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

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3 Sudanese Islamic Criminal Law: sources, structures, procedure, evidence and general principles

3.1 Criminal legislation

3.1.1 The Penal Code 1983 and the Criminal Act 1991

3.1.1.1 Objectives of the codes

In an explanatory note, the Sudanese legislator justified certain provisions and explained how he wanted the Penal Code 1983 to be understood. An important section of the note deals with the question of different or equal treatment of non-Muslims with regard to *ḥadd*- and *qiṣāṣ*-crimes.[560] As a general rule, the explanatory note states that all humans are equal before the law, regardless of their religion or social status. In consequence, the Penal Code makes no difference with regard to the blood price of a Muslim or a non-Muslim. As to the drinking of alcohol, the qur´anic punishment is only applicable to Muslims. Members of other religions, however, who consume alcohol or trade in alcohol and offend the sensibilities of "another person" (read: Muslim) or cause disturbance of the public order will be punished as well because these offences harm society. With regard to unlawful sexual intercourse (*zinā*), non-Muslims will receive the punishments provided for in their own religions. In analogy, a Muslim must be the injured party of false accusation for unlawful sexual intercourse (*qadhf*), If a non-Muslim is accused of *zinā* in the same way the qur´anic punishment shall not apply. The explanatory note also explains that retribution (*qiṣāṣ*) will be carried out by the state in the presence of the injured party. The state acts as a general guardian (*wilāya ´āmma*), in the same manner it carries out any other punishment, following Sudanese practice since independence. Justifying this inherent shift of retribution from private to public law the note argues that allowing the victim or his heir to carry out the punishment would "strengthen the traditional nature of the *qiṣāṣ* as retaliation at the expense of punishment".[561] Interestingly, we can also observe the opposite tendency, i.e. strengthening private law vis-à-vis public law. Thus judges, in the pre-1983 legislation enjoyed immunity with regard to causing unintentional homicide through a wrong judgment. This immunity, the note points out, is abolished in the new Penal Code. Judges in such cases would be liable to blood money (*diya*).

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

The Criminal Act 1991, which repealed the Penal Code 1983, came into force on March 22, 1991.[562] In a memorandum[563] accompanying the CA91 its authors explain in detail what the general guiding principles of the drafting process were and what, in their eyes, it has achieved: The masses of the Sudanese people, says the introduction, have addressed to consecutive governments a call for an Islamic Penal Code.[564] Consequentially, after having secured the country's safety and unity, the „Revolution for National Salvation" was the first government to tackle the problem. It confirmed its identity promulgating "authentic Sudanese laws"[565] derived from the *sharī´a* and answering to the aspirations of the Sudanese masses. The authors of the code explain further that not only the criminal laws of 1974 and 1983 have been taken into consideration, but also various projects of *sharī`a* criminal codes of other countries and institutions, such as projects of the Arab League[566], Al-Azhar, the United Arab Emirates, Pakistan and Egypt as well as a Sudanese project of a new penal code. This project, the Criminal Bill 1988, which had been submitted to parliament in 1989, had passed the first and second reading, but subsequently did not come to fruition due to controversies between the political parties and „foreign pressure".[567] Further, the precision of the wording of the 1991 code was improved by taking into account modern criminal jurisprudence (*al-fiqh al-jinā`ī al-mutaṭawwir*). Major flaws which became evident during the application of the predecessor codes were remedied. The rendering of multiple versions of a particular crime has been abandoned especially with regard to theft, robbery, fraud and crimes committed by public servants.[568]

As its main sources the code uses the Islamic *sharī´a*. It is using *ijtihād* and is taking into account the orthodox schools (*madhāhib fiqhiyya*), the latest developments of the time (*mustajidāt al-´aṣr*), the conditions of the country (*ẓurūf al-bilād*). Orthodox jurisprudential terminology (*al-muṣṭalaḥ al-fiqhī*) is used in order to connect the law with the jurisprudential and Arab heritage (*al-turāth al-fiqhī wa al-´arabī*) as far as compatible with modern and current terminology in the Sudan.[569]

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[562] Köndgen (1991), p. 132.
[563] The following is taken from: mudhakkira irfāq al-qānūn al-jinā`ī lisanat 1991 m, n.d.
[564] Al-Nūr argues that the Criminal Act 1991 continues an Islamic legal tradition of the Sudan which had been interrupted by colonization and Western influence. Al-Nūr (1991), pp. 1-2.
[565] "al-qawānīn al-sūdāniyya al-aṣīla".
[566] mashrū´ qānūn jinā`ī ´arabī muwaḥḥad. Al-Ribāṭ/Dār al-Baiḍā` 1986.
[567] See introduction to the memorandum, p. 1.
[568] Paragraph 2: Exactitude, paragraph 1 deals with the arrangement of the chapters.
[569] Paragraph 3: Sources (*uṣūl*).

With regard to punishments the authors explain that the new code in general has diminished prison terms and limited whipping – except for crimes that call for special deterrence. It has also introduced the new penalties of banishment and exile (*taghrīb wa nafiy*) and has separated punishments (*ʿuqūbāt*) from compensational penalties (*al-jazāʾāt al-taʿwīḍiyya*).[570] Next to the introduction of innovations the new code has also done away with certain features of its predecessor. It has thus abolished the extensive legislation on political offences and introduced wide-ranging amendments on political crimes against the state in favor of freedom (*liṣāliḥ al-ḥurriyya*). It abolished provisions that contain imprecise meanings that are incompatible with the definitive character of criminal laws and the principle of the rule of law. Finally the code treats the consequences resulting from the suspension of the execution of convictions of *ḥadd*-punishments dating from before the code was promulgated. This delay of the execution is considered to be a *shubha* annulling the *ḥadd*-punishment in conformity with the opinion of Abū Ḥanīfa and taking into consideration the relevant text on a substitutional *taʿzīr*-punishment.[571]

3.1.2 Codes of Criminal Procedure

The Code of Criminal Procedure 1983 (CCP83) was, to a large extent, inspired by its predecessor, the Code of Criminal Procedure 1974. Many articles were mere translations.[572] With regard to the general principles the CCP83 basically maintained the same rights that were already guaranteed in 1974. Thus, the accused has the right to a fair and speedy trial[573], there is a presumption of innocence until guilt is proved beyond reasonable doubt[574], no punishment shall be inflicted beyond that prescribed by law in force at the time the offence was committed[575] and no person shall be subjected to cruel and inhuman treatment.[576] Further, no person shall be subject to double jeopardy and torture. Enticement or intimidation shall not be used in interrogation[577] and the accused had a right to an advocate of his choice.[578] The

[570] Paragraph 4: Innovation.
[571] Paragraph 7: Transition.
[572] A thorough description of the CCP74 gives Kenyon (1984).
[573] Guaranteed under the constitution of 1973, art. 64 which was in force when the September laws were promulgated. The CCP83 speaks of the right to a fair and complete (nājiz) trial. See art. 3, CCP83.
[574] Art. 3, CCP83 and CCP74.
[575] Art. 3, CCP83 and CCP74.
[576] Art. 3, CCP83 and CCP74.
[577] Art. 127, CCP83, art. 235 CCP74.
[578] Art. 39, CCP83 and CCP74. Kenyon points out that at least until the first half of the eighties there was a big gap between the legal guarantee to an advocate and the inadequate number of qualified advocates available. He

CCP83, while maintaining substantial parts of the previous system, made, however, important amendments in order to make it compatible with the new Penal Code and in order to Islamize it. Thus, in an annex the CCP83 stipulated that the Chief Justice will issue occasional criminal circulars deciding upon the school or schools (*madhāhib*) the courts have to follow in their application of the Islamic *sharī´a*. These circulars also determine the amount(s) to be paid as *diya* in homicide cases and cases of bodily harm.[579] The necessity to administer justice in conformity with the *sharī´a* also restricts the powers of the president and the attorney general. Thus, the president has the authority to waive a punishment, commute a sentence or cancel a conviction for a crime only when this does not contradict the Islamic *sharī´a*.[580] Similarly, the attorney general cannot terminate criminal proceedings if this violates the *sharī´a*.[581] In order to ensure that the *sharī´a* is respected, the Supreme Court and the Court of Appeals may request on their own initiative any file on criminal proceedings of a court subordinated to its authority when they consider the proceedings to violate the Islamic *sharī´a*.[582] With regard to the death penalty, the CCP83, in contradiction to the *sharī´a*, does not allow for executions of persons who are seventy years of age and older.[583]

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

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wrote in 1984, "There is no legal aid in the country; therefore, judges perform the function of both the prosecution and defense in most of the cases they decide". Kenyon (1984), pp. 29.

[579] These amounts can be applied country-wide or in specific provinces only, as the Chief Justice considers it just (*´ādil*) and in harmony with the Islamic *sharī´a*. See CCP83, annex to art. 307., p. 119.

[580] CCP83, art. 257.

[581] CCP83, art. 215(2).

[582] CCP83, art. 239 (1).

[583] CCP83, art. 247 (1). This has been changed in the CPA91.

[584] For details of the CPA91 see the following chapter 3.2.

3.1.3 The sources of modern Sudanese Islamic Criminal Law

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

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[585] To my knowledge there are no studies on possible influences of customary law on modern Sudanese ICL.
[586] For example family law was codified in 1991.
[587] Kenyon (1984), p. 12.
[588] Art. 3 (b) (vi).

3.1.4 The structures of ICL legislative texts

3.1.4.1 Legislative techniques

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

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

3.1.4.2 Authority of the *sharī´a*

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

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[589] Layish / Warburg describe how custom plays a role in Sudanese criminal jurisdiction, especially in cases involving *qiṣāṣ* and *diya*. Layish/Warburg (2002), pp. 194-197.

[590] This led to important practical problems in cases of rape, when women who were pregnant after having been raped were treated as culprits of *zinā* instead of victims of rape. See below chapter 4.1.

[591] Layish/Warburg (2002), p. 282.

adherence to article 9 of the Permanent Constitution of 1973 which stipulated that " Islamic law and custom shall be the main sources of legislation...".[592] Before the September laws the influence of the *sharī´a* on Sudanese legislation was very limited, but gained momentum as of 1977 when new Islamic legislation concerning the banning of alcohol, gambling, interests et al. was drafted. It must be noted that the dominant role of the *sharī´a* as a main source created a multitude of constitutional problems once the September laws were in force. The 1973 constitution guaranteed equal rights[593], freedom of religion[594], freedom from cruel and unusual punishment[595] which were in direct contradiction to provisions of the PC83. These contradictions persisted with the 1985 Transitory Constitution which gave similar guarantees while the September laws remained on the statutes.[596] In the first Islamist constitution of 1998 the authority of the *sharī´a* as a source of legislation was confirmed, alongside the consensus of the nation by referendum, the constitution and custom. No legislation was to be made in contravention of these fundamentals.[597] In addition, the 1998 constitution contains various *sharī´a*-derived elements such as a provision on *zakāt*[598], the pledge to purge society from liquor among Muslims[599] and a provision on the applicability of the death penalty in *ḥadd*- and *qiṣāṣ*-cases.[600] Despite these provisions, the 1998 constitution has not managed to solve the contradiction between the authority of the *sharī´a* and the granting of fundamental rights such as freedom of religion[601], equality before the law[602] and non-discrimination by reason of sex or religious creed.[603] In the last constitution, the Interim National Constitution (INC) of 2005, which is still in force at the time of writing, the legislators have tried to find a balance between Northern and Southern interests with regard to the role of the *sharī´a*. Article 5(1) of the INC stipulates that the Islamic *sharī´a* and the consensus of the people shall be the sources of legislation having effect only in the Northern states of the Sudan. In the South the *sharī´a* had no role to play as a source of legislation. As to banking a dual banking system, with an

[592] The Permanent Constitution of the Sudan 1973, art. 9. Interestingly, the Penal Code 1974 did not contain any Islamic provisions.
[593] Art. 38.
[594] Art. 47.
[595] Art. 72.
[596] See also Sherman (1989), pp. 295-297.
[597] Article 65, The Constitution of the Republic of the Sudan, adopted June 1998.
[598] Art. 10.
[599] Art. 16.
[600] Art. 33 (2).
[601] Art. 24.
[602] Art. 21

Islamic system in the North, was provided for. With regard to the Southern refugees living in and around Khartoum the INC stipulates that non-Muslims are not subject to prescribed penalties *sharī´a*-based penalties.[604] A special commission is charged with ensuring that non-Muslims are not adversely affected by or subject to the application of the *sharī´a* law in the National Capital.[605]

3.1.4.3 Legality principle

The legality principle "nulla poena sine lege" was firmly established in the constitution of 1973 which was in force when the September laws were promulgated and remained operative until after the downfall of the Numairi regime. The 1973 constitution stipulated that "no person shall be punished for an act which was not an offence at the time he committed that act...".[606] The new Islamist legislation, however, contradicted this principle. Thus, the Judgment Basic Rules Act 1983 stipulates that in the absence of a statutory provision the judge shall apply *sharī´a* rules established by the Qur´an and Sunna.[607] Further, the Penal Code 1983 provided that when a *ḥadd*-punished was remitted the judge could impose any *ta´zīr*-punishment even if such a penalty was not clearly stipulated in the Penal Code. Moreover, the non-existence of a text in the Penal Code does not pose an obstacle to imposing a *ḥadd*-punishment (*´uqūba shar´iyya ḥaddiyya*).[608] While the latter two provisions have been abolished when the new Criminal Act 1991 was introduced, the Judgment Basic Rules Act 1983 remains in force and still allows a judge to apply *sharī´a* rules even without a clear provision in the statutory laws.[609]

With regard to practice it is interesting to note the contradictory application of this principle. Layish reports a case in which the Criminal Court of Appeal overruled a sentence of a criminal court with regard to a crime that had taken place before the September Laws were enacted in 1983.[610] It reasoned that the new 1983 legislation could not be applied retroactively and that "everyone is entitled to know the statutory sanctions entailed in any offence"[611] In

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[603] Art. 21.
[604] Interim National Constitution 2005, art. 156 (d).
[605] Interim National Constitution 2005, art. 157.
[606] The Permanent Constitution of the Sudan 1973, art. 70.
[607] Judgment Basic Rules Act 1983, art. 3 (a).
[608] Art. 458 (3), Penal Code 1983.
[609] For cases illustrating this principle in practice see Layish/Warburg (2002), pp. 180 et sqq.
[610] Layish/Warburg (2002), p. 274.
[611] Layish/Warburg (2002), p. 274.

other words, the Supreme Court upheld the principle of "nulla poena, nullum crimen sine praevia lege", despite the provisions of the Judgment Basic Rules Act and the Penal Code contradicting it. In the highly politicized case dealing with the alleged apostasy of Muḥammad Ṭāhā, however, the uncodified offence of apostasy/ridda led to the execution of the accused despite the non-existence of the offence in the statutes.[612]

3.1.4.4 Legal circulars

The power to issue legal circulars dealing with the interpretation of the *sharī´a* goes back to the Muhammadan Law Courts Organization and Procedure Regulation of 1915[613], which granted the Grand Qāḍī the leverage to introduce reforms by choosing and combining doctrines mainly of the Ḥanafite but also of other schools. Until the abolition of the office of the Grand Qāḍī in 1979 more than 60 circulars were issued, partially dealing with administrative matters and partially introducing reforms of substantive law. In 1980 the Sudanese judiciary was reorganized and *sharī´a* courts and civil courts were unified under the Chief Justice. The Chief Justice, who had been hitherto head of the civil judiciary, continued to issue legal, including criminal circulars.[614] Given the many loopholes of the September criminal legislation and the existing difficulties in its application around a dozen criminal circulars were issued between October 1983 and May 1984 by the then incumbent Chief Justice Daf´allāh al-Ḥājj Yūsuf. The Chief Justice's power to issue circulars (*manshūrāt*) is stipulated in article 308 of the Criminal Procedure Act 1983. According to this article he issues circulars in order to determine the school(s) the courts have to follow in the application of the Islamic *sharī´a*.[615] The Chief Justice himself has declared that the circulars do not follow any particular school of law and that "he has no inhibitions whatsoever to adopting legal doctrines from any school provided they are ´in harmony with the sharī´a and the Islamist statutes`".[616] The circulars are complementary to the Islamist legislation and meant to guide the judges in their application of the *sharī´a*. Most importantly, they are meant to

[612] For a detailed survey of the juridical details of the Ṭāhā trial see An-Na´im (1986) and O´Sullivan (2001).
[613] Section 53, for the following see Layish/Warburg (2002), pp. 72-75.
[614] See Layish/Warburg (2002), pp. 74-75. For a compilation of criminal circulars of this period see Ḥāmid, Vol. 6.
[615] Criminal Procedure Act 1983, art. 308 (a). The article further stipulates that the Chief Justice determines by way of circulars the amounts to be paid as blood money in cases of homicide and bodily harm. See article 308 (b).
[616] Layish/Warburg (2002), p. 99.

mitigate the "harsh consequences of the Qur´anic punishments and retribution".[617] They are, with some exceptions, still valid and applicable with regard to the Criminal Act 1991.[618] Circulars with regard to ICL continue to be issued since the advent of the al-Bashīr regime in order to fill the gaps left by previous Chief Justices.[619]

3.2 Enforcement and procedure

3.2.1 Law enforcement and the Sudanese court system

3.2.1.1 Types, hierarchy and powers of criminal courts

Criminal courts in the Sudan consist of eight different types according to the CPA91.[620] On top of the pyramid we find the Supreme Court, followed in descending order by the Court of Appeal, General Criminal Courts (Province Courts), First Criminal Courts (District Courts), Second Criminal Courts (District Courts), Third Criminal Courts (District Courts), People's Criminal Courts (Town or Rural Courts) and finally any special criminal court established by the Chief Justice under the Judiciary Act 1986 or any other law. The organization of the courts is slightly more differentiated than in the PC83 when the three different levels of District Courts was only one.[621] The Criminal Procedure Act 1983 does not list the People's Criminal Courts but lists "Councils of Judges" (*majālis al-quḍāt*) which in turn have been abolished in 1991.

As to the powers of the different types of courts it is the General Criminal Court that can inflict any penalty or sanction provided for by the law.[622] A First Criminal Court can inflict any penalty other than the death penalty. However, when it considers a criminal suit summarily the penalties it can inflict are limited. For example, a prison term may not exceed one year and whipping may not exceed eighty lashes. The powers of a Second Criminal Court are more limited than that of a First Criminal Court, it cannot, e.g., inflict a prison term exceeding seven years. This decreases to six months or less if it considers a case summarily. A Third Criminal Court has even more limited powers and can consider a criminal suit only summarily. It can only inflict prison terms not exceeding four months and whipping not

[617] Layish/Warburg (2002), pp. 98-99.
[618] With regard to *ḥadd* and *qiṣāṣ* no new circulars seem to have been issued under the al-Bashīr regime. Hāmid´s collection of circulars, published in 2002, does not report any new circulars with regard to *ḥadd* and *qiṣāṣ*.
[619] See Ḥāmid, Volume 2 covering criminal circulars 1983-2006.
[620] Criminal Procedure Act 1991, art. 6.
[621] The three different levels of the District Courts, however, exists at least as of 1986. See Judiciary Act 1986, art. 10.

exceeding forty lashes. People's Criminal Courts have the summary powers prescribed for the First, Second and Third Criminal Courts have in accordance with the warrant of their establishment.

3.2.1.2 Judges: qualifications, appointments, discharge

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

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

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[622] For this and the following CPA91, articles 9-13.
[623] Judiciary Act 1986, art.22.
[624] Judiciary Act 1986, art. 23 (a), (b).
[625] Judiciary Act 1986, art. 23 (c), (d).
[626] Judiciary Act 1986, art. 23 (e).

and from among assistant judges to third degree courts. Again they can also be appointed from among legal advisors to the Ministry of Justice, lawyers or law professors. Judges appointed to military courts are selected by the armed forces.[628] The service of judges is terminated either by dismissal, resignation or retirement.[629]

3.2.1.3 Public prosecutor

The Criminal Prosecution Bureau (*al-niyāba al-jināʿiyya*) has the power to supervise the criminal suit, to direct the investigation, to determine the charge and exercise prosecution before criminal courts.[630] However, the Minister of Justice can grant the powers of the Prosecution Attorneys Bureau with regard to the investigation to any person or committee if he deems it to achieve justice. [631] The General Crimes Police can initiate criminal suits only with the permission of the Prosecution Attorney.[632] Prosecution Attorneys have various powers. They can transfer investigations to another Prosecution Attorneys Bureau if appropriate[633], dismiss the criminal suit, if there are no sufficient grounds for a continuation[634], issue warrants for the arrest of any person[635] or orders to search a place.[636]

3.2.1.4 Rights of the accused

The accused has a number of rights which apply in the pre-trial and/or in the trial stage. [637] These can be found in the Evidence Act 1993 or in the Criminal Procedure Act 1991 and include the following principles:

The accused is presumed innocent until proven guilty beyond reasonable doubt.[638] He has the right to be defended by an advocate or a pleader. If the accused is insolvent and he is accused of an offence that is punishable by imprisonment of ten years, amputation or the death penalty

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[627] For this and the following Judiciary Act 1986, art. 25-28.
[628] Mahmoud (2002), p. 372.
[629] Judiciary Act 1986, art. 72.
[630] CPA91, art.19.
[631] CPA91, art. 20.
[632] CPA91, art.35.
[633] CPA91, art.30 (1).
[634] CPA91, art.57.
[635] CPA91, art.67. Warrants of arrest may also be issued by a judge.
[636] CPA91, art. 86 (1).
[637] For the following Amin/Ramadan (2002), pp. 379-381, if no other sources are indicated.
[638] EvA, art. 5 (b).

the Ministry of Justice appoints a person to defend him with expenses borne by the state.[639] Whoever is convicted for a crime has the right to have his conviction and sentence reviewed by a higher court.[640] An accused person shall not be compelled to testify against himself or to confess his guilt. His or her confession must be willingly. It is illegal to use force to obtain an admission of guilt, to obtain information or to prevent the accused to convey information. Statements, evidence or procedures have to be translated if the accused is interested in them and does not understand the language in which they are given.[641] Where the accused admits to being guilty of an offence punishable by death, amputation or more than 40 lashes the court must caution the accused as to the seriousness of his admission, if an admission is the only evidence against him.[642] Nobody shall be liable to a retrial or re-punishment for an offense for which he has already been convicted or acquitted. The Criminal Procedure Act stipulates as a rule that trials are open to the public and that judgments are also pronounced in an open sitting, however, a trial in absentia is possible too.[643] After the passing of a judgment and if the sentence is subject to appeal, the court has to inform the accused and other interested parties of their right to appeal and the periods within which appeal may be presented.[644] The accused has the right to obtain a copy of the judgment upon request. He will be given a translation in his language, if that is possible and he requests so.[645]

3.2.1.5 Investigation of crimes

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

[639] CPA91, art. 135 (1), (3).
[640] CPA91, art. 183.
[641] CPA91, art. 137 (1).
[642] CPA91, art. 144 (3).
[643] E.g. in cases of offences against the State. CPA91, art. 166, 133, 134.
[644] CPA91, art. 171.
[645] CPA91, art. 173.
[646] CPA91, art. 39 (1), (2).
[647] CPA91, art. 44.

Prosecution Attorney's Bureau to dismiss the criminal suit.[648] The inquiring authorities shall not influence any party to the inquiry by enticement, coercion or hurt, in order to force him to deliver or omit any statements or information.[649]

3.2.1.6 Judgments

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

3.2.1.7 Carrying out sentences

Sentences of whipping, retribution and death are executed in public in the presence of the first instance judge and a number of attendants.[655] The execution of judgments is to be swift, notwithstanding appeal, with the exception of the death penalty, *qiṣāṣ*, *ḥudūd* and whipping.[656] All death sentences and also amputations can only be executed after confirmed

[648] CPA91, art. 42.
[649] CPA91, art. 43 (2).
[650] CPA91, art. 166.
[651] CPA91, art. 169.
[652] CPA91, art. 167, (1), (3).
[653] CPA91, art. 170 (1).
[654] CPA91, art. 190 (1), (2).
[655] CPA91, art. 189.
[656] CPA91, art. 190 (1), (2).

by the Supreme Court.[657] After the Supreme Court has confirmed the sentence and issued an order of execution the execution can only take place after the head of state has given his consent. The exemption to this rule are death sentences by way of *ḥadd* or *qiṣāṣ* where the head of state has no say.[658] In non-*ḥadd* death sentences the head of state may decide to replace the sentence with any other penalty authorized by the law.[659] If a person sentenced to death attains 70 years of age execution shall be suspended. Death sentences by way of *ḥadd* or *qiṣās* are exempted from this regulation. If the pregnancy of a woman sentenced to death becomes known before the execution of the judgment execution will be postponed until after delivery or the lapse of two years lactation period, provided the baby is alive.[660] In cases of executing *ḥudūd*, *qiṣāṣ* and whipping the health condition of the sentenced person is to be taken into consideration in order to avoid undue additional prejudice. Before the execution of an amputation, by way of *ḥadd* or by way of *qiṣāṣ* a medical examination precedes the amputation and the amputated person remains in medical care, paid by the state, until cured.[661] In cases where the health condition of the convicted does not allow for the execution of *ḥadd*-, *qiṣāṣ*- or whipping penalties the court which passed the sentence may take a decision on how to deal with the case as it deems fit.[662] The heirs of a victim of homicide or bodily harm may request suspension of the execution of *qiṣāṣ*, at any moment before the execution of the sentence.[663] As to the execution of whipping the Criminal Procedure Act 1991 is very precise. a man is to be whipped while standing without being tied or bound. A woman, in contrast receives her lashes while being seated. Whipping shall be "...temperate, moderate and non-cracking and non-breaking, distributed, otherwise than on the face, head and fatal places, by a moderate whip, and any other similar tool may be used". Whipping shall be suspended if the observing judge comes to the conclusion during execution that for health reasons the offender will not bear the remainder of the whipping.[664]

[657] CPA91, art. 192 (1)
[658] CPA91, art. 191 (1).
[659] CPA91, art. 191 (2).
[660] CPA91, art. 193.
[661] CPA91, art. 194 (2).
[662] CPA91, art. 194 (3).
[663] CPA91, art. 195 (1).

3.2.1.8 Appeal and cassation

The following judicial matters can be appealed: first instance judgments and judgments that have not exhausted all stages of appeal, orders restricting the freedom of the appellant with regard to his person or property and finally all decisions relating to matters of jurisdiction.[665] First instance measures of the First Criminal Court and the General Criminal Court will pass before the Appeal Court, whose judgment will be final. Measures of the Third and Second Criminal Courts pass before the General Criminal Court.[666] An appeal or a demand for cassation can be lodged, not later than fifteen days after the declaration of the contested judicial measure, either by one of the involved parties or by any other person having interest.[667] The higher court, considering either confirmation or cassation has a range of possibilities. It can confirm the judgment in toto, confirm the decision and change the penalty, modify the conviction decision from one offence to another, return the judgment to the first instance court for revision according to the directions given by the higher court, or quash the judgment with or without re-trial.[668] A court with the power of confirmation, appeal or cassation may pass any suitable order it deems just such as an order to release any person upon bail, or pass an interlocutory order to detain whoever the first instance court had released.[669] All death, amputation or life imprisonment sentences must be submitted, when becoming final, to the Supreme Court with the intent of confirmation.[670] The Supreme Court also has the competence to consider cassation of judicial measures, passed by the competent Court of Appeal provided there is a contravention of the law, or an error in application or interpretation of it.[671] In addition the Supreme Court and the Court of Appeal, can decide to review the record of any criminal suit and of any court in order to ensure soundness of procedure and achievement of justice. It may take any order it deems fit.[672] Further, even Supreme Court judgments can be revised by a special circuit of five judges constituted by the

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[664] CPA91, art. 197 (c).
[665] CPA91, art. 179.
[666] CPA91, art. 180.
[667] CPA91, art. 183, 184.
[668] CPA91, art. 185.
[669] CPA91, art. 186.
[670] CPA91, art. 181.
[671] CPA91, art. 182.
[672] CPA91, art. 188.

Chief Justice, when he considers that a SC judgment contravenes the *sharī´a*, or involves a mistake in the law (*khaṭa` fī al-qānūn*) or in its application or interpretation.[673]

3.2.2 Limitation

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

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

[673] CPA91, art. 188 (A).
[674] Peters (2005), chapter 2.2.2.
[675] Baradie (1983), p. 205.
[676] Baradie mentions that later jurisprudence stipulated periods of limitation for private claims ranging from 15 to 33 years. Baradie (1983), p. 204, footnote 377.
[677] Baradie (1983), p. 204., for the following see also Peters (2005) and Krcsmárik (1904), pp. 97-98.
[678] See Baradie (1983), p. 209.

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

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

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

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[679] Art. 49 (a) and (b).
[680] Compare Baradie (1983), p. 208.
[681] The new chapter V is titled "Offences against the State", equivalent to chapter VI of the draft.
[682] In 1983 limitation was equally part of the Criminal Procedure Act. See articles 259-260.
[683] See the commentaries on the Criminal Procedure Act 1991 of Al-Fāḍil ʿĪsā (2004), p. 209 and Yūsuf (2002), pp. 627-628.

3.2.3 Evidence

3.2.3.1 General rules of evidence

General rules of evidence in the fiqh

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

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[684] For the following Peters (2005), pp. 12 - 19.
[685] Peters (2005), p. 13.
[686] Peters (2005), p. 17. On *qasāma* see also Bahnasī, naẓariyya al-ithbāt, pp. 227-237.

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

The Evidence Act 1983

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

[687] Peters (2005), p. 18.
[688] EvA83, article 24 (2).
[689] EvA83, article 11.

conclusive evidence (*bayyina ghair qāṭi´a*).[691] With regard to the qualification of the witness the Evidence Act 1983 simply states that "...is qualified to bear testimony every person with a sound mind (*´āqil*) who is able to distinguish the facts (*mumayyiz*) he is bearing testimony to.[692] The Evidence Act does neither specify the minimum number of the witnesses in criminal cases nor their sex or religion. The circumstances of the testimony, however, can be taken into account by the court. More specifically, the court has to assess the good reputation (*´adāla*) of the witness, his behavior while giving his testimony and possible contradictions with other evidence.[693] The text of this article does not clearly state that the good reputation of a witness is an indispensable precondition for the acceptance of his testimony by the court. In other words, if we follow the text of the EvA83 alone, testimonies of witnesses with a bad reputation can be accepted in criminal cases. We shall see below how the Supreme Court interpreted the notion of "good reputation" and whether or not this interpretation came close to what the *fuqahā´* originally had intended. Not admissible is the testimony of the person against whom flogging has been carried out in a case of *qadhf*, unless the repentance of the person has been proven.[694] Plaintiff and defendant both have the right to demand the other litigant to swear during any stage of the trial a decisive oath (*al-yamīn al-ḥāsima*).[695] If the litigant on whom the oath is due swears, the trial ends in his favor. In turn, everyone, from whom the swearing of an oath is demanded (*wujjihat ilaihi al-yamīn*) and who refuses to do so without, in turn, returning the demand to his opponent (*dūn an yaruddahā ´alā khaṣmihi*) loses the lawsuit as well as every person to whom the demand to swear an oath is returned and who refuses to do so.[696] It is evident that an oath or the refusal to swear an oath, according to the Evidence Act 1983 has not only corroborative force but can decide a case. Since no minimum number of witnesses is specified in the EvA83, the function of the oath is not to replace a missing second witness but to corroborate or decide a case. It is further striking that the requirements for the proof of *qiṣāṣ*-crimes (i.e. homicide and bodily harm) in the EvA83 are not higher than for other crimes. This considerably facilitates the applicability of *qiṣāṣ* and is clearly in conflict with the *fiqh*. The knowledge of the *qāḍī*, regardless how he acquired it,

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[690] EvA83, article 26 (1).
[691] EvA83, article 26 (2).
[692] EvA83, article 28.
[693] EvA83, article 33.
[694] EvA83, article 32 (2).
[695] EvA83, article 58.
[696] EvA83, article 63.

plays an important role in criminal cases relating to *diya* according to the Ḥanafites and the Shāfiʿites.[697] The 1983 Evidence Act, however, explicitly excludes any usage of the personal knowledge of the *qāḍī* in his judgments, without regard to whether the case results in the application of *qiṣāṣ* or in the payment of *diya*.[698] Noticeably, the *qasāma* procedure, an important element of the Islamic law of evidence, is not mentioned in the 1983 Evidence Act. *Qasāma* did, however, play a limited role in Supreme Court decisions.[699] The 1983 Evidence Act does not explicitly discriminate against non-Muslims. However, it has reserved itself an "escape clause" by stating that it is "allowed to the court to reject acceptable evidence (*bayyina maqbūla*) when it considers it to be violating the principles of the Islamic *sharīʿa* or (the principles of) justice or public order (*al-niẓām al-ʿāmm*).[700] As mentioned earlier the Evidence Act 1983 did not make any distinction between cases involving *diya* and those involving *qiṣāṣ*. It left it thus unclear what the minimum requirements for proof in *qiṣāṣ*-cases concerning homicide and bodily harm were. The following Supreme Court cases clarified this important question to some degree.

Evidence in the Supreme Court - The qualifications of the witnesses

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

In the first case[701] the original indictment of *ḥadd*-theft, intentional homicide and criminal intimidation[702] had been changed to one of abetment.[703] In his appeal the defense lawyer argued that the court had relied entirely on evidence based on the testimony of professional criminals and that the crime as such had never taken place. In its deliberations on the case the

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[697] And the Shiʿites.
[698] Article 16, EvA83.
[699] In the last decision on *qasāma* I could trace, dating from 1988 (Government of Sudan vs. Badr al-Dīn ʿAbbās Abū Nūra, SLJR 1988, no.1406/69), the Supreme Court decided that *qasāma* - since the Evidence Act 1983 did not mention it - was not admissible as a way of proof in criminal matters. For earlier decisions some of which came to the conclusion that *qasāma* was indeed applicable under Sudanese law, see: 1. Government of the Sudan vs. Ibrāhīm ʿĀdam ʿUthmān a.o., SLJR 1984, no. 1984/83, 2. Government of the Sudan vs. ʿUthmān al-Zubair, SLJR 1985, no. 1405/602, 3.Government of the Sudan vs. Auhāj Muḥammad a.o., SLJR 1985, no.1405/151.
[700] Article 12, EvA83.
[701] Government of the Sudan vs. Mubārak Muḥammad Khair, SLJR 1992, no. 1992/62.
[702] See articles 439, 251 and 321 of PC83.
[703] See articles 82/83 and 91 of PC83.

Supreme Court pointed out that the Trial Court had indeed had its doubts with regard to the good reputation (*ʿadāla*) of the witnesses. The court had therefore only taken into account those parts of their testimony which had been corroborated by the testimony of another witness of the prosecution, a police officer. The Supreme Court held that the testimony of persons who do not fulfill the minimum requirements of *ʿadāla* are not automatically rejected (*ʿadam radd shahāda al-fāsiq limujarrad al-fusūq*). Parts of their testimony can be taken into account if they are supported by other, reliable corroborating evidence. However, the Supreme Court specified that the testimony of those who obviously lie must not be accepted (*al-fusūq al-mubarrir liradd al-shahāda fusūq al-kadhb*).

In the second case the Supreme Court discusses under which circumstances the testimony of a drunk person is acceptable or not. In this case the defendant ʿAbd al-Ḥamīd Mūsā Aḥmad was sentenced to death by hanging for intentional homicide (art. 251, PC83) - i.e. for having knifed to death his victim – after the heirs of the victim had refused to pardon the culprit or to settle for a financial compensation. The intentional homicide happened close to a place where Marissa, the traditional Sudanese beer was sold. The lawyer of the defendant argued that two key testimonies were not admissible. One of the witnesses was - according to the lawyer - a quarrelsome drunkard (*sikkīr ʿirbīd*) who could not be considered to have a good reputation (*ghair ʿādil*). According to the lawyer a witness in cases of intentional homicide necessarily would have to be of sound mind, adult, discerning (*rashīd*), of excellent behavior, pious and neutral, without vested interests in the case. Further, the legal representative of the defendant suggested that the testimony of an underage witness was not to be accepted, because the witness lacked the required legal capacity (*ahliyya*). The Supreme Court, however, thought otherwise. It pointed out that while the necessary number of witnesses was specified by the Evidence Act 1983 in cases of *ḥadd*-crimes no minimum number witnesses was specified for *qiṣāṣ*-crimes.[704] Further, the Supreme Court admits that the strict rules of evidence applicable to *qiṣāṣ* (and *ḥadd*-cases) in the *fiqh* should apply here as well. The SC underlines that Criminal Circular 83/88 releases the courts from adhering to a specific school of law in this matter. In addition, it quotes a Supreme Court precedent[705] where the majority opinion of the *fuqahā`* had also not been taken into account and where the requirements for proof of a *qiṣāṣ*-crime had been lower than for a *ḥadd*-crime. Last but not least the Supreme Court quotes the

[704] See EvA83, articles 78 and 28.
[705] Trial of `Ādam Mahdī `Ādam, no. 88/36, not published.

relevant article 28 of the Evidence Act 1983 which specifies that a witness has to be of sound mind (*ʿāqil*) and discerning (*mumayyiz*) "when enumerating the facts" (of the case). Since the witness in question (and all other witnesses) had been of sound mind and discerning when testifying before the Supreme Court, it deemed the testimony acceptable. The text of article 28 reads, however, differently. It says that "every person of sound mind and discerning with regard to the facts he or she is bearing testimony to is qualified to testify". In other words it is not enough to appear in a sober state before the court when testifying. The witness has to be able to discern the facts when actually witnessing the crime in question. Whether this had been the case with regard to the contested witness was not discussed by the court. The Supreme Court thus accepted both testimonies, one by a known drunkard and the other one by an underage child. While the court could invoke the Evidence Act, a Criminal Circular and a precedent it clearly contradicted the *fiqh* by lowering the standards of proof for a *qiṣāṣ*-crime. The death sentence by hanging was confirmed. At the same time the decision specified that the testimony of the drinker of alcohol (*shārib al-khamr*) is not to be rejected on the grounds that his consumption of alcohol makes such a witness a sinner. In contrast, to be rejected is the testimony of those who are addicted to drinking and whose addiction is obvious to other people (*shahāda mudmin al-khamr al-ẓāhir lilnās*). [706]

Admissibility of an oath as evidence

In a case from 1986 the Supreme Court has decided which role an oath can play in *qiṣāṣ* and *ḥadd*-cases and what the legal consequences of such an oath can be. [707] In the case under discussion the two culprits were sentenced to the diminished *diya*[708] (al-*diya al-nāqiṣa*) for intentional hurt with a dangerous weapon in addition to a two month prison term and twenty-five lashes.[709] According to the testimony of the plaintiff, they had, together with a third perpetrator, assaulted their victim (i.e. the plaintiff) in the early morning, beaten him with a club until he fell from his riding animal and subsequently stolen 5000 Sudanese Pounds from his pocket. All three denied the deed after they had been arrested. While the first two accused were sentenced, the third was released. The appeal was made on two grounds. Firstly – the lawyer of the perpetrators assured – that it was not admissible to base a conviction on the

[706] Government of the Sudan vs. ʿAbd al-Ḥamīd Mūsā Aḥmad, SLJR 1991, no. 88/104.
[707] Government of the Sudan vs. Maḥmūd ʿAlī Sanūsī a.o., SLJR 1986, no. 1986/296.
[708] On diminished *diya* see also chapter 3, sanctions.

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

[709] Article 279, PC83.
[710] As foreseen by article 200, CPA83.
[711] Article 200, CPA83.
[712] As often the judges quote, among other sources, ´Abd al-Qādir ´Awda. See ´Awda (2001), Vol.2, p. 341.
[713] In this context *mabdā'ī* refers to *qiṣāṣ* punishments.

exceptional cases.[714] Having quoted these controversial opinions, the Supreme Court explains its own view of the legal effects of oaths in criminal matters. It reasons that if there is no other evidence it has no objections if the plaintiff demands an oath from the defendant in *ḥadd*-, *qiṣāṣ*- or *ta´zīr*-crimes. If the aspired goal of the judgment is justice, why would one prevent the accused to make use of the only evidence he has at his disposal, i.e. to make his opponent swear an oath, the Supreme Court asks. In such cases the oath serves as substitute evidence (*badīl lildalīl*) and the plaintiff can only resort to it if there is no other evidence (than his own testimony) available. While the Supreme Court holds that the oaths described above can be used as substitute proof even in *ḥadd*- and in *qiṣāṣ*-cases it clearly limits for both cases its evidential value which only pertains to financial rights (*al-ḥaqq al-mālī*) and can only lead to a *ta´zīr*-punishment. The promulgation of a *ḥadd*- or a *qiṣāṣ* – *punishment* on the strength of an oath is therefore, according to the Supreme Court, excluded. A *ta´zīr*-punishment for bodily harm, however, as in the case at hand, is possible. The two accused had presented witnesses who testified that they had been together at the time of the crime. This claim, the judge points out, could have been decided, had the two accused been asked to swear an oath. In its final conclusion, for the reasons described above, the Supreme Court abolished the conviction and the penalty (*al-idāna wa al-´uqūba*) of the two defendants and ordered their release. It decided likewise to annul the release order of the third defendant. All three were to be handed over to the police where they were to swear an oath (of innocence).

The Evidence Act 1993[715]

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

[714] The SC decision does not define these cases.

excluded, as in the EvA83.[716] As we have seen above the personal knowledge of the *qāḍī* plays a role in cases of *diya* according to the Ḥanafites and the Shāfi´ītes. The *qasāma*-procedure which still played a limited role in jurisdiction, but not in legislation after the introduction of ICL in 1983 has not been introduced in the Evidence Act 1993 either.

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

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

person who is able to distinguish the facts he is bearing testimony to is qualified to give testimony."[726] No minimum number of witnesses in criminal cases is specified, nor is the sex or the religion[727] of the witness an issue. We have seen above that the requirements for the admissibility of testimonies are rather strict in the *fiqh* where evidence by testimony is only admissible if at least two male adult Muslim witnesses of good reputation testify or one male and two female with the same qualifications. By neither defining a minimum number, nor sex or religion the Evidence Act 1993, like its predecessor, has substantially lowered the requirements of proof in criminal cases in comparison with the *fiqh*. At the same time Muslims and non-Muslims, men and women are now treated on an equal footing with regard to testimonies in non-*ḥadd* criminal cases.

Just like in 1983, the *qāḍī* has to consider all circumstances of the testimony: a possible lack of good reputation of the witness, contradictions in his testimony or his behavior while he is bearing witness.[728] As before, the text of the law does not further specify what exactly "good reputation" consists of and in which cases "good reputation" is an indispensable prerequisite for the acceptance of the testimony. It remains largely unclear whether "good reputation" plays a more important role in criminal than in civil cases or whether testimonies of witnesses who lack good reputation are to be rejected in criminal cases. Further, it is not detectable that any difference is made - with regard to the quality of the witnesses - between cases resulting in *qiṣāṣ* and those resulting in the payment of *diya*. It further remains unclear whether the provision that the judge has to pay attention to contradictions in testimonies means that these testimonies are not admissible. The *fiqh* is unequivocal here, the slightest contradiction in testimonies makes these invalid.[729] The testimony of the person who has been flogged for having committed *qadhf* (*al-majlūd fī ḥadd al-qadhf*) and of the person who has given false testimony (*shahāda al-zūr*) is not admissible, unless their repentance has been proven.[730] With regard to oaths the procedure in 1993 has remained largely the same as in 1983.[731] The plaintiff - upon whom lies the burden of proof - can direct a "decisive oath" (*al-yamīn al-*

[726] EvA93, article 24.
[727] The Evidence Act 1993 does not state that a non-Muslim witness can only testify against a non-Muslim witness. Thus a testimony of a non-Muslim witness against a Muslim is possible. See qānūn al-ithbāt 1993, article 24.
[728] EvA93, article 34.
[729] Peters (2005), p. 12.
[730] EvA93, article 33 (2).
[731] The following articles on oath seem to go back to similar laws at the time of the Condominium. Since the relevant texts are, however, not in my possession I was not able to verify this assumption.

ḥāsima) against his opponent.[732] If the party on which it is due swears the decisive oath the trial ends in its favor.[733] Who refuses to swear the decisive oath which has been requested from him without returning the demand to swear an oath to his opponent loses the lawsuit as well as every person to whom the demand to swear an oath is returned and who refuses to do so.[734] It is further allowed to the Court to demand of its own accord a supplementary oath (*al-yamīn al-mutammima*) of one of the two litigants in order to obtain evidence corroborating the subject of the claim.[735] Two important conditions for the admissibility of this oath is that the case is neither devoid of any proof (*al-da´wā khāliyya min al-dalīl*) nor is there complete and conclusive proof (*dalīl kāmil*) available.[736] Unlike the aforementioned oath this supplementary oath, demanded by the court, can not be returned to one's opponent.[737]
The *qasāma* procedure which had played a certain role in the early jurisdiction after the introduction of ICL in 1983 (not in the legislation though) was not introduced in 1991 either.

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

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

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

[732] EvA93, article 54.
[733] EvA93, article 57 (2).
[734] EvA93, article 57 (3).
[735] EvA93, article 58 (1).
[736] EvA93, article 58 (2).
[737] EvA93, article 58 (3).
[738] Peters (2005), p. 13.

of the confession must be expressed. Testimonies out of court, valid in homicide cases are not valid in *ḥadd*-cases. The proof of *ḥadd*-crimes is also made very difficult by the fact that a confession can be withdrawn at any time until the execution of the sentence and thus annul the sentence. Judges are even obliged to point out this possibility to the confessor. Circumstantial evidence is not admissible in *ḥadd*-cases with two exceptions. The Mālikites accept pregnancy of an unmarried woman, not in the *´idda* period, as proof of *zinā*. The same school and the Ḥanbalites also accept the testimony of two witnesses on the smell of alcohol as proof that this person has consumed alcohol. In order to prove the consumption of alcohol either a confession is necessary– made in a state of soberness - or the testimony of two male witnesses who have caught the culprit while the smell of alcohol was still discernible on him.[740] The testimony of a male together with a female witness is not permitted. The judge has to make sure in his interrogation of the witnesses that the culprit neither drank while being in the *dār al-ḥarb* nor under duress. On the other hand the mere discernability of the smell of alcohol as such does not constitute proof of the consumption of alcohol if the witnesses have not seen the actual drinking of it. As to the confession Abū Ḥanīfa and the Mālikites are satisfied with a single confession while Abū Yūsuf – in analogy to the number of witnesses required – requires two confessions made separately in two different sessions. As in other *ḥadd*-crimes, again the judge is obliged to ask about the circumstances of the crime, i.e. drinking. Does the defendant withdraw his confession, his withdrawal is accepted and the *ḥādd*-penalty averted. If the drunkard in a state of intoxication confesses to having committed a *ḥadd*-crime the *fiqh* distinguishes between the *ḥudūd* which are touching upon the rights of God and those concerning the rights of men such as *qadhf*. In the former case, i.e. in cases of unlawful sexual intercourse, theft and alcohol consumption, his confession is not accepted and he will not receive the *ḥadd*-penalty, because his statement is made in a state of intoxication and possibly is a lie. Here the reasoning of the *fuqahā´*, meant to limit the applicability of *ḥadd*-crimes, leads to the curious result that the intoxicated person is not allowed to admit to his own drunkenness. If the drunkard confesses to a *ḥadd*-crime touching upon the right of men, such as unfounded accusation of unlawful sexual intercourse (*qadhf*), the *ḥadd* for *qadhf* will be executed, provided the victim of the accusation files charges. In this case neither

[739] For the following see Peters (2005), pp. 13-16.
[740] Baradie (1983), p. 122.

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

[741] Bahnasī, mas`ūliyya, pp. 227-228.
[742] For the following see Bahnasī (1988), al-jarā`im fī al al-fiqh al-islāmī.
[743] The possible testimony of women in cases of *qadhf* is controversial among the Mālikites. See Bahnasī, (1988), al-jarā`im, pp. 173-174.
[744] Arévalo (1939), p. 89. See also chapter 4.1.2.3 on rape.

is immediately stopped. It should be noted that the withdrawal can be explicit like e.g. a denial of the former confession. However, the withdrawal can also be implicit (*dalālatan*), e.g. when the person who is being punished for *zinā* runs away from the stoning or the flogging. The escape (from the execution of the punishment) is taken as an indicator of his withdrawal of his confession.[746] In order to prove *zinā* by testimony four male witnesses have to describe persons, time, place and order of events of the sexual intercourse in detail and without contradicting each other. Should the witnesses not fulfill one or more of these conditions they could be liable for *qadhf*.

General rules for the proof of ḥadd*-crimes in the Evidence Acts 1983 and 1993*

In both laws of evidence, apart from *zinā* and *shurb al-khamr,* all other *ḥudūd* can be proven in two ways. Firstly, by a confession at least made once and, secondly, by the testimony of either two male witnesses, or, in case of necessity (*´and al-ḍarūra*) one man and two women or four woman.[747] The wording of both articles is almost identical, with a small difference. In 1983 it was sufficient to make the confession, without further qualification, in a *majlis al-qaḍā`,* which represented the lowest level of a five level penal court system.[748] In 1993 the confession has to be made in front of a court (*maḥkama*).[749] In other words, any confession out of court is to be considered invalid and can not be held against the defendant. Further, the EvA93 has specified that the confession has to be an unequivocal one (*iqrār ṣarīḥ*). Thus, the EvA93 has improved on the wording and now excludes confessions that might be doubtful and not unequivocal. These are also not accepted by the *fuqahā`*. More importantly, a comparison with what has been said above shows that the 1983 and 1993 laws of evidence are in contradiction with two main principles upheld in the *fiqh*: they allow for the testimony of women and they do not make *´adāla* or good reputation a precondition for the acceptance of a testimony. The law makes the reservation that the testimony of a man and two women or four women is only accepted in the case of necessity. It does however not specify how necessity (*ḍarūra*) is to be understood by the judge. A criminal circular specifies that a case of necessity

[745] ´Awda (2001, Vol. 2, p. 433.
[746] ´Awda (2001), Vol. 2, p. 438.
[747] See art. 78, qānūn al-ithbāt 1983 and art. 63, qānūn al-ithbāt lisanat 1993 (m).
[748] See article 8, qānūn al-ijrā`āt al-jinā`iyya lisana 1983.
[749] Which could be any court in a seven-layer court system. See qānūn al-ijrā`āt al-jinā`iyya 1991, art. 6.

occurs simply when a sufficient number of male witnesses is not available.[750] Likewise a commentary published by the Sudan Judiciary explains that the necessity for the acceptance of female witnesses occurs when either no men or not enough men are testifying. Then the testimony of four women replaces the testimony of (the originally required) two men or, if one man testifies, two women replace the testimony of the second male witness.[751] In other words, the proof of a *ḥadd*-crime by means which are not admitted by the majority of the *fuqahā`* becomes accepted procedure in the Islamized Sudanese laws of evidence of 1983 and 1993. How does the said commentary of the Sudan Judiciary comment on the textual basis of female testimonies? It rather frankly concedes that the jurisprudents of the four Sunni school and those of the Zaidites and the Twelver Shi´ites are unequivocally of the opinion that the testimony of women in *ḥadd*-cases are not admissible. It then continues to point out that there is a minority opinion backed by the Ibāḍiyya, Ibn Ḥazm and Ḥasan al-Baṣrī. Finally the commentary concludes, rather daringly, that „the Law of Evidence has adopted the majority opinion (of the *fuqahā`*) in not accepting the testimony of women with regard to the ḥudūd but accepted the testimony of women only or together with (the testimony of) men in the case of the non-availability of (sufficient) male witnesses...“[752] That the Sudan Judiciary sees itself forced to have recourse to legal opinions of the Ibāḍiyya and the Ẓāhiriyya - i.e. a legal opinion that is backed by a very small minority of Islamic jurisprudents - is stretching the principle of takhayyur to a limit jeopardizing its credibility.[753] Next to the acceptance of female testimonies, the inherent possible acceptance of witnesses who do not fulfil the conditions as devised by the *fiqh* – i.e. who are not of good reputation - is at variance with the majority opinion in Islamic jurisprudence.[754] In order to clarify this obvious lacuna the

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[750] With regard to the acceptability of the testimony of women and non-Muslims this will be discussed in the chapter on proving *sariqa ḥaddiyya* (chapter 4.4.2) below.

[751] See al-sulṭa al-qaḍā`iyya: ta`ṣīl qānūn al-ithbāt, pp. 234-235.

[752] Ibid.

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

[754] Inexplicably, Ḥassūna, who is one of the most prolific commentators on Islamic law in the Sudan and also a Supreme Court judge, quotes the relevant passage of article 63 (b) as "....*shahāda shāhidain ´adlain*...". See Ḥassūna (2002) ithbāt jarā`im al-ḥudūd, pp. 38. I possess three versions of the qānūn al-ithbāt 1993/1994 – both years are given – two published by the Sudan Ministry of Justice and the third published by the Sudan Judiciary. None of the three contains the important qualification of " *´adl*". Scholz, who is one of the few Western authors who have taken a closer look at the law says "Die Zulässigkeit bescholtener und weiblicher Zeugen widerspricht wiederum der einhelligen bzw. herrschenden Auffassung der traditionellen Lehre." In other words the copy of

criminal circular (*manshūr jinā`ī*) no. 98/1983 on *sariqa* stipulated that a witness is assumed to be of good reputation until there are indications contradicting this assumption.[755] In effect, the judge can accept the testimony of a witness unless he himself knows, through his own knowledge or other information, that the reputation of the witness is questionable.[756] The wording of the circular follows a minority opinion of the Ḥanafites and the Ẓāhirites who hold that the good reputation and moral integrity of a witness is to be assumed unless proven otherwise. The Mālikites, the Shāfi´ītes, the Ḥanbalites and Abū Yūsuf, the great majority among the Sunni *fuqahā´* thus, hold that the judge is required to verify the good reputation of a witness even in cases where it has not been challenged by one of the litigants.[757] With regard to *qadhf*, however, the problem arises that a witness might have been convicted of *qadhf* previously, thus gravely impairing his credibility in a subsequent case of *qadhf*. While Abū Ḥanīfa and Abū Yūsuf forever exclude the convicted *qādhif* from further testimony in *qadhf*-cases, Mālik and Shāfi´ī do admit such testimony once the offender has repented. Since both Evidence Acts are silent with regard to this problem one could come to the conclusion that a previous conviction for *qadhf* has no influence on the admissibility of the testimony.

No compromises, however, are admissible as to the amount of witnesses. In a landmark case from December 1983, the Supreme Court had overruled a decision of a lower court that had accepted the testimony of officials.[758] Two defendants had been sentenced to amputation for *sariqa ḥaddiyya* after having allegedly stolen an amount of 250 Sudanese Pounds from their victim at a parking lot. None of the two defendants confessed and both claimed not to know each other. Thus the decision of the lower court which was upheld by the Appeals Court had to be based entirely on witnesses. Three male witnesses were produced by the lower court. The first witness was the officer who had accepted the complaint, the second witness was the victim himself and the third victim was a policeman who had been patrolling the parking lot and who had actually seen the theft. In its review of the decision the Supreme Court made it clear that by law the plaintiff can not testify on his own behalf in a case of *ḥadd*-theft. It further declined to accept the testimony of the investigator because he had not been a direct

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the law at his disposal did also not mention "good reputation" as a precondition for the witnesses. See Scholz. (2000), p. 457. al-Ṭāhir also discusses the article on the assumption that *´adl* is a qualification of the witness. See al-Ṭāhir (2003), p. 222.

[755] See Ḥassūna (2003), ithbāt jarā`im al-ḥudūd, p. 40. According to Ḥassūna "*...al-aṣl fī al-shāhid al-´adāla ḥattā yaqūma al-dalīl ´alā khilāf dhālika*".

[756] As to *´adāla* see chapter on *zinā*.

[757] Salama (1982), p. 117.

witness of the crime and had only heard about the events in question (*shahāda samā´īyya*). The Supreme Court thus established at a very early stage after the introduction of ICL in the Sudan that in cases of amputation no other testimony would be accepted but the testimony of direct eyewitnesses other than that of the aggrieved party.[759]

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

Nine cows, belonging to the plaintiff and attached in their corral went missing and were found later in the possession of the defendant al-`Awaḍ Markaz Ma´ālī, who, in turn, claimed that he had found them ownerless (*sā´iba*). The local criminal court indicted the defendant under article 321 for *ḥadd*-theft and condemned him to amputation of the right hand from the wrist. After that the Kordofan Appeal Court had confirmed the decision on, as the Supreme Court judges reasoned, dubious grounds with regard to its foundation in Islamic jurisprudence. The Appeal Court opined that even though the investigation could not establish that the defendant had stolen the cows from a *ḥirz*[760] there was enough circumstantial evidence (*adilla ẓarfīyya*) to prove that the defendant had indeed taken the cows from their corral after their owner had tied them with a rope in the night of the theft. The court deemed it improbable that another person had untied the cows and taken them out of the corral so the defendant would find them. The Appeal Court equally found that more than 26 times[761] the minimum value (*niṣāb*) for *ḥadd*-theft had been reached, that no reasons for the lapsing of the *ḥadd*-punishment could be established and that the rightful owner of the stolen property had filed charges. It therefore upheld and confirmed the decision which had been reached by the Trial Court. In its revision, however, the Supreme Court came to the conclusion that the provisions of article 70, Law of Evidence, had not been met. The defendant had not only not confessed to the crime but had denied it until the passing of the sentence. He only admitted as much as having found the cows freely grazing, which did not even meet the conditions for a confession to non-*ḥadd* theft. In other words there was no confession. Likewise, the second admissible proof of *sariqa ḥaddiyya*, the testimony of either two men, a man and two women or four women, could not

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[758] See Government of the Sudan vs. Fītir Watir Dīnq and `Awaḍ Muḥammad ´Abd al-Jalīl, SLJR 1983.

[759] Interestingly the reviewing Supreme Court judge quotes in his deliberations various sources, including Ibn Qudāma and ´Awda, which all come to the conclusion that a minimum of two males are required to testify *sariqa ḥaddiyya*. The contradiction with article 78 (2), EvA83, is striking. Compare above.

[760] Safe place where movable property is kept. For a discussion of *ḥirz* see chapter 4.4.

be established. In conclusion, the Trial Court had built its verdict entirely on the evidence that the cows were in the possession of the defendant. The Supreme Court, in consequence, stated that such circumstantial evidence was not sufficient in *ḥadd*-crimes such as *ḥadd*-theft where they rather constituted a legal uncertainty (*shubha*), causing the *ḥadd*-punishment to lapse. The verdict under article 321 (2) – *sariqa ḥaddiyya* - was thus annulled and modified to "Criminal Misappropriation" under article 344 PC83.[762]

Proof of zinā *in the Evidence Acts 1983 and 1993*[763]

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

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

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[761] It remains unclear how the *niṣāb* has been established.
[762] See Government of the Sudan vs. al-`Awaḍ Markaz Ma´ālī, SLJR (1984).
[763] The provisions about proof of *zinā* are to be found in four statutes: PC83, CA91, EvA 83 and EvA93. A disussion of landmark Supreme Court cases on *zinā* can be found in chapter 4.1.
[764] Compare Joseph Schacht: "Li´ān", EI2, Vol.V, pp. 730-732 and EvA83, article 80,3.
[765] See article 77,2, EvA83.
[766] To illustrate this: if *zinā* is proven by four valid testimonies and the offender subsequently confesses and if this confession is then withdrawn, the *ḥadd*-punishment for *zinā* cannot be executed according to the Ḥanafites and Ḥanbalites, despite the four valid testimonies. This example of a legal trick (*ḥīla*) stems from a Ḥanbalite work. Compare Baradie (1983), p. 106.
[767] See Coulson (1969), p. 62.
[768] As to the consequences see the case studies below and Sidahmed (2001).

Zinā, according to the EvA93 can be proven in four different ways: firstly, by a clear confession before the court[769], if not withdrawn before the execution of the punishment. Secondly, by the testimony of four male witnesses of good reputation (*rijāl ʿudūl*), thirdly, by pregnancy of the unmarried woman if no legal uncertainty (*shubha*) arises and, lastly, by the refusal of the *liʿān* by the wife, after her husband has sworn the oath of *liʿān*. It is obvious that the legislator has addressed criticism directed at the 1983 Penal Code and improved on the new rules for proof of *zinā,* in the sense of making them more *fiqh*-compatible. Following the *fiqh*, only the testimony of four men of good character is now permitted. The testimony of other witnesses - *shahādāt ghairihim*[770] – are excluded and thus the testimony of women, non-Muslims or witnesses of doubtful reputation.

Further, the admission of pregnancy of the unmarried has been qualified. Article 62 (c) specifies that pregnancy is only admitted as proof for *zinā*, if no legal uncertainty (*shubha*) occurs. It thus explicitly admits legal uncertainties to avert the punishment for *zinā* for unmarried women. Lastly, *zinā* can be proven by *mulāʿana* (also called *liʿān*) in cases where the husband accuses his wife of adultery but there are no witnesses[771], whereby the husband repeats his accusation of *zinā* four times and swears a fifth time that Allah's curse be on him if he was not telling the truth. The husband, in this procedure, is not bound to the normal regulations of proof. The legal consequences of *liʿān* are fourfold: Firstly, the *ḥadd*-punishment for *qadhf* for the husband lapses. Secondly, the denial of paternity (*nafy al-nasab*) of a child borne by the wife during their legally valid marriage.[772] Thirdly, the wife is subject to the *ḥadd*-punishment for *zinā*. She can, however, avert the *ḥadd*-penalty for *zinā* if she makes an affirmation under oath refuting her husbands allegations. And, finally, the dissolution of the marriage.[773]

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

[770] EvA 1983, art. 78 (2).

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

[772] See for this and the following, Schacht, Liʿān, EI2, Vol.V., pp. 730-732 and Bahnasī, jarāʿim, pp. 166-171. In that case maintenance for the child whose paternity has been contested will be upon the mother. See Schacht (1964), pp. 165, 168, and 179.

[773] Whether or not the divorce is an automatism after the *liʿān* procedure is subject to *ikhtilāf* among the *fuqahā*ʾ. For details see Bahnasī, jarāʿim, pp. 170-171.

In order to be valid the *li´ān* is subject to some conditions. Firstly, the husband pronouncing the *li´ān* must be sane, adult and free to choose. Being a Muslim, however, is not a precondition. Secondly, the *li´ān* must be pronounced in the presence of four witnesses.

Proof of alcohol consumption in the Evidence Acts 1983 and 1991

The general rules for the proof of *ḥadd*-crimes are also applicable in cases of alcohol consumption. In addition, circumstantial evidence is admissible, as allowed for by the Mālikites and the Ḥanbalites. The reek of alcohol on the accused is acceptable evidence for the consumption of alcohol if two men of good reputation testify to that effect or by way of an expert's report.[774] Further, a drunk person, according to the *fiqh*, is not allowed to testify against himself in cases where the rights of God are touched upon. However, if one follows the text of article 63, Evidence Act 1993, such a confession would be acceptable under Sudanese law. Neither does the fact that a person is drunk invalidates his testimony, at least in non-*ḥadd* cases. In a divorce case under scrutiny, the Supreme Court ruled that the testimony of a drunk person was not to be rejected merely because of the state of intoxication of the witness. Drunkenness as such, according to this judgment, does not automatically strip a witness of his good reputation. Rather the credibility of the testimony is the decisive factor whether or not a testimony is accepted or not. If the testimony is credible it will be accepted even if the witness has drunk. Reversely, a testimony will be rejected if it must be assumed that the witness is lying, even if the witness is meeting the (minimum) legal requirements of righteousness.[775]

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

[774] EvA83, art. 79 and EvA93, art. 64.
[775] "*...wa inn al-shāhid lam yakun fāsiqan*". See SLJR (1993), case no. 220/1993, issued 20/11/1993.

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

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

[776] The text of article 78 does indeed not mention *qiṣāṣ*-crimes.
[777] "*...raghma an ra`ī jumhūr al-fuqahā` huwwa ithbāt jarā`im al-qiṣāṣ kama al-ḥāl fī jarā`im al-ḥudūd*".
[778] 36/88 Government of the Sudan vs. Ādam Mahdī Ādam.
[779] Bahnasī, naẓariyya al-ithbāt fī al-fiqh al-jinā`ī al-islāmī, pp.88.
[780] Ḥanafite jurist from Transoxania, died around 1096.
[781] SLJR (1988), Government of the Sudan vs. `Abd al-Ḥamīd Musā Aḥmad, No. 104/88.
[782] EvA83, article 79 and EvA93, article 64.
[783] Bahnasī, jarā` im, p. 192.

as article 79 of the Evidence Act 1983 suggests or whether the knowledge of the judge (*ʿilm al-qāḍī*) would be sufficient.

Limitation in cases of alcohol consumption

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

[784] SLJR (1984), Government of the Sudan vs. ʿAbd Al-Wahāb ʿAwaḍ Jādīn.

3.3 General principles in Sudanese Islamic Criminal Law

3.3.1 Introduction

Western authors generally agree that there are few general principles in Islamic criminal law.[785] Johansen, e.g., gives an instructive overview of the lack of guiding and consistent rules, taking Ḥanafite criminal law as an example.[786] Thus, in general, *ḥadd*-offences are considered to be claims of God and *qiṣāṣ*-offences (homicide and bodily harm) are private claims. However, within the category of *ḥadd*-offences a number of inconsistencies can be observed. Some, victimless crimes like alcohol consumption (*shurb al-khamr*) and illegitimate sexual intercourse (*zinā*) entail obligatory public prosecution, i.e. if these offences become known to the authorities an official inquiry is compulsory; no private persecutor is needed here because there is no victim, except in the case of rape. On the other hand, there are *ḥadd*-offences where the authorities can only open a procedure if a private plaintiff has pressed charges. Further, there are *ḥadd*-offences where – just like in the aforementioned case – private charges are indispensable for the opening of a procedure because the private and the public claim are almost on a par with each other. However, the punishment, in Ḥanafite law, is considered a public claim (or claim of God/*ḥaqq Allah*), i.e. satisfying the public legal claim excludes the satisfaction of the private claim.[787] Further, there are *ḥadd*-offences where the religious status is decisive for the punishment (e.g. *shurb al-khamr*, *qadhf*) and others where the juridical status of the slave or the non-Muslim is decisive for the punishment (*zinā*). In addition, the legal status of *iḥṣān* of either perpetrator or victim and its impact on their respective punishments is another example for a guiding principle. These examples might suffice to demonstrate some of the principles that do exist. They apply to *ḥadd*- and *qiṣāṣ*-crimes only, the rules for *ta´zīr* and *siyāsa* are less strict. While the books of classical jurisprudence (*fiqh*) do not contain chapters on general rules, these general concepts can, however, be found by deduction.[788] How these principles relate to the guiding principles in Sudanese ICL codification will be discussed below.

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[785] Compare e.g. Peters (2005), pp. 19, Bleuchot (2002), pp. 670, Schacht (1964), pp. 187 and Johansen (1999), p. 421. For a discussion of the different approaches of selected Arab authors see Bleuchot (2002), Vol.2, pp. 671-672.

[786] Johansen (1999), pp. 421-422.

[787] As mentioned above this is the Ḥanafite view; the schools differ as to the categorization of the punishment for *qadhf*. Compare Bambale (2003), p. 51.

[788] Peters (2005), p. 19.

3.3.2 Geographical applicability

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

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

[790] Schacht (1964), pp.199. For details with regard to the status of non-Muslims in Islamic Criminal Law see respective chapters below on *ḥudūd*, *qiṣāṣ* and *ta´zīr*.

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

[792] Art. 78(2) does not fall under the exemptions. For an analysis see below.

[793] See art. 146 (4) for *zinā* and art. 168 (2) for armed robbery.

offender in the South will also be punished relatively lightly: a maximum of three years imprisonment for the *muḥṣan* in the South, compared to stoning for the muḥṣan in the North. *Qadhf* in the South could be punished as defamation, with the offender receiving a maximum term of imprisonment of six month or a fine or both, instead of 80 lashes for the offender in the North. *Sariqa ḥaddiyya* committed in the South could only be punished as normal theft (art.174), entailing a maximum prison term of seven years or up to 100 lashes instead of amputation in the North. In addition to provisions pertaining to the *ḥadd*-offences, art. 139 (1) exempted the South from *qiṣāṣ* for causing intentional wounds. Instead a maximum prison term of five years with a fine or both was provided for. Finally, the South was exempted from art. 85, forbidding the sale of a carcass.[794] Further, it should be noted, that the non-Muslim population living in the North is not exempted from any of the provisions pertaining to Islamic criminal law.[795] This, however, stands in conflict with the Interim National Constitution (INC) promulgated in 2005. The INC contains a group of five provisions (art.s 154-158) protecting the rights of non-Muslims in the capital Khartoum. Next to pledging respect for all religions in the capital (art. 154), article 156 outlines the principles that are to guide the dispensation of justice in Khartoum. Apart from the application of tolerance with respect to different cultures, religions, and traditions, article 156 affirms that: "The judicial discretion of courts to impose penalties on non-Muslims shall observe the long-established *sharī´a* principle that non-Muslims are not subject to prescribed penalties, and therefore remitted penalties shall apply." Article 157, finally, calls for the establishment of a special commission "to ensure that the rights of non-Muslims are protected and respected (...) and not adversely affected by the application of Shari´a law in the National Capital". It must be mentioned here that article 156 contradicts the position of non-Muslims in the Criminal Act 1991 in many ways and that a faithful application of the INC would require a substantial reform of the Sudan's penal laws, which, in early 2011, after the secession of Southern Sudan, is less likely to happen.

[794] This provision is based on Qur´ān 5:3, prohibiting the consumption of carrion. See ´Īsa, sharḥ qānūn al-jinā`ī, p. 84. See also Waines (2001), pp. 291-292.
[795] Criminal Act 1991, article 5 (1) - (3).

3.3.3 Criminal responsibility[796]

While generally speaking in ICL persons are punished for their own deeds[797] there are exceptions. In the *qasāma* procedure under Ḥanafite law, which is such an exception, those living in a house or a village can be collectively held liable for the payment of *diya* (blood money) if the killer is unknown and the victim has been found in the house or the village. Both Islamized codes 1983 and 1991 have refrained from introducing the *qasāma* procedure despite its being an integral part of Islamic Criminal Law.[798] The collective liability of the *´āqila*, however, continues to play a role in Sudanese ICL.[799]

As in Western law[800] in the *fiqh* actus reus (the punishable offence) in combination with mens rea (the guilty mind) are necessary elements of a crime. The *fiqh* knows a number of cases where mens rea, i.e. the blameworthiness of the defendant is absent and where he, therefore, cannot be punished for the offence committed by him. The most important cases, which will be briefly discussed hereafter are minority, insanity, unconsciousness, legal uncertainties (*shubha/shubuhāt*) and duress (*ikrāh*). Further, a per se punishable offence (actus reus) can lose its punishability and be considered to be lawful under certain circumstances such as in a situation of self-defense.

With respect to criminal responsibility a majority of the *fuqahā`* distinguishes whether the intoxication stems from voluntary drinking or coercion. The majority does not recognize drunkenness as a mitigating factor in criminal cases as long as the state of drunkenness results from voluntary drinking. Drunkenness also does not decrease criminal responsibility since the consumption of wine and other alcoholic beverages is forbidden in the first place.[801] However, if drunkenness results from coercion the drunk is not held criminally responsible.

A second, minority, opinion held by some Ḥanafites and some Shāfi´ites invalidates the acts of the drunk person irrespective of the intoxicating substance taken. Ibn Ḥazm even exempts the drunkard from retaliation (*qiṣāṣ*) and any financial liability for damage caused while being drunk.[802]

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[796] For the following compare Peters (2005), pp. 19-30.
[797] Bambale (2003), p. 7.
[798] For more details see chapters 5.1.7. For the role the *qasāma* procedure has played after 1983 in Supreme Court Jurisdiction see chapter 5.2.7.
[799] See chapters on semi-intentional and accidental homicide.
[800] Compare e.g. definitions of both terms in Martin (2003), p. 10 and p. 312.
[801] See Gräf, (1965), p.16.
[802] Bahnasī (1982), p. 186.

A third opinion, equally a minority, considers the legal capacity of the person. If the drunk person is of legal age and sane a verdict is possible whether the alcoholic drink has been consumed voluntarily or by coercion. In consequence the culprit is fully responsible for his acts and also financially liable.[803]

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

3.3.3.1 Minority, insanity and unconsciousness

There is no criminal responsibility in the *fiqh* if the perpetrator of a crime is either a minor, insane or unconscious. However, if unconsciousness is the result of alcohol consumption it does not preclude criminal responsibility since drunkenness in itself is an offence. The impossibility to impose a punishment on the minor, insane or unconscious offender does not preclude his financial liability for the damage caused. In the case of torts mere causation, not causation by fault, entails financial liability. In the case of *taʿzīr*-crimes the requirements with regard to the offender are lower than in the case of *ḥadd*- and *qiṣāṣ*-crimes. The offender only needs to possess reason (*ʿaql*), i.e. he needs to understand that he acted wrongly.[807] Minors, while not punishable for *ḥadd*- and *qiṣāṣ*-crimes can be punished with corrective measures (*taʾdīb*) for *taʿzīr*-crimes.

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[803] See Bahnasī (1982), pp. 185-186 and Bahnasī, al-masʿūliyya al-jināʾiyya, pp. 225-227.
[804] See Penal Code Act 1974, articles 42 and 43, Penal Code 1983, articles 42 and 43.
[805] Criminal Act 1991, article 10.
[806] See Penal Code 1925, article 50 (b).

As to the age of minority the schools agree that it ends with physical puberty. They differ, however, on the age before which puberty cannot be established and with regard to the age after which the absence of puberty cannot be established.[808] Thus, the Mālikites hold that puberty for boys and girls cannot be established before the age of 9. As to the absence of puberty the Mālikites teach that it can not be established after the age of 18, equally for both sexes. The Ḥanafites, also important in the Sudan, are of the opinion that the puberty for boys cannot be established before the age of 12 and for girls not before the age of 9. The same school holds that the absence of puberty cannot be assumed once a man or a woman have reached the age of 15.

The Penal Code 1983 had removed the age limit of its predecessor and replaced it by the notion of puberty (*ḥilm*).[809] Thus acts of children who have not yet reached puberty do not constitute criminal offences.[810] Unfortunately the chapter 2 "General explanations and definitions" of the PC83 does not provide us with a definition of what "puberty" or " adult" mean in the context of the Code. The age before which puberty cannot be established and the age after which the absence of puberty cannot be established are not defined. This lacuna has been filled in the Criminal Act 1991.[811]

With regard to drunkenness the Penal Code 1983 simply translated the relevant article from its predecessor code. Penal Codes 1974 and 1983 stated that "a person who does an act in a state of intoxication is presumed to have the same knowledge as he would have had if he had not been intoxicated." If the intoxicating substance has been administered to him against his will or without his knowledge, however, the act is not considered to be an offence.[812] While simply being a translation of its secular predecessor, both articles are compatible with the *fiqh*.

Acts committed by persons suffering from permanent or temporary insanity or mental infirmity are likewise not considered to be an offence.[813]

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[807] *ʿaql* in this context means reason or intellectual maturity as a precondition for legal responsibility. Compare Rohe (2009), p. 575.

[808] For a complete table showing the age limits for both in all schools, see Peters (2005), p. 21.

[809] Art. 49, Penal Code 1974 stipulated that "No act is an offence which is done: (a) by a child under ten years of age, or (b) by a child of ten years of age or more but under fourteen who has not attained sufficient maturity of understanding to judge of the nature and consequences of such act.

[810] Art. 49, Penal Code 1983.

[811] See below.

[812] Art. 43, PC74/83.

[813] Art. 50, PC74/83. For a more detailed discussion of insanity in the *fiqh* see chapter 5.3.3.5.

In the CA 1991 a child not having reached puberty cannot be deemed to have committed an offence. However, provided it has reached the age of seven care and reform measures can be applied to it as the Court may deem fit.[814] An analysis of when the CA91 assumes puberty highlights interesting features distinct from the reasoning of the *fuqahā'*. It defines that an adult is "a person whose puberty has been established by definite natural features and who has attained 15 years of age. It further specifies that "whoever attains 18 years of age shall be deemed an adult even if the features of puberty do not appear."[815] The CA91 thus does not make any difference between boys and girls, men and women, unlike some of the schools.[816] Secondly, the minimum age of 15 of an adult showing the natural features of puberty is significantly above the age limits provided by the *fuqahā'* where the Ḥanafites hold that for boys puberty cannot be established before 12 and all Sunni schools assume that for girls as of the age of 9 puberty can be established. Thirdly, the CA91 follows the Mālikites with regard to the age after which the absence of puberty cannot be established. All other Sunni schools hold that at the age of 15, boys and girls alike, have reached the age of puberty.

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

3.3.3.2 Self-defense

The principle of self-defense (*al-difā´ al-shar´ī*) is recognized in the Criminal Act 1991, no act shall be considered an offence if committed in self-defense. Self-defense by appropriate means is permissible in order to fend off an imminent assault upon one's own or someone

[814] Art. 9, CA 1991.
[815] Art. 3, "Adult", CA 1991.
[816] Ḥanafites and Ḥanbalites distinguish between boys and girls with regard to the age before which puberty cannot be established. With regard to the age after which the absence of puberty cannot be established only the Shi´ītes distinguish between boys and girls. See Peters (2005), p. 21.
[817] Art. 10, CA 1991.
[818] Art. 10 (c), CA 1991.

else's person, property or honor and when recourse to the public authorities is not possible.[819] The right to self-defense is, however, not unlimited and does not extend to resistance against a public servant who acts within the limits of this post and provided that there is no apprehension of suffering death or grievous hurt from the acts of the public servant.[820] The right to self-defense does not extend to willfully causing death, except when the imminent danger to be repelled is feared to cause death or grievous hurt or rape or abduction or kidnapping or armed robbery (*ḥirāba*) or robbery or criminal mischief or damage to public property or criminal mischief by sinking or by setting fire or by using poisonous, or explosive materials.[821]

The provisions of the Penal Code 1983 on self-defense are literally translated from its predecessor code and do differ in some details from the Criminal Act 1991. Thus, to protect one's honor could not be invoked in 1983/1974 as a reason for self-defense. The concept of honor for self-defense is an important one in the *fiqh* and the CA91 obviously makes reference to this (see below). The 1983/1974 codes do not speak explicitly about the specific situation justifying the causing of death in the course of self-defense. They rather speak in a general manner of situations which justify self-defense, i.e. the defense of one's own and someone else's body and/or property, [822] specifying that no more harm can be inflicted as self-defense than is needed for the purpose of defense.[823] Thus, while since 1991, judges can rely on rather clear guidance as to when causing death can be invoked as self-defense, in 1983/1974 the only criterion for the use of force in self-defense was that it could not exceed what was necessary to fend off the assault of the offence. Acts of resistance against public servants acting in their official capacity or of persons under directions of public servants, as in 1991, cannot be justified as self-defense.[824]

In the *fiqh*, one of the important reasons to be invoked in order to avoid punishment for homicide or bodily harm is self-defense.[825] In cases of self-defense no punishment nor any financial liability will be the result of the killing or bodily harm, provided the act is not disproportional with regard to the attack it means to ward off. Impunity can also be the result

[819] Criminal Act 1991, art. 12 (1) and (2).
[820] Criminal Act 1991, art. 12 (3).
[821] Criminal Act 1991, art. 12 (4).
[822] Penal Code 1974 and 1983, art. 56.
[823] Penal Code 1974 and 1983, art. 58.
[824] Penal Code 1974 and 1983, art. 60.
[825] For more details on self-defense in the *fiqh* and in the Sudanese Penal Codes respectively see chapter 5.2.2.

of attacks against one's honor. Thus, women are bound to defend themselves in cases of rape, provided they are in a physical state that allows them self-defense. If a woman is capable to and does not defend herself she will be considered guilty of voluntary unlawful sexual intercourse (*zinā*). In the *fiqh* a woman who is raped can use force in order to prevent her being raped. If the degree of violence used leads to the death of the attacker, this is permissible, however only if there are no other possibilities to stop the attack. We shall see further down in our chapter on *zinā* that the position of women in a case of rape is a difficult one. It took years of Supreme Court case law to clarify that if a female victim cannot prove that she has been raped she cannot automatically be convicted for unlawful sexual intercourse.[826]

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

According to the Ḥanafites and the Shāfi´ites, however, the requirement of four male witnesses to sexual intercourse is not lowered. Mālikites and Ḥanbalites accept a minimum of two witnesses, reasoning that the witnesses only serve to ward off the punishment for homicide and not to punish the fornicator (*zāni/zāniyya*). There is a last case where a killing can be justified, i.e. when one's own property cannot be defended without killing the attacker/thief.[827]

3.3.3.3 Duress (ikrāh)

The Criminal Act 1991 defines that no person is deemed to commit an offence if the (punishable) act is done by coercion, threat of death or imminent grievous hurt to his person, or family or his property. The victim of duress apprehends that the threat is most probably to occur and it is not in his power to avoid it by any other means.[828] There are, however, limits to

[826] See chapter 4.1.3.3.
[827] For an example from Egypt see Peters (2005), pp. 26-27.
[828] Criminal Act 1991, article 13 (1).

the invokability of duress. Thus, duress cannot justify causing death, or grievous hurt or any of he offences against the state which are punishable with death.[829]

The definition of duress in 1991 has departed in some important details from its predecessor in 1983 which, in turn, is a verbatim translation of the pertinent article from the Penal Code 1974.[830] Similar to the 1991 definition, in cases of murder and offences against the state punishable with death duress cannot be invoked.[831] In 1983/1974 only the apprehension of instant death was invokable, and neither the threat of grievous hurt to the family or the property were valid reasons to invoke duress. Further, the 1974/83 codes caution that duress cannot be invoked if the person has placed himself in the situation (of duress) either by his own accord or by threats short of instant death. This clause is missing in 1991.

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

3.3.3.4 Necessity (ḍarūra)

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

[829] Criminal Act 1991, article 13 (2). Offences against the state, punishable with the death penalty are e.g. "waging war against the state", art. 51 and "espionage against the country", art. 53, CA91.
[830] Article 53 in both codes.
[831] "Murder" (1974/83) was replaced by "*qatl ʿamd*/intentional homicide" (1991).
[832] Compare Peters (2005), p. 23.
[833] For a discussion of homicide under duress in ICL and the relevant articles in the 1983 and 1991 codes see chapter 5.3.3.1.

imminent grave danger which he has not willfully caused and which he has no ability to avoid, provided that no injury similar to the injury to be avoided or greater injury results; and provided that necessity does not justify causing death except in the performance of duty.“ In other words, even though necessity can be invoked for a variety of acts it can not be invoked in cases where the injury committed is either similar or greater than the one it intends to avoid, neither can it be invoked in order to justify homicide. However, even though necessity does not lead to impunity in connection to homicide, it clearly does have a mitigating effect as to its punishment in cases of homicide, „where the offender commits culpable homicide in the case of necessity for the protection of himself or any other from death.“ [834]

English law does give little authority to the defense of necessity and thus normally necessity can not be invoked in homicide cases.[835] Consequentially, the 1925/1974 Penal Codes and the Islamized code 1983 did not contain any provisions as to a possible mitigating effect of necessity.[836]

Necessity as such is not mentioned in the PC74 and was not introduced in the PC83 either.[837] Both codes, however, contain an identical provision on acts “likely to cause injury but done without criminal intent and to prevent other injury or to benefit person injured”. The illustrations contained in article 48, PC74 explain that what is meant here is e.g. acts that cause the loss of life or grave injuries but inferior in scope compared to what would have happened without the act in question. Thus, e.g. a railway employee who switches a moving train into a siding in order to avoid a collision of two trains is not guilty of an offence even if the train derails and lives are lost, because it is highly likely that in the case of the collision more lives would have been lost. This article, despite not explicitly mentioning the notion of necessity can be considered a variety of necessity since the act, despite constituting an offence was committed with the intention to safe lives.

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[834] CA91, art. 131 (1) (d).

[835] James (1979), pp. 179-180 quotes the precedent of R. v. Dudley and Stephens (1884), where starving shipwrecked sailors killed a cabin boy in order to feed upon his body. Since necessity was not recognized, the sailors were convicted for murder. However, the sentence was later commuted to six months imprisonment. The case illustrates how the courts in the English legal system have the flexibility to mitigate a sentence according to the circumstances despite the non-recognition of necessity.

[836] Compare articles 249 PC 1925/PC 1974 and PC 1983 stating the reasons “when culpable homicide is not murder”. Chapter II, “Of Criminal Responsibility” of all three codes does also not know “necessity”as a mitigating factor.

[837] The extent to which English law accepts necessity as a defense is unclear. Compare Martin (2003), p. 327.

Necessity in the fiqh

Unlike in cases of duress (*ikrāh*) in a case of necessity (*ḍarūra*) not a person is forcing another one to commit a prohibited act, rather the perpetrator is caught in circumstances he can only escape from by committing a forbidden act, thus saving himself or someone else from destruction.[838] Examples given by the *fuqahā'* for cases of necessity are severe hunger or thirst, driving a person to commit either theft (*sariqa*) or to eat or drink forbidden food or drinks. In relation to homicide the eating of human flesh is discussed in extenso. In general, necessity does not have a mitigating impact on homicide, hurt and the cutting off of limbs.[839] The person in need is not allowed under any circumstance to kill someone else, or to cut off any of someone else's limbs or to wound another person in order to save his own life. Thus, if e.g. a group of persons in a boat is bound to sink and drown due to the weight of the goods loaded, it is not permitted to any of them to throw anyone else of this group into the water in order to lighten the load of the boat and to save himself and the others from drowning. The *fuqahā'* agree that the person whose life is protected against homicide, hurt and the cutting of limbs in a case of necessity is the person enjoying *´isma*, i.e. the living *ma´ṣūm*. However, with respect to the *muhdar* and the dead *ma´ṣūm* the opinions differ; the killing of the *muhdar* is not only allowed, it is a duty in most cases.[840] Nevertheless, Mālik outlaws the eating of flesh of a human being in a case of necessity, even if it is the flesh of a *muhdar*, i.e. someone whose blood can be shed with impunity. Whether the *muhdar* is dead or alive does not matter to Mālik and, for that matter, to the majority of the Ḥanafites. Shāfī´ī, Aḥmad ibn Ḥanbal and a minority of the Ḥanafites are of the opposite opinion, they allow the eating of the flesh of the *muhdar*, may he be dead or alive. Moreover, Shafī´ī and some of the Ḥanafites – but not the Ḥanbalites - even authorize the eating of the flesh of the dead *ma´ṣūm*, i.e. an inviolable person, with the justification that the inviolability of the living is greater than the *ḥurma* of the dead. The other *fuqahā'* contradict and do not concede a "hierarchy of necessity" in the sense that one person in need (*muḍtarr*) takes priority to take from another person in need like himself what is necessary to save his own life. And if he does take from another person in need and this other person dies (because what is necessary to survive has been taken from

[838] See Ḥassūna (2001), p. 153.
[839] Compare for the following ´Awda (2001), Vol. 1, pp. 578-579.
[840] ´Awda (2001), Vol. 1, p. 578.

him), then the perpetrator is juridically guilty of homicide.[841] In addition to the controversies described above, four conditions have to be fulfilled to constitute a case of necessity: 1. That the perpetrator is in a situation in which he fears death and the necessity is a recourse. 2. That the case of necessity is imminent and not just expected. Thus, the hungry one is not allowed to eat the meat of animals not ritually slaughtered (*maita*) before he is suffering severe hunger. 3. That there is no other means to ward off the case of necessity than by committing a crime. If the case of necessity can be repelled by an allowed act then the committing of a forbidden act is outlawed, i.e. will have its usual legal consequences. Thus e.g., the hungry one can not commit sariqa (without punishment) if he is able to buy food. 4. That the necessity is warded off within the limits necessary to do so. Thus the hungry one can not take more food than is necessary to satisfy his hunger.[842]

Necessity thus, in 1991, has been introduced as a concept derived from the *fiqh*,[843] but, however, without fully following its precepts. In the *fiqh* three classes of crimes related to necessity are discussed: 1. crimes upon which necessity has no influence, such as homicide, hurt and the cutting off of limbs, 2. crimes which are permissible in cases of necessity, such as the eating of forbidden food and the drinking of forbidden drinks and finally, 3. offences which are not permissible, but where the punishment lapses in cases of necessity. Examples are the stealing of food and drink by the hungry one or throwing over board of merchandise of other passengers when the sinking of a ship is imminent.[844] As to the first class of crimes, which concerns us here, the *fuqahā'* state clearly that the person who is protected against homicide, hurt and the cutting of limbs is the person who enjoys the *´iṣma*, or the (living) *ma´ṣūm*. As we have shown above there is only one exception to this principle which is the cutting off of limbs of the dead *ma´ṣūm*, which is allowed by Shāfi´ī and some of the Ḥanafites. As far as the *muhdar* is concerned, it is allowed or even a duty to shed his blood. This general principle is *also* applicable in cases of necessity, but necessity is not a precondition for its applicability.[845] In other words, as shown above, the killing of the *muhdar* is not considered to constitute either intentional or semi-intentional homicide by the *fiqh* and this is also true in a case of necessity. The killer of the *ma´ṣum* in a case of necessity,

[841] Ḥassūna (2001), p. 156.
[842] See ´Awda (2001), Vol.1, p. 577.
[843] See Ḥassūna (2001), pp. 154-161.
[844] For this classification and the examples compare ´Awda (2001), Vol. 1, pp. 578-581.
[845] See ´Awda (2001), p. 578.

however, has to face the penal consequences of his act. Necessity is thus not considered to be a mitigating factor by the *fuqahā'*. Ergo, if a homicide is intentional it shall not be considered to be semi-intentional if committed in a situation of necessity. Here the CA91 differs with the *fiqh*. While the *fiqh*, unlike English law and the PCs 1925, 1974 and 1983, as we have seen above, recognizes the concept of necessity as a reason of exemption of criminal responsibility, it does so while relating mainly to situations of severe hunger and thirst and the consumption of human flesh resulting thereof. The CA91, in contrast, does not know the distinction between persons enjoying *'iṣma* and those who don't. It also – and this is a significant difference as to the deliberations of the *fuqahā'* - recognizes necessity as having a bearing upon cases of homicide. While it does not prevent the act from being considered a crime – as in all cases described in CA91, art.15 – a case of necessity turns intentional homicide into a case of semi-intentional homicide. Paradoxically, the legislator has thus – while claiming to Islamize the Sudanese Penal Law – omitted *'iṣma*, an important notion in the fiqh, or the differentiation between those who enjoy the full protection of their lives and property and those who have either forfeited or never had this protection.

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

3.3.3.5 Legal uncertainty (shubha)

One of the most important defenses in cases of *ḥadd*-crimes and homicide are legal uncertainties (*shubha*, pl. *shubuhāt*), i.e. an illicit act which resembles a licit one.[846] A *shubha* is usually invoked to avert the imposition of the harsh *ḥadd*-penalties, based on a *ḥadīth* calling upon the believers to "avert the *ḥadd* penalties my means of legal uncertainties" (*idra'ū al-ḥudūd bil-shubuhāt*).

The Evidence Acts of 1983 and 1991 both recognize legal uncertainties (*shubuhāt*) and stipulate that *ḥadd*-punishments are averted by legal uncertainties[847], both define the withdrawal of a confession, differences in the testimonies of witnesses and the withdrawal of the testimony of a witness as legal uncertainties averting the *ḥadd*-punishment.[848] Further,

[846] For the following compare Rowson (1997). For an alternative categorization see Peters (2005), pp. 21-23.
[847] Evidence Act 1983, art. 80 (1) and Evidence Act 1993, art. 65 (1).
[848] Evidence Act 1983, art. 80 (2) and Evidence Act 1993, art. 65 (2).

both codes define the *li´ān* procedure as a legal uncertainty equally averting the *ḥadd*-punishment.[849] Beyond the pertinent Evidence Acts, legal uncertainties with regard to specific *ḥadd*-crimes are defined in legal circulars.[850]

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

3.3.3.6 Repentance (tawba)

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

[849] Evidence Act 1983, art. 80 (3) and Evidence Act 1993, art. 65 (3).
[850] Published in Ḥāmid (2002), mausū´ al-manshūrāt al-jinā´iyya, al-juz al-thālith. The details of these circulars which stipulate recognised reasons for the lapsing of *ḥadd*- and *qiṣāṣ*-crimes in general will be discussed in the respective chapters.
[851] See Rowson (1997), p. 492.
[852] To what degree legal uncertainties are recognized in the PC83 and the CA91 and the ensuing Supreme Court legislation will be discussed below in the corresponding chapters.

and leads a decent life. With regard to apostasy a majority opinion holds that repentance within a certain amount of time, which varies according to the respective school, makes the *ḥadd*-punishment for apostasy lapse. However, repentance does not make the punishment lapse in a case of *qadhf*, unless the aggrieved party pardons the culprit, since the claims of men have prevalence over the claims of god.[854] With regard to illegitimate sexual intercourse, theft and alcohol consumption the leading opinion of the Ḥanafite and the Mālikite school as well as part of the Ḥanbalite and the Shāfiʿīte schools reject any general impact of repentance on the punishment of these *ḥadd*-crimes. They argue e.g. that the Prophet himself has imposed *ḥadd*-punishments against adulterers and thieves despite their repentance. The opposite opinion is held by parts of the Mālikites, the Shāfiʿītes and the Ḥanbalites. They defend the general impact of repentance on the *ḥadd*-punishments with e.g. the argument that it is taken into account for the much bigger crime of *ḥirāba* and that it should therefore also apply to "smaller" *ḥadd*-crimes.

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

Neither the PC 1983 nor the Criminal Procedure Act 1983 had mentioned *tawba* as grounds for the rescindment of a *ḥadd*-punishment.[855] Notwithstanding its limited practical significance, the CA1991 has not only introduced the notion of repentance. It has also, in the case of *ḥadd*-theft, chosen to accept a minority opinion, thus using one of the available tools to mitigate the application of severe *ḥadd*-punishments (cross amputation, amputation, death, crucifixion) for apostasy, banditry and *ḥadd*-theft. The CA 1991 does not follow the minority opinions acknowledging repentance as a valid grounds for the lapsing of all *ḥadd*-penalties. However, in addition to apostasy and banditry – the punishment for theft (*sariqa ḥaddiyya*) also lapses if the culprit repents.[856]

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

3.3.4 Attempt and criminal joint acts

3.3.4.1 Attempt

The Criminal Act 1991 defines "attempt" as the commission of an act which apparently indicates the intention to commit an offence where the offence has not been carried out, due to a cause beyond the offender's will. The attempt to commit an offence is punishable with a prison term not exceeding half of the maximum term prescribed for the attempted offence. When the prescribed penalty for the attempted offence is capital punishment or amputation the punishment will not exceed seven years of imprisonment.[857]

The definition of attempt in 1983 is a literal translation of its 1974 predecessor code with the exception of the punishment. While in 1974 an attempt to commit an offence punishable with imprisonment or the causing of such an offence to be committed was punishable with a prison term of up to one-half of the maximum term for the offence (had it been carried out), in 1983 the penalty is replaced by the ubiquitous formula "by flogging and fine or imprisonment".

In the *fiqh* a theory on attempted crime does not exist.[858]

3.3.4.2 Criminal joint acts

The Criminal Act 1991 defines that when an offence is committed by two or more persons in execution of a criminal conspiracy between them, each person is equally responsible as if the crime is committed by him alone.[859] Criminal conspiracy is defined as an agreement to commit an offence.[860] If the offence is committed by two or more persons without criminal conspiracy each one of them shall be responsible for his act and punished by the penalty prescribed for it.[861] The criminal conspiracy as such, i.e. the agreement between two people or more to commit an offence, is only punishable in cases of intentional homicide, armed robbery (*ḥirāba*) and offences against the state punishable by death or when an attempt has been made to actually commit the offence.[862] In other words, for the three crimes mentioned the mere planning is punishable even if no attempt to carry out the plan has been made.

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[857] Criminal Act 1991, art. 19, 20 (1), 20 (2).
[858] Peters (2005), p. 20.
[859] Criminal Act 1991, art. 20.
[860] Criminal Act 1991, art. 24 (1).
[861] Criminal Act 1991, art. 22.
[862] Criminal Act 1991, art. 24 (2).

The Penal Code 1983 defines joint criminal acts similar to its successor in 1991.[863] Here too, the pertinent articles[864] are a literal translation from the Penal Code 1974.[865] A main difference is, however, that in the 1983 (1974) code no crimes were defined where already the agreement to commit the offence ("criminal conspiracy"), i.e. the planning, was punishable.

In the *fiqh*, in order to impose a *ḥadd*-punishment the perpetrator needs to have committed all elements of the crime himself.[866] The *ḥadd*-punishment lapses if he has, e.g. in the case of *sariqa* (theft), taken out a valuable object out of his safe place (*ḥirz*) but then handed over the object to an accomplice. The exception from this rule is the *ḥadd*-crime of banditry (*ḥirāba*): all participants of an act of banditry will be punished with the amputation of the right hand and left foot even though only one of them actually has taken property from the victim(s). It is important to note that this principle works also in reverse order. If the main culprit cannot be convicted, e.g. because he is a minor, the *ḥadd*-punishment lapses for all others as well.[867]

With regard to cases of homicide complex rules apply in the *fiqh*.[868] A majority of schools hold that in a case of multiple perpetrators it has to be established who exactly caused the death of the victim. Can the actual killer not be identified the claim will be dismissed. However, collective criminal responsibility is assumed – and the death penalty for all is possible - where all perpetrators acted simultaneously and where their act would have been lethal had each one of them carried it out separately. If the perpetrators did not act simultaneously criminal responsibility falls upon the offender who attacked the victim first, if the victim dies within a day after the attack. If the victim dies later than that, criminal responsibility lies upon the last attacker. In both cases there is no collective responsibility nor punishment, all remaining attackers will be liable to a *ta´zīr*-punishment. In opposition to this majority opinion the Mālikites assume in the above cases collective criminal responsibility. All those who directly took part or assisted in the murder, even if their role consisted in abetting, will be held collectively responsible. This means in practice that not only the person

[863] Except that the notion of "criminal conspiracy" (1991) in 1974/83 is "criminal act...done...in furtherance of the common intention".
[864] Articles 78-81, Penal Code 1983.
[865] The illustrating examples of the PC74, however, have been dropped as in all other articles and the notion of "criminal conspiracy" (1991) in 1974/83 is worded "criminal act...done...in furtherance of the common intention".
[866] For this section compare Peters (2005), pp. 28-30.
[867] For more details and a comparison with recent legislation see chapter 4.5 on *ḥirāba*.
[868] See also chapter 5 on homicide.

who actually shot or stabbed the victim will be subjected to *qiṣāṣ* but also those who had lesser roles in the killing.[869]

3.3.5 Sanctions

3.3.5.1 Penalties

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

[869] For multiple perpetrators in modern Sudanese legislation see chapter 5.3.7.
[870] For the following see article 64, (1)-(12), PC83.
[871] Zein (1989), p. 247.

PC83 does not define *qiṣāṣ*, does not mention how it is carried out, who inherits it when the victim is dead, under what circumstances it can be carried out in cases of bodily harm nor in which cases *qiṣāṣ* is remitted. As mentioned above, the terms exile and expatriation are not defined either but would have to be clarified by consulting "Islamic *sharī´a*". Furthermore, the multifold questions surrounding *diya* are not answered, apart from the mentioned definition of full *diya* (*diya kāmila*). We neither learn when, on whom, nor to whom *diya* is due. Also, the PC83 is silent with regard to *diya* for specific parts of the body. Altogether, the changes with regard to the PC74 are rather superficial. Most striking is the removal of the minimum and maximum age limits for the execution of the death penalty. While these were 18 and 70 respectively in the PC74, in the PC83 such limits have been abolished.[873]

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

Penalties in the Criminal Act 1991

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

[872] Zein (1989), p. 248.
[873] Compare art. 65 in the PC74 and its changed version in the PC83.
[874] For the death penalty see art. 27 (1) – (3), CA91.

category a death penalty falls. It should be noted that the *fiqh* provides for beheading by the sword as the normal way of execution.[875] With regard to the minimum and maximum age of the offender who is to be executed, the CA91 makes a clear distinction between *ḥadd* and *qiṣāṣ*-offences on the one hand and *ta´zīr*-offences on the other hand. While those guilty of *ta´zīr*-offences can be executed only if they are at least 18 years of age or below 70 years of age, offenders guilty of *ḥadd*- or *qiṣāṣ*-crimes can also be executed outside these age limits. The CA91 here returns to the age limits of the PC74 which had been lifted in the PC83, however, with an important qualification. The section further specifies that crucifixion can only be imposed in cases of highway robbery (*ḥirāba*).

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

[875] Peters (2005), p. 36.
[876] CA91, art. 28 (1).
[877] See CA91, "Schedule I".
[878] CA91, art. 29 (a).
[879] As to the actual practice of this provision see last chapter.
[880] CA91, art. 28 (2) and art. 32 (1).
[881] CA91, art. 32 (3).

bodily harm and accidental homicide and bodily harm.[882] Under certain conditions *qiṣāṣ* will be remitted.[883] Apart from a pardon, this is the case when the victim or his relative is an offspring of the offender, bodily harm has been inflicted with the consent of the victim or where the offender becomes insane after the passing of the sentence.

As to whipping an age limit, albeit different from the death penalty, applies. No person who is sick or whose life might be in danger or has attained 60 years of age may be whipped, except in cases where the whipping is a punishment for a *ḥadd*-crime. No age limit applies to minors.[884] With regard to imprisonment the discretion judges had in 1983 has been limited. Similarly to the death penalty, imprisonment cannot be imposed on minors below 18 years of age or persons above 70 years of age. Highway robbery (*ḥirāba*), however, is exempted from this general rule. The terms "exile" (*nafy*) and expatriation (*taghrīb*) have now been defined. Both terms can be traced to the Qur´an and to a *ḥadīth*, their meaning, however is controversial in the *fiqh*. Only the Mālikites define it as real deportation, all other schools interpret it as imprisonment until the offender repents.[885] Exile, according to the 1991 definition, is imprisonment far from the place where the offence has been committed and the from he offender's place of residence. Expatriation is the restriction of the offender's residence away from the place where the crime was committed.[886] Lastly, the CA91 provides some important definitions on the possibility of pardoning an offence. Thus, the execution of *ḥadd*-penalties cannot be remitted by a pardon while the execution of a *qiṣāṣ*-penalty can be remitted only by the pardon of the victim or his heirs.[887]

3.3.5.2 Special provisions on ta´zīr *- penalties*

In Islamic law, next to *ḥadd*- and *qiṣāṣ*-crimes there is a third category of crimes. These, called *ta´zīr*-crimes, comprise all forbidden acts, which are not ḥadd, or *qiṣāṣ* and which are punishable by a discretionary punishment. While *ḥadd*- and *qiṣāṣ*-crimes consist of a limited number of clearly-defined crimes, the majority of crimes fall into the category of *ta´zīr*. While before Islamization in the PC74 the term *ta´zīr* did not play a role, it is surprising to note that the Islamized CA83 did also not contain any specific provisions with regard to *ta´zīr*-offences.

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[882] CA91, art. 32 (4).
[883] CA91, art. 31 (a)-(d).
[884] CA91, art. 35 (1).
[885] Peters (2005), pp. 34.
[886] CA91, art. 33 (1) and (2).

In the CA91, however, we find a number of provisions, which are specific to *ta´zīr*-offences. Thus, the court is bound to take into consideration mitigating and aggravating circumstances when determining the appropriate *ta´zīr*-penalty as well as the degree of responsibility, motives of the offender, the seriousness of the act, the grievousness of the injury and other circumstances surrounding the deed such as the dangerous nature of the offender and his previous convictions.[888] Where a single act constitutes more than one offence these are considered to be overlapping and only the most severe penalty shall be inflicted. If, in a case of multiple offences, the most severe penalty is the death penalty it excludes all other penalties, except forfeiture.[889]

3.3.5.2 Blood money (diya)

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

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

[887] CA91, art. 38 (1) and (2).
[888] CA91, art. 39.
[889] CA91, art. 40.

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

Diya for a policeman who has killed while exercising his duties

A case of homicide[892] from the mid-eighties highlights the understanding of the nature of *diya* in the interpretation of the Sudanese Supreme Court. A policeman had shot dead his victim without justification (*dūn mubarrir*) during a pursuit. A provincial court (*maḥkama mudīriyya*) sentenced him under article 253 PC 1983[893] to pay a *diya* of 25.000 Sudanese Pound or a prison term of seven years in the case of the non-payment of the *diya*. The legal representative of the private prosecutors appealed and requested to apply article 251 PC 1983 – intentional homicide – instead, since in his view mala fide was firmly established. He also requested a review of the prison term because a non-payment and the subsequent prison term would have left the private prosecutors without their due financial compensation. However, the Supreme Court in its discussion of the decision concurred with the original sentence for semi-intentional homicide. It agreed that the policeman fell under a special clause,[894] protecting civil servants committing homicide in good faith while performing their duties. Consequentially it also rejected the claim of mala fide, especially since the young man only recently had joined the police force and should not have been given a weapon to protect a residential quarter. However, the judges continued to stress that even though the policeman might not bear the responsibility or had misunderstood the instructions this should not impair

[890] Layish/Warburg (2002), p. 118.
[891] Peters (2005), p. 51.
[892] Government of the Sudan vs. Mukhtār al-Tāj Abū Nafīsa, SLJR 456/1405 (1985).
[893] Article 253 PC 1983 punishes semi-intentional homicide with the death penalty or *diya*.
[894] Article 249 (3) PC 1983.

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

No diya for minors

In 1985 the Supreme Court had to decide whether *diya* could be imposed on minors.[895] It reasoned that *diya* is a punishment imposed with the objective of prevention and deterrence (*´uqūba al-zajr wa al-rad´*). The punishments imposed on minors, however, are corrective (*ta`dībī*), such as flogging (*jald*) and arrest (*ḥajz*) in a reformatory (*iṣlāḥiyya*).[896] It therefore decided that minors, who have not yet reached 18 years of age or do not show the physical signs of adulthood in the light of the Islamic *sharī´a* could not be sentenced to the payment of *diya*. It is noteworthy that in the case in question the punishments for the underage perpetrator of intentional homicide became lighter with each revision. While the original court of first instance had imposed the death sentence, the court of appeal abolished the death sentence and sentenced the culprit to five years in a reformatory and 25.000 Sudanese Pounds of *diya*. The court of appeal specified that if the defendant would not pay; he would remain in the reformatory until payment. Further, the heirs should make their claim heard through civil jurisdiction (*bil-ṭuruq al-madaniyya*). After the final review by the Sudanese Supreme Court, the payment of *diya* was annulled, because the culprit was underage. Thus – the Supreme Court did not mention the possibility of claiming money in the civil courts - the heirs did not receive any financial compensation for the death of a family member.

As mentioned above minors and the insane - while they cannot be held criminally responsible - are liable to pay *diya* in cases of homicide under the *sharī´a* / *fiqh*. No fault is required. While the Court of Appeal had taken this principle into consideration the Supreme Court seems to have confused criminal responsibility and civil liability. Taking the former for the

[895] Government of the Sudan vs. `Awaḍ al-Ḥājj Maḥjūb, SLJR 1985, no.1405/145.
[896] See Criminal Circular 1984/106.

latter it acquitted the minor from his obligation to pay financial compensation and thereby contradicted the *sharī´a* / *fiqh*.

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

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

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

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

[897] Government of Sudan vs. Muḥammad Ḥusain Muḥammad Khair, SLJR 1985, no.1405/81.
[898] See also Criminal Circular 94/83 in Ḥāmid, mausū´a, al-juz al-thālith, (2002), pp. 18-26.

position to forego part of the share which is due to her under age child only, because she is an adult. If the total sum of the *diya* actually paid - including whatever amount the adult(s) have foregone - is less than the *diya* specified by the court (*al-diya al-muqarrara*), then the killer shall have the obligation to pay the difference.

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

Diya in the Criminal Act 1991

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

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

[899] Criminal Circular (1), 2000 abolishes earlier circulars issued in 1991 and 1995. See Ḥāmid, mausū'a al-manshūrāt al-jinā'ī, p. 5. I do not know whether more recent circulars exist.
[900] The provisions described below have been taken over verbatim for the larger part from the Criminal Bill 1988.
[901] CA91, art. 42 (1). Criminal Circular (1), 2000 e.g. fixed the full *diya* at two million Sudanese Dinar and the amount of the enhanced *diya* (*al-diya al-mughallaza*) at three million Sudanese Dinar.
[902] CA91, art. 42 (2).

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

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

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

The CA91 further determines that *diya* is due in the first place to the victim, then the right to *diya* passes on to his heirs according to their shares in inheritance. Where the victim has no heirs, "dia shall vest in the state".[907]

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

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

[903] CA91, art.42 (4).
[904] CA91, art. 42 (5).
[905] CA91, art. 43. (a)-(d).
[906] Ḥāmid, mausūʿa al-manshūrāt al-jināʿī, al-juz al-thānī, p. 5.
[907] CA91, art. 44.

´āqila. Thus, the *´āqila* includes the paternal relatives of the offender, or his insurer (*al-jiha al-mu´amman ladaihā*, i.e. his insurance company),[909] persons who are jointly liable with him, and his employer financially if the offence is committed during the course of employment.[910] As we have seen in our discussion of the definition of the *´āqila* in the *fiqh* above, the Sudanese legislator in 1991 has adopted a definition, which has been derived from the Ḥanafī approach. The Ḥanafīs hold that any group that shows solidarity towards its members can be considered an *´āqila*.[911] In the light of this open definition the Sudanese legislator has developed the concept of the *´āqila* according to modern requirements[912] and thus included insurance companies, and employers under specific circumstances. Thus the Supreme Court declared the General Security Apparatus (*jihāz al-amn al-´āmm*) to be the *´āqila* of an officer who had shot dead a suspect after a car chase.[913]

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

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

Financial compensation in addition to diya

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

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[908] CA91, art. 45 (2).
[909] See explanation in Ḥāmid, mausū´a al-manshūrāt al-jinā`īya, al-juz al-thānī, p. 9.
[910] CA91, art. 45 (3).
[911] For a detailed overview of definitions of the term *´āqila* in the *fiqh*, see Bahnasī, al-diya fī al-sharī´a al-islāmiya, pp. 61-66.
[912] One commentary calls this approach *fiqh mu´āṣir* (contemporary *fiqh*). See Ḥāmid, mausū´a al-manshūrāt al-jinā`ī, al-juz al-thānī, p. 10.
[913] See Supreme Court decision no. 1994/729, SLJR 1994.
[914] CA91, art. 45 (4). This provision was not included in the Criminal Bill 1988.
[915] Government of the Sudan vs. Ismā´īl Ḥadūt Ashūt, SLJR 1992, no.1992/32.
[916] Government of the Sudan vs. `Abd al-Raḥmān Abū Rās Ḥamād, SLJR 1992, no. 1405/63.

according to article 251, PC83.[917] The Supreme Court supported the sentence and requested the original Trial Court to summon the private prosecutors and to suggest to them to either pardon the culprit or to settle for *diya*. While the widow of the victim couldn't be heard (she was not present in the city of the hearing), both parents said during the hearing that they would forego *qiṣāṣ* in exchange for the payment of *diya* and the defendant's covering the costs of the trial. The Supreme Court accepted the waiving of *qiṣāṣ* by the parents, but held that a financial compensation (the trial costs) in addition to *diya* was not admissible according to the Criminal Act 1991 which stipulates that "No other compensation shall be imposed alongside dia for homicide and wounds".[918] The above article, however, does not mean that there is no place at all for the heirs to seek financial compensation for damage incurred in connection with homicide or bodily harm. They are, according to article 46, CA91, rather obliged to make their claims heard while the case is heard by the Trial Court, according to the provisions of the Civil Transactions and Procedures Acts.[919] Since the parents (and the other heirs) of the victim had not requested financial compensation initially and the Trial Court had not decided to this effect, the Supreme Court applied article 42 (4) which rules out financial compensation *alongside diya* for homicide and wounds. The texts of articles 42(4) and 46, at first sight, seem to be rather contradictory. The first article negates the possibility of a compensation, the second one explicitly allows for it. None of the two specifies that claims have to be made during a specific stage of the trial. The sentence discussed here has, however, made it clear that any claim for compensation by heirs of a victim have to be presented at an early stage of the trial, i.e. before the official hearing during which the question of a possible pardon or *diya* is being discussed. Once judgment has been passed on the culprit and the heirs decide to accept *diya* and forego *qiṣāṣ* no further financial claims are admissible. While this judgment harmonizes two, at first sight, contradictory texts, it seems rather unfair that the costs of the trial would have to be shouldered by the heirs of the victim.

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