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

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4 *Ḥadd*-crimes

4.1 Unlawful sexual intercourse (*zinā*)

4.1.1 Introduction

Zinā is arguably a subsection of Islamic Criminal Law that has drawn a lot of attention not only with regard to the Sudan but with regard to other countries where ICL has been codified as well.[920] Concerning Sudanese jurisdiction especially the blurred distinction between rape and *zinā* and the ensuing difficulty for women to prove their innocence has been discussed and criticized. This chapter will describe and analyze relevant Supreme Court decisions with regard to *zinā*. It will determine to what extent and how Supreme Court decisions have developed over time and where this development stands. Next to the rape/*zinā*/proof of *zinā* complex special focus will also be given to *liwāṭ* (buggery), another area that is controversial in the *fiqh* and whose codification had left some questions unanswered. The arrangement of the material is as follows: after a short account of the definitions and treatment of the main concepts of *zinā* and related terms in the *fiqh* follows a synopsis of the treatment of *zinā* in the 1983 and 1991 codes. Wherever available Supreme Court decisions will serve to highlight and explain the application of the law on *zinā* and the interpretation of lacunae left by the legislator.

4.1.2 Zinā *and related offences in the* fiqh

4.1.2.1 *Zinā*

4.1.2.1.1 Definition of *zinā*

Zinā[921] and acts understood as *zinā* are mentioned on several occasions in the Qur´an. Thus Q 4:15 commands that "those of your women who are guilty of lewdness,[922] call to witness four of you against them. And if they testify (to the truth of the allegation) then confine them to the houses until death takes them or (until) Allah appoints for them a way" (through new legislation). Q 4:16 "And as for the two of you who are guilty thereof, punish them both. And if they repent and improve then let them be. Lo! Allah is Relenting, Merciful".

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[920] For the Sudan see Sidahmed (2001).

[921] It must be noted here that the Christian/Western concept of adultery is unknown to Islamic law. Extra-marital intercourse is punished as a crime against religion not as neglect of marital duties. Compare Schacht (1964), p. 179. *Zinā* is always transcribed in this form, another possibility is *zinā'*.

[922] The word used here is *al-fāḥisha* (sin), not *zinā*.

The majority of interpreters maintains that both verses were abrogated by Q 24:2, which defines a punishment of 100 lashes for the *zānī* and the *zāniya* if the deed has been witnessed by four witnesses. Some interpreters believe that verses Q 4:15 and 4:16 target homosexuality.[923] The Qur´an does not specify the marital status of those culpable of *zinā* and sentenced to lashing, nor does it mention at all the punishment of stoning. Stoning is only mentioned in the *sunna*, where two *hadīths* testify to the Prophet himself condemning those committing *zinā* to stoning.[924]

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

4.1.2.1.2 Legal uncertainties with regard to *zinā*

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

[923] Abu-Zahra (2001), p. 28. What is probably meant here is *liwāṭ*, i.e. penetrare per penem in ano. Compare below.
[924] As to the details of these *hadīths* see Peters, zinā, pp.509. The wording of one of them can be found in Peters (2005), p. 60.
[925] For anal intercourse see below.
[926] The Shi´ites make an exception, according to them petting is punishable by a 100 lashes. See Peters (2005), p. 61.

uncertainty is established and the *ḥadd*-penalty is averted.[928] A fourth legal uncertainty called *shubha al-milk* can be invoked with regard to property (*milk*), e.g. when a husband practices sexual intercourse in an unlawful way believing that this is part of his rights as a husband.[929]

4.1.2.1.3 Punishment of *zinā*

The four Sunni schools concur in punishing *zinā* with stoning (*rajm*) if the *zānī* or the *zāniyya* are *muḥṣan*. *Muḥṣan* means, the offender is free, adult, a Muslim and has enjoyed legitimate sexual relations previously in matrimony. This marriage does not need to exist at the time the crime is committed. The Shāfi´ites do not require the *muḥṣan* to be Muslim, a *dhimmī* can be *muḥṣan* as well. Moreover, Ḥanbalites and Ḥanafites require that both offenders are *muḥṣan* for the punishment to be imposed. Offenders who are not *muḥṣan* are to be punished by 100 lashes if they are free and with half of that if they are slaves. All schools, with the exception of the Ḥanafites, have this punishment followed by a banishment of one year. A provision of some consequence is the rule that the offence has to be committed out of one's free will. As a corollary, a woman who has been raped (*mustakraha*) cannot be punished of *zinā*.[930] We shall see below how the controversy on how she has to prove her having been raped has led to severe problems in modern Sudanese legislation and jurisdiction.

It is controversial in the *fiqh* whether, with regard to the applicability of the penalties for *zinā*, it is necessary to be a Muslim. The Ḥanbalites, the Shāfi´ītes and Abū Yūsuf maintain that being a Muslim is not a precondition, since the Prophet himself ordered the stoning of Jews and this was the first stoning in the history of Islam.[931] In other words, *zinā* by a *dhimmī* or a *musta´min* is punishable by *ḥadd* according to these opinions. However, the Ḥanafites – with the exception of Abū Yūsuf – and the Mālikites, are of the opinion that neither a *dhimmī* nor a *musta´min* can be punished by the *ḥadd*-penalty because the *iḥṣān*[932] is a precondition for the *ḥadd*-punishment for *zinā*. *Dhimmīs* and *musta´mins*, however, cannot be *muḥṣan* according to these two schools.[933] They further reason that the punishment of stoning for *zinā* constitutes

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[927] Baradie (1983), pp. 103-104.
[928] Baradie (1983), p. 103.
[929] For an example see chapter below "*Liwāṭ* within marriage".
[930] For the above see Peters (2002), EI2, zinā, p. 509 and Peters (2005), p. 61.
[931] Bahnasī, mausū´a, Vol.3, pp. 197-198. See also Al-Jazīrī, Vol.5, p. 100.
[932] For an explanation of the terms of *iḥṣān*/*muḥṣan* see below.
[933] Al-Jazīrī (2004), Vol.5, p. 101 and Bahnasī, mausū´a, Vol.3, p. 197-198.

a purification from sin (*taṭhīr min al-dhanab*). Dhimmīs and other non-Muslims can never obtain purification except by burning in hellfire.[934]

It is equally controversial whether *dhimmīs* who commit *zinā* with each other are subject to the *ḥadd*-penalty.[935]

4.1.2.2 *Liwāṭ* (buggery)

4.1.2.2.1 *Liwāṭ* between males

Another bone of contention among the *fuqahā´* is the question of whether *liwāṭ*, meaning here anal intercourse between males[936], is to be subsumed under *zinā* and is to be punished accordingly or not.

Among the Ḥanafites it is disputed whether *liwāṭ* falls under *zinā* or not. Abū Ḥanīfa does not consider *liwāṭ* a *ḥadd*-crime and therefore imposes a *ta´zīr*-punishment on both offenders, the active and the passive one. Kāsānī equally advocates *ta´zīr* for *liwāṭ* among males. Other Ḥanafites, however, disagree. Abū Yūsuf and Saibānī both are in favor of the *ḥadd*-penalty for *zinā* for both offenders. Both are to be stoned if they are *muḥṣan* and flogged if they are not.[937]

The Shā´fi´ites compare *liwāṭ* among males to *zinā*. As to the punishment opinions differ. According to some the *muḥṣan* is to be stoned (or killed by the sword), and the non-*muḥṣan* punished by flogging and banishment. Others hold that the offender is to be killed under the heading of *ta`zīr* under all circumstances, either by having a wall collapsing on him or by forcing him to jump from great height. Some hold that the *ḥadd* is not applicable and that flogging is the due punishment.[938]

Among the Ḥanbalites opinions differ lightly. Ibn Taimīya holds that both offenders, the active and the passive one, irrespective of their being *muḥṣan* or not, are to be executed by stoning. Ibn Qudāma subsumes *liwāṭ* among males under *zinā* and consequentially prescribes stoning for the *muḥṣan* and flogging for the non-*muḥṣan*.[939]

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[934] Al-Jazīrī (2004), Vol.5, p. 101.
[935] Baradie (1983), p. 104.
[936] Short for penetrare per penem in ano. Anolingus, penetratio per digitum and penetratio per artefactum are not meant by *liwāṭ*, neither are homosexuality or pederasty correct translations of *liwāṭ*. See Schmitt (2001/02), pp. 51-52. Compare also Schmitt (1992), p. 13 et sqq.
[937] Schmitt (2001/02), pp. 73-74.
[938] See Peters (2005), p. 61 and Schmitt (2001/02), p. 82.
[939] Schmitt (2001/02), pp. 84-85.

Mālik and all Mālikites advocate the penalty of stoning for the *muḥṣan* and for the non-*muḥṣan* offender, whether passive or active. [940]

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

4.1.2.2.2 *Liwāṭ* outside marriage

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

4.1.2.2.3 *Liwāṭ* within marriage

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

[940] Schmitt (2001/02), p. 79.
[941] This is similar to buggery. See Oxford Dictionary of Law (2003), p. 58.
[942] Schmitt (2001/02), p. 73.
[943] See above.
[944] Schmitt (2001/02), p. 79.
[945] ´Awda (2001), Vol.2, p. 353.

ta´zīr.[946] The Mālikites consider *liwāṭ* with one's spouse forbidden and prescribe a *ta´zīr*-penalty. The Shāfi´ītes hold that first-time offenders are not to be punished. Recidivists of *liwāṭ* within a legally valid marriage, however, are to be punished by flogging. [947]

4.1.2.3 Rape (*ightiṣāb*)

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

Mālik, however, has a different view on pregnancy as proof for *zinā*, which – as we will show below – plays an important role in the Sudanese Penal Codes. He is of the opinion that the pregnancy of an unmarried woman is sufficient proof of *zinā*, making the *ḥadd*-punishment compulsory on her. Her claim that she has been raped does not suffice in itself to avert the *ḥadd*. In order to avert the *ḥadd* on these grounds she must provide direct evidence (e.g. the confession of the perpetrator or testimony) or circumstantial evidence for the plausibility of her defense. Circumstantial evidence accepted by Mālik for her defense could consist e.g. in witnesses who saw her calling for help after the rape, with blood stains on her clothing caused by her loss of virginity.[948]

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

4.1.3.1 *Zinā*

4.1.3.1.1 Introduction

In comparison with the 1983 and 1991 legislation, their secular predecessor codes in 1925 and 1974, provided for relatively mild punishments for adultery. Interestingly, even though chapter XXV of the 1974 Penal Code is an almost verbatim takeover of its 1925 precursor[949] it changes it in one important aspect. In the 1925 code adultery was only punished – relatively mildly with a prison term not exceeding two years or a fine or both – if the respective husband

[946] ´Awda (2001), Vol.2, p. 353.
[947] ´Awda (2001), Vol.2, p. 353 and Schmitt (2001/02), p. 81.
[948] ´Awad (2001), Vol.2, pp. 440-441. For an analysis of the historical development of the Mālikite doctrine on *zinā* see Serrano (2005) and (2007).
[949] Chapter XXVI, The Penal and Criminal Procedure Codes of the Sudan, London 1924.

had not agreed to his wife having sexual intercourse with another man. Had he given his consent, the adultery remained unpunished. While this clause gave a husband e.g. leverage to save his unfaithful wife from prison, in 1974 this clause disappeared. While the penalties remained the same, adultery, when committed with or by a married woman, with or without the consent of the husband, was punishable.[950] In contrast, neither adultery committed by a married man with an unmarried woman, nor sexual intercourse between consenting, unmarried, adults was punishable. In both codes, thus, the legislator focuses on the rights of the husband. A wife had to bear with an unfaithful husband, as long as he did not infringe upon the rights of another husband or had intercourse with a girl under the age of 18.[951] Neither code, unlike their successors 1983 and 1991 in the case of *zinā*, gives a definition of what "sexual intercourse" actually means.

Anal intercourse - "carnal intercourse against the order of nature" -, however, is subsumed under "Unnatural Offences"[952] and punishable by up to 14 years (1925) and 12 years (1974) in prison, if committed without consent, i.e. if it constituted anal rape. With respect to anal intercourse the 1974 code has introduced more severe legislation: while in 1925 anal intercourse between consenting adults was not a crime at all[953], the 1974 PC stipulates a prison term of up to two years for both consenting partners, heterosexual and homosexual alike.

Both codes, however, do not accept the consent of the minor as a defense. In 1925, a minor below the age of 16 cannot give his consent to anal penetration, in the 1974 Penal Code the age as of when consent is accepted is increased to 18 years.[954] However, as mentioned, anal intercourse among consenting males is now a crime regardless of their ages. It is worth noting here that the wording of article 318 in both Penal Codes 1925 and 1974 are equally imprecise. In an explanatory note "penetration" is said to be sufficient to constitute "carnal intercourse".

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[950] Compare articles 429 and 430, 1974 Penal Code Act.

[951] The PC74 made sexual intercourse with girls under 18 punishable. Sexual intercourse with girls under 16 was considered to be rape which was punished with imprisonment for up to 14 years and possibly a fine (art. 316, PC74). If the girl was between 18 and 16 her consent was also meaningless, the punishment for the adult man was, however, lighter. He may have been punished with imprisonment for up to two years or with fine or both (art. 316 A).

[952] Article 318, 1925/1974.

[953] It should be noted here that British law at the time was not quite so liberal. Homosexual practices between two consenting males over twenty-one in private were only legalized by the Sexual Offences Act, 1967. See James (1979), p. 199. In the meantime buggery has become legal if committed by consenting males in private who are at least 16 of age. See Martin (2003), ´homosexual conduct´, pp. 233 and ´buggery (sodomy), p. 58.

[954] However, even if consent is given, punishment is due nevertheless. See above.

It is unclear whether anilingus, penetratio per digitum and penetratio per artefactum are included in this definition or whether only penetrare per penem in ano is meant.[955]

4.1.3.1.2 Definition of *zinā* in the Penal Code 1983

In the 1983 code *zinā* was defined as inserting one's penis or glans, or the equivalent of its length of a penis from which the glans has been cut of (*aw mā yu´ādiluhā min maqṭū´ihā*) into the vagina of a person[956] or into his anus without legal bond or by allowing another person to do so to himself.[957] This definition seems to subsume *liwāṭ* - committed either with a man or with a woman - under *zinā*, following a majority of schools and ignoring the minority opinion of the Ḥanafites, who punish *liwāṭ*, whether perpetrated with a woman or a man, by *ta´zīr* (lashing).[958] The 1974 predecessor code, art. 318 had punished "carnal intercourse against the order of nature" in comparison rather lightly with a maximum prison term of two years and possibly a fine. If the act was done without consent the punishment was a maximum prison term of 12 years. Since rape was punishable by a maximum prison term of 14 years, anal rape was punished more lightly with two years less than vaginal rape. This differentiation has been abolished in the Penal Code 1983.

The legislator also deals with the unlikely case of someone committing *zinā* with a mutilated penis.[959] Therefore, if the classical definition does not apply because the glans is missing, *zinā* can still be committed by inserting an equivalent part of the penis in its mutilated or cut form.[960]

As shown above one of the necessary preconditions for *zinā* is that the act is committed out of one's own free will. If a woman is raped (*mustakraha*), she cannot be punished for *zinā*. As will be shown below, the intricacies of rape and its proof resulted in an important set of decisions by the Sudanese Supreme Court. The Penal Code 1983 stipulated without further explanations or examples that if someone had sexual intercourse as stipulated under article 316 (*zinā*) with a minor (*shakhṣ ghair bāligh*) that this act constituted rape and the offender

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[955] Compare footnote 5, Schmitt (2001-2002), p. 52.

[956] The term used here is mutiq meaning a woman or a girl capable of sexual intercourse. According to many scholars does the status of mutiq not necessarily coincide with majority (*bulūgh*, i.e. beginning of menstruation). Girls can reach the status of mutiq before coming of age.

[957] PC83, article 316 (1).

[958] Compare Peters (2005), p. 61.

[959] This case can be found in the classical *fiqh* books. Communication by R. Peters.

[960] Since the legislator wants to define *liwāṭ* with woman and men in one article, the neutral formula used is "...into the vagina of a...person..." instead of "woman".

was to be punished with the punishment for *zinā*.[961] This definition of rape (*ightiṣāb*) was curious for two reasons.

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

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

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

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[961] See article 318 (1).

[962] It should be noted that in the US this is called statutory rape: since the consent of a minor is legally irrelevant, coercion is assumed by law.

[963] See Peters (2005), chapter on mens rea, pp. 20-21.

[964] Which even in 1974 had no impact on the punishability of sexual intercourse with a minor as such. If the minor consented to the sexual intercourse, however, the maximum sentence of two years imprisonment was rather light in comparison to a maximum sentence of 14 years imprisonment for rape (article 317).

includes the rather vaguely defined "shameless/sinful acts" (*fi´l fāḥish*) with a human being or an animal as stipulated in article 319, PC83. Further, it goes without saying that running a brothel is different from committing *zinā*. Thus, all schools agree that the repeated offender can be punished with the capital punishment by way of *ta´zīr*.[965] Cruxifixion and cross-amputation, however, are *ḥadd*-punishments and are reserved for the respective *ḥadd*-crimes only.

4.1.3.1.3.3 *Zinā* in the draft Criminal Bill 1988 and in the Criminal Act 1991

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

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

[965] Peters (2005), p. 67.
[966] Sexual intercourse here means vaginal intercourse, see below.
[967] The official translation translates *liwāṭ* with "homosexuality" which leads to the curious notion that a man penetrating a woman´s anus with his penis is committing the offence of homosexuality. *Liwāṭ*, as explained earlier, merely means the act of penetratio per penem in ano, not a sexual attitude.
[968] Article 149, CA91.
[969] Article 149 (2), CA91.

definition includes minors.[970] Thirdly, the notion of coercion, conspicuously absent in 1983, has now been introduced into the definition. Here the qualification comes into play, stipulating that a person in the custody of or under the authority of the perpetrator of the rape is legally incapable of consenting to sexual intercourse. Put differently, sexual intercourse between an adult man and his ward will automatically be classified as rape, since the ward's consent to the intercourse is not recognized. While minors who are raped fall under the term „person" as defined by paragraph of article 149, the case of the consenting minor, male or female, not under the custody of the adult he or she is having sexual intercourse with, was left undefined by the 1991 legislator. No Supreme Court decisions are available that clarify whether sexual intercourse between an adult and a consenting minor, with the latter not being the ward of the former, would have to be treated as rape, in analogy with sexual intercourse between custodian and ward.

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

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

[970] See the discussion of the case "Maṣ´ab Muṣṭafa Aḥmad" below.

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

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

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

[971] Compare articles 145 (1) (b) and 148 (1), CA91.

this situation inasmuch as no distinction between Muslim and non-Muslim offenders is made any longer.[973] Secondly, the definition of incest now has been fine-tuned to include unlawful sexual intercourse (*zinā*) with and anal penetration (*liwāṭ*) and rape of blood relatives and relatives related by marriage. The latter two offences have been codified here for the first time. Both, Muslims and non-Muslims alike are now liable to the respective punishments designated for *zinā*, *liwāṭ* and rape (*ightiṣāb*) and an additional maximum prison term of five years in cases where the death penalty is not imposed.[974]

The Criminal Act 1991 has also done away with the indiscriminate usage of *ḥadd*-penalties in the realm of sexual crimes. Thus, instead of facing the death penalty and crucifixion or cross-amputation for a second conviction for running a place for prostitution, the CA91 has now differentiated between the second and third offender. While the former faces a maximum whipping of a 100 lashes and a maximum prison term of 10 years, the latter can be punished with either the capital punishment or life imprisonment, in combination with forfeiture of premises.[975] Concurrently, the CA91 has introduced a distinction between "practicing prostitution" and "running a place for prostitution", not existent in the 1983 code with the former being punished with a maximum number of lashes of 100, i.e. equivalent to the *ḥadd*-punishment for *zinā* for the offender who is *muḥṣan*.

4.1.3.2 *Liwāṭ*: The Supreme Court and anal intercourse between males[976]

How the ambiguous wording of article 316, PC83, on *zinā/liwāṭ* created insecurity among judges demonstrates the following case, which dealt with a case of anal intercourse. In January 1989 a 20-year old male student was sentenced to a prison term of three years under article 319 („Indecent acts") of the Penal Code 1983 by the First Degree Criminal Court in Khartoum Bahri East.[977] The sentence was pronounced for a "crime contrary to nature," meaning anal intercourse between males. The lawyer of the defendant appealed to the

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

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

[974] CA91, article 150 (2).

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

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

[977] Government of the Sudan vs. Al-Ṣādiq Aḥmad ´Abdallah, SLJR (1989), no.149/1989.

Province Court, which in turn changed the indictment to be under articles 318, punishment of *zinā*, and 458 (3), *ta´zīr*-punishment in cases where the *ḥadd*-penalty is averted even in the absence of a specific legal text. Despite the more serious charges it reduced the punishment to a prison term of two years, thus pronouncing a *ta´zīr*-punishment in a case where the *ḥadd*-punishment lapses (art. 458 (3)). A second appeal by the lawyer of the defendant led to a judgment by the Court of Appeal, which upheld the modified judgment of the province court. Subsequently the Supreme Court reversed the modified conviction under the *zinā*-paragraph 318[978], arguing that the Penal Code 1983 defines *zinā* exclusively as unlawful sexual intercourse between a man and a woman and does not comprise any kind of sexual acts between members of the same sex. This despite the ambiguous definition of *zinā* in article 316 which does not explicitly mention women as the passive partner, but talks instead of a „person" (*shakhṣ*) being vaginally or anally penetrated. As a clear indicator that anal intercourse between members of the same sex is not covered in article 316 the Supreme Court quotes the expression „without legal bond" (*bidūn ribāṭ shar´ī*), which according to Sudanese family law and Islamic law cannot exist between partners of the same sex. The Supreme Court further points out that the *fuqahā`* have differed on whether anal intercourse falls under the meaning of *zinā* or not. Mālik, Shāfī´ī and Aḥmad ibn Ḥanbal as well as the Twelver Shī´ites and the Zaidites put anal intercourse and *zinā* on the same footing, in the sense that anal intercourse, i.e. *liwāṭ*, falls under the meaning of *zinā*, even if performed between two men. Abū Ḥanīfa, however, - and I follow here the line of the Supreme Court's argument - holds that anal intercourse does not fall under *zinā*, regardless of whether the penetrated person is female or male, since anal penetration has its own denomination „*liwāṭ*", which is evidence for the difference of meaning. And „no ḥadd shall be imposed on those who commit the acts of the people of Lūṭ" (*wa lā ḥadd ´alā man ´amil ´amal qaum Lūṭ*). The difference in opinion between the *fuqahā`* and the fact that *liwāṭ* does not destroy the lineage – one of the negative effects of *zinā* justifying a severe punishment - are the main arguments that bring the Supreme Court to the conclusion that *liwāṭ* is not covered by article 316 (definition of *zinā*) but rather falls under article 319, PC83 (indecent acts/*fi´l fāḥish*).[979] Accordingly, since the offence in question is not considered a *ḥadd*-, but a *ta´zīr*-crime, the high requirements for the proof of the *ḥadd*-crime *zinā* do not apply in this case. However, the medical report and the

[978] Punishment of *zinā*.
[979] The punishment for indecent acts is flogging, a fine or prison, art. 319, PC83.

confession of the defendant convinced the Supreme Court that the defendant perpetrated the crime in question.

In conclusion of its decision and after having quashed the modified decisions of the Province Court and the Court of Appeals, one of the three judges of the Supreme Court who dealt with this case came to the conclusion that the prison terms - of three and two years respectively - of the lower instances were not proportional to the dangerous deed the defendant committed and were to be considered rather light punishments. He argued that anal intercourse between males is condemned in the Qur´an and that the companions of the prophet agreed to punish it by execution, e.g. by stoning. In order to further underline the need for a severe punishment the SC judge refers to the abolished 1974 Penal Code which stipulated a prison term of up to 12 years for practicing anal intercourse with a young boy.[980] His two colleagues, among them the president of the panel, agreed with their colleague as to dealing with the case under article 319 Penal Code 1983. Both, however, deemed the prison term of three years as promulgated by the trial court as sufficient given the clean police record of the defendant and his being 20 years of age only. [981]

The second case under discussion deals with the overlapping crimes of *zinā*, *liwāṭ* and rape of a minor. The facts of the case can be summarized as follows: an eight year old boy was sent by his mother to a shop in order to fetch some necessities.[982] The boy returned to her crying and when she asked him what had had happened it turned out that he had been sexually assaulted and raped. When she examined him she found traces of the forced intercourse on his anus. She filed a complaint and the child was brought to a doctor. The medical report confirmed forced anal intercourse. The owner of the shop, Maṣ´ab Muṣṭafā Aḥmad, was brought to trial and convicted under article 149 (rape) of the Criminal Act 1991 to a hundred lashes and a prison term of three years. Subsequently the Court of Appeals supported the decision under article 149, CA91, but lowered the penalty to eighty lashes and two years of imprisonment. It should be noted that the text of article 149 defines a hundred lashes as a compulsory, not a maximum, punishment while the prison term is limited to ten years

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

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

[982] Compare SLJR (2000), Trial: Maṣ´ab Muṣṭafa Aḥmad, 2000/545, pp. 58-63.

maximum. The father[983] of the defendant contested the decision of the Court of Appeals, demanding the annulment of the conviction and the release of the defendant. In particular the father of the defendant was claiming that: 1. There was no evidence for the charge and that the court(s) had relied on the testimony of the victim's mother who had not been an eyewitness, 2. The court had not listened to the testimony given by the doctor, 3. The court had not accepted the results of the examination of the clothing of the accused even though the result of this examination had been in his favor.[984]

The Supreme Court accepted the father's request to review the original verdict and decided that the trial court's judgment had been correct and confirmed the original punishment of a hundred lashes with a prison term of three years. In their deliberations the SC judges allude to several obscure wordings of the CA91 with regard to the definitions of *zinā*, *liwāṭ* in connection with rape. These definitions of *zinā* and *liwāṭ* are important in the context of rape, because article 149, CA91 explicitly refers to them. In order to understand what constitutes rape, thus one must read its definitions in the context of the definitions of *zinā* and *liwāṭ*. Article 149 (rape) gives us a rather ambiguous definition of who is a possible victim of rape. On the one hand the more neutral term „person" (*shakhṣ*) is employed. On the other hand the text stipulates that rape is committed when someone "...has sexual intercourse with a person by way of *zinā* (*zinā'an*) or by way of *liwāṭ* (*liwāṭan*) without consent of that person". The formula "by way of *zinā* or by way of *liwāṭ*" clearly makes reference to the definitions given in articles 145 and 148. These articles defining *zinā* and *liwāṭ* explicitly mention only adults. The words used here are "woman" (*imra'a*) and "man" (*rajul*) and thus leave no room for any other interpretation.[985] In consequence consenting minors are not covered by the wording of articles 145/146 (*zinā*) and 148 (*liwāṭ*). As to the interpretation of the term "person" (*shakhṣ*), however, the judges came to the conclusion that it includes as well minors and that the definition given in article 149 indeed comprises "all forms of vaginal or anal sexual intercourse with a person under compulsion". In its final conclusion the Supreme Court

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

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

[985] Art.3, CA91 defines "man and woman" as follows: "Man" means the adult male, and "Woman"means the adult female.

therefore found that the case at hand was fully consistent with the definition of the crime of rape as given in article 149 and therefore annulled the decision of the Court of Appeals.

4.1.3.3 Proof of zinā *by confession in the Supreme Court*

The question of who exactly has to confess to *zinā* came up in a case in 1984.[986] In the case at hand the defendant had admitted to theft from a house and to *zinā* with a woman who had been in the house. The two crimes were dealt with separately and he was indicted for *zinā* before the Province Court of Al-Fāshir, under article 318 (1), PC83. He was convicted to death by hanging after having confessed three times to the crime.[987] The woman, however, supposedly his "partner in crime", denied that she had ever met or seen the defendant nor committed *zinā*. In consequence of her denial the court considered her innocent and she was acquitted. In his appeal, the defendant retracted his confession and claimed that it had been obtained under threat and after he had been beaten. The Supreme Court finally commuted the *ḥadd*-penalty to a *ta´zīr*-penalty of eighty lashes and one year in prison. The *ḥadd*-penalty lapsed on the grounds that the confession had been retracted – based on article 77, Law of Evidence – and further on the grounds that the woman – allegedly involved in the crime – had accused the defendant of lying.

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

[986] Government of the Sudan vs. Muḥammad Maḥmūd Ṭāhir, SLJR (1984).
[987] According to the EvA83 one confession was enough to prove *zinā*. See EvA83 article 77 (1).

the Court simply followed Abū Ḥanīfa who, in such cases, made a *ta´zīr*-punishment compulsory when the *ḥadd*-punishment has been averted.

4.1.3.4 Pregnancy as proof of zinā in Supreme Court Judgments

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

Case 1

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

[988] Government of the Sudan vs. Marīam Muḥammad `Abdallah, SLJR (1985), no. 21/1405.
[989] *Zinā* of a Muslim with a married woman.
[990] It is unclear why the court indicted the defendant under this article. While article 429 is geared towards male offenders who commit *zinā* with married women, article 430 is geared towards married women who commit *zinā*.

provide evidence as to her defense. Sidahmed, in addition, points out, that the denial of the charges by her alleged partner should also have shed doubt "on the integrity of her confession and should have been treated as a shubha remitting the ḥadd".[992] Pregnancy, according to article 77 (3), is only taken into account if the woman is not married (*bi al-ḥaml idhā lam yakun lil-mar`a zauj*). In this particular case, however, the Supreme Court reasoned differently, and in contradiction to an unequivocal legal text. Since it had been proven that the husband of the defendant had been absent for more than a year and the accused had admitted that she had menstruated after the departure of her husband more than once, it had been proven that the defendant had not been pregnant at the time of the departure of her husband. The Court therefore compared the situation of the married woman whose husband is absent for a long time with the non-married woman who becomes pregnant illegally.

Case 2

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

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[991] Execution of the *muḥṣan* for *zinā* and 100 lashes for the person not *muḥṣan*.
[992] Sidahmed (2001), p. 195.
[993] See Government of the Sudan vs. Marīam Muḥammad Sulaimān, SLJR (1989), 76/1405.
[994] This view is in clear contradiction to the earlier judgment Government of the Sudan vs. `Āmina Bābikr Aḥmad, SLJR (1985), no. 118/1405, which had established that the status of *muḥṣan* was linked to an existing marriage. See discussion in more detail below.
[995] Stoning had been introduced as a possible punishment into the PC83 (article 24b). Article 318(1) however, specifies execution as the punishment for *zinā* for the *muḥṣan*. This contradiction with the *fiqh* has been rectified in the CA91 (article 146 (1) (a).

May 1985 the lawyer of the defendant requested to review the sentence based on the withdrawal of her confession. She also stated that she had not been married previously and that her admitting to a previous marriage had been the result of a psychological condition she was suffering from. She had also stated that she had been forced to commit *zinā*. Unlike the trial court the Supreme Court in its final decision came to the conclusion that pregnancy is not to be considered unequivocal evidence for *zinā*. Evidence that proves that the pregnancy has not been caused by *zinā* (e.g. by rape) is admissible. It further reasoned that when the probability appears that pregnancy was the result of sexual intercourse by force (rape) or by mistake or if the pregnancy happened without penetration to maintain virginity, the *ḥadd*-punishment is averted. Thus, the defendant had retracted her initial confession to being divorced and no other proof for this previous marriage had been presented but the earlier confession of the defendant. Further, on the strength of her claim of rape and her retraction of her confession to *zinā* the Supreme Court did not endorse the conviction under article 318 (1) – punishment for *zinā* – but ordered the release of the defendant. The almost five years the defendant had spent in prison were considered a sufficient *ta´zīr*-penalty.

Case 3

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

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

The facts of the case unfolded as follows: the accused Kalthūm Khalīfa ´Ajabna had sexual intercourse with another man, allegedly a police officer with the name Al-Tāj, who had not been indicted, nor even arrested. She had not been married to this man at the time *zinā* had been committed, became pregnant from him and buried the new born baby inside her house[997] in order to keep her pregnancy a secret and avoid a scandal. The defendant had been legally

[996] Government of Sudan vs. Kulthūm Khalīfa `Ajabnā, SLJR (1992), no. 48/1992.
[997] The precise circumstances of the pregnancy and the birth remain unclear.

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

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

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

[998] This contradiction was stated openly in the verdict itself in the form of a "remark of the editor", preceding the text of the sentence. Compare Government of the Sudan vs. Kulthūm Khalīfa `Ajabnā, SLJR (1992), no. 48/1992, pp. 129-130.

chapter two of the Criminal Act 1991 dealing with the retroactive effect of the CA91. Article 4 (1) clearly states that "notwithstanding the provisions of sub-section (2), the law in force at the time of the commission of the offence shall be applied". However, sub-section (2) of the same article, obviously applied to this case, states that "In case of offences in which no final judgment has been passed the provision of this act shall be applied where they are beneficial to the accused." The same article also would have provided the Supreme Court with a different justification for the remittance of the *ḥadd*-punishment, since "The non-execution of a *ḥadd*-punishment before the coming into force of this act shall be a legal uncertainty (*shubha*) which remits the *ḥadd*-penalty..." (article 4(3)). It must also be noted that while the SC could apply the new Criminal Act 1991 to the case, the new accompanying Law of Evidence was only enacted in 1993, thus after the case in question. It therefore had to refer to the Law of Evidence 1983. As to pregnancy as a means for the proof of *zinā*, both laws do not differ much. The 1993 Law of Evidence, unlike its predecessor, explicitly mentions that the pregnancy must happen outside an existing marriage and that this state must be free of legal uncertainties.

4.1.3.5 When rape is considered to be a form of zinā

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

Case 1

How difficult it is for a woman to prove that she has been a victim of rape and what the consequences of this difficulty are shows the following case. In this case, al-Ḥājja al-Ḥusain Sulaimān, the accused, together with her stepmother, had gone to a garden in order to collect dates.[999] When being in a different part of the garden, and separated from her stepmother, two men appeared, tied her hands, threw her to the ground, and raped her. Even though she screamed nobody came to her help. Subsequently she returned to her family without

[999] Government of the Sudan vs. al-Ḥajja al-Ḥusain Sulaimān, SLJR (1988), No.84/1406.

informing them of the rape for fear of a scandal. When being pregnant for four months she turned herself in to the police in order to find protection from her family. Instead of being secure, as she had hoped, the police turned her over to the Criminal Court which indicted her for *zinā* and sentenced her to stoning under the assumption that the divorcee al-Ḥājja al-Ḥusain Sulaimān was to be considered a *muḥṣana*. The Criminal Court rejected her claim of rape for lack of evidence and therefore lack of credibility.

In its revision the leading opinion of the Supreme Court, however, accepted her claim of rape and considered it a legal uncertainty averting the *ḥadd*-punishment of stoning. The court, however, reasoned that despite the lapsing of the *ḥadd*-punishment a *ta´zīr*-punishment was due on the grounds that there are two kinds of legal uncertainties (*shubha*), strong ones, and weak ones. While the former annuls the essence of the crime the latter only makes the *ḥadd*-punishment lapse. In that case a *ta´zīr*-punishment is still possible. As in most other cases discussed in this chapter the time the offender had spent in detention - almost three years - was considered a sufficiently long *ta´zīr*-punishment. The Supreme Court therefore ordered her release. While in this decision the *ḥadd*-punishment lapsed, the accused was nevertheless considered guilty, based on the above reasoning. A minority opinion of the same Court differed with that opinion, having come to the conclusion that al-Ḥājja al-Ḥusain Sulaimān was innocent of *zinā* altogether and therefore did not support the conviction of the accused, neither by way of *ḥadd* nor by way of *ta´zīr*.

This case shows again that a pregnancy is taken by some courts as strong proof of having committed *zinā* against a woman even in cases of rape or when rape is a strong possibility. The cases available and discussed in this work show a strong tendency among the lower courts to reject claims of rape as baseless and not averting the *ḥadd*-punishment, if the woman cannot produce strong proof for the rape. However, it can also be noted that in the majority of cases these decisions have been overturned by the Supreme Court. But even though in most cases the worst, either stoning or execution by hanging, was avoided, the accused women were punished in several ways. The fact that they have given birth to children out of wedlock served as strong evidence against them and none of them[1000] was completely cleared of the charges. On the one hand Supreme Court judges have a tendency to avoid stoning or execution in cases of zinā, on the other hand they do support the conviction as such. In most

[1000] Compare other cases discussed in this chapter.

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

Case 2

In the second case[1001] a certain al-Sirr Muḥammad al-Sanūsī lured a six-year old girl away from her comrades by promising to buy her sweets. The medical examination proved that the girl indeed had been raped. The Criminal Court sentenced him under articles 307 (kidnapping or abducting a woman to compel her to marriage) and 317 (rape). The court set aside the punishment under article 307 because it wanted to impose on the accused the harsher punishment for rape under article 317, PC83.[1002] Al-Sanūssī initially was sentenced to a *ta´zīr*-penalty of a prison term of ten years for having committed an offence identical to a *ḥadd* crime but proven under the ordinary means of evidence and not meeting the strict standards required proving *ḥadd* crimes. This decision was confirmed by the Court of Appeals, which added 100 lashes, based on "direct and circumstantial evidence" connecting al-Sanūssī to the crime. This circumstantial evidence included the accounts of the victim and other witnesses in addition to the existence of traces of blood of the same blood group as the victim on the clothing of the defendant. He also had been present at the location of the crime at the time of the crime and had been identified by the victim and her playmates that had played with her before the crime was committed.

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

[1001] Government of Sudan vs. al-Sirr Muḥammad al-Sanūssī, SLJR (1989), no. 55/87.
[1002] It remains unclear why article 307 was deemed applicable in the first place.

reason for changing the applicable article the Supreme Court mentions that the necessary legal evidence proving rape had not been provided. Neither had the accused – who denied the crime - made a complete, unequivocal and unretracted confession nor had there been witnesses to the crime itself. The main reason, which led the Court to believe that rape proper, as stipulated under article 317, PC83, had not been proven was the assumption that rape, has to be proven by the same means as *zinā*. In fact, article 317 reads as follows: "Whoever has sexual intercourse with an underage person in the way stipulated in article 316[1003] is considered to have committed the crime of rape and will be punished with the punishment stipulated in article 318".[1004] It is evident that the element of duress is completely missing in the definition of rape. Consensual sexual intercourse between an adult and a minor automatically is considered to be rape. Secondly, this definition entirely omits the crime of rape among adults. It thus remains unclear how rape among adults is supposed to be punished. And, finally, the definition refers the reader back to *zinā* for a definition of the crime in question. The Supreme Court, closely following the legislator, thus interprets rape as *zinā* with a minor and in consequence deems the minimum requirements for the proof of rape the same requirements as those for the proof of *zinā*. These are, we recall, an unequivocal confession, four male witnesses of good reputation, pregnancy of the unmarried woman or the *mulā´ana*-procedure in the case of a married wife. Since the latter two are impossible and the former two are not available, the Court is of the opinion that the minimum requirement for proving a *ḥadd*-crime (i.e. rape, or *zinā* with a minor) is not provided. However, if a crime is proven with proof other than the proof necessary for the proof of a *ḥadd*-crime, i.e. either by staying below the *niṣāb*[1005] or by circumstantial evidence as in the present case, the applicable crime changes to a (related) *ta´zīr*-crime. In this particular case the conviction was changed to be under article 319, PC83, "attempted *zinā* or rape and indecent acts" (*al-shurū´ wa al-af`āl al-fāḥisha*).

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

[1003] Article 316, PC83, stipulates *zinā*.
[1004] Article 318, PC83, stipulates the punishments for *zinā*.
[1005] E.g. the minimum number of witnesses is not reached.

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

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

[1006] Compare Sidahmed (2001), pp. 200-201.

[1007] Non-Muslims are not subject to the ḥadd-punishment according to art. 318 (2), PC83 but rather to those punishments provided for in their "heavenly religions". In the case that no such punishments are stipulated in that religion (or the accused does not belong to a "heavenly religion"), the punishment is a maximum of eighty lashes and a fine or a prison term of at least one year.

4.1.3.6 Definition of zinā *1988 and 1991*

The 1988/1991 codes have corrected most of the incompatibilities with the *fiqh* of their 1983 predecessor. Firstly, they have reverted to the punishment of stoning as provided for in the *fiqh*, if the offender is *muḥṣan*. Secondly, they provide us with a clear definition of the term *muḥṣan* / *iḥṣān* as meant in the code. Being *muḥṣan* now means „having a valid persisting marriage at the time of the commission of *zinā*, provided that such marriage has been consummated."[1009] In other words, since widowers and divorcees do not fall under the definition of *muḥṣan* the group of those who are liable to one of the harshest *ḥadd*-punishments stoning is reduced and confined to married adulterers. While departing from the classical definition of *muḥṣan* the applicability of the *ḥadd*-punishment of stoning has thus been reduced. Thirdly, while dissociating *liwāṭ* from *zinā* definition-wise, punishment-wise the first and second time offender of *liwāṭ* faces an even harsher punishment than the non-*muḥṣan* offender of *zinā*. Where the latter faces 100 lashes and, if he is male[1010], expatriation of one year, the former will be punished by 100 lashes and a prison term of up to five years. The third-time offender of *liwāṭ* even faces execution or a life sentence. In the majority opinion of the *fuqahā'* - with the exception of the Mālikites - a *ta´zīr*-crime cannot be punished with a *ḥadd*-penalty.[1011] Thus, the maximum number of lashes for a *ta´zīr*-offence must be under the minimum number of lashes for the corresponding *ḥadd*-crime.[1012]

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

In 1997 in an important case the Supreme Court tried to establish a procedure concerning a possible *ta´zīr*-punishment whenever the ḥadd-crime could not be proven.[1013] A case of alleged *zinā* under article 146 CA91 had been dismissed by the criminal court of first instance and both defendants had been set free initially for lack of evidence. When the case was reviewed by the Supreme Court an initial confession of one of the defendants to one of the

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[1008] Articles 316 and 317, Penal Code 1974.
[1009] CA91, article 145 (3).
[1010] It should be noted here that this constitutes one of the few instances in the Sudanese Penal Code where a man faces a harsher punishment than a woman.
[1011] See Peters (2005), p. 67.
[1012] Scholz (2000), pp.69/445, Baradie (1983), p. 149.
[1013] See Government of the Sudan vs. Ismā´īl ´Alī Sulaimān, SLJR (1998), no.326/1997, pp. 37-39.

investigating policemen, as registered in the diary of the investigation, was invoked as sufficient evidence to prove *zinā*. This argument was rebuffed by the Supreme Court because confessions in criminal cases not made in front of the judge or his delegates do not constitute unequivocal proof according to article 21 of the 1993 Evidence Act. By invoking the initial confession the appeal aimed at a *ta´zīr*-penalty for the defendants on the grounds of the principle that the lapsing of a *ḥadd*-punishment (*suqūṭ al-jarīma al-ḥaddiyya*) does not mean that an accused cannot be punished with a *ta'zīr*-penalty. The Supreme Court, however, reasoned, that this principle, in turn, does not mean that a *ta´zīr*-penalty is obligatory after the ḥadd-penalty has lapsed. Whether or not a *ta´zīr*-penalty is due depends on whether the *ḥadd*-crime has been proven in the first place or not. In other words not proving *zinā* in the manner mentioned in article 62 of the Evidence Act 1993[1014] does not automatically mean the execution of a *ta´zīr*-punishment when the *ḥadd*-offence has not been proven originally beyond reasonable doubt. In reverse, the execution of a *ta´zīr*-punishment occurs when the *ḥadd*-crime is proven beyond reasonable doubt, but the *ḥadd*-punishment is averted by a legal uncertainty, such as the retraction of a confession or not reaching the minimum value (*niṣāb*) in the case of theft etc.

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

4.1.3.7 Legal uncertainties with regard to *zinā*

As outlined above, traditional *fiqh* has developed a large variety of legal uncertainties (*shubuhāt*) in order to foreclose the implementation of *ḥadd*-punishments.[1015] The possibility to wave a *ḥadd*-punishment, has been recognized by the Evidence Acts 1983 and 1993.[1016] Apart from this the lapsing of the *ḥadd* for *zinā* as of 1983 was governed by a criminal

[1014] For details see above.
[1015] See Peters (2005) chapter 2.3.2.2. and Baradie (1983), p.

circular listing a rather extended number of reasons.[1017] The circular recognized that the *ḥadd* lapsed when the confession of the defendant or the testimony of the witness was retracted. Further, the ḥadd lapsed when the virginity had been left intact, the *zānī* married the woman he had committed *zinā* with, when it was proven that the sexual intercourse had been committed within a defective marriage (*zawāj fāsid*) and, finally, when the sexual intercourse had been committed within a void marriage (*zawāj bāṭil*).

Of this list only the retraction of the confession of the defendant and the retraction of the testimony of a witness are mentioned in the CA91.[1018] With regard to the first possibility the Criminal Act 1991 now specifies that the retraction of the confession can take place before the execution of the punishment. In analogy, the withdrawal of the testimony of the witness also until the execution of the punishment also leads to the lapsing of the *ḥadd*, provided it lessens the *niṣāb* of the testimony. The EvA 1993 explicitly mentions altogether four reasons that make *ḥadd*-punishments lapse: the two mentioned above and in addition if the witnesses cannot agree on their testimony. Further, the *ḥadd*-punishment for *zinā* is averted for the wife, when an oath is sworn as part of the *li´ān*-procedure (*fī mulā´ina ḥilfihā*) (art.65 (3). The text of article 65, EvA 1993 is phrased in a way that suggests that the list of legal uncertainties (*shubuhāt*) is not limitative but that other legal uncertainties, not included in the list, can also be invoked.

The *fiqh* knows more legal uncertainties than are recognized by the CA91. Thus, the Ḥanafites know the *shubha fī al-dalīl* (uncertainty as to the textual sources of the law) occurs when the defendant thought that sexual intercourse was legal on the strength of a wrong interpretation of the sources of the law.[1019] Further, under a *shubha fī al-fī´l* (uncertainty with regard to the act) it is presumed that sexual intercourse was believed to be legal on the base of an assumed legal prescription that does not exist.[1020] A *shubha fī al-´aqd* (legal uncertainty as to the contract) occurs when a contract similar to a valid marriage contract exists, which is not recognized but cancels the *ḥadd*-punishment.[1021] Art. 145 (3) explicitly states that a marriage bond, which by consensus is ruled void, shall not be deemed a lawful bond. Thus, a possible

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[1016] Evidence Act 1993, art. 65 (1) reads: "The ḥudūd are averted by legal uncertainties", literally the same as art. 80(1) of its predecessor 1983.
[1017] Criminal Circular No. 100/1983. See Ḥāmid, mausū´a, al-juz al-thālith, pp. 35-37.
[1018] CA91, art. 148.
[1019] Baradie (1983), p. 103.
[1020] Baradie (1983), pp. 103-104.
[1021] Baradie (1983), p. 104.

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

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

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

[1022] CA91, art. 147 (a).
[1023] Government of the Sudan vs. Amīra `Abd Allah Aḥmad `Ādam, SLJR (1984), no. 108/1984.

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

That a legal uncertainty can lead to the cancellation of a *ḥadd*-punishment for *zinā* is also demonstrated by another case brought before the Supreme Court in 1987.[1024] In this case a certain ´Ā`isha `Ādam Ibrāhim had run away from her husband and married another man, the second defendant of the case. She had told her new husband that she was divorced from her first husband and subsequently had sexual intercourse with him. She was found culpable under articles 430 (2) (married Muslim woman having sexual intercourse with another person) read in conjunction with article 318 (punishment of *zinā*) and condemned to death by hanging for *zinā*. In its deliberations the Supreme Court came to another conclusion. It held that according to the *fiqh* – among other elements – *zinā* is committed without legal bond (*´aqd*) or the suspicion of a contract (*shubhat ´aqd*) and without ownership or the suspicion of ownership (*shubhat milk*). In the case under discussion, however, the defendant could invoke that she had relied on her conviction that sexual intercourse was allowed to her. Thus, the marriage contract between her and her second husband, despite being void, created a legal uncertainty as to the permissibility of sexual intercourse. On the grounds of this legal uncertainty the SC decided to abolish the capital punishment, to recognize the more than two years she had spent in prison as a *ta´zīr*-penalty and to release her immediately.

[1024] Government of the Sudan vs. ´Ā`isha Ādam Ibrāhim. SLJR (1987), no. 80/1405.

4.1.3.8 Punishment of *zinā*

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

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

[1025] According to the 1983 Criminal Procedure Act, the execution will be by hanging (*shanqan ḥattā al-maut*), see CPA83, article 229.

[1026] While the dichotomy mostly used in the *fiqh* is *muḥṣan/ghair muḥṣan*, the PC83 choses *muḥṣan*/*bikr* (virgin).

[1027] While no precise definition can be found most likely the term "heavenly religion" concerns Christians and Jews only.

[1028] See Government of the Sudan vs. `Āmina Bābikr Aḥmad, SLJR (1985), no. 118/1405.

In its deliberations the Supreme Court focused on the question whether the defendant was to be considered *muḥṣan* or not. It first briefly discussed the opinions of the four Sunni schools, which unanimously hold that the *muḥṣan* in the context of *zinā* must be free and legally capable and must have had sexual intercourse in a legally valid marriage (*nikāḥ ṣaḥīḥ*). The Ḥanafites and the Mālikites further require the *muḥṣan* to be a Muslim. However, for lack of a conclusive text in the four Sunni schools, determining that a divorced woman or man or a widower were to be considered *muḥṣan* as well, the judges came to the conclusion that the status of *iḥṣān* was connected to an existing marriage only. Should the marriage end either by divorce or by death so would the status of *iḥṣān*. For lack of textual evidence in the Sunni schools the Supreme Court, based its reasoning on opinions of al-Imām Ṣādiq of the Twelver Shī`ites[1029], Rashīd Riḍā[1030] and Shaikh Abū Zahra.[1031] Rashīd Riḍā, e.g., had argued that the *muḥṣana* by marriage (*al-muḥṣana bi al-zawāj*) is called *muḥṣana* because she has a husband who is bestowing upon her the status of *iḥṣān*. Once the husband divorces her she can thus not be called a *muḥṣana* any longer. The Supreme Court further quoted an Egyptian project of a codification of Islamic Criminal Law which likewise had stipulated that a person was only to be considered *muḥṣan* when he/she had had sexual intercourse during a legally valid marriage still existing when the crime (of *zinā*) is committed.

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

[1029] Ja´far ibn Muḥammad al-Ṣādiq (702-765) is the sixth Imam of the Shī´a branch of Islam. He is the founder of the Ja´faryya, adhered to by the Twelver Shī´ites.

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

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

4.1.4 Summary and Conclusion

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

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

In an important decision the Supreme Court clarified that rape can be committed against minors who are not the ward of the rapist. The latter case had been explicitly mentioned in article 149 (2), CA91, while the rape of minors in a more general sense had not been defined in an unequivocal manner. Article 149 (1) rather spoke of sexual intercourse with a person by way of *zinā* or *liwāṭ*, thus leaving doubts as to whether the word *person* (*shakhṣ*) was meant in a more general sense or in the sense defined in the respective articles on *zinā* and *liwāṭ*. The latter two clearly referred to adults only. In its decision[1032] the Supreme Court came to the conclusion that the more inclusive meaning of the notion of *person*, as used in article 149 (rape) had precedence over the more restrictive wording of the articles defining *zinā* and *liwāṭ*. This decision thus made it clear that the rape of minors in general is to be judged under article 149. It did not, however, solve the problem of the consenting minor. Since the consent of the ward is explicitly not recognized in article 149 it remains unclear whether minors other than wards could consent to sexual intercourse or whether, in analogy with article 149 (2), such consent would be rejected and the act construed as rape.

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

[1032] See Trial: Maṣ´ab Muṣṭafa Aḥmad, SLJR (2000), No. 2000/545, pp. 58-63.

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

Next to abolishing the indiscriminate use of *ḥadd*-punishments to sexual offences other than *zinā*, *liwāṭ* and rape, the Criminal Act 1991 also puts Muslims and non-Muslims on a par with regard to incest. While in 1983 non-Muslims faced only a *ta´zīr*-punishment for incest, in 1991 they are liable to the respective punishments for *zinā*, *liwāṭ* and rape, when these crimes are committed with relatives and proven.

No separate article is dedicated to *liwāṭ* in the Penal Code 1983. *Liwāṭ* is rather subsumed under the definition of *zinā* in article 316 which talks of a „person" as the passive partner. However, since the same article also speaks of the absence of a legal bond (*ribāṭ shar´ī*) the Supreme Court, in a landmark decision came to the conclusion that despite obvious ambiguities article 316 does not cover *liwāṭ*. *Liwāṭ*, before 1991 was rather to be treated under article 319 – indecent acts. In consequence those accused of *liwāṭ* did neither face a possible *ḥadd*-punishment nor did, on the other hand, the strict rules for the proof of *zinā* apply to them.[1033]

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

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

[1033] See Government of the Sudan vs. al-Ṣādiq Aḥmad ´Abdallah, SLJR (1989), No.149/1989, discussed above.
[1034] See chapter "Pregnancy as proof of *zinā* in Supreme Court judgments".

circumstantial evidence and, finally, the applicability of a *ta´zīr*-penalty in case of remittance of the *ḥadd*-penalty.

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

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

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

[1035] See e.g. cases al-Hajja al-Ḥusain Sulaiman, Marīam Muḥammad `Abdallah and Kalthūm `Ajabna, discussed above.

reprehensible crime (rape of a minor). Taken this lacuna into account, the 1991 legislator explicitly provided for cases of rape not amounting to *zinā* or *liwāṭ*.[1036]

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

With regard to the "partners in crime," i.e. the male partners of the alleged illegitimate sexual intercourse in none of the cases available[1037] any of them was punished. In three cases the partners of the defendant were released in an early stage of the investigation, ostensibly for lack of evidence.[1038] In the case Kalthūm `Ajabnā her partner was not even summoned, let alone indicted or convicted. Even though his identity was not disclosed to the court by the defendant because the man, a police officer, had threatened the defendant, even if his identity had been known a conviction remains quite improbable. In the absence of four male witnesses of good reputation the confession of the male partner is the only possible means of proving *zinā* left to the courts. Since none of the men confessed none were convicted. It goes without saying that the Penal Code 1983 and the Criminal Act 1991 disfavor women with regard to the proof of *zinā* by admitting pregnancy as a means of proof while at the same time the proof of *zinā* against men is virtually impossible, short of a voluntary confession.[1039]

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

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[1036] Compare article 149 (3), CA91.
[1037] I refer to the cases available in the Sudan Law Journal and Reports.
[1038] See cases Marīam Muḥammad ´Abdallah, Amīna Bābikr Aḥmad and Marīam Muḥammad Sulaimān discussed above.
[1039] Compare Sidahmed (2001), pp. 203-204.

`Abdallah (1985). While the criminal court convicted her for *qadhf* – *zinā* of the man could not be proven – the Supreme Court annulled the conviction on the grounds that the aggrieved party, i.e. the victim of *qadhf*, had not brought forward charges. Probably based on the case Marīam Muḥammad `Abdallah, neither the criminal court nor the Supreme Court considered a conviction of the defendants for *qadhf* in the other cases discussed above.

In contrast it must be noted that in all Supreme Court cases studied, where pregnancy was a decisive or at least an important element in the proving of *zinā* the indicted women were convicted. Marīam Muḥammad ´Abdallah was convicted of *zinā* and was to be executed by stoning while in the remaining cases *ta´zīr*-penalties, i.e. prison terms were pronounced. In other words, even if the *ḥadd*-punishment for *zinā* lapses, a hefty *ta´zīr*-punishment and possibly years of fear of execution are due. It goes without saying that it does not seem logic that on the one hand the *ḥadd*-punishment lapses because the defendants were raped or claim to have been raped. Then, despite this inherent recognition of rape or the possibility of rape, a *ta´zīr*-punishment is imposed anyway. It remains unclear what the lapsing of the *ḥadd* really means. It does not seem to mean that the court prefers to assume innocence in order to avoid the conviction of a woman who might have been raped. Since the women are punished anyway – despite a probability that they have been forced to illegitimate sexual intercourse - the message rather reads differently. A woman does not get away lightly if a pregnancy either outside a legally valid marriage or with another partner than her own husband occurs. While her male partner remains free and cannot be punished unless he confesses, a woman can hardly ever clear herself completely of the charges of *zinā*. While the two more recent decisions establish rape as a legal uncertainty averting the *ḥadd*, it does not save women who have become pregnant outside marriage from the ordeal of a possible execution and years in prison.[1040]

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

[1040] Compare also Sidahmed (2001), pp. 194-197.

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

4.2 Unfounded accusation of unlawful intercourse (*qadhf*)

4.2.1 Qadhf *in Islamic jurisprudence* (fiqh)

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

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

[1041] Bahnasī, jarā`im, p. 150.
[1042] Bahnasī, jarā`im, p. 152.

Ḥanbalites and Shāfi´ītes, in Mālikite jurisprudence the using of indirect or metaphorical expressions is sufficient for the imposition of the *ḥadd* for *qadhf*.[1043]

The *fiqh* devises some important qualifications as to the offender (*al-qādhif*) and the victim of *qadhf* (*al-maqdhūf*). The offender needs to be sane (*´āqil*) and of age (*bāligh*). The Mālikites, however, hold that a woman does not need to be adult but just capable of sexual intercourse.[1044] Being a Muslim or free, however, is not a necessary precondition of the offender. A slave[1045], a *dhimmī* and a *musta`min* who are guilty of *qadhf* will also be punished by the *ḥadd*. Abū Ḥanīfa, however, originally taught that a *musta´min* could not be punished with a *ḥadd*. However, he later was of the opinion that a *musta´min* is subject to the same punishment with regard to *qadhf* as the Muslim.[1046] If a father or a grandfather commit *qadhf* against one of their direct descendants, opinions differ. According to the Ḥanafites, the Ḥanbalites and Shāfi´ītes the *ḥadd* does not apply in such case. Mālik, in contrast, proposes their punishment, based on the general meaning of the underlying qur´anic verse.

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

[1043] Peters (2005), p. 63.
[1044] Peters (2005), p. 63.
[1045] The punishment of the slave is only half of that of the free person, i.e. 40 lashes.
[1046] Krcsmárik (1905), p. 320.
[1047] A few authors are of the opinion that the victim of *qadhf* can be a *dhimmiyya*, provided she has given birth to a Muslim child. See Bahnasī, jarā`im, p. 160.
[1048] Abū Ḥanīfa differs, see the more detailed discussion of the meaning of chastity among the different schools below in chapter 4.2.2. The victim of *qadhf* must also not be mute nor a hermaphrodite. See Bahnasī, jarā`im, p. 162.
[1049] Peters (2005), p. 63.
[1050] Bahnasī, jarā`im, pp. 163-164.

The burden of proof as to the lack of chastity lies upon the *qādhif* and not the defendant. This is the case because he is the plaintiff who has to prove his case. Should the victim of *qadhf* commit unlawful sexual intercourse (*zinā*) or an otherwise forbidden sexual intercourse (*waṭ` ḥarām*) before the punishment has been executed on the offender of *qadhf*, the *ḥadd*-punishment on the *qādhif* will lapse.

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

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

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

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

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

[1051] Compare Bahnasī, jarā`im, p. 173.

If *qadhf* is finally proven there are three legal consequences: a *ḥadd* - punishment of eighty lashes, the invalidity (*buṭlān*) of his testimony and his being declared a sinner (*tafsīq*) until he repents.

There is no limitation for *qadhf* because, according to the interpretation of the *fuqahā'*, the delay in giving testimony does not indicate malevolence. The victim of *qadhf* does not have a real choice, he is rather forced to prevent shame for himself by filing charges for *qadhf*. Would he not take action belatedly the case against him would be verified.[1052]

4.2.2 Qadhf *in the Sudanese Penal Codes 1983 and 1991*

According to article 433 of the Penal Code 1983 committing *qadhf* means to accuse a person of *zinā*, either through a public statement or a pronouncement made known in another way, also in writing or by publication, be it through gestures or visible expression. An explanation to this article expounds that any of the declarations as defined above were to be deemed *qadhf* if the victim of *qadhf* was absent or dead. This under the condition that such declaration was *qadhf* if the absent or the dead were present or alive and that the intention (of the *qādhif*) was to hurt the feelings of the family of the *maqdhūf*. In a second explanation the legislator states that the conditions of *qadhf* are also fulfilled by an unambiguous, deceitful picture (*ṣūra mudāwira ṣarīḥatan fī al-uslūb*) or an explicit mockery (*tahakkum ṣarīḥ*).[1053]

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

[1052] For unfounded accusation of unlawful sexual intercourse in the *fiqh* see Bahnasī, al-jarā'im, pp. 147-180.
[1053] Article 433 and explanations 1 and 2, Penal Code 1983.

contain any provision indicating the contrary.[1054] With regard to the stipulation that the *maqdhūf* can also be dead, article 433 follows the *fiqh.*[1055] The wording of the explanation, however, is directly inspired by PC 1974, article 433 defining defamation. Apart from referring to *qadhf*, the only difference is that the absent person (*shakhṣ ghā`ib*) now can be the object of *qadhf* as well.

Qadhf, as defined by the CB 1988[1056] and the CA 1991, is committed by falsely accusing a person, expressly or by implication, of unlawful sexual intercourse or *liwāṭ*[1057] or commits the offence of negation of lineage, against a chaste person, even if this person is dead.[1058] A chaste person is someone who has not been convicted of unlawful sexual intercourse, homosexual intercourse (*liwāṭ*), rape, incest or prostitution.[1059] The provision for *qadhf* in the CA1991 follows article 433 of the PC1983 with a few important differences. The rather wide definition of Numairi's code has not been changed. *Qadhf* by gestures, signs or in writing is still part of the definition. The absent person has been eliminated from the definition of the *maqdhūf*. Most importantly, the CA91 widens the definition of *qadhf* even further by adding an unfounded[1060] accusation – the word unfounded has now been included – of *liwāṭ* and a negation of lineage. While the latter is covered by the classical definition of the *fuqahā`*, the first is more problematic. Whereas it is controversial in the *fiqh* whether *liwāṭ* falls under the definition and punishment of *zinā*, the CA91 itself makes a clear distinction. While the first time offender in a *zinā*-case will be stoned if *muḥṣan*, the *iḥṣān*-principle does not enter the definition of *liwāṭ*[1061] nor is stoning a possible punishment. In other words, if *liwāṭ* is subsumed under *zinā*, based on the pertinent opinions of the *fuqahā`*, logically a false accusation of *liwāṭ* must follow the rules for the punishment of *qadhf*. However, if the legislator decides to distinguish the two offences, as the CA91 has done, unfounded

[1054] For further *qadhf*-related articles see below chapter "Punishment of *qadhf*".
[1055] Compare Bahnasī, jarā`im, pp. 163-164.
[1056] There are a few minor differences between the 1988 draft code and the 1991 legislation. In order to qualify as *maqdhūf*, the 1988 draft code stipulated that "a person is deemed to be chaste when he has not been convicted of adultery, homosexuality or any of the other sexual offences". This wording has been formulated more precise in 1991 (see above).
[1057] *Liwāṭ* is not translated here as homosexuality. As has been shown by Schmitt the notion of *liwāṭ* is limited to anal intercourse. In contrast, the notion of homosexuality, in Western culture, does encompass far more. See Schmitt (2001-2002).
[1058] Art. 157 (1).
[1059] Art. 157 (2).
[1060] In the original Arabic *kidhban*.
[1061] Compare article 148, CA91.

accusation of *liwāṭ* should not fall under *qadhf*, since according to the *fiqh* the accusation only consists of *zinā* and no other offence.

Further, we can observe other important changes in comparison to the 1983 code. While in 1983 the victim of *qadhf* was only defined with regard to religious affiliation, the CA91 has omitted this important notion. It has become irrelevant whether the *maqdhūf* is a Muslim or not. While in the case of the *qādhif* the *fiqh* supports this irrelevance, the victim of *qadhf* can not, by definition, be a non-Muslim. Non-Muslims are thus, as can be observed in other instances, incorporated into the realm of Islamic law in contradiction to its own rules. Since the unfounded accusation of *liwāṭ* is punishable with the punishment for *qadhf*, *liwāṭ* now also enters the definition of chastity. A chaste person, and only such a person can be the object of *qadhf*, is thus someone who has not been convicted of either *liwāṭ*, rape, incest nor prostitution. What are the opinions of the *fuqahā'* concerning the meaning of chastity and which crimes do make one unchaste in the sense relevant to *qadhf*? According to Abū Ḥanīfa the *maqdhūf*, in order to qualify as a possible victim of *qadhf*, must not have had in his lifetime any forbidden sexual intercourse, i.e. without lawful marriage or concubinage with a slave or in a legally invalid marriage (*nikāḥ fāsid*), when the reason of the invalidity is agreed upon, or without property rights (*fī ghair milk*).[1062] It thus does not matter to Abū Ḥanīfa whether the sexual intercourse amounts to *zinā* or not. If the victim of *qadhf* has had forbidden intercourse as described chastity of the *maqdhūf* is not assumed any longer and, therefore, the *qādhif* will not be punished with the *ḥadd*-penalty for *qadhf*. Mālik also holds that the *maqdhūf* must not have been convicted of *zinā* either before he was accused nor afterwards. In contrast to Abū Ḥanīfa he does not consider forbidden sexual intercourse, not amounting to *zinā*, as removing the status of chastity. Shāfi´ī agrees with Mālik that the *ḥadd*-punishment for *zinā* makes the *maqdhūf* lose his chastity. As to other forms of forbidden sexual intercourse not amounting to *zinā* he distinguishes two kinds. In the first kind the man holds no possessory rights in the woman he has sexual intercourse with. Therefore the status of chastity and *iḥṣān* are eliminated as if the intercourse would amount to *zinā*. In the second kind the sexual intercourse does not require the *ḥadd*-punishment, e.g. when a man has intercourse with his menstruating wife. In this case his status of chastity is not changed. Aḥmad ibn Ḥanbal, however, differs with Abū Ḥanīfa inasmuch as he does not call for an

[1062] For a detailed discussion of the concept of chastity (*'iffa*) see ´Awda (2001) , Vol.2, pp. 475-477.

absolute chastity (*al-ʿiffa al-muṭlaqa*) nor for chastity with regard to *zinā* as envisaged by Mālik and Shāfiʿī. According to Aḥmad it is sufficient to be chaste with regard to *zinā* in a strictly legal meaning (*al-ʿiffa al-ẓāhira ʿan al-zinā*). In other words, if *zinā* has not been proven to the *maqdhūf* by a confession or testimony and the *ḥadd*-penalty has not been imposed on him he must be presumed chaste. If the *maqdhūf* has committed *zinā* and is repentant before the crime has been brought to court it will not affect his status of chastity. Coming back to our discussion of article 157, CA91 and its definition of chastity we observe that the Sudanese legislator has stipulated a rather wide range of offences eliminating the status of chastity of the victim of *qadhf*. He followed the minority opinion of Abū Ḥanīfa and to some degree Shāfiʿī who are of the opinion that a victim of *qadhf* who is guilty of forbidden sexual intercourse not amounting to *zinā* can not be considered chaste. In other words the punishment of the *qādhif* has become more difficult, since the pool of possible victims of *qadhf* has been diminished. This decrease, however, is far outweighed by the fact, that non-Muslims can now sue for unfounded accusation of unlawful sexual intercourse or *liwāṭ* or negation of lineage. The bottom line is, however, that by adding *liwāṭ* to the sex crimes which make up *qadhf* – if the accusation cannot be proven – and by adding non-Muslims to the pool of possible victims, the overall applicability of *qadhf* in comparison to its stricter rules in the *fiqh* has been substantially widened.

4.2.3 Punishment of qadhf

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

[1063] See The Penal Code Act 1974, articles 434, 435, 436. Art. 437 stipulates the same punishments for the sale of printed or engraved substance containing defamatory matter.
[1064] Art. 64 (3), PC83.
[1065] Art. 64 (8), PC83.

"fine" also remained essentially unspecified.[1066] Next to these defamation-related offences, the PC83 introduced *qadhf* and – following the *fiqh* – punished it with eighty lashes. The Criminal Bill 1988 and the Criminal Act 1991 preserved this punishment. Concerning the 1983 code we can assess a disequilibrium between crime and punishment, caused by the introduction of the *ḥadd*-offence *qadhf*. Thus while the qur´anic offence's punishment was limited to eighty lashes, other non-qur´anic variations of defamation could be punished with up to a 100 lashes and possibly with a fine. As mentioned an unspecified, possibly long, prison term was also an option available to the judge. In other words, the *ta´zīr*-penalty for related offences could have been more severe than the *ḥadd*-penalty for the *ḥadd*-crime. Secondly, there is an important difference as to the religion of the offender. The PC 1983 stipulated eighty lashes only if the victim of *qadhf* was a Muslim. If the *maqdhūf* was a non-Muslim, the punishment stipulated was the ubiquitous formula „lashing and fine or prison." As our overview of the pertinent rules in the *fiqh* have shown there is indeed a difference between the *qādhif* and the *maqdhūf* with regard to religion. A non-Muslim can be punished for *qadhf* just like a Muslim. He cannot, however, be the object of *qadhf*, because he is not *muḥṣan* as required in cases of *qadhf*. Even though the legislator stipulates a *ta´zīr*-penalty – which can be even more severe than the *ḥadd*, as we have shown – it would have been more appropriate to subsume the defamation of a non-Muslim for unlawful sexual intercourse under a different header, avoiding the term *qadhf*. A usage rather remote from the *fiqh* was also applied by the Sudanese legislator in other instances. Thus we find two more offences, basically taken over from the 1974 code, but now transformed into *ḥadd*-offences related to *qadhf*. Firstly, "printing or engraving matter known to be defamatory"[1067] and, secondly, "sale of printed or engraved substance containing defamatory matter"[1068] are both punishable with eighty lashes for the Muslim and lashing and fine or prison for the non-Muslim. The PC83 thus follows, as to the punishment the logic set in the article punishing *qadhf* proper. Again, comparing with the reasoning of the *fuqahā'* we find that the printing of matter known to be defamatory does not fall under the definition of *qadhf* since the unfounded accusations have to be made within earshot of a listening public and not in writing. The sale of printed defamatory matter is just as far from the definition of *qadhf* and therefore would not be

[1066] Art. 64 (5), PC83.
[1067] Art. 436, PC83.
[1068] Art. 437, PC83.

punishable by a *ḥadd*-penalty. Again in both cases the non-Muslim possibly faces a more severe punishment than the Muslim.

Most of these incongruities, flaws and superficialities have been rectified in the draft CB88 and the CA91. Thus, most importantly, the *ḥadd*-punishment for *qadhf* is indeed limited to *qadhf* proper and no *qadhf*-related and similar offence is punished with eighty lashes while its definition does not concur with the *fiqh*. Further, the prison terms for these offences have substantially been lowered to a level that is even undercutting the punishments of the PC74. Defamation proper is now being punished with a maximum prison term of six months or a fine or both.[1069] Those guilty of insult and abuse face a maximum prison term of one month or a whipping of up to 25 lashes or a fine. Remarkably, the differentiation between Muslims and non-Muslims with regard to the victim has been completely abolished. In other words, even if the victim is a non-Muslim the *ḥadd*-punishment applies. While this means in practice that a non-Muslim's reputation with regard to unfounded accusation of unlawful sexual intercourse is protected in the same way as the Muslim's, it also means that non-Muslims are incorporated into ICL in a way not envisaged by the *fiqh*.

4.2.4 Lapsing of qadhf

The reasons for the lapsing of the *ḥadd*-penalty for *qadhf* were first regulated by criminal circular 99/1983[1070] as follows: 1. Withdrawal of the testimony by the witnesses. 2. Confirmation of the statement of the slanderer by the slandered. 3. Denial of the statement of the aggrieved party by his witnesses, based on an opinion of Abū Ḥanīfa. As in other instances a *ta´zīr*-punishment was possible after the *ḥadd* had lapsed, even if such a punishment had not been stipulated explicitly in the law.[1071] However, the reasons for the lapsing of the *ḥadd* for unfounded accusation for unlawful sexual intercourse changed almost completely in the CA91.[1072] The *ḥadd* now lapses for the following reasons: 1. By a mutual unfounded accusation of unlawful sexual intercourse (*taqādhuf*), when the slandered person or the plaintiff has answered the slanderer (*al-qādhif*) with the same words (*bimithli qaulihi*). 2. By pardon of the victim or the complainant of the unfounded accusation or the claimant pardons before the execution of the *ḥadd*-penalty. 3. By *li´ān* between the two spouses. 4.

[1069] Art. 159, CA91.
[1070] For the following see Ḥāmid (2002), mausū´a, pp. 33-34.
[1071] Compare article 458 (3), PC83.

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

4.2.5 Summary and conclusion

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

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

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[1072] Article 158, CA91.

[1073] This article also allowed for *ḥadd*-punishments despite the non-existence of a text in the Penal Code 1983 prescribing such a punishment. This article was invoked during the apostasy trial against Maḥmūd Muḥammad Ṭāhā.

[1074] Article 159(3), CA91.

the *maqdhūf*, the CA91, again applies a rather wide definition by including *liwāṭ*. Since *liwāṭ* is covered by the definition of *zinā* according to the majority opinion, its inclusion into the definition of chastity seems to be justifiable. However, this inclusion contradicts the distinction between *zinā* and *liwāṭ* chosen by the CA91 itself. Further, by adding a false accusation of *liwāṭ* to the sex crimes which fall under the definition of *qadhf*, the Sudanese legislator, while providing a stricter protection against slander, substantially widens the applicability of *qadhf* in comparison to the rules supported by the majority of the *fuqahā'*.

The CA91 also introduces an important change concerning the religion of the victim of *qadhf*. While in 1983, and in concurrence with the *fiqh*, the *ḥadd*-punishment for *qadhf* was only applicable if the victim of *qadhf* was a Muslim, the CA91 abolishes this distinction. This could be construed as giving non-Muslims the same status as Muslims which, in this particular case is meant to be an efficient protection of their rights. However, it draws, once more, non-Muslims into the realm of ICL, and this against its own prescriptions.

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

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

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

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[1075] See Schacht (1964), pp. 165.

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

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

4.3.1 Introduction

Alcohol consumption and, in extension, the dealing in alcohol respectively are certainly the two (*ḥadd*-) crimes that take a special position in the process of the Islamization of penal law in the Sudan. It should be noted here that no other *ḥadd*-penalties introduced in 1983 and reconfirmed in 1991 have been applied more widely and affected more people. Based on reports one can safely assume that many thousands of Sudanese have received a lashing and or a prison term for either consuming or selling alcohol or other alcohol-related offences. Evidence to the importance the Sudanese regime attributes to the eradication of brewing, drinking and selling of alcohol are the many campaigns announced to that effect. For example, in one of these campaigns in June 1994, in 16 days 657 people were brought to court for alcohol-related offences. In Khartoum and its adjacent refugee camps many displaced Southern women make a living by brewing and selling alcohol. According to article 79, CA91, non-Muslims who deal in alcohol are not subject to flogging but to a prison term not exceeding one year or shall have to pay a fine. However, there are many reports, that these women were given 40 lashes for brewing alcohol.[1076] In other words, they received the same amount of lashes given as a *ḥadd*-punishment to Muslims. Human rights reports also are evidence to the fact that the punishment of flogging for alcohol consumption is often used to intimidate critics of the Islamic regime.[1077]

4.3.2 Definition and punishment of alcohol consumption in the fiqh

The consumption of intoxicants was gradually forbidden in the Qur´an but not declared punishable.[1078] Qur´anic terminology refers to expressions for strong alcoholic drink only.[1079] In their majority, by way of *qiyās*, Islamic jurisprudents interpret the meaning of *khamr* to represent every intoxicant (*muskir*), including alcoholic drinks other than wine, opiates,

[1076] See e.g. Amnesty International, (1995), The Tears of Orphans, pp. 43-45.
[1077] Idem, p. 43.
[1078] Baradic (1983), p. 122; Karic (2002), p. 556-557.

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

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

According to the *fuqahāʾ* in order to be punished the drinker of wine and/or intoxicants must be sane (*ʿāqil*) and adult (*bāligh*), the insane and the minor, like in the rest of ICL, are not held criminally responsible. Thirdly, the culprit must be a Muslim according to the great majority of jurists. The *dhimmī* and the *mustaʾmin* will not be punished as long as he does not cause any public nuisance since alcohol consumption is not punishable in Christianity or Judaism (*mubāḥ ʿand ahl al-dhimma*).[1083] Public nuisance caused by the *dhimmī* or the *mustaʿmin* in a state of intoxication can only lead to a *taʿzīr*-punishment, not to the *ḥadd*. The drinking must be voluntary, drinking under duress or out of necessity (*ḍarūra*) does also not entail the *ḥadd*.

Finally, in order to be punished by a *ḥadd*-punishment the culprit's criminal intention (*qaṣd jināʾī*) has to be established. Thus, who does not know that he is drinking wine or who does

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[1079] E.g. *sakar*, *sukāra*, *rahīq*, *khamr* etc. See Karic (2002), p. 556.
[1080] Karic (2002), pp. 556-557.
[1081] Peters (2005), p. 64; Baradie (1983), p. 122.
[1082] Bahnasī, jarāʾim, p. 187.
[1083] Bahnasī, jarāʾim, pp. 189-190.

not know that the drinking of wine or the getting drunk on other alcoholic beverages is forbidden in the *sharī´a* is not subject to the *ḥadd*. The same holds true for who drinks while being unaware that he is in fact drinking an intoxicating liquid.[1084]

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

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

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

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

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

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[1084] Bahnasī, jarā`im , p. 191.
[1085] Art. 445, PC83. The text of the article refers to a *ḥadīth* saying: *kull mā yuskir kathīruhu faqalīluhu ḥarām.*
[1086] For punishments for alcohol consumption in practice see Layish/Warburg (2002), pp. 233-235.
[1087] Art. 3, CA91.
[1088] Bahnasī, jara' im, pp.183-184. It is unclear whether the usage of *khamr* in this context includes stronger drinks such as whiskey, wodka and the like. Bahnasī also discusses the use of alcohol when cooking or baking or through injections. In the latter case, no ḥadd applies because the alcohol has not been drunk or eaten.

distinction between Muslim and non-Muslim offenders. Thus, under the PC 1983 alcohol consumption by a Muslim (only) was, and still is, under the CA91, punishable with 40 lashes.[1092] The punishment follows the majority opinion in the Shāfi´ite[1093] and Ḥanbalite schools.[1094] Both codes have thus – since Ḥanafites and Mālikites allot 80 lashes - chosen the milder option.

In its effort to streamline and condense the PC83, its successor 1991 has reduced the number of articles dealing with alcohol to three, the first of which not only makes the drinking of alcohol but also the possession and manufacturing of it by a Muslim punishable with 40 lashes.[1095] Possession and manufacturing of intoxicants do not fall, however, under the *ḥadd*-punishment according to the *fiqh*, even though buying, selling and presenting it is considered *ḥarām*[1096] and can be punished with a *ta´zīr*-punishment.

In the 1983 code the dealing with alcohol, i.e. producing, selling, buying and transporting it was punishable with lashing, a fine or a prison term for Muslims and non-Muslims alike.[1097] A glance at the pertinent provisions on lashing shows that the number of strokes can range between 25 and 100.[1098] In other words, a Christian dealing with alcohol could have received a higher number of lashings than a Muslim for drinking alcohol.[1099] According to the majority opinion a *ta´zīr*-penalty, as in this case designated for the non-Muslim culprit, must not be harsher than the *ḥadd*-penalty for a comparable crime. The definition of "prison term" is even less precise and basically gives the judge the latitude to decide a term as long as he sees fit.

Most probably due to the highly symbolic meaning the banning of alcohol consumption has among the Islamist forces in and outside the government[1100], the legislator has not made use of possibilities – e.g. by way of *takhayyur* or *talfīq* – to restrict the applicability of the *ḥadd*-

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[1089] Penal Code 1974, art. 443.
[1090] Penal Code 1974, art. 444.
[1091] Penal Code 1974, art. 445.
[1092] PC83, art. 443 (1).
[1093] Juynboll, (1930), p. 308.
[1094] Baradie (1983), pp.22. See also Peters (2005), p. 64.
[1095] CA91, art.78 (1).
[1096] Wensinck (1990), p. 996, Scholz (2000), p. 454.
[1097] PC83, art. 449.
[1098] PC83, art. 64 (7).
[1099] The reason for the harsher punishment is that it is expected that the Christian abets Muslims to drink alcohol.
[1100] For an account of convictions for alcohol consumption under Numayrī, see Layish/Warburg (2002), p.233-235.

punishment for alcohol consumption.[1101] Further, in addition to the *ḥadd*-offense, art. 78 (2) CA91 provides for "imprisonment for a term not exceeding one month or with whipping "not exceeding 40 lashes" or a fine for whoever drinks alcohol and "thereby provokes the feelings of others or causes annoyance or nuisance thereto or drinks the same in a public place or comes to such a place in a state of drunkenness". As mentioned above the *fiqh* is not interested in non-Muslims drinking alcohol, unless they cause a public nuisance.[1102] The CA91 however leaves room for the punishment of the drinking of non-Muslims beyond cases of public nuisance. It does not explicitly allow the drinking of alcohol by non-Muslims in private places, thus the provocation of feelings of others could take place in a private gathering of Muslims and non-Muslims. Further, lacking a precise definition in article 3[1103], it remains unclear when a place has to be considered public. Finally, the text of the provision allows for up to 40 lashes even for non-Muslims. In combination with the imprecise wording of the text, the legislator has in fact left enough leeway for judges to impose de facto the *ḥadd*-punishment for *shurb al-khamr* on non-Muslims. Since 78 (2) allows that to the 40 lashes a fine may be added, a non-Muslim could even be punished harder than a Muslim who receives the *ḥadd*-punishment only. As for Muslims, article 78 (2) represents a qualified *ḥadd*-offense[1104], which entails the imposition of up to 40 lashes, i.e. a number of lashes equaling the *ḥadd*-penalty, possibly, in combination with a fine. In other words, the qualified *ḥadd*-offence can be punished even harsher than the original *ḥadd*-offence. The PC83 (art. 444) distinguished for the same offence between Muslims and non-Muslims. While the former were punished with 40 lashes and prison, the latter had to expect whipping and a fine or imprisonment.

A highly practical meaning has further article 79, CA91, punishing, "whoever deals in alcohol by storing, sale, purchase, or transport...with a prison term not exceeding one year or with a fine". The same offence in a slightly different wording was punished by the PC1983 by whipping, fine and imprisonment (art.449) without further specification. If any of the offences described above and punishable under the Criminal Act 1991 is committed for the third time, punishment is harsh. Muslims who are caught drunk for the third time (art. 78 (1), Muslims

[1101] The wide applicability of alcohol-related offences is, however, contrasted by the milder punishment of 40 lashes instead of 80.

[1102] Baradie (1983), p. 122. "Persons, who do not belong to the Muslim religion...can not be held responsible for an infraction of the ban on drinking (alcohol)", Krcsmárik (1905), p. 324.

[1103] Article 3, CA91 explains the most important definitions and meanings of terms used in the Criminal Act.

and non-Muslims alike who create a nuisance in public places while being drunk for a third time (78 (2) or are convicted for dealing in alcohol for a third time (art. 79) receive a prison term of up to three years and/or 80 lashes and "the means of transport and tools used in the commission of such offence shall be forfeited..." (art. 81, CA91). The latter provision gave reason to a Supreme Court judgment correcting an earlier decision by a Court of Prices and Public Order (*maḥkama al-as´ār wa al-niẓām al-´āmm*). The court had sentenced a woman, who had been dealing in alcohol to a one year prison term, a fine of 10.000 Sudanese Pounds and to the confiscation of her house under article 81 of the Criminal Act 1991. The Supreme Court confirmed the prison term and the fine. The confiscation of the house, however, was annulled, not only because the woman had been convicted only twice and not three times as stated under art. 81, but because a house is an unmovable good and thus not covered by the definitions of article 81. The terms used there are "means of transport" (*wasā`il al-naql*) and "tools used in the commission of the crime" (*al-adawāt al-mustakhdama fī irtikāb al-jarīma*). The meaning of tools thus, according to this judgment, does not include real estate used for the storage of alcohol or used in any other way for selling alcohol.[1105]

4.3.5 Lapsing of the ḥadd*-penalty for alcohol consumption*

The Criminal Circular 92/83[1106] defines the cases leading to the lapsing of the *ḥadd*-penalty for alcohol consumption:[1107] the withdrawal of the confession when the crime has been proven by confession only (and not, e.g. by circumstantial evidence). Secondly, the withdrawal of the testimony by the witnesses, provided there is no proof confirming this testimony. Thirdly, when the witnesses differ in their testimony. However, the circular specifies that the lapsing of the *ḥadd* does not mean that the culprit goes unpunished. He is rather subject to a *ta´zīr*-punishment.

[1104] Scholz (2000), p. 455.
[1105] SLJR (1994), 1329/1994.
[1106] See Ḥāmid, mausū` al-manshūrāt al-jinā`iyya, al-juz al-thālith, p. 13.
[1107] These are also applicable with regard to other *ḥadd*-crimes. For a detailed account of reasons which make a *ḥadd*-crime lapse see the respective chapters.

4.3.6 Conclusion

On the legislative level the Sudanese legislator has, in 1983 and 1991 alike, banned all alcoholic and other (potentially) intoxicating beverages, including wine, in whatever quantity and regardless of whether they are causing intoxication or not.

Concerning proof the requirements for witnesses, as prescribed by the *fiqh*, are substantially lowered in the relevant Evidence Acts 1983 and 1993. Both codes allow for female and non-Muslim witnesses and are thus in contradiction with Islamic jurisprudence.

Both codes also blur the distinction between the relevant *ḥadd*-punishment and a *ta´zīr*-punishment applicable either for related crimes or to non-Muslim offenders. Thus the 1983 code punished the producing, selling, buying and transporting of alcohol with lashing, a fine or a prison term. Since the judge had the latitude to chose any number of lashes between 25 and 100, a non-Muslim offender could, instead of receiving a lower *ta´zīr*-punishment, be subjected to twice as many lashes as the Muslim convicted for alcohol consumption. In 1991 this contradiction remains. A non-Muslim who causes public nuisance or provokes the feelings of others shall receive also a maximum number of 40 lashes, i.e. the exact number applied to Muslim offenders subject to the *ḥadd*. In the case of the recidivist this disproportion is even accentuated. He will be punished with a prison term of up to three years and/or up to 80 lashes.

Given the strong attitude of the Sudanese government against alcohol consumption and dealings in the great majority of cases connected to these crimes is dealt with swiftly by Public Order Courts applying the pertinent articles of the Criminal Act. Since convictions to lashing for alcohol-related offences are executed immediately an appeal in most cases makes little sense. This situation is also reflected in the scarcity of Supreme Court decisions on this matter. A few decisions, however, have delineated some of the pertinent questions related to alcohol consumption. Thus, the Supreme Court has decided that the mere fact that a witness has drunk alcohol does not disqualify him as a witness or, for that matter, destroys his good reputation - *´adāla* – which is a precondition for giving testimony in *ḥadd*- and *qiṣāṣ*-cases. According to the same judgment, the *´adāla* is only forfeited if the witness is a habitual drinker known to the community or publicly laughed at for his drinking. The court's leniency with regard to the alcohol consuming witness here served in proving a case of intentional homicide and convicting the murderer. Since the heirs of the victim had insisted on their right to *qiṣāṣ* the court weighed the protection of the rights of the heirs, a *ḥaqq adamī*, higher than a

possible legal uncertainty (*shubha*). The latter could have been invoked in order to invalidate the testimony.

Another Supreme Court decision clarified that the punishment for the recidivist dealer in alcohol is limited – next to prison, lashing and fine – to the confiscation of the means of transporting the alcohol and the tools used in the perpetration of the crime. The dispossession of the house of the culprit is thus not covered by the law.

Finally, the Supreme Court ruled, that the passing of several days between the actual happening of the crime and the initiation of legal procedures makes the *ḥadd*-punishment lapse. Following the legal opinion of Abū Ḥanīfa, the SC ruled that it is a precondition for the validity of the testimony that the smell of alcohol is still discernible at the time of the testimony and that with the disappearance of the smell limitation (*taqādum*) takes effect. With this judgment the Supreme Court secures a swift persecution of cases related to alcohol consumption. It forestalls at the same time the possibility of retroactively filing charges with regard to the most frequent *ḥadd*-crime, alcohol consumption.

4.4. *Ḥadd*-theft (*sariqa ḥaddiyya*)

4.4.1 Definition of ḥadd-*theft in the* fiqh

Muslim jurists included *sariqa ḥaddiyya* or *ḥadd*-theft into the small group of *ḥudūd* based on the qur´anic verse 5,38 – "as for the thief, whether male or female, for each, cut off the hands in punishment for what they did, as an exemplary punishment from god".[1108] Since the Qur´an does not specify which hand is to be cut, neither what happens to the recidivist nor any other legal rule pertaining to *ḥadd*-theft, the elaboration of the details was undertaken by Muslim jurisprudence. In consequence, the uncertain meaning of sariqa in the Qur´an and *hadīth*[1109] led to numerous controversial opinions amongst the *fuqahā`*.

The *fuqahā`* define *sariqa ḥaddiyya* as the surreptitious removal of legally recognized property (*māl*) in the safe keeping (*ḥirz*) of another person of a definite minimum (*niṣāb*) to which the thief has no right of ownership and which has not been entrusted to him.[1110] The offender has to be adult (*bāligh*) and sane (*´āqil*) and must have the intention of stealing, i.e.

[1108] Compare Lowry (2006), Heffening (1997).
[1109] A list of *ḥadīths* concerning *sariqa* can be found in Bahnasī, mausū´a, Vol.3, p. 264 et sqq.
[1110] This definition tries to reflect all important elements of the different definitions given by the *fuqahā`*. Compare Baradie (1983), p. 109.

he is not acting under duress.[1111] All of these elements have to be fulfilled in order to make the *ḥadd*-punishment amputation (*qaṭ´*) applicable. We shall therefore explain in some detail the meaning of the different elements of the definition of *sariqa*. What exactly is thus the meaning of legally recognized property (*māl*)? The property must be capable of being owned, moveable (*manqūl*), valuable (*mutaqawwam*) and protected (*ma´ṣūm*). Anything forbidden in Islam such as pigs or alcohol cannot be owned by Muslims and can therefore not lead to the qur´anic punishment for *sariqa*. Only movable property that can be legally owned can thus be the object of *sariqa*. The *fuqahā`* agree that the stolen good has to be physically moved from the possession of the aggrieved party into the possession of the perpetrator. Land and buildings are non-moveable and can therefore not be stolen in the sense of the definition of *sariqa*.[1112] Something is considered valuable if it is storable and reaches the minimum value – *niṣāb* - of 10 Dirham (equivalent to the value of 4,25 gr. of gold) according to a majority opinion.[1113] Five groups of things are controversial among the *fuqahā´* as to whether their stealing constitutes *sariqa*: 1. The stealing of perishable foodstuffs such as fresh meat, fruits or milk does not lead to amputation according to a majority opinion backed by Abū Yūsuf, Mālik and Shāfi´ī, but not the Ḥanbalites.[1114] 2. Things and animals which are ownerless (*mubāḥ*) such as wood, grass, fish, birds, including ducks and pigeons. Nevertheless, *fuqahā´* differ here. Even though they generally agree to this rule they hold that if such animals have been stolen from a *ḥirz*, a legal uncertainty can not be invoked and thus amputation is due.[1115] 3. Things whose consumption or use are forbidden in Islam such as pigs or wine or animals not slaughtered in accordance with the ritual requirements of Islam or musical instruments which are considered instruments of sin (*`āla lil-ma´ṣiyya*).[1116] 4. Children and slaves. The free youth can not be owned and therefore is not possibly an object of *sariqa*, even if he wears a piece of jewelry (which is stolen with him). Abū Yūsuf advocates amputation if the

[1111] For a discussion of *sariqa* in the *fiqh* see the following works in Arabic: ´Awad (2001), Vol. 2, p. 514 et sqq., Bahnasī, al-jarā´im fī al-fiqh al-islāmī, p. 15 et sqq., Bahnasī, madkhal, p. 27 et sqq., Bahnasī, mausū´a (Vol.3), pp. 263-310 and al-Jazīrī (2004), p. 15 et sqq. For literature in Western languages , see Schacht (1964), pp. 179-180, Heffening (1997), p. 62, Peters (2005), pp. 55-57, Bleuchot (2002), Forte (1996), pp. 186-211, p. 690, Krcsmarik (1905), p. Arévalo (1939), pp. 102-109, Bambale (2003), pp. 53-61, and Baradie (1983), pp. 108-117.
[1112] Bahnasī, mausū´a, Vol.3, pp. 277-278.
[1113] Bahnasī quotes two main opinions with regard to the amount of the *niṣāb*. The first opinion is represented by the *fuqahā´* of the Ḥijāz, Shāfi´ī and Mālik and others, setting the *niṣāb* at 3 silver dirhams or a quarter gold dirham. The second opinion is represented by the Iraqi *fuqahā´*, setting the *niṣāb* at ten dirham. Bahnasī, mausū´a, vol.3, pp. 280.
[1114] Bahnasī, al-jarā`im, pp. 36-37.
[1115] Bahnasī, al-jarā`im, pp. 38-39.

valuables carried by the youth reach the *niṣāb*. The stealing of the underage slave, however, entails amputation, except in the opinion of Abū Yūsuf, because a slave is an ownable good (*māl mutaqawwam*). 5. copies of the Qur´an, candles from a mosque or their doors and the like. Especially the stealing of copies of the Qur´an has been discussed by the *fuqahā´* in some detail. Some - among them Abū Ḥanīfa - argue that the Qur´an contains the word of God for which a financial compensation is not permissible (*lā yajūzu akhdh al-´iwaḍ ´anhu*). Mālik and Shāfi´ī advocate the necessity of amputation because they consider copies of the Qur´an an ownable good.[1117] Inviolable and protected (*ma´ṣūm*) is the property of Muslims, *dhimmīs* and *musta`mins*, but not the property of the *ḥarbīs*.

The stolen property must further belong entirely to someone else (*mamlūk lilghair*), i.e. it must be neither ownerless nor should the thief be the sole owner or co-owner of the property in question.[1118] Important with regard to our discussion of modern Sudanese law the category of co-ownership includes public property or things to which the thief holds a title. This is based on the assumption that stealing public property constitutes a legal uncertainty with respect to the ownership (*shubha al-milk*). The Ḥanafites and the Shāfi´ites adhere to this opinion while the Mālikites hold that amputation is obligatory, even if the stolen good is public property.[1119]

Further, the stolen property must have been taken from a safe place where the specific good is customarily kept (*ḥirz*). A *ḥirz* can either be constituted by a place – then called *ḥirz bil-makān* or through the surveillance of a guardian, called *ḥirz bil-ḥāfiẓ*. In the former case the property in question is kept in a closed room which can only be entered by authorized persons. The room must be suitable to protect the valuables against theft such as a house or a stable. However, the protection – *ḥirz* - can only be established if the good is kept in a suitable place. The *ḥirz* for cattle can be in the barn but not in a house and, conversely, money hidden in the stable is not considered to be in a *ḥirz*. *Ḥirz* is neither constituted when the front door of the house is open or when guests are allowed into the house where the valuables are kept.

[1116] ´Awad (2001), vol.2, p. 552.

[1117] Compare ´Awad (2001), vol.2, pp.552. While Schacht (1964) and Baradie (1983) for the sake of conciseness refer to a majority opinion in their discussion of the ownability of goods , Bahnasī and ´Awda dig deeper. See also Bahnasī, mausū´a, vol.3, pp. 278-279 and Bahnasī, al-jarā`im fī al-fiqh al-islāmī, pp. 36-43.

[1118] Compare also 4.4.7.

[1119] Bahnasī, mausū´a, Vol.3, pp. 284. Schacht does not refer to the minority opinion of the Mālikites. See Schacht, 1964, p. 180.

A case quoted by the Sudan Supreme Court judge and prolific commentator on ICL Ḥassūna illustrates this point. A Sudanese court convicted two defendants for non-*ḥadd* theft because the object of the theft was a camel that had been attached outside a house, but in a corral intended to keep the camel. The court, however, decided that the front side of a house can not be considered a *ḥirz*, even if the stolen good (i.e. the camel) was inside a corral intended for it as a *ḥirz*.[1120]

The theft of money by guests would be considered *khiyāna* (embezzlement)[1121] but would not qualify as *ḥadd*-theft. As mentioned, *ḥirz* can be constituted when a guardian protects the property against theft (*ḥirz bil-ḥāfiẓ*). In that case the guardian must either be awake or physically touching the property in a way that he would wake up if the good is taken from him.

Finally, another important criteria in order to constitute *sariqa ḥaddiyya* is that the property has to be stolen surreptitiously. If it is taken openly the thief is called a *ghāṣib*, usurper; if it is taken by force the act shall be deemed *nahb*, robbery and the thief is a *muntahib*, a robber, but he is not guilty of *ḥadd*-theft.[1122]

Proof of ḥadd-theft in the fiqh

In the *fiqh*, *ḥadd*-theft is proven either by a confession of the culprit or by the testimony of witnesses.[1123] It is controversial whether a single confession is sufficient for a condemnation for *sariqa* or whether the confession has to be made twice. Abū Ḥanīfa and Shāfi´ī are content with a single confession, while Abū Yūsuf and the Ḥanbalites preclude an amputation unless the culprit has confessed twice in two different sessions.[1124] If the confession is withdrawn before the actual execution of the amputation, the punishment lapses (see details below).

For the testimony to be counted two men of good reputation have to testify. Not accepted are the testimony of women, the testimony of those not meeting the legal requirements of righteousness or the testimony on the testimony (*shahāda ´alā al-shahāda*). The *qaḍī* has to show great caution and must ask the witnesses about the details of the *ḥadd*-theft with regard to place, time and circumstances in order to avoid mistakes. This is especially important since

[1120] Ḥassūna (2001), p. 310 quoting a case from 1991.
[1121] Bahnasī, mausū´a, Vol.3, p.275 and Baradie (1983), pp. 110-112.
[1122] Bahnasī, mausū´a, Vol.3, p. 275 and Baradie (1983), p. 112.
[1123] For the following see, Bahnasī, al-jarā`im fī al-fiqh al-islāmī, pp. 75-80.
[1124] Compare Bahnasī, al-jarā`im fī al-fiqh al-islāmī, p. 76.

the punishment is severe. The *qaḍī* is bound to pay special attention to who the victim of the theft is (*al-masrūq minhi*) and whether it is a foreigner or a relative or a spouse. Any doubt concerning the nature of the victim should be eliminated. All schools agree that amputation can not take place if the witnesses disagree either on the place, the time, the stolen good or the victim.

As to circumstantial evidence in *ḥadd*-theft cases, it is not admitted by the *fiqh*[1125] or by Sudanese jurisdiction as proof of *sariqa ḥaddiyya*.

Punishment of ḥadd-*theft in the* fiqh

The punishment the *fuqahā´* devise for the first commitment of *ḥadd*-theft is the cutting of the right hand. The punishments for recidivists are severe: the severing of the left foot for the second *sariqa ḥaddiyya*. As to the third repetition, Ḥanafites and Ḥanbalites allow for imprisonment, while Shāfi´tes and Mālikites envisage the amputation of the left hand for the third *ḥadd*-theft and the remaining right foot for the fourth theft.[1126]

The victim of the theft has the right to the restitution of the stolen good and the thief is obliged to return it. If the stolen good has vanished the thief has to indemnify the victim of the theft.[1127] However, opinions differ as to whether indemnification is due if the *ḥadd*-penalty is executed. The Ḥanafites opine in such case that the financial compensation (*ḍamān*) lapses.

Legal uncertainties and the lapsing of the punishment for ḥadd-*theft in the* fiqh

Once all conditions for the execution of the *ḥadd*-penalty are fulfilled it must be executed. However, under certain circumstances the *ḥadd*-punishment will lapse. According to the Ḥanafites this is the case when the victim of the theft denies either the correctness of the confession of the thief or the correctness of the testimony of the witnesses. It does not matter whether the denial of the correctness of the confession or the testimony happens at the beginning or after the lawsuit and the claim of *sariqa*. Mālik does not see here a reason for the lapsing of the punishment as long it is firmly established that the purpose of the denial is to help the culprit (*al-takdhīb qaṣd bihi musā´ada al-jānī*) and the denial does not concur with reality. Shāfi´ī and Aḥmad ibn Ḥanbal are of the same opinion as long as the denial takes

[1125] Compare the exeptions of proof of *shurb al-khamr* and *zinā*.
[1126] Baradie (1983), p.116.
[1127] Baradie (1983), p. 116.

place after the legal proceedings (*ba´d al-mukhāṣama*). If it takes place before the proceedings and the claim of *ḥadd*-theft, amputation is not obligatory.

A pardon of the victim of the theft makes the *ḥadd* lapse only if happening before the case has been reported to the authorities.[1128] Being a *ḥadd*-crime *ḥadd*-theft is not a private matter and has to be prosecuted once it has been made known to those responsible for its prosecution. According to the Sunni schools the pardon does not have to be given by all the victims of the theft, it is enough if one of the victims pardons the culprit for the pardon to be effective.[1129]

The *ḥadd* also lapses according to a majority opinion of the schools – with the exception of a minority of the Shāfi´īs - if the proof is based on a confession only and this confession is withdrawn either explicitly or implicitly. If the *ḥadd*-theft has been committed by two persons and only one of them withdraws his confession, only his *ḥadd* lapses according to Mālik, Shāfi´ī and Aḥmad ibn Ḥanbal. Abu Ḥanīfa, however, holds that the withdrawal of the confession of one of the culprits creates a legal uncertainty on the crime as such and therefore advocates the lapsing of the *ḥadd* on both suspects. Likewise, if only one of the two confesses *sariqa* is not proven.[1130]

Further, according to the Ḥanafites, the *ḥadd* lapses if the thief returns the stolen good before the legal procedure begins (*qabl al-murāfa´a*) because the existence of a lawsuit is a precondition for the appearance of the crime of *ḥadd*-theft (*ẓuhūr al-sariqa*). Thus the return of the stolen goods before the beginning of the procedures invalidates the lawsuit. Abu Yūsuf, in contrast, holds that the return of the stolen goods before or after the legal procedure does not change the fact that *sariqa* entailing amputation has occurred. As to other three Sunni schools, Mālik, Shāfi´ī and Aḥmad ibn Ḥanbal do not consider the return of the stolen good a reason for the non-application of the *ḥadd*. Mālik, as shown below, does not give much room to the lawsuit in his deliberations and for Shāfi´ī and Aḥmad ibn Ḥanbal the lawsuit is a precondition for a judgment and not for the amputation.[1131]

The Ḥanafites, with the exception of Abū Yūsuf, further hold that if the thief legally acquires the stolen good (*tamalluk al-masrūq*) before the trial the amputation lapses and if he acquires the stolen good after the judgment and before the execution of the punishment the *ḥadd* also

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[1128] Peters (2005), p. 57.
[1129] ´Awda (2001), Vol.2, p. 630. The Zaidites hold that the *ḥadd*-punishment has to be executed if only part of the victims of *ḥadd*-theft pardon the thief.
[1130] ´Awda (2001), Vol.2, pp. 630-631.
[1131] ´Awda (2001), Vol.2, p. 631.

lapses. The Shāfi´ites and the Ḥanbalites, in contrast, hold that the punishment lapses only if the defendant – who in effect in this case is not a thief – has legally acquired the "stolen" good before the complaint (*qabl al-shakwā*). If the defendant acquires the good in question only after the complaint of theft has been made, the punishment does not lapse. Mālik only considers the time when the *ḥadd*-theft has been committed (not the time of the complaint, lawsuit or judgment). If the good in question has not been the property of the thief he will be subject to amputation.[1132]

Moreover, the *fīqh* knows a range of cases when the *ḥadd*-punishment for *ḥadd*-theft lapses. Their primary occupation is with cases of various degrees of (blood) relationship. There are three opinions on the consequences of *sariqa* between spouses. The first opinion holds that the *sāriq* is to be amputated. The second opinion deems that none of the two spouses is to be punished because the wife has a right to alimony, while the husband is entitled to prohibit her free movement which is considered to be a *shubha* according to some *fuqahā`*. Finally, some opine that the husband is liable to *ḥadd* when having stolen from his wife, but not the wife when she has stolen from her husband, because she has the right to alimony and he has not.[1133] *Ḥadd*-theft between ascendants and descendants is equally controversial. The Ḥanafites hold that who steals from his parents or from his child will not be subject to the *ḥadd* for *ḥadd*-theft because of a legal uncertainty concerning property between them and their mutual right to enter a place where valuables are safely kept (*dukhūl al-ḥirz*). Mālik however is of the opinion that a father who steals from his son will not be liable to the *ḥadd*-penalty based on the *ḥadīth* "you and your property belong to your father (*anta wa mālak li`abīka*)". A son, however, does not have any right in the property of his father and therefore will be punished with the *ḥadd*.[1134] Finally, the *fuqahā`* discuss *ḥadd*-theft between close relatives (*maḥārim*). Mālik, Shāfi´ī and the Ḥanbalites hold that there is no legal uncertainty pertaining to property and therefore they deem amputation obligatory. Abū Ḥanīfa and Abū Yūsuf are of the opinion that theft between close relatives cannot be punished by amputation since they have the right to enter their respective houses thus creating a legal uncertainty as to *ḥirz*.[1135] Another case discussed in the *fīqh* is the stealing of the *dhimmī* or the *ḥarbī*. Muslim and *dhimmī* alike receive the *ḥadd* for *sariqa* for stealing from either a Muslim or a *dhimmī*

[1132] ´Awda (2001), Vol. 2, pp. 629-633.
[1133] Bahnasī, al-jarā`im fī al-fiqh al-islāmī, pp. 54-55. Ḥassūna (2001), p. 304.
[1134] Bahnasī, al-jarā`im fī al-fiqh al-islāmī, pp. 55-56.

according Shāfi´ī and the unanimous opinion of the other schools. The same holds true for the *ḥarbī* who enters Islamic territory as a *mustā`min*. Abū Ḥanīfa, however, holds that *ḥadd*-punishment for *sariqa* is not applicable to the *ḥarbī* in analogy with the non-applicability of the *ḥadd* for *zinā* in such case.[1136]

4.4.2 The introduction of ḥadd-theft (sariqa ḥaddiyya) in the Penal Code 1983

A codification of *sariqa ḥaddiyya*, like all other qur´anic punishments, has first been introduced in the Sudan by the Penal Code 1983. The codification of theft in article 320, however, was not entirely new, since it almost[1137] literally adopted the definition of theft of its predecessor code but added two more clauses[1138] defining *sariqa ḥaddiyya* and the minimum value (*niṣāb*) respectively. The new definition of *ḥadd*-theft (*sariqa ḥaddiyya*) was worded as follows: "Whoever, with evil intent, takes from the possession of a person, without his consent, movable, valuable property, belonging to someone else, with a value not less than the *niṣāb* is considered to commit *ḥadd*-theft." [1139]

With regard to the notion "belonging to someone else" (*mamlūkan lilghair*) Ḥassūna quotes a court decision from 1990. In this case it was proven that the defendant had entered the house of the plaintiff without her permission when committing the theft. However, at other times the defendant was present in the house of the plaintiff, also in her absence but with her permission. At such an occasion he had entered the room of the plaintiff because it was open. The court therefore was of the opinion that the house was not to be considered a *ḥirz* because the defendant was in general allowed to enter it and in consequence "he became like someone who lived in the house" (*aṣbaḥa ka`ahl al-dār*). Therefore the *ḥadd* was deemed not applicable and he was punished with the *ta´zīr*-punishment for non-*ḥadd* theft.[1140]

While the *niṣāb*, defined as a quarter gold dinar or three silver dirhams or its equivalent in Sudanese currency[1141], clearly is based on the opinions of Shāfi´ī and Mālik,[1142] the definition of *sariqa ḥaddiyya* and subsequent articles extending the scope of its application, pose a variety of problems with regard to their being based on the *fiqh*. Conspicuously, the definition

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[1135] Bahnasī, al-jarā`im fī al-fiqh al-islāmī, p. 57.
[1136] Bahnasī, al-jarā`im fī al-fiqh al-islāmī, p. 58.
[1137] New in the definition is only the notion of *sū` qaṣd* – evil intent.
[1138] Articles 320 (2) and (3).
[1139] Art. 320 (2).
[1140] Ḥassūna (2001), pp. 310 quoting alif sin ḥa/141/1991 Trial Ibrāhīm Mūsā al-Ḥiwār.
[1141] Art. 320 (3).

of *sariqa* PC83 ignored essential features of *sariqa* as agreed upon by the *fuqahā'*. Most notably the notions of *ḥirz* and the exigency of surreptitiousness were missing.[1143] In consequence, the applicability of *sariqa ḥaddiyya* was initially broadened to a degree that can not claim faithfulness to the teachings of the *fuqahā'*, if not outright contradicting their intentions. Only the case law of the Appeal and Supreme Courts would fill this gap and subsequently define *ḥirz* and thus give guidance to the lower courts.

Thus, instead of adhering to a clearly defined set of instruments, meant to delineate and limit its application, the Sudanese legislator 1983 stripped the classical definition of *sariqa ḥaddiyya* of some of its vital prescriptions. In consequence, the lack of *ḥirz* as a precondition meant that thefts outside houses, barns or other safe places where movable property normally is kept now fell under the definition of *sariqa*. Further, thefts which according to the *fiqh* would qualify as *ghaṣb* / usurpation, *ikhtilās* / snatching something without the owner noticing, *khiyāna* / embezzlement or *nahb* / robbery, i.e. the taking of property in the open or with force, could also qualify as *sariqa ḥaddiya*. In the *fiqh* these crimes are not punished with *ḥadd*-penalties.[1144]

In fact, a comparison of the old, translated, definition of theft / non-*ḥadd sariqa* and the new, added one of *sariqa ḥaddiyya* do not show many differences. Only two notions, *niṣāb* and *ownable*, have been added to the definition taken over from the PC74. However, while the *niṣāb* is defined, the notion of ownable is not. It remained thus unclear which legal opinion the Sudanese legislator meant to adhere to and which kinds of stolen property would fall or not fall under *sariqa*. The interpretation of article 320 is further made difficult by the fact that all illustrations of the 1974 code have been omitted.[1145] In contrast, five explanations have simply been translated to Arabic, however without giving any hint to whether these explanations were referring to the old definition of *sariqa* or to *sariqa ḥaddiya* or possibly both. After having distinguished between theft and *ḥadd*-theft in article 320, article 324 introduces amputation as a punishment for (regular) theft in conjunction with preparations made for causing death or hurt. As in other instances[1146] the PC83 extends the applicability of

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[1142] Compare preceding section.
[1143] Köndgen (1992), p. 113.
[1144] Compare also Layish (2002), p. 119.
[1145] Based on English legislative style the old PC74 in many instances illustrated the meaning of an article by giving model cases thus helping the judge in his interpretation and jurisdiction. Its successor codes have omitted these illustrations, thus forgoing an important instrument in guiding the judiciary.
[1146] See e.g. chapters on *ḥirāba* and *zinā* and footnote 215.

ḥadd-punishments to crimes, which might have a remote resemblance with *sariqa ḥaddiyya* but do not qualify as such under the definitions proposed by the *fuqahā`*. In order to impose the *ḥadd*-penalty amputation for *ḥadd*-theft it is essential that *sariqa ḥaddiyya* has indeed been committed.[1147] Thus, a whole range of crimes which are related to (but by definition different from) *sariqa ḥaddiyya* and *ḥirāba* and taken over almost literally with few additions or changes from the PC 1974 have in 1983 been complemented with a variety of *ḥadd*-punishments.

Initiating legal proceedings

It is important to note here that even if the thief confesses or the theft is proven by the testimony of witnesses, the *ḥadd*-penalty can only be imposed if the person whose property was stolen, i.e. the owner of the stolen good, institutes legal proceedings against the thief. The official lawsuit pursued by the victim of the theft is considered to be a precondition for the appearance of theft (*liẓuhūr al-sariqa*) and for the execution of the *ḥadd*-penalty.[1148] This principle is also maintained in Sudanese criminal law as the following two cases demonstrate:
In 1985 two thieves stole a considerable amount of clothing and a sum of 940 Sudanese Pounds from a house. The culprits, a certain al-Amīn Sa´īd Umm Dabaka and his accomplice Aḥmad `Uthmān were quickly found and both confessed to the theft. The responsible local penal court convicted both of them for *ḥadd*-theft based on article 322 (2) – *ḥadd*-theft from residential premises – in conjunction with article 320 (2) – *ḥadd*-theft – PC83. In its review, however, the Supreme Court, remarked that even though the owner of the stolen goods had been firmly established to be a certain Buthaina Ḥajj `Uthmān, she, being the aggrieved party, did neither attend the trial of the case at the Trial Court (*maḥkama al-maudū`*), nor did she file an action against the culprits. The Supreme Court, quoting a legal opinion held by Abū Ḥanīfa, therefore decided to revoke the decision of the lower court and return the file to the Trial Court in order to impose a *ta´zīr*-punishment according to article 322 (1) – non-*ḥadd* theft from residential premises.[1149]

[1147] Compare also Köndgen (1992), p. 115.
[1148] Compare ´Abd al-´Azīz (1997), pp. 370-371.
[1149] See SLJR (1985), Government of the Sudan vs. Al-Amīn Sa´īd Umm Dabaka.

In a comparable case the Supreme Court confirmed this reasoning: in 1990 the defendant Muḥammad Bārūd Akul found the plaintiff sleeping on the ground in a parking lot.[1150] He took advantage of the situation, ripped the pocket of his victim, stole 325 Sudanese pounds and fled. The following day, after missing his purse, the plaintiff informed the police, who, after finding evidence leading to the culprit, arrested Akul. Akul confessed to the theft. However, when the plaintiff did not appear at the trial, the court had to contend itself with the testimony of the two policemen who had been responsible with the investigation. It deemed the defendant, who had confessed, guilty of *ḥadd*-theft and convicted him to amputation of the right hand. In its review the Supreme Court followed the Ḥanafites, the Shāfi´ītes and part of the Ḥanbalites who hold that the testimony of witnesses is not to be accepted if there is no lawsuit (*khuṣūma*) and that there is no lawsuit if the aggrieved party who has the right to sue is not present during the legal proceedings. Consequentially, the *ḥadd*-penalty of amputation lapsed and the Supreme Court applied article 321 (1) - referring to non-*ḥadd* theft - convicted Akul to three and a half years in prison instead.[1151]

The possibility of a private settlement (ṣulḥ)

Further, the thief will not be amputated – if proven guilty – as long as the rightful owner of the stolen good does not demand his amputation before the judge and reclaims the restitution of the stolen property. This rule is the leading opinion among the Ḥanafites, the Shāfi´ites and Ḥanbalites.[1152] The Mālikites do not make the claim of restitution and the initiation of a lawsuit by the owner a precondition for the amputation. What the effect of a private settlement (*ṣulḥ*) between the aggrieved party and the *ḥadd*-thief is has not been solved originally by the Sudanese legislator. A decision of the Supreme Court, however, shows, that a private settlement does not exempt the culprit from punishment:

On November 20, 1987 the plaintiff Mīrghanī Aḥmad Maḥjūb reported to a police post that the defendant Burhān Sīlāsī and others had stolen from him gold jewelry worth 90.000

[1150] The Arabic reads: "*...fī ´arā` fī mauqif ´arabāt...*"

[1151] See SLJR (1990), Government of the Sudan vs. Muḥammad Bārūd Akul. Conspicuously, the court chose not to discuss the question of whether the money was indeed stolen from a *ḥirz*. The absence of *ḥirz* could certainly have served as a second line of argument in defense of the lapsing of the *ḥadd*.

[1152] Compare ´Awad (2001), vol.2, pp. 614-615 and Peters (2005), p. 57.´Awad quotes a second opinion among the Ḥanbalites concurring with the Mālikites. There is also a discussion among the *fuqahā`* on who can initiate the legal proceedings (*man yamluk al-khuṣūma*). All schools agree that the rightful owner (*mālik al-māl*) can do so. It is controversial, however, whether other persons having property in their custody on behalf of the rightful owner may start legal proceedings for *sariqa ḥaddiya*. See `Awad (2001), vol.2, p. 614.

Sudanese Pounds. After the arrest of the accused it appeared that part of the gold had been sold to the second defendant Qarīb Allah Bashīr and the third defendant Ṣadīq ´Abd al-Karīm Bashīr Muṣṭafa after the charges had already been filed. In a subsequent court hearing the defense lawyer argued that the plaintiff had given up his rights with respect to the second and third defendant. The responsible court, however, refused to acknowledge this settlement (*ṣulḥ*) on the grounds that the case touched upon public rights (*ḥaqq ´āmm*) and that no private person was authorized to renounce such rights. After the case had been appealed the Supreme Court finally decided that in cases of *sariqa* and crimes related to it a private settlement is not permissible (*lā yajūzu al-ṣulḥ fīhā*) because they are being considered crimes against the public order and the interests of the society. [1153] Such crimes, as well as crimes against the state, are exempted from settlement under the meaning of article 270, PC83. In all other crimes private settlement is permitted as long as it does not contradict the *sharī´a*. In other words, such settlement, in cases of *sariqa* and related crimes[1154] does neither stop criminal proceedings nor a possible conviction. It must be noted here that according to criminal circular 98/1983 the *ḥadd*-penalty in *ḥadd*-theft cases only lapses if the thief has returned the stolen goods before charges have been filed. This concurs with the general rule in the *fiqh* that once a case has been made known to the authorities concerned and the aggrieved party has asked for the application of the *ḥadd*-punishment the victim of the theft cannot pardon the defendant.[1155]

Legal uncertainties and the lapsing of the ḥadd *in the Penal Code 1983*

The Penal Code 1983 foreclosed the *ḥadd*-penalty when the victim and offender are ascendants and descendants, close relatives whose marriage is precluded (*maḥārim*) or spouses. No *ḥadd* was to be promulgated either when there was doubt about the ownership of the stolen good (*shubhat al-milk*). However, the code left it to the judge to interpret what constitutes *shubhat al-milk*.[1156]

The short and deficient list of reasons to remit the *ḥadd*-penalty for *ḥadd*-theft, as given by the legislators of the Penal Code 1983, moved the Sudanese Chief Justice to supplement it and emit a criminal circular specifying more valid reasons in such case, based on various *aḥadīth*.

[1153] SLJR, 1989, Government of the Sudan vs. Burhān Qabr Silāsī and others.
[1154] This necessarily includes *sariqa ḥaddiya*.
[1155] See Peters (2005), p. 57. Compare also Layish (2002), p. 271.

The circular[1157] added the following reasons for the remittance of the *ḥadd*-penalty: 1. if the crime has been proven by a confession of the culprit only and he withdraws his confession. 2. if the witnesses withdraw their testimony. 3. if the victim of the theft denies the confession of the thief to having committed *sariqa* or he denies the testimonies of the witnesses. 4. if the stolen good comes into the possession of the thief either by way of gift (*hiba*) or inheritance or any other way that transfers the rights of possession (upon him). 5. if the thief returns the stolen good before the notification of the *qāḍī* (*balāgh*). 6. if the thief is forced to take the stolen good by necessity (*ḍarūra*). 7. if the victim of the theft (*al-masrūq minhi*) pardons the thief before the notification of the *qāḍī*.

This criminal circular is important inasmuch as it clearly shows how criminal circulars are not only giving guidelines to the judges for the interpretation of the laws. The supplementary character of the criminal circular in question moreover demonstrates that criminal circulars are used as a quasi-legislative tool to correct the obvious flaws and omissions of the Penal Code 1983.

*Two cases of necessity (*ḍarūra*) entailing the remittance of the* ḥadd*-penalty*

With regard to the notion of necessity (*ḍarūra*), two judgments of the Supreme Court define what can be assumed as constituting a state of necessity and what can not. In the first case[1158] from 1984 the guest of a hostel in a village in Eastern Sudan had forgotten to take his trouser with 140 Sudanese Pounds in its pocket when checking out of the hostel. When he returned to the hostel the money had been taken. Subsequently the police arrested several suspects and found the money in the bag of one of them. The suspect admitted in a court session (*fī majlis al-qaḍā'*) to having stolen the money and was sentenced by the province judge to a *ta'zīr*-punishment on the grounds that he had not eaten his breakfast that day and that he was unemployed without any source of income. The Supreme Court did not find the statements of the defendant convincing. After consulting various sources of the *fiqh*, it came to the conclusion that the state of necessity had not been convincingly proven, based on contradictions in the statements of the defendant. The documents submitted to the Supreme Court did also not clearly give sufficient information on the state of unemployment of the

[1156] Compare art. 323, PC83.

[1157] manshūr jinā'ī raqm 98/1983. Muḥammad Aḥmad Khalīfa Ḥāmid: mausū'a al-manshūrāt al-jinā'īyya, al-juz' al-thālith, al-Kharṭūm 2002.

defendant and when and whether he had eaten the day of the crime. The Supreme Court thus decided to uphold the conviction as such, but to nullify the punishment. It ordered the documents to be returned to the Province Court (*maḥkama mudīriyya*) in order to search for further evidence, which possibly would establish a state of necessity beyond doubt.

The judgment seems problematic on account of the original conviction under article 322 (2) that necessarily would have been amputation and not the prison term promulgated by the lower court and upheld by the Court of Appeals. If the court decides that the *ḥadd*-punishment amputation lapses due to one of the reasons given in the criminal circular 98/1983 – in this case necessity (*ḍarūra*) – then automatically the conditions for the *ḥadd*-crime have not been fulfilled. In consequence another article such as e.g. article 322 (1) - non-*ḥadd* theft - should have been applied.[1159] Secondly, the question of whether taking money out of a trouser found in a hostel constitutes the violation of *ḥirz* is not even discussed. The mere act of finding money and taking it – in contrast to surreptitiously taking it with criminal intention from a *ḥirz* - would not be regarded as fulfilling the conditions for *ḥadd*-theft by the majority of Sunni schools. There is thus no need to search for reasons to have the *ḥadd*-punishment lapse if the conditions for it are not met in the first place. Finally, with respect to the question of necessity, the judgment or, rather the lack of a final judgment in our particular case, shows that criminal circular 98/1983 is taken seriously by the Supreme Court. However, the Supreme Court did not accept the mere claim of necessity as sufficient grounds for the remittance of the *ḥadd*-punishment without further and convincing substantiation.

In a second case from 1985[1160] the Supreme Court once more dealt with the notion of necessity (*ḍarūra*) in a case of *ḥadd*-theft.[1161] The details of this case are as follows: the defendant, a certain Shu´aibū Sa´īd Muḥammad hid in the shop of the plaintiff, i.e. the shopkeeper, shortly before closing time. After the shop owner had left his shop the defendant made a hole into the cash register (*khazīna al-qurūsh*) and took 4993 Sudanese Pounds. He then waited until morning and sneaked off after the owner had reopened his shop, believing that the defendant had entered after him. The defendant then concealed the stolen money in his house where the police found it.

[1158] See Government of the Sudan vs. Faḍl Muḥammad Nūr, SLJR 1984.

[1159] Compare with other cases in this section where this rule has been applied.

[1160] The case falls into the reign of the Transitional Military Council under Siwār al-Dhahab. Under al-Dhahab, those convicted under the September Laws remained in prison. *Ḥadd*-penalties such as simple and cross-amputations continued to be imposed but their execution was suspended. See Köndgen (1992), p. 61.

On the strength of the facts the Province Court of al-Qaḍārif convicted the thief under article 322 (2) – *ḥadd*-theft - to amputation of the right hand. The convicted, however, appealed and the case was referred to the Supreme Court via the Court of Appeals Kassala. The convicted justified his appeal on the grounds that he was a carpenter who owned a workshop and that the tools necessary to earn his livelihood had been stolen from him. In consequence of his ensuing plight he had had to divorce his wife because he was unable to provide for her. He further brought forward that he was responsible for five sisters and brothers still going to school and a father unable to move and therefore earn a living.

In its review the Supreme Court remarks that the defendant had not cited as evidence any of the above-mentioned arguments during the proceedings of the court of first instance, nor, in consequence, any proof of it. On the other hand the court of first instance had not inquired about any circumstances that would have made the *ḥadd*-penalty lapse. Article 170 of the Code of Criminal Procedure, giving the defendant the right and the opportunity to produce witnesses in his favor, had also not been applied. After reviewing the conditions proposed by the *fuqahā'* with respect to the state of necessity and its impact on criminal responsibility and the ensuing penalty the Supreme Court comes to the conclusion that the defendant cannot convincingly assert his claim of necessity. Even if he could establish a state of necessity, the court argues, this would neither justify his deed nor lift the punishment on him. This because according to the *fiqh* the punishment is only removed in cases of theft of food or drinks and only if not more is stolen than what is necessary to satisfy the need. In other words, the Supreme Court deemed that all conditions for *sariqa ḥaddiyya* had been met.

Nevertheless, despite all conditions being fulfilled, the Supreme Court found a loophole to avoid amputation. Quoting ʻAbd al-Qādir ʻAwda it states that the thief who is not in a state of necessity (*ghair muḍṭarr*) will be punished with a *taʻzīr*-punishment only in a year of famine. Thus, the thief will not be amputated on the condition that he does not find anything (i.e. food or drinks) to buy or that he does not find the necessary means to buy it with.[1162] In order to establish that the theft had been committed in a year of famine, the Supreme Court quotes the head of state during the time in question, Siwār al-Dhahab, president of the Transitional Military Council, who had announced in April 1985 that the Sudan was suffering from a famine. In consequence, the Supreme Court reasons, the famine at the time of the theft can be

[1161] See Government of the Sudan vs. Shaʻībū Saʻīd Muḥammad. SLJR (1986).
[1162] ʻAwda (2001), Vol. 2, p. 610.

accepted to be common knowledge (*ʿilm ʿāmm*) and therefore judicial knowledge (*ʿilm qaḍāʾī*) to a degree that no further proof was needed. Further, the court argues that the crime had happened six months after that announcement and that the state of Sudan had not, at the time of the revision by the SC, announced that the state of famine had indeed ended. In conclusion, the Supreme Court abolished the penalty of amputation and ordered the court of first instance to promulgate a *taʿzīr*-penalty after giving the defendant an opportunity to explain his specific circumstances further.

This surprisingly lenient judgment seems to be rather far-fetched with regard to its *fiqh*-based justification. While someone who steals food and/or drinks is held to limit his theft to what he needs to survive, the culprit in this particular case had stolen several thousand Sudanese Pounds. It can hardly be argued that he committed the theft to buy the edibles necessary to secure his physical survival. However, survival could be understood here in a different sense. The thief had told the court how his tools, necessary to make a living, had been stolen from him, how the absence of these tools were the root cause of his plight and how he had tried before to find the money to buy new tools. In other words, the fact that the culprit stole far more than he needed to buy food can only be justified if survival is understood as long-term survival through securing one's livelihood. The Supreme Court does not go that far in its justification and keeps silent as to the rather high amount of money stolen. It should be noted here that this rather lenient judgment was taken under specific political circumstances. The introductory phase – September 1983 until the deposition of Numairi – had seen the bulk of all *ḥadd*-punishments ever promulgated in the Sudan. The frequency and its underlying political motivation had met with substantial criticism in the country. Thus, under the Transitionary Military Council the frequency of *ḥadd*-punishment already started to subside. It is thus not unlikely that the Supreme Court's decision was influenced by the political atmosphere in the Sudan in the years 1985-1986.

Developing new reasons for the remittance of the ḥadd *in Supreme Court case law*

In another case[1163] the Supreme Court decided to remit the *ḥadd*-penalty for *ḥadd*-theft and thus extended through its case law the list of reasons for remittance proposed in article 323 PC83 and in the criminal circular 98/1983. The facts of the case can be summarized as

[1163] Government of the Sudan vs. Al-Sirr Mīrghanī Khalīfa and others, SLJR 1986.

follows: three young thieves, who had confessed to their crime in a court session, had climbed over the outer wall of the plaintiff's shop, broken its inner door, smashed the strongbox and stole its content whose value exceeded by far the *niṣāb*. Two of the defendants were 16 and 15 years of age respectively and thus deemed under age.[1164] Both were convicted under article 67, PC83, to detention in a reformatory for five years. The third defendant, however, was convicted to amputation of the right hand since he was considered to be of age. The court also ordered that the stolen goods had to be returned. After the third defendant had appealed his conviction it was medically established that he was 20 years old and not 17 as he had claimed before. In other words, it was not possible to deem him a minor and thus have the *ḥadd*-penalty lapse. However, in analogy to other similar cases a solution was found in the *fiqh*. While Mālik and Shāfi´ī hold that in cases of joint *ḥadd*-theft the adult thief has to be amputated even though the minor is not, Abū Ḥanīfa and Imam Zufar both are of the opinion that the *ḥadd*-penalty on the adult thief must lapse because it lapses on his under age fellow. Even though, the court reasons, it cannot decide which of the two different opinions is the legally sounder one, a legal uncertainty is established. On the base of this legal uncertainty and the well-known *ḥadīth* "avert the fixed penalties with legal uncertainties" the court decided to avert the *ḥadd* imposed on the third defendant by the court of first instance and to commute his sentence, under article 322 (1) to thirty lashes, a fine of thirty Sudanese Pounds and a prison term of two and a half months. Regarding the other two, minor, defendants the Supreme Court decided their immediate release since article 67 PC83 provides for a term in a reformatory for the minor recidivist only and both had been first-time thieves.

Punishment of ḥadd*-theft in the Sudanese Penal Codes since 1983*

The PC83 stipulates that whoever commits *sariqa ḥaddiyya* is punished with amputation (*qaṭ´*) without further specifying which limb is to be amputated, which side of the limb, nor what happens to someone who is convicted for the same crime a second or even a third time.[1165] Its successor codes become more specific. The draft Criminal Bill 1988 specifies that the hand from the joint is to be amputated and in the Criminal Act 1991 *ḥadd*-theft is punished with the

[1164] The Supreme Court decision does not give any further information on whether they had been undergone a medical examination as to physical signs of adulthood.
[1165] See PC83, article 321.

amputation of the right hand.[1166] Whoever is convicted for *sariqa ḥaddiyya* for a second time will receive a prison term of a minimum of seven years in both codes.[1167] The CA91 has thus chosen to mitigate the severe consequences for the recidivist of *ḥadd*-theft as provided for in the *fiqh*. At the same time it has substantially improved on the rather imprecise wording of the predecessor code 1983. As mentioned art. 321 (1) had neither specified which limb was to be amputated[1168], nor had it formulated a provision to punish the recidivist. The judge thus had little choice but punishing each *sariqa ḥaddiyya* with amputation of a limb.[1169] Both codes cannot, however, escape the inherent imbalance between the severe punishment of amputation for theft, if fulfilling the conditions of a *ḥadd*-crime, and – in comparison – the rather lenient punishments of other, related crimes. Extortion by death threat, for example, was punishable with a prison term of up to seven years according to the PC74.[1170] This punishment was replaced by the ubiquitous formula "will be punished by flogging and fine and a prison term" in 1983. In the CA91, finally, the legislator has chosen to readopt a prison term of up to seven years, as in 1974, as a punishment for extortion by threat of death.[1171]

Punishment of the accomplice

One of the problems pertaining to *ḥadd*-theft is the question to what degree the co-perpetrators of *sariqa ḥaddiyya* are guilty and punishable. The Penal Code 1983, being in most of its parts a faithful translation of its 1974 predecessor, stipulates in article 78: "When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone". In other words, the general principle of the Penal Code 1983 is that little distinction is made as to those who committed the different elements of the act and their effect on the ensuing criminal liability. Such reasoning is not compatible with the *fiqh* with regard to *ḥadd*-theft. In the deliberations of the *fuqahā'* it is extremely important who has committed which act, precisely

[1166] Art. 171 (1).
[1167] CA91, art.171(1) and (2).
[1168] The Qur´ān (5:38) leaves it open whether the right or the left hand is to be cut off. See also Heffening (1997), p. 62.
[1169] Scholz (2000), p. 450.
[1170] PC83, art. 329.
[1171] And possibly a fine. CA91, art. 176 (3).

because it has a decisive influence on the criminal liability of each culprit. A 1990 decision of the Supreme Court delineates the intricacies of this problem with regard to *ḥadd*-theft:[1172]

In September 1986 a court in Atbara sentenced the defendant Khalafallah ʼAbd al-Laṭīf ʼAbdallah to a prison term of five years and a fine of a thousand Sudanese pounds under article 322 (1) – theft from residential premises - in conjunction with article 458 (3), which allowed for a *taʼzīr*-penalty, even without explicit text, in cases where the *ḥadd* had been averted by a legal uncertainty. In the same trial a second defendant, a certain Yūsuf ʼAbdallah Sālim, was sentenced under article 322 (2) – *ḥadd*-theft from residential premises – to amputation of the right hand from the wrist. The case can be summarized as follows: in July 10, 1986, at night, both defendants had broken into the shop of the plaintiff by way of opening a whole in the shop's roof through which the second defendant entered and left after stealing a certain amount of money and two packs of cigarettes. ʼAbdallah Sālim was caught the same day and in his possession the amount of money in question and the cigarettes were found. He confessed to the theft as such and upheld his confession throughout all stages of the trial. In its review the Supreme Court judges considered the conviction under article 322 (2) of the second defendant to be incorrect. It reasoned that the committed crime rather fell under article 395 PC83, dealing with "lurking house-trespass or house-breaking by night." This on the grounds that the conviction had relied on the unretracted confession of the second defendant according to which he had helped his accomplice to make the hole in the roof of the shop but had not entered it. In fact he blamed his accomplice who had received a prison term as punishment for having entered the shop and taking the money. The Supreme Court accepted the account and decided that the defendant ʼAbdallah Sālim could not be convicted to amputation because he had not entered the *ḥirz* and not cooperated in taking the stolen money out of it. According to the *fiqh*[1173] there is agreement that the helper in a case of *ḥadd*-theft will only be amputated if he helped to take the stolen property out of the *ḥirz*. If the help consisted in something else such as breaking the door or opening it with a counterfeit key or breaking the walls in order to enter the *ḥirz* or help in carrying the stolen property after it had been taken out of its *ḥirz*, then the helper is not liable to amputation on the grounds of a legal uncertainty (*shubha*) but to a *taʼzīr*-penalty. In application of these rules the Supreme Court

[1172] See SLJR (1990), Government of the Sudan vs. Khalfallah ʼAbd al-Laṭīf and others.
[1173] The SC judges quote ʼAwda, vol. 2, p. 251.

decided to change the conviction of the second defendant to be under article 395 PC83, choosing a lifelong prison term in conjunction with banishment as a punishment.

This final judgment aptly illustrates the various problems the introduction of *sharī´a* / *fiqh* elements into the Sudanese Penal Code and its subsequent application pose: a closer look at article 395 PC83 shows that it belongs to the set of articles which, in the PC74, under the title "Of Criminal Trespass" had regrouped a variety of crimes related to trespass and punishing these crimes with prison terms corresponding to the weight of the crime and/or fine. Basically, as in most other cases, the PC83 has simply translated these articles but – as a token of Islamization - replaced the old punishments with new ones taken from ICL. Thus, the old article 395 moderately punished "whoever commits lurking house-trespass by night or house-breaking by night" with imprisonment for a term up to three years and possibly with a fine. As in the cases described above, the Sudanese legislator had added extremely harsh punishments and makes the same crime now punishable with the capital punishment or cross-amputation or a life sentence with banishment. In other words it punishes a crime that does not qualify as a *ḥadd*-crime as if it were one and thus disregards the definitions of the *fuqahā´*. With regard to our particular case the Supreme Court judge meticulously applied the rules of proof for *ḥadd*-theft and correctly reached the conclusion that amputation must lapse because of a legal uncertainty. The judge subsequently chose another article whose wording was closer to the crime in question. Paradoxically, the chosen article 395 is also punishable with two different *ḥadd*-punishments - capital punishment and cross amputation - and harsher ones for that matter than the one originally chosen. In order to avoid a more severe punishment than the original amputation the judge was forced to impose a life sentence with banishment.[1174] However, article 395 offers a range of punishments, ostensibly applicable according to the severity of the case. Apart from the necessity to find a non-*ḥadd* punishment, the judge does not explain how the severity of the crime relates to the life sentence with banishment. It is also disputable whether a life sentence with banishment is a "lighter" punishment than amputation. Moreover, it remains unclear, why only one of the two defendants would be judged under article 395 and not both since there were no witnesses and the individual degree of participation in the crime of each one of the defendants could not be established beyond doubt. According to article 239, Criminal Procedure Act 1983, the

[1174] The judge Yūsuf Daf´allah might have had qualms when he formulated "...*wa hiyya ´uqūba mulzima lā khiyār lanā fīhā*".

Supreme Court and the Court of Appeal had the right to revise any decision of a lower court and correct it when it was in contradiction to the *sharī´a*. The revision process in this particular case obviously only concerned the second defendant who was sentenced to amputation. However, by making the *ḥadd*-penalty lapse, the punishment of the first defendant and the article under which he was sentenced should have been revised as well. A moderate prison term in analogy with the one given to the first defendant would have also been possible in accordance article 458 (3) PC83 – invoked in the judgment itself - and with the criminal circular 98/1983.[1175]

4.4.3 Ḥadd-*theft in the Criminal Bill 1988 and the Criminal Act 1991*

The 1988 Criminal Bill, even though it was never accepted by the Sudanese parliament, served as a kind of test run and became - in a slightly modified version - in 1991 the new Criminal Act[1176], taking into account criticism which had been directed against the lack of faithfulness to the *sharī´a*.[1177] The text of article 170 CA91 now reads: "There shall be deemed to commit the offence of *ḥadd*-theft whoever covertly takes, with the intention of appropriation, any moveable property belonging to another, provided that the property shall be taken out of its *ḥirz* and be of a value not less than the *niṣāb*."

It strove to remedy most of the flagrant flaws of the PC83 and thus vastly improved in comparison with its immediate predecessor.[1178] While 1983 the stolen property had to be taken with an evil intention (*bisū` qaṣdin*), 1988/91 the wording has changed to "with the intention of appropriation" (*qaṣd al-tamalluk*) and has thus become more precise and closer to the *fiqh*. Most importantly, the two codes introduced the notion of *ḥirz*, which had been conspicuously absent in 1983, providing a definition of *ḥirz* which covered both, the *ḥirz bil-makān* and the *ḥirz bil-ḥāfiẓ*.[1179] While the notion – inherent in the *fiqh* - that the theft has to be committed covertly was still absent in the 1988 Criminal Bill, it has been introduced in the

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[1175] See Ḥāmid, mausū´a, al-juz al-thālith, manshūr jinā`ī raqm 98/1983, musaqiṭāt ḥadd al-sariqa. Article 458 (3) gives the judge a lot of latitude. It reads "If the *ḥadd* is averted by a legal uncertainty, the imposition of any other *ta´zīr*-punishment is allowed even if it is not explicitly stipulated in this law..."

[1176] As to my knowledge no Criminal Procedure Act, nor an Evidence Act had been prepared by the same committee in 1988.

[1177] Compare art. 173 (1-5), Criminal Bill 1988 and art. 170 (1-6), Penal Code 1991. See also Scholz (2000), pp. 436-437.

[1178] Concerning the intentions of its authors see, mudhakira irfāq al-qānūn al-jinā`ī lisana 1991 (m).

[1179] Art.173 (1) and (3), CB1988, art. 170 (1) and (4), PC83.

CA91 into the definition of *sariqa ḥaddiyya*. The definition of surreptitiousness,[1180] however, now includes covertly violating the *ḥirz* and the seizure of property openly (*akhdh al-māl mujāhiratan*) or forcibly (*mughālibatan*)". Both notions do not fall under the meaning of "covertly" as defined in the *fiqh*.[1181] In the *fiqh* the entire theft has to be carried out in a surreptitious manner, not only the violation of the *ḥirz*.

Both codes have further introduced a provision to the effect that "property belonging to another includes public property, property of religious endowments (*auqāf*) and places of worship".[1182] In the case of public property the two codes have codified a minority opinion of the Mālikites (see above). As to the property of places of worship, the Penal Code 1991 equally adopts the opinion of the Mālikites who hold that the mosque must be considered a *ḥirz* because of its door (*al-masjid ḥirz libābihi*) and therefore anyone who steals mosque property such as candles, mats and carpets is liable to amputation if the *niṣāb* is reached.[1183] The *niṣāb* is now in concordance with the teachings of the Ḥanafites set at one gold dinar of 4,25 gr. or its countervalue in money.[1184]

A Supreme Court case defining ḥirz

Concerning the meaning of *ḥirz*, an important case can be found in the Sudan Law Journal and Reports (SLJR).[1185] Two defendants, on August 9, 1991, had entered an uninhabited government-owned building in New Halfa and had stolen a double bed, a closet, and other household items. Subsequently to the theft they had sold or given the stolen goods to three different persons who all were indicted under article 181 CA91 for having received stolen property. In a first decision the Trial Court in New Halfa had convicted the two defendants under articles 21 (criminal joint acts in execution of criminal conspiracy and (174 (2) (punishment for non-*ḥadd* theft). At the Court of Appeals Kassala the sentence of the lower

[1180] Art. 170 (2), Penal Code 1991.
[1181] Compare Baradie (1983), p. 112
[1182] Art. 173 (2), CB88, art. 170 (3), CA91.
[1183] Al-Jazīrī (2004), vol. 5, pp.147. The Ḥānafites do not consider a mosque to be a *ḥirz* and therefore do not deem the stealing of candles, mats and the like to constitute *sariqa ḥaddiyya*. The Shāfi´ites argue between the Ḥānafites and Mālikites and distinguish goods, such as the mosque´s door, (unlit) candles, for the stealing of which amputation is due and other goods, such as prayer mats prepared for using or lit candles, because both are for the benefit of Muslims and each Muslim has a right (of co-ownership) in analogy to his right in public property (*falahu ḥaqq kamāl bait al-māl*).
[1184] Its countervalue in money is established by the Sudanese Chief Justice and announce by way of a judicial circular.
[1185] See SLJR 1992, Government of the Sudan vs Antūniū Sharīk Kūnj and others.

court was rejected and the papers were sent back for revision in order to reach a conviction for joint *ḥadd*-theft, since, in the opinion of the Court of Appeals all conditions of *sariqa ḥaddiyya* were met in the case. In its deliberations the Appeals Court remarked that in his definition in article 170 (4) the legislator stipulated that a *ḥirz* is to be understood as a *ḥirz al-makān*, i.e. a safe place "where property is kept or the manner in which the particular property or similar types thereof are normally kept, or that of the custom of the people of the country or the particular profession". In other words, the court specifies, the *ḥirz bil-makān*, which is normally a secure room in a more general sense, is more specifically defined here as a *ḥirz al-mithl* or a safe place where a particular good or property is normally kept, e.g. money inside a room and a riding animal inside a stable.[1186] However, in its last passage, article 170 (4) says: "...and property shall be deemed to be in *ḥirz* whenever it is guarded" (*yu´add al-māl fī al-ḥirz ḥaithumā kāna maḥrūsan*). This passage is not meant to be either limiting (*muqayyidan*) nor explaining (*mufassiran*) the meaning of the notion of *al-ḥirz bil-makān* as stated in the beginning of the article. Rather it is to be understood as a supplement. Therefore it is not possible, so the Court of Appeals tells us, to understand the text – as the lower court did whose decision it is correcting - in the sense that property has to be guarded (*maḥrūs*) in order to be deemed to be in a *ḥirz*. In other words, all guarded property (*māl maḥrūs*), is to be considered in a *ḥirz*, even if it is not in a *ḥirz bil-makān*. Reversely, if all conditions of *ḥirz bil-makān* are fulfilled, the property does not have to be guarded to be considered to be in a *ḥirz*. After the retrial at the lower court both defendants were sentenced to amputation of the right hand from the wrist for *ḥadd*-theft under article 171(1) CA91 on the strength of their confessions.

The Supreme Court, in its revision, raises two pivotal questions. Firstly, on the establishment of the *niṣāb* and, secondly, on the nature of the *ḥirz*. Decisive for its own decision was the first one with respect to how the minimum value of the stolen good, the *niṣāb*, as a necessary precondition for a conviction for *ḥadd*-theft can be established. The New Halfa prosecution had estimated the value of the stolen goods to be 11.985 Sudanese Pounds and had backed up its assumption by invoices and declarations of the respective shops. Importantly, the two

[1186] In the Ḥanafī school the nature of the *ḥirz* is controversial. Some believe that a *ḥirz* must be the safe place normally used for the good in question. Thus a house is a *ḥirz* for money and jewellery, a fence is a *ḥirz* for sheep and a stable is a *ḥirz* for riding animals. A second opinion among the Ḥanafites holds that a *ḥirz* can serve as such for all kinds of property, e.g. while a stable is obviously a *ḥirz* for riding animals it can also serve as *ḥirz*

defendants did not confess to the value of the stolen property and the first court (*maḥkama kubrā*) acquitted those who had either bought or otherwise received the stolen goods while it convicted the two main defendants for non-*ḥadd* theft.

Interestingly, the Supreme Court reasoned that the confession of the two defendants, while it is to be considered a vital element for a conviction for *ḥadd*-theft, was deficient in this particular case in the sense that the defendants had not admitted to reaching or exceeding the minimum value (*niṣāb*) in what they had stolen. Moreover, they did not, as expressed in their confession, even understand this value, "...and normally the thief does not understand the value of the property he is stealing, unless the stolen property is equivalent to money he can calculate and compute". The judge further backs his reasoning by quoting a *ḥirāba*-case from 1986 where the SC had decided that the *ḥadd*-penalty could not be imposed if the defendants did not confess that the value of the stolen goods was equivalent or higher than the minimum value.[1187] The court also rejected the validity of the invoices and other documents produced by the prosecution - and accepted by the Court of Appeals. None of these documents and invoices had been assessed by two witnesses of good reputation under oath and acting as evaluating experts (*muthammin*). It would have been the task of the prosecution to employ such experts in order to produce such indirect evidence (*shahāda ghair mubāshira*). Had the value of the goods been evaluated, it would have been necessary, the court opined, to take into account the price at the date when the goods were bought and not the value when they were stolen. This because the original selling price had been moderate and did, at the time, not exceed the *niṣāb*, the judge reckons. The latter assumption seems to be contradicting the Supreme Court's own reasoning since it categorically excludes the knowledge of the judge based on what he has seen, heard, deduced from or based on his impressions as a base on which the value of the stolen good can be determined.

In other words, the Supreme Court interprets the nature of the confession in a sense that makes it compulsory on the defendant(s) to not only confess to *ḥadd*-theft in general but also to confess to having had knowledge as to the value of the stolen property reaching the *niṣāb*. Whether each single element of *ḥadd*-theft as defined by the *fuqahā`* needs to be part of the confession remains unclear. The judgment does not mention whether the thieves confessed to

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for money and jewellery. See ´Awda (2001), vol.2, pp. 579-580. Compare also Bahnasī, (1991), mausū´, vol.2, ḥirz, pp. 149-164 and Bahnasī, (1988), jarā`im, pp. 20-34.

[1187] See Government of the Sudan vs. Isḥaq Muḥammad Arbāb and others. SLJR 1986.

having known that they stole from a *ḥirz* for example. Rather, the SC seems to have come to its conclusion with regard to the ḥirz by assessing the facts without further corroboration through the confession. Thus, in order to prove *sariqa ḥaddiyya* the prosecution is not only bound to prove all necessary elements, such as stealth, criminal intention, the movability of the good, that the stolen property had been taken from a *ḥirz* etc.; in order to reach a conviction – under the condition that the conviction is based upon a confession - the culprit has to confess that he has known and has been aware, during the execution of the crime, that the value of the stolen property reached or exceeded the minimum value for *ḥadd*-theft.
The lower court, in the justification of its judgment had come to the conclusion that the condition of *ḥirz* according to article 170 (4) had not been fulfilled, because the government premises in question had not been inhabited and thus had not been guarded. The Supreme Court, however, reasoned otherwise and saw the *ḥirz* as firmly established. The culprits had confessed that they had entered a closed government building after climbing a wall, opening the outer door with a screw driver, unbolting a second door and finally taking the stolen property out of a room. The Supreme Court thus followed the opinion of the Appeals Court in the question of the *ḥirz*, while pointing out that the two defendants had not confessed to a vital element in the constitution of *ḥadd*-theft. It therefore returned the case to the Trial Court in order to impose a *ta´zīr*-punishment under article 174(2) for non-*ḥadd* theft.

Legal uncertainties and the lapsing of the ḥadd *in the Criminal Bill 1988 and in the Criminal Act 1991*

The 1988 draft code improved on and widened the rather short list of reasons for remitting the *ḥadd*-penalty for *ḥadd*-theft. It also served, as in most other instances, as a model for the Criminal Act 1991. In fact, the wording of the draft code and the CA91 as to reasons for the remittance of the *ḥadd* for *sariqa* are almost identical and will therefore be quoted here once only.[1188] Theft between spouses, ascendants and descendants and those relatives who cannot marry (*arḥām*) still does not fall into the *ḥadd*-category.[1189] Neither can be punished with amputation who "is in a case of necessity (*ḍarūra*) and does not take from that property more than what is sufficient to satisfy his need or the needs of his dependents...and not exceeding

[1188] The text quoted is the version of the CA91.
[1189] Compare CB88, art. 175 (1) (a) and CA91, art. 172 (a).

the minimum (*niṣāb*).[1190] Where the offender has or believes in good faith to have a share in stolen property, and such stolen property does not exceed that share with what amounts to the *niṣāb* the *ḥadd*-penalty is remitted.[1191] The same is true "where the offender has an unsatisfied debt by the victim of the theft and the victim is unwilling to pay, or is dilatory, and the debt is due before the theft and the amount of money stolen by the offender is equal to or more than his debt by more than the *nisab*".[1192] The *ḥadd*-penalty is remitted where the offender restitutes to the victim his alleged stolen property before being brought to trial and declares his repentance or becomes the owner of the alleged property in question and, in addition to that, he is not previously accused or convicted of offences against property.[1193] A retraction of the confession by the offender before the execution of the penalty entails the remittance of the *ḥadd* if the theft has been proved by confession only.[1194] Finally, the *ḥadd*-penalty also lapses when the offender is permitted to enter the *ḥirz* or when the amputation threatens the life of the offender or if his left hand is amputated or paralyzed.[1195]

Despite a rather differentiated list of legal uncertainties important inconsistencies with the *fiqh* can be observed. Most importantly, stolen property in the sense of article 170 includes – for reasons of political expedience - public property and property of *awqāf* and places of worship. In the *fiqh*, however, stealing public property is not considered to be *sariqa haddiyya*, but *ghasb* (usurpation).[1196] In the prevailing opinion of the *fuqahā`* the *ḥadd*-penalty for *sariqa* lapses even if the creditor takes property surpassing the debt in value and regardless of whether the debt was due or not. Article 172 (d) CA1991 in comparison allows for the lapsing of the *ḥadd*-penalty only if a creditor steals from his debtor after the debt is due.

Other legal uncertainties found in the *fiqh* have not been taken into consideration. Ḥanafites and Ḥanbalites teach that the *ḥadd*-punishment lapses for a group of offenders who conjointly committed *sariqa* and if a close relative of the victim is among them. The Ḥanafites even hold that the punishment lapses if a minor or a mentally ill person is part of the group.[1197] More

[1190] CB88, art. 172, art. 175 (1) (b).
[1191] Compare CB88, art. 175 (c) and CA91, art.172 (c).
[1192] CB88, art. 175 (d) and CA91, art. 172 (d).
[1193] Compare CB88, art. 175 (e) and CA91, art. 172 (e). It should be noted here hat the CB88 had been more lenient with regard to restitution. In 1988 the *ḥadd* was remitted when the offender restituted the stolen property before conviction.
[1194] Compare CB88, art. 175 (f) and CA91, art. 172 (f).
[1195] See CB88, articles 175 (g), (h) and CA91, articles 172 (g) and (h).
[1196] Baradie (1983), p. 113.
[1197] Baradie (1983), p. 115.

importantly, according to all schools, the total value of the stolen property must reach the *niṣāb* for each of the thieves.[1198] However, the CA91 stipulates that if the total of the value of the stolen property accumulates to the *niṣāb* the *ḥadd*-penalty is due.[1199] Furthermore, 1983 and 1991, the general provisions about joint criminal acts provide for equal punishment of each of the offenders.[1200] There are some other points, discussed in the *fiqh*, but omitted in the CA91. Thus, the stolen good must be capable of being owned[1201] and – according to the Ḥanafites - must be storable. The stealing of non-storable items, even if their value surpasses the *niṣāb*, does not result in the *ḥadd*-punishment.[1202]
In the case of the remittance of the *ḥadd*-penalty the offender can be punished with a prison term of up to seven years and a fine and possibly a whipping of up to 100 lashes.[1203]

Measuring the niṣāb *with respect to collective theft*

Finally, both codes introduce a new provision clarifying that if a group of thieves has stolen collectively, not the value of what each individual thief has taken will be taken into account in order to establish the *niṣāb* but rather the total sum of the stolen property.[1204] The *fuqahā´* agree that if the *ḥirz* has been violated by every single thief and all other conditions of *sariqa ḥaddiyya* are fulfilled and if each one of them has stolen what amounts to the *niṣāb* for each individual thief, then all of them will be subject to amputation.[1205] However, in the case that the *niṣāb* is only reached by the group of thieves collectively Islamic jurisprudents differ. The Ḥanafites and the Shāfi´ites hold that each thief must be judged according to his individual guilt and since the individual thief does not reach the *niṣāb*, the conditions for amputation are not met. The Mālikites are of the opinion that amputation is due if the thieves had to cooperate in the stealing. If the theft would have been possible for each one of them (without cooperation with the others) opinions differ. The first opinion maintains that they still should

[1198] Heffening (1997), p. 63.
[1199] Art. 170 (6).
[1200] See PC 1983, art. 80 and CA 1991, art. 21. Compare Scholz (2000), p. 74.
[1201] Kidnapping of a free person does not entail the *ḥadd*-penalty because free persons cannot be owned. The stealing of goods from Muslims which they are not allowed to own in the first place – e.g. wine or pork -, does also not entail the *ḥadd*-punishment. However, the stealing of the same goods from a non-Muslim, can amount to *sariqa*. See Peters (2005), chapter 2.6.2. and Baradie (1983), p. 110.
[1202] Peters (2005), chapter 2.6.2. and Baradie (1983), p. 110.
[1203] CA91, art. 173.
[1204] Art. 173 (5) CB88 and art. 170 (6) CA91.
[1205] For the opinions of the four Sunni schools on joint theft, see Al-Jazīrī (2004), vol. 5, pp. 151-152 and ´Abd al-´Azīz (1997), pp. 368-370.

all be amputated, while the second opinion holds that if each of the thieves took part of the booty none of them should be amputated unless it reached the *niṣāb*. The Ḥanbalites, finally, advocate the amputation of all of the thieves, even if the *niṣāb* is reached collectively only, in order to protect the society against criminal gangs. In other words, the Sudanese legislator has chosen to codify a minority opinion based on the Ḥanbalites and to some degree on the Mālikites.[1206] It goes without saying that the reaching of the *niṣāb* and a conviction of *sariqa ḥaddiya* thus has been greatly facilitated. Not only does this run contrary to the principle of restricting the application of the *ḥadd*-punishments, it also simply applies the provisions on "criminal joint acts in execution of criminal conspiracy" which provide for joint responsibility and therefore an equal punishment of all who partake in the act.[1207]

4.4.4 Summary and conclusion

In summary, the Penal Code 1983 had introduced offences related to theft and punishable by amputation which according to the classical *fuqahā´* would not have amounted to *sariqa*.[1208] By creating a virtual class of new *ḥadd*-crimes, it had thus – as in other instances[1209] – considerably expanded the potential applicability of *ḥadd*-punishments. At the same time, the code had omitted important notions of *sariqa ḥaddiyya* in its definition of the crime and only admitted a small number of legal uncertainties as grounds for the lapsing of the punishment.

In comparison, the successor code 1991 has improved on most accounts in terms of reflecting majority opinions of the *fiqh* and its spirit more faithfully. It has introduced in its definition the important notions of surreptitiousness and *ḥirz*, which are pivotal elements in the classical definition. It has further largely augmented the number of recognized legal uncertainties causing the *ḥadd*-penalty for *sariqa* to lapse. However, in two important provisions the code conflicts with the *fiqh*. It does not insist on a second amputation for the recidivist offender and, of larger consequence, it explicitly makes theft of public property punishable by

[1206] Some Western authors simply quote the "herrschende Lehre", thus – possibly involuntarily - giving the impression that a certain provision has no base in the *fiqh*. However, whether or not a certain prescription is derived from the *fiqh* can only be said with certainty when majority and minority opinions of all (Sunni) schools are shown in a synopsis. To illustrate my point compare above with Scholz (2000), p. 450.

[1207] See art. 80 PC83, art. 21 CB88 and art.21 CA91. Generally speaking, in the *fiqh* "persons are punished for their own acts, except in exceptional cases such as e.g. the *qasāma* procedure, collective punishment is not allowed. Compare Peters (2005), p. 20.

[1208] Art. 324 provides for amputation of whoever commits a theft and previously prepares for the killing, hurting or kidnapping of the victim. See Köndgen (1992), p. 115, art. 4.1.

[1209] Art. 318, a allowed for the death penalty and crucifixion or cross-amputation of brothel proprietors or souteneurs caught a second time. See Köndgen (1992), p. 106.

amputation if all prerequisites are fulfilled. While the former, most likely, has little practical importance, the latter, for reasons of political expediency, substantially widens the definition of thefts punishable by amputation. Further, the meaning of surreptitiousness as defined in the CA91 has been restricted to the violation of the *ḥirz*, while in the *fiqh* the entire theft has to be carried out covertly. The applicability of *ḥadd*-theft, thus is widened. Inconsistent with the majority opinion in the *fiqh* is also the provision that establishes in cases of collective theft the *niṣāb* to be the total sum of the stolen property. In other words, by codifying a minority opinion – of the Mālikites – the establishment of the *niṣāb* in cases of joint theft has been considerably facilitated. In a landmark decision the Supreme Court solved several questions as to the establishment of the *niṣāb* and the nature of *ḥirz*. It decided that invoices as such, without further testimony by experts, were not admissible in proving that the *niṣāb* has been reached. However, if experts do confirm that the stolen amount has reached or exceeded the *niṣāb* such indirect evidence is admissible. Secondly, the defendant(s) have to admit to having had knowledge that they stole an amount equivalent or higher than the *niṣāb*. The *ḥadd*-penalty can only be imposed if the culprits admit to having known at the time of the theft that they were stealing an amount reaching the *niṣāb*. With respect to the notion of *ḥirz*, the same decision clarified a misreading of 170 (4) of a lower court. It stated that property does not necessarily have to be guarded in order to be in a *ḥirz*. Thus, even an uninhabited building can be deemed constituting *ḥirz*.

With regard to proof the relevant laws 1983 and 1991 have not specified the important notion of "good reputation" for witnesses in *ḥadd*-cases. However, a criminal circular clarified that a witness is assumed to be of good reputation until there are indications contradicting this assumption. In effect, the court does not bear the burden to gather information as to the trustworthiness of a witness in *ḥadd*-cases. The admission of women and non-Muslims as witnesses in cases of *ḥadd*-theft is not backed by scholars of the four Sunni schools. It strongly enhances the likelihood that *ḥadd*-theft can be proven, even though a missing male witness has to be replaced by two women. The admission of non-Muslim witnesses has a special relevance with regard to the particular ethnical structure of Sudanese society. Obviously the Sudanese legislator feared that in cases were only non-Muslims were concerned or the witnesses were non-Muslims, *ḥadd*-theft would regularly go unpunished.

The Supreme Court has further ruled that no *ḥadd*-penalty can be imposed when the aggrieved party has either not instituted legal proceedings against the defendant or is not present during

the trial. However, the prosecution of the crime as such is deemed to be in the public interest and in such case a *ta´zīr*-punishment is due. Public interest also takes precedence over a private settlement. A private settlement (*ṣulḥ*) between plaintiff and defendant does not exempt the latter from punishment since cases of *sariqa* and cases related to it are deemed to harm the public interest.

The Criminal Act 1991 has only partially managed to improve its provisions with respect to the punishment of *ḥadd*-theft. While the recidivist is now spared a second amputation – in contradiction to the majority opinion of the *fuqahā`* - it also suppressed most if not all of the newly created *ḥadd*-crimes the PC83 had proposed. These had been diametrically opposed to the spirit of the *fiqh* and the limited number of *ḥadd*-crimes recognized by Islamic jurisprudence. However, a gross imbalance between the severe punishment of *ḥadd*-theft and related non-*ḥadd* crimes, especially in relation to *sariqa*, remained also in the CA91. These contradictions had led to serious inconsistencies in the emerging body of case law, especially in the period prior to the introduction of the CA91.

Since the PC83 provided judges only with a very limited list of reasons for the remittance of the *ḥadd*-penalty a subsequent criminal circular supplemented this list. Next to the criminal circulars Supreme Court decisions filled other gaps. Thus the Supreme Court came to the conclusion that a state of necessity can be invoked in years of famine even if the stolen goods far exceeds what is needed to satisfy one's immediate needs. In a case of joint theft the SC decided that the *ḥadd* lapses for all offenders if part of the group is minor and thus criminally not responsible.

Most of the reasons for the remittance of the *ḥadd* in cases of *ḥadd*-theft which had been regulated earlier by criminal circular found their way into the CA91. Thus, correcting the above-mentioned SC decision, a case of necessity can now only serve as a reason for the lapsing of the *ḥadd*, if not more is stolen than what is necessary to satisfy one's needs. While the CA91 improves in terms of introducing a wider list of reasons for the lapsing of the *ḥadd*, the *shubha al-milk* of stealing public property is not among them. Most probably for reasons of upholding public security and order, the stealing of public property can entail amputation if all conditions of *ḥadd*-theft are otherwise met.

This synopsis of case law and legislation concerning the crime of *ḥadd*-theft as it developed as of 1983 has highlighted an, often contradictory, array of laws and SC decisions. The selection of provisions derived from Islamic jurisprudence is highly diverse. At times a

majority opinion is codified, at times a strong minority opinion among the four Sunni schools of law and in one case even opinions of non-Sunni schools are codified. While after 1983 case law and criminal circulars served to supplement a deficient legislative body, many of the flaws of the September laws have been rectified in the Criminal Act 1991. However, even though the importance of criminal circulars and the case law of the Supreme Court regarding *ḥadd*-theft seem to have gradually subsided in the 1990s and after, landmark decisions of the SC still continue to fill important gaps left by the CA91 and the EvA93 to some degree. Given the multitude of provisions and legal opinions in the *fiqh* which have not been codified but which can nevertheless serve as a frame of reference, this process is likely to continue for years to come. Conspicuously, a large majority of the published cases discussed here, and these are available in the courts of the country and serve as guidance, have ended with the remittance of the *ḥadd*-penalty. Layish, analyzing mainly the years 1983-1985, has correctly stated that judges of the Court of Appeals and the Supreme Court applied ICL in a more restrained and liberal manner than judges of the lower courts. Thus, judges of the lower courts have in these years, in most cases, treated pickpocketing (*nashl*) as *ḥadd*-theft and sentenced the thieves to amputation under article 321 (2) PC83.[1210] Indeed, in the case of *ḥadd*-theft his conclusion still holds true for the years including 1986 and after on the level of the SC. Not only does the majority of the discussed decisions end with the remittance of the *ḥadd*, the Supreme Court judges also at times go out of their way to avoid amputation. In the absence of regulations concerning many of the more subtle details of ICL they use their pivotal position to facilitate the lapsing of the *ḥadd*-punishment amputation and to exacerbate the proof of *sariqa ḥaddiyya*. Whether or not Supreme Court case law has a tangible influence on the quantity and quality of the promulgation of the *ḥadd*-punishment amputation by the lower courts is, however, beyond the scope of this study.

4.5 Highway robbery (*ḥirāba*)

4.5.1 Ḥirāba *in the* fiqh

The crime of *ḥirāba*, as expounded in the *fiqh*, is based on Qur´an 5:33-34: "The only reward of those who make war upon Allah and His messenger and strive after corruption in the land will be that they will be killed or crucified, or have their hands and feet on alternate sides cut

[1210] See Layish (2002), p. 271.

off, or will be expelled out of the land. Such will be their degradation in the world, and in the Hereafter theirs will be an awful doom; Save those who repent before ye overpower them. For that Allah is Forgiving, Merciful."

In the *fiqh ḥirāba*[1211] is a rather complex offence and divided into five different crimes entailing varying punishments:[1212]

1. In its most simple form *ḥirāba* or *qaṭ´ al-ṭarīq* consists of a hold-up on a public road in order to take away property from passers-by by force. However, despite the criminal intention of robbing, in this particular form of *qaṭ´ al-ṭarīq* no property is actually being stolen and nobody gets hurt. Therefore, no *ḥadd*-penalty is imposed, the crime is classified as a *ta`zīr*-offence.

2. A second form of *ḥirāba* or *qaṭ´ al-ṭarīq* consists in the hold-up described above in combination with the scaring of passers-by (*ikhāfa al-sabīl*) on a rural road, i.e. outside a city or settlement. The attackers who must be stronger, use arms and prevent their victims to continue their journey.[1213] Again, nobody gets killed and no property is taken away. According to the majority opinion in the Ḥanafite and Ḥanbalite schools this crime is punishable by banishment. The Shāfi´ītes give the judge the freedom of choice between banishment or a *ta´zīr*-penalty. The Mālikites allow for the most severe punishments based on Qur´an 5,33. Here the *qāḍī* has the choice between capital punishment, crucifixion, cross-amputation and banishment.

3. Robbery, i.e. the taking away of property during a hold-up in a remote location where help can not be expected, is punishable by cross-amputation. The Mālikite school allows for one of the punishments mentioned in Qur´an 5:33 – execution, crucifixion, cross-amputation, but not banishment. 4. Homicide in the context of a hold-up without property being taken away is punishable by execution with the sword. Since the death penalty is a *ḥadd*-punishment here the pardon of the victim's heirs is without effect. The Mālikite school allows for crucifixion before the execution. 5. The most aggravated form of *ḥirāba* is the hold-up combining homicide and robbery. This will be punished by the draconian punishment of execution and crucifixion, the order of which is controversial, as well as whether cross-amputation should take place before execution.[1214] Should the offender, guilty of a hold-up murder, repent before

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[1211] Also *muḥāraba* or *qat´ al-ṭarīq*.

[1212] I follow the classification suggested by Baradie (1983), pp. 118-119. See also Peters (2005), pp. 57-59, El-Awa (1982), pp. 7-10, Bahnasī, al-jarā`im, p. 80 et sqq. and ´Awda (2001), vol. 2, p. 638 et sqq.

[1213] Peters (2005), p. 57-59.

[1214] Compare Baradie (1983), pp. 117-122, Safwat, (1982), pp. 165-166 and Krcsmárik, (1905), p. 335.

being arrested, the *ḥadd*-punishment lapses and the crime will be treated like a *qiṣāṣ*-offence. The heirs of the victim can either insist on the execution of the offender or demand the payment of *diya*. Since the heirs can also forego the *diya*, the *qāḍī* still has the right to impose a *ta´zīr*-punishment.[1215]

Finally, the *fiqh* recognizes legal uncertainties in the context of *ḥirāba*. Is among the victims a close relative of the perpetrator or has the deed been committed against a *musta´min*, the *ḥadd*-punishment lapses. The majority opinion rules that *ḥirāba* is punished collectively and whoever takes part in it is liable for the consequences, independent of what his actual part in the crime was. The Shāfi´ites, however, opine that each of the perpetrators can only be held responsible for his contribution to the crime.[1216] According to Abū Ḥanīfa the collective liability also takes effect in the reverse, i.e. the *ḥadd*-penalty lapses for all, if it can not be imposed on one of the offenders.[1217] Further, the *ḥadd*-penalty can not be imposed, according to the Ḥanafites, if the victim or his heirs are not present in court to have their claims heard.[1218]

Proof of ḥirāba in the fiqh

In analogy to *sariqa* the proof for *ḥirāba* can consist in a confession or in a testimony following the same conditions.[1219] There is dissent on whether a confession has to be made once or twice. While Abū Ḥanīfa and Shāfi´ī are content with one confession, the Ḥanbalites and Abū Yūsuf require two. If the confessor withdraws his confession before amputation - and the conviction is based on that confession only - the amputation lapses.[1220] The Mālikites accept the testimony of the aggrieved party, i.e. the victims, against those who robbed them.[1221]

Further conditions concerning offender, victim and deed

The offender must be adult and understanding (*´āqil*). Some *fuqahā`* stipulate that he must as well be male, since *ḥirāba* normally is not committed by women due to the gentleness of their

[1215] Köndgen (1992), p. 118.
[1216] Baradie (1983), p. 121.
[1217] Peters (2005), pp. 57-59, Baradie (1983), p. 121.
[1218] Baradie (1983), p. 121.
[1219] Compare Bahnasī, jarā`im, pp. 75-80.
[1220] Bahnasī, jarā`im, p. 76.
[1221] Compare Supreme Court cases quoted below.

hearts (*riqqat qulūbihinna*) and the weakness of their physical constitution.[1222] As to the victim of *ḥirāba* he can be either a Muslim or a *dhimmī*, since the property of both is protected (*ma´ṣūm*). If the victim is a *musta´min*, however, some hold that his property is not protected and in consequence of that the *ḥadd* is not due. Further, the victim must either be the owner of the stolen good or his authorized representative or his trustee. Finally, there must be no kinship between the offender and the victim.

As to the deed itself, it is necessary that the conditions of *sariqa* are fulfilled. The stolen good must be valuable (*māl mutaqawwam*), it must be inviolable (*ma´ṣūm*), and the *muḥārib* must not have any claim to it. The stolen good also must have a minimum value (*niṣāb*) and be kept in a safe place (*ḥirz*) by its owner.[1223]

4.5.2 Definition and punishment of ḥirāba *in the Penal Code 1983*

In the Penal Code 1983 the *ḥadd*-crime *ḥirāba* / *muḥāraba* / *qaṭ´a al-ṭarīq* has not been codified consistently with the opinions of the *fuqahā´*. As a matter of fact, the three terms are not being used at all in the relevant section of the PC83. Instead, as in other instances, the PC83 adopts to a large degree the pertinent texts of the 1974 predecessor code and, in an effort to Islamize the inherited material, simply changes its echeloned prison terms and fines to either a selection of the severe punishments designed for *ḥirāba* or to the ubiquitous formula „flogging and fine or prison“. The legislator seems to have reasoned that the chapter „Of Robbery and Brigandage“ (articles 332-346) of the 1974 Penal Code sufficiently covered the different crimes banditry (*ḥirāba*) is composed of. However, a comparison of the *fiqh´*s prescriptions with the Penal Code 1983 reveals a certain number of important differences as to the definitions of the crimes. Further, as will be shown below, in most cases the Islamic punishments attached to the different forms of robbery and brigandage are rather problematic in several respects. In order to identify the main differences between the *fiqh* and the Penal Code 1983 we shall take a close look at the five different crimes (see above) *ḥirāba* consists of. Beginning with the first form of *ḥirāba*, i.e. its most simple form, a hold-up on a public road without property taken away nor homicide nor grievous hurt, we observe that it is as such not codified in the PC83. Neither is the same crime in its second form, i.e. in combination with the scaring of passers-by (*ikhāfa al-sabīl*). The first form, in a sense being

[1222] Bahnasī, jarā`im, p. 85.
[1223] Bahnasī, jarā`im, pp. 85-86.

the least common denominator of *ḥirāba*, is to be punished by a *ta´zīr*-penalty only in the *fiqh*. Even though the most simple form of *ḥirāba* devised by the *fuqahā`* was not explicitly defined in the PC83, it was covered to some degree by the article defining „Attempt to commit robbery“.[1224] While the Penal Code of 1974 punished attempts to commit robbery with imprisonment for a term which could extend to seven years and possibly also a fine[1225], the punishment for the same offence in 1983 changed to the mentioned formula “flogging and fine and prison term”. It should be noted here that the 74/83 formula of attempted robbery lacks - despite some similarities – important elements of the two simpler forms of *ḥirāba* as described above. Thus the attempt of robbery does not have to be committed on a public road and it is not necessary that weapons have to be drawn to scare the victims. Attempted robbery as defined by the PCs 74/83 can also take place inside a city. The opinion of the *fuqahā´* concerning this matter is divided. Abū Ḥanīfa does not allow for a *ḥadd*-penalty if the crime happens within a city, unlike Mālik and Shāfi´ī who make the *ḥadd*-punishment compulsory in such cases.[1226]

The second form of *ḥirāba*, including the scaring of passers-by without the taking away of property is not explicitly defined in the PC83 either. It would also have fallen under “attempt to commit robbery” (art.335, PC74/83) even though the element of “scaring passers-by” is not explicitly mentioned in the pertinent definition. Again, in the *fiqh* the majority holds that the hold-up has to take place outside a city, i.e. on a rural road, that the attackers must be stronger and use arms. None of these elements are to be found in 1983. Containing an aggravating element this second form of ḥirāba consequentially entails a more severe penalty in the *fiqh*. The Mālikites even allow for capital punishment, crucifixion, cross-amputation and banishment.

We shall look now at the third kind of *ḥirāba*, the taking away of property during a hold-up in a remote location where help cannot be expected. Ironically, robbery committed on a highway between sunset and sunrise had been defined and made punishable as an aggravated form of robbery by article 334, PC74. It would have been obvious to adapt its wording to make it even more compatible with the form of *ḥirāba* under discussion here. However, the legislator of the PC83 chose to suppress any further specification and to turn the original header “Robbery”

[1224] PC83, article 335.
[1225] PC74, article 335.
[1226] Bahnasī, jarā`im, p. 88.

into "Punishment of robbery" (*ʿuqūbat al-nahb*), stipulating the maximum punishment for robbery to be execution or execution with crucifixion or cross amputation or life sentence with banishment. The definition of the crime itself is to be found under the headers "When theft is robbery" and "When extortion is robbery" (article 332). Both definitions had been adopted almost verbatim from the PC74 and lack – in order to make them *fiqh*-compatible - similar ingredients as "attempted robbery" described above. The definitions of theft as robbery and extortion as robbery do not refer to theft/extortion on a highway, outside a city where help can not be expected, a precondition specified by a majority of the *fuqahāʾ*, with the exception of the Mālikites.[1227] Not specified are the use of weapons or whether the crime must be committed at a certain time of the day or night respectively. However, it should be noted that all of these points are disputed in the *fiqh*[1228]. Importantly, the definition of robbery in the context of *ḥirāba* necessarily must include all conditions of *sariqa ḥaddiyya*. In other words, the stolen good must be valuable (*mutaqawwam*) and inviolable (*maʿṣūm*), its value should reach the *niṣāb*, that the *muḥārib* must not have any claim to the stolen good and so forth.[1229] Since the Arabic text of article 332, PC83, "when theft is robbery" does not mention *sariqa ḥaddiyya* but simply refers to "theft" (*sariqa*), an important element of *ḥirāba* is missing.

Concerning the fourth form of *ḥirāba* – homicide in the context of a hold-up without property taken away – it can be found under the article "brigandage with voluntary homicide"[1230] only. If committed as part of a hold-up of a group, the whole group, i.e. each one of the perpetrators of the robbery will be tried for the crime, which is punishable by execution with crucifixion or cross amputation. The range of possible punishments is thus reduced to the two harshest ones. Neither can the culprits be sentenced to execution only nor to a lifelong prison sentence.

In comparison to its 1974 predecessor the 1983 text does not specify the minimum number of culprits which make up a "group." In 1974 in order to commit "brigandage with murder" the minimum size of the group had to be five persons who were held collectively responsible. They all would have received either the death punishment or receive as a maximum a life sentence. The absence of a clear definition of "group" in 1983 means in fact that the minimum number of perpetrators in 1983 has gone down to two. Just like in 1974 they are

[1227] See Bahnasī, jarāʾim, p. 82.
[1228] Compare Baradie (1983), p. 119.
[1229] Bahnasī, jarāʾim, p. 86.

held collectively responsible, irrespective of who actually committed the homicide. Conspicuously, robbery in conjunction with voluntary homicide committed by a single perpetrator is not covered by the PC74 and, in consequence, has also been omitted in the PC83. It was thus left to actual jurisdiction to decide whether a single robber/murderer would be liable to the harshest punishments as prescribed by article 332 and the *fiqh* respectively.

Last but not least it is important to mention that "brigandage" (1974) or in its 1983 version "*nahb bi al-ishtirāk*" cover joint robbery as well as attempted joint robbery. In other words the severe punishments of execution in conjunction with crucifixion or cross amputation apply irrespective of whether property has indeed been taken away. If no property has been taken away the crime likened to the fourth form of *ḥirāba* as described above. However, it seems that a single perpetrator is not covered by the definition of the article and it remains unclear which article of the PC83 was meant to be applied in cases of single perpetrator robbery or *ḥirāba*. The same uncertainty occurs if property has been taken by a single perpetrator and a voluntary homicide has occurred during the robbery. If one is to follow the wording of article 338, PC83, a single perpetrator can not fall under the definition of brigandage/joint robbery with voluntary homicide. It seems that the 1983 legislator has left an important lacunae and simply omitted to define one of the severest crimes in the *fiqh*.

Ḥirāba-*related* ḥadd-*punishments stipulated for other crimes*[1231]

Some other property offences in the PC83 entail the same *ḥadd*-penalty as the one for robbery (*nahb*). Thus, each recidivist in cases of theft, robbery and fraud will be punished with the capital punishment or capital punishment with crucifixion or cross amputation or a life sentence and banishment, even though fraud is not a *ḥadd*-crime in the *fiqh* and theft would not be punished by penalties reserved for aggravated forms of *ḥirāba*.[1232] The same severe punishments which the *fuqahā`* reserved for *ḥirāba* apply in cases of (attempted) hurt or (attempted) homicide during a burglary.[1233] They also apply to all accomplices of a nocturnal burglary in the course of which an (attempted) intentional homicide or an (attempted) intentional assault happened.[1234] For both crimes the PC74 had stipulated a maximum prison

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[1230] Article 338, PC74/83.
[1231] For the following also compare Köndgen (1992), pp. 122-123.
[1232] See article 362 (e), PC83.
[1233] Article 398, PC83.
[1234] Article 399, PC83.

term of 14 years. It is also noteworthy at this point that, with the exception of capital punishment and crucifixion, all of these punishments were also applicable to a range of other crimes which are clearly not *ḥadd*-crimes as meant in the *fiqh*, e.g. burglary with the intention to commit theft.[1235] The latter crime was punishable by a prison term of up to ten years in the PC74.[1236] Further, the most severe punishments such as capital punishment with or without crucifixion, cross amputation or life imprisonment can be imposed on whoever belongs to a criminal gang formed in order to contravene the Sudanese Penal Code (of 1983) or "any other Sudanese law" or whose deeds are a danger for people, property, public peace or are corrupting public life (*ifsādan lil-ḥayāt al-ʿāmma*). It goes without saying that the legislator had thus widened the definition of a criminal gang to an extent that also political groupings can be punished with the harshest punishments in ICL, originally reserved by the *fuqahāʾ* for certain forms of *ḥirāba*. Similar to other *ḥadd*-crimes – see e.g. the article on the promotion of prostitution - we thus observe that *ḥadd*-penalties are being introduced for offences which do not belong to the group of classical *ḥadd*-crimes. It should be noted that the extended applicability of *ḥadd*-punishments also has the effect of reducing the great difference in the punishment of *ḥadd* and non-*ḥadd*-crimes of a similar nature. In addition, besides sharply contradicting the provisions of the *fuqahāʾ,* this assimilation often led to unduly harsh punishments, with little regard to the severity of the crime. At the same time illustrations provided in 1974 to direct the application of certain articles were neither adopted nor replaced in 1983, thus eliminating a useful tool for guiding the interpretation of ambiguous texts.[1237]

Ḥirāba-*cases in the Supreme Court as of 1983*

With the above-described incongruities the legislator of the Penal Code 1983 had created a veritable juridical maze. It was left to the Supreme Court to interpret legislation concerning robbery and try to make sense of the multifold contradictions between its pre-1983 heritage and its newly added Islamic punishments. However, as the following decisions of the Supreme Court will demonstrate, reconciliation between secular and Islamic law was hardly possible once they combined within the same article.

[1235] Article 393, PC83.
[1236] Compare also articles 394 and 396, PC83.
[1237] See for example the illustrations of articles 323 and 344, Penal Code Act 1974, omitted in 1983.

First case

In the first case of 1984, while the plaintiff was sitting in a corral for cattle in the presence of two witnesses, a person managed to snatch away the plaintiff's Samsonite case with 19000 Sudanese Pounds inside.[1238] The thief subsequently entered a car where four or more accomplices were waiting for him. The car then was pursued by several other cars driven by witnesses of the crime, who, in turn, were shot at by the passengers of the thief's car. When the thief's car finally broke down all passengers - except the defendant, who was overpowered by his pursuers and some bystanders - managed to escape. The case, the money and weapons were retrieved from the car and the defendant was indicted under article 339 (joint robbery or robbery with the attempt to cause death or bodily harm) and sentenced to a life term and banishment. Subsequently, the verdict was reviewed by the court of appeals (*maḥkama isti`nāf*), which annulled the decision and turned it back to a regional court (maḥkama mudīriyya). The regional court then sentenced the defendant under articles 339 to be read in conjunction with article 333 to cross amputation.

In its review the Supreme Court tried to answer three questions. Firstly, whether the crime joint robbery (*nahb bi al-ishtirāk*) was indeed to be considered *ḥirāba* here and whether thus the punishment cross amputation was justified. Secondly, if indeed the case was to be treated as a case of *ḥirāba*, whether the minimum requirements for the proof of *hirāba* were fulfilled. And, thirdly, if these minimum requirements were fulfilled, whether indeed there was to be assumed a joint liability (*mas´uliyya taḍāmuniyya*) of all perpetrators of the crime and those connected to it under which the *ḥadd*-punishment cross amputation was justified. The Supreme Court answered all three questions in the affirmative. We shall analyze now which arguments have been used to reach a confirmation of the conviction for *ḥirāba* under article 339, joint robbery (*nahb bi al-ishtirāk*).

With regard to the first question the Supreme Court judges admit that there is a contradiction between the definition of *ḥirāba* by the *fuqahā`* and the crime at hand. Thus, the Ḥanafites, the Ḥanbalites and the Shāfī´ites hold that among the constitutive elements of *ḥirāba* is the taking of property by way of a fight (*´an ṭarīq al-mughālaba*), neither covertly nor by way of rapid seizure or snatching (*khaṭfan*). If the stolen good is taken secretly, the perpetrators are deemed thieves (*wa hum surrāq*) and if the good is stolen secretly and the perpetrators escape, the

[1238] Government of the Sudan vs. `Ādam Ḥasan Ismā´īl, SLJR (1984), 1984/17.

perpetrators are deemed robbers (...*fahum muntahibūn*) who shall not be amputated (*lā qaṭ´ ´alaihim*). Despite the fact that the stolen good was not taken by way of a fight or by force but snatched away (*khaṭfan*) from inside a corral for cattle and thus not on a highway outside a city, the Supreme Court comes to the conclusion that the constitutive elements for *ḥirāba* are indeed given. It reasoned that the existence of a gang of five or more members was clear proof for their readiness to use violence if needed, e.g. if the rightful owner of the stolen good would insist on the return of his property. It further based its conclusion on the writings of two Muslim scholars, Abū Zahra and `Abd al-Khāliq al-Nawāwī. Abū Zahra argued that gangs of thieves and terrorist organizations in America and Europe commit their crimes "in a heinous way" (*ghīlatan*), i.e. not openly, but covertly. Their crimes, however, are well known and made public and therefore it is justified to follow the minority opinion of the Mālikites (who do not insist that the robbery is committed by way of force). Nawāwī, in turn, maintains that the authoritative verse of the Qur´an also, next to *ḥirāba*, covers a range of other crimes such as crimes against state security, kidnapping, gangs of drug dealers etc. Contrary to the reasoning of the Supreme Court several elements of the crime can be identified that leave either room for a legal uncertainty (*shubha*) or are outright in opposition to the majority opinions of the *fuqahā`*. Firstly, the stolen good had not been taken by force but snatched away. Force was used only during the escape. Secondly, the case with the money was stolen from inside a corral for cattle, while it is a constitutive element of *ḥirāba* that a holdup takes place on a public road. Thirdly, during the theft no weapons were used to intimidate the rightful owner of the stolen good. Fourthly, the circumstances of the case do not conclusively indicate that the gang who escaped in the car was actually superior in strength. On the contrary, despite their being armed they were pursued and forced to escape, while neither the victim of the theft nor the witnesses who participated in the pursuit were hurt.

The Supreme Court also answers the second question - whether *ḥirāba* has been proven according to article 78, Evidence Act – in the affirmative. It has to admit, however, that none of the witnesses had actually seen the culprit taking the Samsonite case in question or carrying it during any later stage of the crime. The Supreme Court judges also conceded in their conclusion that the Supreme Court itself had ruled earlier that the witnesses in *ḥadd*-crimes – in compliance with article 78 of the Evidence Act 1983 – necessarily had to give testimony to *all* elements and incidents of the crime. In this particular case, however, the Supreme Court held that if there were more witnesses available the minimum requirement

(*niṣāb*) for the proof of the *ḥadd*-crime could also be fulfilled by separate testimonies of each set of witnesses on different incidents of the crime. The Supreme Court based its reasoning on the assumption that the "split testimony approach" does not contradict article 78, Evidence Act 1983, which specifies the necessary number of witnesses for the proof of *ḥadd*-crimes. Indeed article 78 does not specify that *the crime as a whole* has to be testified to by one set of witnesses only. The court considered the guilt of the defendant proven, relying on the testimony of two male witnesses who testified to the theft as such, i.e. the snatching away of the Samsonite case by an unspecified male. Two *different* witnesses, however, gave testimony to the subsequent pursuit by car, the use of guns against their pursuers by the fleeing gang and their final capture. Both testified to having seen the defendant in these stages *subsequent to the theft*. The defendant brought forward the defense that he had entered the car only after the theft. This was rejected by the court as not credible.

The third question the court also answered in the affirmative is the question of joint liability and how it can be established. While it could not be proven that the defendant actually stole the case, nor that he kept it within the car nor that he used force by shooting at the pursuers, the court saw it as proven that the defendant indeed had been part of the gang and thus present at all stages of the crime. Even though the defendant claimed that he had entered the car only after the theft, he nevertheless confessed that he had been inside the car during parts of the flight. Since article 333, joint robbery, also made those liable who are helpers in committing the crime and the attempt to escape with the stolen money is considered to be part of the crime, the defendant fell under article 339, PC83, joint robbery with the attempt to cause death or bodily harm. And, in conclusion, since, in this particular case, joint robbery (*nahb bi al-ishtirāk*) is equivalent to *ḥirāba*, and the joint liability (*mas´ūliyya taḍāmuniyya*) of the defendant is proven, the *ḥadd*-punishments stipulated in article 339 are applicable according to the deliberations of the Supreme Court.[1239] Last, but not least, the court quotes Mālik, Abū Ḥanīfa and Aḥmad ibn Ḥanbal who are of the opinion that next to the direct perpetrator of *ḥirāba* also the helper, to whom the *muḥārib* turns to when escaping, the assistant (*mu´īn*) and the vanguard (*ṭalī´a*) are punishable by *ḥadd*.[1240]

[1239] For a confirmation of the principle of joint liability in cases of *ḥirāba* see also Government of the Sudan vs. ´Alī Muḥammad Balah and others, SLJR (1986), 1405/208.
[1240] Compare ´Awda (2001), Vol.2, p. 666.

As we have shown, the Supreme Court went a long way to prove that the decision of cross amputation was justified. While each of the three parts of its argument contains major flaws - as discussed above - it has also become clear that the origin of these methodological problems lies foremost in the problematic legislation the Supreme Court had to deal with. Confronted with the incompatibility of a *ta´zīr*-crime combined with a *ḥadd*-punishment in the same article it saw no other way but to associate the *ta´zīr*-crime *nahb* with the *ḥadd*-crime *ḥirāba*. Only if *nahb* and *ḥirāba* fall into one under certain conditions, or so the court reasoned, the *ḥadd*-punishment for *nahb* is justified. Islamic jurists, however, were meticulous when it came to the definition of crimes. *Ta´zīr*-crimes and *ḥadd*-crimes have clearly distinguished definitions, punishments and ways of proving them. *Nahb* thus can never be equivalent to *ḥirāba*, neither in its definition nor in its punishment.

It should also be noted that the Supreme Court judges and also the judges of the lower courts could have resorted to Article 3 of the Judgments Basic Rules Act 1983 meant to guide the judges in their interpretation of the Islamized legislation. Article 3, hardly ever invoked during the time the PC83 was applied[1241], allows the judge to have recourse to any legal rule confirmed by a text in the Qur´an or the Sunna if there exists no text the case at hand can be solved with. Article 2 (a), however, confirms that the judges must assume that the legislator did not have the intention to be inconsistent with the Islamic *sharī´a*. Of course the Judgments Basic Rules Act 1983 does not account for the many contradictions between the *fiqh* and the Penal Code. If article 2 of this act is to be taken seriously, i.e. if the principles and the spirit of the *sharī´a* should have precedence in cases where terms and expressions (of the positive legislation) have to be interpreted, then a judge would have to take *nahb* for what it stands for in the *fiqh*. This approach would not solve the contradiction between crime and punishment. One could, as explained above, punish *ḥirāba*, through having recourse to article 3 of the Judgments Basic Rules Act. For the crime of *nahb* (robbery) the *ḥadd*-punishments of *ḥirāba* would still be applicable.

[1241] As to my knowledge article 3 was only invoked once in order to justify the execution of Maḥmūd Muḥammad Ṭāhā for apostasy in the absence of an article in the PC83 defining *ridda*.

Second case

In a second landmark decision[1242] the Supreme Court was confronted again with the question of what exactly the features of *ḥirāba* were and, in a more general sense, how the contradiction between *ta´zīr*-crimes and *ḥadd*-punishments for such crimes could be solved in the practice of jurisdiction.

In the case under discussion the sequence of events, based mainly on the initial confession of the defendant, can be summarized as follows: the defendant, a construction worker, living in a village called al-Siqāī walked at midnight to the village club and found the gate to the courtyard open. He then dislodged the bolt of the locked door of the club's main room and entered the room. There, in turn, he found a television set placed inside an iron case (*ṣandūq ḥadīd*). He forced the case open with tools he had brought along and took the television set, worth 370 Sudanese Pounds. He then climbed the wall of the room and also took the aerial. Carrying the television set and the aerial he left the club and stopped a passing car asking its driver to take him to Kharṭūm. The suspicious driver then took the defendant straight to the police where he was interrogated. During questioning the defendant first claimed that the television set was his but then admitted to having stolen it from the club's premises.

In a first decision the district judge (*al-qāḍī al-juz`ī*) found the defendant guilty of *ḥirāba* under article 396 – lurking house-trespass or house breaking by night in order to commit a *ḥadd*-crime - and sentenced him to a life sentence with banishment in a remote prison (*fī aḥad al-sujūn al-nā`iyya*). In a second step the Court of Appeal confirmed the conviction but revoked the punishment because the district judge had overstepped his authority. According to art. 18 (1) (e) a district judge can only impose a maximum prison sentence of one year. The case was then returned to a lower court which a second time sentenced the defendant to a lifelong prison term. When the case reached the Court of Appeal for a second time it changed the applicable article from 396 to 321 (2) – *sariqa ḥaddiyya* - and convicted the defendant to amputation of his right hand from the wrist. The Court of Appeal had come to the conclusion that the defendant was not be considered to be a *muḥārib*, but rather a thief whose deed fulfilled the conditions of *sariqa ḥaddiyya*. In the request for review by the Supreme Court the defendant claimed that the police had forced him to confess which was deemed an implicit retraction of the confession by the Supreme Court.

[1242] Government of the Sudan vs. Muḥammad ´Abd al-Shāfi´ Sākin. SLJR 1984, No. 10/1984.

In its deliberations on the case the Supreme Court first tries to answer the question of whether indeed article 396 is to be applied ("...and it is the article which punishes the crime of *ḥirāba*...")[1243] or whether the case was to be considered under article 322(2) – *ḥadd*-theft from a residential building. After giving due consideration to the different elements the Court comes to the conclusion that all elements of article 396 such as house-trespass and house-breaking at night and the perpetration of a *ḥadd*-crime (*sariqa ḥaddiyya*) were indeed fulfilled. Secondly, the Court pondered over the question of whether the crime committed was indeed *ḥirāba* which would have entailed one of the *ḥadd*-punishments stipulated under article 396. Or, put differently, whether the imposition of one of these punishments was compatible with the Islamic *sharī´a* under the circumstances of this particular case. The Court in its deliberations then denies that the crime committed amounts to *ḥirāba* because constitutive elements of *ḥirāba* were missing. Thus, the perpetrator did not carry any weapons on him, did not overpower anyone by force nor frighten because there had not been anyone in the club at night. In the following step the Supreme Court judges have the courage – unlike many of their colleagues deciding on related cases - to get to the core of the matter: if the crime committed, the judges ask, is indeed house-breaking at night in order to commit a *ḥadd*-crime and the punishments stipulated for this crime are the same punishments reserved in the *fiqh* for *ḥirāba* is it then admissible to impose one of the *ḥadd*-punishments for *ḥirāba* for a crime that is obviously not *ḥirāba*? The answer is negative. Since crime and punishment are both clearly anchored in the Qur´an, the Court holds, the judge is not permitted to give any judgment in contradiction to the text. He can neither deduct from nor add to the punishment and he can also not impose a *ḥadd*-punishment on a crime that is a *ḥadd*-crime. With regard to the case in question, the judge may thus not impose the *ḥadd*-penalty for *ḥirāba* for the crime of *sariqa ḥaddiyya* because such a decision would be diametrically opposed to the pertinent verses of the Qur´an.

In order to justify its reasoning based on the Sudanese Penal Code, the Court quotes article 458 PC, section 5 which does not allow the explanation of any text of the Penal Code in any manner that contradicts any principle of the *sharī´a*. The Court equally invokes article 2 (a) of the Judgments Basic Rules Act (JBRA)[1244] 1983 which stipulates that the judge shall presume that the legislator did not intend to contradict the *sharī´a* scale of five religious-legal

[1243] Quoted from the SC sentence.
[1244] For an analysis of the Judgment Basic Rules Act 1983 see Layish/Warburg (2002), p. 168 et sqt.

qualifications.[1245] Based on its reasoning outlined above and on articles 458 PC and 2 JBRA the Court concludes that the imposition of one of the *ḥadd*-punishments on someone who has not perpetrated any of the deeds *ḥirāba* consists of is a clear violation of the basic principles of the *sharī´a*. It is therefore not admissible for the judge to impose the *ḥadd* for *ḥirāba* on someone who has been proven to have perpetrated another crime irrespective of whether this crime is a *ḥadd*-crime or not.

In conclusion the Court deems the (*ḥadd*-)crime in question to be *sariqa ḥaddiyya* since all the elements constituting it are present. Consistently it changes the article under which the defendant is convicted from article 396 to article 322 (2), because the punishments (of article 396) clearly contradict the Islamic *sharī´a* in view of the nature of the crime committed by the defendant. The fact that the culprit committed the theft after breaking into the house of the club is deemed simply as an aggravating factor (*ẓarf mushaddid*) but does not change the nature of the crime from *sariqa ḥaddiyya* to *ḥirāba*.

However, the Court considered the claim of the defendant that the police had forced him to confess as an implicit retraction of his confession. According to article 26 (2), Evidence Act 1983, the retraction of a confession in criminal cases qualifies the confession to be non-conclusive evidence (*bayyina ghair qāṭi´a*), due to the legal uncertainty (*shubha*) created by the retraction. However, the confirmation of the confession by other proof – two different testimonies in the present case – removes this legal uncertainty and proves the responsibility of the defendant for having committed *sariqa*, the Supreme Court argues. As a net result of the above deliberations the SC ordered the abolition of the conviction under article 396 and changed it to a conviction under 322 (1) – *sariqa* from a house etc. not amounting to *sariqa ḥaddiyya* – and in consequence abolished the *ḥadd*-punishment of amputation.

In a final analysis of this decision and in comparison with the two other *ḥirāba*-decisions discussed above and below, we find a couple of striking features. Firstly, the case forcefully demonstrates the huge discrepancy between *ta´zīr*-crimes and their attributed *ḥadd*-punishments and, as a consequence, the dilemma the judges are faced with. Applying the *ḥadd*-punishment to the *ta´zīr*- crime attached to it evidently contradicts the *sharī´a*. Not applying the stipulated *ḥadd*-punishment even though all the elements of the crime are present is not an option either since it would mean to violate the text of the Penal Code. Therefore, the

[1245] What is meant here are the five qualifications: *wājib*, *mandūb*, *mubāḥ*, *makrūh* and *ḥarām*.

Supreme Court – and this distinguishes this case from the other cases referred to in this chapter – chooses a third option. It denounces in an unprecedented way the obvious violation of basic tenets of the *sharī´a* and solves the dilemma by reassessing the nature of the crime. Thus, even though article 396 is a precise description of the crime committed (a fact admitted by the Court itself), it is now judged to be *sariqa*. While the definition of *sariqa ḥaddiyya*, as shown above, has its own contradictions and incongruities, the pitfalls of having to apply a *ḥadd*-punishment for a *ta´zīr*-crime are avoided as inherent in all articles of the PC83 stipulating the classical *ḥadd*-punishments for *ḥirāba*. Due to the retraction of the confession the Court achieves at the same time another result, the nature of *sariqa* becomes non-*ḥadd*. In other words, the culprit cannot be convicted to amputation but will receive a *ta´zīr*-penalty. It remains, however, a fact, that the crime in question here, is not a simple *sariqa ḥaddiyya* or a (non-*ḥadd*) *sariqa* but a burglary at night precisely as described in article 396. While the Court cannot deny that these additional elements exist it solves the problem of their existence by qualifying them a mere "aggravating factor," not changing the nature of the crime from *sariqa ḥaddiyya* to *ḥirāba*. The crime defined in article 396, however, is not *ḥirāba* in the first place, but "lurking house-trespass or house-breaking by night, in order to commit a *ḥadd*-crime." It should be noted here that the formula "...in order to commit a *ḥadd*-crime" is not only rather unspecific, since no particular *ḥadd*-crime is stipulated, it also does not amount to the *ḥadd*-crime actually having been committed. In other words, e.g. a burglary in connection with the intention to commit a *ḥadd*-crime (as different from the actually perpetrated *ḥadd*-crime) is being punished here with the punishments for *ḥirāba*. It goes without saying that the imprecise wording of the article leaves also room for the punishment of other *ḥadd*-crimes in connection with a burglary at night, such as *shurb al-khamr* or even *zinā*. In brief, the Supreme Court endorses the non-application of a *ḥadd*-punishment, based on article 458 PC, even though the definition of the crime perfectly fits the crime committed. By doing so it had implicitly criticized an important part of the Islamized Penal Code as technically flawed. Simultaneously the Supreme Court had opened the way for lower courts to take similar decisions in all cases where the punishments for *ḥirāba* would have been applicable for crimes other than *ḥirāba*.[1246]

[1246] Compare e.g. Government of the Sudan vs. Jūn Alīqū Būth, SLJR (1984), No. 461/1984.

Third case

In 1988 the Supreme Court had to review a decision of a lower court [1247] in a case of robbery (*nahb*). Mainly two questions were at stake. Firstly, whether robbery, as defined in the PC83, was indeed to be considered a *ḥadd*-crime as the stipulated *ḥadd*-punishment would have suggested. And, secondly, whether the higher minimum requirements (*niṣāb*) for the proof of the *ḥadd*-crime *ḥirāba* were applicable or whether only the lower requirements for the proof of non-*ḥadd* crimes had to be met. The two defendants who had robbed their victim of money, beaten and hurt him with a stick and a knife, had been convicted under article 339 – "joint robbery or robbery with attempt to cause death or grievous hurt" in conjunction with article 78 – "joint acts in furtherance of common intentions".[1248] The trial court (*maḥkama mauḍū´*), considering the crime as a form of *ḥirāba* and thus a *ḥadd*-crime, pointed out in its explanatory statement that the minimum requirements for the proof of *ḥirāba* had not been met. It had based its deliberations on the nature of nahb, as defined in the PC83, and on a 1983 precedent[1249] that had come to several important conclusions. Based on its interpretation of the explanatory memorandum to the PC83 and the stipulated *ḥadd*-punishment as defined in article 339[1250] the judges of the precedent had drawn the conclusion that the legislator had indeed had *ḥirāba* in mind (*qaṣada ilā dhālika*), despite the fact that the term *ḥirāba* had not explicitly been used. Acknowledging the hybrid nature of the definition of *nahb* the judges then came to the conclusion that *nahb* (robbery) as defined in article 332 and its derivations were to be regarded as a *ḥadd*-crime, i.e. *ḥirāba and* as a non-*ḥadd*-crime, i.e. *nahb*, simultaneously. The question of how a case was to be treated was decided according to the available proof. If the minimum requirements for the proof of *ḥirāba* were met, it was to be treated, and, in consequence, punished as such. If these requirements were not met it would have to be treated and punished as a *ta´zīr*-crime. The Supreme Court, however, did not agree with the reasoning of the Trial Court as based on the 1983 precedent. In its revision the SC pointed out that *nahb* and *ḥirāba* are essentially two different crimes consisting of different elements. The two crimes should therefore not be mingled. In order to show the way out of the impasse the Supreme Court judges reasoned that the crime of *ḥirāba* was not to be found

[1247] Government of the Sudan vs. Muḥammad al-Nūr and others. SLJR (1988), No. 1407/18.
[1248] The latter article considers each individual perpetrator of a criminal act to be fully responsible as if he had committed such act alone. PC83, article 78.
[1249] Government of the Sudan vs. Jamāl Muḥammad Hussain, SLJR (1984), 84/11.
[1250] This reasoning would have been valid for all other *nahb*-related crimes punishable by the *ḥadd* for *ḥirāba*.

in the Penal Code 1983 at all ("*...jarīma al-ḥirāba ghair wārida fī qānūn al-ʿuqūbāt lisana 1983*").[1251] Instead the legislator had defined the crime of robbery (*nahb*) with all its elements and subsequently stipulated the punishment it saw fit. The fact that the punishments prescribed for *nahb* are largely the same as for different forms of *ḥirāba* does not mean that the legislator meant to codify *ḥirāba*. Rather, the legislator has the right to stipulate any punishment he chooses for non-*ḥadd*-offences, even if the punishment becomes equivalent to a *ḥadd*-penalty (*ḥattā lau waṣalat ilā al-ʿuqūba al-ḥaddiyya*).[1252] By way of a circular reasoning, the judges then back up their argument by quoting articles[1253] of the PC83 where the Sudanese legislator has indeed combined *taʿzīr*-crimes with *ḥadd*-penalties. Thus the Supreme Court comes to two important conclusions. Firstly, the crime *nahb* (robbery) is – contrary to the dual nature described by the Trial Court – not a *ḥadd*-crime despite its punishment being a *ḥadd*-punishment. Secondly, and as a consequence thereof, the requirements for the proof of *nahb* are those of *taʿzīr*-crimes (*al-ithbāt al-ʿādī li al-jarāʾim al-taʿzīriyya*) without the necessity to reach the niṣāb for *ḥadd*-offences. Finally, the Supreme Court annulled the *taʿzīr*-penalty of seven years imprisonment imposed by the Trial Court because the minimum requirements for the proof of a *ḥadd*-crime had not been met. Since the punishments stipulated for *nahb* and its derivatives were in the reasoning of the SC *taʿzīr*-punishments in the first place, there was also no need to replace them with other (lower) punishments. It therefore directed the lower court to impose one of the punishments stipulated in article 339, i.e. capital punishment or capital punishment with crucifixion or cross amputation or a life sentence with banishment.

It has become clear that neither court has been able to solve the dilemma caused by the flawed 1983 legislation. While the Trial Court tried to apply a more lenient *taʿzīr*-punishment by arguing with the dual nature of the crime, the Supreme Court simply denied that the legislator had the *ḥadd*-offence *ḥirāba* in mind when he Islamized the Penal Code. It further claimed, in contradiction with the majority opinion in the *fiqh*, that the legislator had the right to punish any *taʿzīr*-crime with any *ḥadd*-punishment. The SC thus blurred any distinction between *ḥadd*-crimes and *taʿzīr*-crimes that is of prime importance in the *fiqh*. The original problem

[1251] In other words, the legislator had supposedly (voluntarily?) omitted an important part of ICL in its 1983 effort to Islamize Sudanese criminal law.
[1252] For an earlier decision claiming that a *ḥadd*-punishment for a *taʿzīr*-crime is compatible with the *sharīʿ* see Government of the Sudan vs. Karār Faḍl ʿAlī and others, SLJR (1987), 1984/79.
[1253] E.g. 318 (a), 394, 396, 399, PC83.

lies of course in the legislation of 1983. In the case at hand the Trial Court had found a way out of the quandary. By ascribing a dual nature to all *nahb*-related crimes it opened the way to using two different sets of standards for proving the crime, on the one hand as a *ta´zīr*-crime and on the other hand as a *ḥadd*-crime. While this was certainly not in line with the *fiqh* it would have helped avoiding the extremely harsh *ḥādd*-punishments for *ḥirāba*. The Supreme Court, however, thought otherwise, confirmed the *ḥadd*-punishment for a non-*ḥadd*-crime and simultaneously lowered the minimum requirements for the proof of *nahb*.

4.5.3 Definition and punishment of ḥirāba *in the 1988 and 1991 (draft) codes*

The draft Criminal Bill 1988[1254] and its slightly revised successor code, the Criminal Act 1991, have introduced for the first time in the history of Sudanese Penal Codes the *ḥadd*-crime of *ḥirāba*. The two mostly identical definitions of *ḥirāba* of the two codes have come much closer to the *fiqh* and have mostly done away with the multifold imcompatibilities found in the PC83. They also summarized all of the many different crimes related to brigandage and robbery of the 1974/1983 codes under the heading "*ḥirāba*." In other words, the CA91 has divested itself of the heritage of its predecessor's codes by adapting its terminology and dropping certain crimes such as e.g. joint robbery, joint robbery with voluntary homicide and attempted robbery.

Thus, according to the definition of the CA91 the *ḥadd*-offence of armed robbery (*ḥirāba*) commits who intimidates the public or hinders the users of a highway with the intention of committing an offence against the body, or honor, or property under the condition that the deed happens away from buildings, whether on land, water or air and that weapons or any offensive tool are used ore threatened to be used.[1255] Does the deed result in murder or rape, the offender is punished with the death penalty or death and then crucifixion.[1256] Does it result in grievous hurt or robbery of property equivalent to the *niṣāb*, the punishment will be amputation of the right hand and the left foot.[1257] In any other case the offender will be punished with a prison term not exceeding seven years in exile.[1258]

[1254] Compare Criminal Bill 1988, article 171 (1) and (2).
[1255] CA91, art. 167 (a), (b).
[1256] CA91. art. 168 (1) (a).
[1257] CA91, art. 168 (1) (b).
[1258] CA91, art. 168 (1) (c).

While these punishments were only applicable in the North, the punishments for the same crimes, if committed in the Southern states were stripped of their Islamic content in terms of punishments that can be ascribed to the *fiqh*. Thus, in the Southern states of the Sudan capital punishment was applicable if homicide is involved.[1259] If rape was committed, life imprisonment was the stipulated punishment.[1260] Cases of grievous hurt or robbery of property were punishable by imprisonment not exceeding ten years. All cases not covered by the above articles were punishable by a prison term not exceeding seven years.

The punishment for *ḥirāba* shall be remitted if the offender abandons the commission of armed robbery and repents before his arrest.[1261] In case of remittance of the *ḥadd*-punishment, it may be replaced by a *ta´zīr*-punishment of imprisonment of up to five years[1262] and the rights of the victim to *diya* or compensation shall not be prejudiced.[1263]

Even though the CA91 acknowledges repentance as a valid reason for the lapsing of the *ḥadd*-penalty all other legal uncertainties such as *ḥirāba* against a close relative or the absence of the victim in court do not have an effect. While this works to the detriment of the offender, the absence of a collective punishment works in his favor. The CA91 does not know a collective liability as advocated by the majority opinion of the schools, the defendant will be punished for his individual contribution to the crime only. As to the draconian punishments mentioned in the Qur´an, the CA91 recognizes them all without exception. However, crucifixion can only follow execution and cannot precede it, as some *fuqahā`* hold.[1264] As to the minimum age offenders of *ḥirāba* must have to be convicted the authors of the code have chosen the majority opinion of the *fiqh*. Thus, perpetrators between 15 and 18, who show the features of puberty and deemed adult can be punished by imprisonment and expatriation[1265]. The death punishment and *qiṣāṣ* for *ḥirāba*, like for all other *ḥudūd*, can also be inflicted on perpetrators below 18 years of age, if deemed adult by the court. With regard to the maximum age for the imposition of prison terms, however, *ḥirāba* is an exception. While an

[1259] CA91, art. 168 (2) (a).
[1260] CA91, art. 168 (2) (b).
[1261] CA91, art. 169 (1).
[1262] CA91, art. 169 (3).
[1263] CA91, art. 169 (2).
[1264] Compare Baradie (1983), p. 121.
[1265] Exile is defined as imprisonment in a place far from the place where the crime is committed and from the offender´s place of residence. See CA1991, art. 33 (1) (b).

imprisonment of those who are seventy years of age or older is not permitted by law[1266] it can be inflicted on perpetrators of *ḥirāba* who are 70 or older.[1267]

Supreme Court cases dealing with ḥirāba *as of 1991*

In comparison to the controversies on *ḥirāba* from 1983 onwards, the number of published Supreme Court cases dealing with *ḥirāba* between 1991 and 2005 comprises not even a handful of cases. Following the 1991 codification of ḥirāba most of the incompatibilities with the *fiqh* have been eliminated. However, some details needed a decision of the Supreme Court:

In a 1997 case[1268] a group of men had trespassed into a house and began to steal. When the owner of the house tried to get hold of one of the robbers he was hurt by him with a knife. All four participants in the burglary were arrested later and convicted on the strength of their confessions and other material proof (*bayyina māddiyya*). In its deliberations the Supreme Court had to decide, among other questions pertaining to the age of the perpetrators, whether the definition given in the Criminal Act 1991 covered also the crime as described above. In the criminal act article 167 on *ḥirāba* clearly states as a precondition for *ḥirāba* that (167 (a) „...the act be committed away from inhabited areas (*khārij al-´umrān*), whether on land, water or air or within an inhabited area when it is impossible to call for help (*ma´ al-ta´dhdhur al-ghauth*)." This definition does not leave any doubt that, generally speaking, *ḥirāba* can take place within inhabited areas. It does, however, not specify, whether the definition includes the interior of houses as such. In other words, it remained unclear, whether house-trespass and burglary could be construed as the *ḥadd*-crime *ḥirāba* or whether *ḥirāba* necessarily needed to be committed on an open street. In the case under discussion here the Supreme Court determined that burglary as described above does indeed fall under the definition of *ḥirāba* as stipulated in article 167/168 CA91. It based its decision on the opinions of Mālik, Shāfi´ī and Abū Yūsuf, as well as its interpretation of article 167 which included inhabited areas but left it unclear whether the interior of houses and apartments would be covered by the definition of *ḥirāba*. According to the Mālikites, and contrary to the opinion of the Ḥanafites[1269] (except Abū Yūsuf) and the Ḥanbalites, *ḥirāba* can take place inside a city. The latter two schools

[1266] Article 33 (4), CA91.
[1267] Confirmed in: Government of the Sudan vs. A.Z. (Aḥmad Zaid), SLJR (2002), No.95/2002.
[1268] Government of the Sudan vs. Mubārak Yūnis Ḥamād and others. SLJR (1997), No.318/1997.

presume that in a city the public or the police can come to help the victims and that therefore a constitutive element of ḥirāba is missing.[1270] The Shāfi´ītes reason that *ḥirāba* can take place in a city if the power of the sultan has weakened (and in consequence the state cannot properly protect its citizens).[1271] The CA91 follows in its definition a similar reasoning. While *ḥirāba* can happen inside an inhabited area, a call for help has to be impossible. If such a call is indeed possible, the crime falls outside the definition of *ḥirāba*. In other words, the Supreme Court, implicitly decided that inside a house help can not be called and therefore – if other necessary conditions are fulfilled – *ḥirāba* can also take place inside a house. It should be noted here, that while the president of the court session in question ´Abd al-Jalīl `Ādam Ḥusain had the final say as to the verdict, he met resistance from his colleague ´Abdallah al-Fāḍil ´Īsā. The latter argued that since the house had been guarded (*yaḥrusuhu khafīr*) and the defendant fled after hurting the guard (i.e. the owner of the house), the crime committed could not be qualified as *ḥirāba*. It rather falls, or so argues judge ´Īsā, under article 175, robbery (*nahb*). It should also be noted that in his final verdict the president of the court who had followed a rather narrow definition of *ḥirāba* did not insist on the execution of the harsh punishments for *ḥirāba*. The age of the defendants who were 15 and 16 years old at the time of the commission of the crime offered a way to avoid them. The lower courts had failed to send the adolescents to a medical examination in order to determine whether they showed signs of adulthood or not. The Supreme Court, in turn, found itself incapable to do so since almost a year had lapsed after the crime and the culprits might have come of age only after the crime. It thus supported the original decision of sentencing the defendants to a two-year-term in a reformatory. In 2000 the Supreme Court came to the conclusion that the victims of *ḥirāba* are admitted to testify against the *muḥārib* (see following section „Proof of *ḥirāba*). Further, in the same trial it was decided that homicide (*qatl*) as part of a *ḥirāba* case was to be treated as a *ḥadd*-crime and not treated separately. Since the heir(s) of the victim do not have the right to pardon the culprit in *ḥadd*-crimes they do not need to be informed of the sentence nor do they have to be present during the execution. [1272]

In the case in question a police force had set out to recapture a group of fugitive criminals who had escaped from prison. In the course of the ensuing gun fight three policemen had

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[1269] "...wa qāla Abū Ḥanīfa lā takūna al-ḥirāba fī dākhil al-sakan abadan". Bahnasī, jarā`im,. 83.
[1270] See Peters (2005), pp. 57-58.
[1271] The judgment of the Supreme Court also argues along these lines. Compare also Bahnasī, jarā`im, pp. 82-83.

died. One of the recaptured prisoners, ´Īsā ´Uthmān Muḥammad, subsequently was convicted to death by hanging as retribution (*qiṣāṣ*) under article 130 (1) under the condition that the blood avengers were present during the execution of the sentence. Simultaneously, he was convicted to death by hanging with (subsequent) crucifixion under article 168 (1) (a) CA91.[1273] In its revision the Supreme Court reasoned that homicide is one of the possible crimes *ḥirāba* can consist of and it is thus to be considered a *ḥadd*-crime if it happens within the context of *ḥirāba*. It therefore cancelled the conviction under article 130 stating that since the capital punishment was not to be considered retribution (*qiṣāṣ*) but a *ḥadd*, the blood avengers had no role to play, nor would the president of the Sudan have a final say in it.[1274] The sentence made it clear that private claims to retribution do not play a role in the *ḥadd*-crime *ḥirāba* and that the president of the Sudan, unlike in non-*ḥadd*-crimes, has no authority to pardon a culprit.

4.5.4 Proof of ḥirāba

In both evidence acts – 1983 and 1993 – *ḥirāba*, in analogy with *sariqa*, can be proven by a single, unequivocal confession before the court or by the testimony of two men or, in case of necessity, by the testimony of a man and two women or four women. As with regard to other *ḥadd*-crimes both evidence acts contradict the *fiqh* in two important respects. Firstly, the testimony of women is not admitted there and, secondly, the two male witnesses necessarily have to be of good reputation - *´adl* - in order to be allowed to testify. This important qualification is missing in both codes. Supreme Court case law in 1984 introduced an important qualification to the general principle that the two male witnesses – or, according to the Evidence Act 1983 one man and two women or four women – necessarily need to testify to having witnessed all elements of the crime.[1275] Instead, it ruled that if there were – next to the original witnesses – two more eligible witnesses available, the first two witnesses could testify to one or more incidents of the crime (*yashhadu ithnān ´alā wāqi´a aw akthar*). The other two witnesses, who of course must equally fulfil the requirements for witnesses in ḥādd-

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[1272] Trial ´Īsā ´Uthmān Muḥammad, SLJR (2000), No. 50/2000.
[1273] Moreover, he was convicted under articles 25 (abetment) and 26 CA91 (assistance in the perpetration of a crime).
[1274] Consistent with articles 38, (1), (2) and (3) CA91.
[1275] See Government of the Sudan vs. `Ādam Ḥasan Ismā´īl. SLJR (1984), 1984/17.

crimes[1276], could then testify to the remaining incidents of the crime (...*wa yashhadu ʿākharān ʿalā wāqiʿa ukhra*...). In other words, unlike in the *fiqh*, the crime does not need to be testified to in its entirety by the same witnesses. Rather, different sets of eligible witnesses are now accepted to give testimony to different sequences of the crime.

The Supreme Court also ruled that victims of ḥirāba are permitted to testify against those who have perpetrated *ḥirāba* against them. In the same case described in the preceding section[1277] policemen, who themselves had been part of a shoot-out, testified against the defendant. Their testimony was accepted and the defendant convicted. The defense, in its appeal, had argued that the policemen were party in the lawsuit (*khuṣūm fī al-daʿwā*) and were thus to be excluded from testifying (...*shahāda khaṣm falā taǰūz*). The Supreme Court denied that the policemen who had survived the gun fight were a concerned party of the lawsuit (*falā tūǰad khusūma tabṭal al-shahāda*). It followed in its decision the majority opinion of the Ḥanafites and the Mālikites who accept the testimony of the aggrieved party against the perpetrator e.g. in cases of *qadhf*, *zinā* and *qaṭʿ al-ṭarīq*. Aḥmad ibn Ḥanbal and al-Shāfiʿi, however, do not accept such testimonies in the latter case[1278], because they compare it to the testimony of someone against his opponent or enemy. Such testimony is not accepted among the *fuqahāʾ*, when the enmity is based on worldly concerns (and not religious ones).[1279] This reasoning was confirmed in 2003[1280], when the Supreme Court decided that when the aggrieved party consists of several victims of a crime their testimonies are not to be regarded as testimonies of the plaintiffs on their own behalf. Rather these testimonies are testimonies of each one of the victims on behalf of the other (*shahāda kullu wāḥid minhum lilʿākhar*), as long as the testimony is not aimed at the witness himself (*ṭālamā lam yakun shahādatuhu munṣaba ḥaula nafsihi*), but at the other witnesses.

4.5.5 Lapsing of ḥirāba

The reasons for the lapsing of the *ḥadd* for *ḥirāba* were regulated for the first time in the Criminal Circular 93/83, issued by the Chief Justice.[1281] The circular lists four rules. The *ḥadd* for *ḥirāba* lapses: 1. When the *muḥārib* repents before being caught...and such repentance

[1276] Here: according to the Evidence Act 1983.
[1277] Trial ʿĪsā ʿUthmān Muḥammad, SLJR (2000), No. 50/2000.
[1278] Bahnasī, naẓariyya al-ithbāt, p. 101.
[1279] Bahnasī, naẓariyya al-ithbāt, p. 98.
[1280] Compare Trial ʿĀdam ʿĪsā ʿAlī, SLJR (2003), No.20/2003.

causes the *ḥadd*-penalty for *ḥirāba* such as execution or crucifixion or cross amputation or banishment to lapse, this without prejudice to the rights of other persons to the restitution of property or the right to *qiṣāṣ* in cases of homicide or injury. 2. When the crime of *ḥirāba* has been proven on the strength of a confession only and the *muḥārib* withdraws his confession. Article 458 (3), in contrast, allows for the promulgation of any *ta´zīr*-punishment, when the *ḥadd* lapses. It does not specify that further proof or evidence is required. 3. When the crime of *ḥirāba* is limited to the taking of money only and did not extend to any other crime such as homicide or making highways unsafe (*ikhāfa al-sabīl*), in that case all the reasons for the lapsing of the *ḥadd* for *sariqa* are applicable (see chapter 4.4.) 4. However, the lapsing of the *ḥadd* does not automatically mean that the offender will not receive a *ta´zīr*-punishment. *Ta´zīr* will be imposed when the proof or evidence necessary for a conviction to such penalty is available.[1282] It should be noted here that the *fiqh* knows two other reasons for the lapsing of the *ḥadd*-penalty for *ḥirāba*, i.e. if there is a close relative of the culprit among the victims of his robbery and, secondly, if the deed has been committed against a *musta´min*.[1283] In cases of joint robbery the Shāfī`ites are of the opinion that each accomplice has to be punished only according to his individual contribution to the crime. The majority opinion of the *fuqahā`* and the PC83, however, allots the *ḥadd*-punishment for all accomplices independent of their individual contribution to the crime. Finally, in order to impose the *ḥadd*-penalty for *ḥirāba* it is necessary that the victim is present during the trial and asserts his claim to compensation.[1284]

4.5.6 Summary and conclusion

While other *ḥadd*-crimes such as *zinā*, *qadhf*, *shurb al-khamr* and *sariqa* had been stipulated in the overhauled Penal Code of 1983, *ḥirāba* or *qaṭ´ al-ṭarīq* had, for unknown reasons, not been codified. However, while a definition of *ḥirāba*, consistent with the *fiqh*, was missing, the harsh punishments reserved for *ḥirāba* were introduced for a rather wide variety of crimes. None of these crimes were congruent with the definitions of the different elements *ḥirāba* consists of in the *fiqh* and in consequence the number of crimes punishable with *ḥadd*-

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[1281] See Ḥāmid (2002), mausū´a al-manshūrāt al-jinā`īyya, pp. 15-17 and pp. 27-29.
[1282] Article 458 (3), in contrast, allows for the promulgation of any *ta´zīr*-punishment, when the *ḥadd* lapses. It does not specify that further proof or evidence is required.
[1283] Compare Krcsmárik, (1905) p. 335.
[1284] Baradie (1983), p. 121.

penalties was augmented far beyond the scope envisaged by the *fiqh*. In consequence of the above, courts in general and the Supreme Court in particular were faced with a dilemma. The Islamized Penal Code of 1983 in a variety of cases combined *ta´zīr*-crimes with *ḥadd*-penalties. How could their application be justified or, on legitimate legal grounds, avoided? An analysis of Supreme Court decisions in *ḥirāba*-cases as of 1983 shows three main approaches. In the first case analyzed above, the Supreme Court identified a crime as constituting *ḥirāba* even though the article (art.339) found to be applicable described joint robbery (*nahb bi al-ishtirāk*). By having *ḥirāba* and *nahb* fall into one crime the *ḥadd*-penalty for *ḥirāba/nahb* seemed justified. However, to reach this conclusion the Supreme Court not only had to ignore elements of the crime incompatible with *ḥirāba*, it also had to reinterpret the rules for the proof of *ḥadd*-crimes. Since article 78 of the Law of Evidence 1983 does not explicitly state that all elements of a given *ḥadd*-crime have to be testified to by the same set of witnesses the admission of several such sets of witnesses seems to be justified. It should be noted, however, that this approach clearly is in contradiction with the opinions of the *fuqahā'* who in their majority hold that the witnesses in cases of *ḥadd*-crimes must testify to the crime as a whole and that contradictions of their testimonies constitute *shubha*.

In a second case in 1984 the Supreme Court judges, faced again with the fundamental contradiction between *ta´zīr*-crime and *ḥadd*-punishment, came to a completely different conclusion. It correctly reasoned that a crime that is not *ḥirāba* can not be punished with the punishments for *ḥirāba*, even if the crime to be judged fits the description of the crime in the article applicable to the case in question and the punishments for that crime according to the Penal Code 1983 are indeed the punishments for *ḥirāba*. In other words, by way of analogy, it declared all articles of the Penal Code where a *ta´zīr*-crime was to be punished with a *ḥadd*-punishment those punishments for not applicable. It based its decision on the Judgments Basic Rules Act that did not allow for such contradictions between the PC83 and the *sharī´a*.

A third exemplary decision in a case of *ḥirāba* was taken in 1988, when the Supreme Court came to the conclusion that the crime of *ḥirāba* was not to be found in the Penal Code 1983 and should not be confused with the crime of robbery (*nahb*). In the case to be revised a lower court had reasoned that the definition of *nahb* under article 332 had to be interpreted as meaning *ḥirāba* and *nahb* simultaneously. In order to lift the contradiction between the *ta´zīr*-

crime *nahb* and the *ḥadd*-punishment stipulated for it, the Supreme Court came to the conclusion that the legislator has the right to stipulate any punishment he chooses for non-*ḥadd*-offences, even *ḥadd*-punishments if he sees fit. While the Court thus gave a judgment that seemingly reconciled *ta´zīr*-crimes with their respective *ḥadd*-punishments, it is obvious that this judgment contradicted the majority opinion of the *fuqahā´*.

All of these sentences described above aptly demonstrate the dilemma Sudanese courts have found themselves in as of 1983 regarding cases of *ḥirāba*. They also show that despite different approaches to the problem no level of the court hierarchy up to the Supreme Court was able to find a satisfactory solution to a problem that had essentially been created by a flawed and superficial legislation.

4.6 Apostasy (*ridda, irtidād*) [1285]

4.6.1 Apostasy in the fiqh

Definition

In the Qur´an the apostate is threatened with harsh punishment in the next world only.[1286] In stark contrast many *ḥadīths* speak of the death penalty for apostasy like e.g. in the prophet's saying: "Slay him, who changes his religion." According to another tradition the prophet is "said to have permitted the blood to be shed of him who abandons his religion and separates himself from the community".[1287]

The crime of apostasy can be committed by a Muslim by birth or by conversion, it is irrelevant whether or not he adopts a new faith. To be culpable of *ridda* the *murtadd* (apostate) has to utter expressions of unbelief or commit deeds of unbelief. In the absence of coherent rules and criteria Islamic legal literature gives a plethora of examples of which words and deeds constitute apostasy. Examples relate to Allah, the Prophet Muḥammad, other prophets and angels, the Qur´an, ritual prayer or to science (*´ilm*). Thus, denying Allah's divinity or the prophethood of Muḥammad, believing that Jesus is the son of Allah, adding or omitting

[1285] On apostasy in Islam see e.g. Gräf (1965), pp. 20-22, Peters/De Vries (1976), El-Awa (1982), pp. 61-64, Heffening (1993), Al-Jazīrī (1994), pp. 326-339, Hallaq (2001), ´Awda (2001), Vol.1, pp. 534-538 and Vol.2, pp. 706-731, Peters (2005), pp. 64-65, Tellenbach (2006), Griffel (2007).
[1286] For apostasy in the Qur´ān see Hallaq (2001), also Gräf (1965).
[1287] Heffening (1993), p. 635 and Griffel (2007), p. 131.

qur´anic verses, saying "*bismillah*" as a toast when drinking alcohol, rejecting the validity of *sharī´a* courts and ridiculing scholars amounts to apostasy.[1288]

All schools except the Ḥanafites and the Shāfi´ītes hold that apostasy is a *ḥadd*-crime. The Ḥanafites are of the opinion that certain groups are exempted from execution. Thus women are to be held in custody and beaten every three days until they repent and return to Islam. One of the reasons for the execution of the male *murtadd* was his posing a threat to the Islamic state. This, so the Ḥanafites reason, could hardly be assumed of the female apostate, hence no execution. The Ḥanafites also exempt the "discriminating minor" from execution, his apostasy, however, is considered to be legally valid. In all other schools a minor does not have the legal capacity to commit apostasy.[1289]

The apostate can only be punished if basic elements of his criminal responsibility are fulfilled. First of all, it must be clear that the apostate has indeed been a Muslim before renouncing Islam. This is especially emphasized by the Mālikites. In case of doubt, for example if the apostate had converted to Islam under duress or in a state of intoxication or as an underage child without his parents, he would not qualify as an apostate. The same is true if the convert has only pronounced the *shahāda* but never practiced his faith e.g. prayed his daily prayers or when reliable witnesses are missing who testify to his having adopted Islam.[1290]

Further, the apostate must have renounced Islam out of his own free will (*ikhtiyār*), he must be of age (*bāligh*) and in full possession of his mental faculties (*´āqil*), i.e. the apostate must be aware of what he is doing.[1291] The drunk or the mentally ill can not be punished for apostasy. Who errs or who believes something forbidden is allowed by falsely interpreting religious norms, can equally not be punished as an apostate.[1292]

Punishment of apostasy in the fiqh

The punishment for apostasy is according to all schools the death penalty. Apostasy can be proven either through a confession or the testimony of witnesses. As always in a criminal trial where the accused are Muslims the witnesses must be Muslims of good reputation (*´ādil*). The majority of the *fuqahā´* holds that the witnesses must explain which acts or words of the

[1288] Peters/De Vries (1976), pp. 3-4.
[1289] Peters/De Vries (1976), p. 6.
[1290] See Peters/De Vries (1976), p. 3 and Tellenbach (2006), p. 6.
[1291] Heffening (1993), p. 635.
[1292] Tellenbach (2006), p. 7.

accused made them believe that he is an apostate. It is then up to the *qādī* to assess the testimony and decide whether the deeds or words in question amount to apostasy or not.[1293] Ḥanafites and Shi´ītes exempt women from the death penalty for apostasy. According to these a woman who renounces Islam is to be held in arrest and to be flogged daily, according to the Shi´ītes at each prayer time, until she recants. If she does not recant arrest and flogging continue lifelong.[1294]

Once apostasy has been proven and the apostate has been convicted the punishment will not be meted out immediately. The apostate has three days to repent and only after the invitation to repent has been turned down three times he or she will be killed.[1295] All Sunni schools allow for revocation and repentance, the Shi´ītes, however, grant this possibility only to converts.[1296]

Consequences of apostasy with regard to civil law

It should be noted that apostasy also has its consequences with regard to civil law. The *fuqahā`* concentrate here on the following central questions: What will happen to the property of the apostate, will s/he still be able to make legally binding decisions? Will s/he still be able to inherit or bequeath? What impact will apostasy have on an existing marriage? On the apostate's entitlement to property three opinions can be distinguished. The first opinion holds that his property should be treated like the property of a *ḥarbī* or enemy alien. A *ḥarbī* cannot legally hold property and it therefore falls to the public treasury. Secondly, the rights of the apostate to dispose of his property are in suspension (*mauqūf*) until his repentance. Thirdly, the apostate can still dispose of his property. The Ḥanafites in general hold that female apostates does not lose her legal capacity and can still dispose of her property. Al-Shaybānī (d.805) and Abū Yūsuf (d.798) are of the opinion that this principle is to be applied to male apostates as well.[1297] The apostate can not inherit from his former co-religionists, nor from those to whose religion he has converted to. His own bequeathable property shall be considered enemy property and hence fall to the public treasury. The Ḥanafites distinguish between property acquired while (still) being a Muslim and property acquired as an apostate.

[1293] Tellenbach (2006), p. 7.
[1294] Tellenbach (2006), p. 4.
[1295] Griffel (2007), p. 132.
[1296] Peters/De Vries (1976), p. 6.
[1297] Peters/De Vries (1976, pp. 7-8 and Tellenbach (2006), p. 15.

The former will be inherited by his Muslim heirs, the latter will fall to the public treasury. However, a minority opinion held by al-Shaybānī and Abū Yūsuf does not make an exception from the normal rules of succession and allows the apostate to bequeath all his property to his Muslim heirs. With regard to female apostates the Ḥanafites hold that it will be inherited entirely by her Muslim heirs.[1298] If one or both partners renounce Islam their marriage contract becomes automatically null and void (*faskh*) without the need for the *qāḍī´s* decision.[1299] After the repentance of the apostate the former marriage is not automatically restored, a new marriage contract will be needed. According to the Shāfi´ites and the Shi´ītes the marriage contract remains in suspension during the wife's waiting period (*´idda*). Should the apostate husband repent during the *´idda*, the marriage can resume without a new contract.[1300] Last but not least the apostate cannot be buried according to the Muslim rites.[1301]

4.6.2 Apostasy in the Penal Code 1983

The 1983 Penal Code did not contain any provisions with regard to apostasy, nor did any of its predecessors for that matter. The reason given by al-Jīd, one of the authors of the Penal Code, is the same he gave for not introducing stoning as the punishment for *zinā*. The committee drafting the PC was concerned by the bad impression. This concern took priority over "perfecting the Penal Code from an Islamic point of view."[1302] Not formally introducing apostasy as a defined crime, however, did not prevent the execution for alleged apostasy and state security offenses of the Sudanese mystic and intellectual Maḥmūd Muḥammad Ṭāhā[1303] in 1985 by the Numairi regime. [1304] Ṭāhā´s and his four co-defendant's trial suffered from a multitude of flaws and contradictions. Initially, the five defendants were arrested under the state security offenses. When Numairi gave his green light Section 458 (3) of the Penal Code and Section 3 of the Sources of Judicial Decisions Act were added, however, without explicitly spelling out an indictment for apostasy. As An-Na´im has pointed out both sections

[1298] Peters/De Vries (1976), p. 8. and Tellenbach (2006), p. 16.
[1299] For the dissolution of a marriage in Egypt as a consequence of alleged apostasy see e.g. the analysis of the Abu Zaid case by Bälz (1997).
[1300] Peters/ De Vries (1976), pp. 8-9 and Tellenbach (2006), p. 15.
[1301] Heffening (1993), p. 636.
[1302] Zein (1989), p. 247.
[1303] As to Ṭaha´s weltanschauung see e.g. Taha (1987), Rogalski (1990 and 1996), Mahmoud (2006) and Thomas (2009).
[1304] On the trial see e.g. An-Na´im (1986) and Layish/Warburg (2002), pp. 177-180. For an apologetic view of the trial compare Kabbāshī´s chapter on the Ṭāhā case, Kabbāshī (1986), pp. 85-101. One of the most detailed accounts of the background of Ṭāhā´s execution is given by Ibrahim, Abdullahi Ali (2008), pp. 273-321.

contradicted Article 70 of the Sudan Constitution of 1973 which protected against the imposition of criminal punishments without pre-existing penal provisions in Sudanese law.[1305] Further, article 247 of the Criminal Procedure Act 1983 prohibited the death penalty for persons over 70 years old. Since Ṭāhā was 76 at the time of his execution, the Court of Appeal argued that article 247 was not applicable to *ḥadd*-offenses and that no law could be in contradiction to the *sharī´a*. The Court of Criminal Appeal thus held that apostasy was indeed punishable under Sudanese law and that Ṭāhā and his co-defendants were guilty of it.[1306] While his co-defendants were given one month to recant, Ṭāhā was to be executed immediately. All followers of the Republicans (*Jumhūrīyūn*) of Ṭāhā were declared apostates, their activities were banned and their writings were to be destroyed.[1307] In order to support the charges the Court of Appeal did not come forward with relevant evidence.[1308] The court relied on a ruling of a *sharī´a* court from November 1968 which had declared Ṭāhā to be an apostate. Further, the Court of Appeal quoted the Muslim World League[1309] and Al-Azhar University of Cairo. Both institutions considered Ṭāhā to be a *murtadd*. It goes without saying that the opinions of these two organizations were juridically completely irrelevant. As to the 1968 decision of the *sharī´a* court it was null and void because the court had not had jurisdiction over cases of apostasy.[1310] While the time for repentance and recanting was reduced to three days for Ṭāhā´s co-defendants, Numairi did not grant the same to Maḥmūd Muḥammad Ṭāhā who was executed by hanging in public 18.1.1985. The Sudanese Supreme Court - after the Numairi regime had come to an end in 1986 - repealed the earlier decision of the Criminal Court of Appeal.[1311]

[1305] An-Na´im (1986), p. 207.
[1306] It came to this conclusion despite the fact that the Criminal Procedure Act made no exceptions for *ḥadd*-offenses with regard to the maximum age for the imposition of the death penalty.
[1307] This, however, did not lead to any further death penalties. Compare Köndgen (1992), p. 57.
[1308] Rogalski mentions that the court presented as evidence a flyer in which the Republicans had critizised the September laws as being in contradiction to the *sharī´a*. Rogalski (1996), p. 48.
[1309] For a detailed account of the Muslim World League´s role and position with regard to the *Jumhūrīyūn* and Ṭāhā see Schulze (1990), pp. 377-385.
[1310] As An-Na´im points out the jurisdiction of the *sharī´a* courts at that time was restricted to cases of family law, inheritance and pious foundations according to the Sudan Mohammedan Law Courts (Amendment) Act 1961. See An-Na´im (1986), p. 221, footnote 37.
[1311] Supreme Court, Constitutional Circuit: Asmā` Maḥmūd Muḥammad Ṭāhā, ´Abd al-Laṭīf ´Umar Ḥasaballah vs. Government of the Sudan, no. 2/1406, SLJR 1986.

4.6.3 Apostasy in the Criminal Act 1991

The Sudanese Penal Code of 1991 introduced for the first time the crime of apostasy (*ridda*).[1312] Apostasy commits every Muslim who propagates the renunciation of the creed of Islam or publicly declares his renouncement thereof by an express statement or conclusive act.[1313] However, the apostate shall be given a chance to repent during a period to be determined by the court. Where he insists upon apostasy, and not being a recent convert to Islam, he shall be punished with death.[1314] Whenever the apostate recants before execution the penalty shall be remitted.[1315] Interestingly and in contradiction to most schools, who stipulate three days, the time given by the CA91 to recant is to be determined by the court. This vague and flexible stipulation gives the court the freedom to handle possible cases according to political expediency. Since no maximum time frame is set the apostate could remain in prison until he recants. During my interview with Dr. Ḥasan al-Turābī [1316] he insisted that during the drafting process of the Criminal Bill 1988 under his supervision as Minister of Justice he had tried to exert a mitigating influence on the multi-party committee which drafted the new criminal legislation. He would have preferred, he claimed, not to introduce a stipulation on apostasy. While his colleagues in the drafting committee were in favor of such a stipulation – he told me - he had them agree on the above vague formula, leaving the time for repentance at the discretion of the court. This account seems unlikely for several reasons. Most important, the group drafting the Criminal Bill 1988 consisted, if one follows the foreword of the law written by Ḥasan al-Turābī himself, of jurists of the three coalition parties at the time, the NIF, the Umma and the DUP. The latter two parties were neither known as fervent supporters of Numairi's version of Islamic criminal law nor did they back this project. In fact, in the DUP and Umma parties the project was met with criticism and rejection.[1317] al-Turābī´s claim of having exerted an attenuating influence on DUP and Umma jurists therefore seems to be hardly credible.[1318]

[1312] CA91, art. 126 (1)-(3).
[1313] CA91, art. 126 (1).
[1314] CA91, art. 126 (2).
[1315] CA91, art. 126 (3).
[1316] Interview with Dr. Ḥasan al-Turābī 13.5.2009.
[1317] Compare Delmet (1990), p. 279 and Köndgen (1992), pp. 68-72.
[1318] Ironically Ḥasan al-Turābī himself has become the object of alleged apostasy in 2006. See "Sudan´s Turabi considered apostate", Sudan Tribune 24 April 2006.

4.6.4 Conclusion

Apostasy in Sudanese criminal legislation differs from other crimes derived from Islamic Criminal Law (ICL) in one important aspect. While it has officially been introduced into the 1991 Criminal Act for the first time in the history of Sudanese criminal legislation there is, until the time of writing, only one case known where the punishment has been executed since 1983. The decision, which had led to the hanging of Maḥmūd Muḥammad Ṭāhā, a religious reformer in opposition to the Numairi regime, was revoked by the Supreme Court in 1986. The legal situation in the Sudan with regard to apostasy is thus paradoxical. While Maḥmūd Muḥammad Ṭāhā was executed *before* the crime of apostasy as such had been codified and introduced into the Penal Code, the actual codification in 1991 has not led to the execution of alleged apostates in a single case. The wording of the article on apostasy seems contradictory. On the one hand its vague definition potentially allows for wide applicability. On the other hand the possibility to repent within a period that is left to the discretion of the court provides the judge with a loophole. Even if the alleged apostate does not recant he can be kept in prison theoretically indefinitely, without obligation to execute him. Against the background of fierce criticism voiced inside and outside the Sudan against Ṭāhā´s execution, the Sudanese judiciary and the Sudanese government respectively do not seem to be interested in the actual application of the death penalty against those who renounce Islam.