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

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"...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."[6]

"Islamic law is like a pistol in your pocket, you rarely use it".[7]

1 Introduction

1.1 The Islamization of criminal law

1.1.1 Islamic Criminal Law in the Sudan: the political background[8]

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[9] 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.[10] 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

[6] G.A. Lutfi, The future of the English law in the Sudan (1967), pp. 248-249.
[7] Interview with Jalāl Luṭfī, 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.
[9] Jacobs (1985), p. 206.
[10] Warburg (1990), p. 627. Other bills dealt with the prohibition of alcohol, the *ḥudūd*, 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 *sharī´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 *sharī´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 *sharī´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 Ṣādiq 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 *sharī´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 *sharī´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”.[11]

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 *sharī´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 *sharī´a* application and the tools used when the *sharī´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) *sharī´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 *sharī´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[12], whether a country applies *sharī´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 *sharī´a* is expeditious and effective, thus leading to a society “where good deeds are immediately rewarded and evil deeds punished right away”.[13] 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 *sharī´a*

[11] “Omar al-Bashir: northern Sudan will adopt sharia law if country splits”, The Guardian, 19/12/2010.

[12] See e.g. this comparison of rates of intentional homicide worldwide: http://www.unodc.org/unodc/en/data-and-analysis/homicide.html.

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 *sharī´a* / *fiqh*, in certain countries of the Arab peninsula such as Saudi Arabia, Yemen[15] 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 *sharī´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

[13] Peters (1994), p. 269.
[14] Peters (2005), p. 145.
[15] On the situation in Yemen after the reunification of North and South Yemen see Shamiry (2000).

a codified penal code, but the uncodified *sharī´a* still plays a role. In Saudi Arabia the *sharī´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*.[17]

Who applies ICL?

ICL, at least as far as the "first wave" of re-introduction is concerned (1972-1983)[18], has been (re-)instated or is applied by authoritarian regimes. Examples are Libya[19], Iran[20], Sudan[21], Pakistan[22], Saudi-Arabia[23]. More recently militant Islamists have introduced their idiosyncratic interpretation of the *sharī´a*, for example in the Swat valley in Pakistan[24] and in parts of Somalia[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 *sharī´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,[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".[27] The same poll, however, also showed that a majority of Muslim respondents are in favor of legal

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[16] See Peters (2005), pp. 142-143.
[17] See van Eijk (2010). pp. 166-167.
[18] During this period Libya (1972), Pakistan (1979), Iran (1979) and Sudan (1983) introduced Islamic Criminal Law.
[19] E.g. Mayer (1990).
[20] Silvia Tellenbach translated the relevant Iranian penal legislation of 1983 (*ta´zīr*) and 1991 (*ḥudūd*, *qiṣāṣ*). See Tellenbach, Strafgesetze (1996).
[21] Layish/Warburg (2003), Köndgen (1992).
[22] On Islamic law and its application in Pakistan see for example Mehdi (1994) and Lau (2006).
[23] On Saudi-Arabia see Vogel (2000).
[24] "Sharia in Swat Valley", The Times, March 27, 2009.
[25] See for example "Was die Shabab-Miliz unter Gerechtigkeit versteht", Neue Zürcher Zeitung, 12.01.2011.
[26] Harding (2010), pp. 504-505.
[27] Esposito/Mogahed (2007), p. 35.

equality between men and women.[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.[29]

"Extreme sharī´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".[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 *shari´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 sharī´a laws from Sudan" and the Palestinian constitution. His presentation of the historical development is linear and suggests only one reading, i.e. "extreme *shari´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 shari´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".[31] Libya was a forerunner of ICL, but never applied it. Nigeria's ICL application has, after a first

[28] Esposito/Mogahed (2007), p. 51.
[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 democractic elections in Egypt, Tunisia, Libya and possibly other Arab countries.
[30] Marshall (2005) See chapter "Growth", pp. 5-11. Otto (2010), pp. 620-621.

phase of experimentation, come to a standstill. The original fervor has died down, *ḥadd*- and *qiṣāṣ*-punishments remain unexecuted, the convicts languish in prison.[32] 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 abolishment 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.[33] 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.[34] 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 *qiṣāṣ*-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.[35] 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.[36]

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*

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[31] Otto (2010), p. 645.
[32] Ostien/Decker (2010), pp. 602-606.
[33] Otto (2010), p. 620.
[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.
[35] Harding (2010), pp. 518-519.
[36] BBC NEWS, 14 September 2009, Aceh passes adultery stoning law. http://news.bbc.co.uk/2/hi/8254631.stm.

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 *sharī´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 *sharī´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-Bashīr regime.[37] 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.[38]

1.1.3 Codification: reform of sharī´a *and the role of the state*

Codifying the fiqh: the theoretical framework

How the *sharī´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.[39] 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.[40] 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".[41] 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

[39] See for example: Schacht (1932), Schacht (1960), Schacht (1964), pp. 100-111, Coulson (1964), pp. 149-225, Anderson (1971), Anderson (1976), Al-Bishri (1985), Vikør (2000), Arabi (2001), pp. 189- 211, Peters (2002), Layish (2004), Rohe (2009), pp. 167-205, Hallaq (2009), Sharī´a, pp. 443-550.
[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".[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".[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".[44]

Hallaq concedes, however, that the qualifications and explanations necessary to render an image truthful to the historical *sharī´a* are so many that they are hardly possible without blocking the writing process altogether. In fact, he thinks that the dilemma is unsolvable.[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.[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[47] and Christiaan Snouck

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[42] Hallaq, Sharī´a (2009), p. 5.
[43] Hallaq, Sharī´a (2009), p. 4.
[44] Hallaq, Sharī´a (2009), p. 4.
[45] Evidence of this unsolvable problem is the fact that Hallaq himself uses "Islamic Law" in several of his book titles.
[46] See e.g. Irwin (2007) who arguably wrote the most scathing critique of Said´s "Orientalism".
[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.

Hurgronje[48] are long gone by and for decades scholars interested in Islamic law have been struggling to apply new approaches[49] to their subject, ranging from cultural anthropology[50] and legal pluralism[51] to Luhmann's systems theory.[52] 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".[53] 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.

Sharī´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, *sharī´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 *sharī´a* as „God's divine law"[54], „..an expression of...God's will"[55] and the *fiqh*, being the juridical discipline that interprets Qur´an and Sunna with the help of a range of hermeneutic

[48] Christiaan Snouck Hurgronje (1857-1936), Dutch orientalist and advisor to the Dutch colonial government in the Netherlands East Indies.
[49] For a summary of these approaches in Islamic legal studies see Thielmann (1999).
[50] E.g. Geertz (1983), Rosen (1989).
[51] Dupret (et. al.) (1999).
[52] On this approach see Bälz (1996).
[53] Hallaq (2009), p. 4.
[54] Vikør, (2000), p. 240.
[55] Peters (2002), p. 82.

tools used in order to determine and formulate the *sharī´a*.[56] In other words, while the *sharī´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 *sharī´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 „*taṭbīq al-sharī´a*" (application of the sharī´a) is therefore a very imprecise usage of the term *sharī´a* at best, if not an impossibility.[58] In brief, the *sharī´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´ītes 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 *sharī´a*. Peters has explained how the *fuqahā`* successfully prevented the state's authorities to break the scholar's monopoly of *sharī´a* interpretation.[60] In a nutshell, the *fuqahā`* developed over time the doctrine that the „gate of *ijtihād*" (i.e. independent legal reasoning) was closed (*bāb al-ijtihād maqfūl*). Legal scholars thus had to

[56] Peters (2002), p. 84.
[57] Peters (2002), p. 84.
[58] Vikør (2000), pp. 240-241.
[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. *Taqlīd*, as this necessity to strictly adhere to the traditional views of a given *madhhab* is called, had its advantages, but also its downsides.[61] As to the latter, *taqlīd* 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 ´Abduh and Jamāl al-Dīn al-Afghānī[62] but also by Western scholarship. However, the obligation to apply *taqlīd* kept the state at a distance and prevented it to effectively question the monopoly of the *fuqahā`*. If the traditional guardians of the *sharī´a* 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 *sharī´a* interpretation. Moreover, and possibly even more important, the application of *taqlīd* 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.[63] 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 *taqlīd* suggested.

The „hermeneutic toolbox": uṣūl al-fiqh

Before I shall discuss the relationship between *sharī´a* / *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] *Taqlīd* is normally seen as intellectually inferior to *ijtiḥād*, with the latter being associated "with independant rational thought". Fadel 1996 tries to reposition *taqlīd* and give a more nuanced explanation of its social logic. See Fadel (1996). For other aspects of the *taqlīd/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 *taqlīd* in the 18th and 19th century.

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

[63] Vikør (2000), p. 227.

transforming it into legal rules is called *uṣūl al-fiqh* (the „roots of jurisprudence", i.e. the theoretical and philosophical foundation of Islamic law).[64] 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, *qiyās* and *ijmā´,* 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. *Qiyās*, 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 *ijmā´*, 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 *ijmā´* 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 *sharī´a / fiqh*.[65] Most important, the consideration of the public interest, *istiṣlaḥ*, 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.[66] 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 sharī´a.

Application of sharī´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 *sharī´a.* Thus, the Abbasids issued such administrative orders in order to extend their authority

[64] For a history of Sunnī *uṣūl al-fiqh* see Hallaq (1997).
[65] For a more detailed description see Rohe (2010), pp. 64-73 and Hallaq (1997), pp. 107-115.
[66] Hallaq (1997), p. 112.

on various domains such as fiscal, land and criminal law.[67] 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 *sharī´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 *sharī´a* and could be considered secular legislation.[68] 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.[69]

Was the sharī´a *operational?*

Scholars don't agree to what degree the *sharī´a* was operational and a fully applied system. Vikør argues that though "operational on some level" the *sharī´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 *sharī´a* rules) and difficulties in practical *sharī´a* application (e.g. its procedural rules).[70] 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 sharī´a was a fully applied system".[71] Heyd insists that "The criminal law of the sharī´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".[72]

Peters, however, has shown for nineteenth century Egypt that the *sharī´a* was applied in criminal cases by a *qāḍī*, provided there was a plaintiff and a defendant.[73] 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 *sharī´a* law but impose

[67] Layish (2004), p. 88.
[68] Thus, the *qānūn-nāme* introduced under Sultan Meḥemmed II (1451-1481) considered *ḥadd*-punishments as obsolete and replaced them by *ta´zīr*-punishments, beatings and fines. Schacht (1964), pp. 90-91.
[69] Peters (2002), p. 88.
[70] Vikør (2000), p. 229.
[71] Layish (2004), pp. 87-88.
[72] Heyd (1967), p. 1.
[73] For Peter´s work on 19th century Egypt see Peters 1990. Murder on the Nile and Who killed ´Abd Allah Al-Ghazza?, Peters (1997), (1999), (2007), (2008).

ta´zīr- or *siyāsa shar´iyya* 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 *sharī´a* varied with time and place. In general a system emerged that was determined by the different roles of the Islamic legal scholars and the *sharī´a* on the one hand and the sultan and the court system on the other hand. While the class of *fuqahā´* and the *sharī´a* 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 *sharī´a* and state legislation met. Thus, a *qāḍī* 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 shar´iyya* or operating in a rather autonomous manner by a *qāḍī* applying the *fiqh*-based regulations. Under *siyāsa shar´iyya* the sultan/the state, while deriving its legitimacy from the *sharī´a*, its complex substantive and procedural rules were not applicable. Thus, crimes that could not be tried and punished under *sharī´a* / *fiqh* rules could be handled by a court applying *siyāsa shar`iyya*.[75] Often a case would be judged first by a *sharī´a* 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 shar´iyya*. In these sultanic courts punishments were also often less severe than in the *sharī´a* courts.[76]

An early precursor of codification were the so called *mukhtaṣarāt*, compendia for the legal rules of each school. The *mukhtaṣarāt*, however, differed from the legal treatises of the *fuqahā`* 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 *sharī´a* judge and provide him with an easy-to-use reference work. There are, however, important differences with modern legislation. A *qāḍī* 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 *mukhtaṣar´s* authority derives from the agreement it receives within a given school, hence it is informal.[77]

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[74] Peters (1999), pp. 378-379.
[75] Vikør (2000), p. 231.
[76] This was, however, not always the case. Peters mentions a case of theft in Cairo related by the Egyptian chronicler al-Jabartī. The thieves could not be convicted by the chief *qāḍī* according to the *sharī´a* because their confession did not fulfill all the requirements. They were then tried by the *kethüda*, the de facto governor of Cairo and sentenced to amputation by way of *ta´zīr* or *siyāsa shar´iyya*. Peters (1999), p. 378.
[77] Vikør (2000), p. 238. On *mukhtaṣarāt* see Fadel (1996).

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.[78] 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 *sharī´a* doctrine it is the prerogative of the state, i.e. the sultan to delimit the scope of the *qaḍī´s* jurisdiction. The *qāḍī* is thus not independent but subject to the Sultan's directives in this regard. Various approaches as to how the *sharī´a* / *fiqh* became state law can be found. The state/the sultan might give the *qāḍī* great leverage in the application of the *sharī´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 *ijtihād*. 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 Ḥanafite *madhab* but moreover the most authoritative opinion within it.[79] 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 sharī´a

Real codification began in the Ottoman empire during the Tanẓīmāt period (1839-1876) when codified legislation became a key tool for reform, centralization and legal unification.[80] As Peters points out the Ottoman ruling elite adopted the Western idea that *fiqh*-based law was

[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 Ḥānīfa, followed by Muḥammad al-Shaybānī and Abū Yūsuf. Peters (2002), p. 87.

[80] Peters (2002), p. 88.

"chaotic and inaccessible" and that "codification is civilization".[81] Codification during the Tanẓīmāt 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.[82]

Handbooks of *sharī´a* law, not dissimilar to the *mukhtaṣarāt* were compiled in the same period. The most prominent examples are the Egyptian Muhammad Qadri Pasha's[83] compilation of family law, property and contracts law and *awqāf* law based on Ḥanafī law. Of similar importance is further the Ottoman Ömer Hilmi's compilation of the law of homicide and bodily harm. Similar to the *mukhtaṣarāt* these were private collections with a semi-official status in areas still governed by *sharī´a*. From the beginning of the twentieth century codification had gained momentum and are, by now, the norm in almost all Muslim countries[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´a*-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´a*.[85] Other Arab countries followed the Egyptian model[86] or opted for civil law codification based on the Mecelle.

Within our outside of the sharī´a*?*

Layish and others are concerned with the question of whether modern codifications of the *sharī´a* or elements of it and the methodologies associated therewith should be considered a development within or outside of the *sharī´a*. 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´a*. The same is true for the

[81] Peters (2002), p. 88.
[82] Peters (2002), p. 88.
[83] Died 1886.
[84] Saudi Arabia with its uncodified *sharī´a* law is an exception.
[85] Layish (2004), p. 90.
[86] For a recent and comprehensive overview of Egyptian civil law and its influence in Muslim countries see Krüger (1997).

application of the *sharī´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 *sharī´a*-based legislation as a result of a parliamentary process. He maintains that "Statutes, even if based on mechanisms with traditional *shar´ī* connotations, are first and foremost legislative acts of sovereign parliaments and hence cannot be assessed as a development within the sharī´a".[87] 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 *sharī´a* (or Islam for that matter) is. Thus, Ann Mayer opines that "non-Muslims cannot decide on the legitimacy of the conversion of the *sharī´a* into statutes or whether the developments are inside or outside the sharī´a. Such determinations are exclusively for Muslims to make".[88] Likewise Peters maintains that "...outsiders are not competent to determine for Muslims what Islam and the *sharī´a* is".[89] Layish clarified his point of view by retorting that he does not intend to judge "...the legitimacy of the codification of the sharī´a". He rather thinks that outsiders may participate in a discourse on the meaning and repercussions of *sharī´a* codification and argue "from the viewpoint of orthodox sharī´a".[90] 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 *sharī´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 *sharī´a* necessarily delegitimize the whole process. The assessment "outside the *sharī´a*" as used here signifies no less than "not *sharī´a*". If we are to accept the argument that modern *sharī´a* codifications are thus "not *sharī´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.[91] 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

[87] Layish (2004), p. 91.
[88] Anne Mayer quoted in Layish (2004), p. 91.
[89] Peters (2002), p. 93.
[90] Layish (2004), p. 91.
[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.[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 *sharī´a* is.

Problems and techniques of sharī´a *codification today*

In the process of codification of the *sharī´a* / *fiqh*, by itself a modern Western-inspired technique[93], modern legislators have made use of a variety of expedients and methods. Some of these can be found in the *fiqh*, others resemble devices used in the *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 *qāḍīs* 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 *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 *sharī´a* / *fiqh* into modern legislation. Subsequently and in conclusion I shall evaluate the repercussions of this process and assess the transformation the *sharī´a* undergoes.

Two typical methods mostly employed by modern legislators in order to achieve a modernizing effect are the eclectic expedient (*takhayyur*) and the patching together of contradictory doctrines (*talfīq*). *Takhayyur*, the eclectic choice between different opinions does have a certain base in the *fiqh*, particularly in the Ḥanafite and Shāfi´īte schools.[94] This principle was used in Ottoman law *within* the Ḥanafīte school. In Egypt, however, the expedient was pushed further by applying it to *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, *takhayyur* even included opinions of non-Sunni schools such as the Shī´ītes or the Ibādites. While within the expedient of *takhayyur* opinions remain intact the method called *talfīq* combines parts of opinions of one school with parts of opinions of another school. While the opinions this method draws on can claim

[92] Layish argues "from the viewpoint of orthodox sharī´a as interpreted by its authorized exponents". Layish (2004), p. 91.

[93] Layish´s verdict is unequivocal. Statutes are legislative acts of souvereign parliaments, even if they are based on the *sharī´a* and its mechanisms. For him it is therefore clear that such statutes must be considered to be a development outside the *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. *talfīq* O.K.) represents little more than an attempt to draw the veil of tradition over the face of innovation".[95]

We have mentioned above that the public interest (*maṣlaḥa*) 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 *fuqahā`* 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 *maṣlaḥa* "palatable to the orthodox". They are at the origins of what Hallaq categorizes as "utilitarianism" and "religious liberalism". Both trends promote the use of *maṣlaḥā* in different ways. The utilitarianists nominally adhere to a set of (hermeneutic) principles of the *fuqahā`* but manipulate them "to their own advantage". The liberalists, in contrast, dismiss these principles altogether.[96]

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 *ijtihāḍ* 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 (*maṣlaḥa*) has replaced *qiyās* as a „mode of resorting to the textual sources".[97]

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]

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[94] Anderson (1971), p. 13.
[95] Anderson (1971), p. 14.
[96] Hallaq (1997), p. 214 et seq.
[97] Layish (2004), p. 95.
[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 shar´iyya* 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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[99] Layish (2004), p. 93.
[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.
[103] Hamdi (1998), p. 26.
[104] Hamdi (1998), p. 26.

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, *ijmā´* and *qiyās* al-Turābī suggests *istiḥṣān*[105]and *ḍarūra*[106] 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 *´ulamā`* and the state. Al-Turābī clearly sidelines the *´ulamā`* whom he holds responsible for the lack of progress in the Muslim world. This backwardness can only be overcome by *ijtihād* which, in turn, is a task for all Muslims and not a monopoly of the *´ulamā`*. 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 *ijtihād* 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 *fīqh*, are time-bound. The contemporary legislation and application of the *sharī´a*, 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.

[105] "A discretionary opinion in breach of strict analogy for reason of public interest or convenience". Layish (2002), p. 320.
[106] Necessity.
[107] Eclectic expedient.
[108] Hamdi (1998), pp. 88-89.
[109] El-Affendi (1991), p. 171.
[110] El-Affendi (1991), p. 171.
[111] El-Affendi (1991), pp. 171-172.
[112] For this analysis of al-Turābī´s legal methodology: Layish (2004), pp. 104-105 and Vikør (2000), p. 239. See also Hamdi (1998) and El-Affendi (1991).
[113] El-Affendi (1991), p. 161.

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.[114] 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 *sharī´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 *sharī´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 *sharī´a* and its principles are indeed the main source of the code? How can the relation between *sharī´a* and non-*sharī´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 *sharī´a* and what articles do not. Whenever they do I will establish the sources in the *fiqh*, whenever no connection with the *sharī´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 *sharī´a*-based parts of the CA91 and its predecessor code, the Penal Code 1983 is. What has it kept in terms of *sharī´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 *sharī´a*, the Common Law and customary law were and whether these have fundamentally changed with Numairi´s " Islamic legal revolution". Is the *sharī´a* now really dominant with regard to its non-*sharī´a* environment in which it operates? And if not, how can the relationship between the *sharī´a*-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-Bashīr 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 *sharī´a*-based laws in the various criminal codes. I will do so by examining three aspects: firstly, the interpretation of substantive law in the two *sharī´a*-based criminal codes, secondly, procedure and proof and, thirdly, the actual enforcement of the *sharī´a*-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 *fuqahā'* to limit the application of the *ḥudud*? How do these procedures relate to the *sharī'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 "*sharī'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.[115] 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.[116] 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-Bashīr 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

[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-Nūr[120]. 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 law[121] 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

[117] For bibliographies on the Penal Code 1983 and the historical development of Sudanese criminal law see also Layish/Warburg (2002), Bleuchot (1994), Köndgen (1992).
[118] Vasdev, Krishna: The Law of Homicide, London 1978.
[119] Vasdev, Krishna: The Law of Evidence, London 1981.
[120] Al-Nūr, ´Awaḍ al-Ḥasan: al-qanūn al-jinā`ī al-islāmī al-sūdānī 91. sharḥ al-qism al-´āmm wa l-ḥudūd. al-Kharṭūm, 1991.
[121] Al-Nūr, ´Awaḍ al-Ḥasan: mausū´a al-ijrā´āt al-jinā`iyya al-sūdāniyya – wa nuṣūṣ qānūn al-ijrā`āt al-jinā`iyya 1983 mu´adalan ḥattā 1990 (m) wa lā`iḥa al-mudun wa al-ariyāf 1989 (m), Omdurman, n.d.
[122] Al-Nūr, ´Awaḍ al-Ḥasan: ḥuqūq al-insān fī al-majāl al-jinā`ī fī ḍau` al-fiqh al-islāmī wa al-qānūn al-sūdānī wa al-mawāthīq al-duwaliyya. dirāsa muqārina. n.p. 1999.

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".[123] Hamo, next to criminal responsibility discusses *ḥadd*- and *qiṣāṣ*-crimes and *diya* and concludes with a short section on *ta´zīr*. 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 ´Abd al-Mun´im Ḥassūna 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.[124] A year later she published a work on the different kinds of homicide, the *ḥudūd* and *qiṣāṣ*,[125] followed by a study on proof of *ḥudūd* and *qiṣāṣ*.[126] All studies by Ḥassūna are clearly structured and well documented.[127] 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. Ḥassūna also authored a general commentary on proof which compares the Evidence Act 1994 with the *fiqh* and Sudanese Supreme Court case law when available.[128] The latter is especially interesting to the researcher because some unpublished Supreme Court cases are used which would otherwise be unavailable.

A colleague of Ḥassūna at the Supreme Court is ´Abd Allah al-Fāḍil `Īsā[129], who has published commentaries on the Criminal Act 1991[130], the Criminal Procedure Act 1991[131]

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[123] Hamo, Ahmed Ali: Lectures on the Criminal Law of the Sudan 1991, Khartoum 1992.

[124] Ḥassūna, Badriyya ´Abd al-Mun´im: sharḥ al-qism al-´āmm min al-qānūn al-jinā`ī al-Sūdānī lisana 1991. fiqhan-wa tashrī´an- wa qaḍā`an. n.p., 2000.

[125] Ḥassūna, Badriyya ´Abd al-Mun´im: jarā`im al-qatl al-´amd wa shibh al-´amd wa al-khaṭā` wa jarā`im al-ḥudūd fī al-sharī´a wa al-qānūn. al-Kharṭūm 2001.

[126] Ḥassūna, Badriyya ´Abd al-Mun´im: ithbāt jarā`im al-ḥudūd fī al-sharī´a wa al-qānūn. dirāsa muqārina, n.p., 2002.

[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.

[128] Ḥassūna, Badriyya ´Abd al-Mun´im: sharḥ qānūn al-ithbāt lisana 1994 (m) fiqhan – tashrī´an – qaḍā`an. al-Kharṭūm 2003.

[129] He was also one of my interview partners. I have met him during my first trip, during my second trip to Khartoum ´Īsā was on a secondment in the Gulf.

[130] `Īsā, ´Abd Allah al-Fāḍil: sharḥ qānūn al-jinā`ī li´ām 1991 m. n.d.

and the Evidence Act 1993.[132] 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*.[133] `Īsa´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 Yūsuf.[134] Yūsuf´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.[135] 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.[136] 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[137] and Ismā´īl[138]. 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.[139] 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.[140] Al-Amīn

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[131] `Īsā, ´Abd Allah al-Fāḍil: qānūn al-ijrā´āt al-jinā´iyya 91. al-Kharṭūm 2004.
[132] `Īsā, ´Abd Allah al-Fāḍil: sharḥ qānūn al-ithbāt lisanat 1993 muqārinan bil-qawānīn al-sābiqa. n.d., n.p.
[133] Unfortunately the printing quality of the copy in my possession left a lot to be desired.
[134] Yūsuf, Y. `Umar: al-wasīṭ fī qānūn al-ijrā´āt al-jinā´īyya. n.p., 2002.
[135] It seems that there are hardly any authors who equally cover both fields.
[136] Ḥāmid, Tāj al-Sirr Muḥammad: muḥāḍarāt fī al-qānūn al-jinā`ī (jarā'im al-´irḍ wa al-ādāb al-´āmma), n.d., n.p.
[137] al-Ṭāhir, Ḥājj `Ādam Ḥassan: sharḥ qānūn al-ithbāt al-sūdānī. al-Kharṭūm 2003.
[138] `Ismā`īl, Muḥammad al-Fātiḥ: al-ta´līq ´alā qanūn al-ithbāt al-sūdānī lisanat 1994 m fiqhan wa qaḍā`an. al-Kharṭūm 2002.
[139] `Ismā`īl, Muḥammad al-Fātiḥ: al-ta´līq ´alā qanūn al-ithbāt al-sūdānī lisanat 1994 m fiqhan wa qaḍā`an. al-Kharṭūm 2002.
[140] al-Amīn, Muḥammad ´Alī: tanfīdh al-ḥudūd fī al-fiqh al-islāmī wa taṭbīqātuhu fī al-maḥākim al-sūdaniyya, al-Kharṭūm 2009.

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 Khalīfa 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.[141] 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 (Qiṣāṣ and Diyah) in the Sudan" was submitted at Temple University in Philadelphia in 1986 by Mohamed A. El-Sheikh.[142] 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".[143] 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 *sharī´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

[141] Ḥāmid, Muḥammad Khalīfa: mausū´a al-manshūrāt al-jinā`iyya. dirāsa ta`ṣīliyya fiqhiyya muqārina. al-juz` al-awwal. n.p., n.d., Ḥāmid, Muḥammad Khalīfa: mausū´a al-manshūrāt al-jinā`iyya. dirāsa ta`ṣīliyya fiqhiyya muqārina. al-juz` al-thānī. n.p., n.d. , Ḥāmid, Muḥammad Khalīfa: mausū´a al-manshūrāt al-jinā`iyya. dirāsa ta`ṣīliyya fiqhiyya muqārina. al-juz` al-thālith. al-Kharṭūm, 2002, Ḥāmid, Muḥammad Khalīfa: mausū´a al-manshūrāt al-jinā`iyya. dirāsa ta`ṣīliyya fiqhiyya muqārina. al-juz` al-rābi´. al-Kharṭūm, 2002, Ḥāmid, Muḥammad Khalīfa: mausū´a al-manshūrāt al-jinā`iyya. dirāsa ta`ṣīliyya fiqhiyya muqārina. al-juz` al-sādis. al-Kharṭūm, 2002.

[142] El-Sheikh, Mohamad A.: The Applicability of Islamic Penal Law (Qiṣāṣ and *Diya*h) in the Sudan. Philadelphia 1986.

[143] Zein, Ibrahim M.: Religion, Legality and the State: 1983 Sudanese Penal Code. Dissertation Temple University, 1989.

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 *sharī´a* Osman´s "The Political and Ideological Development of the Muslim Brotherhood in Sudan. 1945-1986" is indispensable.[144] 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-Ikhwān bias. The work, similarly to Zein´s, also benefits from a large number of interviews with key Ikhwān 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.[145] 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 Numairí´s introduction of *sharī´a*-based criminal law in 1983 and the relationship of the Penal Code 1983 with the legal reasoning of the *fuqahā`*.

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.[146] 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.

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[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).

[145] Köndgen, Olaf: Das Islamisierte Strafrecht des Sudan. Von seiner Einführung 1983 bis Juli 1992. Deutsches Orient-Institut, Hamburg 1992.

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.[147] 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.[148]

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.[149] 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”[150] 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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[146] Bleuchot, Hervé: Les Cultures Contre l´Homme? Essai d´Anthropologie Historique du Droit Pénal Soudanais. Aix-en-Provence 1994.

[147] Awad, Siham Samir: The Impact of the Application of Sharia Law on the Rights of Non-Muslims in the Light of International Principles: The Case of Sudan. Institute of Comparative Law, McGill University, Montreal, March 1995.

[148] El-Bushra, M. El-Amin: Criminal Justice & Crime Problem in Sudan. Khartoum University Press, Khartoum 1998.

[149] Layish, Aharon/Warburg, Gabriel: The Reinstatement of Islamic Law in Sudan under Numayrī. An Evaluation of a Legal Experiment in the Light of its Historical Context, Methodology, and Repercussions. Leiden/Boston/Köln 2002.

[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.

academic angle".[151] 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 *ḥadd*-crimes in the Criminal Act 1991 and the Evidence Act 1993 are in harmony with the *sharī´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 ´Uthmān ´Umar under the supervision of the former Supreme Court judge Zakī ´Abd al-Raḥmān.[153] ´Umar, 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 ´Umar´s work.

In summary, the functioning of Islamic criminal law under al-Bashīr, apart from ´Umar´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

[151] Layish / Warburg (2002), p. xviii.
[152] Scholz (2000) and Sidahmed (2001).
[153] Aḥmad ´Uthmān ´Umar: athr al-tashrī´āt al-īslāmiyya fī al-niẓām al-qānūnī al-Sūdānī. jāmi´a al-Kharṭūm, 2002. It is the only Sudanese Ph.D dissertation I could get hold of that – at least partially – covers the Islamised criminal legislations of 1983 and 1991. More studies in Arabic language might be found in the library of the Sudanese judiciary. My search in libraries at the University of Kharṭum did not yield any results.

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.[155] 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.[156] 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.[157] Since the application of the *sharī´a* (*taṭbīq 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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[154] I have not seen the definitive version of Carolyn Fluehr-Lobban´s "Shari´a and Islamism in Sudan: Conflict, Law and Social Transformation", I.B. Tauris, London, forthcoming in 2012.
[155] ´Umar´s thesis has not been published and only few copies seem to circulate in the Sudan.
[156] Exceptions are Sidahmed (2001) and Aḥmad ´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-Bashīr. 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-Bashīr 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.[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.[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.[161] An invaluable source with regard to Sudanese laws is a Compact Disc produced by the Institute of Training & Law Reform (*ma´had al-tadrīb wa al-iṣlāḥ al-qānūnī*) titled "Encyclopedia of the Laws of the Sudan" (*mausū´a qawānīn al-Sūdān*). This CD contains most major Sudanese laws from 1901 until 2003.[162]

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[159] *ḥudūd* and *qiṣāṣ*, see art. 5, CA91.

[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.

[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.[163] 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.[164] 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.[165] With regard to criminal matters cases concerning the death penalty, single and cross-amputations are decided by a five-member panel.[166] Normally decisions are final, only when the Chief Justice deems a decision to contradict the *sharī´a* or when it contains errors pertaining to the law, its application or its interpretation a panel of five judges will review it.[167] 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.[168] 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.[169] 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.[170] 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

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[162] mausū´a qawānīn al-Sūdān min 1901 ilā 2003 m. ri`āsa al-jumhūriyya – majlis al-´adl, ma´had al-tadrīb wa al-iṣlāḥ al-qānūnī. al-Kharṭūm 2003.
[163] Apart from the Constitutional Court which only decides on questions of constitutionality.
[164] Lists of Supreme Court judges can be found in the SLJR. The lists contain more names than seventy. At any given time a certain number of judges is not on active duty but seconded. Some might work in the Gulf, some judges of Southern origin have left for Southern Sudan.
[165] Mallat (2009), p. 213.
[166] qānūn al-hai`a al-qaḍā`iyya lisana 1986, article 17 (2).
[167] The majority of judges taking part in such a panel must not have taken part in the original decision which is to be reviewed. Art. 188 (a) 1-3, Criminal Procedure Act 1991 (amended 2002).
[168] Other persons who satisfy the requirements can also be appointed.
[169] qānūn al-hai`a al-qaḍā`iyya lisana 1986, article 17 (1).

of justice".[171] 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.[172]

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.[173]

Supreme Court instrumental in controlling sharī'a *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-Bashīr 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.[174] All Supreme Court judges I have interviewed insisted,

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[170] Article 181, Criminal Procedure Act 1991.
[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.[175] While this claim cannot be corroborated[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 *qiṣāṣ* 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 *sharī´a* (*aḥkām al-sharī´a al-Islāmiyya*) the Chief Justice has the right to constitute another five-member panel.[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.[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.[179] According to Luṭfī "the government can thus conceal a case".[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 *qiṣāṣ*-offences.[181]

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[175] Interviews with Supreme Court judges in May 2009.
[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.
[177] qānūn al-ijrā`āt al-jinā`iyya lisana 1991, article 188 (a).
[178] See article 39.
[179] Interview with Jalāl Luṭfī, 7 June 2004.
[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.
[181] Article 58 (2).

His decision is final and cannot be contested.[182] It goes without saying that these provisions are in conflict with the right of the Supreme Court to review any case it wishes.

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 *ḥudūd* and *qiṣāṣ* into Sudanese criminal legislation have also given rise to precedents which rely on and derive authority from the *fuqahā´* and their legal reasoning. It goes without saying that a Supreme Court wouldn't deserve its name if *taqlīd* or the (uncritical) imitation of the elders were to be the only method used. Where Supreme Court case law goes beyond the *fuqahā'* 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

[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".[183] 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.

[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-Bashīr 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.[184] 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.[185]

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 Ṭāhā 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 *ḥirāba* 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 ḥaddiyya* 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-qaḍā´iyya al-Sūdāniyya*). 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-haiʿa al-qaḍāʿiyya*), 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- istiʿnāf*) in the fields of criminal law (*qaḍāyā al-jināʿiyya*), family law (*qaḍāyā al-aḥwāl al-shakhṣiyya*) 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. [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 regrettably 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 Ṣādiq al-Mahdī and the late Jalāl Luṭfī, at the time of my first visit President of the Sudanese Constitutional Court (*al-maḥkama 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.[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

[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.

[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 ʼAbd al-Qādir ʼAwda. With one exception I did not see editions of major works of the *fuqahāʻ* 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 ʼUthmān who proved as unreachable as his deputy Muḥammad Ḥamad Abū Sinn.[192] In order to obtain relevant statistical material with regard to the overall volume of *sharīʼa* 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.[193] 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.

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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 couldnʼt 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 Fatḥī Khalīl Muḥammad. Being the president of the Sudan Bar Association (*naqīb al-muḥamīn al-Sūdānīīn*) he is a representative of the al-Bashīr regime and a staunch advocate of *sharī´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. Ḥasan al-Turābī and its Foreign Relations Secretary Dr. Bashīr Ādam Raḥma. During both trips it equally proved impossible to meet with one of the authors of the PC 1983, Badriyya Sulaimān, 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 Mikashfī al-Kabbāshī, 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´afar al-Numairī. 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-Turābī and Ṣādiq al-Mahdī. Both shared with me their necessarily subjective view of „what happened" and their contribution to it. When I asked Dr. al-Turābī 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

[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 Ḥasan al-Turābī 13.05.2009.
[197] al-Turābī was Minister of Justice and Attorney General between May 1988 and February 1989. See Lesch (1998), p. 223-224.

Criminal Bill had been a project of his ministry.[198] Ṣādiq al-Mahdī likewise denied that he had had the political leverage to abolish the *sharī´a* when he was prime minister.[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.[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 *sharī´a*-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

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[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 resistence 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.

[199] Interview with Ṣādiq al-Mahdī 9.6.2004.

[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-Bashīr 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 Köndgen (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*.[202] 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.[203]

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 *ta'zīr*-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

[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[204] 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.

[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.