to be treated as a case of ḥirâba, whether the minimum requirements for the proof of ḥirâba were fulfilled. And, thirdly, if these minimum requirements were fulfilled, whether indeed there was to be assumed a joint liability (masʿuliyya taʿâmunîyya) of all perpetrators of the crime and those connected to it under which the hadd-punishment cross amputation was justified. The Supreme Court answered all three questions in the affirmative. We shall analyze now which arguments have been used to reach a confirmation of the conviction for ḥirâba under article 339, joint robbery (nahb bi al-ishtirâk).

With regard to the first question the Supreme Court judges admit that there is a contradiction between the definition of ḥirâba by the fuqahâ and the crime at hand. Thus, the Ḥanafites, the Ḥanbalites and the Shâfiʿites hold that among the constitutive elements of ḥirâba is the taking of property by way of a fight (ʾan tarīq al-mughālaba), neither covertly nor by way of rapid seizure or snatching (khaṭṭān). If the stolen good is taken secretly, the perpetrators are deemed thieves (wa hum surrâq) and if the good is stolen secretly and the perpetrators escape, the

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perpetrators are deemed robbers (...fāhum muntahibūn) who shall not be amputated (lā qaṭ’ ʿalaihim). Despite the fact that the stolen good was not taken by way of a fight or by force but snatched away (khattān) from inside a corral for cattle and thus not on a highway outside a city, the Supreme Court comes to the conclusion that the constitutive elements for ʿirāba are indeed given. It reasoned that the existence of a gang of five or more members was clear proof for their readiness to use violence if needed, e.g. if the rightful owner of the stolen good would insist on the return of his property. It further based its conclusion on the writings of two Muslim scholars, Abū Zahra and ʿAbd al-Khāliq al-Nawāwī. Abū Zahra argued that gangs of thieves and terrorist organizations in America and Europe commit their crimes “in a heinous way” (ghilatan), i.e. not openly, but covertly. Their crimes, however, are well known and made public and therefore it is justified to follow the minority opinion of the Mālikites (who do not insist that the robbery is committed by way of force). Nawāwī, in turn, maintains that the authoritative verse of the Qurʾān also, next to ʿirāba, covers a range of other crimes such as crimes against state security, kidnapping, gangs of drug dealers etc. Contrary to the reasoning of the Supreme Court several elements of the crime can be identified that leave either room for a legal uncertainty (shubha) or are outright in opposition to the majority opinions of the fuqahāʾ. Firstly, the stolen good had not been taken by force but snatched away. Force was used only during the escape. Secondly, the case with the money was stolen from inside a corral for cattle, while it is a constitutive element of ʿirāba that a holdup takes place on a public road. Thirdly, during the theft no weapons were used to intimidate the rightful owner of the stolen good. Fourthly, the circumstances of the case do not conclusively indicate that the gang who escaped in the car was actually superior in strength. On the contrary, despite their being armed they were pursued and forced to escape, while neither the victim of the theft nor the witnesses who participated in the pursuit were hurt.

The Supreme Court also answers the second question - whether ʿirāba has been proven according to article 78, Evidence Act – in the affirmative. It has to admit, however, that none of the witnesses had actually seen the culprit taking the Samsonite case in question or carrying it during any later stage of the crime. The Supreme Court judges also conceded in their conclusion that the Supreme Court itself had ruled earlier that the witnesses in ʿadd-crimes – in compliance with article 78 of the Evidence Act 1983 – necessarily had to give testimony to all elements and incidents of the crime. In this particular case, however, the Supreme Court held that if there were more witnesses available the minimum requirement
(niṣāb) for the proof of the ḥadd-crime could also be fulfilled by separate testimonies of each set of witnesses on different incidents of the crime. The Supreme Court based its reasoning on the assumption that the “split testimony approach” does not contradict article 78, Evidence Act 1983, which specifies the necessary number of witnesses for the proof of ḥadd-crimes. Indeed article 78 does not specify that the crime as a whole has to be testified to by one set of witnesses only. The court considered the guilt of the defendant proven, relying on the testimony of two male witnesses who testified to the theft as such, i.e. the snatching away of the Samsonite case by an unspecified male. Two different witnesses, however, gave testimony to the subsequent pursuit by car, the use of guns against their pursuers by the fleeing gang and their final capture. Both testified to having seen the defendant in these stages subsequent to the theft. The defendant brought forward the defense that he had entered the car only after the theft. This was rejected by the court as not credible.

The third question the court also answered in the affirmative is the question of joint liability and how it can be established. While it could not be proven that the defendant actually stole the case, nor that he kept it within the car nor that he used force by shooting at the pursuers, the court saw it as proven that the defendant indeed had been part of the gang and thus present at all stages of the crime. Even though the defendant claimed that he had entered the car only after the theft, he nevertheless confessed that he had been inside the car during parts of the flight. Since article 333, joint robbery, also made those liable who are helpers in committing the crime and the attempt to escape with the stolen money is considered to be part of the crime, the defendant fell under article 339, PC83, joint robbery with the attempt to cause death or bodily harm. And, in conclusion, since, in this particular case, joint robbery (nahb bi al-ishtirāk) is equivalent to ḥirāba, and the joint liability (masʿūliyya taḏāmuniyya) of the defendant is proven, the ḥadd-punishments stipulated in article 339 are applicable according to the deliberations of the Supreme Court.¹²³⁹ Last, but not least, the court quotes Mālik, Abū Ḥanīfa and Aḥmad ibn Ḥanbal who are of the opinion that next to the direct perpetrator of ḥirāba also the helper, to whom the muḥārib turns to when escaping, the assistant (muʿīn) and the vanguard (ṭalīʿa) are punishable by ḥadd.¹²⁴⁰

¹²³⁹ For a confirmation of the principle of joint liability in cases of ḥirāba see also Government of the Sudan vs. ʿAlī Muḥammad Balah and others, SLJR (1986), 1405/208.
As we have shown, the Supreme Court went a long way to prove that the decision of cross amputation was justified. While each of the three parts of its argument contains major flaws - as discussed above - it has also become clear that the origin of these methodological problems lies foremost in the problematic legislation the Supreme Court had to deal with. Confronted with the incompatibility of a ta’zīr-crime combined with a ḥadd-punishment in the same article it saw no other way but to associate the ta’zīr-crime nahb with the ḥadd-crime ḥirāba. Only if nahb and ḥirāba fall into one under certain conditions, or so the court reasoned, the ḥadd-punishment for nahb is justified. Islamic jurists, however, were meticulous when it came to the definition of crimes. Ta’zīr-crimes and ḥadd-crimes have clearly distinguished definitions, punishments and ways of proving them. Nahb thus can never be equivalent to ḥirāba, neither in its definition nor in its punishment.

It should also be noted that the Supreme Court judges and also the judges of the lower courts could have resorted to Article 3 of the Judgments Basic Rules Act 1983 meant to guide the judges in their interpretation of the Islamized legislation. Article 3, hardly ever invoked during the time the PC83 was applied\(^{1241}\), allows the judge to have recourse to any legal rule confirmed by a text in the Qur’an or the Sunna if there exists no text the case at hand can be solved with. Article 2 (a), however, confirms that the judges must assume that the legislator did not have the intention to be inconsistent with the Islamic shari’a. Of course the Judgments Basic Rules Act 1983 does not account for the many contradictions between the fiqh and the Penal Code. If article 2 of this act is to be taken seriously, i.e. if the principles and the spirit of the shari’a should have precedence in cases where terms and expressions (of the positive legislation) have to be interpreted, then a judge would have to take nahb for what it stands for in the fiqh. This approach would not solve the contradiction between crime and punishment. One could, as explained above, punish ḥirāba, through having recourse to article 3 of the Judgments Basic Rules Act. For the crime of nahb (robbery) the ḥadd-punishments of ḥirāba would still be applicable.

\(^{1241}\) As to my knowledge article 3 was only invoked once in order to justify the execution of Maḥmūd Muhammad Tāhā for apostasy in the absence of an article in the PC83 defining ridda.
Second case

In a second landmark decision\textsuperscript{1242} the Supreme Court was confronted again with the question of what exactly the features of ḥirāba were and, in a more general sense, how the contradiction between taʿzīr-crimes and ḥadd-punishments for such crimes could be solved in the practice of jurisdiction.

In the case under discussion the sequence of events, based mainly on the initial confession of the defendant, can be summarized as follows: the defendant, a construction worker, living in a village called al-Siqāi walked at midnight to the village club and found the gate to the courtyard open. He then dislodged the bolt of the locked door of the club’s main room and entered the room. There, in turn, he found a television set placed inside an iron case (ṣandūq ḥadīḥ). He forced the case open with tools he had brought along and took the television set, worth 370 Sudanese Pounds. He then climbed the wall of the room and also took the aerial. Carrying the television set and the aerial he left the club and stopped a passing car asking its driver to take him to Kharṭūm. The suspicious driver then took the defendant straight to the police where he was interrogated. During questioning the defendant first claimed that the television set was his but then admitted to having stolen it from the club’s premises.

In a first decision the district judge (al-qāḍī al-juzʾ) found the defendant guilty of ḥirāba under article 396 – lurking house-trespass or house breaking by night in order to commit a ḥadd-crime - and sentenced him to a life sentence with banishment in a remote prison (fī ḥad al-sujūn al-nāʿiyya). In a second step the Court of Appeal confirmed the conviction but revoked the punishment because the district judge had overstepped his authority. According to art. 18 (1) (e) a district judge can only impose a maximum prison sentence of one year. The case was then returned to a lower court which a second time sentenced the defendant to a lifelong prison term. When the case reached the Court of Appeal for a second time it changed the applicable article from 396 to 321 (2) – sariqa ḥaddiyya - and convicted the defendant to amputation of his right hand from the wrist. The Court of Appeal had come to the conclusion that the defendant was not be considered to be a muḥārib, but rather a thief whose deed fulfilled the conditions of sariqa ḥaddiyya. In the request for review by the Supreme Court the defendant claimed that the police had forced him to confess which was deemed an implicit retraction of the confession by the Supreme Court.

In its deliberations on the case the Supreme Court first tries to answer the question of whether indeed Article 396 is to be applied (“...and it is the article which punishes the crime of īrāba...”) or whether the case was to be considered under Article 322(2) – ḥadd-theft from a residential building. After giving due consideration to the different elements the Court comes to the conclusion that all elements of Article 396 such as house-trespass and house-breaking at night and the perpetration of a ḥadd-crime (sariqa ḥaddiyya) were indeed fulfilled. Secondly, the Court pondered over the question of whether the crime committed was indeed ṣaḥāḥ which would have entailed one of the ḥadd-punishments stipulated under Article 396. Or, put differently, whether the imposition of one of these punishments was compatible with the Islamic shari‘a under the circumstances of this particular case. The Court in its deliberations then denies that the crime committed amounts to īrāba because constitutive elements of īrāba were missing. Thus, the perpetrator did not carry any weapons on him, did not overpower anyone by force nor frighten because there had not been anyone in the club at night. In the following step the Supreme Court judges have the courage – unlike many of their colleagues deciding on related cases - to get to the core of the matter: if the crime committed, the judges ask, is indeed house-breaking at night in order to commit a ḥadd-crime and the punishments stipulated for this crime are the same punishments reserved in the fiqh for īrāba is it then admissible to impose one of the ḥadd-punishments for īrāba for a crime that is obviously not īrāba? The answer is negative. Since crime and punishment are both clearly anchored in the Qur’ān, the Court holds, the judge is not permitted to give any judgment in contradiction to the text. He can neither deduct from nor add to the punishment and he can also not impose a ḥadd-punishment on a crime that is a ḥadd-crime. With regard to the case in question, the judge may thus not impose the ḥadd-penalty for īrāba for the crime of sariqa ḥaddiyya because such a decision would be diametrically opposed to the pertinent verses of the Qur‘ān.

In order to justify its reasoning based on the Sudanese Penal Code, the Court quotes Article 458 PC, section 5 which does not allow the explanation of any text of the Penal Code in any manner that contradicts any principle of the shari‘a. The Court equally invokes Article 2 (a) of the Judgment Basic Rules Act (JBRA) 1983 which stipulates that the judge shall presume that the legislator did not intend to contradict the shari‘a scale of five religious-legal

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1243 Quoted from the SC sentence.
Based on its reasoning outlined above and on articles 458 PC and 2 JBRA the Court concludes that the imposition of one of the hadd-punishments on someone who has not perpetrated any of the deeds hirāba consists of is a clear violation of the basic principles of the shari‘a. It is therefore not admissible for the judge to impose the hadd for hirāba on someone who has been proven to have perpetrated another crime irrespective of whether this crime is a hadd-crime or not.

In conclusion the Court deems the (hadd-)crime in question to be sariqa ḥaddiyya since all the elements constituting it are present. Consistently it changes the article under which the defendant is convicted from article 396 to article 322 (2), because the punishments (of article 396) clearly contradict the Islamic shari‘a in view of the nature of the crime committed by the defendant. The fact that the culprit committed the theft after breaking into the house of the club is deemed simply as an aggravating factor (ẓar‘ mushaddid) but does not change the nature of the crime from sariqa ḥaddiyya to hirāba.

However, the Court considered the claim of the defendant that the police had forced him to confess as an implicit retraction of his confession. According to article 26 (2), Evidence Act 1983, the retraction of a confession in criminal cases qualifies the confession to be non-conclusive evidence (bayyina ghair qā‘īa), due to the legal uncertainty (shubha) created by the retraction. However, the confirmation of the confession by other proof – two different testimonies in the present case – removes this legal uncertainty and proves the responsibility of the defendant for having committed sariqa, the Supreme Court argues. As a net result of the above deliberations the SC ordered the abolition of the conviction under article 396 and changed it to a conviction under 322 (1) – sariqa from a house etc. not amounting to sariqa ḥaddiyya – and in consequence abolished the hadd-punishment of amputation.

In a final analysis of this decision and in comparison with the two other hirāba-decisions discussed above and below, we find a couple of striking features. Firstly, the case forcefully demonstrates the huge discrepancy between ta‘zīr-crimes and their attributed hadd-punishments and, as a consequence, the dilemma the judges are faced with. Applying the hadd-punishment to the ta‘zīr- crime attached to it evidently contradicts the shari‘a. Not applying the stipulated hadd-punishment even though all the elements of the crime are present is not an option either since it would mean to violate the text of the Penal Code. Therefore, the

What is meant here are the five qualifications: wājib, mandūb, mubāh, makrūh and ḥarām.
Supreme Court – and this distinguishes this case from the other cases referred to in this chapter – chooses a third option. It denounces in an unprecedented way the obvious violation of basic tenets of the shari’a and solves the dilemma by reassessing the nature of the crime. Thus, even though article 396 is a precise description of the crime committed (a fact admitted by the Court itself), it is now judged to be sariqa. While the definition of sariqa ḥaddiyya, as shown above, has its own contradictions and incongruities, the pitfalls of having to apply a ḥadd-punishment for a taʾzir-crime are avoided as inherent in all articles of the PC83 stipulating the classical ḥadd-punishments for hirāba. Due to the retraction of the confession the Court achieves at the same time another result, the nature of sariqa becomes non-ḥadd. In other words, the culprit cannot be convicted to amputation but will receive a taʾzir-penalty. It remains, however, a fact, that the crime in question here, is not a simple sariqa ḥaddiyya or a (non-ḥadd) sariqa but a burglary at night precisely as described in article 396. While the Court cannot deny that these additional elements exist it solves the problem of their existence by qualifying them a mere “aggravating factor,” not changing the nature of the crime from sariqa ḥaddiyya to hirāba. The crime defined in article 396, however, is not hirāba in the first place, but “lurking house-trespass or house-breaking by night, in order to commit a ḥadd-crime.” It should be noted here that the formula “...in order to commit a ḥadd-crime” is not only rather unspecific, since no particular ḥadd-crime is stipulated, it also does not amount to the ḥadd-crime actually having been committed. In other words, e.g. a burglary in connection with the intention to commit a ḥadd-crime (as different from the actually perpetrated ḥadd-crime) is being punished here with the punishments for hirāba. It goes without saying that the imprecise wording of the article leaves also room for the punishment of other ḥadd-crimes in connection with a burglary at night, such as šurb al-khamr or even zinā. In brief, the Supreme Court endorses the non-application of a ḥadd-punishment, based on article 458 PC, even though the definition of the crime perfectly fits the crime committed. By doing so it had implicitly criticized an important part of the Islamized Penal Code as technically flawed. Simultaneously the Supreme Court had opened the way for lower courts to take similar decisions in all cases where the punishments for hirāba would have been applicable for crimes other than hirāba.1246

Third case

In 1988 the Supreme Court had to review a decision of a lower court in a case of robbery (nahb). Mainly two questions were at stake. Firstly, whether robbery, as defined in the PC83, was indeed to be considered a hadd-crime as the stipulated hadd-punishment would have suggested. And, secondly, whether the higher minimum requirements (nisâb) for the proof of the hadd-crime hirâba were applicable or whether only the lower requirements for the proof of non-hadd crimes had to be met. The two defendants who had robbed their victim of money, beaten and hurt him with a stick and a knife, had been convicted under article 339 – “joint robbery or robbery with attempt to cause death or grievous hurt” in conjunction with article 78 – “joint acts in furtherance of common intentions”. The trial court (mahkama maufat `), considering the crime as a form of hirâba and thus a hadd-crime, pointed out in its explanatory statement that the minimum requirements for the proof of hirâba had not been met. It had based its deliberations on the nature of nahb, as defined in the PC83, and on a 1983 precedent that had come to several important conclusions. Based on its interpretation of the explanatory memorandum to the PC83 and the stipulated hadd-punishment as defined in article 339 the judges of the precedent had drawn the conclusion that the legislator had indeed had hirâba in mind (qaṣada ilâ dhâlika), despite the fact that the term hirâba had not explicitly been used. Acknowledging the hybrid nature of the definition of nahb the judges then came to the conclusion that nahb (robbery) as defined in article 332 and its derivations were to be regarded as a hadd-crime, i.e. hirâba and as a non-hadd-crime, i.e. nahb, simultaneously. The question of how a case was to be treated was decided according to the available proof. If the minimum requirements for the proof of hirâba were met, it was to be treated, and, in consequence, punished as such. If these requirements were not met it would have to be treated and punished as a ta’zîr-crime. The Supreme Court, however, did not agree with the reasoning of the Trial Court as based on the 1983 precedent. In its revision the SC pointed out that nahb and hirâba are essentially two different crimes consisting of different elements. The two crimes should therefore not be mingled. In order to show the way out of the impasse the Supreme Court judges reasoned that the crime of hirâba was not to be found

1248 The latter article considers each individual perpetrator of a criminal act to be fully responsible as if he had committed such act alone. PC83, article 78.
1250 This reasoning would have been valid for all other nahb-related crimes punishable by the hadd for hirâba.
in the Penal Code 1983 at all (“...jarîma al-ḥirâba ghair wârida fî qânîn al-‘uqûbât lisana 1983”). Instead the legislator had defined the crime of robbery (nahb) with all its elements and subsequently stipulated the punishment it saw fit. The fact that the punishments prescribed for nahb are largely the same as for different forms of ḥirâba does not mean that the legislator meant to codify ḥirâba. Rather, the legislator has the right to stipulate any punishment he chooses for non-ḥadd-offences, even if the punishment becomes equivalent to a ḥadd-penalty (ḥattâ lau waṣalat ilâ al-‘uqûba al-ḥaddîyya). By way of a circular reasoning, the judges then back up their argument by quoting articles of the PC83 where the Sudanese legislator has indeed combined taʿzîr-crimes with ḥadd-penalties. Thus the Supreme Court comes to two important conclusions. Firstly, the crime nahb (robbery) is – contrary to the dual nature described by the Trial Court – not a ḥadd-crime despite its punishment being a ḥadd-punishment. Secondly, and as a consequence thereof, the requirements for the proof of nahb are those of taʿzîr-crimes (al-ithbât al-‘âdî lî al-jarâʾîn al-taʿzîriyya) without the necessity to reach the niṣâb for ḥadd-offences. Finally, the Supreme Court annulled the taʿzîr-penalty of seven years imprisonment imposed by the Trial Court because the minimum requirements for the proof of a ḥadd-crime had not been met. Since the punishments stipulated for nahb and its derivatives were in the reasoning of the SC taʿzîr-punishments in the first place, there was also no need to replace them with other (lower) punishments. It therefore directed the lower court to impose one of the punishments stipulated in article 339, i.e. capital punishment or capital punishment with crucifixion or cross amputation or a life sentence with banishment.

It has become clear that neither court has been able to solve the dilemma caused by the flawed 1983 legislation. While the Trial Court tried to apply a more lenient taʿzîr-punishment by arguing with the dual nature of the crime, the Supreme Court simply denied that the legislator had the ḥadd-offence ḥirâba in mind when he Islamized the Penal Code. It further claimed, in contradiction with the majority opinion in the fiqh, that the legislator had the right to punish any taʿzîr-crime with any ḥadd-punishment. The SC thus blurred any distinction between ḥadd-crimes and taʿzîr-crimes that is of prime importance in the fiqh. The original problem

1251 In other words, the legislator had supposedly (voluntarily?) omitted an important part of ICL in its 1983 effort to Islamize Sudanese criminal law.
1252 For an earlier decision claiming that a ḥadd-punishment for a taʿzîr-crime is compatible with the sharīʿa see Government of the Sudan vs. Karâr Faḍl ʿAll and others, SLJR (1987), 1984/79.
1253 E.g. 318 (a), 394, 396, 399, PC83.
lies of course in the legislation of 1983. In the case at hand the Trial Court had found a way out of the quandary. By ascribing a dual nature to all nahb-related crimes it opened the way to using two different sets of standards for proving the crime, on the one hand as a ta’zīr-crime and on the other hand as a ḥadd-crime. While this was certainly not in line with the fiqh it would have helped avoiding the extremely harsh ḥadd-punishments for ḥirāba. The Supreme Court, however, thought otherwise, confirmed the ḥadd-punishment for a non-ḥadd-crime and simultaneously lowered the minimum requirements for the proof of nahb.

4.5.3 Definition and punishment of ḥirāba in the 1988 and 1991 (draft) codes

The draft Criminal Bill 1988\textsuperscript{1254} and its slightly revised successor code, the Criminal Act 1991, have introduced for the first time in the history of Sudanese Penal Codes the ḥadd-crime of ḥirāba. The two mostly identical definitions of ḥirāba of the two codes have come much closer to the fiqh and have mostly done away with the multifold incompatibilities found in the PC83. They also summarized all of the many different crimes related to brigandage and robbery of the 1974/1983 codes under the heading “ḥirāba.” In other words, the CA91 has divested itself of the heritage of its predecessor’s codes by adapting its terminology and dropping certain crimes such as e.g. joint robbery, joint robbery with voluntary homicide and attempted robbery.

Thus, according to the definition of the CA91 the ḥadd-offence of armed robbery (ḥirāba) commits who intimidates the public or hinders the users of a highway with the intention of committing an offence against the body, or honor, or property under the condition that the deed happens away from buildings, whether on land, water or air and that weapons or any offensive tool are used or threatened to be used.\textsuperscript{1255} Does the deed result in murder or rape, the offender is punished with the death penalty or death and then crucifixion.\textsuperscript{1256} Does it result in grievous hurt or robbery of property equivalent to the niṣāb, the punishment will be amputation of the right hand and the left foot.\textsuperscript{1257} In any other case the offender will be punished with a prison term not exceeding seven years in exile.\textsuperscript{1258}

\textsuperscript{1254} Compare Criminal Bill 1988, article 171 (1) and (2).
\textsuperscript{1255} CA91, art. 167 (a), (b).
\textsuperscript{1256} CA91, art. 168 (1) (a).
\textsuperscript{1257} CA91, art. 168 (1) (b).
\textsuperscript{1258} CA91, art. 168 (1) (c).
While these punishments were only applicable in the North, the punishments for the same crimes, if committed in the Southern states were stripped of their Islamic content in terms of punishments that can be ascribed to the *fiqh*. Thus, in the Southern states of the Sudan capital punishment was applicable if homicide is involved.\(^\text{1259}\) If rape was committed, life imprisonment was the stipulated punishment.\(^\text{1260}\) Cases of grievous hurt or robbery of property were punishable by imprisonment not exceeding ten years. All cases not covered by the above articles were punishable by a prison term not exceeding seven years.

The punishment for *hirāba* shall be remitted if the offender abandons the commission of armed robbery and repents before his arrest.\(^\text{1261}\) In case of remittance of the *ḥadd*-punishment, it may be replaced by a *taʿzīr*-punishment of imprisonment of up to five years\(^\text{1262}\) and the rights of the victim to *diya* or compensation shall not be prejudiced.\(^\text{1263}\)

Even though the CA91 acknowledges repentance as a valid reason for the lapsing of the *ḥadd*-penalty all other legal uncertainties such as *hirāba* against a close relative or the absence of the victim in court do not have an effect. While this works to the detriment of the offender, the absence of a collective punishment works in his favor. The CA91 does not know a collective liability as advocated by the majority opinion of the schools, the defendant will be punished for his individual contribution to the crime only. As to the draconian punishments mentioned in the Qur‘an, the CA91 recognizes them all without exception. However, crucifixion can only follow execution and cannot precede it, as some *fuqahā* hold.\(^\text{1264}\) As to the minimum age offenders of *hirāba* must have to be convicted the authors of the code have chosen the majority opinion of the *fiqh*. Thus, perpetrators between 15 and 18, who show the features of puberty and deemed adult can be punished by imprisonment and expatriation.\(^\text{1265}\)

The death punishment and *qisās* for *hirāba*, like for all other *ḥudūd*, can also be inflicted on perpetrators below 18 years of age, if deemed adult by the court. With regard to the maximum age for the imposition of prison terms, however, *hirāba* is an exception. While an

\(^{1259}\) CA91, art. 168 (2) (a).

\(^{1260}\) CA91, art. 168 (2) (b).

\(^{1261}\) CA91, art. 169 (1).

\(^{1262}\) CA91, art. 169 (3).

\(^{1263}\) CA91, art. 169 (2).

\(^{1264}\) Compare Baradie (1983), p. 121.

\(^{1265}\) Exile is defined as imprisonment in a place far from the place where the crime is committed and from the offender’s place of residence. See CA1991, art. 33 (1) (b).
imprisonment of those who are seventy years of age or older is not permitted by law\textsuperscript{1266} it can be inflicted on perpetrators of \textit{h}ir\'\textit{aba} who are 70 or older.\textsuperscript{1267}

\textit{Supreme Court cases dealing with hir\'aba as of 1991}

In comparison to the controversies on \textit{h}ir\'\textit{aba} from 1983 onwards, the number of published Supreme Court cases dealing with \textit{h}ir\'\textit{aba} between 1991 and 2005 comprises not even a handful of cases. Following the 1991 codification of \textit{hir}äba most of the incompatibilities with the \textit{fiqh} have been eliminated. However, some details needed a decision of the Supreme Court:

In a 1997 case\textsuperscript{1268} a group of men had trespassed into a house and began to steal. When the owner of the house tried to get hold of one of the robbers he was hurt by him with a knife. All four participants in the burglary were arrested later and convicted on the strength of their confessions and other material proof (\textit{bayyina m\addiyya}). In its deliberations the Supreme Court had to decide, among other questions pertaining to the age of the perpetrators, whether the definition given in the Criminal Act 1991 covered also the crime as described above. In the criminal act article 167 on \textit{hir}äba clearly states as a precondition for \textit{hir}äba that (167 (a) \textquotedblleft...the act be committed away from inhabited areas (\textit{kh}ārij al-\textit{umrān}), whether on land, water or air or within an inhabited area when it is impossible to call for help (\textit{ma` al-\textit{t}ad\dhur al-\textit{ghauth}).\textquotedblright) This definition does not leave any doubt that, generally speaking, \textit{hir}äba can take place within inhabited areas. It does, however, not specify, whether the definition includes the interior of houses as such. In other words, it remained unclear, whether house-trespass and burglary could be construed as the \textit{hadd}-crime \textit{hir}äba or whether \textit{hir}äba necessarily needed to be committed on an open street. In the case under discussion here the Supreme Court determined that burglary as described above does indeed fall under the definition of \textit{hir}äba as stipulated in article 167/168 CA91. It based its decision on the opinions of Mālik, Shāfi‘ī and Abū Yūsuf, as well as its interpretation of article 167 which included inhabited areas but left it unclear whether the interior of houses and apartments would be covered by the definition of \textit{hir}äba. According to the Mālikites, and contrary to the opinion of the Ḥanafites\textsuperscript{1269} (except Abū Yūsuf) and the Ḥanbalites, \textit{hir}äba can take place inside a city. The latter two schools

\textsuperscript{1266} Article 33 (4), CA91.
\textsuperscript{1268} Government of the Sudan vs. Mubārak Yūnis Ḥamād and others. SLJR (1997), No.318/1997.
presume that in a city the public or the police can come to help the victims and that therefore a constitutive element of ḥirāba is missing. The Shāfīʿites reason that ḥirāba can take place in a city if the power of the sultan has weakened (and in consequence the state cannot properly protect its citizens). The CA91 follows in its definition a similar reasoning. While ḥirāba can happen inside an inhabited area, a call for help has to be impossible. If such a call is indeed possible, the crime falls outside the definition of ḥirāba. In other words, the Supreme Court, implicitly decided that inside a house help can not be called and therefore – if other necessary conditions are fulfilled – ḥirāba can also take place inside a house. It should be noted here, that while the president of the court session in question ᾃعبد الـجـليل ᾃ.Adam ʿUsain had the final say as to the verdict, he met resistance from his colleague ᾃabdallah al- ʿĀdam Ḥusain. The latter argued that since the house had been guarded (yahrusuḥu khaṭīr) and the defendant fled after hurting the guard (i.e. the owner of the house), the crime committed could not be qualified as ḥirāba. It rather falls, or so argues judge ᾃ.ʿIsā, under article 175, robbery (nahb). It should also be noted that in his final verdict the president of the court who had followed a rather narrow definition of ḥirāba did not insist on the execution of the harsh punishments for ḥirāba. The age of the defendants who were 15 and 16 years old at the time of the commission of the crime offered a way to avoid them. The lower courts had failed to send the adolescents to a medical examination in order to determine whether they showed signs of adulthood or not. The Supreme Court, in turn, found itself incapable to do so since almost a year had lapsed after the crime and the culprits might have come of age only after the crime. It thus supported the original decision of sentencing the defendants to a two-year-term in a reformatory. In 2000 the Supreme Court came to the conclusion that the victims of ḥirāba are admitted to testify against the muḥārib (see following section „Proof of ḥirāba“). Further, in the same trial it was decided that homicide (qatl) as part of a ḥirāba case was to be treated as a ḥadd-crime and not treated separately. Since the heir(s) of the victim do not have the right to pardon the culprit in ḥadd-crimes they do not need to be informed of the sentence nor do they have to be present during the execution.

In the case in question a police force had set out to recapture a group of fuggitive criminals who had escaped from prison. In the course of the ensuing gun fight three policemen had

1269 “...wa qāla Abū Hanīfa lá takūna al-ḥirāba fī dākhil al-sakan abadan”. Bahnaṣī, jarāʿīm., 83.
1271 The judgment of the Supreme Court also argues along these lines. Compare also Bahnaṣī, jarāʿīm, pp. 82-83.
One of the recaptured prisoners, Ísã ʿUthmân Muḥammad, subsequently was convicted to death by hanging as retribution (qiṣāṣ) under article 130 (1) under the condition that the blood avengers were present during the execution of the sentence. Simultaneously, he was convicted to death by hanging with (subsequent) crucifixion under article 168 (1) (a) CA91. In its revision the Supreme Court reasoned that homicide is one of the possible crimes ʿirāba can consist of and it is thus to be considered a ḥadd-crime if it happens within the context of ʿirāba. It therefore cancelled the conviction under article 130 stating that since the capital punishment was not to be considered retribution (qiṣāṣ) but a ḥadd, the blood avengers had no role to play, nor would the president of the Sudan have a final say in it. The sentence made it clear that private claims to retribution do not play a role in the ḥadd-crime ʿirāba and that the president of the Sudan, unlike in non-ḥadd-crimes, has no authority to pardon a culprit.

4.5.4 Proof of ʿirāba

In both evidence acts – 1983 and 1993 – ʿirāba, in analogy with sariqa, can be proven by a single, unequivocal confession before the court or by the testimony of two men or, in case of necessity, by the testimony of a man and two women or four women. As with regard to other ḥadd-crimes both evidence acts contradict the fiqh in two important respects. Firstly, the testimony of women is not admitted there and, secondly, the two male witnesses necessarily have to be of good reputation - ṣadl - in order to be allowed to testify. This important qualification is missing in both codes. Supreme Court case law in 1984 introduced an important qualification to the general principle that the two male witnesses – or, according to the Evidence Act 1983 one man and two women or four women – necessarily need to testify to having witnessed all elements of the crime. Instead, it ruled that if there were – next to the original witnesses – two more eligible witnesses available, the first two witnesses could testify to one or more incidents of the crime (yashhadu ithnān ʿalā wāqiʿa aw akthar). The other two witnesses, who of course must equally fulfil the requirements for witnesses in ḥādd-

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1273 Moreover, he was convicted under articles 25 (abatement) and 26 CA91 (assistance in the perpetration of a crime).
1274 Consistent with articles 38, (1), (2) and (3) CA91.
crimes\textsuperscript{1276} could then testify to the remaining incidents of the crime (\textit{\ldots wa yashhada `akhkhar\=an `al\=a w\=aq\=i\=a ukhra\ldots}). In other words, unlike in the \textit{fiqh}, the crime does not need to be testified to in its entirety by the same witnesses. Rather, different sets of eligible witnesses are now accepted to give testimony to different sequences of the crime.

The Supreme Court also ruled that victims of \textit{\=hir\=aba} are permitted to testify against those who have perpetrated \textit{\=hir\=aba} against them. In the same case described in the preceding section\textsuperscript{1277} policemen, who themselves had been part of a shoot-out, testified against the defendant. Their testimony was accepted and the defendant convicted. The defense, in its appeal, had argued that the policemen were party in the lawsuit (\textit{khus\=um f\=i al-da\=w\=a}) and were thus to be excluded from testifying (\textit{\ldots shah\=ada khasm \=fal\=a taj\=u\=za}). The Supreme Court denied that the policemen who had survived the gun fight were a concerned party of the lawsuit (\textit{fal\=a t\=ujad khus\=uma tab\=t\=al al-shah\=ada}). It followed in its decision the majority opinion of the \=Hanafites and the \=M\textperiodcentered\textperiodcentered\=ikites who accept the testimony of the aggrieved party against the perpetrator e.g. in cases of \textit{qadhf}, \textit{zin\=a} and \textit{qat\=\textperiodcentered al-\=tariq}. \=Ah\textperiodcentered\=mad ibn \=\=Hanbal and al-Sh\textperiodcentered\textperiodcentered\=i\=i, however, do not accept such testimonies in the latter case\textsuperscript{1278}, because they compare it to the testimony of someone against his opponent or enemy. Such testimony is not accepted among the \textit{fuqah\=a}, when the enmity is based on worldly concerns (and not religious ones).\textsuperscript{1279} This reasoning was confirmed in 2003\textsuperscript{1280}, when the Supreme Court decided that when the aggrieved party consists of several victims of a crime their testimonies are not to be regarded as testimonies of the plaintiffs on their own behalf. Rather these testimonies are testimonies of each one of the victims on behalf of the other (\textit{shah\=ada kullu \=w\=ahid min\=hum lil\=\=akhar}), as long as the testimony is not aimed at the witness himself (\textit{\=Al\=am\=a lam yakun shah\=adatu\=hu mun\=\=saba \=h\=aula nafs\=ih\=i}), but at the other witnesses.

4.5.5 \textit{Lapsing of \=hir\=aba}

The reasons for the lapsing of the \textit{\=hadd} for \textit{\=hir\=aba} were regulated for the first time in the Criminal Circular 93/83, issued by the Chief Justice.\textsuperscript{1281} The circular lists four rules. The \textit{\=hadd} for \textit{\=hir\=aba} lapses: 1. When the \textit{mu\=\=h\=arib} repents before being caught...and such repentance

\textsuperscript{1276} Here: according to the Evidence Act 1983.
\textsuperscript{1277} Trial `\=Is\=a `U\=thm\=an Mu\=hamm\=ad, SLJR (2000), No. 50/2000.
\textsuperscript{1278} Bahn\=as\=i, na\=\=zariyya al-\=i\=h\=b\=\=at, p. 101.
\textsuperscript{1279} Bahn\=as\=i, na\=\=zariyya al-\=i\=h\=b\=\=at, p. 98.
\textsuperscript{1280} Compare Trial `\=\=\=A\=\=\=d\=\=m `\=Is\=a `Af\=i, SLJR (2003), No.20/2003.
causes the ḥadd-penalty for ḥirāba such as execution or crucifixion or cross amputation or banishment to lapse, this without prejudice to the rights of other persons to the restitution of property or the right to qisās in cases of homicide or injury. 2. When the crime of ḥirāba has been proven on the strength of a confession only and the muḥārib withdraws his confession. Article 458 (3), in contrast, allows for the promulgation of any taʿzīr-punishment, when the ḥadd lapses. It does not specify that further proof or evidence is required. 3. When the crime of ḥirāba is limited to the taking of money only and did not extend to any other crime such as homicide or making highways unsafe (ikhāfū al-sabīl), in that case all the reasons for the lapsing of the ḥadd for sariqa are applicable (see chapter 4.4.) 4. However, the lapsing of the ḥadd does not automatically mean that the offender will not receive a taʿzīr-punishment. Taʿzīr will be imposed when the proof or evidence necessary for a conviction to such penalty is available.\(^{1282}\) It should be noted here that the fiqh knows two other reasons for the lapsing of the ḥadd-penalty for ḥirāba, i.e. if there is a close relative of the culprit among the victims of his robbery and, secondly, if the deed has been committed against a mustaʿmin.\(^{1283}\) In cases of joint robbery the Shāfīʿites are of the opinion that each accomplice has to be punished only according to his individual contribution to the crime. The majority opinion of the fuqahāʾ and the PC83, however, allots the ḥadd-punishment for all accomplices independent of their individual contribution to the crime. Finally, in order to impose the ḥadd-penalty for ḥirāba it is necessary that the victim is present during the trial and asserts his claim to compensation.\(^{1284}\)

### 4.5.6 Summary and conclusion

While other ḥadd-crimes such as zinā, qadhf, shurb al-khamr and sariqa had been stipulated in the overhauled Penal Code of 1983, ḥirāba or qaṭʿ al-ṭariq had, for unknown reasons, not been codified. However, while a definition of ḥirāba, consistent with the fiqh, was missing, the harsh punishments reserved for ḥirāba were introduced for a rather wide variety of crimes. None of these crimes were congruent with the definitions of the different elements ḥirāba consists of in the fiqh and in consequence the number of crimes punishable with ḥadd-

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\(^{1282}\) Article 458 (3), in contrast, allows for the promulgation of any taʿzīr-punishment, when the ḥadd lapses. It does not specify that further proof or evidence is required.

\(^{1283}\) Compare Krcsmárik, (1905) p. 335.

\(^{1284}\) Baradie (1983), p. 121.
penalties was augmented far beyond the scope envisaged by the *fiqh*. In consequence of the above, courts in general and the Supreme Court in particular were faced with a dilemma. The Islamized Penal Code of 1983 in a variety of cases combined *ta’zīr*-crimes with *ḥadd*-penalties. How could their application be justified or, on legitimate legal grounds, avoided? An analysis of Supreme Court decisions in *ḥirāba*-cases as of 1983 shows three main approaches. In the first case analyzed above, the Supreme Court identified a crime as constituting *ḥirāba* even though the article (art.339) found to be applicable described joint robbery (*nahb bi al-ishtirāk*). By having *ḥirāba* and *nahb* fall into one crime the *ḥadd*-penalty for *ḥirāba/nahb* seemed justified. However, to reach this conclusion the Supreme Court not only had to ignore elements of the crime incompatible with *ḥirāba*, it also had to reinterpret the rules for the proof of *ḥadd*-crimes. Since article 78 of the Law of Evidence 1983 does not explicitly state that all elements of a given *ḥadd*-crime have to be testified to by the same set of witnesses the admission of several such sets of witnesses seems to be justified. It should be noted, however, that this approach clearly is in contradiction with the opinions of the *fuqahā*’ who in their majority hold that the witnesses in cases of *ḥadd*-crimes must testify to the crime as a whole and that contradictions of their testimonies constitute *shubha*. In a second case in 1984 the Supreme Court judges, faced again with the fundamental contradiction between *ta’zīr*-crime and *ḥadd*-punishment, came to a completely different conclusion. It correctly reasoned that a crime that is not *ḥirāba* can not be punished with the punishments for *ḥirāba*, even if the crime to be judged fits the description of the crime in the article applicable to the case in question and the punishments for that crime according to the Penal Code 1983 are indeed the punishments for *ḥirāba*. In other words, by way of analogy, it declared all articles of the Penal Code where a *ta’zīr*-crime was to be punished with a *ḥadd*-punishment those punishments for not applicable. It based its decision on the Judgments Basic Rules Act that did not allow for such contradictions between the PC83 and the *shari‘a*. A third exemplary decision in a case of *ḥirāba* was taken in 1988, when the Supreme Court came to the conclusion that the crime of *ḥirāba* was not to be found in the Penal Code 1983 and should not be confused with the crime of robbery (*nahb*). In the case to be revised a lower court had reasoned that the definition of *nahb* under article 332 had to be interpreted as meaning *ḥirāba* and *nahb* simultaneously. In order to lift the contradiction between the *ta’zīr*-
crime *nabīb* and the *ḥadd*-punishment stipulated for it, the Supreme Court came to the conclusion that the legislator has the right to stipulate any punishment he chooses for non-*ḥadd*-offences, even *ḥadd*-punishments if he sees fit. While the Court thus gave a judgment that seemingly reconciled *taʿzīr*-crimes with their respective *ḥadd*-punishments, it is obvious that this judgment contradicted the majority opinion of the *fiqhāʾ*.

All of these sentences described above aptly demonstrate the dilemma Sudanese courts have found themselves in as of 1983 regarding cases of *ḥiṣāba*. They also show that despite different approaches to the problem no level of the court hierarchy up to the Supreme Court was able to find a satisfactory solution to a problem that had essentially been created by a flawed and superficial legislation.

### 4.6 Apostasy (*ridda, irtidād*)

#### 4.6.1 Apostasy in the *fiqh*

**Definition**

In the Qurʾān the apostate is threatened with harsh punishment in the next world only.\(^{1286}\) In stark contrast many *ḥadiths* speak of the death penalty for apostasy like e.g. in the prophet’s saying: “Slay him, who changes his religion.” According to another tradition the prophet is “said to have permitted the blood to be shed of him who abandons his religion and separates himself from the community”.\(^{1287}\)

The crime of apostasy can be committed by a Muslim by birth or by conversion, it is irrelevant whether or not he adopts a new faith. To be culpable of *ridda* the *murtadd* (apostate) has to utter expressions of unbelief or commit deeds of unbelief. In the absence of coherent rules and criteria Islamic legal literature gives a plethora of examples of which words and deeds constitute apostasy. Examples relate to Allah, the Prophet Muhammad, other prophets and angels, the Qurʾān, ritual prayer or to science (*ʿilm*). Thus, denying Allah’s divinity or the prophethood of Muhammad, believing that Jesus is the son of Allah, adding or omitting

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\(^{1286}\) For apostasy in the Qurʾān see Hallaq (2001), also Gräf (1965).

qu'anic verses, saying “bismillahi” as a toast when drinking alcohol, rejecting the validity of shari' a courts and ridiculing scholars amounts to apostasy.\textsuperscript{1288}

All schools except the Hanafites and the Shafi'ites hold that apostasy is a hadd-crime. The Hanafites are of the opinion that certain groups are exempted from execution. Thus women are to be held in custody and beaten every three days until they repent and return to Islam. One of the reasons for the execution of the male murtadd was his posing a threat to the Islamic state. This, so the Hanafites reason, could hardly be assumed of the female apostate, hence no execution. The Hanafites also exempt the “discriminating minor” from execution, his apostasy, however, is considered to be legally valid. In all other schools a minor does not have the legal capacity to commit apostasy.\textsuperscript{1289}

The apostate can only be punished if basic elements of his criminal responsibility are fulfilled. First of all, it must be clear that the apostate has indeed been a Muslim before renouncing Islam. This is especially emphasized by the Malikites. In case of doubt, for example if the apostate had converted to Islam under duress or in a state of intoxication or as an underage child without his parents, he would not qualify as an apostate. The same is true if the convert has only pronounced the shahada but never practiced his faith e.g. prayed his daily prayers or when reliable witnesses are missing who testify to his having adopted Islam.\textsuperscript{1290}

Further, the apostate must have renounced Islam out of his own free will (ikhtiyar), he must be of age (bailigh) and in full possession of his mental faculties (aqil), i.e. the apostate must be aware of what he is doing.\textsuperscript{1291} The drunk or the mentally ill can not be punished for apostasy. Who errs or who believes something forbidden is allowed by falsely interpreting religious norms, can equally not be punished as an apostate.\textsuperscript{1292}

\textit{Punishment of apostasy in the fiqh}

The punishment for apostasy is according to all schools the death penalty. Apostasy can be proven either through a confession or the testimony of witnesses. As always in a criminal trial where the accused are Muslims the witnesses must be Muslims of good reputation (adil). The majority of the fuqahā’ holds that the witnesses must explain which acts or words of the

\textsuperscript{1288} Peters/De Vries (1976), pp. 3-4.
\textsuperscript{1289} Peters/De Vries (1976), p. 6.
\textsuperscript{1291} Heffening (1993), p. 635.
\textsuperscript{1292} Tellenbach (2006), p. 7.
accused made them believe that he is an apostate. It is then up to the qādī to assess the testimony and decide whether the deeds or words in question amount to apostasy or not.\textsuperscript{1293} Ḥanafites and Shiʿītes exempt women from the death penalty for apostasy. According to these a woman who renounces Islam is to be held in arrest and to be flogged daily, according to the Shiʿītes at each prayer time, until she recants. If she does not recant arrest and flogging continue lifelong.\textsuperscript{1294}

Once apostasy has been proven and the apostate has been convicted the punishment will not be meted out immediately. The apostate has three days to repent and only after the invitation to repent has been turned down three times he or she will be killed.\textsuperscript{1295} All Sunni schools allow for revocation and repentance, the Shiʿītes, however, grant this possibility only to converts.\textsuperscript{1296}

\textit{Consequences of apostasy with regard to civil law}

It should be noted that apostasy also has its consequences with regard to civil law. The fuqahā` concentrate here on the following central questions: What will happen to the property of the apostate, will s/he still be able to make legally binding decisions? Will s/he still be able to inherit or bequeath? What impact will apostasy have on an existing marriage? On the apostate’s entitlement to property three opinions can be distinguished. The first opinion holds that his property should be treated like the property of a ḥarbī or enemy alien. A ḥarbī cannot legally hold property and it therefore falls to the public treasury. Secondly, the rights of the apostate to dispose of his property are in suspension (mauqūf) until his repentance. Thirdly, the apostate can still dispose of his property. The Ḥanafites in general hold that female apostates does not lose her legal capacity and can still dispose of her property. Al-Shaybānī (d.805) and Abū Yūsuf (d.798) are of the opinion that this principle is to be applied to male apostates as well.\textsuperscript{1297} The apostate can not inherit from his former co-religionists, nor from those to whose religion he has converted to. His own bequeathable property shall be considered enemy property and hence fall to the public treasury. The Ḥanafites distinguish between property acquired while (still) being a Muslim and property acquired as an apostate.

\textsuperscript{1293} Tellenbach (2006), p. 7.
\textsuperscript{1294} Tellenbach (2006), p. 4.
\textsuperscript{1295} Griffel (2007), p. 132.
\textsuperscript{1296} Peters/De Vries (1976), p. 6.
The former will be inherited by his Muslim heirs, the latter will fall to the public treasury. However, a minority opinion held by al-Shaybānī and Abū Yūsuf does not make an exception from the normal rules of succession and allows the apostate to bequeath all his property to his Muslim heirs. With regard to female apostates the Ḥanafites hold that it will be inherited entirely by her Muslim heirs.1298 If one or both partners renounce Islam their marriage contract becomes automatically null and void (faskh) without the need for the qāḍī’s decision.1299 After the repentance of the apostate the former marriage is not automatically restored, a new marriage contract will be needed. According to the Shāfiʿites and the Shiʿites the marriage contract remains in suspension during the wife’s waiting period (ʿidda). Should the apostate husband repent during the ʿidda, the marriage can resume without a new contract.1300 Last but not least the apostate cannot be buried according to the Muslim rites.1301

4.6.2 Apostasy in the Penal Code 1983

The 1983 Penal Code did not contain any provisions with regard to apostasy, nor did any of its predecessors for that matter. The reason given by al-Jidd, one of the authors of the Penal Code, is the same he gave for not introducing stoning as the punishment for zinā. The committee drafting the PC was concerned by the bad impression. This concern took priority over “perfecting the Penal Code from an Islamic point of view.”1302 Not formally introducing apostasy as a defined crime, however, did not prevent the execution for alleged apostasy and state security offenses of the Sudanese mystic and intellectual Mahmūd Muḥammad Ṭāha1303 in 1985 by the Numairi regime. 1304 Ṭāha’s and his four co-defendant’s trial suffered from a multitude of flaws and contradictions. Initially, the five defendants were arrested under the state security offenses. When Numairi gave his green light Section 458 (3) of the Penal Code and Section 3 of the Sources of Judicial Decisions Act were added, however, without explicitly spelling out an indictment for apostasy. As An-Na‘im has pointed out both sections

1299 For the dissolution of a marriage in Egypt as a consequence of alleged apostasy see e.g. the analysis of the Abu Zaid case by Bälz (1997).
1303 As to Taha’s weltanschauung see e.g. Taha (1987), Rogalski (1990 and 1996), Mahmoud (2006) and Thomas (2009).
contradicted Article 70 of the Sudan Constitution of 1973 which protected against the imposition of criminal punishments without pre-existing penal provisions in Sudanese law. Further, article 247 of the Criminal Procedure Act 1983 prohibited the death penalty for persons over 70 years old. Since Ţāhā was 76 at the time of his execution, the Court of Appeal argued that article 247 was not applicable to ḥadd-offenses and that no law could be in contradiction to the sharī’a. The Court of Criminal Appeal thus held that apostasy was indeed punishable under Sudanese law and that Ţāhā and his co-defendants were guilty of it. While his co-defendants were given one month to recant, Ţāhā was to be executed immediately. All followers of the Republicans (Jumhūrīyān) of Ţāhā were declared apostates, their activities were banned and their writings were to be destroyed. In order to support the charges the Court of Appeal did not come forward with relevant evidence. The court relied on a ruling of a sharī’a court from November 1968 which had declared Ţāhā to be an apostate. Further, the Court of Appeal quoted the Muslim World League and Al-Azhar University of Cairo. Both institutions considered Ţāhā to be a murtadd. It goes without saying that the opinions of these two organizations were juridically completely irrelevant. As to the 1968 decision of the sharī’a court it was null and void because the court had not had jurisdiction over cases of apostasy. While the time for repentance and recanting was reduced to three days for Ţāhā’s co-defendants, Numairi did not grant the same to Maḥmūd Muḥammad Ţāhā who was executed by hanging in public 18.1.1985. The Sudanese Supreme Court - after the Numairi regime had come to an end in 1986 - repealed the earlier decision of the Criminal Court of Appeal.

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1306 It came to this conclusion despite the fact that the Criminal Procedure Act made no exceptions for ḥadd-offenses with regard to the maximum age for the imposition of the death penalty.
1307 This, however, did not lead to any further death penalties. Compare Köndgen (1992), p. 57.
1308 Rogalski mentions that the court presented as evidence a flyer in which the Republicans had critizised the September laws as being in contradiction to the sharī’a. Rogalski (1996), p. 48.
1309 For a detailed account of the Muslim World League’s role and position with regard to the Jumhūrīyān and Ţāhā see Schulze (1990), pp. 377-385.
1310 As An-Na’im points out the jurisdiction of the sharī’a courts at that time was restricted to cases of family law, inheritance and pious foundations according to the Sudan Mohammedan Law Courts (Amendment) Act 1961. See An-Na’im (1986), p. 221, footnote 37.
4.6.3 Apostasy in the Criminal Act 1991

The Sudanese Penal Code of 1991 introduced for the first time the crime of apostasy (*ridda*). Apostasy commits every Muslim who propagates the renunciation of the creed of Islam or publicly declares his renouncement thereof by an express statement or conclusive act. However, the apostate shall be given a chance to repent during a period to be determined by the court. Where he insists upon apostasy, and not being a recent convert to Islam, he shall be punished with death. Whenever the apostate recants before execution the penalty shall be remitted. Interestingly and in contradiction to most schools, who stipulate three days, the time given by the CA91 to recant is to be determined by the court. This vague and flexible stipulation gives the court the freedom to handle possible cases according to political expediency. Since no maximum time frame is set the apostate could remain in prison until he recants. During my interview with Dr. Ḥasan al-Turābī he insisted that during the drafting process of the Criminal Bill 1988 under his supervision as Minister of Justice he had tried to exert a mitigating influence on the multi-party committee which drafted the new criminal legislation. He would have preferred, he claimed, not to introduce a stipulation on apostasy. While his colleagues in the drafting committee were in favor of such a stipulation – he told me - he had them agree on the above vague formula, leaving the time for repentance at the discretion of the court. This account seems unlikely for several reasons. Most important, the group drafting the Criminal Bill 1988 consisted, if one follows the foreword of the law written by Ḥasan al-Turābī himself, of jurists of the three coalition parties at the time, the NIF, the Umma and the DUP. The latter two parties were neither known as fervent supporters of Numairi’s version of Islamic criminal law nor did they back this project. In fact, in the DUP and Umma parties the project was met with criticism and rejection. al-Turābī’s claim of having exerted an attenuating influence on DUP and Umma jurists therefore seems to be hardly credible.

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1312 CA91, art. 126 (1)-(3).
1313 CA91, art. 126 (1).
1314 CA91, art. 126 (2).
1315 CA91, art. 126 (3).
1316 Interview with Dr. Ḥasan al-Turābī 13.5.2009.
1318 Ironically Ḥasan al-Turābī himself has become the object of alleged apostasy in 2006. See “Sudan’s Turabi considered apostate”, Sudan Tribune 24 April 2006.
4.6.4 Conclusion

Apostasy in Sudanese criminal legislation differs from other crimes derived from Islamic Criminal Law (ICL) in one important aspect. While it has officially been introduced into the 1991 Criminal Act for the first time in the history of Sudanese criminal legislation there is, until the time of writing, only one case known where the punishment has been executed since 1983. The decision, which had led to the hanging of Maḥmūd Muḥammad Ṭāḥā, a religious reformer in opposition to the Numairi regime, was revoked by the Supreme Court in 1986. The legal situation in the Sudan with regard to apostasy is thus paradoxical. While Maḥmūd Muḥammad Ṭāḥā was executed before the crime of apostasy as such had been codified and introduced into the Penal Code, the actual codification in 1991 has not led to the execution of alleged apostates in a single case. The wording of the article on apostasy seems contradictory. On the one hand its vague definition potentially allows for wide applicability. On the other hand the possibility to repent within a period that is left to the discretion of the court provides the judge with a loophole. Even if the alleged apostate does not recant he can be kept in prison theoretically indefinitely, without obligation to execute him. Against the background of fierce criticism voiced inside and outside the Sudan against Ṭāḥā’s execution, the Sudanese judiciary and the Sudanese government respectively do not seem to be interested in the actual application of the death penalty against those who renounce Islam.

5 Homicide and bodily harm
5.0 Introduction

Against the background of the pertinent fiqh opinions, this chapter will describe and analyze relevant legislation with regard to homicide and bodily harm and its punishment before and, in more detail, after the introduction of the Islamized legislation in 1983 and after its re-enactment in 1991. This analysis will sound out to which extent the Islamized codes of 1983 and 1991 are newly created or rather textually directly dependent on their colonial and post-colonial predecessor codes. It will be highlighted how the Sudanese legislator introduced Islamic offences into a secular penal code in 1983 by way of “grafting”, thus creating inconsistencies by seriously disturbing the underlying logic of its predecessors, while in many instances not adhering to the prescriptions of the fiqh either. How these inconsistencies have been addressed and for the larger part solved (while, at times, creating new inconsistencies) in the up-to-day last Sudanese Criminal Act of 1991, will be the focus of the final part of this
chapter. Wherever available landmark decisions by the Sudanese Supreme Court (SC) on homicide or bodily harm, based either on the Penal Code 1983 (PC83) or – in the following chapter - the Criminal Act 1991 (CA91) will be analyzed in order to show how the Supreme Court of the Sudan interprets and applies this important part of Islamic Criminal Law. This analysis will attempt to give answers to questions pertaining to the autonomy of the state judicial system vis-à-vis Islamic law, in the context of the Islamization of existing secular codes. It will show how the combination of different schools of law (madhâhib) is efficiently used to reassert this very autonomy wherever it is deemed necessary and possible and can be justified without leaving an Islamic frame of reference.

5.1 Homicide and bodily harm in the fiqh

General principles

In Islamic Criminal Law (ICL) homicide and bodily harm are determined by three guiding principles:

a) The principle of private execution: different from the hudâd, claims of the victim or his heirs are claims of men and not claims of God. Thus, the prosecution, the trial and the execution of the sentence is contingent upon the will of the victim or his heirs. The role of the judge is therefore a limited one. He only supervises the procedure, scrutinizes the evidence and determines a judgment based on the victim's or the victim's heir's claims and the evidence provided. However, in cases where qišâṣ is not a possibility, the state court can impose a taʿzîr punishment.

b) The principle that either retaliation (qišâṣ) or financial compensation (diya) can be demanded as punishment or compensation by the victim or his heirs. In order to demand retaliation the killing or bodily harm must have been inflicted intentionally. If the conditions for retaliation are not fulfilled, diya (blood money) may be demanded by the victim or his heirs. In certain cases the blood money must be paid by the clan of the perpetrator (ʿaqila).

c) The principle of equivalence (mumâthala) stipulates that there must be equivalence between the killer and the victim on the one hand and with regard to the wounds inflicted

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1319 The following section serves as a short introduction and the three principles mentioned will be discussed at length below. For the introduction compare Peters (2005), pp. 38-41.
on the other hand. In the first case retaliation (qiṣāṣ) can only take place if the blood price of the victim is not lower than the monetary value of the perpetrator. In the case of bodily harm the wounds suffered by the victim and the wounds inflicted on the perpetrator by way of retaliation must be equivalent.

5.1.1 Intentional homicide

Intentional homicide (qatīl ʿamdaḥ) is defined as the killing of an immune (maʿṣūm) person, i.e. a human being, with the intention (qaṣd) to cause death and without legal reason to kill. Human life begins with birth. Therefore the killing of an unborn fetus does not fall under intentional homicide, even if, as a consequence of an attack, the death of the baby takes place after its birth only. Further, human life is protected until death, meaning that the killing of a mortally ill or lethally wounded or a person who is about to die is punishable just like the killing of a healthy person. Homicide on demand of the victim constitutes a legal uncertainty which, according to the majority opinion, averts qiṣāṣ. Among the Mālikites the legal consequences of a killing on demand are controversial. One opinion argues in favor of qiṣāṣ while the other is of the opinion that the legal uncertainty make a taʿzīr-punishment and diya obligatory. The killed person must enjoy inviolability (ʿīsmā) which is either based on the fact that the victim is either a Muslim or a non-Muslim under protection of an Islamic state. There are three kinds of non-Muslims with regard to the protection of life. A mustaʿmin enjoys temporary protection, a non-Muslim who enjoys permanent protection is called dhimmī and, finally, a non-Muslim foreigner (without temporary protection), a ḥarēbī, whose life is not protected at all within Muslim territory. Further, the life of a ḥarēbī is not protected when he is killed on the battlefield, nor when he becomes a prisoner of war. A Muslim loses immunity when he becomes an apostate. In the case where a Muslim commits a ḥadd-crime that is punishable with the death penalty (qatīl) he loses legal protection already

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1320 See below on the conditions for the payment of blood money as well as the differences between the Sunni schools.
1322 On the latter see ʿAwda, vol. 2, pp. 73-74.
once the crime has been committed and not only when he is legally sentenced.\textsuperscript{1328} However, who kills someone who has committed zinā must be capable to prove the crime, otherwise the killing will be deemed intentional homicide. The same is true for banditry (ḥirāba).\textsuperscript{1329} A killer of a Muslim who has lost immunity in the aforementioned cases does not commit intentional homicide and therefore qisāṣ is not due. Instead he can be punished by a taʾzīr-penalty because the right to kill is a prerogative of the state. Whoever kills an apostate (i.e. ex-Muslim) can be punished by taʾzīr and the payment of diya to the treasury.\textsuperscript{1330}

Another constitutive element of intentional homicide is the killing of another person. An attempt to commit suicide, despite being a sin, is not punishable. Neither is abetment to or assistance in committing suicide.\textsuperscript{1331}

In the fiqh subjective criteria to determine whether a homicide was committed intentionally are less important than objective ones. The jurists do not think that the intention of the killer can be really known and therefore concentrate on the way how the deed was committed. Further they inquire about the characteristics of the weapon in order to establish an intention to kill or to disprove it. If the killing is carried out with weapons which are - under normal circumstances - lethal, the intention to kill is assumed.\textsuperscript{1332} If the weapons are normally not lethal no intention to kill is presumed. It is, however, controversial among the fuqahā‘ which weapons have to be considered to be lethal and which are not. The most restrictive definition of lethal weapons is suggested by the Ḥanafītes. They only assume the intention to kill if death has been caused either by the use of fire or lacerating instruments (ālāt jāriḥa). These are understood as sharpened or pointed instruments which can be used to sever limbs like, e.g. a sword, a knife, a sharpened stone or an arrow.

In all the other Sunni schools an intention to kill is assumed if the means used and the manner in which the killing was carried out can be considered as being normally lethal. Among these count the already mentioned killing with a lacerating instrument, further poisoning, causing someone to drown, strangling,\textsuperscript{1333} throwing a person from great height or beating someone with a heavy object. The distinction between lethal and non-lethal instruments is, however, not always clear-cut. If death is caused by an instrument which normally is not lethal – e.g. a

\textsuperscript{1328} Awda (2001), vol. 2, p. 20.
\textsuperscript{1329} Awda (2001), vol. 2, p. 20.
\textsuperscript{1330} Awda (2001), vol. 2, p. 19.
\textsuperscript{1332} Compare Peters (2005), p. 43.
whip or a stick – the intention to kill can still be assumed. This is for example the case if death was caused by multiple lashes or by whipping a sensitive part of the victim or if an unusual constitution has advanced the death of the victim, even if the killer did not know about the condition of his victim.\textsuperscript{1334}

\textit{Retaliation (qisās)}

In order to execute retaliation (qisās) the legally correct assessment of proof and all other prescribed conditions by the judge is indispensable. Only after a legally valid judgment by a court qisās can be executed.

According to the majority opinion of the Ḥanafites and the Ḥanbalites execution is carried out through the sword, Mālikites and Shāfi‘ites, however, inflict on the perpetrator the same wounds which have led to the death of his victim.\textsuperscript{1335}

Qisās is a personal right of the private prosecutors, i.e. the legal heirs of the victim. Only if all of them demand qisās it can be executed. If only one of the heirs pardons the culprit retaliation lapses according to the majority opinion in the fiqh. According to Ḥanbalites and Shāfi‘ites the execution of qisās must be postponed if one of the heirs is underage until he is coming of age and can make a legally binding declaration of his intentions. In the meantime the culprit will be imprisoned. It should be noted, however, that the legal protection (‘isma) of a person who has committed intentional homicide ceases. However, he can be killed by the private prosecutors only, but not – unlike in the cases described above - by anyone else.\textsuperscript{1336}

Qisās is not applicable if the perpetrator is an ascendant of the victim or whenever there is a descendant of the perpetrators among the heirs of the victim.

\textit{Equivalence}

While qisās is the punishment for intentional homicide it can only be applied under specific conditions: The victim’s life may not have a diya value higher than the one of the killer except that a Muslim man may be executed for the life of a Muslim woman.\textsuperscript{1337} Thus, a Muslim can not be killed by way of qisās for the killing of a protected non-Muslim

\textsuperscript{1333} On strangling see ‘Awda (2001), vol. 2, p. 71.
\textsuperscript{1335} German: “Spiegelstrafe”. See Baradie (1983), p. 139.
\textsuperscript{1337} Peters (2005), p. 47.
nor for the intentional killing of a slave. However, *qisāṣ* is applicable if the killer has a lower blood price than his victim, i.e. a *mustaʾmin* or a *dhimmī* can be killed by way of *qisāṣ* for the killing of a Muslim and a slave for the killing of a free person. An exception to this rule is the killing of a woman by a man.\(^{1339}\) Despite the fact that her blood price is half of that of a man the male killer can be executed by way of *qisāṣ*.\(^{1340}\)

The Ḥanafites, however, follow a different view. For them equivalence is based on the *permanent* protection of life (ʼ*iṣmā*) not on the value of the blood price. Therefore, according to the Ḥanafites, a free man can be killed for a slave and a Muslim for a *dhimmī*. A Muslim, however, can not be killed for a *mustaʾmin*, because the *mustaʾmin*’s protection is only temporary.\(^{1341}\)

**Multiple perpetrators**

Since *qisāṣ* implies equivalence the *fiqh* has to answer the question of whether *qisāṣ* against multiple perpetrators is possible.\(^{1342}\) The *fuqahāʾ*’ answer in the affirmative, however subject to certain conditions. Several perpetrators can be killed by way of *qisāṣ* for one victim if they have committed the deed together and provided that the individual part each one of them played in the killing, would have equally led to the killing if it had been committed alone.\(^{1343}\)

However, according to a majority opinion of *fuqahāʾ* *qisāṣ* will be averted for all participants of the killing if one of them was either an ascendant of the victim or if one of the perpetrators can not be killed due to the lack of equivalence (*katāʾa*). This would be the case, e.g. if a free man killed a slave together with other slaves or if a Muslim killed a non-Muslim together with other non-Muslims.\(^{1344}\) Averting the *hadd* in these cases is justified by quoting a legal uncertainty (*shubha*).

**Private prosecutors (awliyāʾ al-dam)**

Whether or not retaliation takes place is contingent upon the will of the victim’s next of kin who act as prosecutors. Only if no next of kin exist, will the state act as prosecutor. All

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\(^{1338}\) Bahnasī, al-jārāʾīm, pp. 199-201.

\(^{1339}\) Bahnasī, al-jārāʾīm, pp. 202-203.

\(^{1340}\) Peters (2005), p. 47.

\(^{1341}\) Peters (2005), p. 47.

\(^{1342}\) For the following compare Ḥawdā (2001), vol. 2, pp. 41-43.


\(^{1344}\) For the Ḥanafite opinion on this constellation see above.
prosecutors (in the first case) must agree on their demand of *qiṣāṣ*. If only one foregoes his right to retaliation, *qiṣāṣ* cannot take place. Except for the Mālikites there is agreement among the other schools that the prosecutors are the heirs of the victim, women included. The Shāfiʿites exempt, however, the spouse relict. The Mālikites, in turn, define the prosecutors as the male agnatic group, i.e. a) the descendants, b) the ascendants, c) the descendants of the first ascendant (brothers, nephews etc.), d) the descendants of the second ascendant (paternal uncles, cousins etc. and, e) the descendants of the third ascendant (paternal great-uncles and their offspring). Thus, *qiṣāṣ* must be claimed by the closest male agnatic relatives. The groups above exclude each other from demanding *qiṣāṣ* in descending order, thus descendants exclude ascendants, ascendants exclude the descendants of the first ascendant and so forth. Within a group closer relatives have precedence over more distant ones.\textsuperscript{1345}

The victim’s next of kin, i.e. the private prosecutors (*awliyāʾ al-dam*) can execute the *qiṣāṣ* penalty themselves. However, in order to avoid excessive cruelty, the *qiṣāṣ* is to be executed under official supervision. In later jurisprudence we find the tendency to charge an official hangman with the execution.\textsuperscript{1346} According to the Ḥanafites all private prosecutors have to be present before and during the execution because one of them could possibly pardon the killer in the last moment.

*Qiṣāṣ* lapses if the killer dies or if the heirs pardon him. If at least one of the heirs foregoes his right to *qiṣāṣ*, it is automatically turned into *diya*. Concerning the rights of the heirs there is a difference of opinion between the four Sunni schools. Ḥanafites and Mālikites hold that the heirs have the right of choosing between *qiṣāṣ* or granting pardon. Blood money can only be demanded if the killer agrees, according to these two schools. If he refuses, the heirs can either insist on the execution of *qiṣāṣ* or accept a pardon without any financial compensation. Since the Mālikites and Ḥanafites make the payment of *diya* contingent upon the acceptance of the killer, the heirs do not receive anything if he dies before *qiṣāṣ* has been executed, since only the (living) killer could have agreed to paying blood money.\textsuperscript{1347} The Shāfiʿites and the Ḥanbalites, in contrast, hold that the private prosecutors can chose between three options: a) retaliation (*qiṣāṣ*), b) pardoning the killer without any financial compensation (ʾafw) and, c) pardoning the killer against the payment of *diya*. Thus, if the killer dies before the execution

\textsuperscript{1345} For more details of the Mālikite rules on the private prosecutors see Peters (2005), p. 45.
\textsuperscript{1346} See Baradie (1983), p. 139.
\textsuperscript{1347} Peters (2005), pp. 45-46.
of *qiṣāṣ*, according to Şaffīʿite and Ḥanbalite law the right to demand the blood price is inherited by the victim’s heirs.

Diya *and* taʿzīr

Blood money (*diya*) and *taʿzīr* can both replace *qiṣāṣ*. The normal blood price, payable for accidental and semi-accidental homicide amounts to 100 camels of different age and sex. As compensation for intentional and semi-intentional homicide equally 100 camels are due, but of a better quality, i.e. higher value. The blood price depends on the sex, religion and legal status of the victim. Thus, the *diya* of a woman is half of the *diya* for a man. As to the *diya* of a *dhimmī* the schools differ. While the Ḥanafites and the Ḥanbalites are of the opinion that it is the same as the *diya* to be paid for a Muslim victim, the Mālikites hold that it is only half of the blood price of a Muslim. The Şaffīʿites fix the *dhimmī*’s blood money as low as one third of the full *diya* (*diya kāmilā*).

The blood price for homicide is payable to the victim’s heirs. In the Mālikite and the Şaffīʿite schools the surviving spouse does not receive *diya*.\(^\text{1348}\)

According to the majority opinion the qaḍī can impose a *taʿzīr*-punishment if the conditions for *qiṣāṣ* are not fully met or if the heirs forego their right of *qiṣāṣ*. The Mālikites fix 100 lashes and a one year prison term as an adequate *taʿzīr*-penalty. Further, the perpetrator forfeits his right to inherit from his victim.\(^\text{1349}\)

*Liability of the solidarity group* (*ʿaqila*)

In cases of semi-intentional and accidental homicide it is not the perpetrator but the solidarity group which is liable for financial compensation (*diya*). However, the liability of the *ʿaqila* lapses if the perpetrator himself has played a vital part in establishing the liability, e.g. through a confession to the killing or by agreeing to a financial settlement with the heirs of the victim (*sulḥ*).\(^\text{1350}\)

There are some important differences between the schools as to what the solidarity group actually is. While Mālikites and Ḥanbalites hold that all able-bodied male tribesmen – who have the duty to protect the members of the tribe – make up the *ʿaqila*, the Şaffīʿites are of the

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\(^{1348}\) Peters (1983), p. 49.

\(^{1349}\) Baradie (1983), p. 140.
opinion that the ´aqila is formed by all adult male agnatic relatives who are also heirs. The Ḥanafites have adopted a more open definition, which, as we will see below, will play a role in modern Sudanese jurisdiction. They hold that any group that shows solidarity to its members can be defined as an ´aqila. The litmus test is whether the group would help its individual member if his house is burnt down. If no ´aqila exists and the perpetrator of the crime is a Muslim, the public treasury is liable to pay. The liability of the ´aqila is, however, not unlimited in most schools. While the Shafi’ites do not have an upper limit, the three other Sunni schools know a maximum amount a member of a solidarity group has to pay. The Ḥanafites set the maximum at 3 dirhams per year. Since the diya can be paid in three annual installments it would thus take 1100 men three years to pay the full blood price of 10,000 dirham. Shafi’ites and Ḥanbalites distinguish between different social groups. The affluent pay half a dinar, those with a medium income pay a quarter dinar, while the poor have no obligation to make any financial contribution.

Inviolability of life / ´isma

Islamic Criminal Law further knows the concept of the inviolability of a person’s life, property and freedom (´isma) - a protection offered by the state to all Muslims, dhimmis and those non-Muslims enjoying an assurance of protection (amān, hudna1354, ´aqd al-jizya1355). While a person enjoying ´isma is inviolable as to his/her life, property and freedom, the loss of such inviolability can – under certain circumstances - mean that the intentional killing of such an unprotected individual will not be regarded as intentional homicide under the fiqh. Under which conditions a Muslim or a non-Muslim enjoying inviolability lose it is a matter of discussion among the fuqahā. It will suffice to briefly mention the most important cases when the ´isma is lifted and which potentially have a bearing on the present.

a) the killing of the musta´min and all non-Muslims under the protection of the Muslim state is considered homicide according to all schools. According to Abū Ḥanīfa, however, not the status, i.e. being a Muslim or not, is decisive here, but where the homicide takes place.
In other words, Muslims and non-Muslims in the dār al-ḥarb do not enjoy inviolability for being in a belligerent state and all those who belong to the dār al-Islām enjoy inviolability, whether Muslim or not, by virtue of the protection the dār al-Islām extends to those present in its territory.\textsuperscript{1357}

b) the killing of the apostate (murtadd) whether before his repentance or after it will not be considered intentional homicide.\textsuperscript{1358}

c) the killing of the ḥarbī, i.e. who belongs to a non-Muslim state in war with the dār al-Islām, is also not considered intentional homicide. The blood of the ḥarbī can be shed with impunity in wartime, in cases of self-defense or if the ḥarbī is a prisoner of war.\textsuperscript{1359}

d) killing of those guilty of a hadd-crime which is punishable by death, such as zinā and ḥirāba is not considered intentional homicide and it is a right of the community which can be executed by any member of it. The culprit will be stripped of his inviolability already when committing the crime, not just after the verdict. This, without prejudice to the necessity to prove the crime. If e.g. zinā can not be proven after the supposed zānī has been killed, his killer will himself be guilty of intentional homicide.\textsuperscript{1360}

e) killing of those guilty of intentional homicide will not be considered intentional homicide if committed by the heirs of the victim. It is not a “ḥaqq Allah,” i.e. a right of the community but the right of the private prosecutors.\textsuperscript{1361}

In most of these cases the killer of the apostate (murtadd, ḥarbī, zānī etc. will be liable to a taʿzīr-punishment only for having arrogated himself the rights of the state but not for the killing as such. In the case of the killing of the apostate according to the Mālikites diya is due to be paid to the treasury.\textsuperscript{1362}
5.1.2 Semi-intentional homicide

Semi-intentional homicide, according to the Ḥanbalites and the Shāfi’ites, takes place when the death of an inviolable (ma’ṣūm) person is caused by an illegal and intentional attack with means that usually do not cause death. While the act as such is intentional the intention to cause death is not assumed, based on the use of non-lethal weapons. Such per se non-lethal attacks would be e.g. throwing a pebble by way of jest or beating a person with a cane.

Among the Ḥanafites, however, the definition of semi-intentional homicide is controversial. While Abū Yūsuf (d. 798) and al-Shaybānī (d. 805) follow the above majority doctrine, Abū Ḥanīfa has a different opinion. According to him, intentional homicide can only be committed with fire, or with a sharp weapon or a tool that cuts through the body (such as a sword or a sharp stone). In all other cases, such as hitting with a blunt instrument, or hitting with a stone which is not sharp or with a stick, but also in the case of drowning or poisoning, Abū Ḥanīfa assumes semi-intentional homicide.

The Mālikites do not recognize semi-intentional homicide because it is not mentioned in the Qur’ān. They classify it as intentional homicide.

Semi-intentional homicide does not result in qiṣāṣ but in the obligation to pay the enhanced blood price (diya mughallaṭa). Further, the culprit will be disinherited. Diya, however, will not be paid by the culprit but by his ‘āqila. If the heirs of the victim forego their right to diya a taʿzīr-punishment can be imposed.

5.1.3 Accidental homicide

Accidental homicide takes place when a person has erroneously caused the death of another person, whose life is inviolable, according to the rules of the fiqh by way of an intended act but without the intention to kill his victim. This can happen e.g. through cutting down a tree which accidentally kills another person. Or a man accidentally kills a human being instead of the intended animal during hunting. The act as such does not have to be of a special kind, e.g. hurt. It can also be indirect like throwing melons or pouring water onto the street and thus causing a lethal accident. Further, accidental death can be the result of immaterial causes,

\[1364\] Peters (2005), p. 43.
\[1365\] Bahnasā, jarā’im, p. 216.
\[1366\] ’Awda (2001), vol. 2, pp. 92 and Bahnasā, jarā’im, p. 216.
such as a frightening exclamation causing someone to fall from an elevated place and die.\textsuperscript{1368} In both cases – accidental and semi-accidental – financial liability persists and \textit{diya} has to be paid to the heirs of the victim.\textsuperscript{1369} Whether or not the homicide was the result of negligence – like in the aforementioned case of the mother suffocating her baby - has no impact on the financial liability of the perpetrator.\textsuperscript{1370}

Accidental homicide creates a liability for blood money (\textit{diya}) and as an alternative punishment \textit{ta`zîr}. Secondary punishments are deprivation from inheritance and bequest.\textsuperscript{1371} It must be noted here that blood money (\textit{diya}) is not a criminal responsibility but a compensation for civil damages, i.e. here the loss of life.\textsuperscript{1372} Minors and the insane are also liable for \textit{diya}. It is further important to note here that \textit{diya} must be paid not by the offender but by his \textit `{áqila} in a period of three years. The reason as given in the \textit {fiqh} for making the \textit `{áqila} responsible is that homicides by accident are common and that wisdom requires that such a heavy penalty should not be imposed on the individual with his limited property, but on his solidarity group.\textsuperscript{1373}

5.1.4 Semi-accidental homicide

A fourth category is semi-accidental homicide (\textit {qatl shibh al-khaṭṭā‘}) which is given when neither the act as such nor its result are intended. The classical example is the mother suffocating her baby when turning over in her sleep. This category is only supported by some \textit {fuqahā‘}; the majority subsumes such cases under accidental homicide. The lack of intention has no influence on the liability for blood money in this case, the legal consequences are the same as for semi-intentional homicide. Minors and the insane are only financially liable in cases of homicide and injuries, whether their acts were intended is not decisive.\textsuperscript{1374}

\textsuperscript{1369} Peters (2005), p. 44.
\textsuperscript{1372} However, a number of Muslim authors, such as `Abd al-Qādir `Awda, list \textit{diya} under punishments.
\textsuperscript{1373} Awda (2001), Vol.2, pp. 200-201.
\textsuperscript{1374} Peters (2005), p. 44. Some authors disagree about the precise definition of categories. Baradie (1983), e.g. lists killings by negligence under “semi-accidental homicide”. As an example he gives the person digging a pit in a public road. A passer-by falls into it and dies. Peters (2005), in contrast, lists indirect killings where a person creates the conditions for the killing but does not directly cause it under \textit{qatl bi-sabab} or indirect killing. On \textit{qatl bi-sabab} see Schacht (1990), p. 769.
5.1.5 **Heinous murder**

A category of homicide only recognized by the Mālikites is heinous murder (*qatl ghila*), the definition of which is “killing a person for his money after having him treacherously brought to an isolated place.” In this special category some important rules applicable to other categories of homicide have no validity. Thus, the murderer can be sentenced to execution, even if the blood price of killer and victim are not equivalent. A pardon of the heirs of the victim, in this particular case, can not avert execution.

5.1.6 **Bodily harm**

Crimes related to bodily harm follow the same categorization of intentional, semi-intentional, accidental and semi-accidental as described above with regard to homicide. Equally in analogy to homicide *qiṣāṣ* is only due in cases of intentional bodily harm, provided all conditions are fulfilled. All other categories result in financial compensation (*diya*) or pardon (*’afw*). A *qiṣāṣ*-punishment with regard to bodily harm consists in the infliction of the same wound as the one the culprit has intentionally inflicted on his victim. Concerning bodily harm, *qiṣāṣ* as well as *diya* are considered to be a right of man (*ḥaqq adami*) because they are the result of a violation of a human right, i.e. physical integrity.

With regard to equivalence there are some differences between the schools. Thus, according to the Mālikites *qiṣāṣ* for wounds or injuries (*qiṣāṣ fimā dun an-nafs*) is neither applicable if the perpetrator is a Muslim and the victim a protected non-Muslim (*dhimmī*, *musta´min*), nor if the perpetrator is a free person and the victim a slave. In these cases not *qiṣāṣ* but *diya* is applicable. However, if a Muslim is wounded by a protected non-Muslim or a free person by a slave *qiṣāṣ* is possible but not in the reverse case. The Ḥanafites, in turn, follow a third opinion: *qiṣāṣ* with regard to bodily harm is not applicable between free persons and slaves, men and women and among slaves. However, *qiṣāṣ* is applicable between Muslims and protected non-Muslims (*dhimmīs* and *musta´mins*).

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1376 Baradie (1983), pp. 143-144.
Equivalence is also of importance in the case of injuries, if in a somewhat different sense as discussed above. Thus, a sound organ cannot be removed by way of retaliation (qiṣāṣ) for a partly amputated or defective one. This is also true in the reverse direction.

If bodily harm is inflicted by a group of perpetrators against a single victim, qiṣāṣ can be applied according to the majority opinion under certain circumstances. The Ḥanafites, however, being stricter with regard to the equivalence between perpetrator and victim do not allow for qiṣāṣ in such cases, since several hands cannot be severed for one hand.

Further, qiṣāṣ is excluded if its application would imply inflicting greater harm on the perpetrator than the one he has inflicted himself on his victim. Likewise qiṣāṣ is not admissible if complete similarity between punishment and the original wound cannot be guaranteed or if it would entail a severe health risk. Thus a healthy hand cannot be taken for the loss of a paralyzed one and, likewise, qiṣāṣ will not be applied if someone who has already lost his left hand inflicts bodily harm causing the loss of the left hand of someone else.

As to flesh wounds retaliation can be applied in the case of wounds that lay bare the bone (muḍīḥa) or in the case of smaller injuries. In cases of more severe flesh wounds a qiṣāṣ-punishment is not admitted if there is difficulty to inflict a wound of the same length, depth and form. In cases where the application of the qiṣāṣ-punishment is risky and could lead to death or to greater harm than the one suffered by the hurt person qiṣāṣ will also not be applied. This is the case with respect to the fracture of bones of the neck, the skull (the so-called ma’mūma, where the wound reaches the cerebral membrane) and other sensitive parts of the body.

Whenever the qiṣāṣ-punishment is remitted compensation (diya) has to be paid and, if the qāḍī so decides, a taʿzīr-punishment is due. For the relevant amount of diya a tariff list applies. Thus full diya (also called ‘arsh when based on the tariff list) has to be paid for the loss of reason, one of the five senses, a physical or mental faculty as well as the loss of a member or an organ a human possesses only once. Diya for an organ or a member of which a human being possesses two, four or ten will be half, a quarter or a tenth of the full diya. For the loss of a tooth it will be one-twentieth of the full blood price. All percentages of the blood

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1378 The conditions of qiṣāṣ against multiple perpetrators are in analogy to those in homicide cases. Compare above.
price are measured against the full *diya* of the person who suffered the injury. Therefore, women, having half the value of the blood price of a man, receive half the amount of a man for a member or an organ lost. In all cases not covered by this list or when the injured member organ was not sound, the *qādi*, with the help of experts, will assess the amount of the due compensation (called “*ḥukūma*” or “*ḥukumat ʿadl*”). In cases of multiple wounds *diya* is cumulative, *diya* for each wound must be paid individually even though the total can result in a sum higher than the full blood price. With regard to the role of the *ʿāqila*, the solidarity group, the same rules apply as for homicide.

5.2. **Homicide and its punishment before and after the 1983 Penal Code**

With few differences the PC74 – being the last secular penal code as to date - literally re-enacted the provisions on homicide of the 1925 Penal Code. The PC25/74 knew two kinds of culpable homicide: 1. culpable homicide amounting to murder, punishable by death or life imprisonment and possibly also a fine (articles 248, 251), 2. culpable homicide not amounting to murder, punishable by imprisonment for life or for any less term or with a fine or both (articles 249, 253). The legal difference between the two was that the murderer had the intention to kill or knew that the probable consequence of his act was death. In contrast, culpable homicide not amounting to murder “the offender whilst deprived of the power of self-control by grave and sudden provocation causes the death of the person who gave the provocation...by mistake or accident”.

The Islamized (and arabized) PC83 abolished titles of homicide-related offences, inspired by its predecessor codes, and introduced titles and punishments derived from Islamic jurisprudence (*fiqh*), such as intentional homicide (*qatl ʿamdy*), semi-intentional homicide (*qatl shibh al-ʿamdy*) and accidental homicide (*qatl ḵaṭa*’). This classification follows the majority opinion of all schools, with the exception of the Mālikites, who do not recognize semi-intentional homicide but add heinous murder (*qatl ghīla*).
A comparison of the stipulations for homicide and bodily harm in the different codes show the strong textual relation – often the definitions are identical despite the changed titles - between the pre-1983 codes and their Islamized 1983-version. It also brings to light a number of significant inconsistencies, contradictions and incompatibilities with Islamic jurisprudence, mostly being the result of the circumstances of the fast drafting of the PC83, and the September Laws in general for that matter. A good part of these flaws have been redressed in the CA91. A discussion of these changes will follow below.

5.2.1 Intentional homicide

Thus, the definition for intentional homicide/qatl ‘amd in the PC83 is identical with the definition for murder 1974, in other words, it is merely a translation into Arabic. It is important to note here the fundamental difference between the notions of “murder” in the PC74 and “intentional homicide” (qatl ‘amd) in the shari’a law of homicide. “Murder” as meant in the PC74 takes the intention of the killer into account, thus culpable homicide becomes murder when “the act by which the death is caused is done with the intention of causing death.” Further, article 248 of the PC74 stipulates that culpable homicide becomes murder “if the doer of the act knew that death would be the probable and not only the likely consequence of the act or of any bodily injury which the act was intended to cause”. In contrast, the fuqahā’ did not think that a person’s intention, i.e. his state of mind could be established. Therefore, they concentrate on external factors, such as the kind of weapon or means used to kill (see also below). It is clear that by simply translating the definition of murder under the new title intentional homicide, the Sudanese legislator had not taken into account the incompatibility of the two notions.

However, the legislator has changed the punishment. The PC25/74 envisaged the death penalty, or life-long imprisonment and a fine. The PC83 stipulated the death penalty

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1386 The scope of this work does not allow for a more detailed comparison and will confine itself to the more striking inconsistencies.
1387 For the circumstances surrounding the drafting of the PC 1983, see Köndgen (1992), p. 39 et sqq.
1388 Art. 248 in both codes.
1389 PC74, art. 248 (a).
1390 PC74, art. 248 (b). In English law “malice aforethought” is a crucial element required to establish murder. Malice aforethought is generally understood as the intention to kill. See James (1979), pp. 193-194 and Martin (2003), pp. 322-323.
1392 Art.251, PC83.
(ʾiʿdām) or diya, provided the heir of the victim accepted.\footnote{According to a Supreme Court judgment the consent of all the heirs, however, is not a precondition for the release on bail of the accused. Government of the Sudan vs. Maddani ʾĪsā Bishāra, SLJR 1991, no. 1991/41.} Life-long imprisonment or a fine are not an option any longer.

Similar to the punishment for semi-intentional homicide (see below) fiqh-inspired punishments have been introduced half-heartedly. In the fiqh, the private prosecutors can choose between retaliation (qiṣāṣ) or the payment of diya. Retaliation, according to the majority opinion of the Ḥanafites and the Ḥanbalites, is to be carried out as execution with a sword. Mālikites and Shāfīʿites impose on the perpetrator the same wounds which have led to the death of the victim. In the fiqh qiṣāṣ is carried out either by the heirs themselves under official supervision or by an official executioner.\footnote{Compare Baradie (1983), p. 136 et sqq.} The text of the PC83 does not use the notion of qiṣāṣ at all.\footnote{See PC83, article 253.} The term used, „execution/ʾiʿdām,“ suggests that the heirs have no part to play in the execution of the punishment. Indeed the text of the PC83 does not mention such a participation of the heirs in the execution, the punishment is carried out by state authorities, normally by hanging.

Apart from the pardon of the heirs of the victim, the fiqh knows also other reasons for the remittance of qiṣāṣ. All schools except the Mālikites, agree that a father who kills his son is not liable to qiṣāṣ.\footnote{Compare Al-Jazārī, Vol.5, p. 213} The majority of the schools, with the exception of the Ḥanafites holds that a Muslim who has killed a dhimmī is not liable to qiṣāṣ either. It is also controversial among Muslim legal scholars whether qiṣāṣ can be imposed on a group for having killed one person or not.\footnote{As to the reasons for the remittance of qiṣāṣ compare El-Awa (1982), pp. 78-81.} While none of these reasons for the remittance of qiṣāṣ have been codified in the PC83 this lacuna has been filled by the subsequent promulgation of a criminal circular.\footnote{See discussion in chapter 5.2.6.}

5.2.2 Semi-intentional homicide

A close textual relationship can be detected between the definitions of “culpable homicide not amounting to murder” (PC74) and “qatl shibh al-ʾamd” (PC83) which are also textually almost identical and have only changed titles and the corresponding punishment. The PC 24/74 punished “culpable homicide not amounting to murder” with “imprisonment for life or
for any less term or with both” \(^{1399}\) (article 253). It thus clearly distinguished it from “murder” (article 251), which could be punished with the death penalty or a life prison term and also with a fine. The Islamized version (1983) of the same article surprisingly introduced the death penalty or *diya* as punishment for *qatl shibh āmd*. While article 253 does not specify which *diya* (ʾākima, mughallaẓa) has to be paid, the Supreme Court decided that – in accordance with the *fiqh* – *diya* mughallaẓa, i.e. the enhanced blood price, is meant here. \(^{1400}\) In the PC83, the death penalty (ʾiʿdām) or *diya*, if accepted by the *wali al-dam*, is not any different from the punishment for intentional homicide or *qatl āmd*. \(^{1401}\) This seems questionable on account of several problems resulting thereof. Firstly, the rather fine-tuned relationship between crime and punishment was abolished in a double sense. The 1925/1974 predecessor codes made a clear distinction between the two crimes, definition-wise and, corresponding therewith, punishment-wise. The same is true for Islamic jurisprudence which explicitly distinguishes between intentional and semi-intentional homicide as to its definition and also with regard to its respective punishment. While for the former *qisāṣ* or *diya* are the possible sanctions \(^{1402}\), the latter entails *diya* only.

It should also be noted here that *qisāṣ* – even though it means death for the culprit - is different from the death penalty. The execution of *qisāṣ* or retaliation is essentially a right of the private prosecutors (auliyāʾ al-dam) and can also be remitted. \(^{1403}\) In the *fiqh*, in the case of remittance the *qādī* can impose a *taʿzīr*-punishment if the heirs forego their right to *diya*. This possibility is not mentioned by article 249, PC83. \(^{1404}\) In 1989 the Supreme Court ruled that if

\(^{1399}\) This is how the legislator has phrased it, meaning that the judge has four options: 1. life imprisonment, 2. a limited prison term, 3. a fine or 4. a combination of options 2 and 3.

\(^{1400}\) See Government of the Sudan vs. Ḥāmid Ahmad Al-Shaikh, SLJR 1984, no.1405/5.

\(^{1401}\) Another example for the inconsistencies of the 1983 code is the stipulation in article 251 – intentional homicide - making the *diya* dependent on the acceptance of the heir, while article 253 – semi-intentional homicide is not making such acceptance a precondition for *diya*.

\(^{1402}\) Article 251 makes the payment of *diya* dependent on the acceptance of the heir of the victim. It thus, at least in this partial aspect of the possible consequences of intentional homicide it follows the Ḥanbalites and Shāfīʿītes. The Ḥanafites and the Mālikites in contrast hold that the heirs do not have the right to *diya* if the culprit sentenced to *qisāṣ* does not agree to it. See Baradie (1983), p. 139.

\(^{1403}\) For details on *qisāṣ*, see Baradie (1983), p. 136 et sqq.

\(^{1404}\) Compare Baradie (1983), p. 141 and Schacht (1964), p. 181. According to the Ḥanbalites and Shāfīʿītes the heirs have the choice between *qisāṣ* and *diya*, according to the Ḥanafites and Mālikites the culprit has to consent to *diya*. If he doesn’t, the heirs only have the choice between *qisāṣ* and pardon. Therefore, if the culprit dies before the execution of *qisāṣ* the heirs will not receive *diya* since they do not receive *diya* without the consent of the offender. According to the Ḥanbalites and Shāfīʿītes *qisāṣ* will be changed into *diya* automatically. Baradie (1983), p. 139-140.
the private prosecutors do settle for *diya*, an additional *ta’zûr*-punishment can not be imposed by the court.\textsuperscript{1405}

The right of the private prosecutors to forego *qiṣâṣ*, and thus spare the life of the culprit, is recognized by all schools.\textsuperscript{1406} The death penalty, in contrast, is a right of the public prosecutor, i.e. the state, to be imposed by it and remitting it is not part of the rights of the heirs. In other words, the introduction of the death penalty as punishment for intentional and semi-intentional homicide while depriving the heirs of their right to claim or remit *qiṣâṣ* cannot be justified as having its roots in Islamic jurisprudence. That the legislator has refrained from introducing *qiṣâṣ* for both crimes is even less explicable when considering the introduction of *qiṣâṣ* as a punishment for “attempted intentional homicide (*shurū’ fi qatl ‘amd*)\textsuperscript{1407}, if hurt is caused.”

It is also worth analyzing whether the old article 249 “When culpable homicide is not murder”, turned into “semi-intentional homicide/ *qatl shibh al-‘amd*”, was based on concepts derived from the *fiqh* as the new Islamized title suggested. In the *fiqh*, *qatl shibh al-‘amd* is committed if someone whose life is immune is killed illegally by means which usually are not lethal. In other words, the intention to kill is not assumed when the manner and the means applied normally do not lead to death. In another definition, “semi-intentional (homicide) is assumed when only the act, not the result was intended; for instance, if a person beats another with a cane or throws a pebble at him by way of jest and the other person dies or loses an eye as a result”.\textsuperscript{1408} While this is the opinion of the majority of schools\textsuperscript{1409}, it should be mentioned that the Mālikites do not recognize “semi-intentional homicide” because the Qur’an does not mention it. In this school semi-intentional homicide is subsumed under intentional homicide.\textsuperscript{1410}

We shall now take a look at article 249 (PC 1974/1983) and briefly compare the six cases constituting “culpable homicide not amounting to murder” with the leading opinions given by

\textsuperscript{1405} See Government of the Sudan vs. Ba’hîr Ya’hîî Muhammad Ahmad, SLJR 1989, no.1989/37.

\textsuperscript{1406} It is sufficient that one of the private prosecutors pardons the culprit. The right of the others than automatically changes into *diya*. On the right of the private prosecutors to pardon the killer, see Peters (2005), pp. 45-46 and Baradie (1983), p. 139.

\textsuperscript{1407} Art. 259 PC 1983.

\textsuperscript{1408} See Peters (2006), p. 43.

\textsuperscript{1409} For the Hanafites see Krčsmárik (1905), pp. 341-342. See also Blechot (2002), p. 680.

\textsuperscript{1410} Baradie (1983), p. 141.
the *fuqahā*. Article 249 knows the following reasons why culpable homicide does not amount to murder:\(^{1411}\)

a) grave and sudden provocation,

b) offender acts in good faith of the right of private defense,

c) public servant acting for the advancement of public justice exceeds the powers given to him by law

d) homicide without premeditation in a sudden fight in the heat of passion,

e) an adult suffering death or taking the risk of death with his own consent and

f) offender was under the influence of mental abnormality due to a mental retardation or an injury or a disease.

It will be noted here that none of the cases subsumed under “semi-intentional homicide” mentions the weapon used. Unlike the *fiqh* which stresses the characteristics of the weapon used, most cases here emphasize the motive or the state of mind of the killer.

*Grave and sudden provocation*\(^{1412}\)

In order to understand the actual meaning of sudden provocation (article 249 (1), PC74 gave the following example for a case of sudden provocation:\(^{1413}\)

“Z gives grave and sudden provocation to B who is thereby excited to violent rage. A, bystander intending to take advantage of B’s rage and to cause him to kill Z, puts a knife into B’s hand for that purpose, B kills Z with the knife. Here B has committed culpable homicide not amounting to murder but A is guilty of murder.”

An analysis of this example shows how an illustrating example does not work any longer in an Islamic legal context and has therefore been omitted with good reason. Since the 1983 PC does not differentiate any longer with regard to the punishment for intentional and semi-intentional homicide B and A were facing the same possible punishment, i.e. death penalty or *diya*. The example made sense in 1925 and 1974, because crime and punishment were in a proportional balance, but it does not make sense in 1983 any longer. Moreover, Islamic law reasons differently from the example case described here. According to the reasoning of the majority view in the *fiqh* A would not be guilty of intentional homicide since he did not kill

\(^{1411}\) For a more detailed comparison see also chapter 5.3.3.

\(^{1412}\) Article 249 (1), PC83.
anyone himself. Under Mālikite law, however, he would be held liable for intentional homicide for having abetted the killing. B, in contrast, who actually did commit the homicide in question, used a weapon which must be described as the kind of weapon which normally would make the qāḍī assume that the culprit had the intention to kill. He would thus be liable for intentional homicide in any madhhab. In other words, a sentence to qiṣṣās for both, A and B, would be possible under Mālikite law only.

Offender acts in good faith of the right of private defense

In the fiqh self-defense is considered lawful as long as the means used to ward off the attack is proportional to the violence used by the attacker. If this is the case and no excessive violence has been used the act of self-defense does not entail criminal or financial liability. The fuqahāʾ explain that by attacking a person violently the attacker has lost his inviolability (ʾismāʾ) and his death or injuries incurred are to be considered a form of qiṣṣās. The principle that the violence used should be proportional to the attack had been recognized by the PC74, article 249 (2). However, the crime was qualified as culpable homicide not amounting to murder and the maximum punishment was life imprisonment (or any less term) or a fine or both. While the maximum punishment in 1974 was harsh the range of possibilities left enough leverage to the judge to adjust the punishment to the individual circumstances. In 1983 this flexibility was gone. As in all other cases under article 249, PC83, the punishment is invariably the death penalty or diya. As in all other cases of semi-intentional homicide specified in the PC83, the death penalty contradicts the fiqh. However, also the definition of the crime has changed. While in 1974 the offender, i.e. the attacked who exercised his right of self-defense caused death while he exercised such right “without premeditation and without any intention of doing more harm than is necessary for the purpose of such defense”, in 1983 the offender causes the death of the attacker by exceeding (jāwaza) the limits of self-defense as determined by law without the intention to cause harm bigger than necessary for this self-defense. The punishment stipulated is the death penalty or diya if the heir(s) accept(s)

The PC83, while being for the most part a translation of its 1974 predecessor, has nevertheless omitted all illustrating examples which had helped judges to interpret the meaning of many provisions in 1974.

1415 Article 249 (2), PC83.
1417 Article 249 (2), PC83.
As in the PC74 so does the PC83 explicitly recognize the right to self-defense. Both codes clearly define when the right to private defense extends to causing death, e.g. in cases of an attack which causes reasonable apprehension of death or grievous hurt, rape, abduction or kidnapping, robbery, house-breaking by night or theft, mischief or house-trespass in such circumstances that death or grievous hurt are to be apprehended if private defense is not exercised. In conclusion it can be said that the provision on self-defense, as far as its definition is concerned, is congruent with the fiqh. Both, the fiqh and the PC83 recognize the right to self-defense, in the sense that a crime can become a lawful act if the act remains within the limits necessary to ward off the attacker.

Public servant acting for the advancement of public justice exceeds the powers given to him by law

This case stays within the parameters of the provisions of the fiqh. The act which leads to the death of the victim must be forbidden to the perpetrator. If the act is part of the rights or the duties given to the perpetrator and thus has a legal justification the killing is done lawfully and does thus not entail punishment or the payment of financial compensation. While it makes sense to punish a public servant who oversteps the rights given to him the envisaged death penalty is unduly harsh and not in line with the fiqh which excludes the death penalty for semi-intentional homicide.

Homicide without premeditation in a sudden fight in the heat of passion

The text of this article has almost literally been reenacted in the CA91. Its relationship with the fiqh will be explained below.

An adult suffering death or taking the risk of death with his own consent

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1418 Article 251, PC83.
1419 Compare articles 55-63 in PCs74 and 83.
1420 Article 61, PC 74 and PC83.
1421 Article 62, PC74 and PC83.
1422 Article 249 (3), PC83.
1424 Article 249 (4), PC83.
1425 See chapter 5.3.3.4.
1426 Article 249 (5), PC83. Compare also chapter 5.3.3.3.
While the PC 1983 provides for the death penalty or *diya*, the legal consequences of death with the consent of the victim (article 249 (5)) are disputed in the *fiqh*. While the Ḥanbalites impose neither *qīṣās* nor *diya*, the Ḥanafites and Shāfīʿites have the *qīṣās* lapse, but their respective scholars do not agree on whether *diya* has to be paid instead. Part of the Mālikites even argue in favor of imposing *qīṣās* in such case.\(^{1427}\) This abridged account of the differing legal opinions of the *fuqahāʿ* shows that only part of the Mālikites favor *qīṣās* for killing with the consent of the victim. The legislator of the 1983 Penal Code thus is in conflict with the great majority of schools when imposing the death penalty for this offence.

"Offender was under the influence of mental abnormality due to a mental retardation or an injury or a disease"\(^{1428}\)

As to the last case of semi-intentional homicide under the 1983 Penal Code, it must be noted that in Islamic Criminal Law the mentally retarded and children cannot be punished.\(^{1429}\) Again, a crime committed under circumstances the 1925/1974 Penal Codes considered as mitigating can be punished according to the 1983 Penal Code like intentional homicide and therefore lead to capital punishment. Capital punishment for the mentally ill, however, stands in contradiction to Islamic jurisprudence.

### 5.2.3 Heinous murder

The Penal Code 1983 moreover introduces “heinous murder” (*qatl ghīla*, article 252), which was unknown to the 1925 and 1974 codes. This crime is recognized by the Mālikites only, not by the other schools. The majority of the Mālikites defines *qatl ghīla* as luring the victim into a trap and killing it, some add in order to rob the victim of his/her money.\(^{1430}\) In this special case *qīṣās* and *diya* do not apply, nor can the heirs of the victim pardon the culprit. According to Mālik Ibn Anas *qatl ghīla* is a variety of *ḥirāba* and the killer is to be executed at any rate as a *ḥadd*-punishment.\(^{1431}\)

The introduction of *qatl ghīla* is one more example of how the 1983 Penal Code shows a strong tendency of introducing harsh punishments, either by aggravating the punishments of

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\(^{1427}\) Compare Baradie (1983), p. 133.

\(^{1428}\) Article 249 (6), PC83. Compare also chapter 5.3.3.5.

\(^{1429}\) Notwithstanding their not being punished their *ʿaqila* has to pay *diya*. According to the Ḥanafites they do not lose their right to inherit from the victim.

existing offences or – like in this case - by introducing new crimes. It is also conspicuous that due to the absence of a definition of “heinous murder,” the qāḍī disposes of a considerable latitude in establishing his own definition of what “heinous murder” actually means.\footnote{Awda (2001), Vol.2., p. 641.} However, since the definition of what qatl ghila actually meant was left to the courts the question finally reached the Supreme Court. In a 1988 decision the SC gave a definition of qatl ghila: “Concerning heinous murder the Sudanese legislator has adopted (the relevant opinion of) the Mālikite school that the offender uses deception of his victim or persuasion by way of subterfuge inasmuch as he reassures him (the victim), then betrays him and commits homicide in an appropriate moment”.\footnote{We shall see further down how the Supreme Court deals with this problem.} In 1990, the SC widened the definition of heinous murder and decided to include not only murder by enticement, persuasion (istidrāj) and deceit (khadā’ā), but also intentional homicide while the victim is sleeping as a grave form of betrayal (ghadr). In other words, heinous murder not only applied in cases of treachery but also if the victim could not feel or know of what was planned for him. It goes without saying that the two decisions combined set a wide margin for the application of qatl ghila. In fact to such an extent that any kind of homicide would fall under it, where the perpetrator does not respect certain rules when killing or the victim does not notice one way or the other that his murder is being planned.

Possibly, the latitude given to the courts by the interpretation of heinous murder in these decisions moved the Sudanese legislator to a change of course: the CA91 has neither reintroduced “heinous murder” nor replaced it with a revised text. Thus, the Sudanese legislator simply omitted an offence that had been considered an integral part of the shari’ā eight years earlier. The CA91 thus also reinforced a principle fundamental to the fiqh, i.e. the right of the private prosecutors to receive financial compensation and the right to pardon the killer.\footnote{Government of the Sudan vs. Ḥimād Aḥmad Huwillū and others, SLJR 1989, no. 139/1988, \footnote{Government of the Sudan vs. ʿAlī Ḥassān ʿUmar and ʿĀdām Aḥmad ʿUmar, SLJR 1990, no. 1406/95. \footnote{Umar (2002), p. 149.}}

5.2.4 Equivalence (kafā’ā) and inviolability (ʿisma) in the Penal Code 1983

As we have seen above, the selective and only limited adoption of the qiṣāṣ provisions of the fiqh did create major inconsistencies and incompatibilities with the fiqh. In order to illustrate
the scope of these a more detailed discussion of the notion of equivalence (kafāʿa) with regard to qisāṣ is necessary: Equivalence is a precondition for the execution of qisāṣ. Thus a Muslim according to the majority of schools cannot be executed for the killing of a dhimmī or a mustaʿmin. However, according to the Ḥanafites a Muslim can be executed for intentional homicide against a dhimmī. In the case of a Muslim killing a mustaʿmin, the Ḥanafites recognize a so called shubhat al-ʿisma, a legal uncertainty concerning the immunity of the mustaʿmin. Since for the Ḥanafites the permanence of the immunity (not the monetary value of the blood price) is the main criterion the perpetrator cannot be executed because the protection of the mustaʿmin is only temporary. Whether the Islamized penal law of 1983, had introduced the Islamic concepts of equivalence (kafāʿa) in qisāṣ cases remained unclear, as far as the legislative text is concerned. The Arabic terms used were direct translations from the English, taken from the 1974 code. They suggested equivalence between Muslims and non-Muslims and men and women as to qisāṣ. However, the Judgments Basic Rules Act 1983, gave the qādī the leverage to interpret the law in the light of sharīʿa terminology. How the Supreme Court dealt with this problem will be seen below.

Kafāʿa and ʿisma in the Supreme Court - terrorist plot of Palestinian group
A landmark case discussing an attack by Palestinian terrorists in a Khartoum hotel highlights important issues pertaining to the questions of equivalence (kafāʿa) and inviolability (ʿisma). The facts of the case can be summarized as follows: a group of five Palestinians was convicted under articles 252 (qatl ghīla) and 84/252 (abetment/qatl ghīla) to death by hanging. According to the unretracted confessions of the perpetrators the following crime had taken place: a group of five Palestinian men had carried out two attacks. One with explosives in the dining room of the Acropole Hotel in Khartoum, killing seven, five British citizens and two Sudanese and wounding seven others of different

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1439 Compare articles 8 and 9 of the 1974 and 1983 codes.
1440 The analysis of Supreme Court decisions will show how this dilemma is solved in actual jurisdiction.
1441 The Government of the Sudan vs. ʿImād Ahmad Hūwīlī e.a., SLJR, 139/1988.
1442 The group’s attack allegedly was masterminded by Abū Nidāl.
1443 Qatl ghīla under the PC 1983 was to be punished with the death penalty without the private prosecutors having the right to pardon or receiving the diya. Article 252, PC 1983.
nationalities,\footnote{Three Sudanese, two British, one Swiss and one person from Bangladesh.} and a second attack with guns and hand grenades against the Sudan Club wounding one Sudanese.\footnote{In this discussion of the case I shall as far as possible confine myself to the aspects which are pertinent to Islamic criminal law.} In its discussion of the crime the SC refutes the defense’s contention that the case should be treated as a political crime. Secondly, the SC denies the “legitimacy of the Fedayyeen’s operations against the enemy’s or his supporter’s interests” – as claimed by the defense – pointing out that the British couple killed were employed by the UN and had thus diplomatic status. The SC also denied that the killings could be justified as an act of self-defense or were provoked by sudden provocation, two reasons which would have made a \textit{diya} sentence for semi-intentional homicide possible.

The SC court discusses at length two issues pertinent to the \textit{fiqh}, the question of whether the blood and property of the foreign victims was protected, i.e. whether they, as foreigners from the “\textit{dār al-ḥarb}” were “\textit{ma’ṣūmī}”. This is answered in the affirmative by the SC judges, since the entry visa the victims held were considered to be equivalent to the “\textit{amān}”, the assurance of protection discussed in the \textit{fiqh}. Thus the non-Muslim and at the same time non-Sudanese victims are to be considered “\textit{mustā’minūn}”\footnote{The SC’s reasoning draws on `Awda, Vol.1, p. 277.} and therefore their lives and property are inviolable (\textit{ma’ṣūmū al-dam wa al-māḥ}) as long as they dispose of a valid visa (i.e. \textit{amān}). Consequentially, their killing is punishable like any other killing (of a Sudanese, Muslim or other). The question of the equivalence (\textit{kafā‘a}) of killers and victims is therefore affirmed by the Supreme Court. In consequence the private prosecutors in this case are the heirs of the victims, residing in the \textit{dār al-ḥarb}. Interestingly, the SC judges do not follow here the four Sunni schools\footnote{As we have seen above the reasons why there is no equivalence between the killer and his victim differ between the Hanafites on the one hand and the three other schools on the other.} who would not allow for the execution of a Muslim killer for having taken the life of a \textit{musta’min}, based on the assumed lack of equivalence between them. Instead, by assuming equivalence between a Muslim killer and his non-Muslim foreign victims the Supreme Court makes sure that the lives of non-Muslim foreigners enjoy the same protection as the lives of Muslims, foreign or not.

Finally, the court discusses at length the question of whether a sentence according article 252 “\textit{qatl ghīlā}” is justified. This question is of great importance since article 252 does not allow for a pardon of the private prosecutors and makes the death penalty compulsory.\footnote{See chapter 5.1.5 on heinous murder.} The court
came to the conclusion that the constitutive elements of homicide “ghilatari” are not given because the case at hand does not involve the stealing of money and the victims had not been far away from where they could have received help (ba’idan ’an al-ghauth). In consequence the final decision was commuted from art. 252 (heinous murder) to article 251 (intentional homicide) for the first of the accused and from articles 252/84 to articles 251/84\textsuperscript{1449} for all other accused.

5.2.5  Accidental homicide

The penal codes preceding the PC83 clearly distinguished between negligence and acts committed by accident. Thus, death by negligence was defined in the PC25/74 as the causing of death of a person “by doing any rash or negligent act not amounting to culpable homicide.” Its punishment was either a prison term of up to two years or a fine or both (article 256, PC 25/74). As to acts done “by accident or misfortune,” article 47, PC25/74, had stipulated that they were not offences – and thus not punishable - as long as they were done without criminal intention or knowledge in a lawful manner and by lawful means. Further, both codes had known the offence of causing death unintentionally in an act of committing an offence (article 255) which was punishable with a prison term of up to ten years or a fine or both.\textsuperscript{1450}

The Islamized Penal Code 1983 introduced for the first time the notion of accidental homicide/qatl khaṭā́ (art. 255, PC83). The definition of qatl khaṭā́ and its respective punishment (art. 256, PC83) replaced the crimes of “death caused unintentionally in act of committing offence” and “causing death by negligence”. The disappearance of both left important lacunae. For example, in the PC83 it did not make a difference any longer whether someone was killed accidentally in a lawful act or by way of an unlawful act. However, article 47 PC25/74 – which had stipulated that acts done by accident were not offences (see above) - was not abolished, but supplemented to the effect that accidental homicide/qatl khaṭā́ was explicitly exempted from the general rule formulated in article 47. In other words, if death was the result of the act, article 47 could not be invoked and article 255/256 on qatl khaṭā́ was applicable. The new definition of “homicide by accident is every killing resulting from an act by which the perpetrator did not intent to cause death or hurt to the victim of the

\textsuperscript{1449} The title of art. 84, PC83 reads: “Abetment if the act abetted is committed in consequence and where no express provision is made for its punishment.

\textsuperscript{1450} Article 255, PC 1925 and 1974.
killing (*al-*maqtūl)*. A comparison with the *fiqh* shows that the important notion of immunity – i.e. that the life of the victim has to be inviolable (*maʻṣūm*)\(^{1451}\) – did not enter the definition. Neither does the definition make any difference between accidental and semi-accidental homicide as some schools do. The article thus does not distinguish whether the act as such was intended or unintended as long as death as a result of the act was unintended.

Interestingly, article 256, PC83 does not stipulate any *tażḏr*-punishment as a consequence of such an offence, but *diya* only, and thus does not follow the provisions of the *fuqahā‘* (see above) but rather moves the offence entirely into the sphere of private law. Consequentially, some commentators are of the opinion that the nature of homicide by accident (*qatl al-*khaṭā‘*) - at least according to its new definition in the PC83 - was not to be considered a criminal offence (*ghair jinnā‘*) at all, since the perpetrator did neither intent to kill nor hurt and the offence only entailed a financial liability. It should, according to that opinion, therefore be removed from the Criminal Act 1991 and find its due place in the Civil Code.\(^{1452}\)

The Penal Code 1983, in contrast with the *fiqh*, does not stipulate that the *diya* has to be paid by the *ʿāqila*. The text of article 256 suggests that it is the offender alone who has to bear the burden of the blood money. It should also be noted that in Islamic Criminal Law fault does not play a role for liability in cases of accidental homicide. Causation is sufficient. Minors and the insane are liable for *diya* in cases of accidental homicide. The wording of article 256 thus is in harmony with the *fiqh* in this respect. Secondary punishments such as the deprivation of inheritance and bequest are not mentioned by the Penal Code 1983.

Finally, it should also be noted that accidental homicide is introduced into three more articles of the PC83. All three articles are direct translations from the two predecessor codes and concern “acts done by a person bound or justified by law” (article 44), “acts of court of justice” (article 45) and “acts done in pursuance to the judgment or order of a court” (article 46). All these articles describe exemptions to the criminal responsibility of those who commit such acts. However, by making *qatl khaṭā‘* punishable even in these three cases PC83 introduced in effect the financial liability in cases of accidental homicide of court officials, when acting as a court of justice, and of government officials in pursuance of a court order. Whether or not this was the intended effect of the introduction of the mentioned clause can not be decided here.

\(^{1451}\) For more details see “Inviolability of life / ʻisma‘” in this chapter.

5.2.6 Bodily harm

Like in other instances the comparison of the relevant articles on bodily harm of the PC83 with its predecessor 1974 show that the authors of the new code relied to a large degree on the predecessor. However, a closer look reveals that the introduction of notions taken from the fiqh, grafted onto its secular predecessor led to inconsistencies especially with regard to the punishments and to a general impression of disorganization and confusion. Thus, e.g., crimes and their respective punishments appear in articles far apart from each other, others have been omitted.\(^{1453}\) Where the PC74 had used the notion of hurt throughout, the arabized PC83 had introduced a difference between "jurîh" (wounds), "qaṭ’ uḏw" (cutting of a limb) and "adhart" (hurt). While "jurîh" and "qaṭ’ uḏw" referred to crimes punishable by qiṣṣās and diya, crimes qualified as hurt were punishable by the ubiquitous "flogging, fine and/or a prison term."\(^{1454}\) However, the different articles pertaining to crimes related to hurt specify punishments varying between "flogging and fine or prison" (e.g. article 283), "flogging or fine or prison" (article 282) and "flogging and fine and prison" (e.g. article 280). These three punishments in varying combinations replaced maximum prison terms the PC74 had specified in relation to the severity of the crime. This intended relationship between the punishment and the crime committed has been abolished with relation to hurt. The punishments – meant as ta’zīr-punishments - had now become completely discretionary, it is up to the qāḍī to determine the number of lashes, the amount of the fine or the months or years of the prison term.\(^{1455}\)

While the PC83 provides us with definitions of “intentional causation of wounds,”\(^{1456}\) “intentional cutting of a limb,”\(^{1457}\) and “accidental causation of wounds or cutting of a limb,”\(^{1458}\) it conspicuously completely omits the important notion of semi-intentional causation of wounds or cutting of limbs. This striking lacuna is even less explicable as semi-intentional homicide had been recognized by the Sudanese legislator. In other words, an important notion of the fiqh, i.e. semi-intentional bodily harm, had not been codified in 1983. The PC83 leaves it open what the punishment for such crimes was meant to be. With regard to the punishment of intentional causation of wounds it was to be punished by qiṣṣās or the

\(^{1453}\) E.g. the definition of accidental wounds is given in article 275 (page 95 of the PC83), the punishment of the same crime follows in art. 284, page 98.
\(^{1454}\) PC83, art. 276.
\(^{1455}\) Chapter 2 presenting definitions used in the code remains silent as to the meaning of flogging, fine, prison.
\(^{1456}\) PC83, art. 273.
\(^{1457}\) PC83, art. 274.
\(^{1458}\) PC83, art. 275.
diminished *diya* (al-*diya* al-*nāqiṣa*).\(^{1459}\) Most importantly, the punishments envisaged limit themselves to satisfying the claims of the private prosecutors. Since no *taʿzīr*-punishments are stipulated the state cannot impose an additional punishment once private claims are settled. This is also true for “intentional cutting of a limb.”\(^{1460}\) The accidental causation of wounds and the “accidental cutting of a limb” is equally exempted from any punishment by the state, private claims are satisfied by way of payment of *diya*.\(^{1461}\) The PC83 did not contain a list defining for the loss of which body parts full or partial *diya* was due, or a list of body parts and wounds subject to retribution.\(^{1462}\) It should be noted here that the PC74 had contained an article outlawing a specific form of female circumcision.\(^{1463}\) This article had been deleted in 1983 without replacement.

**Bone fractures in the Supreme Court**

The question of equivalence plays an important role with regard to bone fractures. In a case from 1984 the Supreme Court took an important decision limiting the application of *qiṣāṣ* in cases of bodily harm early on in the history of Islamic Criminal Law in the Sudan.\(^{1464}\) The facts of the case are as follows: in March 1984 the juvenile victim Simon Josef (Saimūn Jūzīf) wanted to urinate close to the United Nations Square in Khartoum and was prevented to do so by the guardian and defendant Mūsā Bāšā Hubailā. Hubailā prevented the victim from urinating, lifted him up and threw him against a wall delineating the square, thus breaking the right hand of the victim. The defendant denied the charges and claimed that while he had indeed tried to prevent the youth to urinate against the wall the victim had jumped from the wall voluntarily. The guardian claimed that he had accompanied him to the police and subsequently to the hospital. After listening to an expert’s testimony and the testimonies of the plaintiff and the only witness to the incident the criminal court Khartoum North\(^{1465}\) sentenced the defendant under article 277 (punishment for intentional hurt) PC83 to the payment of the lesser *diya* (al-*diya* al-*nāqiṣa*) of 2000 Sudanese Pounds and in the case of

\(^{1459}\) PC83, art. 277.
\(^{1460}\) PC83, art. 278.
\(^{1461}\) PC83, art. 284.
\(^{1462}\) This lacuna was closed in the CA91.
\(^{1463}\) Article, 284A (1), (2), PC74.
\(^{1465}\) *mahkama majlis quḍāt al-Khartūm shimāl.*
non-payment to the application of *qīṣāṣ* by breaking the right hand of the defendant at his wrist.

In its review of the case the Supreme Court concentrated on two main questions pertaining to the admissibility of *qīṣāṣ* and, secondly, to the available evidence and its meaning. With regard to the admissibility of *qīṣāṣ* the Supreme Courts quotes Abū Ḥanīfa, Shāfi`ī and Aḥmad ibn Ḥanbal who are all of the opinion that in cases of broken bones *qīṣāṣ* is not applicable because it can not be guaranteed that the bone of the defendant will be broken in exactly the same manner (*al-tamāthul ghair mumkin*). Subsequently, the Supreme Court turns to the question of evidence and asks whether one can be sure that the defendant has indeed caused the injury of the victim. Since the defendant had denied the charges and thus a confession is missing the prosecution relied on the testimonies of the plaintiff, an expert and one eyewitness. The SC does not admit the first two since the plaintiff’s testimony is not admissible (*shahāda al-insane linafsihi ghair mu’tabara shar’an*) and the expert was not an eyewitness. In order to explain whether or not the remaining evidence is sufficient as proof in a case of *qīṣāṣ* the SC refers to the *fuqahā*. The judge quotes the majority opinion which holds that in cases of *qīṣāṣ* (at least) two men of good reputation are necessary to testify. He clearly states that neither the testimony of one man and two women nor of one man in combination of an oath of the plaintiff are admissible, according to the majority view. The minority view of Mālik, however, holds that in cases of *qīṣāṣ* the testimony of one man in combination with an oath of the plaintiff is acceptable as proof. While the court (of first instance) had thus relied on Mālik in its reasoning the presented evidence, i.e. one eyewitness and the oath of the plaintiff, would have been sufficient had the plaintiff been legally capable. The youth, however, had been, according to conflicting statements, 10 or 14 years old. In both cases he was not of age (*huwa fi ḥalātaīn dūn al-bulūgh*), i.e. legally capable, to swear an oath. The available evidence is thus limited to one eyewitness which is insufficient except in cases of necessity (*darūra*). Necessity is not given, since the incident happened in broad daylight and a public place and a bigger number of witnesses could have witnessed the incident.

The Supreme Court finally comes to the conclusion that there is not sufficient evidence available for a conviction to *qīṣāṣ* nor for a replacement punishment (i.e. *diya*). However, on the strength of one witness it is admissible for the court to impose a discretionary financial punishment (*ʿuqūba taqdiriyya māliyya*), i.e. a financial compensation in relation to the
damage suffered. The Supreme Court thus annuls the conviction to the payment of the lower diya and the breaking of the hand of the defendant. The case had to be retried in the light of the above deliberations.

This case vividly shows how pragmatically the Supreme Court invokes those opinions of the fuqahāʾ, which in the light of given circumstances and necessities seem to be the appropriate ones. When it wants to block the possibility of qisās in cases of broken bones it refers to the majority opinion of three Sunni schools. However, the majority opinion is abandoned for a minority view when the Supreme Court is confronted with the question of what is the minimum requirement for proof of a qisās-crime. Since a lower court had decided that a minimum of one eyewitness and an oath by the defendant – an opinion held by Mālik - would be sufficient proof in a qisās-case, it did, this time, not invoke the majority opinion since not even this very low threshold of proof had been reached. The choice between either adopting a majority opinion of the fuqahāʾ or a minority opinion with regard to a given crime is maybe not as discretionary as it might seem. It does make sense to avoid qisās in cases of hurt, and, more specifically, in cases of broken bones. Its application with a view to equivalence (tamāthul) and its practical realization would be technically difficult and certainly cause protest inside the Sudan and in the Western world. Being able to rely on a majority opinion among the fuqahāʾ thus provides the judiciary with a waterproof Islamic legal solution for a difficult legal problem. In contrast it can also be expedient to ignore a majority opinion if it is in conflict with the interests of the state. The high threshold for the proof of hadd- or, like in the case under discussion – qisās-crimes is a case in point. Thus, in order to make a conviction of a qisās-crime easier and therefore more likely, the Supreme Court judges accept Mālik’s minority view that not – as the majority holds – two men of good reputation are necessary for the proof of a qisās-crime, but only one man and the oath of the victim.

5.2.7 Remittance of retaliation for homicide and bodily harm

The major source for reasons for the remittance of retaliation in Sudanese ICL is the Criminal Circular No. 94/83. Unlike its successor code, the PC83 did not contain a list of body parts and wounds subject to retaliation. The Supreme Court, however, decided that qisās in the case of a lost tooth is possible. See Government of the Sudan vs. Hamza ‘Ali Kutaini, SLJR 1985, no. 1405/188.

See Hāmid, mausū’a, al-juz al-thālíth, pp. 18-26.
lapsing of retaliation does not forestall the imposition of a taʿzīr-penalty, the circular recognizes the following reasons:

Retaliation lapses by way of pardon. However, certain preconditions must be fulfilled. Thus, a sentence of retaliation can only be pronounced after the private prosecutors, who must be present and of age have been asked to offer their pardon according to the Qurʾān and the Sunna. And if they all or one of them pardon in an unequivocal manner before the court the retaliation lapses. In such case the pardon can be granted in exchange for financial compensation (diya) or without.

Retaliation lapses with a peaceful financial settlement between the parties (ṣulḥ). The amount of money agreed upon as compensation can actually be higher than the diya, provided the perpetrator accepts a higher amount.

Retaliation lapses with the death of the perpetrator (but not the obligation to pay diya). Retaliation lapses if the killer himself inherits the right to retaliation, either in full or in part. This provision follows the Ḥanbalite and the Shāfiʿite schools.

The private prosecutors who own the right to pardon or to a peaceful settlement are all heirs of the killed victim at the time of his death. The obligation to summon the heirs to suggest to them to pardon the perpetrator lapses if the whereabouts of the heirs are unknown. Based on the majority opinion of the fuqahāʾ the court does not need to wait until the underage heir has reached adulthood.

The circular further specifies that the right to grant pardon or to come to a peaceful settlement is valid until the execution of retaliation. Thus, if pardon is given or a settlement reached in any stage until the execution of qiṣāṣ the case will be returned to the court in order to impose diya and the appropriate taʿzīr-punishment.

With regard to bodily harm, the circular specifies four reasons for the remittance of retaliation: firstly, if the organ or limb which is the object of the qiṣāṣ does not exist anymore. Secondly, by pardon (ʿafw). Thirdly, by peaceful settlement (ṣulḥ) and, fourthly, if the exact equivalence of the wound inflicted in the course of retaliation can not be guaranteed.

Circular 94/83 also gives examples for a better understanding of how to interpret the reasons for remittance given above, taken from Sudanese jurisdiction. Thus it quotes two different

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1468 The payment of diya is a civil right (ḥaqq madani) which does not lapse with the death of the killer. See Government of the Sudan vs. Ismāʿīl Ḥadūt Ashūṭ, SLJR 1992, no. 1992/32.

1469 Peters (2005), p. 49.
cases dealing with a situation where the heirs of the victim cannot be found. In the first case\textsuperscript{1470} an Ethiopian refugee had killed another refugee, also from Ethiopia. Subsequently, the whereabouts of the heirs of the victim could not be established by the court, since they were not inside Sudanese territory, but in Ethiopia. As a consequence, and different from what Circular 94/83 specifies, pardoning the killer or reaching a peaceful settlement with him, could not be suggested to the heirs. The Supreme Court judges, based on the majority of the fuqahā\textsuperscript{1471}, came to the conclusion that the fact that a pardon or a peaceful settlement was not possible for purely technical reasons could not prevent the court to impose the death sentence. The killer was indeed sentenced to death by hanging under article 251, PC83.

In another, unpublished, Supreme Court case\textsuperscript{1472} neither the name of the victim, who had been stabbed to death, nor the identity of his heirs could be established. After unsuccessfully exploring possibilities to remit the death penalty the Supreme Court confirmed the initial death sentence.

Both cases illustrate that the prosecution of homicide in Sudanese criminal law is not considered to be an affair to be settled between two private parties only. It is rather a mix between private claims and the claims of the society/the state. While leaving considerable room for maneuver to private claims, these do not exclude the societal need to see a killer punished. Thus, if pardon, ṣulh or diya are technically impossible, due to the absence of the heirs of the victim or because their whereabouts are unknown, the state is the only party left to punish the killer. In applying the death penalty the state thus confirms its authority and guarantees social order. On the other hand it ensures that the technical impossibility to establish private claims does not obstruct justice as such.

5.3 Homicide, bodily harm and their punishment in the Criminal Act 1991

Many of the criticisms\textsuperscript{1473} directed against the PC83 have been adressed and redressed in the 1991 successor code. The following section will describe and analyze how the Criminal Act 1991 has to a large degree succeeded in detaching itself further in its Islamized sections from


\textsuperscript{1471} Only Abū Ḥanīfah is of the opinion that in a case where the heir of the killer is unknown qīṣāṣ is not obligatory. All other schools are of the opposite opinion. ‘Awda (2001), Vol.2, p. 136. See also Ḥāmid, mausū’a, al-juz al-thālith, p. 23.


\textsuperscript{1473} See Köndgen (1992), pp. 42-44; Warburg/Layish (2004).
its secular 1925/1974 predecessors and in eliminating substantial incompatibilities with the *fiqh* and thus in returning a certain balance between crime and punishment.

5.3.1 **Intentional and semi-intentional homicide**

Most importantly, the CA91 eliminates the gross imbalance between intentional and semi-intentional homicide with regard to their respective punishments. Intentional homicide (*qatl ḍamd*, article 130) is now punishable by *qiṣāṣ* (death penalty in 1983, see above) which can be remitted by the private prosecutors. If remitted, a *taʿzīr*-punishment of up to ten years without prejudice to the right of *diya* can be imposed. In comparison, the punishment for semi-intentional homicide has now been brought back to a sensible proportionality with regard to intentional homicide: the disproportional death penalty for semi-intentional homicide (art. 253 PC83) has been eliminated and replaced by a prison term of not more than seven years without prejudice to the right of *diya*. In other words, the comparison of the two crimes show that the CA91 has reestablished the equilibrium between the definition of the crimes and their respective punishment in the sense that semi-intentional homicide is punished considerably lighter than intentional homicide. This proportionality had been lost in the PC83. However, it must also be noted that the prescribed prison term of up to seven years is a rather light one, especially in comparison with the envisaged imprisonment for life or a lesser term of the PC74.

Secondly, faithful to the *fiqh*, the CA91 now introduces *qiṣāṣ* as punishment for intentional homicide, while at the same time giving the heirs of the victim the right to remit the execution of it. Significantly, the comparison also shows how the state reasserts its right to punish while assuring the rights of the heirs to compensation. In the PC83 serious crimes like intentional homicide and semi-intentional homicide were either punished by the harshest punishment possible, the death penalty, or entailed a financial compensation payable to the heirs only. The state thus had deprived itself of the necessary flexibility to punish these crimes according to their circumstances. At the same time, whenever the *qādī* had come to the conclusion that capital punishment would not be appropriate, the state could not impose any punishment at all. At least this is what the PC83 says. Moreover, the wording “...is punished by the death penalty or the *diya* if the heir of the victim accepts it” (art. 251, PC83) suggests that the decision of whether the culprit would be executed or would get away with paying a financial compensation was in its final consequence to be decided not by the judge but by the heirs of
the victim. In other words, with regard to the most serious crime in secular or Islamic law, intentional homicide, the state left the decision of the punishment entirely to the private prosecutors. It thus had completely given up on its own right to punish if the heir chose compensation and concurrently had introduced a solution that was in stark contrast with the regulations of the *fiqh*. In brief, the CA91 redresses all of these flaws, it recreates the balance between crime and punishment, it introduces *qiṣāṣ* in order to re-approach criminal concepts based on the *fiqh* and finally maintains the state’s right to punish irrespective of private financial claims.

5.3.2 Who executes retaliation for homicide?

The PC83 had introduced a whole new vocabulary inspired by the *fiqh* without giving definitions to those who were supposed to use it. PC83, part IV, art. 64 thus integrated Islamic punishments such as single amputation, cross amputation, stoning, crucifixion and *qiṣāṣ* into the list of applicable punishments, however, without giving definitions, explanations or illustrations on all of them. While “full *diya*” was explained, *qiṣāṣ*, crucifixion (*salb*), stoning and amputation were not. This lacuna has been filled in the CA91. *Qiṣāṣ* (retaliation) is now defined as the “punishment of an intending offender with the same offensive act he has committed.” The right to retaliation is initially established for the victim and then vests in his heirs (CA91, art.28 (2)). Since the question of who is vested with the right to execute retaliation touches directly upon the prerogative of the state to punish, it is significant to state that the CA91 has found a solution to balance the diverging interests and rights of the state and the heirs of the victims. Article 28, (3) determines that “retaliation shall be death by hanging” and that “it is allowed to kill the offender in the same manner in which he has caused death, if the court deems it appropriate”. In other words, again the state reasserts its right to punish crimes by defining hanging – which by definition is to be executed by the state itself – as the standard way of executing *qiṣāṣ*. Only in exceptional cases, “when the court deems it appropriate”, *qiṣāṣ* will be executed as retaliation or in the way the culprit has inflicted death on his victim. However, in the *qiṣāṣ*-cases published in the SLJR between 1983-2007 and ending in a death sentence, the culprit invariably was sentenced to death by hanging. I could not find any trace of an

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1474 On the severity of homicide in the *fiqh* see ’Awda (2001), Volume 2, article 7, p. 10.
1475 As to the question whether *diya* is a punishment there are controversial opinions. See Peters (2005), p. 49
execution in the same way the perpetrator has used to kill his victim. Article 229 of the Criminal Procedure Act 1983 specifies: “If an accused is sentenced to death it is necessary that the verdict specifies that execution (will be carried out) by way of hanging until death.” In other words, there are no alternative ways of execution stipulated in the Criminal Procedure Act 1983. During my interviews with Supreme Court judges in 2009 all my interlocutors confirmed that no death penalty had ever been carried out by the heirs of the victim.

It is also instructive to compare the provisions for the execution of the capital punishment by way of *qiṣāṣ* in the CA91 with the opinions of the four Sunni schools. As described above the Ḥanbalites and the Ḥanafites argue that the culprit should be executed by the sword, the Shāfīʿites and the Mālikites impose retaliation on the culprit. The private prosecutors can, according to these latter two schools – at least if one follows their earlier writings - execute the offender themselves. In order to avoid excesses, however, the execution should take place under official supervision. The later jurisprudence of the Mālikites and the Shāfīʿites rather comes to the conclusion that the execution should be left to an official hangman. In summary, the CA91 has skillfully reasserted the state’s prerogative to punish. However, execution by the sword, as taught by the Ḥanbalites and the Ḥanafites, has been replaced by hanging. Concurrently, it can claim having relied on the *fiqh* as well by having adopted retaliation as the appropriate method of execution as proposed by two of the four Sunni schools. This, however, is of little consequence as to actual practice.

*Homicide within a family and the inheritance of* qiṣāṣ*  
A case which was presented to the Supreme Court in 1996 for review illustrates how complex the rules for the inheritance of *qiṣāṣ* can present themselves when the killer is part of the group of heirs. The details of the case are as follows: the general criminal court of Khartoum had sentenced a man to execution by hanging for intentional homicide. The conviction as such had been supported, in a first review, by the Supreme Court but had been sent back to the criminal court for a revision of the punishment (*li-ʾādat al-naẓr fī al-ʾuqūba*). 

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1476 Baradie (1983) , p. 139.
1477 Government of the Sudan vs. Maḥāwī Muḥammad Ahmad ʿAbbās, SLJR 1996, no. 1996/64. For a case which was tried under the Penal Code 1983 and came to similar conclusions see: Government of the Sudan vs. Faḍl Allah Al-Samānī Ahmad ʿAṭī, SLJR 1989, no. 1987/80.
1478 Art. 130 (2), CA91.
because the heirs of the victim included the father of the accused and the killer himself. The man had killed his own half-brother (qatala akhāhu li’abīhi). The father, however, had died after the killing and before the original verdict. Thus, when the private prosecutors were heard, the father (of the killer and the victim alike) had already been dead. Subsequently the Trial Court heard the remaining living heirs who did not pardon the culprit and opted for qīsās. The original verdict (death by hanging) had been based on this decision of the heirs. When the Trial Court heard the heirs for the second time, after the case had been returned to it by the Supreme Court, the result was different. The mother of the defendant pardoned him on her own behalf and on behalf of one of her under age sons while the rest of the heirs insisted on qīsās. The Trial Court subsequently issued a new judgement, sentencing the killer to a prison term and to the payment of diya and thus revoked the earlier qīsās punishment. While this second sentence of the Trial Court was supported by the Court of Appeals, the heirs of the victim who had opted for qīsās appealed to the Supreme Court on the grounds of article 32 (1) of the Criminal Act 1991 which specifies that “the relatives of a victim entitled to retaliation (qīsās) are his heirs at the time of his death”. The question the Supreme Court thus had to answer was the following: If someone who owns the right to qīsās or pardon dies, is this right subsequently transferred to his heirs? The Supreme Court answers this question in the affirmative. In the case at hand the father had died before he had been able to make use of his right to qīsās and pardon. The mother had then inherited these rights from him and therefore had the right to pardon. In addition, the Supreme Court reasons, there is another reason for the remittance of qīsās: the killer himself had inherited part of the right to qīsās or pardon from his father. To back up their reasoning the judges quote ´Abd al-Qādir ´Awda:“(the right to qīsās) is remitted if the killer inherits all or part of it”. The judges quote further:”...and if the person dies who owns the qīsās...then he (the qīsās) is inherited by the daughters and mothers. They have the right to pardon or to (demand) qīsās as if they were all one agnatic group (kamā lau kānū kulluhum ´aṣaba).” Thus the Supreme Court came to the conclusion that a) the right to qīsās or pardon is indeed inheritable, b) this right was partially inherited by the killer himself and partially by the mother and her under age son after the death of the father c) the Criminal Act 1991 stipulates that a pardon can be given by either the victim or (at least) one of his heirs, either with or

without compensation (bimuqābil aw bidūn muqābil)\textsuperscript{1480} and that therefore the pardon given by the mother and her under age son was legally valid (nāfīdih). In consequence, the Supreme Court decided not to interfere with the second sentence of the Trial Court remitting qisāṣ.

Equivalence in the Supreme Court

A case concerning homicide and involving non-Muslims illustrates how the Sudanese Supreme Court established the equivalence (kafā`) of Muslims and non-Muslims in cases of homicide under the Criminal Act 1991.\textsuperscript{1481} The case deals with the intentional killing of a Christian by a Muslim and the ensuing question of whether qisāṣ can be applied against a Muslim for having killed a non-Muslim.

The facts of the case are as follows: a certain Majdī Ḥabīl Abī Mājud Ahmad had been sentenced to death by the General Criminal Court in Omdurman North according to article 130 (1) of the PC 1991 (intentional homicide) for stabbing his father to death with a knife. After the confirmation of the sentence by the Appeals Court the case was referred to the Supreme Court, which, according to article 181 of the Criminal Procedure Act 1991, has to review all cases involving capital punishment, amputations and life sentences.

Ḥabīl Abī Mājud Ahmad, son of a Christian father, had been thrown out of his father’s house after having had a continuous row about his drug consumption and after having stolen money from his father. The fact that he subsequently converted to Islam deepened the rift between the two men. The son then bought a knife and stabbed his father to death in his garage after the father had just returned home with his car. According to the Supreme Court the crime as such as well as the criminal intent of the perpetrator was proven by the unretracted confession of the culprit and the testimony of a witness under oath. Moreover, the fact that Ḥabīl Abī Mājud Ahmad had stabbed his father five times was interpreted as sufficient proof in itself of his criminal intent to kill. Since neither diminished criminal responsibility nor attenuating circumstances were recognized and the private prosecutors\textsuperscript{1482} insisted on their legal right of qisāṣ, the Supreme Court confirmed the death penalty.

At least two important questions pertaining to qisāṣ must be under consideration here. Firstly, the question of whether qisāṣ can be executed on a descendant who killed an ascendant and,

\textsuperscript{1480} Article 31 (b).
\textsuperscript{1481} Government of the Sudan vs. Majdī Ḥabīl Abī Mājud Ahmad, SLJR 85/1997
secondly, whether qisās is applicable against a Muslim for having taken the life of a non-Muslim.

As to the first problem, the judges of the Supreme Court refer to it only briefly, merely stating that the fuqahā’ agree that a son can be subject to qisās for having killed his father but not in the reverse case. The Criminal Act 1991 indeed only remits retaliation “where the victim or his heir is an off-spring of the offender,” but not in the opposite case. In the fiqh, the majority opinion of the Ḥanafites, the Shāfiʿites and the Ḥanbalites subscribes to the same view, while the Mālikites maintain that the father who kills his son is liable to qisās, if intentional homicide is proven. In the case of a descendant intentionally killing his or her ascendant, qisās is thus possible according the fuqahā’. In other words, the Sudanese Criminal Act as well as the Supreme Court judgment under discussion here are in harmony with the fiqh.

The situation is different with reference to the second issue at stake, the intentional killing of a non-Muslim, in this particular case a Christian, by a Muslim. The Supreme Court refers to article 130 (2) of the CA 1991 which allows for death by retaliation or in the case of remittance of the retaliation for diya for “…whoever commits intentional homicide…” The CA 1991 thus does not provide for the remittance of qisās if the killer is Muslim and the victim is a non-Muslim. As a matter of fact it puts Muslims and non-Muslims on a par.

Before refering to the laws in force, the SC acknowledges the difference of opinion of the fuqahā’ with regard to this matter. It correctly mentions differences in opinion of the different schools. While the majority of the Mālikites, the Shāfiʿites and the Ḥanbalites rule out the execution of qisās against a Muslim for having intentionally killed a non-Muslim for lack of equivalence (katā’ā), the Ḥanafites do not concur. They maintain that being a Muslim does not lead to remittance of retaliation for the culprit and that indeed a Muslim can be executed by way of qisās for intentionally having taken the life of a non-Muslim. While the majority of schools argues with the lack of equivalence between perpetrator and victim, the Ḥanafites point out that the relevant Qur’ānic verses (2:179) simply declare qisās to be the punishment

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1482 The SC decision does not mention who the private prosecutors are. It is however mentioned that the deceased had several sons. The son, who killed his father, can not inherit the right to qisās.
1483 Criminal Act 1991, article 31 (a)
1484 In their explanatory statement the SC judges omit this Mālikite minority view.
1486 CA 1991, article 31 enumerates the reasons for the remittance of retaliation (qisās), the religion of the culprit is irrelevant.
for intentional homicide irrespective of the religion of perpetrator and victim.\textsuperscript{1488} It is remarkable that the Supreme Court in the substantiation of its judgment has adopted the legal opinion of one school only, in other words a minority opinion. Except for a short quotation of a qur’anic verse, pointing out that the Qur’an does not distinguish between the Muslim and the non-Muslim, the judges do not further delve into Ḥanafite reasoning concerning this question. However, they mention as a guiding principle that the equivalence (\textit{katā`a}) between perpetrator and victim is not prescribed by the law in order to execute the capital punishment. The judges thus imply that there is no equivalence between perpetrator and victim in the present case. However, by choosing the Ḥanafite solution they establish the principle that the intentional killing of a non-Muslim by a Muslim is punishable by \textit{qiṣāṣ} – if not remitted by the private prosecutors - just like any other homicide fulfilling the conditions of intentional homicide or \textit{qatl` amd}.

5.3.3 Semi-intentional homicide
The PC74 had known six cases\textsuperscript{1489} where culpable homicide was deemed semi-intentional homicide.\textsuperscript{1490} These were translated and literally taken over without further supplementing them in the PC83. Illustrating examples, however, which had given guidance to judges, were suppressed. Its successor, the CA91, lists all of the six 1974/1983 cases\textsuperscript{1491} of semi-intentional homicide and supplements them with three more. These will be examined here selectively with special attention to their relationship with the \textit{fiqh}. Culpable homicide therefore, according to article 131 CA91, shall be deemed semi-intentional homicide, inter alia, in the following cases:

\textsuperscript{1487} See Al-Jazā’ī, volume 5, pp. 220-221.
\textsuperscript{1488} Ibid. and El-Awa (1982), p. 79.
\textsuperscript{1489} The PC24 had known five, “mental subnormality due to a mental retardation” had been added in 1974.
\textsuperscript{1490} For a discussion of these, see above.
\textsuperscript{1491} The wording slightly, but not substantially differs and the CA91, just like the PC83 does not give any specific examples to illustrate cases.
5.3.3.1 Homicide under the influence of compulsion of threat of death

Similar to the provisions on „consent“\textsuperscript{1492}, the CA91, article 13 (1) defines that „there shall not be deemed to commit an offence every person who is compelled to do an act by coercion or by threat of death for imminent grievous hurt to his person or family...and it is not in his power to avoid it by any other means“. While article 13 (1) thus recognizes coercion as a factor exempting the coerced person from punishment, article 13 (2), however, makes an important qualification: „Compulsion shall not justify causing death or grievous hurt ...“.

The CA91 here follows its predecessor codes which likewise had recognized coercion with the exemption of murder and offences against the state.\textsuperscript{1493} However, PC24/74/83 had not listed coercion as one of the cases where culpable homicide was not murder.\textsuperscript{1494} While all three codes define murder/intentional homicide under duress as an offence, it remained unclear whether this was supposed to have any mitigating effect as to its punishment or whether, as the texts suggests, the death penalty for murder, was to be imposed. CA91 has filled this lacuna and states in article 131 (2) (c) that culpable homicide is deemed semi-intentional, where „the offender commits culpable homicide under the influence of threat of death.“ It thus makes it clear that a conviction for murder/intentional homicide is not possible because duress is now considered a mitigating circumstance leading to a conviction under semi-intentional homicide.\textsuperscript{1495} It should be noted that the penalty for homicide under duress in the CA91 is considerably lighter than in all its predecessor codes. While the CA91 envisions a maximum prison term of seven years without prejudice to the right of \textit{diya}, its 1983 predecessor implicitly\textsuperscript{1496} classified it under murder/intentional homicide, thus allowing for the capital punishment as a maximum penalty.

In the \textit{fiqh} it is disputed whether coercion is admissible as a defense. When A forces B to kill C, then, according to Abū Ḥanīfa, \textit{qišāṣ} is executed on A, according to Abū Yūsuf, neither A

\textsuperscript{1492} Under article 3, CA91 we read that consent:”...means acceptance, and it shall not be deemed consent that which is given by: (a) a person under the influence of compulsion or mistake of fact where the person doing the act knows that consent was given as a result of such compulsion or mistake: or (b) a person who is not an adult; or (c) a person unable to understand the nature or consequence of that to which he has given his consent by reason of mental or psychological instability.

\textsuperscript{1493} Compare article 53 in the 1925, 1974 and 1983 Penal Codes.

\textsuperscript{1494} Compare article 249 in the 1925, 1974 and 1983 Penal Codes.

\textsuperscript{1495} With regard to the coercer, he „shall be responsible for it (i.e. the crime) as if he has committed it alone...“.

See CA91, art. 23.

\textsuperscript{1496} As mentioned above, the PCs 1925/1974/1983 do not contain any specific article relating to homicide under duress.
nor B will be subject to *qiṣāṣ*.

According to Mālik, Aḥmad b. Ḥanbal and the majority opinion of the Shāfiʿites *qiṣāṣ* must be imposed on A and on B, because A is the cause which led to the killing and B, being the forced one, is the direct perpetrator of the wrongful killing of the victim in order to protect his own life. Mālik further makes A also liable to *qiṣāṣ* if the compulsion comes from a person having authority. Thus a father is killed for having forced his son to commit homicide and the son will be killed too if he is adult. The same principle will be applied to the teacher and his pupil and the master and his slave.

To what degree, thus, can the provisions of the CA91 be regarded as rooted in the *fiqh*? From the above it has become evident that there is a certain contradiction between the majority of schools and the CA91 insofar as the leading opinions of all schools envision *qiṣāṣ* for either the “coercer“ or the „coerced“ or even both. In summary, the CA91 takes a considerably more lenient stand, not only in comparison with the *fiqh*, but also in relation to its predecessor codes where duress was not explicitly recognized as a mitigating factor in homicide cases.

5.3.3.2 Homicide with the consent of the victim

Article 131 (2) (e), CA91, states that homicide is deemed to be semi-intentional: “Where the offender commits culpable homicide with the consent of the victim”.

The *fuqahāʾ* agree that the human being is inviolable in Islam and therefore suicide, the hurting of oneself or giving permission to someone else to hurt or kill one are forbidden (*ḥarām*). What they disagree on is the question of what are the penal and other consequences of killing a person with his/her consent. In the Ḥanafite school we find two main opinions. The first one argues that consent of the victim makes both *qiṣāṣ* and *diya* lapse. The second one says that consent makes the *qiṣāṣ* lapse but not the necessity to pay *diya*. The preponderant opinion among the Mālikites is that the permission to kill does not make the deed as such permissible and does not make the punishment lapse, even if the victim exculpates the perpetrator in advance. According to Mālikite reasoning, the victim, since the human being is inviolable, can not absolve the perpetrator, who, in turn, will be held responsible for intentional homicide. However, the adherents of this opinion differ in what the

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punishment should be. Some believe it should be *qisāṣ*, others think that the permission given by the victim should be regarded a legal uncertainty (*shubha*), which in consequence averts *qisāṣ* and makes the *diya* compulsory. Among the Shāfiʿites there are two opinions. Firstly, that the permission does not make the deed permissible but makes punishment lapse and that therefore neither *qisāṣ* nor *diya* are applicable. The second opinion sees the permission as a legal uncertainty which averts *qisāṣ* and makes *diya* compulsory. A minority opinion among the Shāfiʿites does not consider the permission a *shubha* and therefore holds that *qisāṣ* is the necessary punishment. Ahmad Ibn Ḥanbal, finally, argues that the perpetrator of the killing is not subject to a punishment because it is the right of the victim to remit the punishment and that the consent to be killed is equivalent to the remittance of the punishment. In summary, the *fuqahāʾ* disagree about the nature of the consent of the victim and its consequences. Some regard consent to killing as equivalent to an advance pardon which, in turn, makes the punishment, i.e. *qisāṣ* and *diya*, lapse. Others do not deem consent to killing an advanced pardon, because a pardon for homicide needs as a precondition the existence of homicide. If pardon is granted before the homicide has happened it is invalid, according to this reasoning. However, proponents of this opinion disagree on whether the punishment should be *qisāṣ* or *diya*.\(^{150}\)

From the disagreements of the *fuqahāʾ* described above it has become clear that in the case under discussion several solutions could have been justified as being based on or compatible with the *fiqh*. It should be noted that the CA91 generally recognizes consent (of the “victim”) as decisive for not deeming an act an offence (art.17 (1)), but exempts “acts which are likely to cause death or grievous hurt” (art.17 (2)). Art. 131 (2) (e) stands, first of all, in the tradition of the Penal Codes 1925/1974, where article 249 (5) deemed consent as one of the reasons to classify culpable homicide as not amounting to murder. The wording, however, at the time, was more specific. The article defined that only the consent of persons older than 18 years would be recognized as culpable homicide not amounting to murder. In the CA91 it remains unclear whether the consent of a 17 year old person, e.g., would have the same mitigating effect. According to the PC 1925/74 homicide with the consent of a 17 year old


\(^{150}\) Schacht (1990), p. 769, writes under “Notes on the question of permission, request, compulsion and assistance in illegal killing: If someone kills another by his request or with his permission there is neither *qisāṣ* nor obligation to pay *diya*.” Given the many differing legal opinions quoted above, this seems to be too simplifying a summary.
person would have been deemed murder. As to remitting *qiṣāṣ*, the CA91, is in harmony with the majority of the schools. Apart from part of the Ḥanafites and the Ḥanbalites all other schools are also in favor of imposing *diya* after *qiṣāṣ* has been remitted. In other words, article 131 (2) (e) is in harmony with opinions in the Ḥanafite, Mālikite and the Shāfi´ite schools, not the Ḥanbalite. Although, it should be noted here that, given the disagreement of the *fuqahā´*, the exemption from *qiṣāṣ* and *diya* could just as well have found its Islamic justification in the *fiqh*.

5.3.3.3 *Homicide without premeditation during a sudden fight*

Article 131 (2) (h) classifies homicide “without premeditation during a sudden fight and without his (i.e. the offender) having taken undue advantage or acted in a cruel or unusual manner” as one of the cases which make culpable homicide semi-intentional homicide. This case clearly has its roots not so much in the *fiqh* but in the three predecessor codes of the CA91. The Penal Codes of 1925, 1974 and 1983 had under article 249 (4) given almost literally the same definition for one of the cases of culpable homicide not amounting to murder.

The *fuqahā´* have not developed a special theory on homicide during a sudden fight. However, they do mention a variety of precepts which - if combined - can be construed as a theory on the topic.1502

The Ḥanafites and a minority opinion of the Ḥanbalites distinguish between intentional homicide and intentional bodily harm or beating on the one hand and between crimes which are the result of an unintentional fight on the other hand. In both cases they make the offender responsible for the result of his acts. The adherents of this opinion distinguish between the intention with regard to committing the lethal act and the intention to kill. If the culprit intends the lethal act as such and at the same time the killing of the victim the killing must be qualified as intentional homicide. If only the first intention is given, i.e. the intention to commit the act as such without the intention to kill, then the crime is considered to be semi-intentional homicide. In order to determine criminal responsibility the *fuqahā´* condition only the general intention of committing the act with the knowledge that the act is prohibited. If this precondition is fulfilled the perpetrator is fully responsible for the consequences of his act.

whether he intended or expected these consequences or not. Thus, whoever hits another person with the intention of hitting only (i.e. not killing) and his victim dies, is responsible of semi-intentional homicide and not beating.\textsuperscript{1503}

The Shāfi‘ites and the majority opinion of the Ḥanbalites finally also hold that the perpetrator is fully responsible for the results of homicide during a fight. They make him responsible for intentional homicide if he intended the act and also had the intention to kill his victim. If he intended the act only, but not the perishing of his victim, and the act normally does not lead to death, then they make him responsible for semi-intentional homicide only.

Mālik too holds that the culprit at any rate is responsible for the consequences of his act, whether he intended or expected them or not.\textsuperscript{1504} He knows acts which are intentional, but do not, however, entail retaliation, such as when two men are fighting against each other (i.e. a sudden fight without any intention to kill) and one gets hold of the other one’s foot and throws his opponent to the ground causing his death. In that case \textit{diya} for accidental homicide is due, to be paid by the solidarity group (\textit{‘āqila}). If the killer intended the fight \textit{qiṣāṣ} is the punishment.\textsuperscript{1505}

\textit{A sudden fight and its mitigating effect in Supreme Court decisions}

With regard to a possible mitigating effect of a sudden fight two diverging opinions can be found in a Supreme Court decision from 1998.\textsuperscript{1506} The Supreme Court judges argued that no mitigating effect could be derived from the \textit{fiqh} when homicide happens as a result of a sudden fight (\textit{al-ma‘raka al-mufājī‘a wa athruhā ‘alā takhfīf al-jarīma lā aṣl lahu fī al-fiqh al-islāmī}). In the case in question this opinion did not have any impact on the sentence because the judges could not find any evidence that a sudden fight had taken place in the first place. It is obvious, however, that the Supreme Court argues in contradiction with article 132 (2) (h) of the 1991 Criminal Act. Interestingly the same judgment contains a dissenting opinion, which, in this context, has the quality of a non-binding comment, not influencing the decision as such. Thus, the editor of the Sudan Law Journal and Reports (SLJR) points out that the 1991 Criminal Act explicitly recognizes a sudden fight as an element of homicide changing it from

\textsuperscript{1503} Compare Hassūna (2001), p. 199.
\textsuperscript{1504} Hassūna (2001), p. 200.
\textsuperscript{1505} Hassūna (2001), p. 198.
intentional to semi-intentional homicide. The editor further claims that this is congruent with the majority opinion in the *fiqh*.

In a second case from 1999 a sudden fight played a decisive role. The accused had originally been sentenced to hanging until death (*i’dām shanaqan*) according to article 130, CA91 for having killed his victim by several blows on the head with a stick following a dispute about the land of the victim. The culprit had confessed and the only evidence the court could rely on was this confession and his statements during the trial.

When reviewing the case the Supreme Court concentrated on two main questions: 1. Whether the case could possibly be treated under article 131 (semi-intentional homicide instead of article 130 (intentional homicide) by invoking one of the reasons provided for in this article and 2. Whether the statements of the culprit were acceptable as evidence if there were no other witnesses and no other evidence available. The Supreme Court came to the conclusion that the confession and the subsequent statements of the defendant were – despite some contradictions on minor details – plausible and therefore credible, especially with regard to the sudden fight which had preceded the homicide. As to the second question the Supreme Court stated the conditions under which the testimony of the culprit is acceptable: it must be clear that his testimony is indeed the only evidence available. Further, his testimony must be in conformity with logic and reason and the normal course of events. As to the case at hand the Supreme Court mentions two more factors having led to its decision to amend the applicable article. Firstly, the court reflects on the meaning of the number of blows meted out by the defendant during the sudden fight. It underlines that the mere number of blows is of minor importance. The decisive question is whether the violent means employed have ended the fight and whether the defendant has continued to beat the victim after he had fallen onto the ground. The judge accepted the account of the defendant that he had stopped beating the victim immediately after he had fallen. Secondly, the court takes favorably into account that the defendant himself had informed his family (who in turn informed the police) of the happening. Had he kept quiet - the court reasons - it would have been very difficult to find the culprit, given that the incident had taken place at night. Based on the arguments outlined above the Supreme Court decided in a majority decision to sentence the defendant to a five year prison term under article 131 instead of the original death penalty by hanging. The

1508 The decision does not mention that the applicable article is 131 (2) (h).
decision further specifies that the payment of *diya* is due on the condition that it be obtained through civil jurisdiction. The leading opinion of this decision was accepted by three out of five judges of the respective court. It is noteworthy that the minority opinion held that the defendant had no case in invoking “sudden fight” as a mitigating circumstance. As the judge, formulating the minority opinion, points out, the defendant had repeatedly trespassed onto the land of the victim and had even been sentenced to pay a fine to him. In brief, since both had clashed several times for similar reasons this last, lethal, encounter had not come quite as surprising as the majority of judges had assumed. Further, the mere number of seven blows, some of them causing the lethal skull fracture the victim had died of and the fact that the victim had been twice as old as the killer, induced the two opposing judges to deny any recognition of mitigating circumstances and to support the original death sentence.

Since, as we have outlined above, the *fuqahā* have not developed a theory of the concept of “sudden fight” in the context of homicide, the judges consequentially do not make any reference to the *fiqh* when they discuss its possible mitigating effects. As mentioned above article 131 (2) (h), CA91 is directly derived from the criminal legislation prior to Islamization. All three codes (24/74/83) had given the explanation that it was immaterial which party had first provoked the other or committed the first assault. This explanation has been omitted in the CA91. At any rate the surviving party was or is, also according to the CA91, guilty of either “culpable homicide not amounting to murder” (Penal Codes 24/74) or of “semi-intentional homicide” (PC 1983 and CA 1991). If one follows the text of the CA91 it is still insignificant whether the victim provoked the perpetrator or vice versa. Those judges who invoke “sudden fight” argue completely in line with the Penal Code 1974 when trying to determine whether the killer had taken undue advantage (i.e. beaten his victim after he had fallen on the ground) or acted in a cruel manner. The decision therefore strongly illustrates the strong connection between the Islamized codes of 1983 and 1991 and their secular predecessors.

5.3.3.4 Homicide under the influence of mental disturbance

*Insanity in the Criminal Act 1991*

The Criminal Act 1991 explicitly exempts persons incapable of judgment due to permanent or temporary insanity or mental infirmity at the time of the offence from criminal responsibility (article 10, (a)). It must be noted here that the wording as to its content is essentially not
different from its 1925/1974/1983 predecessor codes. Likewise, none of these codes deemed these persons to have committed an offence at all. Article 131 (2) (i) CA91 further stipulates that “offenders (committing) culpable homicide under the influence of mental, psychological, or nervous disturbance which manifestly affects his ability to control his acts” are deemed to have committed semi-intentional homicide.

**Insanity and criminal responsibility in the fiqh**

The adult person is considered by the *shari‘a* to be responsible for his (criminal) acts only if he/she is endowed with reason and understanding (*idrāk*) and free to chose (*mukhtār*). If one of these two qualifications is not given then the legal capacity (*taklīf*) disappears. If an offence is committed by a person deemed to be insane, *idrāk* / reason is not assumed. The defendant thus is not blameworthy, the offence can not be imputed to the offender and his criminal conviction is thus precluded. The *fuqahā*’ know several degrees of insanity or conditions associated with it, the most important are the following:

Losing one’s capability to understand (*idrāk*) can be complete (*tāmm*) and permanent (*mustamirr*) and is then called complete insanity (*junūn muṭbiq*). The person suffering of complete insanity is criminally not responsible.

Further, insanity can be complete and not continuous and is therefore called discontinued or temporary insanity (*junūn muṭqatī*). A person thus suffers at times from it and then completely loses his capability to understand. At other times reason returns to this person. The first condition is considered the same as in complete insanity, except that it is temporary. A person who commits a crime during a state of temporary insanity is therefore criminally not responsible as long as this condition lasts. However, once his capability to understand is restored, he is also responsible for crimes committed during this state of recovery.

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1509 See article 50 (a), PC24 and 1974 and article 50 PC83. The CA91 further lists “sleep”, “unconsciousness” (10 (b)) and the “taking of intoxicating substances or drugs (10 (c)) as a result of coercion or necessity” as reasons that make the punishment lapse. The first two reasons were not mentioned by its predecessor codes. In the PC83 this article was changed. Reasons like sleep etc. and drugs/intoxicating substances were not mentioned at all in by this article. Instead it provided for punishment of the person who helped or abetted the insane to commit a crime.  
Moreover, the fiqhâ‘ know the state of partial insanity (junûn juz‘î), where a person loses the capacity of understanding related to a certain subject but fully understands anything apart from this subject. Who suffers from partial insanity is not criminally responsible for the domains he does not understand, but responsible in relation to all other aspects where his reason works.\(^\text{1514}\)

In connection with insanity a range of other conditions are discussed by the fiqhâ‘ and, extrapolating from fiqh-based solutions, also by modern legal scholars. Most of these conditions remain untested in the Sudanese courts with regard to their relevance as a defense in insanity cases.\(^\text{1515}\)

Thus, the watershed for the legal consequences of all cases of insanity or conditions associated with it is the same. The criminal responsibility ceases if the capacity of comprehension (idrâk) is absent.\(^\text{1516}\) The fiqhâ‘ agree, however, that financial liability persists since it stems from causation and not from the fact that the damage has been caused by fault.\(^\text{1517}\) However, they disagree on which kind of diya is to be paid in cases of homicide and hurt committed in a state of insanity. Their disagreement is based on differences how the crime of the insane has to be qualified. Mâlik, Abû Ḥanîfa and Aḥmad ibn Ḥanbal are of the opinion that the insane can not commit homicide or hurt intentionally and that his deed therefore must be qualified as accidental. Shâﬁ‘î, in contrast, sees the insane as being able to commit both crimes intentionally. In consequence, both opinions differ with regard to the diya to be paid. In intentional crimes the enhanced diya (diya mughalla‘a) has to be paid out of the perpetrator’s own pocket, while in cases of accidental homicide and hurt the lesser diya (diya

\(^\text{1514}\) Partial insanity and temporary insanity can also coincide. Criminal responsibility of the perpetrator nevertheless is the same as in all other cases discussed. If reason had returned to the culprit when he committed the crime he is criminally responsible, otherwise not. See ‘Awda (2001), Vol.1, pp. 586-587.

\(^\text{1515}\) Further - subsumed under insanity in a wider sense and with a bearing on responsibility - is the state of idiocy or feeble-mindedness, dementia (’uth). The demented person (ma‘tûh) is described as someone who comprehends little (qalâl al-fahm), speaks confusedly and generally understands less than average people. He is thus suffering from a lesser degree of insanity. Epilepsia and hysteria are not discussed by the fiqhâ‘, being clinical pictures described for the first time in modern times. However, by way of analogy modern Muslim jurists like ’Abd al-Qâdir ‘Awda – just like non-Muslim ones - discuss both conditions under insanity. Their criminal responsibility is deemed just like that of the insane if reason/idrâk is lost or weak like in the case of the idiot (ma‘tûh). Both conditions are judged like the person acting under duress (mukrah) if the hysterical or the epileptic enjoy reason but have lost their free will (ikhtiyâr). If they have lost neither reason nor free will they are deemed fully criminally responsible. ‘Awda (2001), Vol.2, p. 588. Schizophrenia is treated according to the general pattern. If the condition is such that the defendant does not understand that he is committing a crime he is treated as insane. See ‘Awda (2001), Vol.2, pp. 588-589.

\(^\text{1516}\) It is interesting to note that contemporary authors like ‘Abd al-Qâdir ‘Awda discuss conditions which have been described in modern times for the first time and place them in a legal context derived from the fiqh.

\(^\text{1517}\) See Peters (2005), p. 21.
\( n\ddot{a}qis\ddot{a} \) is due to be paid by the solidarity group (\( \dot{\ddot{a}}qila \)) of the culprit alone or by the solidarity group and the culprit together.\(^\text{1518}\)

From the above it has become obvious that the notions of insanity and diminished responsibility as present in today’s CA91 clearly have their roots in the pre-existing penal codes of the colonial and post-colonial eras. However, since various degrees of insanity are also an important subject in the deliberations of the \( \dot{\dot{f}}uqah\ddot{a} \), we shall try to determine how far the relevant articles of the Penal Code 1983 and the Criminal Act 1991 concerning insanity are compatible with the regulations of the \( \dot{\dot{f}}iqh \). As has been shown above the Penal Code 1983 stipulated “capital punishment or \( d\text{iya} \)” as punishment for semi-intentional homicide (\( qatl shibh al-\'amd \)). It thus diverged substantially from its predecessor codes by making the capital punishment compulsory in cases where the private prosecutors did not agree to settle for blood money, thus effectively making no difference between intentional and semi-intentional homicide with regard to their punishment. The only difference between the punishment of the two different crimes was the fact that in the case of intentional homicide the private prosecutors were explicitly mentioned while in the case of semi-intentional homicide they were not. It thus remained unclear whether this lacuna was intentional or accidental. It further remained unclear whether it was up to the private prosecutors to claim \( d\text{iya} \) and make the capital punishment lapse. At any rate the logical relationship between the crime and its corresponding punishment - here a milder punishment for a lesser crime – had been erased. Apart from the divergence from the example of its predecessors the harsh punishment for semi-intentional homicide was not compatible with the reasoning of the fuqah\ddot{a}’ either. While the capital punishment seems unduly harsh \textit{in all cases} of semi-intentional homicide, it certainly does so in the case of someone who is mentally retarded or mentally abnormal. As a matter of fact, our research could not trace any case of a death penalty under article 249 (6), between 1983 and 1991, confirmed by the Supreme Court. The Criminal Act 1991 thus tried to remedy this flaw of its immediate predecessor by, firstly, stipulating a rather mild prison term of seven years as a \( ta\text{\'zir} \)-punishment, without prejudice to the right to \( d\text{iya} \). While this solution did not answer the relevant question why a mentally retarded perpetrator should go to prison at all – instead of receiving psychiatric treatment – it stayed well below the likewise rather harsh life term stipulated as a maximum punishment in

the Penal Codes of 1925 and 1974. The lighter punishment also restored the balance between a crime and its punishment up to a certain degree.
Secondly, the wording of 131 (i), CA 1991 was changed, obviously in order to highlight the difference between insanity leading to impunity (article 10 (a) and, in contrast, a state of “mental, psychological, or nervous disturbance”, leading to qualifying homicide to be semi-intentional homicide. As noted above, the wording of all predecessor codes was such that there was only a thin line between insanity, permanent or temporary and mental infirmity on the one hand and mental retardation, mental abnormality or a disease of the mind on the other hand. We can thus draw the preliminary conclusion that regarding mental disturbance as a mitigating factor in homicide cases the Criminal Act 1991 not only remedied an important deficiency of its 1983 predecessor. Moreover, by fine-tuning the wording as to clearly distinguish it from insanity it also removed a long-standing source of conceptual confusion which had led to unconvincing judgments in the past.1519

The comparison of insanity in the fiqh and Sudanese law before and until 1983 has further shown that the relevant articles of the PC83 were a mere translation of their English language predecessors. We have seen that the harsh capital punishment for semi-intentional murder of the mentally retarded was incompatible with the fiqh. This obvious flaw has been remedied in the CA91 by making semi-intentional homicide by a mentally or psychologically disturbed person punishable by a taʿzīr-punishment (up to seven years in prison) and recognizing the financial liability of the perpetrator. It has been shown above that the fiqh clearly envisages the financial indemnification of the victim’s heirs in cases of semi-intentional homicide. So far compatibility with the fiqh is given. As to the criminal responsibility of the mentally disturbed the situation is more ambiguous. The wording of article 131 (2) (i) can not easily be traced to the different clinical pictures described in the fiqh. It rather seems to be an intended improvement on the predecessor codes. Most fittingly it could be equated with the state of mind described in the fiqh as “weakness of judgment” (daʿʿal-tamyīz).1520 The person “weak of judgment” can be likened with someone who is “under the influence of mental,
psychological, or nervous disturbance which manifestly affects his ability to control his acts.” However, as we have seen above, in this case as in all other cases associated with insanity, the fiqh only acknowledges two possibilities. Either the perpetrator was reasonable (mudrik) and free to choose (mukhtâr) or he had lost one or both of these two qualities. If reason (idrâk) was present – and this is the quality in question here – full criminal responsibility ensues, if reason is lost, the perpetrator is criminally not responsible. The concept of diminished responsibility with, as a result, a lesser punishment or a substitute punishment is, according to the overwhelming majority of the fuqahâ’ only admissible in ta’zîr-cases and not either in hadd- or in qiṣâṣ-cases as discussed here.1521 Nevertheless, the Sudanese legislator has stipulated exactly that: diminished criminal responsibility in a case of homicide leading to its qualification as semi-intentional homicide and entailing a diminished punishment. In other words, article 131 (2) (i) CA91 is incompatible with the reasoning of the great majority of the fuqahâ’.

5.3.4 Accidental homicide in the Criminal Act 1991

Accidental homicide is now defined1522 as homicide where it is not intentional or semi-intentional homicide and the offender causes it by 1. negligence (ihmâl), 2. lack of caution (qilla iḥtirâz) or 3. an unlawful act (fi’l ghair mashrû‘). The punishment introduced by the CA91 for homicide by accident is a prison term not exceeding three years, without prejudice to the right of diya.1523

The Criminal Act 1991 changes not only the definition of “accidental homicide” and its respective punishment. It also surprisingly restores some concepts of criminal responsibility as defined in its secular predecessor codes (PC24/74). The new definition now includes negligence, which, as we shall remember, was punishable with a prison term of up to two years1524 – for being the result of a blameworthy act - under the provisions of the PCs25/74.

1522 See article 132, CA91. It should be mentioned that the official English translation of the CA91 as published in the Arab Law Quarterly generally is correct. However, in some instances, gross errors occurred. Thus, the Arabic original qatl khâtât is translated with “homicide by negligence” which is, as has been shown above, missing the point.
1524 Or with fine or both. See article 256, PC74.
but only entailed *diya* under the Islamized PC83. Since accidental killing by negligence or lack of caution only entails *diya* in the majority opinion of the *fuqahā‘*, the PC83 already was following closely its prescriptions. By re-introducing a prison term as a possible punishment, the CA91 in fact partially restores penological precepts of the pre-Islamization period. It should be noted, however, that this change could also be justified from a *sharī‘a* point of view: *qatl khata‘* (i.e. the mere causation of death) entails *diya*, however, if the killer acted unlawfully and by negligence or fault, then the state may impose a *ta‘zīr* punishment.

For “accidental homicide by an unlawful act,” the CA91 in fact re-introduces article 255, PCs25/74, which, as we have shown above, had been dropped without proper replacement in 1983. This reintroduction, however, differs from its predecessor in that it lowers the threshold of what kind of unlawful act leads to the accidental killing. The PCs25/74 had stipulated that the unlawful act leading to the accidental killing had to be punishable with a prison term of at least one year or more. This threshold was directly connected with and served as a justification of the relatively high prison term of up to ten years for that offence. In other words, while the PCs25/74 punished the offence discussed here rather harshly, the CA91 lowered the threshold, thus accidental killings as a result of a minor offence are now included. At the same time and consequential it lowered the punishment of such an offence to a prison term of up to three years only (and *diya*).

In conclusion it must be noted that all articles of the PC83 on criminal responsibility where accidental homicide had been inserted (see discussion above) have been removed and unified respectively. In consequence court and government officials who were, under the PC83, financially liable when committing accidental homicide as a result of their functions, now enjoy impunity, as long as the perpetrator “is bound or authorized to do it by law...or...believes in good faith that he is bound or authorized so to do”. The accountability of court and government officials with regard to accidental homicide, which had been introduced by the PC83, has thus been removed, restoring in fact the status quo ante.

### 5.3.5 Bodily harm

In comparison to 1974 and 1983, the relevant articles with regard to bodily harm have been largely simplified and reduced: five articles suffice in 1991, where the predecessor codes

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1525 See CA91, article 11 “Performance of duty and exercise of right”.

needed 14. Most, if not all inconsistencies observed in the PC83 with regard to bodily harm have been removed. Thus the notion of semi-intentional causation of wounds is now part of the CA91. The notions of wounds and cutting of limbs have now been unified in one definition. The many variations of hurt the PC74 and the PC83 knew now all fall into one single article. Concurrently the formula “flogging, fine or prison” with its discretionary character has been eliminated. Instead prison terms according to the gravity of the hurt caused have been reintroduced.

The CA91 distinguishes between wounds (jarḥ) and hurt (adhan). While the former refers to bodily harm punishable by qiṣṣā or diya such as fractures, wounds, loss of an organ, the latter refers to causing pain or disease or hurt caused by poison or drugs and is punishable by a ta’zīr-penalty. Causing wounds is defined as causing another person to lose an organ, a mental function, a sense, a limb, a fracture or a wound in the body. In analogy to the articles on homicide those on wounds are similarly categorized into intentional, semi-intentional and accidental wounds. No further definitions are given, instead the code refers to the corresponding articles on homicide. The intentional causing of wounds is punished with retaliation (qiṣṣā), provided all necessary preconditions are satisfied. If this is not the case or qiṣṣā is remitted (by the private prosecutor or for other reasons), the intentional causing of wounds shall be punished with a prison term not exceeding five years or with a fine or both, without prejudice to the right of diya. The same punishments were prescribed with the exception of qiṣṣā, if the crime happened in one of the Southern states. Again in analogy with homicide no qiṣṣā is applicable in cases of semi-intentional or accidental causing of wounds. The maximum prison term is three years and one year respectively, in both cases without prejudice to the right of diya. The Criminal Act 1991 further specifies the parts of the body and wounds subject to retaliation in a list and which diya, full or partial, is applicable to a specific loss of organ or sense.

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1526 See articles 271-284 in the PC74 and PC83.
1527 CA91, article 142 (1) and (2).
1528 CA91, article 142 (1) and (2).
1529 CA91, article 138 (1).
1530 CA91, article 138 (2).
1531 CA91, article 139 (1).
1532 CA91, article 139 (2).
1533 CA91, article 139 (3).
1534 CA91, article 139 (4).
1535 See “first list” attached to the CA91.
1536 See “second list” attached to the CA91. For a more detailed description, see below chapter 5.3.9 on diya.
Most importantly, the CA91 has restored the state’s prerogative to punish. The PC83 had treated the intentional and accidental causation of wounds or cutting of a limb exclusively as an affair to be settled between the culprit and the victim. The CA91 has reintroduced ta’zūr-punishments, i.e. maximum prison terms, which, as to their length, correspond with the gravity of the crime. Interestingly, the prison term appears before diya and therefore is presented as the main punishment. Only in the case of intentional causation of wounds, qiṣāṣ is the primary punishment and the ta’zūr-punishments becomes applicable if qiṣāṣ has been remitted or the conditions for its implementation have not been satisfied.¹⁵³⁶

5.3.6 Reasons for the remittance of retaliation in the CA91

The CA91 is also much more specific about reasons for the remittance of retaliation. These had not been codified in the PC83, but had been later determined in Criminal Circular 94/83. Several reasons for the remittance of retaliation are stated¹⁵³⁷: 1. “where the victim or his relative is an off-spring of the offender”. It is generally agreed in the fiqh, that qiṣāṣ is remitted if the perpetrator is an ascendant of the victim.¹⁵³⁸ 2. qiṣāṣ is remitted, “where the victim or some of his relatives have pardoned...”. This reason for the remittance of qiṣāṣ is also in accordance with the general precepts of the fiqh. The private prosecutors have the right to pardon the culprit. The foregoing can either be pronounced without quid pro quo or in return for the payment of the diya as intended by the fiqh or as agreed upon between the two parties, i.e. the perpetrator of the crime and the heirs of the victim. In Sunni fiqh¹⁵³⁹ it is enough that only one of the heirs pardons the victim. The right to retaliation of the remaining group of heirs is then automatically transformed into blood money. 3. qiṣāṣ is remitted where the offender is becoming insane after the passing of the sentence of retaliation (qiṣāṣ) against him.¹⁵⁴⁰

¹⁵³⁶ The 1974 provision which made female circumcision punishable and abolished in 1983 has not been reintroduced in 1991.
¹⁵³⁷ Here we are only concerned with the reasons relevant to homicide.
¹⁵³⁹ Shi‘ite law follows the opposite approach. Retaliation can take place if at least one of the private prosecutors demands it. See Peters (2005), p. 44.
¹⁵⁴⁰ CA91, article 31 (d).
5.3.7 Multiple retaliation, multiple perpetrators, abetment

The CA91 also summarily regulates the question of multiple retaliation (*ta’addud al-qisās*) for the first time. According to article 30, CA91, “an individual shall be executed for a group and a group for an individual”. How this article translates into practice remains open. According to the majority view in the *fiqh*, however, in order to establish the criminal responsibility of a group the plaintiff must specify whether the acts were committed simultaneously or in succession. If the perpetrators acted simultaneously and with proven criminal intent and if the acts would have been lethal if perpetrated separately, they can all be sentenced to death. If they acted in succession, the first attacker is responsible of the death of the victim if he dies within one day after the attack. If the victim dies later, criminal responsibility accrues to the last attacker. Here, the Mālikites take a minority point of view. They hold responsible all those who are involved in the crime, whether through directly causing death or through abetment or through assistance. Thus, according to the Mālikites, a group of persons can be sentenced to *qisās* for intentional homicide, if they jointly planned and carried out the crime.\(^{1541}\)

Concerning the treatment of more than one perpetrator in cases of intentional homicide it is useful to take a look at the predecessor codes. Article 259 PC74 had – relatively lightly - punished abetment to murder with a prison term of up to two years, or up to fourteen years if hurt was caused. In its Islamized version of 1983 abetment to suicide was maintained while abetment to murder was omitted as a separately defined crime.\(^{1542}\) However, the whole section on abetment of the PC74 had been translated in the PC83 and abetment to murder fell under this definition. According to this section, article 84, PC74, and subsequently adopted by the PC83, the abettor to intentional homicide would have faced the same punishment as the actual perpetrator of intentional homicide himself. In other words, by simply translating the wording of the PC74, its successor in 1983 had – inadvertently or by design - adopted the minority opinion of the Mālikite school which, as described above, recognizes joint criminal responsibility, even if a contribution to the crime, if taken separately, would not have led to the death of the victim.


\(^{1542}\) Article 259, PC83 changed titles and now read “Punishment of attempted intentional homicide”. It translated the generic text of the old article 259 and added the ubiquitous “flogging, fine or prison” as a punishment. This article is an example of the technically rather dissatisfactory drafting of the new parts of the PC83.
5.4 Conclusion

Our historical analysis has shown that the PC83 and its provisions on homicide had closely followed its predecessor codes. However, the changes made in 1983 have in many cases destroyed the close coherence between crime and punishment. Fine-tuned punishments which had reflected the gravity of the crime had been replaced by summary punishments whose application, i.e. the quantity of lashes, the amount to be paid or the time to be spent in prison, was largely left to the discretion of the judge. Where Islamic punishments had been introduced they were, at times, contradicting the fiqh. Where the legislator changed the definitions of a crime often, and at times substantial, discrepancies can be observed with regard to the solutions offered in the fiqh. Given these discrepancies it is no surprise that the time between 1983 and 1991 has produced a great number of Supreme Court decisions on homicide. While these decisions could decide individual cases and serve as precedents for similar cases they could not reconcile inherent contradictions and the incoherent character of the changes made in 1983.

In the largely overhauled Criminal Act 1991 most of these incongruities and discrepancies have been addressed. In the majority of cases the Criminal Act 1991 and its provisions on homicide are far closer to precepts found in the fiqh than in its predecessor code. However, traces of the pre-Islamization penal codes can still be detected. Crimes, such as heinous murder, were standard rules with regard to qisāṣ and diya do not apply have been abolished altogether, after their application in practice had proven difficult.

The death penalty, i.e. the sentencing and its execution, remained despite Islamization a prerogative of the state. The state executes it by hanging. The heirs of the victim could kill the offender “in the same manner in which he has caused death, if the court deems it appropriate.” However, we have not found a single Supreme Court judgment allowing the heirs of a victim to execute the death penalty themselves. While calling the death penalty qisāṣ its technical execution is in fact not different from non-Muslim countries still applying the death penalty (by hanging). What distinguishes post-Islamization practice from its colonial predecessor is the right of the heirs to pardon or to settle for diya, however.

Qisāṣ is also restricted with regard to bodily harm. A Supreme Court decision came to the conclusion that in the case of broken bones qisāṣ is not applicable because equivalence of the fracture inflicted originally and the one which would be the punishment can not be guaranteed. I could not detect any Supreme Court decisions leading to the application of qisāṣ
for bodily harm. In my interviews with Supreme Court judges, all my interview partners insisted that qisāš for bodily harm is not being applied and that heirs preferred to receive dīya.

The nature of dīya seems to remain somewhat hazy. While the CA91 lists it under the header “compensation”, thus being distinct from penalties, we find Supreme Court decisions in which dīya is called a punishment (ʼuqūba), imposed with the objective of prevention and deterrence.

The legislator has also changed the punishments of intentional and accidental bodily harm. While in 1983 both crimes were treated as an affair to be settled between offender and victim through qisāš or dīya, in 1991 the legislator reintroduced prison terms as a possible punishment. The state thus reclaimed to some degree his prerogative to punish.

The requirements for the proof of homicide are considerably lower in both, the 1983 and the 1991 codes, in comparison with the requirements found in the fiqh. Thus neither a minimum number of witnesses nor their sex have been specified for criminal cases. The good reputation of a witness is stipulated as a condition, the interpretation of its meaning, however was and is subject to interpretation in the courts. Court cases indeed show that the testimonies of witnesses with a doubtful reputation, e.g. of a drunkard, can be taken into consideration under specific circumstances. The function of the oath has changed with regard to its role in the fiqh. Since no minimum number of witnesses is specified in the Evidence Act, the function of the oath is not to replace a missing second witness but to corroborate or decide a case. The promulgation of a ḥadd- or qisāš-punishment on the strength of an oath is, however, excluded, according to a Supreme Court ruling. One method to prove homicide that is recognized in the fiqh, the qasāma procedure, has not been codified at all. Johansen, giving the example of the Ḥanafite school, has shown how the ʼuqūbāt, i.e. the ḥudūd and qisāš-crimes, are distinct from other parts of Islamic Criminal Law through their specific procedural law. Indeed, all schools set the threshold for the proof of crimes entailing qisāš (and for ḥadd-crimes) significantly higher than for the proof of other crimes. The Evidence Acts 1983 and 1993 both know distinct rules of proof for ḥadd-crimes. As to

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1543 This refers to my main source the SLJR, 1983-2007. There is, however, one exception. The Supreme Court decided that retaliation in the case of a broken tooth is possible. See Government of the Sudan vs. Ḥamza ʾAlī Kutaini, SLJR 1985, no. 1405/188. I do not know whether this decision has been carried out.

1544 Since it is hard to imagine that heirs always and without exception prefer dīya from retaliation it can only be speculated how the desired result is being achieved.
crimes punishable by *qīṣāṣ*, however, the same rules apply as in other (non-*ḥadd* non-*qīṣāṣ*)
criminal cases. In other words, *qīṣāṣ* crimes are not distinct from other criminal cases with
regard to proof as in the *fiqh* and the requirements for the proof of *qīṣāṣ*-crimes are not higher
than for regular crimes.

Certain features of Islamic Criminal Law which are hardly reconcilable with the concept of
citizenship have been omitted altogether. Thus the concepts of *ʾišma* and *kafāʾa* play hardly a
role in the Islamized penal codes and the relevant Supreme Court legislation. Both codes have
not stipulated different blood prices for men and women or for Muslims and non-Muslims.
While the latter stipulation can be justified with similar opinions in the *fiqh* the legislator has
indeed established gender equivalence and equivalence between citizens of different religions
with regard to homicide and bodily harm. This is also true for the death penalty. Its execution
does not depend on the equivalence between killer and victim. However, the concept of *ʾišma*
has not disappeared altogether. Thus the Supreme Court decided that the life and property of
those who enter Sudan with a visa is inviolable as long as the visa is valid.

A modern interpretation has been given to the notion of *ʿāqila*, the solidarity group. Derived
from a Ḥanafite opinion the solidarity group now can be e.g. an insurance company, or, as
decided in an important Supreme Court decision, the employer in whose service the crime
was committed.

6 Taʿzīr
6.1. Taʿzīr in the *fiqh*¹⁵⁴⁶

*Taʿzīr*-punishments are unknown to the Qurʾan and hardly mentioned in the Sunna. They have
found their way into the *fiqh* relatively late in order to fill the gaps resulting of the relative
scarcity of penal regulations to be found in the Qurʾan or Sunna.

*Function of the taʿzīr*

They enable the judge to punish those who have committed *ḥadd*- or *qīṣāṣ*-crimes but where
the legal requirements for the respective punishment are not met or where legal uncertainties

¹⁵⁴⁶ For more details, see El Baradie (1983), pp. 146-165, Peters (2005), pp. 65-68, Bahnasī, al-jarāʾim, pp. 245-
preclude the application of a ħadd- or qiṣāṣ-punishment.\textsuperscript{1547} Taʿţīr also serves to punish sinful or undesirable behavior, even if it is not related to ħadd- or qiṣāṣ—crimes.

A taʿţīr-punishment thus serves to better the sinner and to save him from recidivism. It further is applied in order to deter the community to commit crimes against the claims of God and to retaliate against the infringement on claims of man.\textsuperscript{1548} As Peters has pointed out a taʿţīr-punishment thus can serve to either punish past conduct or to coerce a person to fulfil his ritual duties, such as prayer or fasting.\textsuperscript{1549}

A taʿţīr-punishment can represent a claim of God, a claim of man or both. It will be considered a claim of God if it is the result of an act of disobedience before God such as neglecting ritual prayers. It will be considered a claim of man if the rights of men are concerned, e.g. in a case of libel. Both claims come into play when, e.g. small amounts of property are being stolen. Here the claim of man is the right to property and the claim of God is public security.\textsuperscript{1550} In contrast to ħadd-crimes the qāḍī can dispense with the taʿţīr-punishment as far as the claims of God are concerned. With regard to the claims of men the aggrieved party has to forego its rights before the qāḍī can dispense with a taʿţīr-punishment.

\textit{Punishment of taʿţīr-crimes}

The notion taʿţīr subsumes infractions against the (security) interest of the community (claims of God), punitive measures in order to protect the religious values and coherence of the Muslim community as well as all punishments enforcing private claims. The range of punishments reflects the variety of offences and crimes to be punished. They encompass capital and corporal punishments (flogging), imprisonment and banishment and punishments against the property of the delinquent. No corporal punishments other than flogging are allowed.\textsuperscript{1551} A taʿţīr-punishment can further consist of the deposition of an official, a reprimand, public rebuke or the public announcement of the deed in question. While qāḍīs enjoy a relative latitude when imposing taʿţīr-punishments, there are, however, limitations, especially in comparison to ħadd- and qiṣāṣ-punishments.

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\textsuperscript{1547} Peters (2005), p. 66.  \\
\textsuperscript{1548} El Baradie (1983), p. 147.  \\
\textsuperscript{1549} Peters (2005), p. 66.  \\
\textsuperscript{1550} El Baradie (1983), p. 147.  \\
\textsuperscript{1551} There is one exception to this rule, however, the Mālikites allow the amputation of the right hand of someone who has forged documents. Compare Peters (2005), p. 66.  \\
\end{tabular}
\end{flushright}
The majority of schools holds that the total number of lashes may not exceed those fixed for *ḥadd*-crimes. As an exception of this rule, the Mālikites leave the maximum number of lashes to the discretion of the judge or the official imposing the punishment. In the three schools it is controversial what the exact maximum amount of lashes should be. The number of lashes recommended by the different *fuqahā* varies between ten, based on a *ḥadīth*, and 79 lashes, one less than the maximum number of lashes as *ḥadd*-punishment for the drinking of alcohol of a free person. Some Shāfīʿite and Ḥanbalite scholars argue that the number of lashes applied should not exceed the respective *ḥadd*-penalty. Thus, if, e.g., *zinā* cannot be proven and the *qāḍī* decides a *taʿzīr*-punishment, the maximum number of lashes is 99 and thus one less than the respective fixed punishment. The minimum number of lashes as *taʿzīr*-punishment is not fixed.

While the capital punishment is undisputed for various *ḥadd*-crimes and as a *qisāṣ*-punishment it remains controversial among the *fuqahā* whether execution is admissible in the *taʿzīr*-system. The proponents of the death penalty as a *taʿzīr*-punishment belong to all schools but are especially present in the Ḥanafite school. According to this school, the ruler can impose the death penalty when it is in the public interest, e.g. for the person who repeatedly committed crimes similar to *ḥadd*- or *qisāṣ*-crimes (but not fulfilling all of their legal characteristics). Examples are *liwāṭ* of a *muḥṣan* or intentional homicide with instruments which (normally) do not hurt. This opinion holds that crimes similar to *ḥadd*- or *qisāṣ*-crimes, such as the two examples given above, are to be clearly distinguished from these. They fall under *taʿzīr*-crimes. The death penalty, however, is not compulsory and will only be applied to the recidivist. In contrast, those jurists – especially in the Shāfīʿite and the Ḥanbalite schools – who reject the application of the death penalty as a *taʿzīr*-punishment consider cases such as the above as true *ḥadd*- or *qisāṣ*-crimes and imposes the death penalty already for the first time offender.

The minimum amount of time of imprisonment (*ḥabs*) as *taʿzīr* is undefined. As to the maximum time a culprit has to stay in prison opinions are controversial. According to the Shāfīʿites the maximum prison term must stay below the maximum term in banishment, i.e. one year. According to the other schools the maximum prison term is not fixed. The Ḥanafite

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Ibn ´Abidin holds that in cases of felonies such as semi-intentional homicide the culprit should stay in prison until he shows signs of repentance.\footnote{El Baradie (1983), p. 152-153.}

Being mentioned in the Qur´an and in the Sunna banishment (\textit{na`f}, \textit{taghrīb}) as a deterrent \textit{ta`zīr}-punishment is not controversial in the \textit{fiqh}. However, its mode of application and its maximum length are. Shāfi´ītes and Ḥanbalites hold that the convicted should be placed in a different social context so that the separation from his original tribe and the ensuing feelings of loneliness serves as punishment. The majority holds that the place of banishment should not be outside the \textit{dār al-Islām} since the betterment and reintegration of the culprit are important goals of the punishment. If the banished person constitutes a danger for the people around him he can also be imprisoned. Some Mālikites, however, are of the opinion that banishment means to chase the culprit out of Muslim territory. Ḥanafites even hold that banishment is imprisonment.

According to the Ḥanafites and the Mālikites the maximum time of imprisonment or banishment is not fixed. The Shāfi´ītes and the Ḥanbalites hold that banishment should be less than one year.\footnote{El Baradie (1983), p. 154.}

Punishments with regard to property are also highly controversial in the \textit{fiqh}. Those against such punishments argue that the protection of one’s property as guaranteed by Islam should not be touched. Admitting this punishment would lead to tyranny and arbitrariness. In contrast, the proponents hold that the convicted should be deprived of part of his property until he repents his deed and betters himself. If the official imposing the punishment gives up hope for the repentance of the culprit his property becomes property of the state. Further, property can be destroyed because it is forbidden (wine) or confiscated because it has been used to commit a forbidden act, e.g. milk diluted with water.\footnote{El Baradie (1983), p. 156.}


\textit{Ta`zīr} crimes can be proven by a confession of the offender. A single confession, which can not be withdrawn, is sufficient since the conviction will not be averted by legal uncertainties. \textit{Shubha} as taken into account in the context of \textit{ḥadd}– and \textit{qiṣāṣ}–crimes does not play a role in the area of \textit{ta`zīr}-crimes. Secondly, \textit{ta`zīr}-crimes can be proven by the testimony of either two
men or one man and two women. Indirect testimony (shahāda ʿalā al-shahāda) such as an admission by the defendant out of court or by two qualified witnesses out of court are admitted. Equally admissible is the written testimony a qāḍī receives from another qāḍī (kitāb al-qāḍī lilqāḍī) and the qāḍī’s own knowledge (ʿilm al-qāḍī). While the above opinions represents the majority of fuqahā’, Abū Ḥanīfa does not accept the testimony of women alongside men.

6.2. Taʿzīr in the Islamized Penal Codes 1983 and 1991

*Functions of taʿzīr in the Islamized Penal Codes*

As shown above taʿzīr-punishments have various functions in the fiqh either in the context of criminal law or related to the fulfillment of ritual duties. As to the latter, both Islamized Penal Codes are silent, they do not use taʿzīr as a means to punish the neglect of ritual duties. Thus neither eating in public during Ramaḍān nor neglecting one’s ritual prayers are the object of tazīr-punishments as stipulated in the two Islamized Penal Codes.

The PC83 has a strong connection with its predecessor, the PC74. A large majority of its provisions are direct translations of its 1974 model. With regard to its function as a punishment for crimes other than ḥadd- or qiṣṭ-crimes the 1983 Penal Code does not clearly separate ḥadd-crimes and their respective punishment and taʿzīr-crimes and their punishments respectively. The PC83 combines taʿzīr- crimes, in some instances taken over verbatim from the PC74, with newly introduced ḥadd-punishments and thus, in contradiction with the fiqh, unduly enlarges the number of crimes where the harsh ḥadd-punishments are applicable. At the same time the legislator had replaced the specific punishments for clearly defined crimes, as stipulated in the PC74, in many instances with tazīr-punishments such as flogging, fine or prison in various combinations. In most cases the number of lashes, the amount of the fine and the maximum prison term remained unspecified. It can be safely assumed that the team of three jurists, charged by former president Numairi to overhaul the 1974 Penal Code and Islamize it, had wanted to introduce the kind of latitude traditional qāḍīs had enjoyed as to the imposing of punishments. This approach stood in contradiction to pre-1983 legislative principles and had especially led to the destruction of the well-defined relation between the gravity and nature of crimes and their corresponding punishment which was a distinctive

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characteristic of the PC74. Instead very similar ta‘zīr-punishments were stipulated wholesale for very different crimes. Whether or not a qāḍī would take into account differences with regard to the gravity of the crime was to a large extent left to him. This clearly being a major flaw of the Penal Code 1983 the latitude given to judges was reduced, but not entirely removed, in the Criminal Act 1991. The formula „flogging, fine and/or prison“ in various combinations was to some degree replaced by punishments that normally more closely related to the gravity and nature of the crime, thus following more closely the model of the pre-1983 Penal Codes. However, the leeway given to judges in the PC83 continues to exist to a lesser extent in the CA91. Typically, the punishment for ta‘zīr-crimes is a prison term in proportion to the deed. This prison term can be either combined with a fine or be replaced by it.\textsuperscript{1557}

Both laws punish – next to ḥadd- and qisāṣ-crimes a large variety of crimes that either represent claims of God/the community or claims of man that do not amount to ḥadd- or qisāṣ-crimes or cannot be punished as such because the legal requirements are not met or their punishment is precluded due to legal uncertainties. This includes, especially with regard to the Penal Code 1983, a sizeable variety of political crimes, whose punishments are often harsh e.g. the death penalty for the organization of illegal strikes or the publication of critical articles.\textsuperscript{1558}

Punishments

While in 1983 ta‘zīr-punishments had not been mentioned explicitly, the Criminal Act 1991 for the first time makes reference to ta‘zīr. A ta‘zīr-penalty is explicitly defined as „any penalty other than ḥudūd and retribution (qīṣāṣ)“.\textsuperscript{1559} This definition shows clearly that the legislator had intended to adopt the classical trichotomy of ḥudūd, qīṣāṣ and ta‘zīr. This trichotomy is also confirmed by the right to pardon which differs for the three categories. While the execution of ḥudūd can not be stopped by a pardon (by either the public authority or the aggrieved party) the execution of qīṣāṣ can indeed be remitted by the pardon of the victim or his heir. In cases of ta‘zīr a pardon can be granted by the public authority, the rights of the aggrieved party to compensation, however, have to be satisfied.\textsuperscript{1560}

\textsuperscript{1557} En passant, flogging – ubiquitous in the PC1983 – was abolished in many instances.
\textsuperscript{1558} For an analysis see e.g. Köndgen (1992), pp. 124-126.
\textsuperscript{1559} See article 3, CA91, “Interpretations and explanations”.
\textsuperscript{1560} Art. 38, “Pardon of the offence”, CA91.
Further a whole chapter defines guidelines for judges on how to apply ta’zīr-punishments. Judges are advised to take into consideration all aggravating and mitigating circumstances, the degree of responsibility (of the defendant), the motive, previous convictions of the offender etc. What looks like a matter of course can not be taken for granted. In 1983 and after defendants were at the mercy of judges who had been given substantial leeway and little guidance on how to use it. From 1991 onwards judges were bound again by well-defined maximum prison terms for specific crimes and the principles described above.

Both codes with regard to ta’zīr-punishments have been largely inspired by either their secular predecessor or by the necessities of criminal legislation in the modern nation state. The fiqh plays for the 1983/1991 ta’zīr-legislation only an insignificant role.

With regard to punishments it is useful to take a step back and look at the development of punishments between 1974 and 1991. Under the secular 1974 Penal Code punishments were restricted to six: a) death, b) forfeiture of property, c) imprisonment, d) detention in a reformatory, e) fine and f) whipping. Due to the introduction of crimes and punishments inspired by Islamic Criminal Law the total number of punishments in the 1983 Penal Code subsequently doubled to twelve. The six punishments of the predecessor code had been taken over into the 1983 code and complemented with compensation (ta’wīd) as an additional ta’zīr-punishment. The five remaining new punishments are directly connected with the Islamization of the Penal Code: execution with or without crucifixion, stoning, amputation and cross-amputation, full or reduced diya, qīṣāṣ.

It is noteworthy that certain ta’zīr-punishments foreseen by the fiqh, such as reprimand, public rebuke or the public announcement of the deed in question have not been codified.

With regard to corporal punishments the fuqahā’ did not allow any other punishment than flogging. As to flogging it must be pointed out that its application goes back to the times of the Anglo-Egyptian condominium and beyond. Thus, its application was simply continued and was - unlike other punishments derived from the fiqh - no novelty in Sudanese criminal

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1561 Chapter Two, articles 39-41, CA91.
1562 The title Penal Code 1983 (qānūn al-´uqūbāt 1983) already indicates the general tendency of the 1983 code to focus on punishments.
1563 Art. 64, PC83.
1564 Interestingly diya is listed here under punishments. The nature of diya, whether punishment or mere compensation, is disputed in the fiqh.
1565 Art. 64, PC83.
1566 Article 64 (f) and (g) of the Penal Code 1925 made a difference between flogging and whipping while the same article in the 1974 Penal Code has dropped flogging but maintained whipping.
law. The maximum number of lashes, however, was twenty-five in 1925 and 1974. In addition, only men could be subjected to whipping. In 1983 twenty-five was not longer the maximum number of lashes but the minimum number. The maximum number of lashes quadrupled to a hundred, applicable to men and women alike. In 1991 the possible range of lashes has changed only slightly, and is set now between 20 and a maximum of hundred. Ta’zīr-offences punishable by whipping are mostly related to public morals and crimes that are related to ḥadd-crimes but were the requirements for a ḥadd-punishment are not met. Examples for the former are „Gross indecency“ and „Indecent and immoral acts.“ Examples for the latter are „Practicing prostitution“/„Running a place for prostitution“, „Insult and abuse“ (not amounting to qadḥf) and theft (not amounting to ḥadd-theft). It should be noted here that in the fiqh minors can be disciplined (ta’dīb) by way of a ta’zīr-punishment. The Criminal Act 1991 has adopted this opinion and stipulates, among other possible punishments, up to 20 lashes for children who were between seven and eighteen when they committed the crime.

We have shown above how especially the Penal Code 1983 has changed ta’zīr-crimes into ḥadd-crimes by stipulating ḥadd-punishments, i.e. corporal punishments not admissible under the above rule, for crimes that did not meet the requirements of the respective ḥadd-crime. In other words ta’zīr-crimes become punishable by corporal punishments other than flogging. This is hardly in harmony with the great majority of the fiqahā’.

We have also seen above that the application of the death penalty is controversial under the ta’zīr-system. Both Islamized codes have opted in favor of the death penalty as a ta’zīr-penalty (in addition to being an accepted ḥadd- and qiṣāṣ-punishment). However, the two laws use the death penalty in different ways.

The Penal Code 1983 does not explain the nature of „execution“ (i’dām). In practice the death penalty is executed by hanging. The definition in 1991 becomes specific: „Death shall be by hanging, stoning, or in the same manner in which the offender caused death, and it may be by

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1567 See articles 76,77 PC24 and article 76, PC74.
1568 Art. 64 (8), PC83.
1569 Art. 151, CA91.
1570 Art. 152, CA91.
1571 Articles 154 and 155, CA91.
1572 Art. 160, CA91.
1573 Articles 173 and 174, CA91.
way of hud, retribution (qisas) or Taʿzir; and it may be accompanied by crucifixion”.  

1575 Taʿzir – crimes punished with the death penalty, i.e. hanging, are various in the Penal Code 1983. At times the death penalty was combined with hadd-punishments.  

1576 In other instances the death penalty was widely used as a means to stifle opposition.  

1577 Whether or not this was in harmony with ICL is debatable. The use of the death penalty as a taʿzir-penalty could have been construed as following Ḥanafite scholars who deem „the death penalty inflicted with Taʿazir as a necessary measure to ensure political order“.

1578 From 1991 onwards the use of the death penalty as a taʿzir penalty changes again. The political crimes of the PC83 have been removed completely. Only waging war against the state and espionage can still be punished with the death penalty.  

1579 Further, the death penalty can be imposed for certain sexual crimes such as repeated acts of homosexuality (liwāţ), rape and incest. However, the wording of the relevant articles is not unequivocal enough to determine whether the legislator meant them to be punished as taʿzir-crimes or as a hadd-crime. Suffice to say that the application of the death penalty as a taʿzir-punishment has been reduced in the CA91 to but a few crimes.

Having said that, it is important to take a closer look at the actual application of the death penalty in the Sudan under ICL. Our research has not found any cases of the application of stoning or retribution (qisāṣ) in the sense that the killer died in the same way as his victim. In actual practice the various forms of the death penalty seem to have been reduced to one, i.e. hanging. While the verdicts as confirmed by the Supreme Court do tell us whether the pronounced death penalty is by way of ḥadd, qisāṣ or taʿzir its actual execution is uniform.

Put in different terms, where the fiqh clearly distinguishes the three spheres of criminal law – ḥadd, qisāṣ, taʿzir – by different ways of executing the death penalty, the Sudanese Criminal Act 1991 retains these differences only as a theoretical possibility. In actual practice, execution methods prescribed for certain ḥadd crimes (stoning for zinā) and qisāṣ by way of

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1575 Criminal Act 1991, article 27.(1). I quote from the official translation, ALQ, Vol.9, 1994. The wording is somewhat misleading, it does not clearly separate the different methods of execution. Executions by way of taʿzir are carried out by hanging only.
1576 See e.g. article 457 “Networks of organized crime”.
1577 Compare e.g. articles 96-98. For proof as stipulated in the PC83 and the CA91 and interpreted by the Supreme Court see chapters 5.2.7. and 5.3.8.
1579 Art. 51, CA91.
1580 Art. 53, CA91.
retribution (Spiegelstrafe) are not applied. Since only hanging is left, clearly the death penalty has been brought into the sphere of ta’zir.

Conclusion

Ta’zir has, for the first time, found its proper place in the Criminal Act 1991. The wide applicability and functions of ta’zir in the fiqh have allowed the Sudanese legislator to define any punishment, and therewith the corresponding crime, outside the ḥudūd and qiṣāṣ as a ta’zir-punishment. While, from 1991 onwards, respecting the traditional trichotomy between ḥadd-, qiṣāṣ and ta’zir-crimes on paper, in actual practice non-ta’zir execution methods are not applied. As in other instances the flaws of the 1983 Penal Code have been corrected to a large extent with regard to ta’zir. The excessive and unspecified use of flogging has been reduced and, where it is applicable, is specific as to the maximum number of lashes. Despite the removal of a number of political crimes, punishable under the PC83, the death penalty – as ta’zir – is still applicable for certain crimes under the Criminal Act 1991 and other laws.1581

Thus, espionage1582, undermining the constitutional system1583, waging war against the state1584, some terrorism-related offences1585 and drug trafficking.1586

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1581 While technically separate from the CA91 these laws can be considered to be part of criminal law. This concerns e.g. the Terrorism Combating Act of 2000 and the Sudan Narcotics Drugs and Psychotropic Substances Act of 1994.

1582 CA91, art. 53.

1583 CA91, art. 50.

1584 CA91, art. 51.

1585 Examples are the following articles of the Terrorist Combating Act of 2000. Art.5: Committing a terrorist act is punishable by death. Art. 6: Forming or attempting to form a criminal organization, or participating in such an organization of facilitating its activities, to stage attacks that may jeopardize life or property or tranquility, is punishable by death. Art.8: Terrorism involving aircraft hijacking that jeopardizes life or an attempt to seriously damage or destroy an aircraft is punishable by death.

1586 Trafficking or producing drugs by recidivist, an ofcial entrusted with combating drug trafficking, by use of a person unable to give legal consent, or as part of an international criminal organization makes capital punishment mandatory. Sudan Narcotics Drugs and Psychotropic Substances Act of 1994, art. 15 and art.17. The death penalty can be imposed for providing drugs or other assistance related to trafficking or when drugs are provided to students or distributed in places of schooling. Articles 16 and 17 of the same law. For more information on the death penalty in the Sudan in general see http://www.deathpenaltyworldwide.org.
7 The enforcement of Sudanese ICL

7.1 Survey of human rights violations

7.1.1 Equality before the law

Equality before the law is a legal principle under which all persons are subject to the same laws and all are equal before the law. The Universal Declaration of Human Rights (UDHR, article 7) states that “All are equal before the law and are entitled without any discrimination to equal protection of the law”. While this principle is all encompassing and concerns religion, ethnicity, nationality, sexual orientation, socio-economic status and more in the specific Sudanese context and with regard to the Sudan’s Islamic Criminal Law it is most relevant with regard to gender and religion.\footnote{1587} It goes without saying that the latter in the Sudanese context to some degree is connected with the question of ethnicity, since most non-Muslims belong to non-Arab Southern tribes.\footnote{1588} Apart from the UDHR, there is a multitude of universal and regional human rights instruments defining the notion of equality before the law.\footnote{1589} Further, the ICCPR\footnote{1590} (art. 26) reads: “All persons are equal before the law...the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. This ban on discrimination is echoed in the ICESCR\footnote{1591}, the CRC\footnote{1592}, the International Convention on the Elimination of All Forms of Racial Discrimination\footnote{1593} but also in regional human rights tools such as the African Charter on Human and People’s Rights. One of the human rights instruments of relevance in this context is the Convention on the Elimination of All forms of Discrimination against Women (CEDAW, 1979) to which the Sudan is not party to. CEDAW defines discrimination against women as “…any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose or impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political,

\footnote{1587} On freedom of religion see following chapter.
\footnote{1588} The scope of this work does not allow me to deepen this issue. I am aware of the complexity of all questions related to ethnicity in the Sudan.
\footnote{1589} It will not be possible to discuss all of them. I shall limit myself to a selection of those which are relevant to the Sudan, either because the Sudan has ratified or acceded them or because their accession is under discussion.
\footnote{1590} Accession of the Sudan, 18 March 1986.
\footnote{1591} Accession of the Sudan, 18 March 1986.
\footnote{1592} Ratified by the Sudan, 3 August 1990.
\footnote{1593} Accession of the Sudan, 21 March 1977.
economic, social, cultural, civil or any other field” (CEDAW, article 1). CEDAW also calls on state parties to accord women equality with men before the law (Art. 15). With regard to CEDAW, the government argues, in order to explain its refusal to accede, that some of the articles in the convention do not comply with the principles of the shari’ā. In January 2001, President al-Bashīr reportedly said that the Sudan would not sign CEDAW because it was held to contradict Sudanese family values.\footnote{While the Sudan has not yet signed CEDAW, it is important to mention that the Muslim Personal Law Act 1991 is in contradiction with Article 16 of CEDAW, which calls for equal rights of men and women with regard to their rights to enter a marriage out of their free will and equal rights with regard to its dissolution, and with regard to equal rights and responsibilities as parents and concerning guardianship. Tønnessen & Roald (2007), pp. 27-29. On the discussion around an accession to CEDAW in the Sudan, with a focus on (women) Islamists see Tønnessen (2011).}

Our analysis of Sudanese ICL has shown (see chapter on zinā) that women are clearly not treated on an equal footing with men. That women suffer from a severe imbalance is especially evident in the laws pertaining to unlawful sexual intercourse (zinā) and its proof as well as rape. All four witnesses of good reputation that are required have to be men. Women are not allowed.\footnote{Evidence Act 1993, article 62 (b).} While this requirement is in conformity with the shari’ā it contradicts the human rights treaties cited above. We have shown above how the laws on proof of zinā are lopsided and discriminatory against women. Especially in cases of rape Sudanese legislation can turn a female victim into the perpetrator of an offence (zinā) which is punishable by death. This is the case when the female victim cannot prove rape while being pregnant as a result of it. Here the legislator construes the pregnancy as the result of unlawful sexual intercourse, provided the woman is not married. While Supreme Court case law has tried to mitigate the effects of this legislation clearly discriminating against women, the laws creating this situation have never been changed and remain in the statutes. Adding pregnancy to the methods of proof in cases of unlawful sexual intercourse clearly creates an advantage for men involved in such cases. In the absence of the testimony of the four men of good reputation it simply suffices for men to deny any involvement in the offence. Thus, in judicial practice, men generally have to be released from detention for lack of evidence while a woman in the same case faces charges that could potentially lead to her execution. This legal situation clearly leads to an unequal treatment of men and women under Sudanese criminal law, it undermines a woman’s right to bring charges against their rapist and contributes to his impunity. In consequence, the UN Human Rights Committee called upon the Sudan in 2007
to “undertake to review its legislation, in particular articles 145 and 149 of the 1991 Criminal Code, so that women are not deterred from reporting rapes by fears that their claims will be associated with the crime of adultery”.1596 Apart from creating a situation of inequality before the law in cases when rape constitutes a criminal offence not related to an armed conflict, the prevalent situation with regard to rape is also in clear contradiction with the prohibition of rape under international human rights law in both international and non-international armed conflicts. Thus, rape is prohibited according to all four Geneva Conventions of 1949. These conventions are binding on the Sudan.1597 The Geneva Convention IV (article 27) e.g. stipulates that “Women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault”.

7.1.2 Freedom of religion1598

Religious rights are guaranteed by a variety of international Human Rights Treaties the Sudan is party to such as the International Covenant on Civil and Political Rights (ICCPR)1599, the International Covenant on Economic, Social and Cultural Rights (ICESCR)1600, the Convention on the Rights of the Child (CRC)1601, the International Convention on the Elimination of All Forms of Racial Discrimination1602 and the Convention on the Prevention and Punishment of the Crime of Genocide.1603 Especially the ICCPR, based on the Universal Declaration of Human Rights and accessed by the Sudan in 1986, is very specific as to religious rights. Article 18 of the ICCPR stipulates: “1. Everyone has the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and

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1597 See REDRESS (November 2008), p. 15.
1598 UN Human Rights reports on the Sudan quote numerous violations of the freedom of religion on a de facto level. Such violations include the restriction of church activities, the closure and destruction of churches, the refusal to issue building permits to churches, the denial of travel permits to Sudanese priests to prevent them from evangelizing, forced Islamic missionary work on tribesmen serving in the PDF etc. While all these incidents constitute violations of religious freedom I shall limit myself in this chapter on legislation.
1599 Accession of the Sudan, 18 March 1986.
1600 Accession of the Sudan, 18 March 1986.
1601 Ratified by the Sudan, 3 August 1990.
1602 Accession of the Sudan, 21 March 1977.
1603 The Sudan accessed 13 October 2003. Article II of the Convention protects the collective right of a religious group to exist.
teaching. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.” These freedoms to manifest one’s religion or belief, however, can be “subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” (Article 18, 3). As El Tayeb has pointed out the inclusion of the right to change one’s religion or belief met with opposition from Muslim countries which wanted to delete it before the adoption of the final text. The result of the preliminary discussion was a compromise formula with the wording “to have or to adopt a religion or belief” which, while being less explicit, still clearly includes the right to change one’s religion or belief.\footnote{1604} This is also the unanimous opinion of leading commentators and UN rapporteurs.\footnote{1605} Further, the International Covenant on Economic, Social and Cultural Rights guarantees to parents the right to determine and ensure religious and moral education for their children (art.13 (3)). The Convention on the Rights of the Child affirms the right of children to freedom of thought, conscience and religion (art. 14 (1)) and their right to belong to a religious minority (art.30). How do these guarantees for the existence and practice of religions and beliefs relate to the Sudan’s ICL\footnote{1606}, being the object of this study? The most blatant contradiction is without doubt the 1991 introduction of apostasy as a crime punishable by death. As mentioned earlier, in the case of Maŷmūd Muŷammad Ṭāḥā a Muslim religious leader was executed for alleged apostasy in 1985, without specific stipulation in the existing Penal Code, based on the Judgements Basic Rules Act. This law stipulates that a court must apply \textit{sharī’}a law in the absence of legislation, as was the case here since apostasy was not yet codified. \textit{Sharī’}a must also be applied in the case any legislative provision exists but is not in harmony with \textit{sharī’}a. While the Judgment Basic Rules Act remains in force, the Criminal Act 1991 has introduced apostasy for the first time in modern Sudanese legal history into its statutes, in clear violation of the above mentioned international human rights treaties.\footnote{1607} The relevant article clearly only refers to the apostasy of Muslims, the CA91 does not contain any similar stipulation with regard to Christians or other religions. In other words, the Muslim apostate is liable to the death penalty, while apostates of other religions are not punished at all according to the

\begin{footnotes}
\footnote{1606} While concentrating on ICL it is worth mentioning that there are other laws discriminating against non-Muslims such as the 1962 Missionary Act which severely limits proselytizing of Christian churches. No such limitations are imposed on Muslim missionary activities.
\end{footnotes}
Criminal Act 1991. Confronted by the UN Special Rapporteur with regard to the obvious conflict between Sudan’s legislation on the one hand and its obligations under ratified Human Rights Treaties, the government of the Sudan replied: “The punishment is inflicted in cases in which apostasy is a cause of harm to the society, while in those cases in which an individual simply changes his religion, the punishment is not to be applied. But it must be remembered that upthreatening (sic!) apostasy is an exceptional case, and the common thing is that apostasy is accompanied by some harmful actions against the society or State…Assuredly, the protection of society is the underlying principle in the punishment for apostasy in the legal system of Islam”.

This statement clearly does not address the main concern which is the flagrant contradiction between article 126, CA91 on apostasy and the Sudan’s obligation to ensure religious freedom, including the right to change one’s religion as included in the ICCPR. It is rather a political statement, and was understood as such by the UN Rapporteur Gáspár Bíró, trying to portray those who make use of their guaranteed rights as being threats to society. Bíró rightly pointed out that article 126 can be used not only against recent converts who wish to reconvert to their old faith but could also serve as a potential threat to majority Muslims who dissent from the official position on religious matters.

Next to introducing apostasy, either by way of an explicit provision or without it, both Islamized penal laws, the Penal Code 1983 and the Criminal Act 1991 discriminate against non-Muslims in different ways. The Penal Code 1983 introduced the full range of ḥadd and qīṣāṣ provisions, clearly based on only one, though the majority religion, for the entire territory of the Sudan, i.e. including on the one hand the South, mostly inhabited by non-Muslims and also including non-Muslims in the North on the other hand. By exempting the South from ḥadd and qīṣāṣ punishments the Criminal Act 1991 tried to address the problem but stopped half-way since non-Muslims in the North were still subject to the full range of punishments, at least until the Interim National Constitution of 2005 introduced some measure of protection against Islamic punishments for non-Muslims living in the North. It has also been pointed out that while the South was exempted from the punishments the definitions of the crime (combined with a separate set of punishments for the South only) stayed as they were.

In other words, while the ICCPR guarantees “freedom of thought, conscience and

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1607 See chapter 4.6 above.
1609 See Kok (1991), pp. 245-246.
religion...(and)...to manifest his religion or belief in worship, observance, practice and teaching”, the Islamized criminal law gravely violates the notion of equality of religions inherent in the ICCPRs provisions. Criminal legislation, as well as any other law, based mainly on principles of the sharī’a and interpretable only in the light of the sharī’a is in a sense a legitimate manifestation of the Islamic faith, its practices and teachings, at least in the eyes of the proponents of such legislation. However, by imposing such legislation on the entire non-Muslim population of the Republic of the Sudan, all adherents of other religions are subject to the manifestation of a religion that is not theirs and are therefore severely discriminated against. We have shown above how the Supreme Court’s case law has tried to interpret the existing criminal law in a way as to establish a high degree of equality of citizens. While this approach reduces discrimination in the jurisdiction of the highest court of the country it is also questionable from an Islamic point of view. Moreover, it cannot and does not address multifold discrimination on a de facto level.

7.1.3 Rights of children

The Criminal Act 1991 is in conflict with the Sudan’s obligations under article 37 of the Convention on the Rights of the Child. Article 37 CRC provides that “no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Article 27 (2) of the CA91, however, explicitly allows for the application of the death penalty on persons under the age of eighteen in cases of hadd- and qisās offences. As to qisās other than the death penalty the CA91 does not mention that persons under the age of 18 are exempted (articles 28-32) which implicitly allows for the amputation of minors. Further, under the heading “Measures of Welfare and Reform. Measures prescribed for juveniles” the CA91 explicitly allows for the whipping with up to 20 lashes of children between seven and eighteen years of age (art. 47 (b)). The UN Committee on the Rights of the Child is strongly opposed to the corporal punishment of children, i.e. persons under the age of eighteen in all settings, including in the justice system. It has clarified that the prohibition of corporal punishment is absolute, and cannot be justified. The problem that for particular crimes (hadd/qisās) the general age limit of 18 is not applicable has been addressed by reports of the UN Committee on the Rights of the Child which said in its 2002 report that it “is concerned that the definition of the child is unclear under Sudanese law and is not in conformity with the principles and

\[1610\] REDRESS, March 2012, No more cracking of the whip, p. 23.
provisions of the Convention. For example, minimum ages may be determined by arbitrary
criteria, such as puberty, and discriminate between girls and boys...” Closely related to this
matter the Committee was concerned that the age of criminal responsibility is too low since
children as young as 7 years of age are punishable by detention in a reformatory. The
Committee thus recommended, next to raising the minimum age of criminal responsibility,
that the Sudan ends the “imposition of corporal punishments, including flogging, amputation
and other forms of cruel, inhuman or degrading treatment or punishment, on persons who may
have committed crimes while under 18”.

The al-Bashîr regime has responded to international criticism, the most specific of which has been coming from the UN Committee
on the Rights of the Child, by legislating a “The Child Act 2009”. This new law which
defines a large number of rights of children could rectify major concerns of human rights
groups and the UN Committee on the Rights of the Child. It seeks to establish a parallel
justice system specialized in children, which are defined as any person below the age of
eighteen. Child courts, specially trained magistrates and a Children Prosecution Attorneys
Bureau are the main pillars of this new system. The law does not mention the term shari‘a and
makes no reference to it. Instead it clearly specifies that the Child Courts “shall follow the UN
Minimum Rules on Juvenile Courts”. Most importantly, the Child Act 2009 establishes the
principle that “the sentence of whipping is not inflicted on the Child” (art. 77 (d)) and that
“the death sentence is not inflicted on the Child” (art. 77 (e)). The Child Act is silent on the
question of amputations. In general it can be said that, despite important lacunae, the Child
Act 2010 is a step into the right direction. However, as long as corresponding sections in the
Criminal Act 1991 are not changed it seems unlikely that judges in criminal courts would
tacitly follow the Child Act instead of applying the CA91. Indeed, in their October 2010
report on the Sudan the UN Committee criticized that juvenile court system “is not yet fully
functional and does not have separate courts and detention facilities for children”.

Further,
the UN Committee came to the conclusion that the age of criminal responsibility is still determined according to “apparent physical maturity (puberty), rather than actual age”. In fact, children, i.e. persons under the age of 18, continued to be executed by way of retribution (qiṣās) or by way of ḥadd, thus violating articles 6 and 37(a) of the Convention on the Rights of the Child. Further, children were still brought before courts for adults and detained together with adults in prison and while in police custody. Different from what the Child Act 2009 stipulates, children were “routinely dealt with in the absence of their parents or guardians” without “effective oversight of the investigative and judicial processes”. The UN Committee report also mentions that female genital mutilation, which is widespread in the Northern Sudan, is not prohibited by the Child Act 2009.\footnote{1615} As to caning and flogging, the Child Act prohibits it in schools and also as a judicial punishment. In actual practice, the report is concerned, the flogging of children and other corporal punishments are widely practiced in schools, courts and prisons.\footnote{1616}

### 7.1.4 Cruel, inhuman and degrading penalties

The Sudan is party to a number of international human rights treaties prohibiting torture and other cruel, inhuman or degrading treatment or punishment (CIDTP). These treaties include the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and the Convention on the Rights of the Child (CRC). Further, the Sudan is party to the Convention on the Prevention and Punishment of the Crime of Genocide, the Slavery Convention, and the Convention relating to the Status of Refugees. The Sudan is also party to the International Convention on the Suppression and Punishment of the Crime of Apartheid and the African Charter on Human and Peoples’ Rights (ACHPR). The Sudan has signed, but not ratified, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

Thus, Sudanese criminal legislation is clearly in conflict with the country’s commitments under Article 7 of the ICCPR, providing that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”. Especially shari‘a-based punishments such as flogging, stoning, crucifixion, and amputation as stipulated in the 1991 Penal Code plainly

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\footnote{1615}{The Child Act of the Southern Sudan (2008) prohibits the practice.}
\footnote{1616}{Ibid. article 39.}
contradict the ICCPR. The UN Human Rights Committee which monitors the adherence of states to the Covenant has clearly stated that article 7 of the ICCPR extends to corporal punishment. It has therefore called on several states, among them the Sudan, to abolish all laws allowing for corporal punishment. It has further rejected explanations such as the one made by a Sudanese delegation in 2007, which asserted that “flagellation and whipping, for example, were lawful forms of punishment in the Sudan and as such not incompatible with the Covenant”. While I could not find any trace of an execution of stoning, the punishment of flogging is imposed and executed on a regular basis. While Article 14(5) of the ICCPR guarantees the right of appeal, sentences to flogging in accordance with the Security of the Society Law are in practice carried out instantaneously, and without counsel. The Criminal Act (CA) 1991 allows in cases concerning the hudud and qisas the death penalty for individuals below the age of 18, while the ICCPR and the CRC both prohibit death sentences against offenders who have not yet reached the legal age of maturity. Apart from contradictions between the Sudan’s obligations under the ICCPR and other human rights covenants and its shari’a-based national legislation, there are many examples of violations of the Sudan’s international obligations at a de facto level. In addition to the well-known mass killings and mass rape in Darfur, one of the most blatant human rights violations that has long persisted throughout the country is the recurrent scourge of slavery. Banned by both the ICCPR (Art. 8) and the Slavery Convention, it has nevertheless continued to be practiced with impunity.

Sudan is also party to the African Convention on Human and People’s Rights which states that “...All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishments and treatment shall be prohibited” (art.5). Doebbler v Sudan is the leading case on corporal punishment which has been decided before the African Commission on Human and People’s Rights. In this case eight male and female students were convicted to fines and between 25 and 40 lashes for contravening art. 152 of the Criminal Act 1991. Article 152 punishes indecent or immoral conduct or dress. The whipping was meted out in public on the uncovered backs of the female defendants. While the Sudanese government argued that the punishment was justified because the defendants committed acts

1617 REDRESS, March 2012, No more cracking of the whip, p. 21.
1618 REDRESS, March 2012, No more cracking of the whip, p. 22.
which are criminal according to Sudanese law, the Commission dismissed this argument. It unequivocally stated that the whippings had violated article 5 and that “there is no right for individuals, and particularly the government of a country to apply physical violence to individuals for offences. Such a right would be tantamount to sanctioning State sponsored torture under the Charter and contrary to the very nature of this human rights treaty”.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), signed but not ratified by the Sudan, prohibits torture (art.1) and acts of cruel, inhuman or degrading treatment or punishment (art. 16). The monitoring Committee against Torture has taken a clear position the public execution of punishments in general and physically abusive measures such as flogging or caning in particular, e.g. in the case of Indonesia. It is likely that a ratification of the Convention and resulting monitoring would lead to similar concerns in the case of the Sudan.

The Committee on Economic, Social and Cultural Rights, responsible for monitoring the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 2000 was “gravely concerned about the occurrence of flagellation or lashing of women for wearing allegedly indecent dress or for being out in the street after dusk, on the basis of the Public Order Act 1996 (Khartoum), which has seriously limited the freedom of movement and of expression of women.” It therefore asked the government of the Sudan to “…reconsider existing legislation, particularly the 1996 Public Order Act, in order to eliminate discrimination against women…”

In conclusion, the Sudanese government, since its introduction 1983, has been criticized and continues to be criticized for the application of CIDTP by the monitoring committees of the international conventions and treaties the Sudan is party to. The conventions and treaties as well as comments of the said committees leave no doubt as to the fact that the prohibition of CIDTP is absolute and can neither be derogated from by way of emergency legislation nor is it admissible to enter reservations limiting the scope of the prohibition. Especially the latter has been tried by a variety of countries, including Pakistan and the Sudan, in order to avoid international criticism for human rights violations. It is important to note that the Sudan

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1621 Committee on Economic, Social and Cultural rights, Concluding Observations on Sudan, UN Doc. E/C. 12/1/Add.48,1 September 2000 para. 24. Quoted in REDRESS (March 2012), No more cracking of the whip, p. 32.
1622 Ibid., p. 32.
resisted all requests by Amnesty International and the relevant UN monitoring bodies to ratify CAT and ICCPR when al-Turābī was Attorney General. While asserting the Sudan’s commitment to human rights he resisted ratification because CAT and ICCPR outlaw the application of hadd punishments. ICCPR and CAT were ratified under the TMC 1985-1986.\(^{1623}\)

_Legal contradictions between the shari’a and human rights in national and international law_

Immediately after the 1989 coup, the al-Bashir regime suspended the 1985 Transitional Constitution and ruled by constitutional decrees enacted by the Revolutionary Command Council (RCC). In relation to this, the Sudan’s initial report (1991) to the UN Human Rights Committee lodged a derogation concerning its obligations under the ICCPR:

It became expedient to proclaim a state of emergency with the inevitable derogation from Sudan’s obligations under the Covenant on Civil and Political Rights [...] With the achievement of more progress in the peace process and the establishment of the political system, that state of emergency will be naturally lifted and the derogation from Sudan’s obligations under the Covenant will be terminated forthwith. Since that 1991 report, first in 1998, and then in 2005, new constitutions have been enacted, the first of which, in turn, has been partially suspended due to the imposition of emergency law in 1999. It is unclear whether with the lifting of the state of emergency in 2005 in most of the Sudan the above derogations have become groundless. The INC of 2005 (see 5.5) does not mention international human rights as a source of legislation. Article 27 states that ‘all rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of the Sudan shall be an integral part of the Bill of Rights (i.e. the INC). It is, however, not clear that these international human rights treaties and conventions enjoy the same legal recognition as other articles of the constitution, nor does the INC explicitly mention that these treaties and conventions are enforceable in Sudanese courts.\(^{1624}\)

In fact, in many instances the INC subjects itself to ‘prescribed laws’, thus inverting the usual practice of the hierarchy of norms. To date, little progress has been made concerning the

\(^{1623}\) Kok (1992), p. 189.

\(^{1624}\) The INC explicitly states that rights described in its chapter II (“Guiding Principles and Directives”) are “not by themselves enforceable in a court of law (art. 22).” For a detailed critique of the 2005 Interim National Constitution see “Observations on the Transitional Constitution”, The Sudanese Human Rights Quarterly 20 (January 2006).
adjustment of statutory laws in order to make them compliant with the Interim National Constitution and international human rights conventions to which the Sudan is party.

The ḥadd offence of apostasy and its respective punishment constitute a violation of Article 18(1) of the ICCPR, which guarantees freedom of thought, conscience, and religion. It is also discriminatory in its differential treatment of adherents of the different faiths. Important shari‘a-based stipulations of the CA do not exempt non-Muslims in the northern governorates. Thus, Article 168(1) on armed robbery (ḥirāba) provides for the death penalty and/or crucifixion for Muslims and non-Muslims alike. Similarly, Article 171(1) punishes ḥadd theft (sariqa ḥaddiyya) with amputation of the right hand, irrespective of the faith of the offender. It goes without saying that cruel corporal punishments as such constitute a human rights violation, no matter whether the person sentenced is Muslim or not. In practice non-Muslims in the North are frequently victims of shari‘a-based legislation on alcohol-related offences. Thus, the majority of prisoners in the Omdurman Women’s Prison were imprisoned for alcohol-related offences. More recently, the Sudanese government seems to have taken measures to rectify this situation.

7.2. Survey of severe shari‘a penalties

The analysis of published Supreme Court decisions has shown that most of the more severe corporal punishments, such as single and cross amputations, the death penalty for zinā or apostasy and retaliation for bodily harm, have rarely been upheld by the Supreme Court, after the fall of the Numairi regime 1985. The Supreme Court cases as published in the SLJR give us, however, only part of the picture and it is necessary to match them with the reports of international human rights organizations in order to have an approximate view of the quantitative dimension of ICL application. While floggings and executions are indeed applied large-scale, all other corporal punishments based on the shari‘a, do remain on the statutes, are imposed by the lower courts but are then in the majority of cases, it seems, not executed, either because they are scrapped by the Supreme Court or because they are commuted. The

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1625 The following conclusions have been reached on the basis of primary and secondary sources used, i.e. Supreme Court jurisdiction as published in the SLJR, statements made by Supreme Court judges during interviews and AI and HRW annual reports. We cannot be absolutely certain that there are no unpublished cases contrary to the trends described below. Also, the possibility that amputations and executions are carried out in secret cannot be ruled out entirely. In its 1994 report Amnesty International mentioned that in September 1993 a
Sudan’s approach to ICL application and the application of severe *shari‘a*-penalties can be compared to some degree to Pakistan’s. Similarly, no death sentence by stoning has been carried out in Pakistan and in general, ICL application has been “careful and controlled”. A major difference is, however, that in Pakistan there were only few amputation sentences passed by lower courts, which, in turn, where all quashed by the Federal Shariat Court. In fact the Federal Shariat Court has stated that it will make an effort “not to inflict a ḥadd as long as it may be avoided by all legitimate and established means”. In the Sudan, no such statement of the Supreme Court has become known and the frequency of amputation sentences passed by lower courts seems to be higher than in Pakistan. The possibility to carry out amputations is being kept open, even if the number of amputations is low. I shall now discuss the different punishments one by one.

It has become clear that the Sudan does not execute adulterers by way of stoning. While stoning is the punishment for adultery if the adulterer is *muhšan*, in none of the cases discussed in the SLJR it was actually applied. In fact, stoning as a punishment has never been carried out in the Sudan according to all sources available to me. No execution for homosexual intercourse between males has become known either.

After the downfall of Numairi no death penalties for *zinā* were confirmed by the Supreme Court, as far as we know from the published material at hand. While in the early phase of ICL application pregnancy of the *muhšana* served as proof for *zinā*, in later cases the Supreme Court recognized (unproven) claims of rape as *shubha*. While remaining in the statutes pregnancy can thus only serve as proof for *zinā* if the accused does not cite rape, which would be considered a legal uncertainty (*shubha*), in her defense.

The Supreme Court has also narrowed down the definition of *muhšan* to the person being legally married at the time of the commitment of *zinā*. It thus considerably reduced the possible application of stoning.

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1626 See Peters (2005), p. 160. The exeption to this restraint are the blasphemy laws against the Ahmadiyya sect.
1628 The method of execution for *zinā*, stipulated in the Supreme Court cases investigated is not always stoning, but can be hanging as well.
Zinā cases, even without the de facto application of stoning or the death sentence, do make headlines and do find their way into human rights reports though. They are normally punished by flogging or the sentence is commuted. For example, in Southern Darfur a 18-year old Dinka woman was sentenced to death by stoning for zinā in December 2001. After international protest, the sentence was quashed and the trial court imposed forty lashes which were carried out on the spot without possibility of appeal. Fluehr-Lobban reports that hospitals have to report to the police any childbirth where the mothers can not indicate the father. The police will then administer 100 lashes to these unmarried women. This and other evidence from HR sources corroborate that the regime does not wish to execute women – men are hardly ever the victim of these accusations – for zinā, without, however, wanting to let the crime go unpunished. It therefore imposes flogging on the alleged culprits, often administered by Public Order Police after a decision by a Public Order Court and before the case even reaches a regular criminal court. Often the accused do not have access to legal assistance and cannot appeal before the flogging is administered.

As to ḥirāba, until 1991 the Supreme Court had to cope with the peculiar situation that ḥirāba as such was not codified, while a number of taʿzīr-crimes were punishable with punishments normally reserved for ḥirāba. The published, rather contradictory, SC decisions thus oscillate between a justification of the flawed 1983 legislation to an outright rejection of ḥadd-

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1630 Annual and other reports by international human rights organisations are the single most important and independent source allowing us to compare Supreme Court judgments with the judgments of lower courts. This source, however, has its limits. Amnesty International delegations have had limited access to the Sudan since the inception of the al-Bashir regime. Nevertheless, a comparison between Amnesty International and Human Rights Watch annual reports shows that the latter reports significantly less amputations and ICL-related cases in general. One can therefore safely assume that had there been continuous observation of the human rights situation in the Sudan by AI and HRW since 1989 more ICL-related cases would have been revealed. AI and HRW reports often do not follow up on cases. We read for example in one report that x persons have been sentenced to amputation. In the following reports however no further details or subsequent developments of the case are reported. It is therefore impossible to say whether these sentences have been carried out or whether the case has been quashed in the Appeal or Supreme Courts. In other words, while AI and HRW reports provide us with valuable information, it is impossible to obtain a comprehensive picture of de facto ICL – application based on these reports.

1631 Human Rights Watch World Report 2003. For another case see Human Rights Watch World Report 1999 quoting a case of four women facing the death penalty on zinā. In 2002 AI reports a death sentence by stoning imposed in Nyala on a 18 year old Dinka woman. The sentence was subsequently reduced to 75 lashes. AI, Annual Report 2003. In 2003 a 14-year old girl who was nine months pregnant was sentenced to 100 lashes, also in Nyala. The sentence was later commuted. AI, Annual Report 2004. In 2007, two women from Där Für were sentenced to be stoned for adultery in Managil Province, Gazira State. According to AI information the sentence was later commuted. AI, Annual Report 2008.

1632 Fluehr-Lobban, Shari’a and Islamism, chapter 4 (forthcoming).

1633 In its annual report 1994 Amnesty International relates the case of Peter al-Birish, an Anglican Bishop who received 80 lashes after being convicted of adultery.
punishments for non-ḥadd crimes. With the introduction of ḥirāba as a clearly defined ḥadd-crime in the CA91 SC decisions on ḥirāba become scarcer. Neither before nor after 1991 SC decisions indicate a clear tendency with regard to the actual application of ḥirāba-related punishments. However, Amnesty International and Human Rights Watch report that amputation, execution and crucifixion\textsuperscript{1634} sentences as punishment for ḥirāba were indeed, relatively frequently, pronounced by local courts, mainly in Dār Ṣur, at times also in Khartoum\textsuperscript{1635}. It appears that the higher frequency of ḥirāba-related sentences reflect the determination of the authorities to use all means to punish those who commit this massive disturbance of public order\textsuperscript{1636}.

It is noteworthy that the majority of the ḥirāba cases reported by Amnesty International and Human Rights Watch took place in remote Dār Ṣur which has been the scene of long-standing violent confrontations between rebel forces and government-backed militias. While these reports do not disclose the political or criminal background of the cases it is rather likely that the relevant articles of the CA91 are used as a disciplinary tool in a situation of civil strife.

As to amputations for ḥadd-theft a large majority has not been confirmed by the Supreme Court, according to the published material. At times the Supreme Court judges went out of

\textsuperscript{1634} It seems that offences other than ḥirāba are punished with execution and subsequent crucifixion. Thus, three men of the Masaalit tribe (Dār Ṣur) were sentenced to cross-amputation, hanging and crucifixion for having taken part in “tribal clashes” in 1999. See Amnesty International, Annual Report 2000. Unfortunately the report does not reveal which article of the Criminal Act 1991 was applied. One man was sentenced to death and subsequent crucifixion in 1992 for “waging war against the state and illegal possession of firearms”. Amnesty International, Annual Report 1993. Again, it is not clear, why crucifixion was to follow hanging. The pertinent article 51 only speaks of the death penalty.

\textsuperscript{1635} HRW reports a few cases of public hanging followed by crucifixion in Dār Ṣur in 1991 for ḥirāba. See HRW World Report 1992. AI reports one case of hanging and subsequent crucifixion in Dār Ṣur in 1991. It is unclear whether this case is part of the cases reported by HRW. AI reports that in 1996 ten people were sentenced to cross-amputation for ḥirāba in Dār Ṣur, while at the same time the Director of Prisons announced that 100 people were waiting for the implementation of the sentences of limb amputation. See AI, Annual Report 1997. Three people were sentenced to cross-amputation for ḥirāba in Dār Ṣur in 1997. See AI, Annual Report 1998. In 2000 12 sentences of limb amputations passed. It is unclear whether for ḥirāba or theft. One of these sentences was executed in Khartoum. AI, Annual Report 2001. In 2001 five cross-amputations for ḥirāba were carried out in Kober prison in Khartoum, 19 other men were equally sentenced to cross-amputation. AI, Annual Report 2002. Further, in December 2001, also in Dār Ṣur, six men were sentenced to single and cross amputations for ḥirāba and illegal possession of unlicensed firearms. See Human Rights Watch World Report 2003. In 2002 the final appeal of five people sentenced in Nyala (Dār Ṣur) to cross-amputation and hanging was rejected. AI, Annual Report 2003. In 2003 two men were hanged for ḥirāba after having been convicted in Nyala. As of 2005 the Annual Reports of AI and HRW do not report further cross-amputations for ḥirāba.

\textsuperscript{1636} That the state is determined to punish ḥirāba severely is also evident by article 24 (2), CA91. This article stipulates that criminal conspiracy is not deemed an offence unless an attempt is made to commit the offence. However, intentional homicide, ḥirāba and offences against the state are not included. In other words, if two or more persons agree to commit any of these crimes, i.e. intentional homicide, ḥirāba or a crime against the state, the fact that they agreed on committing the crime is deemed sufficient to impose the respective punishment. It is not necessary that they made an attempt to actually commit the offence.
their way to avoid amputation. Amnesty International reported that shortly after the introduction of the Criminal Act 1991, in September 1991, three people were sentenced to limb amputation after being convicted for theft. It is not known whether these amputations were carried out.\textsuperscript{1637}

Sudan, according to a 2006 statistic, was fifth among the six countries that carried out 91% of all known executions worldwide.\textsuperscript{1638} The number of confirmed executions seems to have gone down in the following years. All the judges I interviewed were in favor of the death penalty and strongly believed in its deterrent effect.\textsuperscript{1639}

Whenever there are legal heirs the decision will be qualified “execution by way of qiṣāṣ” (iʿdām qiṣāṣan). Whenever intentional homicide is proven and there are no heirs the execution will be carried out anyway according to pertinent SC jurisdiction.\textsuperscript{1640} While this difference has no impact on the actual execution method (hanging) in the former case the heirs have the right to either settle for diya or pardon the culprit. This principle not only diminishes the total number of executions it also allows for a financial compensation of the heirs of the victim. While paying attention to these individual rights the state, however, secures its prerogative of punishment by determining that execution is always hanging and no qiṣāṣ in the sense of “an eye for an eye” is admissible. Further, even if the heirs pardon or settle for a financial compensation the judge can impose a taʿzīr-penalty.\textsuperscript{1641}

With regard to qiṣāṣ for bodily harm, no cases could be found among the investigated SC decisions that ended in retaliation, with one exception. According to interviews with Supreme Court judges they normally end with the payment of diya. As shown above, the Supreme Court decided that equivalence in the case of broken bones can not be guaranteed and

\textsuperscript{1637} Amnesty International, Annual Report 1992. This conviction for theft came only a few months after all sentences of amputation imposed before the introduction of the Criminal Act 1991 had been commuted.\textsuperscript{1638} http://deathpenaltyinfo.org/death-penalty-international-perspective#interexec. In the years 2005-2010 Sudan has not been among the first five countries with the highest number of confirmed executions worldwide according to the same source. Reliable numbers of executed death sentences in the Sudan are difficult to find. The website “Death Penalty Worldwide” (http://www.deathpenaltyworldwide.org) estimates that by February 2010 between 310-350 individuals were on death row in the Northern Sudan in addition to another 100 in the Southern Sudan. It should be noted that extra-judicial killings, a current phenomenon in the Sudan, are not included in this statistics.\textsuperscript{1639} Interviews with Supreme Court judges May 2009. In November 1997 the Minister of Justice announced that since 1989 894 death sentences were imposed for murder and armed robbery. Of these 112 were carried out. AI, Annual Report 1997.\textsuperscript{1640} Article 130, CA91 only stipulates two possibilities, i.e. retribution or the remittance of retribution with a subsequent taʿzīr-punishment. We can therefore safely assume that in cases where the state executes a person guilty of intentional homicide in the absence of legal heirs, the state assumes the role of heir. According to the classical fiqh the state may not pardon the perpetrator in such a situation. Personal communication Ruud Peters.
therefore retaliation is excluded. It is possible that this principle has been extended to bodily harm in general. This assumption is confirmed by the annual reports of AI and HRW that do not report cases of retaliation with regard to bodily harm as from 1989. It should be noted, however, that the Supreme Court does not automatically review qisas-cases concerning bodily harm.\(^{1642}\) It can therefore not be excluded that an analysis of judgments of lower courts would lead to a reevaluation of the above findings.

Apart from the Ţāhā case no execution for apostasy seems to have taken place in the Sudan since 1985. The published decisions of the SLJR do not contain any other apostasy cases nor do Human Rights Watch or Amnesty International report any. This, however, does not mean, that the relevant articles of the CA1991 do not play a role in daily judicial practice. Apostasy, as it is in direct defiance of the official Islamization project of the al-Bashīr regime, is not taken lightly by the authorities and (alleged) offenders will face severe consequences.\(^{1643}\)

In summary we observe that despite the Supreme Court’s reticence in confirming the harsher shari‘a-based punishments such as amputations or death penalties for zinā, ICL-application as such subsists. While between October 1983 and April 1985 more than 140 amputations were carried out\(^ {1644}\), no amputation sentences seem to have been implemented after the downfall of the Numairi regime until the advent of the al-Bashīr regime. All pending amputation sentences were commuted in 1991. Single and cross-amputations, executions, at times in combination with crucifixion were, however, resumed with the introduction of the Criminal Act 1991. These punishments were mainly imposed for armed robbery (ḥirāba). The total number of confirmed cases of carried out amputations is far lower than during the Numairi era. According to the pertinent reports of Amnesty International and Human Rights Watch, the reported number of implemented amputations doesn’t even reach one per year on average. This contrasts, however, with a higher number of amputation sentences.\(^ {1645}\) Since obviously a high percentage of these sentences are not carried out we have to assume that these are either

\(^{1641}\) CA91, art. 130 (2).
\(^{1642}\) Article 181 of the Criminal Procedure Act 1991 only speaks of death and life sentences and amputations that have to be submitted to the Supreme Court for confirmation.
\(^{1643}\) This is illustrated, among others, by a case from June 2001 when security forces arrested an alleged convert to Christianity and kept him in solitary confinement for three months while reportedly torturing him and demanding him to reconvert to Islam. Human Rights Watch World Report 2002. See also Human Rights Watch World Report 1999 quoting a case of a Nuba teacher living in the North and charged with apostasy.
\(^{1644}\) AI, The Tears of Orphans, pp. 46-47.
\(^{1645}\) As mentioned above, e.g. in 1996 the Director of Prisons announced that 100 people were waiting for the implementation of their amputation sentences.
commuted or scrapped by either the Court of Appeal or the Supreme Court. The Supreme Court judges I interviewed argued that many of the *hadd* crimes, especially those leading to amputation or stoning, were so difficult to prove that their application was close to impossible. Supreme Court judgments therefore were simply following the spirit of the *shari‘a*.\(^{1646}\)

Apart from a relatively low number of amputations and crucifixions (of already executed delinquents), ICL application thus subsists mostly with regard to the death penalty for *qiṣāṣ* crimes and flogging.\(^{1647}\) The latter is mainly administered for alcohol related offences, offences concerning “public morale” such as contraventions against the Islamic dress code, but also for *zinā*. It is important to note that in all three instances women represent the great majority of those accused.\(^{1648}\) Brewing “marissa”, the local Sudanese beer, is a business exercised mainly by Southern women who have no other source of income, while the consumers are mainly Southern men. Both groups are targeted by the Public Order Police and especially Southern women are frequently flogged for contravening the pertinent articles of the Criminal Act 1991.\(^{1649}\) As in cases of *zinā*, many if not most of these cases do not reach the regular criminal courts, but are instead decided by Public Order Courts. Regular amnesties free hundreds of women serving prison sentences for alcohol related offences. Their places, however, are quickly filled by others. As to enforcing the *ḥijāb* and other features of an imagined proper Islamic dress code, the regime has dimmed down its fervor in the late nineties after a decade of zealous prosecution of women for not wearing the *ḥijāb* or wearing trousers. While these cases might occur more infrequently in recent years, they have not disappeared.\(^{1650}\)

An offence difficult to assess is false accusation of illegitimate sexual intercourse (*qadhf*). I did not find published SC decisions on *qadhf* nor AI and HRW annual reports that contain *qadhf* cases. Available statistics, however, report 659 court decisions on *qadhf* cases in 2008.

\(^{1646}\) Interviews with different Supreme Court judges, May 2009.

\(^{1647}\) Flogging and capital punishment punishments were already part of the colonial criminal codes although the nature of capital punishment has changed with the new role conceded to the heirs of the victim.

\(^{1648}\) In 2010, however, 19 young men received 30 lashes before an audience of 200 people for cross-dressing and wearing make-up. AI, Annual Report 2011.

\(^{1649}\) AI reported 1993 that in 1992 a Supreme Court judge received 20 lashes in public for drinking alcohol. This is a rather exceptional case. See AI, Annual Report 1993. Alcohol related offences were the most frequent crime of the 2008 crime statistics with 91641 cases decided.

\(^{1650}\) This has been demonstrated by the case of the Sudanese journalist Lubna al-Hussain who faced 40 lashes in July 2009 for having worn a trouser in a Khartoum restaurant, See AI, Annual Reports 1989-2011.
alone. Sharī‘a application is limited mainly geographically and with regard to the social strata it affects. Geographically in the sense that amputations and crucifixion are rarely applied in Greater Khartoum and most other parts of the Sudan. However, they seem to have been applied at a slightly larger scale in Dār Fūr, probably in the context of the outbreak of hostilities between rebels and government-backed militias. With regard to flogging the group most affected are Southern non-Muslims in the North. Here sharī‘a application obviously serves to discipline a refugee population in and around Khartoum which, for cultural and economic reasons is not willing or able to comply with the Islamist legislation. Southern women are however not the only ones who are in danger of being flogged. Muslim women in Khartoum and other cities of the North also continue to be targeted for improper dress, zinā or other offences.

7.3. Survey of legal factors

7.3.1 Development in legislation

The comparison of the two penal codes under scrutiny in this study concludes in a large number of differences. In terms of structure and length the PC83 had still closely followed its 1974 predecessor. The CA91, in contrast, has been streamlined and shortened. Out of 458 articles (1983) became 185 (1991). This streamlining and shortening has been reached mainly by reducing the number of punishable political crimes and by a much more concise drafting. Especially with regard to the Islamized parts of the PC1983, the CA91 is much clearer in its definitions, more precise and concise, and has remedied many of the flaws of its predecessors, moving it closer to the provisions that can be found in the fiqh and thus making it more acceptable to those who criticized it from an Islamic point of view. In particular it has done away with the PC83’s controversial combination of hadd punishments with non-hadd crimes. These had been codified in order to widen the scope of applicable hadd-crimes for crimes that can only be associated with hadd-crimes but do not represent the hadd-crime itself (as defined in the fiqh) and, on the other hand, for attempted hadd-crimes. The latter receives different treatment in the fiqh and should not be punished by punishments reserved for the hadd-crime itself. Thus, the CA91 has considerably reduced the number of crimes punishable by hadd-

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1651 Fluehr-Lobban reports in her forthcoming book that in 2003 14 persons were held in Khartoum’s Kober prison for qadhf according to a 2004 study of the Ahfad University Center for Gender and Development (edited by Balghis Badri).
crimes and basically reduced it to crimes that can be found also in the *fiqh*. At the same time the CA91 has also reduced the applicability of flogging to a large extent. Instead of keeping the arbitrary and unspecific formula “will be punished by flogging, fine and prison”, so ubiquitous it has restored the proportionality between the severity of the crime and its punishment. Keeping a reasonable relationship between the graveness of the crime and the severity of the punishment had been one of the important principles of the Penal Code 1974 and had been abandoned to a large degree in the Penal Code 1983. Further, the CA91 has filled the gaps by the PC83 attempting a more comprehensive legislation of ICL. It has thus, e.g., introduced the crime of *hirāba*, not codified in 1983, *riḍḍa* (apostasy), equally not explicitly codified in 1983 and blood money (*diya*), which is a central notion of the *fiqh* but had nevertheless been omitted in 1983. That a crime which is derived from the *fiqh* is introduced does not, however, mean that the regime intends its application. Thus the introduction of apostasy has obviously more symbolic than practical value. To have the crime of apostasy in the statutes helps the regime to present itself as the guardian of Islam while its non-application avoids the kind of international and domestic indignation the Numairi regime had to face when it executed Ṭāḥā. Until today no execution of the death penalty for apostasy has become known under the CA91. The CA91 has also improved and become much more precise with regard to the death penalty. These can be passed by way of *ḥadd*, *qiṣāṣ* or *taʿzīr* with each of the three categories entailing different rights with regard to a possible pardoning.\(^\text{1652}\) In line with the *fiqh*, the CA91 has also introduced for the first time two “schedules” defining limbs and wounds for which there is retribution and the corresponding *diya* payable for the different possibilities of homicide, the loss of limbs and wounds. As to the first schedule it is unclear whether the legislator at the time of drafting the CA91 still had the intention to actually apply *qiṣāṣ* for wounds or whether it was meant to be dead letter right from the start. As mentioned above, retribution for wounds does not seem to be applied, at least the SC decisions researched do not show any evidence that this is the case.

No fundamental development can be detected with regard to the contradictions between ICL and the applicable Sudanese constitutions. Rights guaranteed in the latter are clearly violated by the two codes codifying ICL. With the South of the Sudan now independent a new

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\(^\text{1652}\) Capital punishment by way of *ḥadd* cannot be pardoned, not even by the president, a capital punishment by way of *qiṣāṣ* can be pardoned by the heirs of the victim and capital punishments by way of *taʿzīr* can be pardoned by the President of the Sudan.
constitution is being discussed in the North and it must be feared that the Bashîr regime will go the opposite way. Instead of legislating a constitution that is in line with International Human Rights Treaties and reforming criminal (and other) law accordingly, the Criminal Act 1991 will most probably stay in place and the new constitution will be giving ample leeway for *fiqh*-based ICL application. While this approach might remedy contradictions in domestic law, however, it will not address the multifold contradictions between International Human Rights Treaties and Sudanese criminal (and other) law(s).

An important development has been the shift from a Penal Code (1983) which was, at least in theory, applicable to all Sudanese throughout the country, to a criminal legislation (1991), that exempted the Southerners of many of the *fiqh*-based punishments. This was still problematic in several ways. While it was presented as a reconciliatory concession by al-Turábî and the regime that seemingly voluntarily addressed Southern concerns it was rather a recognition of the fact that Southern acceptance of ICL application was unattainable and that, moreover, the North was never in sufficient military and political control of the South to be able to efficiently enforce ICL. Further, as mentioned above, only the *punishments* were inapplicable. The *definitions* of the crimes, equally based on the *fiqh*, stayed in place, and while being combined with new punishments, specifically designed for the South, are in conflict with the cultural and social realities in the South. In addition, the CA91 did not address the problem of non-Muslims in the North, who remained, at least until the promulgation of the INC, subjected to ICL. The symbiotic relationship between crime, punishment and procedure as present in the *shari’a/fiqh* has been respected to a higher degree in the case of *hadd*-crimes. Here the legislator accepts that the procedural laws render *hadd*-crimes very difficult to prove. In the case of *qiṣāṣ*-crimes the situation is different. In cases of homicide and bodily harm the rights of private persons are directly concerned. Here we have observed a distinct shift in Sudanese criminal legislation, brought about by Islamization. The 1925/1974 codes focused mainly on the state’s prerogative to punish. Islamization, however, led to a paradigmatic shift, i.e. to a re-evaluation of the rights of the victim and his heirs. This shift has been reinforced by Supreme Court case law. In the case of bodily harm *qiṣāṣ* is rarely, if ever, applied and victims are encouraged to settle for diya. In the case of intentional homicide the victim’s heirs can equally settle for blood money or pardon the perpetrator. In both cases, however, the decision on the legal consequences of the crime have not entirely passed into the hands of the victim or his heirs. With the possibility to impose an additional *ta’zîr*-punishment crimes in
that category go neither unpunished nor do they necessarily end with a financial settlement only. In summary, by changing and lowering the standards of proof for qisāṣ-crimes the Sudanese legislator has, on the one hand, facilitated the application of qisāṣ in cases of intentional homicide and bodily harm. On the other hand neither the heirs of homicide victims nor the victims of bodily harm can claim more than a theoretical right to inflict on the perpetrator the same kind of death or the same wounds as the victim received. Coming back to the interaction between the shariʿa-based parts and its secular environment the latter, by paying much more attention to the rights of the victim and his heirs than in previous legislation, has changed its character as well. An important development of the development of shariʿa-application after 1989 is the introduction, on the level of the governorates, of an additional and parallel system of legislation, enforcement and jurisdiction with regard to Public Order and Islamic morale, the Public Order Laws, Police and Courts. All three complement the new Criminal Act 1991 and the existing regular police and jurisdiction in important ways. This parallel system allows the regime to pursue its low frequency application of harsh shariʿa-based punishment on the national level while having another powerful disciplinary tool at its disposal. In other words, while the Islamized parts of the Criminal Act 1991 are difficult to handle, due to lengthy procedures and various appeal and review stages, the POL/POC system allows for much faster punishment normally without appeal, let alone review. The POL/POC system is not only faster, its punishments whipping, fines, prison terms, forfeiture and closure of premises are also more suitable to be meted out in a much higher frequency. The POL, by the mere frequency of its application, are a constant reminder of where the boundaries of an Islamic morality, as defined by the state, are.

In summary, the introduction of elements into criminal legislation and procedure that are derived from and based on the fiqh has a variety of consequences. Most of all, it leads to a situation where different standards coexist within the same legislation. This development clearly distinguishes ICL from its predecessor codes that did not contain elements based on the fiqh. Thus, e.g. the general age of adulthood is not applicable in the case of hadd-crimes when puberty serves to determine adulthood. The concept of legal uncertainties (shubha) averts hadd-punishments but is not applicable in regular crimes. For hadd-crimes different standards of proof apply compared to non-hadd crimes with a further differentiation between zinā and other hadd-crimes etc. Crimes and punishments directly traceable to the fiqh are, however, not the majority. Most crimes are crimes which are not very different from those
that can be found in the Penal Code 1974 or its predecessors. In order to integrate them into an Islamic framework they are classified as ta‘zīr-crimes, punishable by ta‘zīr-punishments. By subsuming all non-ḥadd and non-qiṣāṣ crimes under the third classical category of ta‘zīr, omitted in 1983, the CA91 concludes the Islamization attempt the PC83 had started rather clumsily. And while on the surface all crimes listed in the CA91 fit into one of the three categories ḥadd / qiṣāṣ / ta‘zīr, there can be little doubt that the CA91’s relation with the fiqh the sharī‘a is far weaker than one might expect. This is mainly due to the largely hybrid nature of the Criminal Act 1991. While stopping short of a “revolution at the level of the principles of jurisprudence” as al-Turābī advocates it, it is clear that a good number of sources and methodological principles suggested by him have indeed been applied when he had the chance to draft a penal legislation in 1988, which was legislated in 1991 with very few changes. Indeed all four Sunni schools serve as sources, next to Qur‘an and Sunna. The former are used in a discretionary manner, by way of the eclectic expedient (takhayyur), with the principles of istihšān and necessity (darūra) being the principles that allow for reforms. The memorandum accompanying the CA91 equally mentions a large number of sources and methodologies for the CA91. It reflects in many respects the wide range of possibilities al-Turābī had suggested in his theoretical writings. In both, it remains unclear how much room is reserved to either orthodox elements (the sharī‘a, the madhāhib, Qur‘an, Sunna, ʿijmā‘, qiṣāṣ etc.) or potentially modernizing factors (the conditions of the country/zurūf al-bilād, the latest developments of the time /mustajidāt al-ʿaṣr, ijtihād, modern criminal jurisprudence and terminology etc.). Given the avowedly modernist approach al-Turābī professes in his writings, e.g. with regard to the limits of ijtihād (“everything can be reviewed...”), he chose to codify a version of ICL, at least with regard to ḥadd and qiṣāṣ crimes, that finds its inspiration to a large degree in the legal opinions of the madhāhib. While being careful not to deviate from its historical models at times al-Turābī’s CA91 even went beyond what its predecessor had introduced (e.g. apostasy). The rectification of the flaws of its predecessor, a suppression of multiple versions of a particular crime and other changes in the legislation did still leave enough possibilities for a harsh application of the law in practice. In other words, that the application of ICL turned out to be much more limited than under Numairi is much less the result of a particular reformist approach in legislation than the consequence of subsequent landmark Supreme Court decisions, which, in turn, is the result of general political guidelines set by the ruling regime. Many of these SC landmark decisions have effectively filled gaps,
given new meaning to *fiqh*-based concepts and thus clearly defined the limits of ICL application.

### 7.3.2 Development in procedure

Following closely its 1974 predecessor the Code of Criminal Procedure 1983 nevertheless introduced important amendments in order to make it compatible with the Penal Code 1983 and the *shari‘a*. These amendments, however, are more limited in scope than the changes of the respective Penal Code 1983 and are securing that there is no undue interference by higher authorities which might violate principles of the *shari‘a*. Thus, the Sudanese President, who may waive a punishment, commute a sentence or annul a conviction for a specific crime now has none of these wide-ranging powers if they violate the *shari‘a*. Since this means in practice that the president cannot waive e.g. a *ḥadd*-punishment this provision automatically enhances the role of the Supreme Court as the highest and last institution dealing with amputations and executions by way of *ḥadd*. Next to the President also the Attorney General saw his powers limited. While he is allowed to terminate criminal proceedings at any time after the end of the investigation he may not do the same if this violates the *shari‘a*. Both restrictions are further examples, this time with regard to procedure, of how the introduction of *fiqh*-based ICL has created two sets of legal standards which coexist with each other.

The CCP83 has also confirmed an instrument that existed already in colonial times, i.e. circulars, and introduced it into the realm of criminal law. The Chief Justice was authorized to issue criminal circulars which were to specify the school(s) the courts were to follow in their application of the *shari‘a*. This novelty is remarkable for two reasons. It showed that an institution of the colonial *shari‘a* that had proven its value was not only acceptable in the new system as well; its authority was even transferred and expanded into ICL, while criminal circulars before 1983 had only regulated areas of criminal law not related to the *shari‘a*. Further, it shows that the legislators were aware of the many gaps the swift drafting of the new laws had left. Confirming criminal circulars issued by the Chief Justice secured a useful tool that would make it possible to fill the most important gaps of a hasty ICL legislation at a later stage. It also enabled the Chief Justice Yūsuf, who was critical of Numairi’s Courts of Instantaneous Justice and in favor of strengthening the rule of law\(^{1653}\), to remind the authors

of the Penal Code/the Code of Criminal Procedure as well as the judges of the Courts of Instantaneous Justice that the rules of the *fiqh* were by far more complex than what had been legislated. He reminded them through his 1983/84 criminal circulars as well of the fact that the *fiqh* knows for each ḥadd offence a variety of reasons leading to the remittance of the ḥadd-punishment.¹⁶⁵⁴

The streamlined CPA93¹⁶⁵⁵ confirms in many respects, but also complements the CPA83, filling its gaps. The President still cannot pardon either individual cases or by way of a general amnesty cases of ḥadd or qisāṣ.¹⁶⁵⁶ Ḥadd and qisāṣ punishments are likewise exempted from the courts’ prerogative to suspend the execution of judgments on a probation period. Taking into consideration the severity of the punishments, ḥadd, qisāṣ, death penalty and whipping are not be carried out as soon as possible as is the case of all other punishments, irrespective of an appeal.¹⁶⁵⁷ It must be noted that the law talks here about judgments reached in the regular court system. In practice, whippings are imposed by the POC and carried out by the POP very rapidly, normally without appeal. What is more, ḥadd offences such as *zinā* or alcohol consumption very often, if not in the majority of cases, do not enter the regular court system but are decided instead swiftly by POCs. These swift decisions taken by a parallel system have several effects. First of all, the stalling effect of article 190 (2), CPA91, is obviously not taken into account by the POC/POP system. The swift execution of POC judgments are normally not being appealed and since already executed such an appeal would not have any effect on the administration of the punishment anyway. In other words, it is part and parcel of the Public Order system to reclassify at least two, possibly other, ḥadd offences as offences that entail ta’zīr penalties. Since very few records are kept, legal assistance normally is not granted and the accused are not permitted to prepare their defense, procedural and legal guarantees as stipulated in the CPA91/CA91 are not existent in an important part of the Sudanese justice system. The advantages, as seen from the point of view of the regime, seem obvious. Instead of having a large number of ICL-related cases congesting a slow-going system that guarantees basic rights and procedure, such cases are referred to a parallel system where such guarantees do not exist and the swift execution of ta’zīr-punishments is a foregone

¹⁶⁵⁴ It must be noted that Yūsuf, despite his critical views, did not resign from his position until he was replaced in September 1984.
¹⁶⁵⁵ The 308 articles in 1983 have been reduced to 213 in 1991.
¹⁶⁵⁶ CPA91, articles 208, 211.
¹⁶⁵⁷ CPA91, art. 190 (2).
conclusion. This disburdens the regular court system and ensures that punishments are meted out with the desired frequency. As to more severe corporal punishments we now find detailed provisions that are meant to secure proper procedure in cases of amputations (“...the amputated person remains in medical care, paid by the state, until cured”). The health condition of the sentenced person is now taken into consideration in cases of ḥadd, qīṣāṣ and whipping and if one follows the text the court can suspend execution as it deems fit. There are also clear provisions on how whipping should be carried out, detailing which parts of the body may be hit and which may not and how the lashes are to be administered. The CPA91 thus makes an effort to create clear procedures that prevent abuse and undue cruelty in the execution of ICL-related punishments. However, given the nature of the Public Order parallel system, for the most part unhampered by procedural constraints, such guarantees seem to be of little consequence.

With regard to the above exceptions in cases of ḥadd, qīṣāṣ and whipping the CPA91, and this is an observation valid for Sudanese criminal legislation in general, creates a two-pronged system. On the one hand there are provisions on crimes, their respective punishments and procedures that pertain to the realm of ICL. They are a minority. On the other hand there are all other crimes, punishments and procedures, the majority, which could be found as well in any pre-Islamization predecessor code or in codes of professedly secular countries. The two realms, however, cannot always be clearly separated. At times both are combined by the legislator for the sake of introducing solutions that better meet the conditions of the country. Procedure, especially the provisions for proof in ḥadd-cases and cases of intentional homicide and bodily harm are an area where sharī’a-based solutions are in conflict with the realities and requirements of a multi-religious and multi-ethnic nation state such as the Sudan. In order to facilitate convictions with regard to qīṣāṣ offences the requirements of proof have been substantially lowered in the EvA83 and the EvA93. Requirements with regard to religion and gender, as provided for in the fiqh, have not been introduced. An important effect is that discrimination based on gender and/or religion has been reduced. This approach, which is confirmed by subsequent SC case law, has moved legislation closer to contemporary notions of the equality of citizens in a nation state. Firstly, the Evidence Acts of 1983 and 1993 do not specify that a witness has to be Muslim in qīṣāṣ-cases. Thus non-Muslims can testify against Muslims in qīṣāṣ cases. Further, they do not stipulate either that two females can replace one male witness. In other words, as a witness in qīṣāṣ-cases women are equal to men. Secondly,
in close interplay with the secular\textsuperscript{1658} environment it is operating in Sudanese ICL has abandoned the important notion of equivalence (\textit{ka\textsuperscript{f}a\textsuperscript{a}}). By not introducing different blood prices for men and women, Muslims and non-Muslims, the legislator has established equivalence between the sexes and between Muslims and non-Muslims in \textit{qi\textsuperscript{s}âs} cases. The legislator, and this is confirmed by subsequent SC case law, has thus moved the contemporary Sudanese version of ICL closer to modern definitions of citizenship, at least in the important domain of \textit{qi\textsuperscript{s}âs} crimes. At the same time discrimination based on gender and/or religion subsists especially in the domain of proof and punishment of \textit{hadd}-crimes. It should be remembered in this context, however, that the death penalty for intentional homicide is executed in significant numbers while the severe corporal punishments for \textit{hadd}-crimes such as amputations and executions by way of \textit{hadd} are only rarely applied. Thirdly, the legislator has harmonized Sudanese ICL with the requirements of modern notions of citizenship in another aspect. The distinction between persons enjoying inviolability (\textit{\'i\textsuperscript{s}ma}) and those whose killing cannot be punished as intentional homicide has not been introduced. Neither Sudanese legislation nor published Supreme Court cases indicate that “unprotected” non-Muslims can be killed with impunity or that heirs of homicide victims can take the life of the killer with impunity. With the non-introduction of the notion of inviolability (\textit{\'i\textsuperscript{s}ma}) the legislator has tacitly established an important element of equivalence between Muslims and non-Muslims by ensuring that neither private revenge nor the private execution of those assumed guilty of severe \textit{hadd}-crimes has any room in the Sudanese criminal system.

In summary, in the case of \textit{qi\textsuperscript{s}âs}-crimes the standards of proof as suggested in the \textit{fiqh} have been substantially lowered, but also extended, to the level needed for the proof of other, non-ICL, crimes. However, while, on the one hand, \textit{qi\textsuperscript{s}âs}-crimes become easier to prove, their factual application is, on the other hand, reduced to some degree, such as in the case of retaliation for wounds which seems to end routinely with the payment of \textit{di\textsuperscript{ya}}. With the secularization of important parts of the procedural law a conviction for a \textit{qi\textsuperscript{s}âs}-crime becomes more likely. The relationship between severe punishment and a high standard of proof has been broken. Altogether the influence of the \textit{fiqh} on Sudanese criminal procedure is strongest.

\textsuperscript{1658} By “secular” I mean not directly based on notions and concepts that can be found in the Qur`ân or the \textit{fiqh}. Certainly, whatever is not \textit{hadd} or \textit{qi\textsuperscript{s}âs} is defined as \textit{ta\textsuperscript{z}r}. However, this seems to be a retroactive rationalization. As shown above \textit{ta\textsuperscript{z}r}-crimes in the first version of ICL 1983 had not even been mentioned explicitly. As a concept, derived from the \textit{fiqh}, \textit{ta\textsuperscript{z}r} was only introduced in 1991. However, despite a
in the proof of *hadd*-crimes. Islamic criminal law in the Sudan is, in important areas, cut off from Islamic procedural law that was meant to complement it. Both were intended to form a “working unit”. This working unit, with its different requirements for *hadd*, *qiṣāṣ* and *taʿzīr*-crimes has only partially been translated into Sudanese criminal legislation.

There is another important development with regard to the CPA91 that needs mentioning. As observed earlier the CAP91 has the power to review any case and is obliged to review all life imprisonment, death and amputation sentences. With the CPA91 it has introduced a further, internal control mechanism, a special circuit of five judges, formed by the Chief Justice when, in his opinion an SC judgment contravenes the *sharīʿa* or has erred in its interpretation or application of the law. The introduction of this circuit is remarkable for several reasons. It gives the Chief Justice the last word even in *sharīʿa*-related cases that have already been reviewed by his colleagues. Formerly, the Supreme Court, which supposedly consists of the most qualified and experienced judges the Sudanese judicial system has to offer, reviewed a case once and decided. With the said circuit it is possible to ensure that SC judgments are consistent with the desired official line with regard to *sharīʿa*-application. It appears that when the law speaks of “Islamic *sharīʿa* ordinances” that may have been contravened it does not want to create a tool with the help of which its entire ICL legislation can be put to test. Cases are rare where SC judges have criticized Sudanese ICL legislation for not being in line with the *sharīʿa*. While these cases are infrequent and go back to the early phase of ICL application under Numairi no similar cases have become known under the present regime. With the special circuit in question as a security valve the Chief Justice can ensure that no repeat “internal testing” of the Sudanese version of *sharīʿa* takes place.

### 7.3.3 Supreme Court decisions

This study has highlighted the function of the Supreme Court as a security valve and as a regulatory agency. Warburg and Layish have shown the tendency of lower criminal courts to apply severe *sharīʿa*-based punishments with a certain frequency. While there are no statistical studies available as to the frequency of harsh *sharīʿa*-based punishments pronounced by lower courts in the period since 1989, it can be safely assumed that the

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reformulation of *taʿzīr*-crimes in 1991 and their classification as such, their connection with pre-1983 criminal legislation cannot be denied.

1659 CPA91, art. 188 (a).
Sudanese judicial system produces such sentences more often than what the regimes would like to see actually applied in practice.\(^{1660}\) In other words, the Supreme Court has an important function in ensuring that the majority of these sentences are not carried out.\(^{1661}\) The reasons for either quashing or commuting the decisions of lower courts are mainly two. Either these decisions contain serious legal errors or they are contrary to an undeclared policy of low-level application of severe *hadd*-punishments (with the exception of *ḥirāba*). Sometimes both reasons come together. In the former case quashing or commuting a decision of a lower court is relatively easy. This becomes, however, more difficult a task when the decision of a lower court does not contain obvious legal errors and rather interprets the law in a way that leads to a harsh punishment in a case where the SC has not yet given clear guidance. In such cases the Supreme Court, as the highest court of the Sudan, can offer a different and more authoritative and binding interpretation of the law that renders all differing interpretations of lower courts inadmissible henceforward. As shown in this work more often than not these SC interpretations have the tendency to restrict the application of harsh *sharī‘a*-based punishments. Examples are the acceptance of rape as a legal uncertainty remitting the *ḥadd*-punishment for *zīnā* or interpreting the term „*muḥṣar*“ in a way that excludes divorcees and widows/widowers, thus limiting the number of those who can be potentially sentenced to stoning. The example of rape also shows how the case law of the SC develops over time toward a more lenient\(^{1662}\) interpretation of the pertinent legislation. It further shows that the SC not only regulates the interpretation of existing legislation, it also functions as a corrective of its own earlier ICL-related case law. Many of the SC decisions are clearly singular decisions on specific topics, deciding a controversial issue in a conclusive manner (as far as we know now). However, there are also SC decisions that are challenged, are subsequently developed and corrected until, it seems, a certain balance has established itself. The last decision on the matter then reflects what the SC judges want to establish as a legal norm that is not in contradiction with the general approach the current regime has chosen to apply. It has to be underlined that the SC is not operating in a political vacuum. Its personnel, its internal

\(^{1660}\) It must be remembered that the cases published in the SLJR are only a fraction of those that reach the SC for review.

\(^{1661}\) For the reasons of this policy see chapter 7.2.

\(^{1662}\) „Lenient“ in this context means: the SC tries to avoid the death penalty for *zīnā*. It does, however, not mean that the female defendants are not punished. In the cases investigated they generally have languished years in prison before a decision to spare their lives is taken. These years in prison, under the threat of execution, are then declared a *ta‘zīr* penalty and the defendants do not receive compensation for the time spent in prison.
statutes and organization, the criminal legislation it has to deal with and its general approach with regard to highly sensitive matters, such as the execution of amputations, crucifixions and stonings, all of this is, no doubt, highly political and therefore subject to regulation by the political sphere. Most of my interview partners underlined their perceived juridical independence and freedom to administer justice according to their own conscience. A clear examination of the above mentioned factors, however, shows the narrow parameters of that independence.

Next to streamlining ICL application according to the wishes of the ruling regime, SC jurisdiction at times has objectives that might be less to the liking of policy makers. Especially in the first phase of ICL application (1983-1991), when due to the superficial drafting and the multifold contradictions and lacunae in the legislation judges urgently needed guidance the Supreme Court had an important role to play. The majority of SC decisions during Numairi’s rule try to make sense of a legislation, that is in many ways in conflict with the fiqh, without contradicting the PC83 or pointing at its obvious flaws or openly criticizing it. This approach is not surprising given the pressure the judiciary had to endure in that particular period. We should also not forget that many of the judges still belonged to the old guard that had been trained in the common law tradition and was rather unfamiliar with Islamic law in general. However, it did not limit itself to issuing authoritative interpretations it also, in some rare occasions, had the courage to test the Penal Code against the shari’ā, thus questioning the sound drafting and applicability of important parts of the new Penal Code 1983. I have found at least one daring decision that demonstrates great courage of the responsible judges. In this landmark decision on ḥirāba/sariqa (ḥaddiyya) the SC judges took the Judgments Basic Rules Act 1983 (JBRA) and article 458 PC83 seriously, thus testing a group of articles of the PC83 against the fiqh. It came to the conclusion that a ḥadd-punishment that is normally reserved for a particular ḥadd-crime cannot be imposed if the corresponding crime is not the ḥadd-crime the ḥadd-punishment is meant for. In other words, if the legislator combines the definition of a ta’zir-crime with a ḥadd-punishment it is not

1663 Art. 2 JBRA stipulates that in “interpreting legislative provisions, the judge shall (a) presume that the legislator did not intend to contradict the shari’ā-scale of five religious-legal qualifications; (b) interpret the general concepts and discretionary expressions in accordance with the rules, principles, and general spirit of the shari’ā; and (c) interpret the technical terms legal terms and the religious legal expressions in the light of basic principles (qawā’id usuliyya) and the linguistic rules of the Islamic science of the shari’ā”. Article 458 (1) and (5) “instructs the judge...to ascertain that the provision applicable to an offense, especially one entailing a
admissible to impose that *hadd-*punishment, even if the crime committed fulfills all the elements specified in its definition. This unique and confronting approach of the Supreme Court questioned not only a whole group of articles of the Penal Code 1983 but in fact the quality of the drafting and its relationship with the *fiqh* in a remarkable way. The SC reaffirmed its professional autonomy when it implicitly spelled out what every legally trained person with some additional knowledge of Islamic law was able to see, i.e. the fact that the Penal Code 1983 was in many ways incompatible with the *fiqh*, that it was poorly drafted and posed multifold problems to the practitioners. Since this new and critical approach was actually published in the SLJR it was obviously meant to guide the lower echelons of the judiciary in their quest for justice. There are, however, also many other, more accommodating examples of how SC judges dealt with the contradictions of the PC83. In the majority of cases SC judges applied ICL without questioning the soundness of how it was codified. It is not clear which direction the lower courts followed in their judgments after the publication of the said decision. Secondly, it is equally remarkable that the SC actually dared to take the JBRA and article 458 seriously and used it as a tool to question and test the logic and applicability of the Penal Code 1983. While on the surface the legislator wanted to ensure that jurisdiction was in line with the *shar’i*a, it can hardly have been his intention that courts use both tools to address all contradictions and incompatibilities with the *fiqh*. This would have led to a situation where parts of the newly legislated Penal Code 1983 would have become inapplicable and more legal confusion would have been the result.

With regard to the Criminal Act 1991 the situation has improved. The CA91 and the legislation accompanying it, as shown, have rectified many of the flaws of their predecessors. However, there are, still a certain number of important incompatibilities with the *fiqh*, especially with regard to its interplay with procedural law. While article 458 has disappeared with the PC83, the JBRA is still in force and could, theoretically be invoked by courts. This, however, does not seem to be the case. In other words, as far as published SC decisions are concerned, and unlike during the first phase of ICL application, the SC judges seem to accept the legislation which is the base of their daily work and do not question its compatibility with the *fiqh*. Given the subsisting contradictions between Sudanese criminal legislation and the *fiqh* there would be ample grounds for invoking the JBRA. That this is not the case can be

explained by the fact that the CA91 has moved closer to the *fiqh* on the one hand and the changed legal personnel and better control mechanisms on the other hand. As to the interpretation methods used by the Supreme Court the investigated court decisions showed that judges normally try to establish the meaning of specific articles or legal terminology by either going back to the relevant legislative sources or by consulting relevant precedents. With regard to issues that are not directly related to ICL these sources are normally the predecessor codes, e.g. the PC83 as the precursor of the CA91 and the PC74 as the precursor of both. At times we even find decisions that quote precedents taken from English law. Whether or not English precedents are quoted is the decision of the judge and not all have a sufficient command of English for that purpose. Without linguistic access to the relevant sources (English precedents, Indian criminal code) developing historical depth in a decision becomes difficult. As to questions that are directly linked with ICL SC judges normally consult either synoptic works such as those authored by ‘Abd al-Qādir Ḥawd and Muḥammad Abū Zahra, consult directly the handbooks of the four Sunni *madhāhib*, either those ascribed to the founding fathers of these schools or other important authorities of the same school or they consult commentaries on a particular school. However, not only the four Sunni schools are taken into consideration, we also find references to other schools, e.g. the Zāhirite school, the Zaidite school or the Twelver Shiʿites. They do quote, of course, the Qurʾan and Sunni *ahadīth* as well in order to find guidance with regard to a specific legal problem. Similar to the multiple sources criminal legislation draws on the Supreme Court judges thus equally seek guidance in a large variety of Islamic sources that go far beyond the traditional schools that historically were prevalent in the Sudan. This flexibility in interpretation, and in addition the use of *ijtihād*, allow the Supreme Court the finding of creative solutions to complex ICL-related problems. This is even more so the case since the legislator has explicitly legitimized the use of other sources such as modern criminal jurisprudence and terminology and the taking into consideration of modern developments and the condition the country finds itself in. Next to predecessor codes and the works of the *fuqahā*, we can also observe how over time, since 1983, a body of SC decisions grows, that is ICL-related and increasingly serves as a point of (self-)reference for decisions. This approach,

\[1664\] See chapter 3.1.1.1.
of course, continues very much the Sudanese pre-1983 tradition which in turn emulates the importance and use of precedents in English law.

Analyzed separately, legislation, procedure and jurisdiction show large differences with regard to potential social and societal acceptability. Legislation and procedure combined can potentially be interpreted in a way leading to a shari‘a-application comparable to the high-frequency application of cruel shari‘a punishments as practiced during the „revolutionary phase“ under Numairi. However, such “cavalier deployment“ (Sidahmed) of severe shari‘a-punishments was not socially acceptable at the time, except for a minority, and probably wouldn’t be so today. Keeping them in the statutes and interpreting them in a way that avoids further societal debates, political conflicts and individual tragedies is certainly socially beneficial in the sense that it is acceptable to the concerned individuals and to society as a whole. By functioning as a corrective to the underlying legislation the Supreme Court certainly makes a decisive contribution to how “the shari‘a as a whole is being perceived not only within the judiciary but also within society at large. The acceptance of the claim of rape as shubha averting the hadd for zinā and the non-applicability of retribution for wounds with the concurrent awarding of blood money are striking examples of how political, individual and societal needs can match. The reduction of discrimination based on gender and/or religion described below are equally evidence to this approach.

In summary the combination of Islamized penal codes, legislation on criminal procedure and the growing body of case law on ICL, whether of the Supreme Court or Criminal Courts of Appeal, creates what we could call a "Sudanese national shari‘a". It is national in the sense that it has selected a corpus of solutions, either from the different madhâhib, by way of ijtihâd or by other methods, that is in its methodology as well as in its results unique. We can safely assume that there is no other country that has chosen a similar mix of methods nor is there another country that has reached the same solutions. Both, methods and solutions are specific to the Sudan and it is therefore justified to speak of a national Sudanese shari‘a. In fact, with reference to our introductory discussion of the terms shari‘a vs. fiqh we can state that while policy makers like to use the term shari‘a with its connotations of divinity and timelessness, the actual practice of ICL is rather a very human affair. Methods used for finding solutions and the results of these endeavors are the choices of human actors. Both, methods and results, are determined by a very specific political and historical situation and can hardly claim universality. "The shari‘a" thus falls apart into as many national versions as there are
countries that are entertaining *shari’a*-based codifications of Islamic (Criminal) Law. Moreover, as to the national Sudanese version of ICL it cannot even claim to be the result of a clear and unequivocal popular vote. It has been controversial from its inception and continues to be so. While doubtlessly also having its proponents, it is contested within the country by large parts of the opposition and Southerners and it is not without reason that its acceptance has never been tested by way of free elections or a referendum.

7.4. **Political and historical factors**

Islamic Criminal Law in the Sudan, its introduction, subsequent development and management by various regimes, has to be contextualized and can only be understood in relation to the political developments surrounding it. It was introduced by and had its heyday under a regime that tried to muster popular support through Islamization. Numairi had resorted to the introduction of Islamized legislation when his failed economic policies and the re-ignited conflict in the South of the Sudan had deprived him of much of his credibility and political legitimacy. His regime wanted to prove that it was serious about ICL. It therefore made sure that the harsh corporal punishments of the new Penal Code 1983, which was in fact a superficially Islamized version of its 1974 predecessor, were applied frequently. Despite vocal domestic and foreign protest severe *shari’a*-punishments, such as amputations, were carried out and many thousands were flogged. With the fall of Numairi’s dictatorship, the political situation changed. However, neither the following military-led interim government nor the democratically elected government of Ṣādiq al-Mahdī were willing or able to either reform ICL or abolish it altogether. The situation of ICL between 1985 and 1989, while the execution of decisions had been suspended, remained in limbo during this period. When, after years of maneuvering, the al-Mahdī government finally envisaged the abolition of ICL, a military coup d’état preempted the move. It soon became clear that the new military regime was in alliance with Ḥasan al-Tūrābī and his Islamist forces who provided the new dictatorship with the necessary ideological trappings. And while the re-introduction of ICL, by way of a reformed and improved criminal legislation, was an important part of their agenda, after twenty years of its application, however, it has become obvious that there are fundamental differences between the first “revolutionary phase” 1983-1985 and the practice of ICL 1991 to present. A “Criminal Bill” project, a 1988 brainchild of the then incumbent Minister of Justice al-Tūrābī and which had been temporarily shelved in 1989 for lack of
parliamentary acceptance, was reanimated in 1991. Much more diligently drafted, the Criminal Act 1991, is not only a more condensed code than its predecessor of 1983. It also tried to be more faithful to the fiqh in its provisions. In brief, it steered clear of most of the flaws of its predecessor and thus, to some degree, preempted criticism from Islamist competitors. Given the fact that the “application of the shari‘a” had been part and parcel of the ideological repertoire of the very Islamists that were now in power one could have expected a resolute resumption of shari‘a application. However, this is not what happened. Shari‘a-based criminal law was applied, but its application, since the military-Islamist regime has assumed power, did and does only lead to a limited number of severe shari‘a-penalties actually being carried out. Indeed, there is a remarkable divergence between the rhetoric of the al-Bashir regime with regard to the importance of the shari‘a and the dimmed-down version it chooses to apply. There are several possible explanations for this phenomenon. First of all, the al-Bashir regime needs ICL (“the shari‘a”) in the statutes in order to gain legitimacy in the eyes of its followers. Whether or not all the punishments contained in the legislation are actually carried out is of secondary importance in this context. It is not a priority for the regime to apply all possible punishments of ICL with a high frequency, and thus most likely provoking domestic resistance and international protest. Sidahmed has argued that the military-Islamist regime was not concerned with possible Western reactions against shari‘a application since Khartoum and Western governments had few relations in the first place. Further, it would not be likely that a more moderate application of the shari‘a improves the regime’s (few) ties with the West, since Western countries have excellent relations with countries that do apply the shari‘a in criminal matters on a regular basis. I can generally agree with this argument. It should, however, not be forgotten that the Sudan’s choice not to opt for a high-frequency shari‘a application is a rational choice based on a variety of factors. Reducing friction with the monitoring bodies of international human rights conventions the Sudan is party to might not be the government’s main motive but it is one aspect of several in making such a rational choice as well as calming down domestic opposition and resistance to harsh shari‘a punishments with the same approach. Defiant reactions to human rights reports e.g. by Amnesty International indicate that the Sudan.

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1665 On this argument see Sidahmed (1997), p. 221.
1666 E.g. Saudi Arabia.
government is not immune to international criticism. As shown above (see chapter on human rights) the Sudan also has to position itself with regard to criticism from monitoring bodies, it does thus not act in a political vacuum as the assumption of lacking ties with the West suggests.

Further, the regime has always stressed that the application of the *shari‘a* is a popular demand of the vast majority of the Sudanese. Thus, or so the logic goes, “the regime which enacts *shari‘a* is by default an embodiment of this will and its legitimate representative”. This is certainly the argument the Islamist regime has chosen to propagate. It goes without saying that this argument is flawed for several reasons. If the demand by the “Sudanese masses” really were overwhelming the introduction of ICL could easily have been the object of a national referendum. But of course the outcome of such a referendum, short of being rigged, would have been unpredictable and popular approval of the majority would have been less than secure. To the contrary, a democratic vote on the introduction and application of ICL/the *shari‘a* did never take place. Neither a direct one nor did the NIF or any of its predecessors or successors, as the main pressure group for the introduction of the *shari‘a*, ever win elections. Both Islamized penal codes, as well as most other *shari‘a* related laws, were realized by two dictatorial regimes which suppressed all competing voices either objecting the application of the *shari‘a* altogether such as the Southern parties or the secular-minded parties of the North or calling for an alternative version of *shari‘a* such as some of the Islamist parties of the North. As to the NIF and its different manifestations it has shown a tactical approach with regard to its propagation of the *shari‘a*, never losing sight of the higher strategic goal of winning power and control of the state in order to realize its Islamization program. Thus, the NIF and its predecessors used the *shari‘a* question to either take a lead in the discussion or to make their influence felt, whenever the *shari‘a* became a major topic in the national debate. This was the case during the second democratic interlude in 1966/67 when an Islamic constitution was discussed, after “reconciliation” with Numairi when in 1978 a committee reviewed Sudanese laws with regard to their compliance with the *shari‘a*, in 1983/84 when ICL was introduced and finally between 1985 and 1989 when the NIF used the *shari‘a* as the

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1668 See e.g. the introduction to the CA91 quoted above.
decisive argument for or against their joining a coalition government.\textsuperscript{1670} In all these debates al-Turābī and his comrades-in-arms were able to use the shari‘a question to portray themselves as the party that was the most serious about shari‘a application. However, attaining power has always been more important than shari‘a application. When between 1978 and 1983 most recommendations of the said committee were not realized, the Muslim Brothers continued to cooperate with and back the dictatorial and increasingly unpopular Numairi regime. When ICL and other shari‘a-based laws were introduced in 1983/84 Muslim Brotherhood members manned many of the courts and did not hesitate to play along Numairi’s directives, turning the whole experiment into a very cruel and bloody affair. These MB judges indicted members of the hated SSU, without much success, for corruption in order to demonstrate their impartiality and the justness of the shari‘a. Concurrently, the same judges ordered amputations for the theft of trifle amounts. As shown above, the actual practice of ICL application before the downfall of Numairi clearly showed a class bias with the high representatives of the regime receiving small or no punishments for the embezzlement of major government funds. In other words “sharia ...laws are interpreted to strike those who encroach on private property and spare those who steal from the public coffer”.\textsuperscript{1671} Given the state of impunity for high-level corruption in the Sudan under the al-Bashīr regime this class bias is clearly still very much present.

Since the MB and its different political manifestations was never committed to a particular version of the shari‘a it was able to apply great flexibility in the presentation of their demands and positions. These ranged from backing (and executing) Numairi’s particularly harsh version of ICL to introducing their own version and limiting its de facto application, with exceptions, to a rather low level. As long as it is “the shari‘a”, content and approach can vary if it serves the aims of the movement. This flexibility, however, has its limits and it is difficult to conceive either side of the now split movement conceding the abolition of ICL or other shari‘a-based parts of the legislation. Next to enhancing its legitimacy the regime, with the help of its rallying cry “tatbīq al-shari‘a’, is also drawing a boundary ”within which the regime accommodates or excludes other political forces”.\textsuperscript{1672} While Sidahmed certainly has a point here it must be underlined that on the one hand the regime could probably come to

\textsuperscript{1670} Sidahmed (1997), p. 221.

terms with the two big sectarian parties with regard to the *shari’a* question. After all there is a substantial amount of sympathy among both parties for *shari’a* application and it is not without reason that al-Mahdī was rather hesitant in abolishing the September laws in his time as Prime Minister. On the other hand, *shari’a* application and the position with regard to this question is only one factor for exclusion or inclusion into the ruling regime and not any longer even a decisive one for that matter. A point in case is the schism of the Islamist movement which took place with and after al-Turābī’s ouster. NCP and PCP have politically more in common than what separates them and it is not known that they have a disagreement on *shari’a* application. After all, the current version of ICL is a brainchild of al-Turābī. The split between the two parties has completely different reasons which, in turn, cannot be overcome by a common position in this particular question only. Sidahmed’s book which quoted here was published in 1997, thus before al-Turābī’s removal and the split of the movement. At the time this analysis was certainly much more valid, but with the deep rift in the Islamist movement the *shari’a* issue is not any longer a decisive factor distinguishing between friends and foes.

The combination of Islamized criminal statutes and selective and at times low level ICL application accompanied by pertinent political rhetoric appears to be sufficient to meet the expectations of most of the *shari’a* proponents in the Sudan. At the same time ICL application in the Sudan is rather rarely in the limelight of international media attention. *Shari’a* cases are being discussed internationally under specific circumstances, e.g. when a flogging video appears on YouTube or when a journalist is sentenced to flogging and talks to the international press. Such cases, however, are exceptional. A thorough reading of AI and HRW reports leaves no doubts about the abysmal human rights record of the Sudan, especially under the military-Islamist rule of president al-Bashīr, but also under his predecessors Šādiq al-Mahdī and Numairi. The contribution of ICL application to this negative record is, however, in the face of war atrocities that have been ongoing for decades, habitual torture and mass extra-judicial killings, rather small. These human rights violations are a direct result of the violent strategies the al-Bashīr regime devises to get the upper hand in the multifold regional conflicts it has inherited and aggravated. On the other hand human rights violations are used to subdue and silence the opposition in the North. On both accounts ICL application

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has only a very small role to play. It is mainly limited to a small number of ħirāba-cases in Dār Fūr and rarely used, at least with regard to the harsher corporal punishments, in the North.

*Present day sharî’a application is not a recreation of the past*

Our survey has clearly shown that the application of Islamic law before the Condominium cannot serve as a model for modern day application. Modern ICL has in form and content only a very weak connection with its historical predecessors. These were never codified, not embedded in modern legal structures of Western origin and characterized by only a limited knowledge of the *sharī’a*. The claim of some *sharī’a* supporters that modern ICL removes a historical wrong, i.e. the introduction of the Common Law system, and concurrently reinstates an authentic and indigenous system, this claim was not corroborated by this study. Also, the criminal law as applied today, in form and content and despite its (partial) Islamization, is far from being detached from its colonial heritage. The Islamization efforts of the 1980s and the early 1990s changed this to some degree but have made the Sudanese legal system also more hybrid than ever before. The present Sudanese criminal law is indeed new and unprecedented. It relies mainly on Western legislative techniques and on judicial structures that clearly have their roots in the system inherited from the former colonial power. In this sense ICL has been grafted into a secular legal system that is older than the Islamized parts of the legal system and was free from elements that could claim religious legitimacy. ICL in this process undergoes a secularization process with regard to procedure, evidence and the structures of the court system, all of which are governed by an environment that is clearly a remnant of the pre-1983 legal history. The personnel dispensing justice is the secular judge, often trained in secular institutions within or outside of the Sudan and bound by a multitude of rules, regulations and structures that are not following historical models based on the *sharī’a* / *fiqh*. The same is true with regard to the definition and development of ICL which is not any longer in the hands of a class of independent legal theoreticians, the *fuqahā*’. ICL as practiced in the contemporary Sudan is therefore not only very different from the historical *sharī’a* as practiced before the Condominium, it is not even dominating criminal law as such. It is to a large degree shaped by the legal environment that surrounds it and by the political agenda of the regime that has “re”-introduced it. It is the Republic of the Sudan and its institutions which chooses, formulates, applies and develops the law. Outside state institutions there is no
formulation of Islamic law that could ever hope to be codified. In other words the state has not only eliminated all competing voices, religious and political, it has thereby also established a monopoly that claims the right to define what Islamic law is and how to apply it. The result of this process is a national version of, mostly fiqh-derived and highly selective ICL, i.e. a version of the sharī‘a that is limited to a particular nation state, i.e. the Sudan.

References


Abū Zahra, Muhammad: al-jarīma wa al-‘uqūba fī al-fiqh al-islāmī, al-Qāhirah, 1998 (2 Vols.)


Akolawin, Natale Olwak: Compensation in Criminal Proceedings in the Sudan. SLJR 1969, pp. 185-220


Amin, S.H.: Middle East Legal Systems, Glasgow, 1985


Arévalo, Rafael: Derecho Penal Islamico. Escuela Malekita, Tanger 1939


El-Awa, Mohamed S.: Punishment in Islamic Law. Indianapolis 1982


Bleuchot, Hervé: Signification de la réforme mahdiste du droit islamique, Colloque du 8-12 avril 1991, Durham, United Kingdom


Brown, Nathan J.: Shari’a and state in the modern Muslim Middle East. IJMES, 29 (1997), pp. 359-376


Coulson, Noel J.: Conflicts and Tensions in Islamic Jurisprudence, Chikago 1969


Ibrahim, Taha: Why the criminal law needs to be reformed. In: Tier, Akolda/Badri, Balghis: Law Reform in the Sudan, Ahfad University for Women, Cairo 2008, pp. 122-137
International Crisis Group: Divisions in Sudan’s ruling party and the threat to the country’s future stability, Africa Report No 174 – 4 May 2011
Irwin, Robert: For Lust of Knowing. The Orientalists and their Enemies. London 2007
’Isā, ’Abd Allah al-Fāḍil: qānūn al-ijrā‘iyya 91. al-Khārūm 2004
James, Philip S.: Introduction to English Law. London 1979
Johansen, Baber: Eigentum, Familie und Obrigkeit im hanafitischen Strafrecht. Das Verhältnis der privaten Rechte zu den Forderungen der Allgemeinheit in hanafitischen


Khalid, Mansour: The government they deserve. The role of the elite in Sudan´s political evolution. London 1990

Khalid, Mansour: War and peace in the Sudan: a tale of two countries. London 2003

Köndgen, Olaf: Das Islamisierte Strafrecht des Sudan. Deutsches Orient-Institut, Hamburg 1992


Lavergne, Marc: Le Soudan Contemporain, Paris 1989


Layish, Aharon / Warburg, Gabriel: The Reinstatement of Islamic Law in Sudan under Numayrī. Brill, Leiden 2002

Layish, Aharon: The transformation of the shari´a from jurist´s law to statutory law in the contemporary Muslim world. Die Welt des Islams, 44,1, 2004, pp. 85-113


Mahmood, Tahir: Criminal Law Reform in Muslim Countries: Glimpses of Traditional and Modern Legislation. Mahmood, Tahir et al (ed.): Criminal Law in Islam and the Muslim


**Martin**, R.: Sudan’s Perfect War. Foreign Affairs, March/April 2002


O’Fahey, Sean: State and Society in Dar Fur, London 1980

O’Fahey, Sean / Abu Salim, M.I.: Land in Dar Fur, Cambridge 1983

O’Fahey, Sean / Spaulding, Jay: Kingdoms in the Sudan, London 1974

Ortega, Rafael Rodrigo: El Islam Político en Sudan. Una propuesta fallida de internacional islamista. Universidad de Granada, Granada 2004


Peters, Rudolph: From jurists’ law to statute law or what happens when the shari‘a is codified. Mediterranean Politics. Volume 7, Autumn 2002, Number 3, pp. 82-95


REDRESS: No more cracking of the whip: Time to end corporal punishment in Sudan. London, March 2012


Republic of the Sudan, Ministry of Justice: Interim National Constitution of the Sudan 2005, Khartoum, no date


Schacht, Joseph: An Introduction to Islamic Law. Oxford 1964


Sidahmed, Abdel-Salam: Problems in contemporary applications of Islamic criminal sanctions. The penalty for adultery in relation to women. British Journal of Middle Eastern Studies (Durham), 28 (November 1, 2001) 2, S. 187-204


Spaulding, Jay: The heroic age of Sinnar. East Lansing 1985


Taha, Mahmoud Mohamed: The Second Message of Islam, Syracuse 1987


**Tellenbach**, Silvia.: Die Apostasie im Islamischen Recht. Homepage of the Gesellschaft für Arabisches und Islamisches Recht (GAIR) e.V.


Warburg, Gabriel: The Sudan under Wingate. London 1971


Warburg, Gabriel R.: The Muslim Brotherhood in Sudan: From Reforms to Radicalism. The Project for the research of Islamist movements (PRISM), Global Research in International Affairs (GLORIA) Center, August 2006,
http://www.e-prism.org/images/Muslim-BROTHERS.PRISM.pdf


Sudanese Laws and legislative projects

1. The Penal Code 1925
2. The Code of Criminal Procedure 1925

For a more detailed list of the September Laws see Layish/Warburg (2002), pp. 305.
3. al-qānūn al-maddanī lisana 1971
4. The Permanent Constitution of the Sudan, 1973
5. The Penal Code Act, 1974
8. qānūn al-ijrāʾāt al-jināʾiyya, 1983 (Criminal Procedure Act, 1983)
10. al-qānūn al-nāʾib al-ʿāmm lisana 1983
12. Emergency Regulations, 1984
15. The Criminal Bill 1988 (not enacted)\(^{1674}\)
18. qānūn al-ithbāt 1993 (Evidence Act 1993)
22. mashrūʿ qānūn al-ʿuqūbāt (al-tajammuʿ al-waṭanī al-dīmūqrāṭī, 2001)
24. al-qānūn al-jināʾī (taʿdīl) lisana 2009

List of quoted Supreme Court cases

Unlawful sexual intercourse (zinā)

\(^{1674}\) I rely on an English translation collected by L’Institut Suisse du Droit International Comparé in Lausanne.
5. Government of the Sudan vs. Mariam Muḥammad Sulaimān, SLJR (1989), 76/1405
8. Government of the Sudan vs. al-Ḥajja al-Ḥusain Sulaimān, SLJR (1988), no. 84/1406

**Alcohol consumption (shurb al-khamr)**
3. Government of the Sudan vs. ʿĀdam Mahdī Ḍādam, 36/88
5. Government the Sudan vs. ʿAbd Al-Wahāb ʿAwāḍ Jādīn, SLJR (1984)

**Theft (sariqa ḥaddiyya)**
1. Government of the Sudan vs Antūniū Sharīk Kūnj and others, SLJR 1992,
2. Government of the Sudan vs. Isḥaq Muḥammad Arbāb and others. SLJR 1986
3. Government of the Sudan vs. Al-Amīn Saʿīd Umm Dabaka. SLJR (1985),
5. Government of the Sudan vs. Burhān Qabr Silāsī and others. SLJR, 1989
8. Government of the Sudan vs. Khalīfah ʿAbd al-Latīf and other. SLJR (1990),
11. Government of the Sudan vs. Al-Sirr Mīrghanī Khalīfa and others, SLJR 1986
**Highway robbery (hiţâba)**
1. Government of the Sudan vs. 'Ādam Ḥasan Ismā‘īl, SLJR (1984), 1984/17
2. Government of the Sudan vs. 'Alī Muḥammad Balah and others, SLJR (1986), 1405/208

**Apostasy (ridda)**

**Homicide and bodily harm (qatāl / jurḥ)**
5. Government of the Sudan vs. ‘Īmād Ahmad Huwillū and others, SLJR 1989, no. 139/1988
11. Supreme Court case No. 69/1987
29. Government of the Sudan vs. Ḥamza ʿAlī Kutainī, SLJR 1985, no. 1405/188

**Glossary**

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<tr>
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<tr>
<td>adhan</td>
<td>harm, injury, grievance</td>
</tr>
<tr>
<td>aḥaqqiya</td>
<td>legal claim, title, right</td>
</tr>
<tr>
<td>aḥliyya</td>
<td>legal capacity</td>
</tr>
<tr>
<td>ʿāqil</td>
<td>sane</td>
</tr>
<tr>
<td>ʿāqila</td>
<td>solidarity group liable for blood money</td>
</tr>
<tr>
<td>ʿārida</td>
<td>petition, application</td>
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</tbody>
</table>

1675 This glossary is based on Peters (2005), Layish (2002) and my own collection of *fiqh*-based legal terminology.
arsh

financial compensation for bodily harm for members or organs which exist two, four or ten times

bakāra

virginity

balāgh jināʾī

charge

bālígh (a)

to be of age

bulūgh

legal majority

ghair bālígh

underage

bayyina

proof, evidence

bayyīna qāṭiʿa

unequivocal proof

bayyīna ghair qāṭiʿa

non-conclusive evidence

bayyīna sharīk

accessory evidence

bikr

virgin

buṭlān

invalidity, nullity, untruth

fauq marhalat

al-shakk al-maʿqūl

beyond logical doubt

daʿāra

immorality, debauchery

daʿwā daʿwā

case, lawsuit, action, cause

daḥāda

to disprove, to refute, to invalidate

daḥīya

victim

daḥd

refutation, disproof

dalīl

proof, evidence, symptom

dalīl qāṭiʿ

unequivocal evidence

dalīl žarfī/adilla žarfīyya

circumstantial proof, circumstantial evidence

damān

(financial) liability

darʿ

to avert

dhakar/dhukūr

penis

dhimmi

protected non-Muslim subject of an Islamic state

dimāʿ

homicide cases

diyya

blood money, blood price, the financial compensation for homicide and injuries

diyya kāmila

full blood money

diyya nāqiṣa

diminished blood money

diyya mughallaža

enhanced blood money

dubr

anus, buttocks

faḥs

scrutiny, examination, investigation

fāʾida lil-shakk

benefit of the doubt

fāḥish

obscene, shameless, indecent

fārj

vulva

fāsid

irregular, defective (marriage, sale)

fiqra

section, paragraph

ghaṣb

compulsion, usurpation

ghurra

financial compensation for the loss of a foetus

ḥābila

to become pregnant

ḥadara

to shed (s.o. blood) with impunity

ḥadath/ḥądāth

juvenile, youth

ḥāid

menstruation, monthly period

ḥaithiyāt

legal reasons on which the judgment is based,
legal opinion
detention, arrest
ruler, judge
non-Muslim residing outside the territory of Islam
glans (of a penis)
puberty
depropvation
safe place where movable property is kept
safe place guarded by a guardian
safe place in a house or barn
safe place commonly used for a certain property
safe place for any kind of property without specification
a ħirz in one’s own house, guarded by oneself
a ħirz guarded by someone else
probative force, conclusivity (Beweiskraft)
sentence, principles, legal consequence of the facts of a case
financial compensation for bodily harm determined by the judge
reversal of the sentence
repeal of the sentence
legal
financial compensation for bodily harm
inviolability, sanctity, dignity
(legal) representative for
prosecution, claim, assumption
right to take direct legal action
condemnation, conviction
harm, hurt, damage, offence
remission (of punishment)
testimony, witness, statement, deposition
chastity, righteousness, virtue
rape
immunity (against temptations through consummation of a valid marriage)
scaring of passers-by (as element of qaṭʿa al-ṭarīq)
jurisdiction
release
controversy, difference of opinion in legal matters
embezzlement
fabrication, invention (e.g. of a testimony)
duress
penetration
repeal, annulment, abrogation of a judicial decision
denial, negation
justice, equity, fairness, just treatment
infliction of punishment, penalty
iqrār qaḍā‘ī  
legally valid confession

taqār  
perpetration (of a crime)

iṣlāḥiyah  
house of correction, reformatory, prison

iṣma (fī ʿiṣma fulān)  
legal protection (under the tutelage/custody of)

istidā  
summoning, subpoena

istijwāb  
questioning, interrogation

istirdād  
reclamation, claim of restitution

istirḥām  
plea for mercy

istītāba  
calling on s.o. to repent

isti‘nāf  
appeal

ʿisyān  
disobedience, sedition, revolt, rebellion

ittāf  
injury, harm

ittihām  
indictment, charge, accusation

mumaththil al-ittihām  
prosecuting counsel

ittiṣāl jinṣī  
sexual intercourse

ʿitiyān  
perpetration (of a crime)

jāʿ ifā  
wound in the body that reaches one of the inner cavities

jāʿ iz  
permitted, legal, lawful

jald  
flogging

jān/ junā  
perpetrator, delinquent, criminal, culprit

jarīma/jarā‘ im  
crime, offense

jimā‘  
sexual intercourse

jināyāt  
offense, crime, sin

junūn  
insanity

junūn juz‘ī  
partial insanity

junūn munqaṭī‘  
discontinued insanity

junūn mutbiq  
complete insanity

jurm/ajrām  
offense, crime, sin

kafā‘a  
equivalence (between culprit and victim in qiṣṣā cases)

kaffāra  
penance, atonement, expiation

khaṣm/khuṣūm  
opposing party (in a lawsuit)

khilāl/(khilāl) ḥukmī  
legal defect, legal fault or flaw

khīyāna  
embezzlement, betrayal, breach of faith, treason

khuṣūma (=mukhāṣama)  
lawsuit, dispute, feud

lawth  
circumstantial or incomplete evidence against a person

making him a suspect of manslaughter

liʿān  
sworn allegation of adultery committed by either

husband or wife

liwāṭ  
anal intercourse, penetrare per penem in ano

maḍārūr  
aggrieved party

mağhmūr ʿalaihi  
unconscious

majlis al-qādā  
judicial council

majnūn ʿalaihi  
aggrieved party, injured party, claimant

mahbāl  
vagina

mahḍar  
procés-verbal, minutes, record of the official findings

mahdūd  
convicted for a ḥadd-crime (e.g. al-mahdūd ʿī al-qadhf)

mahjūr ʿalaihi  
placed under guardianship, minor, ward
mahkama dustūriyya  Constitutional Court
mahkama juz’ iyya  court for petty cases (court of first instance)
mahkama al-mauḍū’  trial court
mahkama mudiriiyya court of the province
mahkama naqdiyya Court of Cassation
mahkama al-isti’nāf  Court of Appeal
mahkama al-’ulyā  Supreme Court
maḥkūm ’alaihi  convicted, condemned
mahram/mahārim  being in a degree of consanguinity precluding marriage
majlis al-qadā’  court session
majnūn  insane
māl mutaqawwam  ownable good, property
mā’ mūma  head wound laying bare the cerebral membrane
mansūs ’alaihi  stipulated, laid down in writing
maqdhūf  victim in a case of qadhf
masā’il jināʾiyya  criminal cases
maʿsiyya  sin, rebellion, insubordination
masrūq minhi  victim of (ḥadd-)theft
masrūqāt  stolen goods
mas’uliyya ta’dāmuniyya  joint liability
ma’sūm  inviolable, protected by the laws of vendetta
ma’sūm al-damm  inviolable, protected by the laws of vendetta
ma’tūh  idiot
maṭʿūn (hukm, qarār) challenged, appealed
maṭʿūn ḍiddhu  defendant
mirāṭh  inheritance
mubāḥ  ownerless, free for all
mubāḥ al-damm wa al-māl  whose life and property can be taken
mubāshara  direct, physical cause
mubāshir  direct perpetrator (of a crime)
mudān (proven) guilty, convicted
mūdaʿ  deposited (legal document)
muddaʿin  claimant
muddaʿi ’alaihi  defendant
mūḏīha  wound that lays bare the bone
mudrik  endowed with reason
muḍṭarr  person in need (in cases of necessity)
muhākama  trial, proceeding, legal prosecution
muhākama ’ijāziyya summary trial
saʿir fī al-muhākama  pursuance of the trial
muhdār s.o. not enjoying inviolability, whose blood can be shed with impunity
muḥṣan(a) „immune“ (against sexual temptations). i.e., a man or a woman, who has consummated a valid marriage and is consequently liable to lapidation in case of illicit intercourse
mukallaḍf  legally capable, sane in mind, fully responsible
mukhtār  free to choose
mukrah  person acting under duress
mulābasāt  accompanying phenomena, surrounding conditions
mumāthala  exact equivalence (in diyaʾ/qiṣṣās – cases)
mumayyiz  reasonable, rational, distinguishing
munaqqila  wound whereby a bone is displaced
muqirr  confessor
muqtarif  perpetrator (of a crime)
murāfāʾa  pleading, procedure
murāfīʾ  plaintiff
murtakib  perpetrator
mushājara  fight, quarrel, dispute, argument
mustakraha  raped woman
mustaʿmin  ḥarīb temporarily admitted to Muslim territory and enjoying full protection of life, property and freedom
mustaqām  rectum
mutaʿammid  willful, intentional, premeditated, deliberate
mutaḥarrin  investigator
mutaqawwam  valuable
(khābir) muthammin  assessor, estimator, expert in evaluating stolen goods
muttahim  defendant
muttasiq  balanced, in good order (ḥukm)
muwakkil (fi daʿwā)  client
muwaththiq  notary public
muwāqaʿa  sexual intercourse, copulation
nāfidh  legally valid
nahb  robbery, plundering, looting
al-nāʿib al-ʿāmm  attorney general
nashl  pickpocketing
niṣāb  minimal value of the stolen object as a precondition for amputation
niṣāb al-shahāda  fulfillment of the requirements of the evidence
niyya  intent
nukūl  refusal to testify in court
nukūṣ ḍan iqrāʾ  withdrawal of the confession
qaḍāʾ  judgment, sentence, decision
raʾis al-qaḍāʾ  chief justice
qadhf  unfounded accusation for unlawful sexual intercourse
qādhif  offender in a case of qadhf
qānūn waḍaʿī  positive law
qarāʾ al-naqḍ  decision of revocation, annulment, cassation
qarīna/qarāʾ in  evidence, indication
qarāʾ in al-ḥāvāl  indicia, factual evidence
qaṣd  jināʾi  criminal intent
sūʾ al-qāṣd  evil intent
qaṣir  minor, under-age
qasam/aqsām  oath
qasāma

procedure based on the swearing of fifty oaths aimed at establishing liability for a homicide with an unknown perpetrator

qaṣḍ jīnāʾī
criminal intention

qāṭ’
amputation

qāṭ’ min khilāf
cross amputation

qāṭl
homicide

qāṭl ʿamd
intentional homicide

qāṭl bi-sabab
indirect killing

qāṭl ghīla
heinous murder

qāṭl shibh al-ʿamd
semi-intentional homicide

qāṭl shibh al-khāṭāʾ
demi-accidental homicide

qāṭl, maqṭūl
victim of homicide

qāwānīn waḍaʾīyya
positive laws

qiṣāṣ
testimony, statement

qiṣāṣ
retaliation

qiṣāṣ fīmā dūn al-nafs
retaliation (for wounds or injuries)

qiṣāṣ fī al-nafs
qiṣāṣ for homicide

qiwāma
guardianship

rājiʾ
testimony, statement

rajm
review, revise, reexamine, verify

rashīd
stoning, lapidation

rashīd
reasonable, discriminating, discerning

sabb al-nabī
discriminating, intelligent minor

ṣāḥīfa sawābiq
insulting the prophet

ṣāʿīl
police record

ṣāṭw
assailant, attacker

ṣahāda
assault, burglary, housebreaking

ṣahāda
testimony

ṣahāda al-zūr
false testimony

ṣahāda ʿalā al-shahāda
testimony on the testimony of someone else

ṣahāda ghair mubāshira
indirect evidence

ṣāḥīḥ al-ʿiyān
eye witness

ṣāḥīḥ al-samāʾ
ear witness

ṣāḥijja (pl. shijāj)
head wound, skull fracture

ṣāḥīṭa
lawgiver, legislator

ṣatafāb al-ittihām
dismissal of the case

ṣuqūṭ
legal uncertainty

ṣuqūṭ
lapse

ṣaqaṭa
to lapse

ṣāḥijja/shijāj
head wound which lays open the skull, skull fracture

ṣāḥikān
complainant, plaintiff

ṣḥaraj
anus

ṣifāḥ
fornication

ṣīyāgha
formulation, wording
síyása discretionary justice exercised by the head of state and executive officials, not restricted by the rules of sharí’á

şulḥ amicable settlement out of court between parties
şulḥ taḥaﬀuẓi preventive settlement
sū’ al-niyya bad faith, mala fide
ta’amud intent, premeditation
tafṣiq to declare s.o. a sinner (fāsiq)
taḥarrin investigation, detection (of crime)
tahayyuj affect, excitement, agitation
tahdhib correction, education
ṭā’ila retribution, retaliation, vengeance
takhdhib denial
takhayyur eclectic expedient
taklif legal capacity
ṭalab al-istirḥām petition for mercy
talabbus (qaḍāyā al-) criminal cases in which the perpetrator was caught in the act
tamalluk right of possession, tenure, holding
tanāzul waiver, abandonment, relinquishment (of rights)
taqādum limitation
ṭa’n dustūrī constitutional complaint
tahriḏ incitement, abetment
ṭā’in plaintiff (in a constitutional complaint)
tajrīd expropriation of property
ṭa’n appeal, objection
taqādhuf mutual unfounded accusation of unlawful sexual intercourse
taraṣṣud lurking, surveillance
tasharrud vagrancy, vagabondage
‘an ṭawā’iyya voluntarily, of one’s own free will
tauba repentance
tauqī’ promulgation, execution
tha’r retaliation, revenge, blood revenge
thayyib not a virgin, deflowered
‘udūlān dimnīān implicit retraction/renunciation (e.g. of a confession)
‘udūlān ‘an al-iqrār retraction of a confession
‘uqūba punishment, penalty
‘uqūbāt all punishments which can be averted by shubha, i.e. all ḥadd-punishments and the two kinds of talio

isqāṭ al-‘uqūba lapsing of the punishment
tauqī’ al-‘uqūba promulgation/execution of the punishment
wakīl al-niyyāba prosecuting attorney
walīy legal guardian
walīy (auliyyā’) al-dam the victim’s blood avenger
wāqī’ factual evidence
wāqī’ to have sexual intercourse
waṣīya bequest
Various sources, mainly BBC website: http://news.bbc.co.uk/2/hi/middle_east/827425.stm
18.1.1985 Execution of Muhammad Taha for apostasy (ridda)
10.3.1985 Sideling of the Muslim Brethren. All decisions of Islamic courts to be checked
6.4.1985 Numairi deposed
9.4.1985 Transitional Military Council established. Suspension of the application of the shari’a (i.e. its regulations concerning penal law)
3/1986 Conference of Koka Dam, except DUP and NIF all parties demand the abolition of the September laws
4/1986 Military cedes power, elections, first government of Sadiq al-Mahdi
1986 Project of new Penal Code proposed by Sudan Bar Association
15.5.1988 Second government of Sadiq al-Mahdi. NIF joins a coalition government. Hasan al-Turabi becomes Minister of Justice
11.9.1988 Under the guidance of Hasan al-Turabi new project of shari’-a-based Penal Code
16.11.1988 Agreement between SPLM and DUP. The problem of the shari’a to be solved by a constitutional conference. Suspension of the shari’a until the convening of the conference
12.4.1989 Debate on shari’a adjourned by parliament
20.4.1989 Ultimatum of the army: formation of a unity government and approval of the agreement between SPLM and DUP within 8 days
mid 6/1989 Mahdi announces imminent abolition of the shari’a-based legislation on July 1, 1989
30.6.1989 Coup d’Etat by Umar Hasan al-Bashir
9.7.1989 Formation of a government with a strong participation of the NIF
31.7.1989 Detention of judges and lawyers opposing the shari’a
1/1989 Re-application of the shari’a
7/1989 al-Turabi in prison (until 12/89)
12/1989 Nairobi talks founder
17.12.1989 First executions after the coup
1/1990 Crucifixion of two
22.2.1990 Umma and SPLA form common front for the restoration of democracy in the Sudan
9.3.1990 Sudan-Libya unification
5.4.1990 Men banned from working in hairdresser’s for women
23.4.1990 Failed coup d’état
5.6.1990 RCCNS member Khalifa rebuffs US-SPLA peace plan
8/1990 Talks with SPLA in Addis Ababa
1.1.1991 al-Bashir announces the application of the shari’a in Northern Sudan. Southern Sudan to apply its own laws
5.2.1991 Decree al-Bashir’s on the introduction of a federal system, meant to facilitate also the application of the shari’a in the North
10.-18.3.1991 Conference of the legal profession in Khartoum. Emphasis on the role of the shari’a
22.3.1991 New Criminal Act officially comes into force
24.3.1991 Garang calls for an intensification of the struggle against the „Islamic regime“ in Khartoum
3.4.1991 al-Bashir announces the formation of a national fund for the implementation of the sharī’a and the Islamic mission (da´wā)


20.8.1991 Uncovering of an attempted coup

29.8.1991 Partition of the SPLA into two factions

16.-17.11.1991 Islamic-Christian conference in Khartoum

3/1992 Biggest offensive of government troops against the SPLA since 1983

24.5.1992 Peace talks between government and the two SPLA factions in Abuja (Nigeria)

1995 Egyptian President Mubarak accuses Sudan of being involved in attempt to assassinate him in Addis Ababa

1998 New Constitution

1999 President al-Bashir dissolves the National Assembly and declares a state of emergency following a power struggle with parliamentary speaker, Ḥasan al-Turābī.

9/2000 Governor of Khartoum issues decree barring women from working in public places.

12/2000 al-Bashir re-elected for another five years in elections boycotted by main opposition parties

4-5/2001 Police continue arrests of members of al-Turabi's Popular National Congress party (PNC).


2/2003 Rebels in western region of Darfur rise up against government, claiming the region is being neglected by Khartoum.

10/2003 PNC leader al-Turābī released after nearly three years in detention and ban on his party is lifted.

1/2004 Army moves to quell rebel uprising in western region of Darfur; hundreds of thousands of refugees flee to neighbouring Chad.

3/2004 UN official says pro-government Arab "Janjaweed" militias are carrying out systematic killings of African villagers in Darfur. Army officers and opposition politicians, including Islamist leader Ḥasan al-Turābī, are detained over an alleged coup plot.

19.-21.4.2004 Conference on Sharī’a, Justice and Ijtihad in Khartoum

5/2004 Government and southern rebels agree on power-sharing protocols as part of a peace deal to end their long-running conflict. The deal follows earlier breakthroughs on the division of oil and non-oil wealth.

6/2005 Government and exiled opposition grouping - National Democratic Alliance (NDA) - sign reconciliation deal allowing NDA into power-sharing administration. President frees Islamist leader Hassan al-Turābī, who was detained in 2004 over an alleged coup plot.
1.8.2005  Vice president and former rebel leader John Garang is killed in a plane crash. He is succeeded by Salva Kiir. Garang's death sparks deadly clashes in the capital between southern Sudanese and northern Arabs.

9/2005  Power-sharing government is formed in Khartoum.

10/2005  Autonomous government is formed in the south, in line with the January 2005 peace deal. The administration is dominated by former rebels.

5/2006  Khartoum government and the main rebel faction in Darfur, the Sudan Liberation Movement, sign a peace accord. Two smaller rebel groups reject the deal. Fighting continues.

11/2006  African Union extends mandate of its peacekeeping force in Darfur for six months. Hundreds are thought to have died in the heaviest fighting between northern Sudanese forces and their former southern rebel foes since they signed a peace deal last year. Fighting is centred on the southern town of Malakal.

04/2007  Sudan says it will accept a partial UN troop deployment to reinforce African Union peacekeepers in Darfur, but not a full 20,000-strong force.

05/2007  International Criminal Court issues arrest warrants for a minister and a Janjaweed militia leader suspected of Darfur war crimes. US President George W Bush announces fresh sanctions against Sudan.

07/2007  UN Security Council approves a resolution authorising a 26,000-strong force for Darfur. Sudan says it will co-operate with the United Nations-African Union Mission in Darfur (Unamid).

10/2007  SPLM temporarily suspends participation in national unity government, accusing Khartoum of failing to honour the 2005 peace deal.

12/2007  SPLM resumes participation in national unity government.

01/2008  UN takes over Darfur peace force. Within days Sudan apologises after its troops fire on a convoy of Unamid, the UN-African Union hybrid mission. Government planes bomb rebel positions in West Darfur, turning some areas into no-go zones for aid workers.

04/2008  Counting begins in national census which is seen as a vital step towards holding democratic elections after the landmark 2005 north-south peace deal. UN humanitarian chief John Holmes says 300,000 people may have died in the five-year Darfur conflict.

05/2008  Southern defense minister Dominic Dim Deng is killed in a plane crash in the south. Tension increases between Sudan and Chad after Darfur rebel group mounts raid on Omdurman, Khartoum's twin city across the Nile. Sudan accuses Chad of involvement and breaks off diplomatic relations. Intense fighting breaks out between northern and southern forces in disputed oil-rich town of Abyei.

06/2008  President al-Bashir and southern leader Salva Kiir agree to seek international arbitration to resolve dispute over Abyei.
07/2008 The International Criminal Court's top prosecutor calls for the arrest of President al-Bashir for genocide, crimes against humanity and war crimes in Darfur; the appeal is the first ever request to the ICC for the arrest of a sitting head of state. Sudan rejects the indictment.

09/2008 Darfur rebels accuse government forces backed by militias of launching air and ground attacks on two towns in the region.

11/2008 President al-Bashir announces an immediate ceasefire in Darfur, but the region's two main rebel groups reject the move, saying they will fight on until the government agrees to share power and wealth in the region.

01/2009 Sudanese Islamist leader Hasan al-Turabi is arrested after saying President al-Bashir should hand himself in to The Hague to face war crimes charges for the Darfur war.

03/2009 The International Criminal Court in The Hague issues an arrest warrant for President al-Bashir on charges of war crimes and crimes against humanity in Darfur.

06/2009 Khartoum government denies it is supplying arms to ethnic groups in the south to destabilise the region.

10/2009 North and south Sudan say they accept ruling by arbitration court in The Hague shrinking disputed Abyei region and placing the major Heglig oil field in the north.

12/2009 Leaders of North and South say they have reached a deal on the terms of a referendum on independence due in South by 2011.

01/2010 President ´Umar al-Bashir says would accept referendum result, even if South opted for independence.

02/2010 Judges of International Criminal Court are ordered to review their decision to omit genocide from the war crimes arrest warrant issued for President al-Bashir.

02/03/2010 The Justice and Equality Movement (Jem) main Darfur rebel movement signs a peace accord with the government, prompting President al-Bashir to declare the Darfur war over. But failure to agree specifics and continuing clashes with smaller rebel groups endanger the deal.


12/2010 President al-Bashir announces reinforcement of Islamic legislation if Sudan splits.

05/2011 Northern Sudan occupies disputed province of Abyei.

01/2011 Southern Sudan holds referendum on its independence, a majority of 98.83% of the votes in favor of independence from Khartoum.
09/07/2011 The Republic of South Sudan gains its independence.

List of interviewees

1. Aḥmād Aṁm Ṣāliḥ (former Supreme Court Judge, advisor at the Institute of Training and Law Reform), 2.6.2004
2. Dr. ʿAwaḍ al-Ḵārṣānī (Prof. of Political Science University of Khartoum), 4.6.2004 and 9.6.2004
3. John Wuol Makec, (Supreme Court Judge), 6.6.2004
4. ʿAbdallāh Fāḏīl Ḭ̣sa, (Supreme Court Judge), 6.6.2004 and 8.6.2004
5. Jalāl Luṭfī, (President Constitutional Court, former Chief Justice), 7.6.2004
6. ʿUmāima ʿAbd al-Wahāb, (Institute for Legal Training and Reform), 8.6.2004
7. Ṣādiq al-Mahdı, (former Prime Minister, Secretary General Umma Party), 9.6.2004
8. Ṣiddīq Ḥasan al-Ṭūrābī, (Son of Ḥasan al-Ṭūrābī), 10.06.2004
9. Zaki ʿAbd al-Raḥmān, Lawyer (former Attorney General), 10.06.2004
10. Salwa Muḥammad (Lawyer, NGO Mutaʿwinat), 5.06.2004
11. Muḥammad Abū Zaid (Head of Public Grievances and Corrections Board), 5.06.2004
12. Dr. Haidar Ibrahīm Ṭalī (Director, Center for Sudanese Studies) 11.5.2009
13. Fatḥī Khalīl Muḥammad (President of Sudan Bar Association), 12.5. 2009
14. Dr. Alī Sulaimān (Professor, Faculty of Law, University of Khartum), and 12.5. 2009
15. Dr. ʿAbd al-Raḥmān Muḥammad ʿAbd al-Raḥmān Sharfī (Supreme Court Judge), 19.5. 2009
16. ʿAbd al-Raḥmān Sināda (Supreme Court Judge), 12.5. 2009
17. Maḥmūd Muḥammad Saʿīd Abkam (Supreme Court Judge), 12.5. 2009
18. Dr. Ḥasan al-Ṭūrābī (former Minister of Justice, Islamist thinker and Secretary General of Popular Congress Party) 13.5. 2009
19. Al-Rashīd al-Ṭūm Muḥammad Khair (Supreme Court Judge), 17.5. 2009 and 21.5. 2009
20. Al-Bāqir ʿAbdallah Ṭalī (Supreme Court Judge), 18.5. 2009
Summary

In 1983 the Sudan introduced for the first time an Islamized penal code which, after a period of strict application, was first suspended with regard to the harsher corporal punishments and subsequently replaced in 1991 by a new, overhauled Criminal Act. The present thesis analyses Islamized Sudanese criminal legislation and ICL-related case law of the Sudanese Supreme Court. In addition, a number of interviews with judges, lawyers, academics, and politicians were conducted. The main research questions of this thesis pertain to the legal and political history of Islamic Criminal Law in the Sudan and its relation with Islamic jurisprudence (fiqih) and secular predecessor codes. Further, the application and interpretation of Sudanese ICL in the Supreme Court as well as the relation between Islamic Criminal Law and its contradiction with international human rights treaties were analyzed.

Based on published Supreme Court decisions and human rights reports, the overall analysis of de facto sharia application shows that severe sharia penalties such as single and cross-amputations and the death penalty for zinā have rarely been upheld by the Supreme Court of the Sudan after the fall of Numairi in 1985. Other sharia-derived punishments were or are in the statutes but have seemingly not been executed such as the death penalty for apostasy, for homosexual penetration per penem in ano or stoning as a punishment for zinā. Retribution for wounds also does not seem to be applied and is normally replaced by blood money. The general tendency of Supreme Court decisions is to interpret ICL to the effect of avoiding the execution the more severe sharia punishments as much as possible. However, there are exceptions and a low-level application of amputations and crucifixions still subsists, especially in cases of ḥirāba. These, in turn, are more likely to happen in Dār Fūr than in Khartoum or other parts of the Sudan. ICL application continues mostly with regard to the death penalty for qisāṣ crimes and flogging. The latter is applied large-scale in the Public Order System, which is used by the regime as a parallel court system. Many of the rights the accused enjoy in the regular judicial system such as the right to a defense lawyer or the right...
to appeal are in actual practice not available in the Public Order System. Due to its practice of "swift justice" corporal punishments are meted out immediately. It therefore plays an important role in the regime’s policy of imposing self-defined standards of Islamic morale on the Sudanese population. Taken as a whole the application of severe sharī’a penalties was marked by a clear class bias in the time of Numairi. Under the Criminal Act 1991 and the Public Order Law this striking disequilibrium between different kinds of crimes and groups of perpetrators subsists. While those guilty of ḥadd-theft are threatened with amputation large scale government corruption would not result in a severe sharī’a-derived punishment and is, as a matter of fact, hardly punished at all.

The Supreme Court serves as a security valve and regulatory agency, reigning in the pro-shari´a disposition of lower courts, on behalf of a political regime that is content with keeping "the sharī’a in the statutes while avoiding the excessive application as practiced during Numairi’s reign 1983-1985. For Bashâr and his party it is of secondary importance whether all the punishments contained in the legislation are actually carried out as long as their existence in the statutes enhances the regime’s legitimacy among its constituency. Not carrying out amputations or stoning deflects international media attention, avoids domestic opposition, and reduces friction with HR human rights monitoring bodies. To be sure, while the human rights record of the Sudan has been and continues to be abysmal, severe sharī’a-based punishments only play a limited role in this regard. Ethnic cleansing, extrajudicial killings, torture and mass rapes obviously have no connection with the Islamized judicial system. Nevertheless, important parts of the Sudanese criminal legislation are contradicting not only the Interim National Constitution of 2005, but also international human rights treaties the Sudan is party to. This is especially the case with regard to cruel, inhuman and degrading penalties such as flogging, amputations, stoning, crucifixion and qisāṣ punishments, which violate various international human rights treaties the Sudan has acceded to and ratified. Concerning equality before the law women are especially disadvantaged in cases of zinā where (pregnant) victims of rape find themselves accused of zinā, since pregnancy is admitted as proof of unlawful sexual intercourse. Freedom of religion, especially the right to change one’s religion does not exist for Muslims. Muslim apostates do face the death penalty, though, except in a singular case, this punishment has never been carried out. Contradictions with international human rights treaties also exist with regard to children’s rights, since children and adolescents under
the age of 18 can be executed by way of a *hadd* or a *qisāṣ* penalty. They can also be subjected to amputations. In addition, the Criminal Act 1991 allows for the whipping of minors.

A number of important developments have been observed with regard to legislation and procedure. In general the Criminal Act 1991 has removed most of the flaws its predecessor suffered from with regard to the multiple inconsistencies between the fiqh and the solutions the legislator had chosen to codify in 1983. Thus, while the Criminal Act 1991 can claim a higher degree of juridical craftsmanship many of the main problems remain: contradictions with guarantees given on the constitutional level, an imbalance between the harsh punishments for *hadd* and *qisāṣ* crimes and other crimes and the inherent difficulties to apply these punishments due to procedural impediments. It has also been observed that, compared to its secular predecessors, the Islamized penal codes have established a new balance between the prerogative of the state to punish and the rights of the victims or their heirs. Thus, while in the *fiqh* different methods of executing the capital punishment are known, in Sudanese ICL only hanging, executed by the state authorities, is used in practice. Victims or heirs do not have any part in the execution of punishments and cannot claim more than the theoretical right to inflict on the perpetrator the same kind of death or the same wounds as the victim received. Heirs do have, however, the possibility to save a delinquent’s life and settle for blood money or pardon. Since in *qisāṣ* crimes the rights of humans are directly concerned (as opposed to the qur’anic *hadd* crimes) the legislator has opted to lower the threshold of proof for such crimes. Thus, the relationship between severe punishment and a higher standard of proof, a central precept of the *fiqh*, has been broken. Sudanese procedural legislation is at variance with the *fiqh* also with regard to the inherently discriminatory concepts of inviolability (‘isma) and equivalence (katā‘a). Where the *fiqh* discriminates against women and non-Muslims, modern Sudanese ICL makes no difference here and thus ensures that a human life has the same value irrespective of gender and religion.

Given the tangible influence of its pre-Islamization predecessor codes in combination with the continuation of a judicial system that clearly finds its inspiration in Western models Sudan’s Islamic "legal revolution" has introduced as many Islamic, i.e. *fiqh*-derived elements into criminal legislation as necessary to satisfy the regime’s constituency. It has thus created a system that is more hybrid and marked by an uneasy co-existence of Islamized provisions and a majority of crimes and punishments that would equally find their place in any fully secular legal system. Indeed, today’s Sudanese ICL is neither a harmonious continuation of a past
experience nor is it a stable body of law that is likely to remain in force for a long period. It is
rather a function of the political aspirations of the now dominant part of the Northern elite and
will most likely not survive their demise.

**Samenvatting**

In 1983 introduceerde Soedan voor het eerst een geïslamiseerde strafwetgeving. Na een
periode van strikte toepassing werden eerst de hardere lijfstraffen opgeschort. De wetten
werden vervolgens in 1991 vervangen door een nieuwe, gerevisierde Wetboek van Strafrecht.
Dit proefschrift analyseert de geïslamiseerde Soedanese strafwet en ICL-gerelateerde
jurisprudentie van het Soedanese Hooggerechtshof. Daarnaast is een aantal interviews
afgenomen met rechters, advocaten, academici en politici. De belangrijkste onderzoeksvragen
van dit proefschrift hebben betrekking op de juridische en politieke geschiedenis van het
islamitische strafrecht in Soedan en de relatie met de Islamitische jurisprudentie (fiqh) en de
seculiere codes die aan het geïslamiseerde recht voorafgingen. Verder werden de toepassing
en interpretatie van de Soedanese ICL in het Hooggerechtshof geanalyseerd, evenals de relatie
tussen het Islamitische strafrecht en zijn tegenstrijdigheden met internationale
mensenrechtenverdragen.

Op basis van gepubliceerde beslissingen van het Hooggerechtshof en verslagen over
mensenrechten toont de algemene analyse van de de facto *sharī'a*-toepassing dat ernstige
*sharī'a*-straffen, zoals enkele en dubbele amputaties en de doodstraf voor *zinā*, zelden zijn
bevestigd door het Hooggerechtshof van Soedan na de val van Numairi in 1985. Andere
*sharī'a*-afgeleide straffen zijn of waren in de statuten terug te vinden, maar zijn klaarblijkelijk
niet uitgevoerd, zoals de doodstraf voor geloofsafval of voor homoseksuele penetratio per
penem in ano of steniging als straf voor *zinā*. Vergelding voor wonden lijkt ook niet te
worden toegepast en wordt normaal gesproken vervangen door bloedgeld (*diya*). De algemene
tendens bij beslissingen van het Hooggerechtshof is om de uitvoering van de zwaardere
*sharī'a* straffen zo veel mogelijk vermijden. Er zijn echter uitzonderingen en amputaties en
kruisigingen komen nog steeds op kleine schaal voor, vooral in gevallen van *ḥirāba*. Dit
gebeurt waarschijnlijk vaker in Där Für dan in Khartoum of andere delen van Soedan. Een
beroep op ICL wordt meestal gedaan in geval van de doodstraf voor *qiṣāṣ*-misdaden en
geseling. Dat laatste wordt op grote schaal toegepast in het Openbare Orde Systeem (Public
Order System) dat wordt gebruikt door het regime als een parallel rechtssysteem. Veel van de
rechten die de verdachten genieten in het reguliere rechtssysteem, zoals het recht op een advocaat of het recht van beroep, zijn in de praktijk niet beschikbaar in de Public Order System. Door zijn praktijk van 'snelle rechtvaardigheid' worden lijfstraffen (geseling) direct uitgedeeld. Het speelt dus een belangrijke rol in het beleid van het opleggen van zelf gedefinieerde normen van islamitisch moraal op de Soedanese bevolking door het regime. Als geheel werd de toepassing van strenge *shari’a*-straffen gekenmerkt door een duidelijke sociale vooringenomenheid in de tijd van Numairi. Onder de Criminal Act 1991 en de Public Order Law blijft dit opvallende gebrek aan evenwicht tussen de verschillende soorten misdaden en groepen van daders bestaan. Terwijl degenen die zich schuldig maken van *hadd*-diefstal met amputatie worden gestрафt, zou de grootschalige corruptie bij de overheid niet resulteren in een ernstige *shari’a*-afgeleide straf en wordt in de praktijk nauwelijks gestraft.

Het Hooggerechtshof dient als veiligheidsventiel en regelgevend orgaan. Het corrigeert het pro-shariakarakter van lagere rechtbanken namens een politiek regime dat tevreden is met het houden van 'de *shari’a* in de statuten, terwijl de overmatige toepassing zoals aangewend tijdens het bewind van Numairi 1983-1985 wordt vermeden. Voor Bashîr en zijn partij is het van ondergeschikt belang of alle straffen in de wetgeving worden toegepast, zolang hun bestaan in de statuten de legitimiteit van het regime in de ogen van hun voorstanders verhoogt. Het niet uitvoeren van amputaties of stenigingen leidt internationale media-aandacht af, houdt binnenlandse oppositie in toom en vermindert de wrijving met op mensenrechten toezichthoudende instanties. Hoewel de mensenrechts situatie in Soedan uitzichtloos is en blijft, spelen ernstige op *shari’a*-gebaseerde straffen slechts een beperkte rol in dit verband. Etnische zuivering, buitengerechtelijke executies, martelingen en massale verkrachtingen houden uiteraard geen verband met het geïslamiseerde rechtssysteem.

Hoe dan ook, belangrijke onderdelen van de Soedanese strafwetgeving spreekt niet alleen de Interim Nationale Grondwet van 2005 tegen, maar ook internationale mensenrechtenverdragen die Sudan heeft ondertekend. Dit is vooral het geval met wrede, onmenselijke en vernederende straffen zoals geseling, amputaties, steniging, kruisiging en *qisâs* die verschillende, door Soedan geratificeerde, internationale mensenrechtenverdragen schenden. Inzake gelijkheid voor de wet zijn vrouwen vooral benadeeld in gevallen van *zinâ*, waar (zwangere) slachtoffers van verkrachting zelf beschuldigd zijn van *zinâ*, omdat zwangerschap wordt aanvaard als bewijs van onwettige geslachtsgemeenschap. Vrijheid van godsdienst, met name het recht om van godsdienst te veranderen, bestaat niet voor moslims.
Islamitische afvalligen worden geconfronteerd met de doodstraf, hoewel, behalve in één geval, deze straf nooit is uitgevoerd. Tegenstrijdigheden met internationale mensenrechtenverdragen bestaan ook met betrekking tot de rechten van het kind, omdat hadd- of qisâs-straffen tegen kinderen en adolescenten jonger dan 18 jaar kunnen worden uitgevoerd. Minderjarigen kunnen ook worden onderworpen aan amputaties. Daarnaast is volgens de Criminal Act 1991 zweepslagen geven aan minderjarigen mogelijk.

Een aantal belangrijke ontwikkelingen zijn waargenomen met betrekking tot wetgeving en procedure. In het algemeen heeft de Criminal Act 1991 het grootste deel van de gebreken waaraan zijn voorganger leed, verwijderd, in het bijzonder met betrekking tot de veelvoudige inconsistenties tussen de fiqh en de oplossingen die de wetgever in 1983 had gekozen voor de codificatie. Dus, terwijl de Criminal Act 1991 een hogere mate van juridische vakmanschap kan eisen, blijven veel van de belangrijkste problemen bestaan: tegenstellingen met garanties gegeven in de grondwet, een gebrek aan evenwicht tussen de strenge straffen voor hadd en qisâs en andere misdaden en de inherente moeilijkheden om deze straffen toe te passen, wegens procedurele belemmeringen. Ook is geconstateerd dat, in vergelijking met zijn seculiere voorgangers, de geïslamiseerde strafwetboeken een nieuw evenwicht tussen het prerogatief van de staat om te straffen en de rechten van de slachtoffers of hun erfgenamen hebben vastgesteld. Dus, terwijl in de fiqh verschillende methoden van het uitvoeren van de doodstraf zijn bekend, wordt in de Soedanese praktijk van ICL alleen ophanging gebruikt, uitgevoerd door de overheid. Slachtoffers of erfgenamen hebben geen deel aan de uitvoering van straffen en kunnen geen aanspraak maken op meer dan het theoretische recht op het toebrengen van dezelfde wond aan de dader als het slachtoffer heeft ontvangen. Erfgenamen hebben echter de mogelijkheid om het leven van een delinquent te redden en de zaak op te lossen met bloedgeld of gratie. Aangezien in qisâs-misdaden de rechten van mensen rechtstreeks betrokken zijn (in tegenstelling tot de hadd-misdrijven uit de Koran) heeft de wetgever ervoor gekozen om de drempel van de bewijslast voor dergelijke misdrijven te verlagen. Zo is de relatie tussen strenge straf en een hoger niveau van bewijs, een centraal gebod van de fiqh, verbroken. Soedanese procedurele wetgeving is in strijd met de fiqh, ook met betrekking tot de inherent discriminierende begrippen onschendbaarheid ('ismo) en gelijkwaardigheid (katâ’a). Waar de fiqh vrouwen en niet-moslims discrimineert, maakt hier het moderne Soedanese ICL geen verschil en zorgt dus ervoor dat een menselijk leven dezelfde waarde heeft, ongeacht geslacht en religie.
Gezien de concrete invloed van de codes van voor de islamisering, in combinatie met de voortzetting van een gerechtelijk systeem dat duidelijk zijn inspiratie in de Westerse modellen vindt, heeft de Soedanese islamitische 'juridische revolutie' zo veel islamitische, d.w.z. fiqh-afgeleide elementen in het strafrecht geïntroduceerd als nodig is om de voorstanders van het regime tevreden te stellen. Er is dus een meer hybride systeem gecreëerd dat zich kenmerkt door een ongemakkelijke coëxistentie van geïslamiseerde voorzieningen en een meerderheid van misdaden en straffen die ook hun plaats zouden hebben in een volledig seculier rechtssysteem. Sterker nog, de huidige Soedanese ICL is noch een harmonische voortzetting van een ervaring uit het verleden, noch is het een stabiel corpus van wetten dat waarschijnlijk voor een lange periode van kracht blijft. Het is duidelijk een uiting van de politieke aspiraties van het nu dominante deel van de noordelijke elite en zal zeer waarschijnlijk de ondergang van deze niet overleven.