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

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2 Historical development of Islamic law in the Sudan

2.1 Law in the Funj-Sultanate (1504- 1821) and in Dār Fūr (1640-1916)[205]

The Funj-Sultanate in Sinnār dominated northern Sudan between 1504, after the collapse of the Christian kingdoms of Soba and Dongola, and 1820/21, the year Muḥammad `Alī´s troops conquered the Sudan. Early jurisdiction under the Funj – who had adopted Islam under their first king ´Amara Dunqas (1504-1534) – was marked by only limited knowledge of the *sharī´a* and the dominance of customary law. The institution of *qāḍī* was known but rare in the early phase of the kingdom of Sinnār.[206] A salient feature of the Fūnj jurisdiction was that all those the king deemed to be guilty were executed, irrespective of the severity of their crime.[207] Only the king himself could impose the death penalty. Those found guilty of intentional homicide were often handed over to the heirs of the victim for execution.[208] At the end of the 16th and the beginning of the 17th century Shaikh `Ajīb the Great of Qarrī[209] nominated more often *qāḍī*s from among the *fuqarā*.[210] After his downfall it took almost a century before leading *fuqarā* could take over again the function of a *qāḍī* in Qarrī.[211] During the 17th century Sinnār saw an important economic revival and the ensuing presence of a

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[205] It should be noted that the historical introduction follows closely Köndgen, Olaf: Sharia and National Law in the Sudan. In: Otto, Jan Michiel. Sharia Incorporated, Leiden University Press, Leiden 2010, pp. 181-230.
[206] Spaulding (1977), pp. 411- 412.
[207] Spaulding (1977), p. 411.
[208] Spaulding (1985), p. 6.
[209] Provincial capital in the North of Sinnār.
[210] The double meaning of *faqīh* and faqīr (sg.*faki/fuqarā*) in Sudanese Arabic expresses the range of their functions, oscillating between mystic and legal scholar. On this double role compare Trimingham (1965), p. 140.

large number of foreign merchants called for the creation of orthodox Islamic institutions. Flogging and execution proved to be unsuitable means for the settlement of conflicts between traders. While there were *muftīs* for all schools, the Mālikīte *madhhab* became the predominant one in Sinnār,[212] taught and propagated by scholars from the Hedjas and Egypt and West African pilgrims. Alongside a minority of Shāfi´ītes existed.[213] Between 1675 and 1725 Sinnār experienced a phase of transition during which new cities were growing and a new, local, merchant class came into being. Just like their predecessors, the foreign traders, this new merchant class had a practical need for Islamic legal institutions. This led to the appointment of *qāḍīs* for the new urban centers in Northern Sinnār.[214] After the downfall of the Ūnsāb, the leading house of the Fūnj, in 1718 and the de facto rule of the Hamaj (from 1762) the role of Islam as a source of legitimacy became more important. A new pyramidal institution, the "National Qadirate" (Spaulding) came into being. In this new system a chief-*qāḍī* was appointed by the Sultan to whom he was responsible. The chief-*qāḍī* chose the *qūḍāt* of the lower echelons and had the power to revise and annul their decisions and impose a different verdict. An appeal to the king's justice was still discouraged by the threat of execution of the defeated party. Intentional homicide and other capital crimes continued to be judged by the king himself.[215] In cases of intentional homicide the *qāḍī* would ask the heir of the victim whether he wished "blood or money". If the heir accepted financial compensation he and the killer would agree on the amount to be paid. Part of the money was to be paid directly to the *qāḍī*. If the heir insisted on the execution of the killer the case would be handed over to the king's justice and the killer was to be executed immediately. Another important feature of the jurisdiction of the National Qadirate were the replacement of corporal punishments by fines. These were paid for theft (if the stolen good could be retrieved), libel, physical assault, adultery and homicide (if the heirs accepted blood money). Brocchi[216] relates that collective liability was common. If an accused person escaped his relatives were shackled and incarcerated until the accused turned himself in.

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

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[211] Spaulding (1977), p. 413.
[212] Fluehr-Lobban (1987), pp. 23-26.
[213] O´Fahey and Spaulding (1974), p. 73.
[214] Spaulding (1977), p. 413.
[215] Spaulding (1977), p. 418.

1800 and 1811. In these law suits the decision was pronounced twofold, once by the provincial king and then by the *qāḍī*. The first was confirmed by notables, the second by the *´ulamā`*. Thus the prevailing party had obtained a verdict based upon the *sharī´a* as well as customary law.

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

Like in Sinnār Islamic law coexisted also in Dār Fūr, the second important Sultanate, with customary law, with the former gaining importance in the higher echelons of Fūr society. The king or a *maqdūm*[219] dispensed justice normally after having consulted with a group of *fuqarā*. In contrast, within village communities crimes were solved internally. The most severe sanction was the expulsion from the village. Outside the village community *shartays*, *dimlijs*[220] and local landlords administered justice and earned therewith an important part of their livelihood. Fines, which played an important role in the customary law of the Fūr, were to be paid for homicide, theft, adultery, assault, and libel and were split between those administering the law. Judicial proceedings that were meant to restore peace *between* villages after violent clashes or homicides were considered an affair of the state. In such cases the *shartay* imposed a financial compensation on the community of the offender called either "big blood" (*dam kabīr*) or "small blood" (*dam saghīr*). Those who were guilty of intentional homicide, however, were often sent to al-Fāshir where they were beaten to death or hanged.

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

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[216] Giovanni Battista Brocchi (1772-1826), Italian botanist, geologist and orient traveller.
[217] Spaulding (1977), p. 424.
[218] Spaulding (1977), p. 424.
[219] The title *maqdūm* was used as of 1800 in Dār Fūr for representatives of the king who governed a specific region or had the mandate to wage war. Compare O´Fahey (1980), p. 87 et seq.
[220] The four provinces of Dār Fūr were divided into approximately 12 districts (*shartaya*) and subdivided into smaller local administrative units (*dimlijīya*), consisting of 2-3 villages each. On the administration of Dār Fūr see O´Fahey (1980), p. 69 et seq.

Until `Alī Dīnār (1898-1916) restored the Sultanate of Dār Fūr some families of *fuqarā* provided *qāḍīs* for several generations, serving the Sultan and his governors.[221] However, despite the existence of the *fuqarā* and the *qāḍīs* who were recruited from the midst of their ranks, penal law seems to have been entirely a domain of customary law, '[…] there is no evidence that the *shari´a* punishments were ever imposed'.[222] The *fuqarā* confined themselves to advise the *shartay* in his decisions regarding criminal cases according to customary law.

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

It was under Ottoman-Egyptian rule (1820-1881) that, for the first time in their history, the North and the South of the Sudan gradually became united. Sinnār and Dār Fūr, which had formed distinct political entities, were now administratively and politically united and ruled by the central government in Khartoum. In harmony with the new administrative centralism, a centralized judiciary was created for the first time with a hierarchical system of local courts of first instance (*majlis maḥallī*)[223] for each district and a provincial council and a mufti for each province. While the province *qāḍī* presided over the province council his decisions had to be confirmed by the mufti of the province. These province councils functioned as courts of original jurisdiction as well as appellate courts. On the highest level was an appeals court in Khartoum (*majlis ´umūm al-Sūdān*). Any decision of the appeals court had to be endorsed by the highest *muftī* and the governor-general and was sent for final approval to the highest judicial body in Egypt, the *majlis al-aḥkām* in Cairo.[224] Egyptian-Ottoman dominance and the introduction of a unified court system also meant the introduction of Ḥanafite law.[225]

Which laws were actually applied by the Egyptian administration remains to a certain degree unclear, as relevant archives were later destroyed by the Mahdi's army.[226] According to Mustafa in some instances *shari´a* was applied, in other cases Egyptian military and civil codes appear to have been implemented.[227] In more remote areas, justice was administered

[221] O´Fahey (1980), p. 112.
[222] O´Fahey & Abu Salim (1983), p. 9.
[223] Hill (1959), p. 43.
[224] Mustafa (1971), pp. 37-38 and Hill (1959), p. 43.
[225] The Mālikite *madhhab* was the traditional school in the Sudan until the introduction of the Ḥanafite school.
[226] As to the paucity of studies of this era see Bleuchot (1994), pp. 161-185 and Köndgen (1992), p. 15.
[227] Hill relates that at the beginning of the Egyptian rule the law was mainly applied to the personnel of the government. In the correspondance dealing with criminal investigations and trials the Sudanese are hardly mentioned. Hill (1959), pp. 43-44.

according to customary law.[228] As of 1858, a new Ottoman penal code was introduced as part of the tanẓīmāt reforms and implemented through a newly created system of secular courts (Niẓāmiyye).[229] Whether this code was also applied in the Sudan is not certain. Bleuchot concludes that there is neither evidence of the application of Ottoman criminal legislation in the Sudan nor of the existence of any special codes applicable in the Sudan only.[230] The Egyptian codes would be applied, Sudan being part of Egypt. He also points out that none of the travelers, i.e. western eyewitnesses, of the time report amputations. In contrast, excessive whipping seems to have been the order of the day. What seems to be clear is that justice was dispensed for the majority of the population mainly according to customary laws. If a crime was committed within a tribe the case would be handled by the traditional tribal institutions and be settled with the payment of financial compensation. However, if offender and victim belonged to different tribes and intertribal peace was jeopardized the public authorities had to intervene.[231]

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

Ottoman-Egyptian rule ended when the Mahdi's army conquered Khartoum in 1885. Muḥammad Aḥmad al-Mahdī (1843-1885), a religious renovator, had set out to liberate the Sudan from its 'infidel' oppressors, i.e. the Turks, by means of *jihād*. Consequently, after the conquest all verdicts of the judges of the Egyptian-Ottoman rule, which was equated with the *jāhiliya*, were declared void. Using the early community of Muslims as a model, he aspired to restore the religious purity of the Prophet Muhammad's time. The only sources of the Mahdi's legislation were thus Qur´an and Sunna in his, often idiosyncratic, interpretation. His large number of legal circulars (*manshūrāt qawā´id al-aḥkām*) was frequently in conflict with the traditional Sunni schools of law. Thus, for example, he stipulated 100 lashes for women who entered public streets or market places.[232] Hardly in harmony with the *fiqh* the Mahdi deemed smoking a more severe crime than drinking alcohol. While the former is punishable

[228] Mustafa (1971), p. 37.
[229] Anderson (1960), p. 293.
[230] Bleuchot (1994), pp. 173-175.
[231] Bleuchot (1994), pp. 174-175.
[232] Holt (1958), p. 114.

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

The highest power of jurisdiction was held by the Mahdi himself, who delegated his prerogative to hear and decide cases to the *qāḍī al-Islām*[238] and to provincial, district and military judges. The *khulafā`*[239], the military governors and the *ashrāf*[240] also administered justice. The *qāḍī al-Islām*, being the highest judge in the country, had to ensure that all judgments were based on the Qur´an, the Sunna and the judicial circulars of the Mahdi himself only. To what degree the former authority of the *´ulamā`* had decreased is illustrated by the following incident: after the governor of Dār Fūr had sent some judgments to the Mahdi for confirmation, the *qāḍī al-Islām* admonished him for having followed the advice of the *`ulamā´* in his judicial reasoning. He reminded him that the Mahdi´s decrees had rendered the *fiqh* obsolete.[241]

After the death of the Mahdi, under the rule of his successor ´Abdullāhi (ruled 1885-1898) jurisdiction theoretically still followed Qur`an and Sunna, the *fiqh*, as before under the Mahdi, was to be disregarded. In actual practice, however, the double loyalty to ´Abdullāhi on the one hand and the *fiqh* on the other caused tensions and resulted e.g. in the deposition of the *qāḍī*

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[233] Holt (1958), p. 115. Mustafa (1971) writes that smoking was punishable by 27 lashes. (p.39). In contrast, Bleuchot relates that drinking alcohol and smoking were equally punished by 80 lashes. According to him 27 lashes was the prescribed punished for the buyer of tobacco (and thus not the smoker). Bleuchot (1994), p. 192.
[234] According to Bleuchot the prescribed punishment for the refusal to perform the ritual prayers was execution and the confiscation of his property. Bleuchot (1994), p. 192.
[235] Mustafa (1971), p. 39.
[236] Safwat (1988), p. 236.
[237] Bleuchot (1991a), p. 4.
[238] For ten years this office was held by Aḥmad Wad ´Alī who had been judge during the Turkiyya. Bleuchot (1994), p. 188.
[239] The three highest representatives of the Mahdīyya. Holt (1958), p. 158 et sqt.
[240] Relatives of the Mahdi. Holt (1958), p. 96.
[241] Holt (1958), p. 116.

al-Islām Ḥusain Ibrāḥim w. al-Zahrā, who had been in office only a short time.[242] The court structure was modified. Alongside courts dealing with market disputes or claims against the treasury (*bait al-māl*) a special court (*maḥkama radd al-maẓālim*) was created which dealt with claims against the corruption and arbitrariness of the ruling elite, e.g. governors, army commanders and princes. Judges in the provinces dispensed justice in cooperation with one or two notables, selected by them. Their decisions had to be submitted to the highest judicial council in Omdurman. Judgments of the members of this council were signed and sealed by the *qāḍī al-Islām*, only cases of intentional homicide were dealt with by the *qāḍī al-Islām* himself. The more severe cases had to be confirmed by the Khalīfa ´Abdullāhi himself.[243]

2.4 The Condominium and the Introduction of British-Indian law (1898-1956)

Between 1896 and 1899 a joint Anglo-Egyptian army conquered the Sudan and the Anglo-Egyptian condominium was established, which made the Sudan effectively another British dependency. The judicial structures of the Mahdiyya had been centered largely around the Mahdi himself. Their collapse, thus, meant that the 'Anglo-Egyptian colonial administration had to start from scratch'[244] since, or so the British thought, there was no local personnel with suitable experience to run the new administration.[245] When planning for the new legislation the new rulers could not ignore that the Sudanese were deeply religious and that the predecessor state had been a theocracy. Therefore, when Lord Cromer, the British Consul General explained British policy to religious notables in 1898 he promised respect and non-interference with the Islamic religion. When questioned he asserted that this would imply the application of Islamic law.[246] This promise, however, had its limits, as was to be seen later.

Shari´a *and penal law after the British-Egyptian conquest*

Shortly thereafter, the colonial administration was to fulfil its promises, at least partially. The Mohammedan Law Courts Ordinance of 1902 and the Mohammedan Law Courts Procedure Act of 1915 provided the basis for the creation and procedures of the Mohammedan Law

[242] Holt (1958), p. 243. The first *qāḍī* al-Islām had been in office about ten years, his successor was deposed after just approximately one year. No new *qāḍī al-Islām* was appointed after that. The successor was called *qāḍī al-´umūmī*. See Bleuchot (1994), p. 189.
[243] Bleuchot (1994), pp. 188-189.
[244] Salman (1983), p. 66.
[245] Mustafa (1971), p. 42.
[246] Salman (1983), p. 66.

Courts. These courts administered the *sharī´a* in personal status cases and in litigation regarding pious foundations (*awqāf*). They were staffed by mostly Egyptian and some Sudanese religious notables. Until independence, the Grand *Qāḍī* was Egyptian.[247] In principle, litigants could appeal to the Mohammedan Law Courts also in other domains of the law, including penal law, provided they had bindingly confirmed to submit to Islamic law.[248] This option can be traced back to Lord Cromer´s promise to allow for Islamic jurisdiction whenever a Sudanese claimant expressly wished its application. However, this regulation remained theoretical and was never applied in practice. Sudanese Muslims appealed to the Mohammedan Law Courts in cases concerning family law and pious foundations only.[249] Decisions of the Mohammedan Law Courts were based on the Ḥanafite *fiqh* which had been introduced under Ottoman-Egyptian rule (1820-1881).[250] The Mohammedan Law Courts Ordinance provided for the Grand *Qāḍīs* to issue legal circulars (*manshūrāt*) functioning as provisions and regulating the interpretation of the *sharī´a*. Being published regularly, as they were, these circulars constituted a precursor to codification, an innovation "the Egyptian *´ulamā`* appear not to have opposed".[251] Lord Cromer held the opinion that a simple version of civil and penal law was sufficient for the Sudan. The new civil servants were to be chosen carefully and were to be endowed with far-reaching powers in order to enable them to do justice to the specific characteristics of the country. To apply Egyptian or Islamic law in civil or criminal matters was not considered, the British had no interest in allowing their Egyptian partners a dominant position in legal matters other than those related to family law and *awqāf*. Within the framework of the condominium, the Egyptians were generally kept at bay and only filled the lower ranks in the colonial administration. The first Penal Code and a Criminal Procedure Act were promulgated in 1899. The former was based on Anglo-Indian colonial legislation, the latter on Egyptian military law, which, in turn, had its origins in British military law. Both had been adapted to Sudanese conditions and the penal code had already been applied in the East African protectorates and Zanzibar. The penal code was revised in 1925. With regard to punishments provincial administrators and governors were allowed great leeway in the interpretation of the new penal code. The same crime could be punished

[247] Jeppie (2003), p. 2.
[248] Guttmann (1957), p. 407.
[249] Guttmann (1957), p. 407.
[250] Zein (1989), p. 175.
[251] Jeppie (2003), p. 2.

differently, depending on whether the culprit was a nomad, a Southerner, or an Arab. For intentional homicide e.g. the penal code stipulated capital punishment or a life sentence. If the killing had taken place among nomads, however, these penalties were normally not executed but instead, after a petition to the Governor General commuted into a shorter prison term or the payment of *diya*.[252] Native or tribal courts dispensing justice in the South and among Muslim nomads in the North received recognition only twenty years after the conquest.[253] Under Reginald Wingate, the Sudan's second governor-general[254], fear of a regenerated Mahdism led to a resolute suppression of what was perceived as heterodoxy. Thus, Sufi orders were denied recognition and surviving Mahdist leaders subdued. Concurrently, the *´ulamā'*, who had never been very important in the Sudan, were granted pensions and status. In 1912, an institute to train *´ulamā'*, emulating al-Azhar in Cairo, was opened in Omdurman. In addition, mosques were built and repaired and the pilgrimage to Mecca (*ḥajj*) was promoted in order to pre-empt 'fanaticism'.[255]

Refining the system

This strengthening of the *´ulamā'*, however, did not mean that *sharī´a*-based jurisdiction was allowed to gain ground. To the contrary, from 1920 native courts were effectively used to gradually supplant the *sharī´a* courts. In order to diminish the status of the *sharī´a* courts, native courts were now given concurrent jurisdiction on personal status issues, applying customary law. By 1929, a good number of *sharī´a* courts had been suppressed and native courts set up instead. However, even though reduced in number, *sharī´a* courts continued to exist throughout the era of the Condominium.[256] Throughout the time of the Condominium, the judicial system of the Condominium consisted of three divisions: *sharī´a* courts co-existed with civil courts where justice was dispensed according to British common law and so-called native courts where customary law was administered by tribal leaders.

[252] Warburg (1971), p. 126.
[253] Jeppie (2003), pp. 1- 2.
[254] Wingate replaced Herbert Kitchener as Governor-General of the Anglo-Egyptian Sudan at the end of 1899 and remained in office until the end of 1916.
[255] Daly (1997), p. 746.
[256] Jeppie (2003), p. 3.

2.5 Discussions on Islamic law before and after independence (1952-1969)

The path to independence and beyond

The Sudan's path to independence accelerated with a self-government Statute passed in April 1952. In January 1954 it was decided that within a period of three years the Sudanese had to reach a decision between independence and union with Egypt. Immediately after, a Sudanization committee was established and British officials started leaving the Sudan. In December 1955 the Sudanese parliament unanimously voted for independence. The Sudan's first, transitional, constitution was promulgated a month after the country achieved independence, in January 1956. It guaranteed parliamentary rule, the existence of a multi-party system, and free elections. It was intended to be a transitional constitution, later to be replaced by a permanent one. Instead, however, it survived three military takeovers and was revitalized whenever the military had to step down.[257] Three distinct main tendencies dominated the discussion about the future constitution and legislation between the years before independence and on into the seventies. Firstly, proponents of an Islamic constitution and legislation were represented above all by the Umma party, the Democratic Unionist Party, the Muslim Brothers, and some members of Sufi sects.[258] Secondly, the camp of the Nasserites, Ba´athists, and Arab nationalists advocated the Egyptianization of the Sudanese legal system, thus harmonizing it with the majority of socialist Arab states and dispensing with the British colonial heritage. Thirdly, a pragmatist camp endorsed the reform of the existing legal system, but rejected its complete replacement by either Islamic or Egyptian legislation. Most of the secular intelligentsia and graduates of the Law Faculty of the University of Khartoum belonged to this camp[259], as well as the prominent Sudanese jurist Jalāl Luṭfī who suggested in an article published in 1967 the retention of English law and its further development along the standards set in England itself. Luṭfī in a provident article anticipated later developments and warned of changes for the sake of short-lived political gains: "...if the situation is considered objectively, English law will no doubt continue as the main guidance for our future legal development. But if the tend is to follow opinion and ideas tainted and coloured with sentiment and emotions then any change to a different legal system will serve no purpose other than temporary political gain by those who are advocating it. If

[257] Warburg (2003), p. 144.
[258] Kok (1991), p. 240.
[259] Kok (1989), p. 461 et sqt. ; Kok (1991), pp. 237-243.

unnecessary change takes place – and I hope not – the result would definitely be a disastrous one".[260]

As early as September 1956 a committee began to draft a 'permanent' constitution. Sufi leaders such as Sayyid ´Abd al-Raḥmān al-Mahdī and Sayyid ´Alī al-Mīrghanī, joined by the Muslim Brotherhood, advocated an Islamic parliamentary republic with the *sharī´a* as the main source of legislation. Khartoum was to be the capital of a centralized system of government with Arabic as the official language and Islam as the religion unifying the nation.[261] Non-Muslims were to be granted all rights envisaged by the *sharī´a*. Racial or religious discrimination was to be excluded. Within a period of five years the Sudan was to be fully Islamized. Southern objections against Islamization and demands for a federal system were dismissed. Thus, when in November 1958 the military took over under General Ibrahīm dabbed, a national consensus on the permanent constitution had not been reached and the draft constitution had not yet been promulgated. The junta under dabbed abolished the provisional constitution of 1956, without, however, replacing it with a new one. Kook has pointed out that major developments under ´Abbūd´s rule laid the foundations, which would have a major influence on the decades to come. Thus, resistance in the South against the dictatorship developed into a full-fledged war for independence. Not least because of its resistance against the regime the Sudanese Communist Party increased its influence and became, until its demise in 1971, one of the most influential communist parties of the Arab world. The Muslim Brothers, while still being a young movement only founded in August 1954, equally widened their influence, especially among intellectuals and students.[262] ´Abbūd

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

[261] Kok (1989), p. 439.

[262] Kok (1989), p. 440.

had all political parties banned but allowed the Muslim Brotherhood, being a religious movement, to function. Already at this early stage of their existence, the Muslim Brotherhood was decided to usurp power, if necessary by violent means. In November 1959 it plotted, unsuccessfully, to overthrow the regime by way of an army cell, whose detection effectively ended the Brotherhood's freedom to act.[263]

Sudan's second democratic experience

After the downfall of ´Abbūd's military dictatorship in 1964, the Sudan lived through its second democratic stage. A slightly amended version of the transitional constitution of 1956 was re-enacted. However, solutions for the constitutional impasse as proposed by the different parties concerned had not materially changed. Thus, southern claims to self-determination and demands for a referendum on their future rapport with the Muslim North continued to fall on deaf ears, even with moderate parties in the North.[264] As of December 1967, a constitutional committee debated anew a future 'permanent constitution' and in early 1969 presented a draft defining the Sudan as a 'democratic socialist republic under the protection of Islam' (Art. 1). This formulation was meant to placate the left as well as the traditional Islamic right. Falling short of full recognition of the Sudan's religious plurality, Article 3 stipulated Islam as the state religion. The *sharī´a* was meant to be the main source of legislation and all existing laws were to be reviewed in order to bring them into conformity with the *sharī´a*.[265] The draft also set forth that the presidency would have been reserved for Muslims only, thus – in constitutional terms – turning Southerners into second-class citizens.[266]

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

At the beginning of 1969, the Sudan's two largest Sufi orders, Anṣār and Khatmiyya, agreed upon a common political program, providing for the creation of a presidential republic with an Islamist constitution. However, Numairi's coup d'état in May 1969 averted the ratification of this second constitutional draft. Backed by a coalition of Nasserites, communists and Ba´athists, Numairi immediately outlawed all political parties and revoked the transitional

[263] Warburg (2006), pp. 1-2.
[264] Warburg (2003), p. 146.
[265] Kok (1989), pp. 443-444.
[266] See also the revealing dialogue between Ḥasan al-Turābī and Phillip Abbas Gobosh in An-Na'im (1985), p. 329.

constitution in its 1964 version.[267] The new secularist and anti-sectarian regime in March 1970 bombarded the Anṣār in their stronghold on Aba Island during a head-on confrontation. Their Imam al-Hādī al-Mahdī was killed when trying to take refuge in Ethiopia so his nephew Ṣādiq al-Mahdī fled to Libya, where he, together with Ḥasan al-Turābī and Sharīf al-Hindī (Democratic Unionist Party), founded the anti-Numairi-coalition 'National Front'. Numairi's honeymoon with the Sudanese Communist Party (SCP), however, did not last long. Disagreements between him and the SCP on the creation of a single-party system and the ensuing power struggle came to a head when a communist coup attempt in July 1971 fell short of sweeping the Numairi regime away. However, with concerted Egyptian and Libyan help, a counter-coup brought Numairi back to the helm.[268] The secretary general of the SCP and hundreds of its members were executed. In the course of the ensuing political reorientation, the United States, Egypt and Saudi-Arabia became the Sudan's key allies.

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

Soon after Numairi's takeover, a good part of the legal system came under scrutiny, resulting in the enactment of a succession of new laws. Numairi, being himself a proponent of greater Arab unity, decided to bring the Sudanese legal system in line with many Arab states, which, in turn, had adopted important parts of the Egyptian legal system. He thus followed the demands of the pragmatist school, mainly represented by Nasserists, Ba´athists and Arab Nationalists who aimed at eliminating the colonial heritage. It did not seem to matter to the pan-arabist school that the Egyptian legal system was itself mainly based on French law and thus hardly an authentic Arab system that could claim to have overcome the colonial heritage.

A Law Reform Commission was appointed in 1970, ignoring the work of several earlier commissions which had been working on law reform since 1968.[269] The new commission composed a Civil Code written in Arabic.[270] The code, hastily drafted by a law reform commission consisting of 12 Egyptian jurists and three Sudanese lawyers[271], was, unsurprisingly, mainly inspired by the Egyptian Civil Code of 1949 and, thus, meant a radical

[267] An-Na´im (1985), p. 332.
[268] Numairi spent three days in prison and later claimed that this experience was the beginning of his "Islamic path".
[269] These commissions, established under Law Reform Commission Act 1968, had been charged each with a specific area of law. The work they had done since 1968 had been considerable and was completely ignored.
[270] al-qānūn al-maddanī lisanat 1971. jumhūriyya al-Sūdān al-dīmūqrāṭīyya, wizārat al-´adl, 31 mayū 1971.
[271] Kok (1991), p. 238.

shift from common law to continental (French) European law.[272] In the description of a Sudanese jurist, "[…] the commission proceeded to copy with impunity, and with trivial and sometimes absolutely meaningless amendments, section after section and chapter after chapter from the Egyptian Civil Code of 1949, flavoring it here and there with a slightly modified or differently phrased version from the Iraqi, Syrian, or Libyan Civil Codes."[273] In the same assembly-line fashion, a Civil Evidence Code (1971), Civil Procedure Code (1972), and draft penal and commercial codes (1972) were expeditiously produced. But Numairi's 'legal revolution' was not to last. The new codes were revoked in 1974, and the common law was restored once the regime's preoccupation with Arab unity had subsided and given way to other priorities.[274] Kok pointed out that the trend to egyptianize the Sudanese legal system has never really regained the momentum it had in the early 1970s despite a high production of law graduates of the Khartoum branch of Cairo University.[275]

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

[272] Amin (1985), p. 334.
[273] Kok (1991), p. 238.
[274] Kok (1991), p. 238.
[275] These outnumbered the common-law trained graduates by 1:8 in the early 1990s, Kok (1991), p. 238. On the 1984 Civil Transactions Act and its connections with Egyptian civil law see below.

understood the two to be on an equal footing, many southern politicians were opposed to the new constitution since it gave, in their view, too much weight to Islamic law and made Arabic the official language of the Sudan.[276] Indeed, article 9 would later, in September 1983, be invoked to justify the introduction of the *sharī´a*. Islam, however, was not declared the religion of the state. In recognition of Sudan's plurality, the new constitution guaranteed the principles of decentralization (articles 6 and 7) and self-government in the South on a permanent basis (article 8). The permanent constitution also confirmed that all Sudanese were "equal in rights and duties irrespective of origin, race, locality, sex, language or religion".[277] In 1974 the Sudan saw yet another wave of new legislation. With the defeat of the pan-Arabist trend, the pragmatist school this time had its way and neither the sharī´a nor Egyptian law played a significant role in the drafting process. Zaki Mustafa, Attorney-General and author of the seminal "The Common Law in the Sudan"[278] oversaw the drafting of the new legislation, called `a legislative revolution´ by president Numairi.[279] A Sales of Goods Act, a Contract Act, a new Civil Procedure Act, an Agency Act, a Penal Code, and a Criminal Procedure Act were all promulgated in 1974.[280] While the Civil Procedure Act simply repealed the Civil Justice Ordinance of 1929, the Contracts Act, the Sales Act and the Agency Act were for the most part codifications of the pertinent concepts of English law and the Sudanese precedents. As to the 1974 Penal Code, it was an adaptation of the penal code from 1925 and, likewise, free of *sharī´a* elements.

"The Islamic path" – Numairi finds new allies

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

[276] Warburg (2003), p. 166.
[277] Warburg (2003), p. 166.
[278] See references.
[279] The same wording was used by him in 1983 to describe the September laws.
[280] Köndgen (1992), p. 22.
[281] Numairi had published two books on his ideas of a truly Islamic Sudan. Both published in Cairo their titles were: al-nahj al-islāmī limādhā? (1980) and al-nahj al-islāmī kaifa? (1985).

by his advisors.[283] He also met with King Faysal of Saudi-Arabia to discuss "a new Islamic phase in Sudanese politics".[284] According to some reports Numairi had promised Faysal that a new constitution would make the Sudan an Islamic state. When the 1973 "permanent" constitution fell considerably short of this promise the financial aid promised by the Saudis was cancelled.[285] As to the sincerity of Numairi´s religious convictions the interpretations of observers vary. Khalid Mansour, who knew Numairi well after having served as foreign minister under him[286], underlines Numairi´s political motives and gives little credit to his religious intentions. He describes Numairi´s beliefs as "an incongruous mixture of Islam, superstition and belief in witchcraft and magic" and claims that Numairi was ignorant of "Orthodox Islam".[287] Warburg, a more distant observer, equally stresses the conjuncture between Numairi´s new religiosity and the rise of militant Islam in Iran and other Muslim states such as Egypt where the Muslim Brotherhood and Islamic student organizations had gained considerable importance under Sadat.[288] The heyday of secular leftist nationalism according to the Nasserist model was long gone by and Numairi had, according to another observer, "tried nearly all possible options, so at one time Islamism simply had to have its turn".[289] Clearly, Sudan's economic plight and the resulting need of financial aid from the petro-monarchies of the Arabian peninsula, especially Saudi-Arabia, made the reconciliation with the different Islamic movements, especially the Anṣār and the Muslim Brotherhood and Islamization in general seem advisable.[290]

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

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[282] Warburg (1990), p. 626.
[283] Warburg (1990), p. 625
[284] Warburg (1990), p. 625.
[285] Warburg (1990), p. 625.
[286] For a detailed profile of Khalid see Nkrumah, Gamal: Mansour Khalid: Rewriting Sudan with verve and passion. Rebel and maverick. Al-Ahram Weekly on-line, 24-30 April 2003, Issue No. 635. http://weekly.ahram.org.eg.
[287] Zein (1989), p. 101.
[288] Warburg (1990), p. 626.
[289] Durán (1986), p. 576.
[290] Warburg (1990), p. 626.
[291] Durān (1986), pp. 576 and Schulze (1990), p. 381.

abstain from alcohol (1976), Numairi gave the 'Islamic path' an important role in his 1977 electoral program. The same year saw the establishment of a committee for the revision of Sudanese legislation and the founding of the Faisal Islamic Bank, the first bank in the Sudan working according to Islamic principles.[292] In the meantime, domestic opposition to Numairi did not diminish. After several failed attempts to overthrow his regime between 1970 and 1975, the above-mentioned National Front came very close to toppling Numairi in 1976. This failed coup attempt was followed by a historical compromise with the leading opposition parties. Its leaders, Ṣādiq al-Mahdī and Ḥasan al-Turābī, were co-opted into the Sudanese Socialist Union (SSU). In turn, the National Front agreed to cease its military resistance. However, the Front proved unable to overcome its internal divisions. Aḥmad ´Alī al-Mīrghanī, the spiritual leader of the Khatmiyya had rejected an active role in Sudanese politics right at the start of the reconciliation and founded the "Islamic Revival Committee" which demanded, similar to the Muslim Brotherhood, a comprehensive application of the *sharī´a*. In October 1978, Ṣādiq al-Mahdī was criticized by parts of the Anṣār because of a perceived closeness to Numairi. He subsequently withdrew from the SSU in protest against Numairi's support of the Camp David agreement. Many followers of the Anṣār were not convinced of the national reconciliation and had remained in camps outside the Sudan, e.g. in Libya. Southern Sudanese were equally wary of the arrangement and argued that Anṣār and Muslim Brotherhood only had a place for Southerners as second-class citizens in the Islamic state they were striving for.[293] Ṣādiq al-Mahdī followed a tactic to sideline the Muslim Brotherhood, trying to prevent them from taking a leading role in the National Front and thus made it clear to al-Turābī that the Brotherhood would not gain power through elections nor by way of a violent takeover. The majority of Muslim Brothers nevertheless concluded that backing the Numairi regime was their best option. After the purges of the MB by the regime in the years 1973-1976, the Muslim Brotherhood was in a state of weakness. They believed that a possible loss of credibility in the eyes of the Sudanese public caused by cooperating with Numairi´s dictatorial regime would be outweighed by the strengthening of the organization and the experience their members would gain by working within the government apparatus. A small minority, which was critical of al-Turābī´s modernist views and called for

[292] To secure the success of the Faisal Islamic Bank its operations were exempted from taxation. Köndgen (1992), p. 32.

a closer union with the Egyptian Ikhwān preferred to break off in 1979 and establish their own organization.[294] As a possible explanation for al-Turābīs willingness to cooperate with Numairi Esposito has suggested that Numairis frequent demonstrations of religiosity had convinced the former of their congeniality. This assessment, however, seems rather doubtful. That al-Turābī himself seems to have had a rather sober view of this cooperation shows an interview where he stated "As long as President Nimairi keeps his word and allows us to function and to propagate Islam, we are satisfied. It is our advantage to support Nimairi, for whoever replaced him might be less tolerant or less religious".[295] Thus, al-Turābī and the Muslim Brotherhood began to fill government, SSU and other official positions. In August 1977, al-Turābī took over the chairmanship of the mentioned committee reviewing Sudanese laws for their compliance with the *sharī´a* and a month later he joined another committee reviewing the constitution.[296] The former found 38 out of 286 laws not in harmony with the *sharī´a*, among them the Penal Code, the Banking Act (because it made charging interest legal) and, interestingly the Southern Provinces Self-government Act, 1972, because it allowed for the development of customary law.[297] The committee further drafted laws banning alcohol, the charging of interest, and on gambling as well as draft laws on alms tax (*zakāt*), *ḥadd* punishments, and a law on the sources of legislation.[298] The *zakāt* draft law was ratified by parliament, but repealed due to difficulties with its application. In 1979 the position of the Muslim Brothers improved further when al-Turābī was appointed Minister of Justice and his close confidant Aḥmad ´Abd al-Raḥmān Minister of Higher Education.[299] Al-Turābī gained further influence by joining the Central Committee of the SSU in March 1980. In the same year the "Islamic Trend Movement", the Ikhwān´s student organization controlled, except in Juba in the South, all student councils in Sudanese universities.

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[293] This view was held e.g. by Bona Malwal, Minister of Culture and Information and editor-in-chief of "Sudanow".
[294] Osman (1989), p. 255 et sqt.
[295] Middle East, September 1979, pp. 71-72.
[296] Köndgen (1992), pp. 35-36.
[297] Kok (1991), p. 242.
[298] Kok claims that these draft laws were promulgated in 1983 with only small modifications. Kok (1989), p. 463. Other authors, however, deny al-Turābī's influence on the September laws.
[299] Osman (1989), p. 255 et sqt.

A deteriorating economy and rampant corruption

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

[300] Köndgen (1992), p. 29.
[301] See e.g. Khalid (1985), p. 243 et sqt. and Khalid (1990), p. 314 et sqt.
[302] Abd al-Rahim (1989), p. 284.

Dismantling the Addis Ababa agreement

Regarding his Southern policy, Numairi in 1979 began to dismantle gradually the 1972 Addis Ababa agreement, which had successfully ended the 17-year southern war of independence. The Addis Ababa agreement has been regarded by many as the most important achievement of the Numairi era. It recognized for the first time in Sudan's post-independence history the pluralistic nature of Sudanese society, granted the South regional autonomy and "acknowledged that culture, race, religion and economics dictated a new approach to the internal structure of Sudan and to its constitution".[304] As noted above, the Addis Ababa agreement was hammered out without the participation of the sectarian parties and the Muslim Brotherhood. Kok stresses that many Southerners were well aware that the NIF, the Umma party and the DUP had been and continued to be against the agreement since it turned the South into one federal state constituting an important base of support for Numairi´s (still secular) regime. Therefore, in order to achieve their strategic goal of removing Numairi and Islamizing the state, and the legal system in particular, would only succeed with first weakening the self-governance of the South.[305] It comes therefore as no surprise that al-Turābī, who was Sudan's Attorney-General during this time, played a leading role in advising and supporting Numairi in his endeavor to dismantle gradually the Addis Ababa agreement.[306] In 1979, Numairi suggested to the National Congress of the SSU a re-division of the South into three, instead of one, autonomous regions, each with its own regional parliament and government. This would have financially overburdened the South and clearly amounted to a dismantling of the "Southern Provinces Regional Self-government Act" of 1972.[307] The regional governments would have been directly responsible to the president, thus effectively ending Southern Sudanese autonomy. A large majority of Southerners, however, opposed the changes and when in March 1981 the Southern Regional Assembly rejected the motion, Numairi dissolved it and installed an interim government in October 1981. A referendum, intended to decide the question of restructuring the South was cancelled in February 1982. An important factor contributing to the South's readiness for a renewed military confrontation with the North was the striking neglect of the Southern economy by Numairi´s regime.

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[303] Khalid (1985), p. 217 et sqt.
[304] Warburg (2003), p. 165.
[305] Kok (1991), pp. 241-242.
[306] Warburg (2003), p. 167.
[307] Köndgen (1992), p. 30.

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

Sharī´a *as a last resort: Numairi Islamizes the legal system*

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

[308] Köndgen (1992), p. 31.
[309] Anyanya I fought for Southern independence 1955-1972.
[310] Jacobs (1985), p. 208.
[311] Jacobs (1985), p. 206.
[312] Jacobs (1985), p. 206.

September laws the confrontation between Numairi and the judiciary had escalated. Clearly, the dismissals, the Islamization of the legal system and the subsequent introduction of alternative courts were the successful attempt to effectively curtail the autonomy of a Westernized elite, which dared to oppose his high-handed rule. In July 1983, while the confrontation between the regime and the judiciary persisted, Numairi appointed a three-member committee to Islamize the Sudanese legislation. The delicate question of an Islamic constitution, however, was excluded from the agenda. Al-Turābī, whom Numairi wanted to keep away from the process, was ousted as Minister of Justice shortly before the committee began its deliberations. He was replaced as attorney general and appointed first to an advisory post as minister for legal affairs in the presidency. Less than four months later he became foreign affairs advisor in the presidency. The official pretext for shifting al-Turābī to this relatively unimportant post was to use al-Turābī´s language skills[313] and western education to convince the international community of the importance of the legal reform.[314] It is telling that Numairi himself visited Saudi Arabia, Egypt, Kenya, Italy, France, Britain and the US to gain support from the former and convince the others that the Sudan's Islamization would not lead to an Iranian-style radicalization.[315] The real reason of moving al-Turābī away from his „legal revolution" was to prevent al-Turābī and the Muslim Brotherhood in general to be able to claim any credit for the regime's Islamic legal revolution.[316] Ironically, since the Muslim Brotherhood were still part of the government, Numairi´s attempt to disassociate the Muslim Brothers from the new Islamized codes was not entirely successful. There was a general impression that al-Turābī and the Brothers were still pulling the strings behind the scene.[317] The committee charged with the Islamization of the Sudanese laws worked in secret and the only person informed about the ongoing work, apart from the president himself, was al-Rashīd al-Ṭāhir Bakr, the successor of al-Turābī as attorney general.[318] The main reason for keeping the committee's work secret seems to have been Numairi´s fear of international pressure. The small committee charged with Islamizing the PC83 consisted of al-Nayāl ´Abd al-Qādir Abū Qurūn, the son of a prominent Sufi master of the Qādiriyya brotherhood in Abū

[313] Apart from his mother tongue Arabic, al-Turābī is fluent in English and French.
[314] Zein (1989), p. 190.
[315] Zein (1989), p. 192.
[316] Zein (1989), p. 190.
[317] Zein (1989), p. 191.
[318] Bakr had been one of the first leaders of the Muslim Brotherhood but was expelled from it during the sixties. Compare Zein (1989), pp. 190-191.

Qurūn, ´Awaḍ al-Jīd Aḥmad, a former legal assistant of the Attorney General Zakī Muṣṭafā and Badriyya Sulaimān, a province judge.[319] Abū Qurūn and al-Jīd had earned a law degree at the juridical faculty of the University of Khartoum in the early 1970s.[320] While the team was relatively junior for the task they were given all three had a legal background and at least two had practiced law for some years. Abū Qurūn, who was known as a singer, during his time as a student at the law faculty had developed into a self-styled religious leader who had made such an impression on president Numairi that he became not only his chief advisor on Islamic affairs but was also appointed Minister of Legal Affairs at the Presidency.[321] It is important to note in this context that already since the early 1970s Numairi had been spiritually close to the Abū Qurūn Sufi order in general and with the father of Nayal Abū Qurūn, Shaikh Abū Qurūn in particular.[322] The Abū Qurūn Sufi order believed in a "second coming" of a mahdi who would be a follower of the order. According to Zein al-Jīd claimed that most of the work of Islamizing the penal code was done by him. Neither al-Jīd nor Abū Qurūn seem to have undergone any specialized training with regard to the *fiqh*. His and Nayal Abū Qurūn´s specialization in the common law system would indeed explain the high degree of inconsistency with the *sharī´a* of the PC83. However, while technical inconsistencies can be explained by their lack of expertise in the *fiqh*, the PC83 shows a general tendency of aggravating punishments and turning the PC83 into a tool of political oppression as a whole. It can be safely assumed that the drafting committee's intentions in this respect closely followed Numairi´s and that, given Numairi´s rising political problems on the domestic front, the PC83 was meant to serve as a tool of oppression.[323] In an interview Zein conducted with Abū Qurūn, the latter maintained that the authors were "aware of the shortcomings of the law from an Islamic point of view" and that they introduced a stipulation at the end of each law that confirmed the non-validity of any provision of the law that contradicts the *sharī´a*.[324] While it is certainly true that such a provision unmistakably confirms the sovereignty of the *sharī´a*, Abū Qurūn did not give any convincing explanation why these shortcomings occurred in the first place.

[319] Osman (1989), p. 266.
[320] I could not find information on Sulaiman´s legal background.
[321] Durán (1986), p. 577.
[322] Warburg (1990), p. 627.
[323] For more details on how the Penal Code was used as a tool of oppression see below.
[324] Zein (1989), pp. 247-248. In the PC83 this is article 458 (5).

In September 1983, the first new Islamist laws were enacted as presidential decrees. The Sudanese parliament ratified the 'September laws' without further discussion in November 1983. The most important of these statutes were: the Civil Procedure Act (1983), the Civil Transactions Act (1984), the Penal Code (1983), the Criminal Procedure Act (1983), the Evidence Act (1983), the Judgements Acts (1983), the Propagation of Virtue and the Prevention of Vice Act (1983), and the Zakat Act (1984).[325] It is worth noting that all of the more significant laws enacted before the downfall of Numairi in 1985 were initiated by the Sudanese president himself, who was, without any doubt, the driving force of the Islamization process.[326] Durán overstates the responsibility and role of al-Jīd and Abū Qurūn when he writes "...these two jurists bear the full responsibility for the amputations and other brutalities carried out in the name of sharī´a from September 1983 to March 1985" and "Whereas al-Turābī was the executioner of Numairi´s "Islamization", its architect was Abū Qurūn.[327] They certainly carried out the technical drafting of the new laws and badly enough for that matter. No doubt, they bear responsibility for the quality of the work they delivered. The political responsibility for the whole experiment lies, however, with president Numairi alone. He chose jurists for the committee, which apparently had little or no training in *sharī´a* matters, charged them with a task that would have taken even more experienced jurists much more time and then ensured that these badly drafted laws were applied with utmost rigor.

Churned out in very much the same fashion as the Egyptianized legislation of the early seventies, numerous provisions of the September laws were in conflict with traditional Islamic jurisprudence (*fiqh*). For instance, the Evidence Act required the testimony of four adult men to establish unlawful sexual intercourse (*zinā*), but it was in contradiction to the *fiqh* in allowing that "when it is necessary, the testimony of others may be taken." The 1983 Penal Code drew heavily on its 1974 predecessor, punishments such as flogging, fines or prison no longer corresponded to the gravity of the offence.[328] As to *ḥadd* punishments, the 1983 Penal Code eclectically took its inspiration from different schools so as to aggravate possible punishments. Simultaneously, the use of 'legal uncertainties' (*shubha*), used in the *fiqh* to restrict the execution of *ḥadd* punishments, was rather limited. In combination with the

[325] Layish & Warburg (2002), p. 305.
[326] According to The Permanent Constitution of the Sudan (1973), article 155: "The President of the Republic or the Prime Minister or any Minister or member of the Assembly may present any Bill to the People´s Assembly".
[327] Durán (1986), p. 578.
[328] Köndgen (1992), p. 42.

admission of witnesses not approved by the *fiqh*, the application of *ḥadd* punishments was thereby facilitated considerably.[329] Further, the new Penal Code introduced *ḥadd*-punishments for (*ta´zīr*-) crimes that would not have been considered *ḥadd*-crimes in the *fiqh*.[330] Finally, by adding more severe punishments for political offences, the new penal code provided a suitable instrument for the oppression of political opposition.

Reactions to the new laws

When the September laws were publicly announced on 8 September, the whole of Sudan, including the Muslim Brotherhood, was taken by complete surprise. Interestingly, apart from the official announcement which prohibited alcohol and established the *ḥadd*-punishments for theft, highway robbery and unlawful sexual intercourse the new, Islamized Penal Code was not made available to the Sudan's courts for several weeks and the first public amputation of a hand did not take place before December 10.[331] In the meantime, Numairi tried to make full use of the momentum the September 8 announcement had created and tried, through speeches in parliament and spectacular maneuvers, to present himself as an Islamic revolutionary.[332] Thus, on September 24 alcoholic beverages with an estimated value of 11 million $ were destroyed in the streets or poured into the Nile. End of September 13000 prisoners were released to "give them a second chance under Islamic law."[333] That application of the *sharī´a* was not just a political slogan became clear when two young convicted car thieves had their rights hands severed in front of 3000 cheering spectators.

After intensive discussions, al-Turābī and the Brotherhood decided to back Numairi, despite some reservations and the exclusion of al-Turābī from the process of codification.[334] As Abdelwahab Osman has aptly put it: during their entire existence as a movement the Muslim Brotherhood had been campaigning for the application of the *sharī´a* and there, "out of the blue" it was. "The elation within the movement was indescribable."[335] In his earlier writings, al-Turābī had advocated a rather modernist approach towards the *sharī´a*, which indeed is very different from what the September laws represents. For al-Turābī the *fiqh* represents the

[329] The 1983 Penal Code stipulated *ḥadd* punishments for crimes similar to *ḥadd* offences, but not covered by traditional definitions (Köndgen (1992), pp. 42-44.
[330] See juridical chapters below.
[331] Jacobs (1985), p. 207.
[332] Jacobs (1985), p. 207.
[333] Jacobs (1985), p. 207.
[334] Osman (1989), p. 267

forefathers´ quest for an understanding of religious truth. Since their endeavors can only be understood in their historical context al-Turābī argued against a blind imitation of the traditional Muslim jurists (*fuqahā´*) and for an adaptation of Islamic law to the needs of today. He argued in favor of maximum freedom for those who want to contribute to the renewal of Islamic law, as long as their deliberations are based on basic Islamic principles. Al-Turābī himself has acted as a *mujtahid* and found new and unorthodox solutions for specific problems of Islamic criminal law. He tried thus to prove, with the help of qur´anic verses, that the stoning of the *zāniyya* is not obligatory and that the death penalty for the apostate is only compulsory if he actively waged war against the Muslims.[336] This reformist approach tellingly did not find its way into the Criminal Bill 1988 and its copycat successor, the Criminal Act 1991, which were both al-Turābī´s brainchildren. However, different al-Turābī´s theoretical approach to the development of the *fiqh* might have been, as the last remaining allies of a discredited regime, the Muslim Brotherhood themselves had come under pressure, not only by external critics but also through criticism from within the movement. The sudden introduction of the *sharī´a* retrospectively vindicated their close cooperation with the regime. Internal discussions and questions concerning Numairi´s motives were cut short, "what mattered was that the Islamic laws were in place and that a new atmosphere had been created which the movement must exploit to the full."[337] An important motive for the NIF to back Numairi´s legal Islamization policy was that they profited immensely from new rules for Islamic banking. Already since the early 1970s, the Brotherhood had gradually gained control of the Islamic banking system.[338] Initially this was realized through their connections in Saudi Arabia and, subsequently, through their privileged position as allies of president Numairi. In the early 1980s, the NIF managed to take over all important management positions of the Faysal Islamic Bank of Sudan.[339] The majority of shares of the Tadamon Islamic Bank were equally in the hands of members of the NIF.[340] Given their prominent role in Islamic banking, the NIF further benefited when in 1983 and 1984 the Civil Procedure Act, the Civil

[335] Osman (1989), p. 267.
[336] Köndgen (1992), p. 47.
[337] Osman (1989), p. 267.
[338] Warburg (2006), p. 3.
[339] Köndgen (2010), pp. 214-215.
[340] Köndgen (1992), p. 46.

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

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

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

[341] Köndgen (2010), p. 215.
[342] Osman (1989), p. 268.
[343] MERIP (1985), p. 12.
[344] Warburg (1990), p. 631.
[345] I follow here Bleuchot (1991), Islam, droit pénal et politique. Bleuchot analyzed two of Ṣādiq´s books. One, "yas`alūnaka ´an al-mahdiyya" was published before the September laws in Beirut in 1975 and the second, " Al-´uqūbāt al-shar´iyya wa mawqifuhā min al-niẓām al-ijtimā´ī al-islāmī was published in 1987 in Cairo, i.e. after the September laws.
[346] Bleuchot (1991), Islam, droit pénal et politique, p. 273.

is only one possible interpretation of the *sharī´a*, a modern interpretation must be different and some of the (more prominent) features of the historical *fiqh* are incompatible with the requirements of the modern time, including the status of the *dhimmī*, slavery, the (inferior) status of women, the doctrine of the caliphate, the law against rebellion, as well as the status of the apostate and the stranger (*ḥarbī*). In all of these matters the solutions that can be found in the *fiqh* are either too harsh, contrary to the principle of equality (e.g. *dhimmī*, women, the slave), or not realistic (the caliphate) or dangerous for the freedom of the opposition (law on rebellion) or contrary to the principle of reciprocity and tolerance (apostasy and strangers).[347]
As to the *ḥudūd*, Ṣādiq stresses the necessity to apply the *fiqh*-based principles that avoid *ḥadd*-punishments such as repentance and legal uncertainties (*shubuhāt*). According to Ṣādiq al-Mahdī the introduction of Islamic penal law depends on the realization of social justice in a society, where faith and the adherence to the prescribed religious duties by the believers are a living practice. When the whole of society lives in harmony with Islam and complete social justice has been achieved, crimes committed out of poverty and destitution will disappear. When the September laws where introduced, the great majority of the Sudanese society lived neither in harmony with the teachings of Islam nor was social justice achieved. Both factors considerably contributed to the exaggerations of the experiment. Islamic penal law is, according to Ṣādiq not thinkable without an independent and neutral judiciary, which has to be controlled by a Supreme Court. Non-Muslims and women would be admitted to work in such a system. Special courts or emergency courts, and this is certainly a conclusion he has drawn from Numairi´s experiment, should not have a place in an Islamic judicial system. Interestingly Ṣādiq criticizes the legitimacy of the existence of lawyers who he sees as businessmen working on behalf of the rich. Ṣādiq al-Mahdī was arrested 25 September 1983, one day after the new laws had come into force. He stayed in prison until the end of the Numairi era in April 1985. We shall discuss below whether Ṣādiq al-Mahdī´s reformist approach as to the *sharī´a* had any bearing on his position and political decisions when, as prime minister between 1986-1989, he was in a position to either abolish Numairi´s version of the *sharī´a* or replace it with a reformist code according to the principles explained above.
As to the Anṣār´s rival Sufi brotherhood, the Khatmiyya, it had, thus different from the Anṣār, traditionally shunned an active role in Sudanese politics. This approach had continued under

[347] Bleuchot (1991), Islam, droit pénal et politique, pp. 273-274.

Numairi and its leader Muḥammad Uthmān al-Mīrghanī, who was also head of the Sufi Islamic Revival Committee, fully backed the September laws. However, after Numairi´s downfall, he changed his mind and now judged the codification and application of the *sharī´a* 1983-1985 as false, misleading and unjust. He voiced his hopes, though, that with the help of trained *´ulamā`* and *fuqahā`* the flaws of Numairi´s legislation could be redressed.[348]

One of the most outspoken critics of the introduction of the *sharī´a* was Maḥmūd Muḥammad Ṭāhā, spiritual leader of the reformist 'Republican Brothers'. During a prison term in 1946-1948, Ṭāhā had developed his own legal theory, propagating a liberal version of the *sharī´a*, adapted to the needs of modern society. Based on his teachings,[349] the Republican Brothers, who had never participated in elections as a political party, called for a democratic state with equal rights for Muslims and non-Muslims and for both men and women. When Numairi banned political parties after his May 1969 coup Ṭāhā had already transformed his party into a movement called the "Republican Brothers" which did not oppose Numairi. As a result they were spared and continued to exist. Quite to the contrary, the Republican Brothers were during the first eight years of Numairi´s rule among his closest allies[350] or, according to other observers, at least showed passive consent[351] to his anti-sectarian and, later, anti-Communist agenda as well as in his endeavors to seek a formula which would guarantee a lasting compromise with the South. Indeed, the *jumhūriyūn* had called for a federal solution for the South since 1951.[352] When Numairi opted for reconciliation with the Umma party and the Muslim Brothers the alliance between the Republican Brothers and Numairi ended. As Warburg points out, both regarded the teachings of Ṭāhā as amounting to heresy.[353] Being a rather small movement the Republican Brothers avoided, however, an outright confrontation with Numairi and chose instead to work and publish against the Muslim Brotherhood and al-Turābī. In the long run, the confrontation with the regime was, however, unavoidable, if only because the Republican Brothers had not concealed that they were strongly opposed to the introduction of the *sharī´a* in its rigorous form. When the movement criticized the incumbent head of the Sudanese State Security and Vice-President General ´Umar al-Ṭayyib over the

[348] Warburg (1990), p. 635.
[349] His two most important books are "ṭarīq Muḥammad" (The Path of Muhammad) and "al-risāla al-thāniyya min al-Islām" (The Second Message of Islam).
[350] Warburg (2003), p. 162.
[351] Rogalski describes the position of the Republican Brothers as "passives Einverständnis", i.e. passive consent (with Numairi´s political course). Rogalski (1990), p. 39 et sqt.
[352] Warburg (2003), p. 162.

case of the radical Egyptian preacher Shaikh al-Muṭī´ī,[354] Ṭāhā and 50 of his followers were arrested in June 1983 and remained in prison until December 1984 without charges or even an interrogation. Already in March 1984, with their leadership still in prison, the Republican Brothers had started a campaign against the September laws, publishing a booklet and leaflets, criticizing Numairi´s version of the *sharī´a* on grounds of its inherent contradictions with the traditional *sharī´a* and its violation of the Sudanese constitution.[355] When leaving prison in December 1984 they immediately published another leaflet which strongly criticized the September laws and demanded their repeal: "The September laws have distorted Islam in the eyes of intelligent members of our people and in the eyes of the world...These laws violate Shari´a (Islamic law) and violate religion itself.... We call for the repeal of the September 1983 laws because they distort Islam, humiliate the People and jeopardize national unity..."[356] For his uncompromising opposition he would have to pay with his life in 1985 when he was executed for alleged apostasy.[357]

Interestingly, Numairi´s two major allies in the Arab Middle East, Saudi-Arabia and Egypt did not support the new laws. Saudi Arabia agreed in principle but criticized the methodology of the codification as well as the speed with which it had been realized. President Mubarak of Egypt was interested in a peaceful settlement of the conflict with the South because the Jonglei canal project in the South had great importance for Egypt's agriculture.[358] The Secretary General of the Saudi-financed Muslim World League in Mekka, ´Abdallah ´Umar Naṣīf, sent a telegram to Numairi to congratulate him on the introduction of the *sharī´a* and defended its introduction in the League's publications.[359] The Grand Shaikh of Al-Azhar Jād

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[353] Warburg (2003), p. 162.
[354] Shaikh al-Muṭī´ī, who was held partially responsible for violent clashes between Muslims and Christians in Cairo in 1981 continued his anti-Christian preachings in Khartoum in the Kobar mosque and even on Sudanese television. He also called for the immediate arrest of the Republican Brothers. Warburg (1990), p. 163 and Rogalski (1990), pp. 42-43.
[355] An-Na´im (1986), The Islamic Law of Apostasy, p. 205.
[356] Quoted by Rogalski (1990), pp. 44-45.
[357] On the juridical aspects of the Ṭāhā case see An-Na´im (1986). On Ṭāhā and his weltanschauung see e.g. Rogalski (1990), pp. 59-121 and (1996). A more recent analysis of Ṭāhā´s ideas is Mahmoud, Mohamed A.: Quest for Divinity: A Critical Examination of the Thought of Mahmud Muhammad Taha. Syracuse University Press 2006. On the death sentence for Ṭāhā and the legal problems involved, see O´Sullivan (2001). Warburg also gives a concise summary of the background of the Ṭāhā case. See Warburg (2003), pp. 160-165.
[358] Köndgen (1992), p. 48.
[359] Schulze (1990), p. 381.

al-Ḥaqq supported Numairi´s new Islamic laws but criticized that al-Azhar had not been consulted for its expertise when the text of the legislation was drafted.[360]

Given the mixed reactions after the introduction of the *sharī´a* cooperation in actual implementation of the new laws was slow and met with resistance in the first phase before the declaration of the state of emergency. Neither the judiciary nor the bureaucracy in general did much more than paying lip service and resistance to the new laws seems to have come even from the People's Assembly.[361]

Emergency courts implement the sharī´a

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

[360] Köndgen (1992), pp. 48-49.
[361] Osman (1989), p. 269.
[362] Osman (1989), p. 294.

influenced how the *sharī´a* was applied and how their fervor led to growing tensions with the old secular guard of the regime and ultimately with Numairi himself. Osman relates that the Brotherhood judges ensured that "ministers and other high officials were routinely dragged in front of the new all-powerful courts to testify and face charges".[364] According to his version of events, "when it entailed the humiliation of top officials", the application of the *sharī´a* received a lot of public support, also because the crime rate in the capital dropped sharply.[365] Osman´s version does not, however, take into account that trials against high-ranking officials or even personalities close to the regime were only one side of the matter. While the public discussion in the media of these cases might have generated some public support for *sharī´a* application based on a perception of fairness and balance, the flip side of the coin was, however, a rather bloody affair, marked by executions, amputations and floggings. Apart from that, *sharī´a* application, as Kok has correctly pointed out, was also marked by a strong class bias. Thus, the former Minister for Presidential Affairs, Baha al-Dīn, was rather mildly punished with a fine and a prison term for the embezzlement of 1,180,139$. In contrast, the jobless Siddīq Ramaḍān al-Mahdī was sentenced to cross-amputation for stealing electric wire worth less than 20$ because his theft was considered to be a *ḥadd*-theft.[366] According to Kok´s evaluation over 98% of the 93 victims[367] of amputation sentences came from poor and marginalized parts of the Sudan and all except one were workers, car washers, domestic servants, unemployed, workers at building sites etc. During the first three months of the functioning of the emergency courts, the defendants were denied the right to appeal against these often harsh, and once carried out, irreversible decisions. The only exceptions were decisions involving the death penalty, which had to be approved by the president. However, when, after three months, the right to appeal was finally reintroduced, the court of appeal in Khartoum was staffed with "the most notorious pro-government judges who had appeared during the experiment", among them al-Mukāshfī Ṭāhā al-Kabbāshī, who in 1986 published in Cairo a personal account and justification of his role as a judge in Numairi´s parallel

[363] Zein (1989), p. 209-210.
[364] Osman (1989), p. 269.
[365] Osman does not disclose his sources regarding the alleged dropping of the crime rate. Other authors have been unable to corroborate this argument which was also used by the regime.
[366] Kok (1991), p. 244.
[367] It is not entirely clear during which time span these amputations took place. He probably refers to the time between December 1983, when the first amputation took place, and April 1985 when Numairi was ousted.

courts.[368] Apart from the fact that the judges of the Court of Appeal were handpicked in order to secure that the new machinery worked smoothly, the three Court of Appeal judges did not give up the seats they held in lower courts. This stood in clear contradiction to article 245 of the Criminal Procedure Act 1983 and meant in practice that defendants would appear in some cases twice before the same judges. In summary, neither the judges nor the legal structures established by Numairi had the quality necessary for a competent implementation of the September laws, which were marked by many incoherences and contradictions with the *fiqh*. The Muslim Brotherhood in this phase received a "major political and psychological boost" through their role in the emergency courts/courts of instantaneous justice. According to Osman, who generally writes from a pro-Ikhwān perspective, "the general atmosphere favored the Islamists", Sufi leaders started supporting the *sharī´a* and even left-wing intellectuals announced their "conversion to the path of Islam".[369] That "the language Ikhwan kept speaking in relative solitude (turned) into the language of the majority"[370], seems to be doubtful considering the reactions to the introduction of the *sharī´a* described above, especially from the Anṣār and the Khatmiyya. However, growing popular support seems to have emboldened hard-line judges such as the mentioned al-Kabbāshī to defy more and more openly the regime, including the president himself. Al-Kabbāshī e.g. clashed with al-Rashīd al-Ṭāhir, al-Turābī´s successor as Attorney General, when al-Ṭāhir tried to protect some leading SSU figures against charges of corruption. In another case the brother of the First Vice-President ´Umar Muḥammad al-Tayyib was imprisoned for corruption and his property was confiscated.[371] In summary, these and a number of similar cases brought the Muslim Brotherhood and the old guard of the SSU in direct confrontation on the one hand and created a public image of the Muslim Brotherhood as the main driving force behind the implementation of the *sharī´a*. In consequence, this would lead to Numairi´s crackdown against his former allies. He could neither allow the Brotherhood to take center stage as the champions of Islamization, nor could they be allowed to openly challenge his authority or alienate him from the leading old guard of the SSU. Thus, the emergency courts, subsequently renamed courts of instantaneous justice, became a parallel court system, which was clearly

[368] See bibliography, Kabbāṣhī (1986). The two others of the three-member bench were Fuād al-Amīn ´Abd al-Raḥmān and Aḥmad Mahjūb.
[369] Osman (1989), p. 270.
[370] Osman (1989), p. 270
[371] Osman (1989), p. 272.

preferred by president Numairi as an efficient tool for the speedy and unquestioned implementation of the *sharī´a*. Their decisions were reported on a daily basis in the state-owned media, while the same media (state TV, radio, and press) suggested that the (traditional) judiciary was "less interested in implementing Shari´a, and even incapable of doing so."[372] Being sidelined in this crude manner, the traditional judiciary had to find its role and it was clear that there was no other option but to play along the new rules. Under Chief Justice Daf´allah al-Hājj Yūsuf, the judiciary steered a conservative course, which stood in contrast to the radical approach of the emergency courts. Thus, Yūsuf issued a large number of criminal circulars, most of them still applicable today, in order to clarify the many gaps and unclarities of the new legislation and at the same time in order to streamline *sharī´a* application, give clear guidance to the judges bound to apply it, ensure the rule of law and protect citizen's rights. During my interview with Yūsuf, the former Chief Justice confirmed his critical stance towards Numairi´s political interference in judicial matters. He insisted that his main achievement during his tenure had been the body of criminal circulars, which were instrumental in creating a clear framework for *sharī´a* application.[373] He also issued a circular explaining the trial of civil cases in the emergency courts. However, since the new courts were under the direct supervision of Numairi himself, attempts to supervise these courts and keep them within the judiciary had only limited effect. It should be noted that Yūsuf, while being critical of the emergency courts and their judicial practice, did, nevertheless, not resign until he was replaced in September 1984.

The failed introduction of an Islamic constitution

Already in June 1984 Numairi had suggested a long list of constitutional amendments to the People's Assembly. The Islamization of the legal system under a secular constitution had led to a number of laws becoming unconstitutional. However, with the Supreme Court increasingly filled with supporters of the September laws, no judicial review of such laws took ever place.[374] Now Numairi suggested the Islamization of the constitution to bring it into line with the *sharī´a*-based legislation and, above all, his political interests. Islamic terminology was to replace the secular wording of the 1973 constitution. While the president

[372] Zein (1989), pp. 213-214.
[373] Interview with Daf´allah al-Hājj Yūsuf, 18.5.2009.

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

Islamic legislation as a tool of political oppression: the execution of Ṭāhā and other cases

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

[374] Kok (1991), p. 242. Before the introduction of a Constitutional Court in 1998, questions of constitutionality were decided by the Supreme Court.
[375] Köndgen (1992), pp. 54-55.

initially given one month to repent, which was reduced to three days by Numairi himself. They repented and their lives were spared. Ṭāhā was not given a chance to recant because "he had persisted in advocating his *heretical* views for many years and refused to heed judicial and other pronouncements".[377] His property was to be confiscated and he was denied a proper Muslim burial. Not surprisingly, the notoriously hard-line judge al-Kabbāshī, as a member of the Criminal Court of Appeal, played a pivotal role in the conviction of Ṭāhā as well.[378] The indictment was initially construed as offences against the state, there was no mentioning of apostasy. Subsequently, after the president had agreed to the trial, Article 458(3) of the Penal Code and article 3 of the Judgments Basic Rules Act were added by the State Minister for Criminal Affairs. Article 458(3) stipulated that even uncodified *ḥadd*-offences could be punished. During the appellate proceedings Ṭāhā and his four co-defendants, in addition to the state security offences of the trial, were sentenced for apostasy, based on the 1968, juridically irrelevant, decision of a *sharī´a* court, which, at the time, had not had jurisdiction in cases of apostasy. The Criminal Court of Appeal further quoted al-Azhar University and the Muslim World League who both had declared Ṭāhā to be an apostate. The Muslim World League had called upon Numairi to indict Ṭāhā for heresy and for being the Antichrist (*dajjāl*).[379] Apart from the highly flawed underpinnings of the judgment, the sentence contravened Article 247 of the Criminal Procedure Act exempting persons over 70 years of age from the death penalty. The Criminal Court of Appeal had dismissed this provision, arguing that it was not applicable in *ḥadd*-cases, despite the absence of such a provision in the Criminal Procedure Act 1983. It also violated article 70 of the 1973 Permanent Constitution of the Sudan which clearly states that no penalty can be imposed in the absence of a pre-existing penal provision. In 1986, posthumously, the death sentence for Ṭāhā was eventually declared to be null and void.[380] The execution, highly controversial in the Sudan and strongly criticized in the Western press, was only one more step toward the downfall of the Numairi regime. In summary, one cannot but agree with An-Na´im who correctly came to the conclusion that Ṭāhā "was sacrificed in the cause of maintaining President Nimeiri´s personal

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[376] If not stated otherwise I follow An-Na´im (1986), The Islamic Law of Apostasy.
[377] An-Na´im (1986), The Islamic Law of Apostasy, p. 208.
[378] For his version, see al-Kabbāshī (1986), pp. 85-101.
[379] For a detailed account of the Muslim World League's position on Ṭāhā see Schulze (1990), pp. 377-386.
[380] See discussion in e.g. 'Mahmoud Taha – Sudan's new martyr?', Middle East, February 1987. See also An-Na'im, Abdullahi Ahmed. "The Islamic Law of Apostasy and Its Modern Application: A Case from Sudan." Religion 16 (1986): pp. 197-224.

drive for Islamization...(Ṭāhā) was killed in order to frighten others who might have been contemplating criticism or opposition to Nimeiri´s policies in general, and his Islamization policy in particular".[381]

Less international media attention was generated by the case of the Indian businessman Lalitt Ratnalal Shāh and his fellow defendants which, similar to Ṭāhā´s case, is a striking example of how the new *sharī´a* laws were abused for political ends.[382] Shāh had been charged of *ribā* (usury) and "destruction of the national economy" (art. 98 of the PC83) in a court of first instance led by Mukāshifī al-Kabbāshī.[383] Because of contradicting statements of expert witnesses, the charges according article 98 were dropped and Shāh was sentenced to ten years imprisonment and ninety lashes for dealing in foreign currency without a license. However, since this included *ribā* / interest, and *ribā*, just like *ridda* (apostasy) in the case of Ṭāhā, had not been codified the court had to rely on article 3 of the Judgments Basic Rules Act which made a decision based on Qur´ an and Sunna possible even if there existed no legislative text. Article 3, however, was in contradiction with the Sudan's 1973 constitution, which clearly stipulated that no punishment could be imposed without a pre-existing definition of the crime in question in the Penal Code. While this was not the case, the Supreme Court panel judging on the constitutionality of the trial court's decision dismissed Shāh´s constitutional complaint, because, according to the panel, article 3 of the Judgment's Basic Rules Act did not violate article 70 of the 1973 Constitution. In fact, this decision meant that the *sharī´a* replaced the constitution as the highest source of law. While before the "legislative revolution" the secular 1973 Permanent Constitution was the supreme source of law, it played this role after Islamization, at least under Numairi´s rule, only if there was no contradiction with the *sharī´a*.

Apart from the constitutional aspect, which the panel solved by simply not admitting the constitutional conflict, the case has several other aspects. It showed the low level of the legal reasoning of key legal actors and at the same time it exposed that the legal structures of the new courts had moved far away from the sound legal principles guaranteed under the Permanent Constitution of 1973. In this particular case, this was demonstrated by the fact that al-Kabbāshī had had a leading role in all three stages of the lawsuit. He was the trial judge, responsible for the initial sentence, he was the head of the Criminal Court of Appeal that

[381] An-Na´im (1986), The Islamic Law of Apostasy, p. 210.
[382] I follow Zein´s account of the Shāh case, Zein (1989), p. 297 et sqt.
[383] For al-Kabbāshī´s version of the case see al-Kabbāshī (1986), p. 102 et sqt.

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

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

The regime falls apart

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

[384] On this case see Zein (1989), pp. 214-215.
[385] The real numbers are probably substantially lower. Nevertheless, it seems to have been an impressive show of force.

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

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

Frozen shariʿa *under Siwār al-Dhahab*

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

[386] For details see Osman (1989), pp. 276-277.
[387] Osman (1989), p. 278.

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

[388] See Sudan Monitor, December 1990, Vol. 1, issue 6.
[389] Warburg (1990), p. 634.

such as the SPLA-leader John Garang. It is important to realize that an important motive for the NIF's enthusiasm for the retention of the *sharī´a* was economic. The banks controlled by the Muslim Brothers had made considerable profits under its Islamic provisions.

Indecision and procrastination under Ṣādiq al-Mahdī

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

[390] Warburg (1990), p. 635, quoting the NIF brochure: The Islamic National Front (sic) presents: The Southern Sudan Question, Review, Analysis, Proposals. (n.d.; n.p.).
[391] However, the elections were a setback for the DUP who gained only 63 seats instead of the 101 seats it had won in 1968. The Umma, in contrast, went up from 72 seats (1968) to 100 seats. See also Kok (1996), pp. 43-49.
[392] Altogether, 48 seats remained unoccupied as a result of the war. Kok (1991), p. 45.
[393] Salih (1991), p. 50.
[394] Salih (1991), p. 62.

Sudan Council of Churches.[395] The SPLA was equally opposed to any kind of Islamic law and demanded its complete abolition as one of the main preconditions for a peaceful settlement. Despite al-Mahdī's repeated promises to revoke the September laws and replace them by completely overhauled legislation, only a few minor corrections were ever effectuated.[396] One of the reasons behind al-Mahdī´s inability or unwillingness to live up to his promises was increased pressure by the NIF. The NIF had withdrawn from their earlier pledge not to oppose the repeal of the September laws as long as a new *sharī´a*-based penal code would replace them. Ṣādiq al-Mahdī did not want to furnish a pretext to NIF-induced demonstrations nor could he afford to frustrate the expectations of his own constituency. While Ṣādiq al-Mahdī when I interviewed him, blamed his various coalition partners for his lack of success in abolishing the September laws[397], his wavering and lack of clarity on this important issue, however, were rather of his own making. For several decades, the Umma/Anṣār had demanded an Islamic system of government for the Sudan. Ṣādiq al-Mahdī himself had demanded that Islam should be the religion of the state and the *sharī´a* the main source of legislation. The South was to be fully Arabized and Islamized. On the other hand he agreed with many of the grievances of Southerners against the *sharī´a* turning non-Muslims into second class citizens. Therefore, he proposed that taxation should be based on a unified secular legislation. The *jizya*, the head tax for non-Muslims was not to be applied and *zakāt* was to be paid by non-Muslims only.[398]

However, when the Umma party finally was at the helm of the state they neither moved forward with an Islamic constitution nor did they replace Numairi´s penal code with a new Islamic code, possibly based on Ṣādiq al-Mahdī´s proposals.[399] As shown above al-Mahdī, when the September laws had been introduced, had argued that the *sharī´a* should not be applied before social justice was firmly established in the Sudan. However, in 1986 the political context had changed and Ṣādiq al-Mahdī, short of taking any decisive steps, now argued that the Sudanese people did not want a secular state, the idea of which was "foreign-

[395] See e.g Les Chrétiens et la Législation sur la Shari'a au Soudan, in : Islam et Societés au Sud du Sahara 3, (1989).
[396] Flogging, used rather summarily under the September laws, had been limited to *ḥadd* offences.
[397] Interview with Ṣādiq al-Mahdī, 9.6.2004.
[398] Warburg (1990), p. 636. Warburg quotes a treatise of Ṣādiq al-Mahdī "Al-Islām wa mas`alat janūb al-Sūdān" (Islam and the South Sudan problem). Ummdurmān, 1985.
[399] Bob (1990), p. 215.

inspired".[400] In general, al-Mahdī´s coalition governments were plagued by rivalries between the coalition partners, corruption and instability. In May 1987, his first government collapsed, unable to agree on badly needed solutions and devoid of the strong leadership al-Mahdī could not provide. The successor coalition government, formed again with the DUP and some smaller Khartoum-based Southern parties did not prove to be any more stable and equally fell apart after three months, mainly due to the seemingly insurmountable rivalry between the Umma party and the DUP.[401] This led to a political situation in limbo between August 1987 and May 1988. The Umma and the DUP could not agree on forming a new government. Both parties rejected the dissolution of parliament and the holding of new elections. Instead ministers simply continued to function in their posts. While the Ba´ath and other left-wing parties as well as the Southern parties strongly opposed any cooperation in a government that would include the NIF, the NIF equally strove to exclude its opponents from the formation of a new government. In May 1988, finally, the NIF joined the third coalition government, called the "national unity government" and consisting of the Umma party and the DUP. One of the preconditions for joining the government had been that new Islamic legislation would be enacted within two months. Under the guidance of Ḥasan al-Turābī, who became Minister of Justice and Attorney-General, the Ministry of Justice finally submitted to the Council of Ministers for discussion a draft penal code in September 1988, which was meant to replace the September laws. Hammered out by a group of jurists led, most likely, by the NIF, the draft suppressed to a large degree the politically motivated stipulations of the 1983 Penal Code. The South was to be exempted from *ḥadd* punishments. A dual system was to be introduced in the sense that the location of the commission of the crime (e.g. North or South), rather than the identity of the perpetrator (e.g. Southerner, non-Muslim, Muslim, etc.), was to be decisive in determining penalties. Highway robbery, thus, was to be punished with cross-amputation in the North and a maximum prison sentence of ten years in the South. On the other hand, non-Muslim Southerners living in Khartoum would have been subject to the *sharī´a*, while Muslims living in the South could enjoy alcoholic drinks or even become apostates, at least according to a literal interpretation of the letter of the law.[402] The new Criminal Bill met considerable resistance. The SPLA completely rejected the dual system, as well as all other

[400] Bob (1990), p. 215.
[401] Salih (1991), pp. 51-53.
[402] Köndgen (1992), pp. 70-71.

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

[403] Salih (1991), p. 63.
[404] Salih (1991), p. 67.
[405] Warburg (1990), p. 635.

the NIF with the DUP and representatives of the labor unions and professional associations, the peace agreement with the SPLA was finally ratified in April 1989. Now the tides had turned in favor of a revocation of the *sharī´a* laws. In mid-June, the al-Mahdī government announced that the *sharī´a* laws would be at last be nullified by the first of July and that a government delegation was to meet SPLA representatives to discuss a permanent end to the civil war. However, one day before the cancellation of the *sharī´a* laws, the military intervened once more and ended another – rather short – era of civilian rule. The draft penal code of 1988 was to be resuscitated less than two years later when it was enacted as the Criminal Act 1991 with only minor changes.[406] In summary, the democratic interlude 1986-1989 under Prime Minister Ṣādiq al-Mahdī showed clearly that the political elite, at least those leaders and parties who took part in government formation, were unable to deliver solutions to the Sudan's most pressing problems. Coalition governments were chronically unstable, marked by the rivalry between the Umma and the DUP, their haggling over posts, party factionalism,[407] but also by uncompromising and fierce opposition of left-wing and Southern parties. Economically, the Sudan suffered from its inability to pay off its foreign debts arrears. The government preferred not to respond to the IMF´s demands to remove subsidies on food and apply an austerity program for fear of riots and demonstrations. However, in September 1987 the Sudanese government was finally forced to conclude an agreement with the IMF in order to finance its costly import bill. It committed itself to a four year plan including a reform of public sector companies, substantial cuts on public expenditure and a 44% devaluation of the Sudanese Pound. As feared, the austerity measures led to riots and violent protests in several parts of the Sudan[408], but did not result in the intended economic recovery.

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

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

[406] The origins of the Criminal Act 1991 seem to be forgotten in the Sudan, many of my interview partners were not aware that the "Criminal Bill 1988" was the original text.
[407] Both, the Umma and the DUP suffered from party splits.

revoked and a state of emergency declared. Even though al-Turābī, like other religious leaders and members of the former government, was detained after the coup, it later became clear that the coup was in fact staged with the active support of the National Islamic Front.[409] There is now almost unanimous agreement among observers that al-Turābī colluded with the fifteen middle to lower ranking officers who had staged the coup. As to the motives of the coup, several observations can be made. Most importantly, taking over power in the Sudan by whatever means available had been the goal of the Muslim Brotherhood since al-Turābī won the upper hand in internal power struggles in the late 1960s. Not only was the MB part and parcel of several attempts to depose president Numairi, they also founded in 1972 a secret organization (*al-niẓām al-sirrī*). Its members received training in camps hidden in the Sudan ranging from military, security, propaganda, to intelligence and other training.[410] Next to its underground activities the Muslim Brotherhood, based on the extreme flexibility and pragmatism of al-Turābī´s approach never showed any qualms as to the use of any means that could further their cause. When all coups against Numairi´s rule had failed, the MB accepted to join the "national reconciliation" process. They thus happily collaborated with a regime they had fought for eight years and accepted whatever post was given to them. During Sudan's third democratic interlude the Naïf's approach was equally tactical. They agreed to alliances with their sectarian rivals when they thought it conducive to their Islamist agenda and they refused such alliances when their agenda was not accepted by these very rivals. With regard to democracy as a political system, the NIF was content to make use of the possibilities of free speech and propaganda, however, without any deeper commitment to democracy as such. Al-Turābī and the NIF knew that if democratic rules were applied their chances of governing the Sudan were next to nil. Their explanations and justifications after the coup drove this point home. Thus al-Turābī defended the NIF´s alliance with the military and its coming to power by way of a military coup as the only way to establish an Islamic state in the Sudan and to finish sectarianism[411], "a multi-party system in the Sudan would not be democratic because political parties or a government governed by the House of Khatmiyya

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[408] Salih (1991), pp. 58-61.
[409] In an interview with al-Turābī's son Ṣiddiq Ḥasan al-Turābī, he confirmed that the imprisonment of his father was meant to cover up his involvement in the coup. Personal communication of Ṣiddīq Ḥasan al-Turābī, 10 June 2004.
[410] Warburg (2003), p. 207.
[411] Warburg (2003), p. 210.

and the House of the Mahdi was a dynastic thing", al-Turābī stated.[412] While al-Turābī and the NIF were not choosy with regard to the means of gaining power, the particular point in time chosen for the coup d´état was most probably triggered by Muḥammad ´Uthmān al-Mirghanī´s draft agreement with the SPLM on the one hand and Ṣādiq al-Mahdī´s decision to abolish the September Laws by 1 July 1989 without a new Islamist legislation replacing it on the other hand. The NIF had little doubts that its political influence and any chances of an Islamic state would have been severely diminished had a peace treaty been realized. On both accounts the NIF was not willing to make compromises and, consequentially, its later Southern "*jihād* policy" (see below) moved the country as far away from a settlement of the conflict as possible without, however, ever coming close to winning it militarily.

Building new structures, dismantling old ones

Once firmly entrenched, the al-Bashīr/NIF regime followed a systematic approach toward the transformation of all relevant Sudanese institutions, effectively turning them into NIF bastions. Thousands of civil servants, 14000 in 1989 alone, were sacked. More than a hundred career diplomats were dismissed; others resigned in protest and were replaced by NIF loyalists.[413] Close to 40% of the officer corps was dismissed, despite the ongoing war in the South.[414] 400 police officers were fired, thousands forced into retirement later on. The NIF soon controlled key government institutions such as state security, military intelligence, police security, and foreign security which reported on Sudanese living in exile. Next to taking over existing structures the NIF also established and ran its own security apparatus such as the Revolutionary Security Guards, the Guardians of Morality and Advocates of Good, al-Turābī´s private security detachment and the People's Police.[415]

Around 15 of the outlawed political parties founded the National Democratic Alliance (NDA)[416] in order to organize their opposition to the new regime from abroad, mainly operating from Cairo and Asmara. Among other laws and a project of a new constitution the

[412] Warburg (2003), p. 210.
[413] Lesch (1998), p. 134.
[414] Warburg (2003), p. 210.
[415] Lesch (1998), pp. 136-137.
[416] al-tajammu´ al-waṭanī al-dīmūqrāṭī. Members were, among others, the DUP, the Umma Party, the Communist Party of Sudan, the Beja Congress, and the SPLM/SPLA.

NDA published their own project of a new penal code in Cairo in 2001. This project, while maintaining the death penalty, did not contain *ḥadd*- or *qiṣāṣ* punishments. [417]

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

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

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[417] See al-tajammuʹ al-waṭanī al-dīmūqrāṭī: mashrūʹ dustūr wa qawānīn al-fatra al-intiqāliyya. al-Qāhira 2001. Amin and Ramadan describe a 1986 project of a new Penal Code by the Sudan Bar Association. While I was not able to get hold of the full text of this project the description Amin and Ramadan give suggests that the NDA project published in 2001 is either very similar or even identical with the 1986 project of the Sudan Bar Association. Compare Amin/Ramadan (2002), pp. 341-345.

[418] Lesch (1998), pp. 143-145.

[419] Lesch (1998), p. 144.

Judiciary and legislation as cornerstones of the NIF's Islamization agenda

The judiciary was a prime target for the realization of the NIF's Islamization program. Not any more pliant than the judiciary under Numairi the regime opted for large-scale changes of personnel in order to get a grip on the judicial apparatus. According to estimates, 'over sixty percent of all judges have been replaced by appointees of the new regime'.[420] Between 300 and 400 judges were dismissed or resigned between 1989 and 1991 alone.[421] Their replacements often lacked proper training in *sharī'a / fiqh* beyond personal status matters or were not qualified at all. While purging the traditional judiciary, the al-Bashīr/NIF regime simultaneously built up a parallel system of courts that consisted of Security of the Revolution Courts (later to be re-baptized 'Emergency Courts') and Public Order Courts (POC) (see following section). One observer came to the conclusion that '[t]he parallel judicial institutions created by the NIF now handle more than 95% of the caseload of the Sudan, and are under the absolute control of the executive branch'.[422] This estimate obviously does not take into account the high number of cases tried under customary law. While Southern law students, not trained in Arabic, were excluded in practice from access to the legal professions, those who did enter were often trained in newly founded law schools, concentrating on the *shari'a / fiqh* and neglecting the Sudanese common law traditions. Many southern judges were transferred to the North to hold minor positions or left the judiciary to pre-empt dismissal. NIF adherents were appointed in their place to guarantee the application of Islamic law wherever non-military courts in the South were allowed to function.[423] According to some observers, many of the female judges who held positions in the civil and in the *shari'a*-governed personal status courts were dismissed by the new regime or relegated to insignificant assignments.[424] A 1996 report from the Lawyers Committee for Human Rights indicates that neither southern nor female judges were appointed by the al-Bashīr/NIF regime until the mid-nineties.[425] The regime also made sure that any opposition from the legal

[420] Lauro & Samuelson (1996), p. 9.
[421] Amnesty International (1995), p. 20.
[422] Abdelmoula (1996), p. 17.
[423] Lauro & Samuelson (1996), pp. 37-38.
[424] Lauro & Samuelson (1996), p. 10.
[425] This information was confirmed in an interview with a lawyer at the Institute of Training and Legal Reform in Khartoum on 8 June 2004. However, according to the same source, three women were shortlisted for positions as judges in June 2004. During my second visit, in 2009, women were working at the Supreme Court, among them the prolific author and commentator on ICL Badriyya Hassuna.

profession was muted. Thus, the Sudanese Bar Association was first dissolved after the coup and later 'downgraded to a trade union subject to the controls of the Registrar of Trade Unions and the Minister of Labor'.[426] Concomitantly, the Bar Association lost some of its traditional immunities, such as the inviolability of a lawyer's files in his chambers.

Not surprisingly, the al-Bashīr/NIF regime also promulgated important legislation to further its strategic goal of an in-depth Islamization of the Sudanese society. As of early 1991, an overhauled, Islamized penal code was promulgated and implemented.[427] The new Criminal Act was in fact the Criminal Bill of 1988 with only a few changes. It contained the full range of *ḥadd*-offences and punishments and included, for the first time in the history of Sudanese law, apostasy. In the same year, for the first time, a Muslim Personal Law Act codified personal status law.[428] Other important legislative initiatives include the Public Order Act of 1996 (now the Security of the Society Law), the 1998 Constitution, and the Political Associations Act of 1998. It must be noted that some of the September laws with a bearing on criminal law, such as the Judgment Basic Rules Act and most of the criminal circulars remain in force until the time of writing. With regard to the Criminal Act 1991 it has been concluded that it "appeared to have the potential of subjecting the society to even harsher sanctions than the ones endured during Nimeiri´s *sharí´a* experiment".[429] This assessment, however, seems to be unjustified. While it is certainly true that the potential for harsh sanctions is there the new penal code suppressed not only part of the politically motivated crimes and punishments of the 1983 PC but also most of the articles that had combined *ḥadd*-punishments with non-*ḥadd* crimes. Further, the de facto application of the new code, the same author concedes, was "lenient", "ever since its coming to force in March 1991, there were hardly any reports of stoning, amputation or crucifixion".[430]

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

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

[426] Lawyers Committee for Human Rights (1996), pp. 37-38.
[427] Bleuchot (1994), pp. 423-427.
[428] Ali (2001), p. 29; An-Na´im (2002), p. 83.
[429] Sidahmed (1997), p. 220.
[430] Sidahmed (1997), p. 220.

decree.[431] They must be understood in relation to and in their interplay with parts of the Criminal Act 1991[432], the Public Order Police (POP) and the Public Order Courts (POC). While each POL reflects particular local traditions to some degree most of the POL share a certain amount of common provisions.[433] The Khartoum Public Order Act 1996, applicable to approximately 7 million people in Sudan's capital, and the POL of the governorate Kassala can serve as examples of how Public Order Laws control human relations and behavior in the public and private spheres through criminal prohibition. Both laws stipulate that for private and public parties with music a permission of the local authorities (i.e. the POP) has to be obtained.[434] Several restrictions are imposed. The party must end at 11 p.m.[435], dancing between men and women is not allowed and women shall not dance in front of men".[436] Further „shooting"[437] and „the singing of trivial songs" are prohibited".[438] Both laws give the police the right to take whatever measures it sees fit in order to stop the infraction, including the termination of the party. Both laws outlaw „parties with music, cinema and theatre shows, exhibitions and similar events on Fridays between 12.00 a.m. and 2 p.m.[439] The chapter on parties with music contradicts Sudanese manners and customs, resulting from its specific ethnic composition in various ways. Due to the massive influx of refugees from the South, the Sudanese capital Khartoum now is a miniature Sudan with most of its tribes represented. Mixed dancing is part of their beliefs and heritage and banning it amounts to outright discrimination. Mixed dancing has also been common among Muslims in the North and they are thus just as affected by the law as are Southerners.[440] It has also been noted that the power of the Public Order Police to stop parties with music after 11.00 p.m. is not in harmony with

[431] For this section on Public Order Law compare Strategic Intitiative on Women in the Horn of Africa (SIHA) (2009).
[432] Especially Part XV, "Offences of Honour, Reputation and Public Morality" and here in particular art. 152 on indecent and immoral acts.
[433] Compare e.g. the Public Order Laws of Kharṭūm and Kassala: qawanīn wilāyat al-Kharṭūm, qanūn wilā`ī raqm (28) lisanat 1996 (m), qanūn al-niẓām al-´āmm biwilāyat al-Kharṭūm lisanat 1996 (m) (Public Order Law, Khartoum Governorate, 1996), qānūn al-niẓām al-´āmm liwilāyat Kassala lisanat 1999 (m), (Public Order Law Kassala Governorate 1999).
[434] POLKh, art. 5.
[435] POLKh, art. 7a / POLKa, art. 8a.
[436] POLKh, art. 7b.
[437] POLKh, art. 7c.
[438] POLKh, art. 7d.
[439] POLKh, art. 8/POLKa, art. 9.
[440] As a guest of a party in Omdurman in the summer of 2004, I could observe that part of the law was not observed. The music did indeed stop at 11.00 p.m. and no alcohol was consumed. However, after a timid beginning with men dancing by themselves (as is indeed allowed by the POLKh), women and children soon joined.

Sudanese custom. „It is one of the character traits of the Sudanese that the quarter joins in celebrations and mourning and during the past years we have not witnessed resistance against long parties lasting until morning“.[441] The same author also points out, that the Public Order Police is given the right to intervene, notwithstanding the fact that there might not be a claimant or a damaged third party.[442] Both laws also regulate gender separation in public transport. The POL Khartoum specifies: „Each public bus used for public transportation within the state shall specify a door to be used by women and reserve ten seats for women[443], „men shall not sit in the seats reserved for women, neither shall women sit in the seats reserved for men“[444], „writing any expression, or sticking any picture or sketches that contradicts religion, morals and good taste is prohibited on public transportation”.[445] Kassala outlaws the same misdemeanors and in addition the playing of „tapes of obscene songs“[446] in „public transport and public places“.[447] „The shading of public and private vehicles is forbidden, unless a written permit has been issued by the Minister of Interior or his deputy.[448] Further, „twenty five percent of the total seats in public transportation...shall be reserved for women“.[449] As to gender segregation in hair dresser's and tailor's businesses the POL stipulates that "no person shall practice the profession of (women) hair dressing unless a license is obtained from the competent peoples committee and after obtaining the required recommendation issued by the competent people's authority committee“.[450] "Men may not be employed in a women's hairdressing business“[451] in Khartoum. Kassala is less strict. The same rule applies, but, by way of exception, men may carry out „administrative or technical

[441] Al-Sayyid, p. 134.
[442] Al-Sayyid, p. 135.
[443] POLKh, art. 9 (1) a.
[444] POLKh. art. 9 (1) b. During visits to Khartoum in 2004 and 2009 I could observe that gender segregation in public buses was not enforced. Reserving a door for women is not possible in the widely used minibusses, since they only dispose of one (sliding) door. Nor does the personnel operating these busses pay attention to gender separation. Instead, new passengers first fill up seats farther away from the door.
[445] POLKh, art. 9 (1) c.
[446] Obscene songs (*aghānī hābiṭa*) are defined under chapter 1 as: "...songs using words or expressions contradicting faith or morality or good manners and the general taste and sound sentiment, whether accompanied by music or not. POLKha, art. 4g.
[447] POLKa, art. 10.1.
[448] POLKh, art. 9 (1) d.
[449] POLKh, art. 9 (2).
[450] POLKh, art. 13 a. Even though the title of the law talks about "women´s hair dressing businesses", the first article talks about "hair dressing businesses" in general without specifying whether this provision includes men´s hairdressing businesses as well. POLKa, art. 13 does define "women´s hairdressing businesses" only.
[451] POLKh, art. 14 a.

tasks“[452] but in both governorates men „may not enter a women's hairdressing business“.[453] How they can carry out their administrative or technical tasks without entering the premises the Public Order Law of Kassala does not explain. To make sure, that men and women alike cannot claim ignorance of these regulations, „a sign explaining the provisions of this subsection must be placed in a visible place“.[454] The POL Khartoum allows that „men may own (women's) hairdressing businesses“[455], but „...to grant a license...the business must be managed by women“.[456] Owners and managers of hairdresser's businesses must be sure of their employee's „righteousness and good reputation“[457], and „the manager must not be less than 35 years of age“.[458] There is no age limit specified for owners of women's hairdressing businesses. Since the owner often is also the manager, a women who has not reached 35 might not be able to manage her own business. The licensing authority and the Public Order Police have the right to enter any hairdressing business at any time for inspection and in order to make sure of the compliance with this law, provided that the inspection is carried out by women.[459] The Public Order Police (POP), however, does not have female squads that could carry out this kind of inspections. In general, male POP in full gear raid businesses in question in order to check on the compliance with the POL´s regulations.[460] The starting of a tailor's business is forbidden unless a license from the local authorities[461] has been obtained, which will „prescribe the regulations which shall have regard to the public morality of the employees and the business“.[462] Other regulations pertinent to public morals or religion specify that queues before (public) authorities must separate men and women[463], „imposture , fraud , magic and Zaar are prohibited[464], „bathing naked in the Nile is prohibited“[465], the selling of food and drink by restaurants or cafeterias during the day during Ramadan is

[452] POLKa, art. 14 (1).
[453] POLKh, art. 14 b, POLKa, art.14 (2).
[454] POLKh, art. 14 c.
[455] POLKh, art. 15.1.
[456] POLKh, art. 15.2.
[457] POLKh, art. 16 (a), POLKa, art. 14 (6).
[458] POLKh, art. 16 (c).
[459] POLKh, art. 17. POLKa, art. 15 - as a reference for this provision - mentions the Law of Criminal Procedure.
[460] See Al-Sayyid, p. 137.
[461] POLKh, art. 18. (a), POLKa, art. 16 (1).
[462] POLKh, art. 18. (b), POLKa, art. 16 (2).
[463] POLKh, art. 20. In a similar sense POLKa, art. 19. Here not only official authorities but every person (kullu shakhṣ) dealing with the public must separate men and women.
[464] POLKh, art. 22. POLKa, art. 24.
[465] POLKh, art. 23 (a).

prohibited.[466] The POL Kassala regulates also a variety of other issues, beginning with commercial enterprises who are not allowed to operate on Fridays during prayer time from 12.00 a.m. to 1.30 p.m.[467] No commercial license or a renewal thereof may be issued if the name of a company is in conflict with faith, values and customs.[468] In addition to hairdressing and tailor's businesses the Kassala POL also regulates gender separation in telephone parlors. Female employees are not allowed to work in them, unless they have been registered with the responsible authorities and their righteousness and good reputation have been confirmed.[469] As in the case of hairdressing businesses, telephone parlors are not allowed to have more than one entrance and exit, facing a public street and not covered by a curtain or tinted glass.[470] Women selling food or drinks in public places are not allowed to do so between the prayer at sunset and morning prayer.[471] Kassala is also restrictive as to smoking the water pipe: the use of the „shīsha" is forbidden in public places.[472] Finally, the POL Kassala, in article 28, makes reference to the Penal Code of 1991: „The laws of the Penal Code 1991 will be applied to who attempts, participates in, abets or cooperates in the perpetration of any of the misdemeanors specified in this law".[473] The punishments stipulated in the POL for the above contraventions in Khartoum are severe. They are: a) imprisonment for a term not exceeding five years, b) a fine, c) both of the above d) whipping, e) forfeiture of any instrument used in such contravention f) closure of the premises for a term not exceeding two years. Interestingly, the Kassala Public Order Law, even though it is more restrictive and legislates on more misdemeanors, shows more leniency with regard to punishments. Thus, the Kassala POL contents itself with imprisonment of not more than a month and limits the possible range of the fine to 5000 Dinars.[474] Since both laws allow for both punishments – imprisonment and fine – to be combined, the Khartoum POL appears especially harsh in comparison with its counterpart in Kassala: an unspecified fine in combination with imprisonment of up to five years in Khartoum and a maximum of one month in prison in combination with a maximum

[466] POLKh, art. 24., POLKa, art. 20.
[467] POLKa, art. 17.
[468] POLKa, art.21.
[469] POLKa, art. 23 (1). It is noticeable that good reputation is explicitly mentioned in this context while the Evidence Act 1993 does not stipulate it as a precondition for giving testimony in *ḥadd* cases (exception *zinā*).
[470] POLKa, art. 23(2).
[471] POLKa, art. 22.
[472] POLKa, art. 26.
[473] POLKa, art. 28.
[474] Ca. 14,5 Euro (December 2004).

of 5000 Dinars in Kassala. Moreover, the Khartoum POL does provide for flogging, while the Kassala POL does not.

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

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

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

[475] The POP has been renamed "Police of Society Security" but continues to be known by its former name POP.
[476] The following sections on POP and POC follow Strategic Initiative on Women in the Horn of Africa (SIHA) (2009).

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

The promotion of an Islamist international

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

[477] Strategic Initiative on Women in the Horn of Africa (SIHA) (2009), pp. 6-7.
[478] Warburg (2006), p. 10.

secret service DST in August 1994.[479] Islamist Sudan's most notorious guest, however, was Usama bin Ladin, who relocated al-Qā´ida´s headquarter to Khartoum in 1992. In May 1996, bin Ladin left for Afghanistan, after a failed assassination attempt on Mubarak in Ethiopia and subsequent strong political pressure from the United States, Saudi-Arabia and Egypt. Usama bin Ladin built a new airport in Port Sudan, which was then used as a hub for arms shipments to militant Islamists in Yemen and Somalia. For Afghan *mujāhidīn* alone 23 camps were constructed in the Sudan with the financial and logistical help of the al-Qa´ida leader. His hosts also benefited from bin Ladin's financial support for the PDF and the training of NIF students".[480] The Mubarak assassination attempt, undertaken by the Egyptian *al-jama´āt al-islāmiyya* with full support from the NIF[481], led to growing differences between the NIF and the military, with the latter retaking control of Sudan´s intelligence service after the failed plot. Al-Bashīr was opposed to lending support to al-Qā´ida and bin Ladin and ordered "his officers to stop it".[482]

Next to supporting international terrorist groups, al-Turābī and the NIF also quickly moved forward to organize an Islamist International regrouping a wide range of Islamist and other movements from the Arab world but also, unlike the name Popular Arab and Islamic Congress (PAIC) indicates, from Iran and Asia as far as the Philippines. To this end al-Turābī organized in April 1991, only a few days after the cease-fire in the Gulf War, the first PAIC meeting which gathered 300 Sudanese and 200 international Islamist leaders from 45 states.[483] Al-Turābī himself became PAIC´s Secretary General, the Secretariat had its seat in Khartoum. PAIC´s foundation and first meeting, heralded by the Sudanese government as "the most significant event since the collapse of the Caliphate"[484], coincided with the humiliating defeat of Iraq in the Gulf War and al-Turābī´s intention was to seize the momentum. The perceived Western imperialist conspiracy, their Arab collaborators such as Egypt, Saudi-Arabia and Syria, which had all sided with the anti-Saddam forces, and reactionary regimes in Muslim countries in general were the targets of the PAIC´s revolutionary agenda. Consequentially, PAIC was unpopular with most leaders of Muslim

[479] He was transfered to France and now serves a life sentence.
[480] Warburg (2006), p. 10.
[481] For details of the Sudanese involvement in the plot see Burr/Collins (2003), pp. 188-194.
[482] Burr/Collins (2003), pp. 58-59.
[483] Warburg (2006), p. 9.
[484] Burr/Collins (2003), p. 57.

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

[485] Since 2011 Organisation of Islamic Cooperation
[486] Warburg (2003), p. 213.
[487] Ortega (2004), p. 92 and Burr/Collins (2003), p. 137. It seems that "Carlos the Jackal", as a prelude to his subsequent extradition, was identified by a French secret agent at the second PAIC meeting. Compare Burr/Collins (2003), p. 157.
[488] Burr/Collins (2003), p. 139.
[489] Ortega (2004), p. 92.
[490] Yassir Arafat, Rashid al-Ghannushi, Qalb al-Din Hikmatyar, Nayif Hawatima and George Habbash did not attend. See Ortega (2004), p. 113.
[491] Ortega (2004), p. 113. Iranian *mujāhidin*, however, were present.
[492] Burr/Collins (2003), p. 168.

groups to meet and coordinate plans to "destabilize moderate Arab regimes".[493] The third PAIC "brought together four of the world's most influential and effective terrorist organizations: Hizbollah, Hamas, Islamic Jihad, and Al-Qaeda".[494] A fourth meeting which had been planned for 1996 was first postponed to February 1999 and then cancelled altogether.[495] In February 2000 president al-Bashīr had the PAIC shut down and their building confiscated. The deepening rift between al-Turābī and al-Bashīr, who seems to have kept a certain distance from PAIC meetings, also meant the end of the Islamist International PAIC and thus al-Turābī´s role as mentor and mediator of international Muslim radicals.

Jihād in the South

Another cornerstone of the NIF's claim to power was the establishment of parallel military and security forces, meant to gradually replace the existing ones. As mentioned above the new military-Islamist regime dismissed almost 40% of the regular Sudanese army, the Sudan Defense Force (SDF). Gradually replacing the SDF with the PDF, or so was the plan, would have provided the NIF with a strong instrument to cement its power. Accordingly, al-Turābī openly stated that the Popular Defense Forces (PDF) were meant to absorb the regular army and 'mobilize the public behind the jihād' [496], as the war against the Southern forces was now baptized. To al-Turābī, at least according to his public statements, the PDF was a means for the Muslim collective to fulfill its obligation to contribute to jihād, portraying the non-Muslim soldiers of the South as an infidel enemy.[497] Thus, while thousands of officers critical of the coup were fired despite the ongoing war in the South, the Popular Defense Forces, meant to reach a number of 150.000 in total, were built up from Arab tribal militias (mainly from Dār Fūr and Kordofan), NIF volunteers, including from its youth movement *shabāb al-waṭan*, drafted students and civil servants – for the last two groups enlistment was made compulsory - and forcibly recruited teenagers.[498] In the meantime, the regime had made sure that a substantial part of the pro-government fighters were Southerners, who were either rounded up in Khartoum and sent to fight for the Sudanese army in the South or belonged to southern pro-

[493] Burr/Collins (2003), p. 169.
[494] Burr/Collins (2003), p. 167.
[495] For an in-depth analysis of the different PAIC meetings see also Ortega (2004), pp. 81-122.
[496] Lesch (1998), p. 135.
[497] Abdelmoula (1996), p. 20.
[498] Lesch (1998), p. 135 and Warburg (2003), pp. 210-211.

government militias.[499] Islamic imagery and wording was used more frequently for mobilization purposes as the number of military operations and casualties rose. While the war with the South, which had been going on since 1983, was a *jihād*, the Popular Defense Forces were called *mujāhidīn*. The pro-government fighters who died in battle, accordingly, were called martyrs (*shahīd/shuhadā'*) in the mass media and a martyr's day was introduced. By 1994/1995 the high numbers of victims had forced the regime to increase its recruitment efforts. In the first half of 1995 alone an estimated 9000 Northern soldiers died, 15.000 had been wounded. This led to a situation where any Northern male between 18 and 30 became recruitable. Responses to draft notices were, however, not what the regime had hoped for. Out of 10.000 draftees who had received draft notices from the PDF only 89 responded.[500] Moreover, mothers and wives of either killed soldiers or those to be sent to the front protested alongside university professors and political activists against the abuse of the Sudanese youth as cannon fodder in the South.

Islamism and the economy

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

[499] Martin (2002), p. 3.
[500] Lesch (1998), p. 136.
[501] For the following see "Divisons in Sudan´s Ruling Party and the Threat to the Country´s Future Stability". Africa Report No. 174, International Crisis Group, 4 May 2011.
[502] Stiansen (2004), p. 157.

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

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

[503] Stiansen (2004), p. 157.
[504] The streamlining of Islamic banking in order to curb abuses did not lead to an improvement of bank performance. Stiansen (2004), pp. 161-162.
[505] International Crisis Group (May 2011), pp. 17-18.
[506] International Crisis Group, (May 2011), p. 18.
[507] On the dominant patterns of elite recruitment see Ahmed (2004).
[508] International Crisis Group (May 2011), p. 18.

disposal of the government is mainly transparent with regard to salaries. As to expenditures for the security apparatus and the military, however, they are kept secret as are their financial sources. For major sources of income such as the oil revenue transparency is completely lacking. It is believed that the oil revenue is controlled by the security services and the military. Transparency and auditing are also absent on the federal level were corruption, with concurrent impunity, is rampant. "Federalism has come to mean, in effect, a decentralized system of political corruption rather than a decentralized system of governance".[509] The proportional distribution of national revenue between the center and the periphery remains as imbalanced as it was since colonial times. The capital Khartoum receives 55% and the remaining 45% are distributed between the federal states which use the funds mainly to pay salaries. Their share of development projects is hardly existent, such projects are all concentrated in the center. It hardly needs mentioning that the lack of economic development in and the neglect of most federal states by the central government is one of the key factors behind the multiple conflicts the Sudan is facing at the domestic front.

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

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

[509] International Crisis Group, (May 2011), p. 20.
[510] Belluci (1999), p. 170.
[511] Gallab (2008), p. 130.

evil".[513] While al-Turābī´s influence was strong in the National Assembly and in institutions dominated by the NIF, al-Bashīr not only had the army behind him but also began to use his presidential prerogatives to outmaneuver al-Turābī and eliminate him from the political scene. As a prelude to the coming showdown al-Bashīr used a cabinet reshuffle in March 1998 to promote NIF stalwarts to the rank of minister. Those chosen, were disillusioned with al-Turābī and proved to be loyal to al-Bashīr.[514] In June 1998 the new constitution, drafted by a presidential committee, came into force. It was approved by a national referendum and strengthened the position of the president considerably. In May 1999 al-Turābī negotiated a secret alliance with Ṣādiq al-Mahdī in Geneva in order to prepare a regime change towards an NIF/Anṣār coalition, whilst simultaneously engaging in plans to get rid of al-Bashīr and the military. To this end, al-Turābī, as speaker of the National Assembly, contrived a motion suggesting the creation of the position of Prime Minister, thus effectively trying to reduce al-Bashīr to a mere figurehead, stripped of any real power. When al-Bashīr asked the parliament to postpone the discussion of the motion, he was harshly rebuffed by al-Turābī. Being in no doubt about the imminent threat to his regime, al-Bashīr swiftly dissolved the National Assembly, imposed a state of emergency and scheduled new elections for the National Assembly in December 2000. The dismantling of al-Turābī´s power base went further when in January 2000 nine ministers who were close to al-Turābī were dismissed. In February 2000 al-Bashīr had the PAIC headquarter closed and its building confiscated.[515] All reconciliation attempts failed as well as al-Turābī´s attempts to mobilize support from the military and security forces. First Vice President ´Ali ´Uthmān Muḥammad Ṭāhā, who also supervised the internal security apparatus, had switched sides and was now loyal to al-Bashīr. Decisive in al-Bashīr´s winning the day was his popularity in the military. The NIF had already before the coup in 1989 begun to infiltrate its ranks and it continued these efforts with some success in the first decade of al-Bashīr´s rule. Al-Turābī´s efforts to create a substitute army with the PDF which was to gradually absorb the regular army had, however, disenchanted many senior officers, who never trusted al-Turābī and Ṭāhā.[516] Al-Turābī, however, did not easily accept defeat and instead found another, unlikely, ally. In February 2001 he hammered out a

[512] Gallab (2008), p. 130.
[513] Belluci (1999), p. 171.
[514] Burr/Collins (2003), p. 256.
[515] Burr/Collins (2003), pp. 272-273.
[516] Burr/Collins (2003), p. 271.

memorandum of understanding between his new party, the Popular National Congress (PNC), and John Garang's SPLA, the very same foe his PDF had fought against for many years, with many thousands of Sudanese youth killed. President al-Bashīr would not let himself be outmaneuvered. He forestalled the scheme, had al-Turābī and more than thirty senior PNC party officials arrested and held him in detention for two-and-a-half years, until his release in October 2003.[517] The offices of the PNC as well as their newspaper were shut down and the remaining al-Turābī loyalists were purged from the government and security apparatus.[518] At the end of March 2004, Ḥasan al-Turābī was arrested anew and remained in prison until June 2005.[519] The elimination of the architect of the Sudan's Islamization program of the nineties did not, however, lead to a complete political realignment. Al-Bashīr has made it clear on numerous occasions that adherence to the *sharī´a* was still and will remain to be a pivotal element of the regime's ideology. At the time of writing, the Islamist statutes are still in force and applied (in the North). The statement that the 'Islamic experiment' has come to an end seems therefore premature.[520] In retrospect the consequences of the split between al-Bashīr and al-Turābī cannot be overestimated. Most importantly, the rift did not limit itself to the two leaders but extended to two factions of what was previously the al-Turābī camp. With the departure of the main thinker and strategist those who decided to side with the intellectually rather colorless al-Bashīr are left without a charismatic leader who could provide the Islamist project with meaning and direction. It is rather, as Gallab has baptized it "Islamism without al-Turābī, authoritarianism without Nimairi".[521] Secondly, the end of al-Turābī as a main player on the ruling side also meant the end of the radical phase of Sudan's Islamist experiment. The *jihād* al-Turābī-style, Sudan's backing of Islamist terrorism within and outside of the Sudan, the PAIC have all disappeared with their spiritus rector. Thirdly, in its own understanding the al-Bashir regime is still Islamist and has not ceased to coerce Sudanese society into obedience by a mixture of extensive human rights violations and Islamist legislation. Fourthly, and this is certainly the most momentous legacy of Islamist rule, the regime's uncompromising policy, continued after 1999, has led directly to the independence

[517] See BBC News online, 'Sudan strongman al-Turabi arrested', dated 21 February 2001; See BBC News online, 'Sudan Islamist leader released', dated 13 October 2003.
[518] Gallab (2008), pp. 154-155.
[519] During my first visit to Khartoum in May 2004 I was therefore not able to interview al-Turābī himself but talked to his son Ṣiddīq instead.
[520] Burr & Collins (2003), pp. 253-280.
[521] Gallab (2008), p. 149.

of the South. The Islamist regime, like their predecessors, has neither been able to win the war with the South by military means nor has it been capable to devise a sustainable compromise formula that would have allowed for a peaceful coexistence of the South and the North in a united Sudan.[522] The regime's high-handed, culturally and religiously supremacist attitude vis-à-vis the South has thus reached its unintended but unavoidable end.

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

Constitution making in the Sudan has been an ongoing Endeavor since independence. "Transitional", "permanent" or "interim" constitutions took turns. Rhythm and direction of the public discourse and the constitution making process have been and continue to be a reflection of regime changes and of the Sudan's unstable national identity. This has not changed under the current military-Islamist regime which has enacted two constitutions so far, one in 1998, which has neither been called "permanent" nor "Islamic", and the Interim National Constitution (INC) in 2005, with a third one, probably an Islamized one, in the making. The question of how Islamic (or how secular) the Sudan's constitution should be has been at the heart of the battle between Islamists and their opponents since 1956. Interestingly, despite, or probably as a result of this discussion and the divergent views on the matter none of the Sudan's constitutions bore the epithet "Islamic", not even the 1998 constitution. It is therefore instructive and worthwhile to take a closer look at what constitution making looked like under military-Islamist rule. It should also be noted that the al-Bashīr government created new legal institutions: while hitherto constitutional conflicts were decided by the Supreme Court, in 1998, as an institutional underpinning to the new constitution a Constitutional Court was established. It can be appealed to by 'any aggrieved person for the protection of freedoms, sanctities and rights' guaranteed in the constitution.[523] The INC maintains the Constitutional Court whose president, a deputy, and five members are appointed by the president of the republic with the approval of two-thirds of the Council of States. The president can, thus, ensure a composition of the court favorable to his interests.

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

[522] See also chapter 7.
[523] Bantekas & Abu-Sabeib (2000), p. 543.

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

The 2005 Interim National Constitution (INC)[526] largely draws on its 1998 predecessor, but also contains provisions for power-sharing on a 70-30 basis with Southern Sudan; establishment of an upper house representing the states; and creation of a first and a second vice-president, with one of the two from Southern Sudan. Article 218 makes it obligatory for

[524] Seesemann (1999), p. 44.
[525] Seesemann (1999), p. 45.
[526] See http://www.reliefweb.int/library/documents/2005/govsud-sud-16mar.pdf .

any person running in elections to respect the Comprehensive Peace Agreement and to enforce its main clauses.[527] The INC, not changing the territorial principle applicable before, maintains that the *sharī´a* is to be effective in the North only, thus posing the problem of the status of non-Muslims living in the North. Article 160 calls for an Interim Constitution for 'Southern Sudan', which was promulgated in September 2005.[528] Only a few of the INC's articles make direct reference to Islam. Most importantly, the Sudan is not defined as an Islamic republic, nor is Islam the religion of the state.[529] Article 1 of the 1998 constitution set forth that '[t]he State of Sudan is an embracing homeland, wherein races and cultures coalesce and religions conciliate. Islam is the religion of the majority of the population. Christianity and customary creeds have considerable followers.' In comparison, in the INC references to Islam with respect to the nature of the state have been omitted. Instead, article 1 (INC) states that the Sudan is a multiracial, multi-ethnic, multi-religious, and multi-lingual state. Thus, de jure Islam is not the state religion.

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

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

[528] See http://www.cushcommunity.org/constitution.pdf.

[529] Böckenförde (2008), p. 85

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

[530] For the full text of the Interim Constitution 2005 see the website of the Max Planck Institute: http://www.mpil.de/shared/data/pdf/inc_official_electronic_version.pdf.

ḥadd- and retribution-related offences (*qiṣāṣ*). It also confirms the applicability of the death penalty for underage (below 18) and elderly (above 69) offenders in *ḥadd* or *qiṣāṣ* cases (Art. 36). Concerning religious freedom, Articles 6 and 38 of the INC commit the state to all precepts of religious freedom normally associated therewith. Article 38 stipulates: 'Every one shall have the right to […] declare his/ her religion or creed and manifest the same […]'. It should be noted here that this right must be seen in the light of the pertinent sections of the Criminal Act (1991), which make apostasy of Muslims punishable by death (Art. 126). Non-Muslims are, thus, free to convert to Islam, but not vice versa. In practice, however, death penalties have not been imposed in cases against converts since the promulgation of the Criminal Act in 1991.[531] But, discrimination against Christians and adherents of native religions was and is still commonplace[532], irrespective of Article 31, which sets forth that '[a]ll. persons are equal before the law and are entitled without any discrimination as to race, color, sex, religious creed […] to the equal protection of the law.' The INC also guarantees men and women equal rights in the areas of civil, political, social, cultural, and economic rights (Art. 32). These guarantees, however, contradict to some degree other Sudanese legislation. Equal rights for men and women are especially relevant with regard to *shari'a*-based parts of the Criminal Act (1991) and in consideration of family and inheritance laws, which are known to be unfavorable to women in a variety of ways. Article 15 of chapter II on the 'guiding principles and directives' of the INC guarantees that: 'No marriage shall be entered into without the free and full consent of its parties.' In the second section of the same article, the state is called upon to 'protect motherhood and women from injustice, promote gender equality and the role of women in family, and empower them in public life.' Article 22 of the same chapter, however, clarifies that these provisions 'are not by themselves enforceable in a court of law'.

In conclusion, the 1998 constitution is a document reflecting one side of a two-pronged strategy. On the one hand, the regime followed a strategy of large-scale and uncompromising

[531] The hanging of Ṭāhā in 1985 is to my knowledge until today the only known execution in the Sudan on the grounds of apostasy.

[532] Non-Muslim university graduates have difficulty finding government jobs. There is an undeclared policy of Islamisation of public services in place, leading to non-Muslims losing their jobs in the civil service, the judiciary, and other professions. Christian secondary school students have not been allowed to finish their obligatory military service because they attended church. This is critical because students who do not complete their military service are not permitted to study at universities. There are also recurrent reports of *ḥadd* punishments being inflicted on Christians. Furthermore, while Muslims may proselytise among non-Muslims, proselytisation among Muslims is de facto excluded, since apostasy of Muslims is punishable by death.

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

[533] Seesemann (1999), p. 43.
[534] Seesemann (1999), p. 43.
[535] Compare the detailed analysis of the Sudan Human Rights Organisation: Observations on the Transitional Constitution. The Sudanese Human Rights Quarterly, Issue 20, January 2006.
[536] As well as the Max Planck Institute which was initially assisting in the drafting process but was then excluded.

Losing the South

In May 2004, a protocol on power sharing between the al-Bashīr government and the SPLA's political wing, the SPLM, was signed in Naivasha, Kenya. In this protocol the latter agreed to the application of the *sharī´a* in the capital Khartoum; other provisions of the agreement gave guarantees as to the protection of non-Muslims. In principle, the wording of these provisions was meant to safeguard the rights of non-Muslims in the capital, while simultaneously allowing for the continued application of the *sharī´a* in Khartoum as the government sees fit. In July 2005, the Interim National Constitution of Sudan was adopted after the National Congress Party, representing the central government and the SPLM, had reached a Comprehensive Peace Agreement (CPA) in January 2005. According to this agreement, the Sudan was to be governed by an interim constitution during a six-year transitional period. At the end of this period, in January 2011, a referendum took take place in southern Sudan which resulted in the independence of the Republic of South Sudan (9 July 2011) with the capital Juba. The split between Khartoum and Juba marks the end of at least part of the conflict around the *sharī'a*. The independent South has now its own, *sharí´a*-free, criminal law, the CA91 remains enforceable only in the North. Southern politicians or other Southern pressure groups such as the churches are not party to the discussions around the future of the *sharī'a* any longer. This, however, doesn't mean that the eternal discussion on the nature of the state will now be solved easily. On the contrary, with the secession of the South the discussion on the next constitution is now in full swing. According to a report of the Umma National Party (UNP) of spring 2011 the UNP agreed in discussions with the National Congress Party to the principle would be implemented on a territorial, not on a personal basis and that *sharī´a* and "local norms" (read: customary law) would be the basis for legislation. [538] It is, however, more than doubtful that the ruling regime is willing to concede the UNP or any other opposition party for that matter a real say with regard to the future constitution of the country. In April 2011, Salah Gosh, who was responsible for the NCP political party negotiations, was suddenly fired by al-Bashīr, another sign of the deep rift in the ruling NCP.[539] With regard to the future constitution and *sharī´a* application the al-Bashīr government has so far followed its

[537] On the difficulties of implementing the CPA see Sudan´s Comprehensive Peace Agreement: Beyond the Crisis. International Crisis Group, Africa Briefing No 50, Nairobi/Brussels, 13 March 2008.
[538] Divisions in Sudan´s ruling party and the threat to the country´s future stability. International Crisis Group, Africa Report No 174 – 4 May 2011, p. 28.
[539] Ibid. pp. 28-29.

usual two-pronged approach. On the one hand it makes an effort to mobilize its clientele. Before and after South Sudan's secession al-Bashīr has underlined that "he rejects secularism in the Sudan" and "reiterated his commitment to replace the country's constitution with an Islamic one".[540] He also defended the flogging of a woman, the YouTube video of which had caused international consternation.[541] According to al-Bashīr the NCP´s insistence on *sharī´a* law played no role in the secession of the South. The North is populated by 98% Muslims who are obliged to follow God's orders and therefore *sharī´a* would be the basis of the new state the NCP was going to build.[542] Vice-President ´Alī Uthmān Ṭāhā has warned "that Islamic laws would be applied in the country, especially against those rejecting it and detractors of President Al-Bashir".[543] Thus, while reasserting its followers it concurrently negotiates with the political opposition, i.e. Umma and DUP, seemingly willing to listen and make compromises. It seems to be unlikely though that NCP and the Umma especially can under the current NCP leadership identify enough common ground that would justify Umma´s co-optation into the political system. The fact that two of the major opposition parties have agreed to enter unilateral negotiations with the regime must be seen as a success of the NCP irrespective of its outcome. The regime clearly wants to present itself as the main bulwark of the Islamic state, also in order to preempt other Islamist groups who now try even harder to pressure the regime to accelerate Islamization. In February 2012 an "Islamic Constitution Front" (ICF) held its foundation conference in Khartoum. Participating Islamist groups comprised the Anṣār al-Sunna, the Muslim Brotherhood[544] and the Just Peace Forum (JPF) all of which threatened "an uprising by Islamists" which would "topple President Bashīr if he does not approve the draft constitution" the ICF proposes.[545] While these splinter groups hardly have the power to topple the government, al-Bashīr and the ruling National Congress party have come under increasing pressure due to a variety of factors. As a result of the South's secession Khartoum lost about 75% of its oil income, resulting in a 30% inflation rate in May 2012. The costs of food and other basic necessities have skyrocketed and in June 2012 Arab spring-style protests broke out, triggered by students of the University of Khartoum.[546]

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[540] Sudan´s upcoming constitution will be "Islamic" Bashir says. Sudan Tribune, July 7, 2012.
[541] http://www.youtube.com/watch?v=PBJRsh4bn3k
[542] Sudanese president asserts North Sudan´s Arabic, Islamic identity. Sudan Tribune, February 6, 2011.
[543] Sudan´s Taha says country to apply Shariah, warns Al-Bashir´s detractors. Sudan Tribune, August 1, 2011.
[544] Not to be confused with the NCP or al-Turābī´s PCP.
[545] Sudan Islamists warn Bashir over Shariah constitution. Sudan Tribune, Feburary 28, 2012.
[546] Has the Arab Spring now spread to Sudan? The Independent, 28 June 2012.

The security forces have swiftly clamped down on the protesters and at the time of writing it seems unlikely that al-Bashīr and the NCP will face a similar fate as former Arab dictators Mubarak, Qadhafi, Ben Ali and Salih. It should be remembered that the regime is able to muster considerable forces for its protection. At any point in time approximately 6000 security personnel of a private security force directly under al-Bashīr´s command are deployed in strategic areas of the capital and another 12000 are based outside of it.[547] In addition, the army, a plethora of state security services and several police corps are effective instruments to crush the opposition. Also, the NCP is well organized, does enjoy a certain support and disposes of substantial financial means. Thus, while, for the time being, the NCP regime is still capable of winning in the streets of Khartoum its list of political and economic problems is long and further aggravated by fierce infighting in the ruling NCP. One year after the secession of the South the conflicts with its now independent neighbor have neither ceased nor are they likely to do so in the near future. It will be crucial to find solutions for the contested common 1800 km long border[548], the disputed area of Abyei and a wide array of problems directly related to the split such as citizenship, refugees, nomads affected by the new borders, security arrangements and economic and financial matters. As to the latter it seems that for the most pressing problem, the crucial question of how much the South has to pay in order to be able to pump its oil through Northern territory to Port Sudan for exportation, a solution has been found.[549] The Dār Fūr conflict has still not been solved with the government preferring to continue a divide and rule policy rather than pursuing a credible peace process.[550] While this list could be continued the general situation is further aggravated by the multiple internal splits of the Islamist movement which make reforms or a major change of direction unlikely if not impossible. Thus, the movement not only suffers from the split between the al-Turābī faction, organized as the Popular Congress Party, and the ruling National Congress Party. The past years have also seen severe infighting of different factions in the NCP, mainly between security hard-liners and more accommodating civilians.[551] These conflicts are decided by president al-Bashīr who is acting as the final arbiter. The NCP´s

[547] Divisions in Sudan´s ruling party and the threat to the country´s future stability. International Crisis Group, Africa Report No 174 – 4 May 2011, p. 14.
[548] 20% of the 1800 km long common border are contested.
[549] Two Sudans reach deal on fees for oil pipelines. The New York Times, August 4, 2012.
[550] Divisions in Sudan´s ruling party and the threat to the country´s future stability. International Crisis Group, Africa Report No 174 – 4 May 2011, pp. 26-27.

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

Conclusion

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

[551] Divisions in Sudan´s ruling party and the threat to the country´s future stability. International Crisis Group, Africa Report No 174 – 4 May 2011, p. 22-23.
[552] Kok (1989), pp. 361-362.

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

The camp advocating Egyptianization of the legal system, however, can, to some degree, claim victory for the important field of civil law. After the failed introduction of a slightly modified version of Egyptian civil law in 1971[553], a second, though somewhat different, attempt in 1984 was successful. The Civil Transaction Act 1984 (al-qānūn al-mu´āmalāt al-maddaniyya 1984) follows mainly the Jordanian civil code, which in turn is inspired by both, the Mecelle, the Ottoman civil code of 1876 and Egyptian civil law.[554] The Sudan has thus, despite the influence of the Mecelle, joined the large group of Arab states that have adopted Egyptian civil law.[555]

Most significantly, despite efforts of the al-Bashīr government to marginalize it, customary law is still of major importance in the rural areas of the Sudan.[556] Further, since 1983 Sudanese legislation has gone through an accelerated process of Islamization. While this process was not a linear one, for more than twenty years, two autocratic regimes have expanded the influence of the *sharī´a* / *fiqh* to the detriment of competing sources of law. The *sharī´a*/*fiqh* has substantially influenced criminal legislation, banking laws, taxation laws (*zakāt*), the 1998 and 2005 constitutions, and, as in most Muslim countries, family and inheritance laws for Muslims and to some degree civil law.[557] However, with regard to the actual implementation of the *ḥudūd* it has been noted that "the new legislators seemed rather keen to give an impression of moderate and considerate application as opposed to the cavalier deployment that characterized the 1983 experiment".[558] These findings are confirmed by this study.

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[553] al-qānūn al-maddanī lisanat 1971. On the repercussions of the introduction of a code of French orientation in a Common Law system see Dilger (1974).

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

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

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

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

[558] Sidahmed (1997), p. 220.

In summary it can be said that the Sudanese legal system remains to be a hybrid patchwork, marked by a high degree of legal syncretism. Sudan belonged to the first wave of countries introducing ICL in 1983, after Libya, Pakistan and Iran had showed the way. The fervent application of floggings and amputations under Numairi was suspended under his direct successors until the present regime came to power in 1989 and subsequently supplanted the 1983 Penal Code by the Criminal Act 1991. Despite substantial non-Muslim minorities in the South and among the refugee population around Khartoum Numairi had decided to introduce ICL for the country as a whole. This was for the most part changed in 1991 when the South was exempted from *sharī´a*-based punishments. The legislation as such, however, was, at least in theory, applicable in the South of the Sudan as well, despite the fact that parts of the South were not under effective government control. It should also be noted that the exemptions pertained to punishments while the definitions were the same for the North and the South. Thus, e.g. *sharī´a*-based definitions for theft, unlawful sexual intercourse and armed robbery were applicable in the South as well without paying any attention to cultural differences.[559] ICL has been an important bone of contention between the North and the South since 1983 but also in the North itself. Its looming abolition was an important motive behind the coup d'état in 1989. While as of 1991 the *ḥudūd* and *qiṣāṣ* were not applicable any longer in the South, non-Muslim Southerners living in the North were still subject to *sharī´a*-based punishments. This highly controversial situation only ended, at least on paper, with the Interim National Constitution (INC) in 2005. In 2012 plans for reinforced *sharī´a*-application and an Islamic constitution seem to get a new impetus. The al-Bashīr regime seems to be poised to move ahead with an Islamic constitution. Whether the repeated announcements of "*sharī´a* application" mean that the laws in place will be applied in a more draconian manner seems unlikely. The government is fighting at too many fronts and can ill afford to further antagonize public opinion.

[559] Kok has rightly pointed out that the CA91 defines zinā as unlawful sexual intercourse between a man a women without lawful bond between them. Sex within a levirate relationships or in a "ghost marriage" is lawful under customary law in many southern communities, but obviously not under *sharī´a*. Compare Kok (1991), pp. 245-246.