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

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5 Homicide and bodily harm

5.0 Introduction

Against the background of the pertinent *fiqh* opinions, this chapter will describe and analyze relevant legislation with regard to homicide and bodily harm and its punishment before and, in more detail, after the introduction of the Islamized legislation in 1983 and after its re-enactment in 1991. This analysis will sound out to which extent the Islamized codes of 1983 and 1991 are newly created or rather textually directly dependent on their colonial and post-colonial predecessor codes. It will be highlighted how the Sudanese legislator introduced Islamic offences into a secular penal code in 1983 by way of "grafting", thus creating inconsistencies by seriously disturbing the underlying logic of its predecessors, while in many instances not adhering to the prescriptions of the *fiqh* either. How these inconsistencies have been addressed and for the larger part solved (while, at times, creating new inconsistencies) in the up-to-day last Sudanese Criminal Act of 1991, will be the focus of the final part of this

chapter. Wherever available landmark decisions by the Sudanese Supreme Court (SC) on homicide or bodily harm, based either on the Penal Code 1983 (PC83) or – in the following chapter - the Criminal Act 1991 (CA91) will be analyzed in order to show how the Supreme Court of the Sudan interprets and applies this important part of Islamic Criminal Law. This analysis will attempt to give answers to questions pertaining to the autonomy of the state judicial system vis-à-vis Islamic law, in the context of the Islamization of existing secular codes. It will show how the combination of different schools of law (*madhāhib*) is efficiently used to reassert this very autonomy wherever it is deemed necessary and possible and can be justified without leaving an Islamic frame of reference.

5.1 Homicide and bodily harm in the *fiqh*

General principles[1319]

In Islamic Criminal Law (ICL) homicide and bodily harm are determined by three guiding principles:

a) The principle of private execution: different from the *ḥudūd*, claims of the victim or his heirs are claims of men and not claims of God. Thus, the prosecution, the trial and the execution of the sentence is contingent upon the will of the victim or his heirs. The role of the judge is therefore a limited one. He only supervises the procedure, scrutinizes the evidence and determines a judgment based on the victim's or the victim's heir's claims and the evidence provided. However, in cases where *qiṣāṣ* is not a possibility, the state court can impose a *ta´zīr* punishment.

b) The principle that either retaliation (*qiṣāṣ*) or financial compensation (*diya*) can be demanded as punishment or compensation by the victim or his heirs. In order to demand retaliation the killing or bodily harm must have been inflicted intentionally. If the conditions for retaliation are not fulfilled, *diya* (blood money) may be demanded by the victim or his heirs.[1320] In certain cases the blood money must be paid by the clan of the perpetrator (*´āqila*).

c) The principle of equivalence (*mumāthala*) stipulates that there must be equivalence between the killer and the victim on the one hand and with regard to the wounds inflicted

[1319] The following section serves as a short introduction and the three principles mentioned will be discussed at length below. For the introduction compare Peters (2005), pp. 38-41.

on the other hand. In the first case retaliation (*qiṣāṣ*) can only take place if the blood price of the victim is not lower than the monetary value of the perpetrator. In the case of bodily harm the wounds suffered by the victim and the wounds inflicted on the perpetrator by way of retaliation must be equivalent.

5.1.1 Intentional homicide

Intentional homicide (*qatl ʿamd*) is defined as the killing of an immune (*maʾṣūm*) person, i.e. a human being[1321], with the intention (*qaṣd*) to cause death and without legal reason to kill.[1322] Human life begins with birth. Therefore the killing of an unborn fetus does not fall under intentional homicide,[1323] even if, as a consequence of an attack, the death of the baby takes place after its birth only. Further, human life is protected until death, meaning that the killing of a mortally ill or lethally wounded or a person who is about to die is punishable just like the killing of a healthy person.[1324] Homicide on demand of the victim constitutes a legal uncertainty which, according to the majority opinion, averts *qiṣāṣ*. Among the Mālikites the legal consequences of a killing on demand are controversial. One opinion argues in favor of *qiṣāṣ* while the other is of the opinion that the legal uncertainty make a *taʿzīr*-punishment and *diya* obligatory.[1325] The killed person must enjoy inviolability (*ʿiṣma*) which is either based on the fact that the victim is either a Muslim or a non-Muslim under protection of an Islamic state.[1326] There are three kinds of non-Muslims with regard to the protection of life. A *mustaʿmin* enjoys temporary protection, a non-Muslim who enjoys permanent protection is called *dhimmī* and, finally, a non-Muslim foreigner (without temporary protection), a *ḥarbī*, whose life is not protected at all within Muslim territory. Further, the life of a *ḥarbī* is not protected when he is killed on the battlefield, nor when he becomes a prisoner of war.[1327] A Muslim loses immunity when he becomes an apostate. In the case where a Muslim commits a *ḥadd*-crime that is punishable with the death penalty (*qatl*) he loses legal protection already

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[1320] See below on the conditions for the payment of blood money as well as the differences between the Sunni schools.
[1321] ʿAwda (2001), vol. 2, pp. 12-13.
[1322] On the latter see ʿAwda, vol. 2, pp. 73-74.
[1323] ʿAwda (2001), vol.2, p. 14.
[1324] ʿAwda (2001), vol. 2, p. 13.
[1325] For more details see ʿAwda (2001), vol. 2, pp. 83-85 and Baradie (1983), p. 133.
[1326] ʿAwda (2001), vol. 2, p. 15.
[1327] ʿAwda (2001), vol. 2, p. 18.

once the crime has been committed and not only when he is legally sentenced.[1328] However, who kills someone who has committed *zinā* must be capable to prove the crime, otherwise the killing will be deemed intentional homicide. The same is true for banditry (*ḥirāba*).[1329] A killer of a Muslim who has lost immunity in the aforementioned cases does not commit intentional homicide and therefore *qiṣāṣ* is not due. Instead he can be punished by a *ta´zīr*-penalty because the right to kill is a prerogative of the state. Whoever kills an apostate (i.e. ex-Muslim) can be punished by *ta´zīr* and the payment of *diya* to the treasury.[1330]

Another constitutive element of intentional homicide is the killing of *another* person. An attempt to commit suicide, despite being a sin, is not punishable. Neither is abetment to or assistance in committing suicide.[1331]

In the *fiqh* subjective criteria to determine whether a homicide was committed intentionally are less important than objective ones. The jurists do not think that the intention of the killer can be really known and therefore concentrate on the way how the deed was committed. Further they inquire about the characteristics of the weapon in order to establish an intention to kill or to disprove it. If the killing is carried out with weapons which are - under normal circumstances - lethal, the intention to kill is assumed.[1332] If the weapons are normally not lethal no intention to kill is presumed. It is, however, controversial among the *fuqahā´* which weapons have to be considered to be lethal and which are not. The most restrictive definition of lethal weapons is suggested by the Ḥanafites. They only assume the intention to kill if death has been caused either by the use of fire or lacerating instruments (*ālāt jāriḥa*). These are understood as sharpened or pointed instruments which can be used to sever limbs like, e.g. a sword, a knife, a sharpened stone or an arrow.

In all the other Sunni schools an intention to kill is assumed if the means used and the manner in which the killing was carried out can be considered as being normally lethal. Among these count the already mentioned killing with a lacerating instrument, further poisoning, causing someone to drown, strangling,[1333] throwing a person from great height or beating someone with a heavy object. The distinction between lethal and non-lethal instruments is, however, not always clear-cut. If death is caused by an instrument which normally is not lethal – e.g. a

[1328] ´Awda (2001), vol. 2, p. 20.
[1329] ´Awda (2001), vol. 2, p. 20.
[1330] ´Awda (2001), vol. 2, p. 19.
[1331] Baradie (1983), pp. 134. For a detailed discussion of "suicide/*intiḥār*", see Rosenthal (1986), pp. 1246-48.
[1332] Compare Peters (2005), p. 43.

whip or a stick – the intention to kill can still be assumed. This is for example the case if death was caused by multiple lashes or by whipping a sensitive part of the victim or if an unusual constitution has advanced the death of the victim, even if the killer did not know about the condition of his victim.[1334]

Retaliation (qiṣāṣ)

In order to execute retaliation (*qiṣāṣ*) the legally correct assessment of proof and all other prescribed conditions by the judge is indispensable. Only after a legally valid judgment by a court *qiṣāṣ* can be executed.

According to the majority opinion of the Ḥanafites and the Ḥanbalites execution is carried out through the sword, Mālikites and Shāfi´ites, however, inflict on the perpetrator the same wounds which have led to the death of his victim.[1335]

Qiṣāṣ is a personal right of the private prosecutors, i.e. the legal heirs of the victim. Only if all of them demand *qiṣāṣ* it can be executed. If only one of the heirs pardons the culprit retaliation lapses according to the majority opinion in the *fiqh*. According to Ḥanbalites and Shāfī´ites the execution of *qiṣāṣ* must be postponed if one of the heirs is underage until he is coming of age and can make a legally binding declaration of his intentions. In the meantime the culprit will be imprisoned. It should be noted, however, that the legal protection (*´iṣma*) of a person who has committed intentional homicide ceases. However, he can be killed by the private prosecutors only, but not – unlike in the cases described above - by anyone else.[1336]

Qiṣāṣ is not applicable if the perpetrator is an ascendant of the victim or whenever there is a descendant of the perpetrators among the heirs of the victim.

Equivalence

While *qiṣāṣ* is the punishment for intentional homicide it can only be applied under specific conditions: The victim's life may not have a *diya* value higher than the one of the killer except that a Muslim man may be executed for the life of a Muslim woman.[1337] Thus, a Muslim can not be killed by way of *qiṣāṣ* for the killing of a protected non-Muslim

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[1333] On strangling see ´Awda (2001), vol. 2, p. 71.
[1334] Baradie (1983), pp. 135-136.
[1335] German: "Spiegelstrafe". See Baradie (1983), p. 139.
[1336] ´Awda (2001), vol. 2, p. 21.
[1337] Peters (2005), p. 47.

(*musta´min*, *dhimmī*)[1338] nor for the intentional killing of a slave. However, *qiṣāṣ* is applicable if the killer has a lower blood price than his victim, i.e. a *musta´min* or a *dhimmī* can be killed by way of *qiṣāṣ* for the killing of a Muslim and a slave for the killing of a free person. An exception to this rule is the killing of a woman by a man.[1339] Despite the fact that her blood price is half of that of a man the male killer can be executed by way of *qiṣāṣ*.[1340]

The Ḥanafites, however, follow a different view. For them equivalence is based on the *permanent* protection of life (*´iṣma*) not on the value of the blood price. Therefore, according to the Ḥanafites, a free man can be killed for a slave and a Muslim for a *dhimmī*. A Muslim, however, can not be killed for a *musta´min*, because the *musta´min´*s protection is only temporary.[1341]

Multiple perpetrators

Since *qiṣāṣ* implies equivalence the *fiqh* has to answer the question of whether *qiṣāṣ* against multiple perpetrators is possible.[1342] The *fuqahā`* answer in the affirmative, however subject to certain conditions. Several perpetrators can be killed by way of *qiṣāṣ* for one victim if they have committed the deed together and provided that the individual part each one of them played in the killing, would have equally led to the killing if it had been committed alone.[1343]

However, according to a majority opinion of *fuqahā` qiṣāṣ* will be averted for all participants of the killing if one of them was either an ascendant of the victim or if one of the perpetrators can not be killed due to the lack of equivalence (*kafā`a*). This would be the case, e.g. if a free man killed a slave together with other slaves or if a Muslim killed a non-Muslim together with other non-Muslims.[1344] Averting the *ḥadd* in these cases is justified by quoting a legal uncertainty (*shubha*).

*Private prosecutors (*awliyā` al-dam*)*

Whether or not retaliation takes place is contingent upon the will of the victim's next of kin who act as prosecutors. Only if no next of kin exist, will the state act as prosecutor. All

[1338] Bahnasī, al-jarā´im, pp. 199-201.
[1339] Bahnasī, al-jarā`im, pp. 202-203.
[1340] Peters (2005), p. 47.
[1341] Peters (2005), p. 47.
[1342] For the following compare ´Awda (2001), vol. 2, pp. 41- 43.
[1343] Baradie (1983), p. 138. See also Bahnasī, jarā´im, pp. 201-202.
[1344] For the Ḥanafite opinion on this constellation see above.

prosecutors (in the first case) must agree on their demand of *qiṣāṣ*. If only one foregoes his right to retaliation, *qiṣāṣ* cannot take place. Except for the Mālikites there is agreement among the other schools that the prosecutors are the heirs of the victim, women included. The Shāfi´ites exempt, however, the spouse relict. The Mālikites, in turn, define the prosecutors as the male agnatic group, i.e. a) the descendants, b) the ascendants, c) the descendants of the first ascendant (brothers, nephews etc.), d) the descendants of the second ascendant (paternal uncles, cousins etc. and, e) the descendants of the third ascendant (paternal great-uncles and their offspring). Thus, *qiṣāṣ* must be claimed by the closest male agnatic relatives. The groups above exclude each other from demanding *qiṣāṣ* in descending order, thus descendants exclude ascendants, ascendants exclude the descendants of the first ascendant and so forth. Within a group closer relatives have precedence over more distant ones.[1345]

The victim's next of kin, i.e. the private prosecutors (*awliyā` al-dam*) can execute the *qiṣāṣ* penalty themselves. However, in order to avoid excessive cruelty, the *qiṣāṣ* is to be executed under official supervision. In later jurisprudence we find the tendency to charge an official hangman with the execution.[1346] According to the Ḥanafites all private prosecutors have to be present before and during the execution because one of them could possibly pardon the killer in the last moment.

Qiṣāṣ lapses if the killer dies or if the heirs pardon him. If at least one of the heirs foregoes his right to *qiṣāṣ*, it is automatically turned into *diya*. Concerning the rights of the heirs there is a difference of opinion between the four Sunni schools. Ḥanafites and Mālikites hold that the heirs have the right of choosing between *qiṣāṣ* or granting pardon. Blood money can only be demanded if the killer agrees, according to these two schools. If he refuses, the heirs can either insist on the execution of *qiṣāṣ* or accept a pardon without any financial compensation. Since the Mālikites and Ḥanafites make the payment of *diya* contingent upon the acceptance of the killer, the heirs do not receive anything if he dies before *qiṣāṣ* has been executed, since only the (living) killer could have agreed to paying blood money. [1347] The Shāfi´ites and the Ḥanbalites, in contrast, hold that the private prosecutors can chose between three options: a) retaliation (*qiṣāṣ*), b) pardoning the killer without any financial compensation (*´afw*) and, c) pardoning the killer against the payment of *diya*. Thus, if the killer dies before the execution

[1345] For more details of the Mālikite rules on the private prosecutors see Peters (2005), p. 45.
[1346] See Baradie (1983), p. 139.
[1347] Peters (2005), pp. 45-46.

of *qiṣāṣ*, according to Shāfī´ite and Ḥanbalite law the right to demand the blood price is inherited by the victim's heirs.

Diya *and* ta´zīr

Blood money (*diya*) and *ta´zīr* can both replace *qiṣāṣ*. The normal blood price, payable for accidental and semi-accidental homicide amounts to 100 camels of different age and sex. As compensation for intentional and semi-intentional homicide equally 100 camels are due, but of a better quality, i.e. higher value. The blood price depends on the sex, religion and legal status of the victim. Thus, the *diya* of a woman is half of the *diya* for a man. As to the *diya* of a *dhimmī* the schools differ. While the Ḥanafites and the Ḥanbalites are of the opinion that it is the same as the *diya* to be paid for a Muslim victim, the Mālikites hold that it is only half of the blood price of a Muslim. The Shāfi´ītes fix the *dhimmī´s* blood money as low as one third of the full *diya* (*diya kāmila*) .

The blood price for homicide is payable to the victim's heirs. In the Mālikite and the Shāfī´ite schools the surviving spouse does not receive *diya*.[1348]

According to the majority opinion the qaḍī can impose a *ta´zīr*-punishment if the conditions for *qiṣāṣ* are not fully met or if the heirs forego their right of *qiṣāṣ*. The Mālikites fix 100 lashes and a one year prison term as an adequate *ta´zīr*-penalty. Further, the perpetrator forfeits his right to inherit from his victim.[1349]

Liability of the solidarity group (´āqila)

In cases of semi-intentional and accidental homicide it is not the perpetrator but the solidarity group which is liable for financial compensation (*diya*). However, the liability of the *´āqila* lapses if the perpetrator himself has played a vital part in establishing the liability, e.g. through a confession to the killing or by agreeing to a financial settlement with the heirs of the victim (*sulḥ*).[1350]

There are some important differences between the schools as to what the solidarity group actually is. While Mālikites and Ḥanbalites hold that all able-bodied male tribesmen – who have the duty to protect the members of the tribe – make up the *´āqīla*, the Shāfī´ites are of the

[1348] Peters (1983), p. 49.
[1349] Baradie (1983), p. 140.

opinion that the *´āqila* is formed by all adult male agnatic relatives who are also heirs. The Ḥanafites have adopted a more open definition, which, as we will see below, will play a role in modern Sudanese jurisdiction. They hold that any group that shows solidarity to its members can be defined as an *´āqila*. The litmus test is whether the group would help its individual member if his house is burnt down.[1351] If no *´āqila* exists and the perpetrator of the crime is a Muslim, the public treasury is liable to pay.[1352] The liability of the *´āqila* is, however, not unlimited in most schools. While the Shāfi´ites do not have an upper limit, the three other Sunni schools know a maximum amount a member of a solidarity group has to pay. The Ḥanafites set the maximum at 3 dirhams per year. Since the *diya* can be paid in three annual installments it would thus take 1100 men three years to pay the full blood price of 10.000 dirham. Shāfi´ites and Ḥanbalites distinguish between different social groups. The affluent pay half a dinar, those with a medium income pay a quarter dinar, while the poor have no obligation to make any financial contribution.[1353]

*Inviolability of life /´*iṣma

Islamic Criminal Law further knows the concept of the inviolability of a person's life, property and freedom (*´iṣma*) - a protection offered by the state to all Muslims, dhimmis and those non-Muslims enjoying an assurance of protection (*amān*, *hudna*[1354], *´aqd al-jizya*[1355]). While a person enjoying *`iṣma* is inviolable as to his/her life, property and freedom, the loss of such inviolability can – under certain circumstances - mean that the intentional killing of such an unprotected individual will not be regarded as intentional homicide under the fiqh. Under which conditions a Muslim or a non-Muslim enjoying inviolability lose it is a matter of discussion among the *fuqahā`*. It will suffice to briefly mention the most important cases when the *´iṣma* is lifted and which potentially have a bearing on the present.[1356]

a) the killing of the *musta´min* and all non-Muslims under the protection of the Muslim state is considered homicide according to all schools. According to Abū Ḥanīfa, however, not the status, i.e. being a Muslim or not, is decisive here, but where the homicide takes place.

[1350] For a detailed discussion of all cases where the responsibility for the *diya* does not fall upon the *´āqila*, compare Bahnasī, al-diya, pp. 69-72.
[1351] Peters (1983), p. 50.
[1352] Bahnasī, al-*diya*, pp. 67-68.
[1353] Peters (1983), pp. 49-50.
[1354] Protection offered under a truce.
[1355] Protection offered to those paying the head tax within the *dār al-Islām*.

In other words, Muslims and non-Muslims in the *dār al-ḥarb* do not enjoy inviolability for being in a belligerent state and all those who belong to the *dār al-Islām* enjoy inviolability, whether Muslim or not, by virtue of the protection the *dār al-Islām* extends to those present in its territory.[1357]

b) the killing of the apostate (*murtadd*) whether before his repentance or after it will not be considered intentional homicide.[1358]

c) the killing of the *ḥarbī*, i.e. who belongs to a non-Muslim state in war with the *dār al-Islām*, is also not considered intentional homicide. The blood of the *ḥarbī* can be shed with impunity in wartime, in cases of self-defense or if the *ḥarbī* is a prisoner of war.[1359]

d) killing of those guilty of a *ḥadd*-crime which is punishable by death, such as *zinā* and *ḥirāba* is not considered intentional homicide and it is a right of the community which can be executed by any member of it. The culprit will be stripped of his inviolability already when committing the crime, not just after the verdict. This, without prejudice to the necessity to prove the crime. If e.g. *zinā* can not be proven after the supposed *zānī* has been killed, his killer will himself be guilty of intentional homicide.[1360]

e) killing of those guilty of intentional homicide will not be considered intentional homicide if committed by the heirs of the victim. It is not a "*ḥaqq Allah*," i.e. a right of the community but the right of the private prosecutors.[1361]

In most of these cases the killer of the apostate (*murtadd*), *ḥarbī*, *zānī* etc. will be liable to a *ta´zīr*-punishment only for having arrogated himself the rights of the state but not for the killing as such. In the case of the killing of the apostate according to the Mālikites *diya* is due to be paid to the treasury.[1362]

[1356] For the following compare ´Awda (2001), Volume 2, pp. 15-25.
[1357] ´Awda (2001), Volume 2, p. 15.
[1358] ´Awda (2001), Volume 2, pp. 18-19.
[1359] Compare ´Awda (2001), Volume 2, p. 17.
[1360] ´Awda (2001), Volume 2, pp. 20-21.
[1361] As a case of minor importance in the present context we may add the *bughāt*, or rebels against the state. They are inviolable – according to Mālik, al-Shāfi´ī and Aḥmad Ibn Ḥanbal – unless they go to war against the state. According to Abū Ḥanīfa they lose their inviolability and their blood can be shed as soon as the *bughāt* attack those who back the legitimate order or encroach upon their property. See ´Awda (2001), Volume 2, p. 21.
[1362] See ´Awda (2001), Volume 2, p. 19.

5.1.2 Semi-intentional homicide

Semi-intentional homicide, according to the Ḥanbalites and the Shāfī´ites, takes place when the death of an inviolable (*ma´ṣūm*) person is caused by an illegal and intentional attack with means that usually do not cause death.[1363] While the act as such is intentional the intention to cause death is not assumed, based on the use of non-lethal weapons. Such per se non-lethal attacks would be e.g. throwing a pebble by way of jest or beating a person with a cane.[1364]

Among the Ḥanafites, however, the definition of semi-intentional homicide is controversial. While Abū Yūsuf (d. 798) and al-Shaybānī (d. 805) follow the above majority doctrine, Abū Ḥanīfa has a different opinion. According to him, intentional homicide can only be committed with fire, or with a sharp weapon or a tool that cuts through the body (such as a sword or a sharp stone). In all other cases, such as hitting with a blunt instrument, or hitting with a stone which is not sharp or with a stick, but also in the case of drowning or poisoning, Abū Ḥanīfa assumes semi-intentional homicide.[1365]

The Mālikites do not recognize semi-intentional homicide because it is not mentioned in the Qur´an. They classify it as intentional homicide.[1366]

Semi-intentional homicide does not result in *qiṣāṣ* but in the obligation to pay the enhanced blood price (*diya mughallaẓa*). Further, the culprit will be disinherited. *Diya*, however, will not be paid by the culprit but by his *´āqila*. If the heirs of the victim forego their right to *diya* a *ta´zīr*-punishment can be imposed.

5.1.3 Accidental homicide

Accidental homicide takes place when a person has erroneously caused the death of another person, whose life is inviolable, according to the rules of the *fiqh* by way of an intended act but without the intention to kill his victim. This can happen e.g. through cutting down a tree which accidentally kills another person. Or a man accidentally kills a human being instead of the intended animal during hunting. [1367] The act as such does not have to be of a special kind, e.g. hurt. It can also be indirect like throwing melons or pouring water onto the street and thus causing a lethal accident. Further, accidental death can be the result of immaterial causes,

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[1363] Baradie (1983), p. 141.
[1364] Peters (2005), p. 43.
[1365] Bahnasī, jarā`im, p. 216.
[1366] ´Awda (2001), vol. 2, pp. 92 and Bahnasī, jarā`im, p. 216.
[1367] Peters (2005), p. 44 and Baradie (1983), p. 142.

such as a frightening exclamation causing someone to fall from an elevated place and die.[1368] In both cases – accidental and semi-accidental – financial liability persists and *diya* has to be paid to the heirs of the victim.[1369] Whether or not the homicide was the result of negligence – like in the aforementioned case of the mother suffocating her baby - has no impact on the financial liability of the perpetrator.[1370]

Accidental homicide creates a liability for blood money (*diya*) and as an alternative punishment *ta´zīr*. Secondary punishments are deprivation from inheritance and bequest.[1371] It must be noted here that blood money (*diya*) is not a criminal responsibility but a compensation for civil damages, i.e. here the loss of life.[1372] Minors and the insane are also liable for *diya*. It is further important to note here that *diya* must be paid not by the offender but by his *´āqila* in a period of three years. The reason as given in the *fīqh* for making the *´āqila* responsible is that homicides by accident are common and that wisdom requires that such a heavy penalty should not be imposed on the individual with his limited property, but on his solidarity group.[1373]

5.1.4 Semi-accidental homicide

A fourth category is semi-accidental homicide (*qatl shibh al-khaṭā'*) which is given when neither the act as such nor its result are intended. The classical example is the mother suffocating her baby when turning over in her sleep. This category is only supported by some *fuqahā´*; the majority subsumes such cases under accidental homicide. The lack of intention has no influence on the liability for blood money in this case, the legal consequences are the same as for semi-intentional homicide. Minors and the insane are only financially liable in cases of homicide and injuries, whether their acts were intended is not decisive.[1374]

[1368] ´Awda (2001), Vol. 2, pp. 108-110.
[1369] Peters (2005), p. 44.
[1370] ´Awda (2001), Vol. 2, p. 105.
[1371] ´Awda (2001), Vol. 2, p. 200.
[1372] However, a number of Muslim authors, such as ´Abd al-Qādir ´Awda, list *diya* under punishments.
[1373] ´Awda (2001), Vol.2, pp. 200-201.
[1374] Peters (2005), p. 44. Some authors disagree about the precise definition of categories. Baradie (1983), e.g. lists killings by negligence under "semi-accidental homicide". As an example he gives the person digging a pit in a public road. A passer-by falls into it and dies. Peters (2005), in contrast, lists indirect killings where a person creates the conditions for the killing but does not directly cause it under *qatl bi-sabab* or indirect killing. On *qatl bi-sabab* see Schacht (1990), p. 769.

5.1.5 Heinous murder

A category of homicide only recognized by the Mālikites is heinous murder (*qatl ghīla*), the definition of which is "killing a person for his money after having him treacherously brought to an isolated place."[1375] In this special category some important rules applicable to other categories of homicide have no validity. Thus, the murderer can be sentenced to execution, even if the blood price of killer and victim are not equivalent. A pardon of the heirs of the victim, in this particular case, can not avert execution.

5.1.6 Bodily harm

Crimes related to bodily harm follow the same categorization of intentional, semi-intentional, accidental and semi-accidental as described above with regard to homicide. Equally in analogy to homicide *qiṣāṣ* is only due in cases of intentional bodily harm, provided all conditions are fulfilled. All other categories result in financial compensation (*diya*) or pardon (*ʿafw*). A *qiṣāṣ*-punishment with regard to bodily harm consists in the infliction of the same wound as the one the culprit has intentionally inflicted on his victim. Concerning bodily harm, *qiṣāṣ* as well as *diya* are considered to be a right of man (*ḥaqq adamī*) because they are the result of a violation of a human right, i.e. physical integrity.

With regard to equivalence there are some differences between the schools. Thus, according to the Mālikites *qiṣāṣ* for wounds or injuries (*qiṣāṣ fīmā dūn an-nafs*) is neither applicable if the perpetrator is a Muslim and the victim a protected non-Muslim (*dhimmī*, *mustaʿmin*), nor if the perpetrator is a free person and the victim a slave. In these cases not *qiṣāṣ* but *diya* is applicable. However, if a Muslim is wounded by a protected non-Muslim or a free person by a slave *qiṣāṣ* is possible but not in the reverse case.[1376]

The Ḥanafites, in turn, follow a third opinion: *qiṣāṣ* with regard to bodily harm is not applicable between free persons and slaves, men and women and among slaves. However, *qiṣāṣ* is applicable between Muslims and protected non-Muslims (*dhimmīs* and *mustaʿmins*).[1377]

[1375] Peters (2005), p. 44 quoting Ibn Qudāma, al-Mughnī (Beirut: Dār Iḥyāʿ al-Turāth al-ʿArabī, n.d.), vol.VII, pp. 648-9.
[1376] Baradie (1983), pp. 143-144.
[1377] Baradie (1983), p. 144.

Equivalence is also of importance in the case of injuries, if in a somewhat different sense as discussed above. Thus, a sound organ can not be removed by way of retaliation (*qiṣāṣ*) for a partly amputated or defective one. This is also true in the reverse direction.

If bodily harm is inflicted by a group of perpetrators against a single victim, *qiṣāṣ* can be applied according to the majority opinion under certain circumstances.[1378] The Ḥanafites, however, being stricter with regard to the equivalence between perpetrator and victim do not allow for *qiṣāṣ* in such cases, since several hands can not be severed for one hand.

Further, *qiṣāṣ* is excluded if its application would imply inflicting greater harm on the perpetrator than the one he has inflicted himself on his victim. Likewise *qiṣāṣ* is not admissible if complete similarity between punishment and the original wound cannot be guaranteed or if it would entail a severe health risk. Thus a healthy hand cannot be taken for the loss of a paralyzed one and, likewise, *qiṣāṣ* will not be applied if someone who has already lost his left hand inflicts bodily harm causing the loss of the left hand of someone else.

As to flesh wounds retaliation can be applied in the case of wounds that lay bare the bone (*muḍīḥa*) or in the case of smaller injuries. In cases of more severe flesh wounds a *qiṣāṣ*-punishment is not admitted if there is difficulty to inflict a wound of the same length, depth and form. In cases where the application of the *qiṣāṣ*-punishment is risky and could lead to death or to greater harm than the one suffered by the hurt person *qiṣāṣ* will also not be applied. This is the case with respect to the fracture of bones of the neck, the skull (the so-called *ma´mūma*, where the wound reaches the cerebral membrane) and other sensitive parts of the body.[1379]

Whenever the *qiṣāṣ*-punishment is remitted compensation (*diya*) has to be paid and, if the *qāḍī* so decides, a *ta´zīr*-punishment is due. For the relevant amount of *diya* a tariff list applies. Thus full *diya* (also called *´arsh* when based on the tariff list) has to be paid for the loss of reason, one of the five senses, a physical or mental faculty as well as the loss of a member or an organ a human possesses only once. *Diya* for an organ or a member of which a human being possesses two, four or ten will be half, a quarter or a tenth of the full *diya*. For the loss of a tooth it will be one-twentieth of the full blood price. All percentages of the blood

[1378] The conditions of *qiṣāṣ* against multiple perpetrators are in analogy to those in homicide cases. Compare above.

[1379] Baradie (1983), p. 145.

price are measured against the full *diya* of the person who suffered the injury. Therefore, women, having half the value of the blood price of a man, receive half the amount of a man for a member or an organ lost.[1380] In all cases not covered by this list or when the injured member organ was not sound, the *qāḍī*, with the help of experts, will assess the amount of the due compensation (called "*ḥukūma*" or "*ḥukūmat ʿadl*").[1381] In cases of multiple wounds *diya* is cumulative, *diya* for each wound must be paid individually even though the total can result in a sum higher than the full blood price.[1382] With regard to the role of the *ʿāqila*, the solidarity group, the same rules apply as for homicide.

5.2. Homicide and its punishment before and after the 1983 Penal Code

With few differences[1383] the PC74 – being the last secular penal code as to date - literally re-enacted the provisions on homicide of the 1925 Penal Code. The PC25/74 knew two kinds of culpable homicide: 1. culpable homicide amounting to murder, punishable by death or life imprisonment and possibly also a fine (articles 248, 251), 2. culpable homicide not amounting to murder, punishable by imprisonment for life or for any less term or with a fine or both (articles 249, 253). The legal difference between the two was that the murderer had the intention to kill or knew that the probable consequence of his act was death. In contrast, culpable homicide not amounting to murder "the offender whilst deprived of the power of self-control by grave and sudden provocation causes the death of the person who gave the provocation...by mistake or accident".

The Islamized (and arabized) PC83 abolished titles of homicide-related offences, inspired by its predecessor codes, and introduced titles and punishments derived from Islamic jurisprudence (*fiqh*), such as intentional homicide (*qatl ʿamd*), semi-intentional homicide (*qatl shibh al-ʿamd*) and accidental homicide (*qatl khaṭaʾ*).[1384] This classification follows the majority opinion of all schools, with the exception of the Mālikites, who do not recognize semi-intentional homicide but add heinous murder (*qatl ghīla*).[1385]

[1380] Peters (2005), p. 53.
[1381] Baradie (1983), p. 145.
[1382] Peters (2005), p. 52.
[1383] E.g. "infanticide" is introduced as article 253 A, while 262 is supplemented by a provision on "causing miscarriage by an unmarried woman to avoid shame".
[1384] Articles 248, 249 and 255, PC83.
[1385] See Peters (2006), p. 43.

A comparison of the stipulations for homicide and bodily harm in the different codes show the strong textual relation – often the definitions are identical despite the changed titles - between the pre-1983 codes and their Islamized 1983-version.[1386] It also brings to light a number of significant inconsistencies, contradictions and incompatibilities with Islamic jurisprudence, mostly being the result of the circumstances of the fast drafting of the PC83, and the September Laws in general for that matter.[1387] A good part of these flaws have been redressed in the CA91. A discussion of these changes will follow below.

5.2.1 Intentional homicide

Thus, the definition for intentional homicide/*qatl ʿamd* in the PC83 is identical with the definition for murder 1974[1388], in other words, it is merely a translation into Arabic. It is important to note here the fundamental difference between the notions of "murder" in the PC74 and "intentional homicide" (*qatl ʿamd*) in the *sharīʿa* law of homicide. "Murder" as meant in the PC74 takes the intention of the killer into account, thus culpable homicide becomes murder when "the act by which the death is caused is done with the intention of causing death."[1389] Further, article 248 of the PC74 stipulates that culpable homicide becomes murder "if the doer of the act knew that death would be the probable and not only the likely consequence of the act or of any bodily injury which the act was intended to cause".[1390] In contrast, the *fuqahāʿ* did not think that a person's intention, i.e. his state of mind could be established. Therefore, they concentrate on external factors, such as the kind of weapon or means used to kill (see also below).[1391] It is clear that by simply translating the definition of murder under the new title intentional homicide, the Sudanese legislator had not taken into account the incompatibility of the two notions.

However, the legislator has changed the punishment. The PC25/74 envisaged the death penalty, or life-long imprisonment and a fine. The PC83[1392] stipulated the death penalty

[1386] The scope of this work does not allow for a more detailed comparison and will confine itself to the more striking inconsistencies.
[1387] For the circumstances surrounding the drafting of the PC 1983, see Köndgen (1992), p. 39 et sqq.
[1388] Art. 248 in both codes.
[1389] PC74, art. 248 (a).
[1390] PC74, art. 248 (b). In English law "malice aforethought" is a crucial element required to establish murder. Malice aforethought is generally understood as the intention to kill. See James (1979), pp. 193-194 and Martin (2003), pp. 322-323.
[1391] Peters (2005), pp.43 and Baradie (1983), pp. 134-135.
[1392] Art.251, PC83.

(*i´dām*) or *diya*, provided the heir of the victim accepted.[1393] Life-long imprisonment or a fine are not an option any longer.

Similar to the punishment for semi-intentional homicide (see below) *fiqh*-inspired punishments have been introduced half-heartedly. In the *fiqh*, the private prosecutors can choose between retaliation (*qiṣāṣ*) or the payment of *diya*. Retaliation, according to the majority opinion of the Ḥanafites and the Ḥanbalites, is to be carried out as execution with a sword. Mālikites and Shāfi´ītes impose on the perpetrator the same wounds which have led to the death of the victim. In the *fiqh qiṣāṣ* is carried out either by the heirs themselves under official supervision or by an official executioner.[1394] The text of the PC83 does not use the notion of *qiṣāṣ* at all.[1395] The term used, „execution/*i´dām*," suggests that the heirs have no part to play in the execution of the punishment. Indeed the text of the PC83 does not mention such a participation of the heirs in the execution, the punishment is carried out by state authorities, normally by hanging.

Apart from the pardon of the heirs of the victim, the *fiqh* knows also other reasons for the remittance of *qiṣāṣ*. All schools except the Mālikites, agree that a father who kills his son is not liable to *qiṣāṣ*.[1396] The majority of the schools, with the exception of the Ḥanafites holds that a Muslim who has killed a *dhimmī* is not liable to *qiṣāṣ* either. It is also controversial among Muslim legal scholars whether *qiṣāṣ* can be imposed on a group for having killed one person or not.[1397] While none of these reasons for the remittance of *qiṣāṣ* have been codified in the PC83 this lacuna has been filled by the subsequent promulgation of a criminal circular.[1398]

5.2.2 Semi-intentional homicide

A close textual relationship can be detected between the definitions of "culpable homicide not amounting to murder" (PC74) and "*qatl shibh al-´amd*" (PC83) which are also textually almost identical and have only changed titles and the corresponding punishment. The PC 24/74 punished "culpable homicide not amounting to murder" with "imprisonment for life or

[1393] According to a Supreme Court judgment the consent of all the heirs, however, is not a precondition for the release on bail of the accused. Government of the Sudan vs. Maddanī `Īsā Bishāra, SLJR 1991, no. 1991/41.
[1394] Compare Baradie (1983), p. 136 et sqq.
[1395] See PC83, article 253.
[1396] Compare Al-Jazīrī, Vol.5, p. 213
[1397] As to the reasons for the remittance of *qiṣāṣ* compare El-Awa (1982), pp. 78-81.
[1398] See discussion in chapter 5.2.6.

for any less term or with both"[1399] (article 253). It thus clearly distinguished it from "murder" (article 251), which could be punished with the death penalty or a life prison term and also with a fine. The Islamized version (1983) of the same article surprisingly introduced the death penalty or *diya* as punishment for *qatl shibh ´amd*. While article 253 does not specify which *diya* (*kāmila*, *mughallaẓa*) has to be paid, the Supreme Court decided that – in accordance with the *fiqh* – *diya* mughallaẓa, i.e. the enhanced blood price, is meant here.[1400] In the PC83, the death penalty (*i´dām*) or *diya*, if accepted by the *walī al-dam*, is not any different from the punishment for intentional homicide or *qatl ´amd*.[1401] This seems questionable on account of several problems resulting thereof. Firstly, the rather fine-tuned relationship between crime and punishment was abolished in a double sense. The 1925/1974 predecessor codes made a clear distinction between the two crimes, definition-wise and, corresponding therewith, punishment-wise. The same is true for Islamic jurisprudence which explicitly distinguishes between intentional and semi-intentional homicide as to its definition and also with regard to its respective punishment. While for the former *qiṣāṣ* or *diya* are the possible sanctions[1402], the latter entails *diya* only.

It should also be noted here that *qiṣāṣ* – even though it means death for the culprit - is different from the death penalty. The execution of *qiṣāṣ* or retaliation is essentially a right of the private prosecutors (*auliyā` al-dam*) and can also be remitted.[1403] In the *fiqh*, in the case of remittance the *qāḍī* can impose a *ta´zīr*-punishment if the heirs forego their right to *diya*. This possibility is not mentioned by article 249, PC83.[1404] In 1989 the Supreme Court ruled that if

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[1399] This is how the legislator has phrased it, meaning that the judge has four options: 1. life imprisonment, 2. a limited prison term, 3. a fine or 4. a combination of options 2 and 3.

[1400] See Government of the Sudan vs. Ḥāmid Aḥmad Al-Shaikh, SLJR 1984, no.1405/5.

[1401] Another example for the inconsistencies of the 1983 code is the stipulation in article 251 – intentional homicide - making the *diya* dependent on the acceptance of the heir, while article 253 – semi-intentional homicide is not making such acceptance a precondition for *diya*.

[1402] Article 251 makes the payment of *diya* dependent on the acceptance of the heir of the victim. It thus, at least in this partial aspect of the possible consequences of intentional homicide it follows the Ḥanbalites and Shāfi´ītes. The Ḥanafites and the Mālikites in contrast hold that the heirs do not have the right to *diya* if the culprit sentenced to *qiṣāṣ* does not agree to it. See Baradie (1983), p. 139.

[1403] For details on *qiṣāṣ*, see Baradie (1983), p. 136 et sqq.

[1404] Compare Baradie (1983), p. 141 and Schacht (1964), p. 181. According to the Ḥanbalites and Shāfi´ītes the heirs have the choice between *qiṣāṣ* and *diya*, according to the Ḥanafites and Mālikites the culprit has to consent to *diya*. If he doesn´t, the heirs only have the choice between *qiṣāṣ* and pardon. Therefore, if the culprit dies before the execution of *qiṣāṣ* the heirs will not receive *diya* since they do not receive *diya* without the consent of the offender. According to the Ḥanbalites and Shāfi´ites *qiṣāṣ* will be changed into *diya* automatically. Baradie (1983), p. 139-140.

the private prosecutors do settle for *diya*, an additional *ta´zīr*-punishment can not be imposed by the court.[1405]

The right of the private prosecutors to forego *qiṣāṣ*, and thus spare the life of the culprit, is recognized by all schools.[1406] The death penalty, in contrast, is a right of the public prosecutor, i.e. the state, to be imposed by it and remitting it is not part of the rights of the heirs. In other words, the introduction of the death penalty as punishment for intentional *and* semi-intentional homicide while depriving the heirs of their right to claim or remit *qiṣāṣ* cannot be justified as having its roots in Islamic jurisprudence. That the legislator has refrained from introducing *qiṣāṣ* for both crimes is even less explicable when considering the introduction of *qiṣāṣ* as a punishment for "attempted intentional homicide (*shurū´ fī qatl ´amd*)[1407], if hurt is caused."

It is also worth analyzing whether the old article 249 "When culpable homicide is not murder", turned into "semi-intentional homicide/*qatl shibh al-´amd*", was based on concepts derived from the *fiqh* as the new Islamized title suggested. In the *fiqh*, *qatl shibh al-´amd* is committed if someone whose life is immune is killed illegally by means which usually are not lethal. In other words, the intention to kill is not assumed when the manner and the means applied normally do not lead to death. In another definition, "semi-intentional (homicide) is assumed when only the act, not the result was intended; for instance, if a person beats another with a cane or throws a pebble at him by way of jest and the other person dies or loses an eye as a result".[1408] While this is the opinion of the majority of schools[1409], it should be mentioned that the Mālikites do not recognize "semi-intentional homicide" because the Qur´an does not mention it. In this school semi-intentional homicide is subsumed under intentional homicide.[1410]

We shall now take a look at article 249 (PC 1974/1983) and briefly compare the six cases constituting "culpable homicide not amounting to murder" with the leading opinions given by

[1405] See Government of the Sudan vs. Baḥr Yaḥīā Muḥammad Aḥmad, SLJR 1989, no.1989/37.
[1406] It is sufficient that one of the private prosecutors pardons the culprit. The right of the others than automatically changes into *diya*. On the right of the private prosecutors to pardon the killer, see Peters (2005), pp. 45-46 and Baradie (1983), p. 139.
[1407] Art. 259 PC 1983.
[1408] See Peters (2006), p. 43.
[1409] For the Ḥanafites see Krcsmárik (1905), pp. 341-342. See also Bleuchot (2002), p. 680.
[1410] Baradie (1983), p. 141.

the *fuqahā'*. Article 249 knows the following reasons why culpable homicide does not amount to murder:[1411]

a) grave and sudden provocation,
b) offender acts in good faith of the right of private defense,
c) public servant acting for the advancement of public justice exceeds the powers given to him by law
d) homicide without premeditation in a sudden fight in the heat of passion,
e) an adult suffering death or taking the risk of death with his own consent and
f) offender was under the influence of mental abnormality due to a mental retardation or an injury or a disease.

It will be noted here that none of the cases subsumed under "semi-intentional homicide" mentions the weapon used. Unlike the *fiqh* which stresses the characteristics of the weapon used, most cases here emphasize the motive or the state of mind of the killer.

Grave and sudden provocation[1412]

In order to understand the actual meaning of sudden provocation (article 249 (1), PC74 gave the following example for a case of sudden provocation:[1413]

"Z gives grave and sudden provocation to B who is thereby excited to violent rage. A, bystander intending to take advantage of B´s rage and to cause him to kill Z, puts a knife into B´s hand for that purpose, B kills Z with the knife. Here B has committed culpable homicide not amounting to murder but A is guilty of murder."

An analysis of this example shows how an illustrating example does not work any longer in an Islamic legal context and has therefore been omitted with good reason. Since the 1983 PC does not differentiate any longer with regard to the punishment for intentional and semi-intentional homicide B and A were facing the same possible punishment, i.e. death penalty or *diya*. The example made sense in 1925 and 1974, because crime and punishment were in a proportional balance, but it does not make sense in 1983 any longer. Moreover, Islamic law reasons differently from the example case described here. According to the reasoning of the majority view in the *fiqh* A would not be guilty of intentional homicide since he did not kill

[1411] For a more detailed comparison see also chapter 5.3.3.
[1412] Article 249 (1), PC83.

anyone himself. Under Mālikite law, however, he would be held liable for intentional homicide for having abetted the killing.[1414] B, in contrast, who actually did commit the homicide in question, used a weapon which must be described as the kind of weapon which normally would make the *qāḍī* assume that the culprit had the intention to kill. He would thus be liable for intentional homicide in any *madhhab*. In other words, a sentence to *qiṣāṣ* for both, A and B, would be possible under Mālikite law only.

Offender acts in good faith of the right of private defense[1415]

In the *fiqh* self-defense is considered lawful as long as the means used to ward off the attack is proportional to the violence used by the attacker. If this is the case and no excessive violence has been used the act of self-defense does not entail criminal or financial liability. The *fuqahā'* explain that by attacking a person violently the attacker has lost his inviolability (*'iṣmā*) and his death or injuries incurred are to be considered a form of *qiṣāṣ*.[1416] The principle that the violence used should be proportional to the attack had been recognized by the PC74, article 249 (2). However, the crime was qualified as culpable homicide not amounting to murder and the maximum punishment was life imprisonment (or any less term) or a fine or both. While the maximum punishment in 1974 was harsh the range of possibilities left enough leverage to the judge to adjust the punishment to the individual circumstances. In 1983 this flexibility was gone. As in all other cases under article 249, PC83, the punishment is invariably the death penalty or *diya*. As in all other cases of semi-intentional homicide specified in the PC83, the death penalty contradicts the *fiqh*. However, also the definition of the crime has changed. While in 1974 the offender, i.e. the attacked who exercised his right of self-defense caused death while he exercised such right "without premeditation and without any intention of doing more harm than is necessary for the purpose of such defense", in 1983 the offender causes the death of the attacker by exceeding (*jāwaza*) the limits of self-defense as determined by law without the intention to cause harm bigger than necessary for this self-defense.[1417] The punishment stipulated is the death penalty or *diya* if the heir(s) accept(s)

[1413] The PC83, while being for the most part a translation of its 1974 predecessor, has nevertheless omitted all illustrating examples which had helped judges to interpret the meaning of many provisions in 1974.
[1414] Peters (2005), pp. 28-30 and Abū Zahra (1998), Vol.1, p. 295.
[1415] Article 249 (2), PC83.
[1416] Peters (2005), p. 25.
[1417] Article 249 (2), PC83.

it.[1418] As in the PC74 so does the PC83 explicitly recognize the right to self-defense.[1419] Both codes clearly define when the right to private defense extends to causing death, e.g. in cases of an attack which causes reasonable apprehension of death or grievous hurt, rape, abduction or kidnapping,[1420] robbery, house-breaking by night or theft, mischief or house-trespass in such circumstances that death or grievous hurt are to be apprehended if private defense is not exercised.[1421] In conclusion it can be said that the provision on self-defense, as far as its definition is concerned, is congruent with the *fiqh*. Both, the *fiqh* and the PC83 recognize the right to self-defense, in the sense that a crime can become a lawful act if the act remains within the limits necessary to ward off the attacker.

Public servant acting for the advancement of public justice exceeds the powers given to him by law[1422]

This case stays within the parameters of the provisions of the *fiqh*. The act which leads to the death of the victim must be forbidden to the perpetrator. If the act is part of the rights or the duties given to the perpetrator and thus has a legal justification the killing is done lawfully and does thus not entail punishment or the payment of financial compensation.[1423] While it makes sense to punish a public servant who oversteps the rights given to him the envisaged death penalty is unduly harsh and not in line with the *fiqh* which excludes the death penalty for semi-intentional homicide.

Homicide without premeditation in a sudden fight in the heat of passion[1424]

The text of this article has almost literally been reenacted in the CA91. Its relationship with the *fiqh* will be explained below.[1425]

An adult suffering death or taking the risk of death with his own consent[1426]

[1418] Article 251, PC83.
[1419] Compare articles 55-63 in PCs74 and 83.
[1420] Article 61, PC 74 and PC83.
[1421] Article 62, PC74 and PC83.
[1422] Article 249 (3), PC83.
[1423] See Peters (2005), p. 38.
[1424] Article 249 (4), PC83.
[1425] See chapter 5.3.3.4.
[1426] Article 249 (5), PC83. Compare also chapter 5.3.3.3.

While the PC 1983 provides for the death penalty or *diya*, the legal consequences of death with the consent of the victim (article 249 (5)) are disputed in the *fiqh*. While the Ḥanbalites impose neither *qiṣāṣ* nor *diya*, the Ḥanafites and Shāfiʿītes have the *qiṣāṣ* lapse, but their respective scholars do not agree on whether *diya* has to be paid instead. Part of the Mālikites even argue in favor of imposing *qiṣāṣ* in such case.[1427] This abridged account of the differing legal opinions of the *fuqahāʿ* shows that only part of the Mālikites favor *qiṣāṣ* for killing with the consent of the victim. The legislator of the 1983 Penal Code thus is in conflict with the great majority of schools when imposing the death penalty for this offence.

Offender was under the influence of mental abnormality due to a mental retardation or an injury or a disease[1428]

As to the last case of semi-intentional homicide under the 1983 Penal Code, it must be noted that in Islamic Criminal Law the mentally retarded and children cannot be punished.[1429] Again, a crime committed under circumstances the 1925/1974 Penal Codes considered as mitigating can be punished according to the 1983 Penal Code like intentional homicide and therefore lead to capital punishment. Capital punishment for the mentally ill, however, stands in contradiction to Islamic jurisprudence.

5.2.3 Heinous murder

The Penal Code 1983 moreover introduces "heinous murder" (*qatl ghīla*, article 252), which was unknown to the 1925 and 1974 codes. This crime is recognized by the Mālikites only, not by the other schools. The majority of the Mālikites defines *qatl ghīla* as luring the victim into a trap and killing it, some add in order to rob the victim of his/her money.[1430] In this special case *qiṣāṣ* and *diya* do not apply, nor can the heirs of the victim pardon the culprit. According to Mālik Ibn Anas *qatl ghīla* is a variety of *ḥirāba* and the killer is to be executed at any rate as a *ḥadd*-punishment.[1431]

The introduction of *qatl ghīla* is one more example of how the 1983 Penal Code shows a strong tendency of introducing harsh punishments, either by aggravating the punishments of

[1427] Compare Baradie (1983), p. 133.
[1428] Article 249 (6), PC83. Compare also chapter 5.3.3.5.
[1429] Notwithstanding their not being punished their *ʿāqila* has to pay *diya*. According to the Ḥanafites they do not lose their right to inherit from the victim.
[1430] Baradie (1983), p. 138.

existing offences or – like in this case - by introducing new crimes. It is also conspicuous that due to the absence of a definition of "heinous murder," the *qāḍī* disposes of a considerable latitude in establishing his own definition of what "heinous murder" actually means.[1432] However, since the definition of what *qatl ghīla* actually meant was left to the courts the question finally reached the Supreme Court. In a 1988 decision the SC gave a definition of *qatl ghīla*: "Concerning heinous murder the Sudanese legislator has adopted (the relevant opinion of) the Mālikite school that the offender uses deception of his victim or persuasion by way of subterfuge inasmuch as he reassures him (the victim), then betrays him and commits homicide in an appropriate moment".[1433] In 1990, the SC widened the definition of heinous murder and decided to include not only murder by enticement, persuasion (*istidrāj*) and deceit (*khadī´a*), but also intentional homicide while the victim is sleeping as a grave form of betrayal (*ghadr*).[1434] In other words, heinous murder not only applied in cases of treachery but also if the victim could not feel or know of what was planned for him. It goes without saying that the two decisions combined set a wide margin for the application of *qatl ghīla*. In fact to such an extent that any kind of homicide would fall under it, where the perpetrator does not respect certain rules when killing or the victim does not notice one way or the other that his murder is being planned.

Possibly, the latitude given to the courts by the interpretation of heinous murder in these decisions moved the Sudanese legislator to a change of course: the CA91 has neither reintroduced "heinous murder" nor replaced it with a revised text. Thus, the Sudanese legislator simply omitted an offence that had been considered an integral part of the *sharī´a* eight years earlier. The CA91 thus also reinforced a principle fundamental to the *fiqh*, i.e. the right of the private prosecutors to receive financial compensation and the right to pardon the killer.[1435]

5.2.4 Equivalence (kafā`a) *and inviolability* (`iṣma) *in the Penal Code 1983*

As we have seen above, the selective and only limited adoption of the *qiṣāṣ* provisions of the *fiqh* did create major inconsistencies and incompatibilities with the *fiqh*. In order to illustrate

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[1431] ´Awda (2001), Vol.2., p. 641.
[1432] We shall see further down how the Supreme Court deals with this problem.
[1433] Government of the Sudan vs. `Imād Aḥmad Huwillū and others, SLJR 1989, no. 139/1988,
[1434] Government of the Sudan vs. Aḥmad Ḥassan `Umar and Ādam Aḥmad ´Umar, SLJR 1990, no. 1406/95.
[1435] `Umar (2002), p. 149.

the scope of these a more detailed discussion of the notion of equivalence (*kafā`a*) with regard to *qiṣāṣ* is necessary: Equivalence is a precondition for the execution of *qiṣāṣ*. Thus a Muslim according to the majority of schools cannot be executed for the killing of a *dhimmī* or a *musta`min*.[1436] However, according to the Ḥanafites a Muslim can be executed for intentional homicide against a *dhimmī*. In the case of a Muslim killing a *musta`min*, the Ḥanafites recognize a so called *shubhat al-´iṣma*, a legal uncertainty concerning the immunity of the *musta`min*.[1437] Since for the Ḥanafites the permanence of the immunity (not the monetary value of the blood price) is the main criterion the perpetrator cannot be executed because the protection of the *musta´min* is only temporary.[1438] Whether the Islamized penal law of 1983, had introduced the Islamic concepts of equivalence (*kafā`a*) in *qiṣāṣ* cases remained unclear, as far as the legislative text is concerned. The Arabic terms used were direct translations from the English, taken from the 1974 code.[1439] They suggested equivalence between Muslims and non-Muslims and men and women as to *qiṣāṣ*. However, the Judgments Basic Rules Act 1983, gave the *qāḍī* the leverage to interpret the law in the light of *sharī´a* terminology.[1440] How the Supreme Court dealt with this problem will be seen below.

Kafā´a *and´* isma *in the Supreme Court - terrorist plot of Palestinian group*

A landmark case[1441] discussing an attack by Palestinian terrorists[1442] in a Khartoum hotel highlights important issues pertaining to the questions of equivalence (*kafā´a*) and inviolability (*´isma*). The facts of the case can be summarized as follows: a group of five Palestinians was convicted under articles 252 (*qatl ghīla*)[1443] and 84/252 (abetment/*qatl ghīla*) to death by hanging. According to the unretracted confessions of the perpetrators the following crime had taken place: a group of five Palestinian men had carried out two attacks. One with explosives in the dining room of the Acropole Hotel in Khartoum, killing seven, five British citizens and two Sudanese and wounding seven others of different

[1436] A *ḥarbī*, a non-Muslim foreigner residing outside the territory of Islam is without immunity. Baradie (1983), p. 134.
[1437] Baradie (1983), p. 136.
[1438] Peters (2005), p. 47.
[1439] Compare articles 8 and 9 of the 1974 and 1983 codes.
[1440] The analysis of Supreme Court decisions will show how this dilemma is solved in actual jurisdiction.
[1441] The Government of the Sudan vs. `Imād Aḥmad Hūwīllū e.a., SLJR, 139/1988.
[1442] The group´s attack allegedly was masterminded by Abū Niḍāl.
[1443] *Qatl ghīla* under the PC 1983 was to be punished with the death penalty without the private prosecutors having the right to pardon or receiving the *diya*. Article 252, PC 1983.

nationalities,[1444] and a second attack with guns and hand grenades against the Sudan Club wounding one Sudanese.[1445] In its discussion of the crime the SC refutes the defense's contention that the case should be treated as a political crime. Secondly, the SC denies the "legitimacy of the Fedayyeen's operations against the enemy's or his supporter's interests" – as claimed by the defense – pointing out that the British couple killed were employed by the UN and had thus diplomatic status. The SC also denied that the killings could be justified as an act of self-defense or were provoked by sudden provocation, two reasons which would have made a *diya* sentence for semi-intentional homicide possible.

The SC court discusses at length two issues pertinent to the fiqh, the question of whether the blood and property of the foreign victims was protected, i.e. whether they, as foreigners from the "*dār al-ḥarb*" were "*ma´ṣūm*". This is answered in the affirmative by the SC judges, since the entry visa the victims held were considered to be equivalent to the "*amān*", the assurance of protection discussed in the *fiqh*. Thus the non-Muslim and at the same time non-Sudanese victims are to be considered "*mustā`minūn*"[1446] and therefore their lives and property are inviolable (*ma´ṣūmū al-dam wa al-māl*) as long as they dispose of a valid visa (i.e. *amān*). Consequentially, their killing is punishable like any other killing (of a Sudanese, Muslim or other). The question of the equivalence (*kafā`a*) of killers and victims is therefore affirmed by the Supreme Court. In consequence the private prosecutors in this case are the heirs of the victims, residing in the *dār al-ḥarb*. Interestingly, the SC judges do not follow here the four Sunni schools[1447] who would not allow for the execution of a Muslim killer for having taken the life of a *musta´min*, based on the assumed lack of equivalence between them. Instead, by assuming equivalence between a Muslim killer and his non-Muslim foreign victims the Supreme Court makes sure that the lives of non-Muslim foreigners enjoy the same protection as the lives of Muslims, foreign or not.

Finally, the court discusses at length the question of whether a sentence according article 252 "*qatl ghīla*" is justified. This question is of great importance since article 252 does not allow for a pardon of the private prosecutors and makes the death penalty compulsory.[1448] The court

[1444] Three Sudanese, two British, one Swiss and one person from Bangladesh.
[1445] In this discussion of the case I shall as far as possible confine myself to the aspects which are pertinent to Islamic criminal law.
[1446] The SC´s reasoning draws on ´Awda, Vol.1, p. 277.
[1447] As we have seen above the reasons why there is no equivalence between the killer and his victim differ between the Ḥanafites on the one hand and the three other schools on the other.
[1448] See chapter 5.1.5 on heinous murder.

came to the conclusion that the constitutive elements of homicide "*ghīlatan*" are not given because the case at hand does not involve the stealing of money and the victims had not been far away from where they could have received help (*ba'īdan 'an al-ghauth*). In consequence the final decision was commuted from art. 252 (heinous murder) to article 251 (intentional homicide) for the first of the accused and from articles 252/84 to articles 251/84[1449] for all other accused.

5.2.5 Accidental homicide

The penal codes preceding the PC83 clearly distinguished between negligence and acts committed by accident. Thus, death by negligence was defined in the PC25/74 as the causing of death of a person "by doing any rash or negligent act not amounting to culpable homicide." Its punishment was either a prison term of up to two years or a fine or both (article 256, PC 25/74). As to acts done "by accident or misfortune," article 47, PC25/74, had stipulated that they were not offences – and thus not punishable - as long as they were done without criminal intention or knowledge in a lawful manner and by lawful means. Further, both codes had known the offence of causing death unintentionally in an act of committing an offence (article 255) which was punishable with a prison term of up to ten years or a fine or both.[1450]

The Islamized Penal Code 1983 introduced for the first time the notion of accidental homicide/*qatl khaṭā'* (art. 255, PC83). The definition of *qatl khaṭā'* and its respective punishment (art. 256, PC83) replaced the crimes of "death caused unintentionally in act of committing offence" and "causing death by negligence". The disappearance of both left important lacunae. For example, in the PC83 it did not make a difference any longer whether someone was killed accidentally in a lawful act or by way of an unlawful act. However, article 47 PC25/74 – which had stipulated that acts done by accident were not offences (see above) - was not abolished, but supplemented to the effect that accidental homicide/*qatl khaṭā'* was explicitly exempted from the general rule formulated in article 47. In other words, if death was the result of the act, article 47 could not be invoked and article 255/256 on *qatl khaṭā'* was applicable. The new definition of "homicide by accident is every killing resulting from an act by which the perpetrator did not intent to cause death or hurt to the victim of the

[1449] The title of art. 84, PC83 reads: "Abetment if the act abetted is committed in consequence and where no express provision is made for its punishment.
[1450] Article 255, PC 1925 and 1974.

killing (*al-maqtūl*)". A comparison with the *fiqh* shows that the important notion of immunity – i.e. that the life of the victim has to be inviolable (*ma´ṣūm*)[1451] – did not enter the definition. Neither does the definition make any difference between accidental and semi-accidental homicide as some schools do. The article thus does not distinguish whether the act as such was intended or unintended as long as death as a result of the act was unintended.

Interestingly, article 256, PC83 does not stipulate any *ta´zīr*-punishment as a consequence of such an offence, but *diya* only, and thus does not follow the provisions of the *fuqahā`* (see above) but rather moves the offence entirely into the sphere of private law. Consequentially, some commentators are of the opinion that the nature of homicide by accident / *qatl al-khaṭā`* - at least according to its new definition in the PC83 - was not to be considered a criminal offence (*ghair jinā`ī*) at all, since the perpetrator did neither intent to kill nor hurt and the offence only entailed a financial liability. It should, according to that opinion, therefore be removed from the Criminal Act 1991 and find its due place in the Civil Code.[1452]

The Penal Code 1983, in contrast with the *fiqh*, does not stipulate that the *diya* has to be paid by the *´āqila*. The text of article 256 suggests that it is the offender alone who has to bear the burden of the blood money. It should also be noted that in Islamic Criminal Law fault does not play a role for liability in cases of accidental homicide. Causation is sufficient. Minors and the insane are liable for *diya* in cases of accidental homicide. The wording of article 256 thus is in harmony with the *fiqh* in this respect. Secondary punishments such as the deprivation of inheritance and bequest are not mentioned by the Penal Code 1983.

Finally, it should also be noted that accidental homicide is introduced into three more articles of the PC83. All three articles are direct translations from the two predecessor codes and concern "acts done by a person bound or justified by law" (article 44), "acts of court of justice (article 45) and "acts done in pursuance to the judgment or order of a court" (article 46). All these articles describe exemptions to the criminal responsibility of those who commit such acts. However, by making *qatl khaṭā`* punishable even in these three cases PC83 introduced in effect the financial liability in cases of accidental homicide of court officials, when acting as a court of justice, and of government officials in pursuance of a court order. Whether or not this was the intended effect of the introduction of the mentioned clause can not be decided here.

[1451] For more details see "Inviolability of life / *´iṣma*" in this chapter.

[1452] Compare al-Na´īm, al-qānūn al-jinā`ī, p. 112 and `Umar (2002), p. 150.

5.2.6 Bodily harm

Like in other instances the comparison of the relevant articles on bodily harm of the PC83 with its predecessor 1974 show that the authors of the new code relied to a large degree on the predecessor. However, a closer look reveals that the introduction of notions taken from the *fiqh*, grafted onto its secular predecessor led to inconsistencies especially with regard to the punishments and to a general impression of disorganization and confusion. Thus, e.g., crimes and their respective punishments appear in articles far apart from each other, others have been omitted.[1453] Where the PC74 had used the notion of hurt throughout, the arabized PC83 had introduced a difference between "*jurḥ*" (wounds), "*qaṭ´ ´uḍw*" (cutting of a limb) and "*adhan*" (hurt). While "*jurḥ*" and "*qaṭ´ ´uḍw*) referred to crimes punishable by *qiṣāṣ* and *diya*, crimes qualified as hurt were punishable by the ubiquitous "flogging, fine and/or a prison term."[1454] However, the different articles pertaining to crimes related to hurt specify punishments varying between "flogging and fine or prison" (e.g. article 283), "flogging or fine or prison" (article 282) and "flogging and fine and prison" (e.g. article 280). These three punishments in varying combinations replaced maximum prison terms the PC74 had specified in relation to the severity of the crime. This intended relationship between the punishment and the crime committed has been abolished with relation to hurt. The punishments – meant as *ta´zīr*-punishments - had now become completely discretionary, it is up to the *qāḍī* to determine the number of lashes, the amount of the fine or the months or years of the prison term.[1455]

While the PC83 provides us with definitions of "intentional causation of wounds,"[1456] "intentional cutting of a limb,"[1457] and "accidental causation of wounds or cutting of a limb,"[1458] it conspicuously completely omits the important notion of semi-intentional causation of wounds or cutting of limbs. This striking lacuna is even less explicable as semi-intentional homicide had been recognized by the Sudanese legislator. In other words, an important notion of the *fiqh*, i.e. semi-intentional bodily harm, had not been codified in 1983. The PC83 leaves it open what the punishment for such crimes was meant to be. With regard to the punishment of intentional causation of wounds it was to be punished by *qiṣāṣ* or the

[1453] E.g. the definition of accidental wounds is given in article 275 (page 95 of the PC83), the punishment of the same crime follows in art. 284, page 98.
[1454] PC83, art. 276.
[1455] Chapter 2 presenting definitions used in the code remains silent as to the meaning of flogging, fine, prison.
[1456] PC83, art. 273.
[1457] PC83, art. 274.
[1458] PC83, art. 275.

diminished *diya* (al-*diya al-nāqiṣa*).[1459] Most importantly, the punishments envisaged limit themselves to satisfying the claims of the private prosecutors. Since no *ta´zīr*-punishments are stipulated the state cannot impose an additional punishment once private claims are settled. This is also true for "intentional cutting of a limb."[1460] The accidental causation of wounds and the "accidental cutting of a limb" is equally exempted from any punishment by the state, private claims are satisfied by way of payment of *diya*.[1461]

The PC83 did not contain a list defining for the loss of which body parts full or partial *diya* was due, or a list of body parts and wounds subject to retribution.[1462]

It should be noted here that the PC74 had contained an article outlawing a specific form of female circumcision.[1463] This article had been deleted in 1983 without replacement.

Bone fractures in the Supreme Court

The question of equivalence plays an important role with regard to bone fractures. In a case from 1984 the Supreme Court took an important decision limiting the application of *qiṣāṣ* in cases of bodily harm early on in the history of Islamic Criminal Law in the Sudan.[1464] The facts of the case are as follows: in March 1984 the juvenile victim Simon Josef (Saimūn Jūzīf) wanted to urinate close to the United Nations Square in Khartoum and was prevented to do so by the guardian and defendant Mūsā Bāshā Hubaīlā. Hubaīlā prevented the victim from urinating, lifted him up and threw him against a wall delineating the square, thus breaking the right hand of the victim. The defendant denied the charges and claimed that while he had indeed tried to prevent the youth to urinate against the wall the victim had jumped from the wall voluntarily. The guardian claimed that he had accompanied him to the police and subsequently to the hospital. After listening to an expert's testimony and the testimonies of the plaintiff and the only witness to the incident the criminal court Khartoum North[1465] sentenced the defendant under article 277 (punishment for intentional hurt) PC83 to the payment of the lesser *diya* (*al-diya al-nāqiṣa*) of 2000 Sudanese Pounds and in the case of

[1459] PC83, art. 277.
[1460] PC83, art. 278.
[1461] PC83, art. 284.
[1462] This lacuna was closed in the CA91.
[1463] Article, 284A (1), (2), PC74.
[1464] Government of the Sudan vs. Mūsā Bāsha Hubaīlā, SLJR 1984, no.1984/62.
[1465] maḥkama majlis quḍāt al-Kharṭūm shimāl.

non-payment to the application of *qiṣāṣ* by breaking the right hand of the defendant at his wrist.

In its review of the case the Supreme Court concentrated on two main questions pertaining to the admissibility of *qiṣāṣ* and, secondly, to the available evidence and its meaning. With regard to the admissibility of *qiṣāṣ* the Supreme Courts quotes Abū Ḥanīfa, Shāfi´ī and Aḥmad ibn Ḥanbal who are all of the opinion that in cases of broken bones *qiṣāṣ* is not applicable because it can not be guaranteed that the bone of the defendant will be broken in exactly the same manner (*al-tamāthul ghair mumkin*).

Subsequently, the Supreme Court turns to the question of evidence and asks whether one can be sure that the defendant has indeed caused the injury of the victim. Since the defendant had denied the charges and thus a confession is missing the prosecution relied on the testimonies of the plaintiff, an expert and one eyewitness. The SC does not admit the first two since the plaintiff's testimony is not admissible (*shahāda al-insane linafsihi ghair mu´tabara shar´an*) and the expert was not an eyewitness. In order to explain whether or not the remaining evidence is sufficient as proof in a case of *qiṣāṣ* the SC refers to the *fuqahā´*. The judge quotes the majority opinion which holds that in cases of *qiṣāṣ* (at least) two men of good reputation are necessary to testify. He clearly states that neither the testimony of one man and two women nor of one man in combination of an oath of the plaintiff are admissible, according to the majority view. The minority view of Mālik, however, holds that in cases of *qiṣāṣ* the testimony of one man in combination with an oath of the plaintiff is acceptable as proof. While the court (of first instance) had thus relied on Mālik in its reasoning the presented evidence, i.e. one eyewitness and the oath of the plaintiff, would have been sufficient had the plaintiff been legally capable. The youth, however, had been, according to conflicting statements, 10 or 14 years old. In both cases he was not of age (*huwa fī ḥalatain dūn al-bulūgh*), i.e. legally capable, to swear an oath. The available evidence is thus limited to one eyewitness which is insufficient except in cases of necessity (*ḍarūra*). Necessity is not given, since the incident happened in broad daylight and a public place and a bigger number of witnesses could have witnessed the incident.

The Supreme Court finally comes to the conclusion that there is not sufficient evidence available for a conviction to *qiṣāṣ* nor for a replacement punishment (i.e. *diya*). However, on the strength of one witness it is admissible for the court to impose a discretionary financial punishment (*´uqūba taqdīriyya māliyya*), i.e. a financial compensation in relation to the

damage suffered. The Supreme Court thus annuls the conviction to the payment of the lower *diya* and the breaking of the hand of the defendant. The case had to be retried in the light of the above deliberations.

This case vividly shows how pragmatically the Supreme Court invokes those opinions of the *fuqahā'*, which in the light of given circumstances and necessities seem to be the appropriate ones. When it wants to block the possibility of *qiṣāṣ* in cases of broken bones it refers to the majority opinion of three Sunni schools.[1466] However, the majority opinion is abandoned for a minority view when the Supreme Court is confronted with the question of what is the minimum requirement for proof of a *qiṣāṣ*-crime. Since a lower court had decided that a minimum of one eyewitness and an oath by the defendant – an opinion held by Mālik - would be sufficient proof in a *qiṣāṣ*-case, it did, this time, not invoke the majority opinion since not even this very low threshold of proof had been reached. The choice between either adopting a majority opinion of the *fuqahā'* or a minority opinion with regard to a given crime is maybe not as discretionary as it might seem. It does make sense to avoid *qiṣāṣ* in cases of hurt, and, more specifically, in cases of broken bones. Its application with a view to equivalence (*tamāthul*) and its practical realization would be technically difficult and certainly cause protest inside the Sudan and in the Western world. Being able to rely on a majority opinion among the *fuqahā´* thus provides the judiciary with a waterproof Islamic legal solution for a difficult legal problem. In contrast it can also be expedient to ignore a majority opinion if it is in conflict with the interests of the state. The high threshold for the proof of *ḥadd*- or, like in the case under discussion – *qiṣāṣ*-crimes is a case in point. Thus, in order to make a conviction of a *qiṣāṣ*-crime easier and therefore more likely, the Supreme Court judges accept Mālik´s minority view that not – as the majority holds – two men of good reputation are necessary for the proof of a *qiṣāṣ*-crime, but only one man and the oath of the victim.

5.2.7 Remittance of retaliation for homicide and bodily harm

The major source for reasons for the remittance of retaliation in Sudanese ICL is the Criminal Circular No. 94/83.[1467] After having stated clearly that – based on the Mālikī school – the

[1466] Unlike its successor code, the PC83 did not contain a list of body parts and wounds subject to retaliation. The Supreme Court, however, decided that *qiṣāṣ* in the case of a lost tooth is possible. See Government of the Sudan vs. Ḥamza ´Alī Kutainī, SLJR 1985, no. 1405/188.

[1467] See Ḥāmid, mausū´a, al-juz al-thālith, pp. 18-26.

lapsing of retaliation does not forestall the imposition of a *ta´zīr*-penalty, the circular recognizes the following reasons:

Retaliation lapses by way of pardon. However, certain preconditions must be fulfilled. Thus, a sentence of retaliation can only be pronounced after the private prosecutors, who must be present and of age have been asked to offer their pardon according to the Qur´an and the Sunna. And if they all or one of them pardon in an unequivocal manner before the court the retaliation lapses. In such case the pardon can be granted in exchange for financial compensation (*diya*) or without.

Retaliation lapses with a peaceful financial settlement between the parties (*ṣulḥ*). The amount of money agreed upon as compensation can actually be higher than the *diya*, provided the perpetrator accepts a higher amount.

Retaliation lapses with the death of the perpetrator (but not the obligation to pay *diya*).[1468]

Retaliation lapses if the killer himself inherits the right to retaliation, either in full or in part. This provision follows the Ḥanbalite and the Shāfi´īte schools.[1469]

The private prosecutors who own the right to pardon or to a peaceful settlement are all heirs of the killed victim at the time of his death. The obligation to summon the heirs to suggest to them to pardon the perpetrator lapses if the whereabouts of the heirs are unknown. Based on the majority opinion of the *fuqahā`* the court does not need to wait until the underage heir has reached adulthood.

The circular further specifies that the right to grant pardon or to come to a peaceful settlement is valid until the execution of retaliation. Thus, if pardon is given or a settlement reached in any stage until the execution of *qiṣāṣ* the case will be returned to the court in order to impose *diya* and the appropriate *ta´zīr*-punishment.

With regard to bodily harm, the circular specifies four reasons for the remittance of retaliation: firstly, if the organ or limb which is the object of the *qiṣāṣ* does not exist anymore. Secondly, by pardon (*´afw*). Thirdly, by peaceful settlement (*ṣulḥ*) and, fourthly, if the exact equivalence of the wound inflicted in the course of retaliation can not be guaranteed.

Circular 94/83 also gives examples for a better understanding of how to interpret the reasons for remittance given above, taken from Sudanese jurisdiction. Thus it quotes two different

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[1468] The payment of *diya* is a civil right (*ḥaqq madanī*) which does not lapse with the death of the killer. See Government of the Sudan vs. Ismā´īl Ḥadūt Ashūt, SLJR 1992, no. 1992/32.

[1469] Peters (2005), p. 49.

cases dealing with a situation where the heirs of the victim cannot be found. In the first case[1470] an Ethiopian refugee had killed another refugee, also from Ethiopia. Subsequently, the whereabouts of the heirs of the victim could not be established by the court, since they were not inside Sudanese territory, but in Ethiopia. As a consequence, and different from what Circular 94/83 specifies, pardoning the killer or reaching a peaceful settlement with him, could not be suggested to the heirs. The Supreme Court judges, based on the majority of the *fuqahā'*[1471], came to the conclusion that the fact that a pardon or a peaceful settlement was not possible for purely technical reasons could not prevent the court to impose the death sentence. The killer was indeed sentenced to death by hanging under article 251, PC83.

In another, unpublished, Supreme Court case[1472] neither the name of the victim, who had been stabbed to death, nor the identity of his heirs could be established. After unsuccessfully exploring possibilities to remit the death penalty the Supreme Court confirmed the initial death sentence.

Both cases illustrate that the prosecution of homicide in Sudanese criminal law is not considered to be an affair to be settled between two private parties only. It is rather a mix between private claims and the claims of the society/the state. While leaving considerable room for maneuver to private claims, these do not exclude the societal need to see a killer punished. Thus, if pardon, *ṣulḥ* or *diya* are technically impossible, due to the absence of the heirs of the victim or because their whereabouts are unknown, the state is the only party left to punish the killer. In applying the death penalty the state thus confirms its authority and guarantees social order. On the other hand it ensures that the technical impossibility to establish private claims does not obstruct justice as such.

5.3 Homicide, bodily harm and their punishment in the Criminal Act 1991

Many of the criticisms[1473] directed against the PC83 have been adressed and redressed in the 1991 successor code. The following section will describe and analyze how the Criminal Act 1991 has to a large degree succeeded in detaching itself further in its Islamized sections from

[1470] Government of the Sudan vs. al-Maw al-Hawā Kāsā, SJLR 1989 (No. 64/1987). Quoted in Ḥāmid, mausū´a, al-juz al-thālith, pp. 23-25.

[1471] Only Abū Ḥanīfa is of the opinion that in a case where the heir of the killer is unknown *qiṣāṣ* is not obligatory. All other schools are of the opposite opinion. ´Awda (2001), Vol.2, p. 136. See also Ḥāmid, mausū´a, al-juz al-thālith, p. 23.

[1472] Supreme Court case No. 69/1987. Quoted in Ḥāmid, mausū´a, al-juz al-thālith, pp. 25-26.

[1473] See Köndgen (1992), pp. 42-44; Warburg/Layish (2004).

its secular 1925/1974 predecessors and in eliminating substantial incompatibilities with the *fiqh* and thus in returning a certain balance between crime and punishment.

5.3.1 Intentional and semi-intentional homicide

Most importantly, the CA91 eliminates the gross imbalance between intentional and semi-intentional homicide with regard to their respective punishments. Intentional homicide (*qatl ʿamd*, article 130) is now punishable by *qiṣāṣ* (death penalty in 1983, see above) which can be remitted by the private prosecutors. If remitted, a *taʿzīr*-punishment of up to ten years without prejudice to the right of *diya* can be imposed. In comparison, the punishment for semi-intentional homicide has now been brought back to a sensible proportionality with regard to intentional homicide: the disproportional death penalty for semi-intentional homicide (art. 253 PC83) has been eliminated and replaced by a prison term of not more than seven years without prejudice to the right of *diya*. In other words, the comparison of the two crimes show that the CA91 has reestablished the equilibrium between the definition of the crimes and their respective punishment in the sense that semi-intentional homicide is punished considerably lighter than intentional homicide. This proportionality had been lost in the PC83. However, it must also be noted that the prescribed prison term of up to seven years is a rather light one, especially in comparison with the envisaged imprisonment for life or a lesser term of the PC74.

Secondly, faithful to the *fiqh*, the CA91 now introduces *qiṣāṣ* as punishment for intentional homicide, while at the same time giving the heirs of the victim the right to remit the execution of it. Significantly, the comparison also shows how the state reasserts its right to punish while assuring the rights of the heirs to compensation. In the PC83 serious crimes like intentional homicide and semi-intentional homicide were either punished by the harshest punishment possible, the death penalty, or entailed a financial compensation payable to the heirs only. The state thus had deprived itself of the necessary flexibility to punish these crimes according to their circumstances. At the same time, whenever the *qaḍī* had come to the conclusion that capital punishment would not be appropriate, the state could not impose any punishment at all. At least this is what the PC83 says. Moreover, the wording "...is punished by the death penalty or the *diya* if the heir of the victim accepts it" (art. 251, PC83) suggests that the decision of whether the culprit would be executed or would get away with paying a financial compensation was in its final consequence to be decided not by the judge but by the heirs of

the victim. In other words, with regard to the most serious crime in secular or Islamic law,[1474] intentional homicide, the state left the decision of the punishment entirely to the private prosecutors.[1475] It thus had completely given up on its own right to punish if the heir chose compensation and concurrently had introduced a solution that was in stark contrast with the regulations of the *fiqh*. In brief, the CA91 redresses all of these flaws, it recreates the balance between crime and punishment, it introduces *qiṣāṣ* in order to re-approach criminal concepts based on the *fiqh* and finally maintains the state's right to punish irrespective of private financial claims.

5.3.2 Who executes retaliation for homicide?

The PC83 had introduced a whole new vocabulary inspired by the *fiqh* without giving definitions to those who were supposed to use it. PC83, part IV, art. 64 thus integrated Islamic punishments such as single amputation, cross amputation, stoning, crucifixion and *qiṣāṣ* into the list of applicable punishments, however, without giving definitions, explanations or illustrations on all of them. While "full *diya*" was explained, *qiṣāṣ*, crucifixion (*ṣalb*), stoning and amputation were not. This lacuna has been filled in the CA91. *Qiṣāṣ* (retaliation) is now defined as the "punishment of an intending offender with the same offensive act he has committed." The right to retaliation is initially established for the victim and then vests in his heirs (CA91, art.28 (2)).

Since the question of who is vested with the right to execute retaliation touches directly upon the prerogative of the state to punish, it is significant to state that the CA91 has found a solution to balance the diverging interests and rights of the state and the heirs of the victims. Article 28, (3) determines that "retaliation shall be death by hanging" and that "it is allowed to kill the offender in the same manner in which he has caused death, if the court deems it appropriate". In other words, again the state reasserts its right to punish crimes by defining hanging – which by definition is to be executed by the state itself – as the standard way of executing *qiṣāṣ*. Only in exceptional cases, "when the court deems it appropriate", *qiṣāṣ* will be executed as retaliation or in the way the culprit has inflicted death on his victim. However, in the *qiṣāṣ*-cases published in the SLJR between 1983-2007 and ending in a death sentence, the culprit invariably was sentenced to death by hanging. I could not find any trace of an

[1474] On the severity of homicide in the *fiqh* see ʿAwda (2001), Volume 2, article 7, p. 10.
[1475] As to the question whether *diya* is a punishment there are controversial opinions. See Peters (2005), p. 49

execution in the same way the perpetrator has used to kill his victim. Article 229 of the Criminal Procedure Act 1983 specifies: "If an accused is sentenced to death it is necessary that the verdict specifies that execution (will be carried out) by way of hanging until death." In other words, there are no alternative ways of execution stipulated in the Criminal Procedure Act 1983. During my interviews with Supreme Court judges in 2009 all my interlocutors confirmed that no death penalty had ever been carried out by the heirs of the victim.

It is also instructive to compare the provisions for the execution of the capital punishment by way of *qiṣāṣ* in the CA91 with the opinions of the four Sunni schools. As described above the Ḥanbalites and the Ḥanafites argue that the culprit should be executed by the sword, the Shāfi´ītes and the Mālikites impose retaliation on the culprit.[1476] The private prosecutors can, according to these latter two schools – at least if one follows their earlier writings - execute the offender themselves. In order to avoid excesses, however, the execution should take place under official supervision. The later jurisprudence of the Mālikites and the Shāfi´ites rather comes to the conclusion that the execution should be left to an official hangman. In summary, the CA91 has skillfully reasserted the state's prerogative to punish. However, execution by the sword, as taught by the Ḥanbalites and the Ḥanafites, has been replaced by hanging. Concurrently, it can claim having relied on the *fiqh* as well by having adopted retaliation as the appropriate method of execution as proposed by two of the four Sunni schools. This, however, is of little consequence as to actual practice.

Homicide within a family and the inheritance of qiṣāṣ

A case which was presented to the Supreme Court in 1996 for review illustrates how complex the rules for the inheritance of *qiṣāṣ* can present themselves when the killer is part of the group of heirs.[1477] The details of the case are as follows: the general criminal court of Khartoum had sentenced a man to execution by hanging for intentional homicide.[1478] The conviction as such had been supported, in a first review, by the Supreme Court but had been sent back to the criminal court for a revision of the punishment (*li-i´ādat al-naẓr fī al-´uqūba*)

[1476] Baradie (1983) , p. 139.
[1477] Government of the Sudan vs. Maḍawī Muḥammad Aḥmad ´Abbās, SLJR 1996, no. 1996/64. For a case which was tried under the Penal Code 1983 and came to similar conclusions see: Government of the Sudan vs. Fadl Allah Al-Samānī Aḥmad ´Alī, SLJR 1989, no. 1987/80.
[1478] Art. 130 (2), CA91.

because the heirs of the victim included the father of the accused and the killer himself. The man had killed his own half-brother (*qatala akhāhu li'abīhi*). The father, however, had died after the killing and before the original verdict. Thus, when the private prosecutors were heard, the father (of the killer and the victim alike) had already been dead. Subsequently the Trial Court heard the remaining living heirs who did not pardon the culprit and opted for *qiṣāṣ*. The original verdict (death by hanging) had been based on this decision of the heirs. When the Trial Court heard the heirs for the second time, after the case had been returned to it by the Supreme Court, the result was different. The mother of the defendant pardoned him on her own behalf and on behalf of one of her under age sons while the rest of the heirs insisted on *qiṣāṣ*. The Trial Court subsequently issued a new judgement, sentencing the killer to a prison term and to the payment of *diya* and thus revoked the earlier *qiṣāṣ* punishment. While this second sentence of the Trial Court was supported by the Court of Appeals, the heirs of the victim who had opted for *qiṣāṣ* appealed to the Supreme Court on the grounds of article 32 (1) of the Criminal Act 1991 which specifies that "the relatives of a victim entitled to retaliation (*qiṣāṣ*) are his heirs at the time of his death". The question the Supreme Court thus had to answer was the following: If someone who owns the right to *qiṣāṣ* or pardon dies, is this right subsequently transferred to his heirs? The Supreme Court answers this question in the affirmative. In the case at hand the father had died before he had been able to make use of his right to *qiṣāṣ* and pardon. The mother had then inherited these rights from him and therefore had the right to pardon. In addition, the Supreme Court reasons, there is another reason for the remittance of *qiṣāṣ*: the killer himself had inherited part of the right to *qiṣās* or pardon from his father. To back up their reasoning the judges quote ´Abd al-Qādir ´Awda:"...(the right to *qiṣāṣ*) is remitted if the killer inherits all or part of it".[1479] The judges quote further:"...and if the person dies who owns the *qiṣāṣ*...then he (the *qiṣāṣ*) is inherited by the daughters and mothers. They have the right to pardon or to (demand) *qiṣāṣ* as if they were all one agnatic group (*kamā lau kānū kulluhum ´aṣaba*)."

Thus the Supreme Court came to the conclusion that a) the right to *qiṣāṣ* or pardon is indeed inheritable, b) this right was partially inherited by the killer himself and partially by the mother and her under age son after the death of the father c) the Criminal Act 1991 stipulates that a pardon can be given by either the victim or (at least) one of his heirs, either with or

[1479] Compare ´Awda (2001), Vol.2, p. 169.

without compensation (*bimuqābil aw bidūn muqābil*)[1480] and that therefore the pardon given by the mother and her under age son was legally valid (*nāfidh*). In consequence, the Supreme Court decided not to interfere with the second sentence of the Trial Court remitting *qiṣāṣ*.

Equivalence in the Supreme Court

A case concerning homicide and involving non-Muslims illustrates how the Sudanese Supreme Court established the equivalence (*kafā'a*) of Muslims and non-Muslims in cases of homicide under the Criminal Act 1991.[1481] The case deals with the intentional killing of a Christian by a Muslim and the ensuing question of whether *qiṣāṣ* can be applied against a Muslim for having killed a non-Muslim.

The facts of the case are as follows: a certain Majdī ʿAbd al-Majīd Aḥmad had been sentenced to death by the General Criminal Court in Omdurman North according to article 130 (1) of the PC 1991 (intentional homicide) for stabbing his father to death with a knife. After the confirmation of the sentence by the Appeals Court the case was referred to the Supreme Court, which, according to article 181 of the Criminal Procedure Act 1991, has to review all cases involving capital punishment, amputations and life sentences.

ʿAbd al-Majīd Aḥmad, son of a Christian father, had been thrown out of his father's house after having had a continuous row about his drug consumption and after having stolen money from his father. The fact that he subsequently converted to Islam deepened the rift between the two men. The son then bought a knife and stabbed his father to death in his garage after the father had just returned home with his car. According to the Supreme Court the crime as such as well as the criminal intent of the perpetrator was proven by the unretracted confession of the culprit and the testimony of a witness under oath. Moreover, the fact that ʿAbd al-Majīd Aḥmad had stabbed his father five times was interpreted as sufficient proof in itself of his criminal intent to kill. Since neither diminished criminal responsibility nor attenuating circumstances were recognized and the private prosecutors[1482] insisted on their legal right of *qiṣāṣ*, the Supreme Court confirmed the death penalty.

At least two important questions pertaining to *qiṣāṣ* must be under consideration here. Firstly, the question of whether *qiṣāṣ* can be executed on a descendant who killed an ascendant and,

[1480] Article 31 (b).
[1481] Government of the Sudan vs. Majdī ʿAbd al-Majīd Aḥmad, SLJR 85/1997

secondly, whether *qiṣāṣ* is applicable against a Muslim for having taken the life of a non-Muslim.

As to the first problem, the judges of the Supreme Court refer to it only briefly, merely stating that the *fuqahā'* agree that a son can be subject to *qiṣāṣ* for having killed his father but not in the reverse case. The Criminal Act 1991 indeed only remits retaliation "where the victim or his heir is an off-spring of the offender,"[1483] but not in the opposite case. In the *fiqh*, the majority opinion of the Ḥanafites, the Shāfi´ites and the Ḥanbalites subscribes to the same view, while the Mālikites maintain that the father who kills his son is liable to *qiṣāṣ*,[1484] if intentional homicide is proven.[1485] In the case of a descendant intentionally killing his or her ascendant, *qiṣāṣ* is thus possible according the *fuqahā'*. In other words, the Sudanese Criminal Act as well as the Supreme Court judgment under discussion here are in harmony with the *fiqh*.

The situation is different with reference to the second issue at stake, the intentional killing of a non-Muslim, in this particular case a Christian, by a Muslim. The Supreme Court refers to article 130 (2) of the CA 1991 which allows for death by retaliation or in the case of remittance of the retaliation for *diya* for "...*whoever* commits intentional homicide..." The CA 1991 thus does not provide for the remittance of *qiṣāṣ* if the killer is Muslim and the victim is a non-Muslim. As a matter of fact it puts Muslims and non-Muslims on a par.[1486]

Before refering to the laws in force, the SC acknowledges the difference of opinion of the *fuqahā'* with regard to this matter. It correctly mentions differences in opinion of the different schools. While the majority of the Mālikites, the Shāfi´ites and the Ḥanbalites rule out the execution of *qiṣāṣ* against a Muslim for having intentionally killed a non-Muslim for lack of equivalence (*kafā'a*), the Ḥanafites do not concur. They maintain that being a Muslim does not lead to remittance of retaliation for the culprit and that indeed a Muslim can be executed by way of *qiṣāṣ* for intentionally having taken the life of a non-Muslim.[1487] While the majority of schools argues with the lack of equivalence between perpetrator and victim, the Ḥanafites point out that the relevant Qur´anic verses (2:179) simply declare *qiṣāṣ* to be the punishment

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[1482] The SC decision does not mention who the private prosecutors are. It is however mentioned that the deceased had several sons. The son, who killed his father, can not inherit the right to *qiṣāṣ*.

[1483] Criminal Act 1991, article 31 (a)

[1484] In their explanatory statement the SC judges omit this Mālikite minority view.

[1485] Al-Jazīri, Vol.5, pp. 213-214, Bambale (2003), pp. 92 and El-Awa (1982), pp. 80-81.

[1486] CA 1991, article 31 enumerates the reasons for the remittance of retaliation (*qiṣāṣ*), the religion of the culprit is irrelevant.

for intentional homicide irrespective of the religion of perpetrator and victim.[1488] It is remarkable that the Supreme Court in the substantiation of its judgment has adopted the legal opinion of one school only, in other words a minority opinion. Except for a short quotation of a qur´anic verse, pointing out that the Qur´an does not distinguish between the Muslim and the non-Muslim, the judges do not further delve into Ḥanafite reasoning concerning this question. However, they mention as a guiding principle that the equivalence (*kafā´a*) between perpetrator and victim is not prescribed by the law in order to execute the capital punishment. The judges thus imply that there is no equivalence between perpetrator and victim in the present case. However, by choosing the Ḥanafite solution they establish the principle that the intentional killing of a non-Muslim by a Muslim is punishable by *qiṣāṣ* – if not remitted by the private prosecutors - just like any other homicide fulfilling the conditions of intentional homicide or *qatl ´amd*.

5.3.3 Semi-intentional homicide

The PC74 had known six cases[1489] where culpable homicide was deemed semi-intentional homicide.[1490] These were translated and literally taken over without further supplementing them in the PC83. Illustrating examples, however, which had given guidance to judges, were suppressed. Its successor, the CA91, lists all of the six 1974/1983 cases[1491] of semi-intentional homicide and supplements them with three more. These will be examined here selectively with special attention to their relationship with the *fiqh*. Culpable homicide therefore, according to article 131 CA91, shall be deemed semi-intentional homicide, inter alia, in the following cases:

[1487] See Al-Jazīri, volume 5, pp. 220-221.
[1488] Ibid. and El-Awa (1982), p. 79.
[1489] The PC24 had known five, "mental subnormality due to a mental retardation" had been added in 1974.
[1490] For a discussion of these, see above.
[1491] The wording slightly, but not substantially differs and the CA91, just like the PC83 does not give any specific examples to illustrate cases.

5.3.3.1 Homicide under the influence of compulsion of threat of death

Similar to the provisions on „consent“[1492], the CA91, article 13 (1) defines that „there shall not be deemed to commit an offence every person who is compelled to do an act by coercion or by threat of death for imminent grievous hurt to his person or family...and it is not in his power to avoid it by any other means“. While article 13 (1) thus recognizes coercion as a factor exempting the coerced person from punishment, article 13 (2), however, makes an important qualification: „Compulsion shall not justify causing death or grievous hurt ...“. The CA91 here follows its predecessor codes which likewise had recognized coercion with the exemption of murder and offences against the state.[1493] However, PC24/74/83 had not listed coercion as one of the cases where culpable homicide was not murder.[1494] While all three codes define murder/intentional homicide under duress as an offence, it remained unclear whether this was supposed to have any mitigating effect as to its punishment or whether, as the texts suggests, the death penalty for murder, was to be imposed. CA91 has filled this lacuna and states in article 131 (2) (c) that culpable homicide is deemed semi-intentional, where „the offender commits culpable homicide under the influence of threat of death.“ It thus makes it clear that a conviction for murder/intentional homicide is not possible because duress is now considered a mitigating circumstance leading to a conviction under semi-intentional homicide.[1495] It should be noted that the penalty for homicide under duress in the CA91 is considerably lighter than in all its predecessor codes. While the CA91 envisions a maximum prison term of seven years without prejudice to the right of *diya*, its 1983 predecessor implicitly[1496] classified it under murder/intentional homicide, thus allowing for the capital punishment as a maximum penalty.

In the *fiqh* it is disputed whether coercion is admissible as a defense. When A forces B to kill C, then, according to Abū Ḥanīfa, *qiṣāṣ* is executed on A, according to Abū Yūsuf, neither A

[1492] Under article 3, CA91 we read that consent:"...means acceptance, and it shall not be deemed consent that which is given by: (a) a person under the influence of compulsion or mistake of fact where the person doing the act knows that consent was given as a result of such compulsion or mistake: or (b) a person who is not an adult; or (c) a person unable to understand the nature or consequence of that to which he has given his consent by reason of mental or psychological instability.

[1493] Compare article 53 in the 1925, 1974 and 1983 Penal Codes.

[1494] Compare article 249 in the 1925, 1974 and 1983 Penal Codes.

[1495] With regard to the coercer, he „shall be responsible for it (i.e. the crime) as if he has committed it alone...“. See CA91, art. 23.

[1496] As mentioned above, the PCs 1925/1974/1983 do not contain any specific article relating to homicide under duress.

nor B will be subject to *qiṣāṣ*.[1497] According to Mālik, Aḥmad b. Ḥanbal and the majority opinion of the Shāfi´ites *qiṣāṣ* must be imposed on A and on B, because A is the cause which led to the killing and B, being the forced one, is the direct perpetrator of the wrongful killing of the victim in order to protect his own life.[1498] Mālik further makes A also liable to *qiṣāṣ* if the compulsion comes from a person having authority. Thus a father is killed for having forced his son to commit homicide and the son will be killed too if he is adult. The same principle will be applied to the teacher and his pupil and the master and his slave.[1499]

To what degree, thus, can the provisions of the CA91 be regarded as rooted in the *fiqh*? From the above it has become evident that there is a certain contradiction between the majority of schools and the CA91 insofar as the leading opinions of all schools envision *qiṣāṣ* for either the "coercer" or the „coerced" or even both. In summary, the CA91 takes a considerably more lenient stand, not only in comparison with the *fiqh*, but also in relation to its predecessor codes where duress was not explicitly recognized as a mitigating factor in homicide cases.

5.3.3.2 Homicide with the consent of the victim

Article 131 (2) (e), CA91, states that homicide is deemed to be semi-intentional: "Where the offender commits culpable homicide with the consent of the victim".

The *fuqahā'* agree that the human being is inviolable in Islam and therefore suicide, the hurting of oneself or giving permission to someone else to hurt or kill one are forbidden (*ḥarām*).[1500] What they disagree on is the question of what are the penal and other consequences of killing a person with his/her consent. In the Ḥanafite school we find two main opinions. The first one argues that consent of the victim makes both *qiṣāṣ* and *diya* lapse. The second one says that consent makes the *qiṣāṣ* lapse but not the necessity to pay *diya*. The preponderant opinion among the Mālikites is that the permission to kill does not make the deed as such permissible and does not make the punishment lapse, even if the victim exculpates the perpetrator in advance. According to Mālikite reasoning, the victim, since the human being is inviolable, can not absolve the perpetrator, who, in turn, will be held responsible for intentional homicide. However, the adherents of this opinion differ in what the

[1497] ´Awda (2001), Vol. 2, p. 132.
[1498] See ´Awda (2001), Vol. 2, pp. 131-132 and likewise Al-Jazīrī (2004), Vol.5, pp. 223-226, Ḥassūna (2001), pp. 141-148 and Peters (2005), p. 24. In contradiction to ´Awda, Al-Jazīrī and Peters Schacht writes that Mālik and Aḥmad ibn Ḥanbal envision *qiṣāṣ* only for A. See Schacht (1990), p. 770.
[1499] Al-Jazīrī (2004), Vol .5, pp. 223-226.

punishment should be. Some believe it should be *qiṣāṣ*, others think that the permission given by the victim should be regarded a legal uncertainty (*shubha*), which in consequence averts *qiṣāṣ* and makes the *diya* compulsory. Among the Shāfi`īites there are two opinions. Firstly, that the permission does not make the deed permissible but makes punishment lapse and that therefore neither *qiṣāṣ* nor *diya* are applicable. The second opinion sees the permission as a legal uncertainty which averts *qiṣāṣ* and makes *diya* compulsory. A minority opinion among the Shāfi´ites does not consider the permission a *shubha* and therefore holds that *qiṣāṣ* is the necessary punishment. Aḥmad Ibn Ḥanbal, finally, argues that the perpetrator of the killing is not subject to a punishment because it is the right of the victim to remit the punishment and that the consent to be killed is equivalent to the remittance of the punishment. In summary, the *fuqahā´* disagree about the nature of the consent of the victim and its consequences. Some regard consent to killing as equivalent to an advance pardon which, in turn, makes the punishment, i.e. *qiṣāṣ* and *diya*, lapse. Others do not deem consent to killing an advanced pardon, because a pardon for homicide needs as a precondition the existence of homicide. If pardon is granted before the homicide has happened it is invalid, according to this reasoning. However, proponents of this opinion disagree on whether the punishment should be *qiṣāṣ* or *diya*.[1501]

From the disagreements of the *fuqahā´* described above it has become clear that in the case under discussion several solutions could have been justified as being based on or compatible with the *fiqh*. It should be noted that the CA91 generally recognizes consent (of the "victim") as decisive for not deeming an act an offence (art.17 (1)), but exempts "acts which are likely to cause death or grievous hurt" (art.17 (2)). Art. 131 (2) (e) stands, first of all, in the tradition of the Penal Codes 1925/1974, where article 249 (5) deemed consent as one of the reasons to classify culpable homicide as not amounting to murder. The wording, however, at the time, was more specific. The article defined that only the consent of persons older than 18 years would be recognized as culpable homicide not amounting to murder. In the CA91 it remains unclear whether the consent of a 17 year old person, e.g., would have the same mitigating effect. According to the PC 1925/74 homicide with the consent of a 17 year old

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[1500] Compare Ḥassūna (2001), pp. 163-168.

[1501] Schacht (1990), p. 769, writes under "Notes on the question of permission, request, compulsion and assistance in illegal killing: If someone kills another by his request or with his permission there is neither ḳiṣāṣ nor obligation to pay *diya*." Given the many differing legal opinions quoted above, this seems to be too simplifying a summary.

person would have been deemed murder. As to remitting *qiṣāṣ*, the CA91, is in harmony with the majority of the schools. Apart from part of the Ḥanafites and the Ḥanbalites all other schools are also in favor of imposing *diya* after qiṣāṣ has been remitted. In other words, article 131 (2) (e) is in harmony with opinions in the Ḥanafite, Mālikite and the Shāfi´ite schools, not the Ḥanbalite. Although, it should be noted here that, given the disagreement of the *fuqahā´*, the exemption from *qiṣāṣ and diya* could just as well have found its Islamic justification in the *fiqh*.

5.3.3.3 Homicide without premeditation during a sudden fight

Article 131 (2) (h) classifies homicide "without premeditation during a sudden fight and without his (i.e. the offender) having taken undue advantage or acted in a cruel or unusual manner" as one of the cases which make culpable homicide semi-intentional homicide. This case clearly has its roots not so much in the *fiqh* but in the three predecessor codes of the CA91. The Penal Codes of 1925, 1974 and 1983 had under article 249 (4) given almost literally the same definition for one of the cases of culpable homicide not amounting to murder.

The *fuqahā`* have not developed a special theory on homicide during a sudden fight. However, they do mention a variety of precepts which - if combined - can be construed as a theory on the topic.[1502]

The Ḥanafites and a minority opinion of the Ḥanbalites distinguish between intentional homicide and intentional bodily harm or beating on the one hand and between crimes which are the result of an unintentional fight on the other hand. In both cases they make the offender responsible for the result of his acts. The adherents of this opinion distinguish between the intention with regard to committing the lethal act and the intention to kill. If the culprit intends the lethal act as such and at the same time the killing of the victim the killing must be qualified as intentional homicide. If only the first intention is given, i.e. the intention to commit the act as such without the intention to kill, then the crime is considered to be semi-intentional homicide. In order to determine criminal responsibility the *fuqahā´* condition only the general intention of committing the act with the knowledge that the act is prohibited. If this precondition is fulfilled the perpetrator is fully responsible for the consequences of his act

[1502] Compare Ḥassūna (2001), pp.198-200.

whether he intended or expected these consequences or not. Thus, whoever hits another person with the intention of hitting only (i.e. not killing) and his victim dies, is responsible of semi-intentional homicide and not beating.[1503]

The Shāfi´ites and the majority opinion of the Ḥanbalites finally also hold that the perpetrator is fully responsible for the results of homicide during a fight. They make him responsible for intentional homicide if he intended the act and also had the intention to kill his victim. If he intended the act only, but not the perishing of his victim, and the act normally does not lead to death, then they make him responsible for semi-intentional homicide only.

Mālik too holds that the culprit at any rate is responsible for the consequences of his act, whether he intended or expected them or not. [1504] He knows acts which are intentional, but do not, however, entail retaliation, such as when two men are fighting against each other (i.e. a sudden fight without any intention to kill) and one gets hold of the other one's foot and throws his opponent to the ground causing his death. In that case *diya* for accidental homicide is due, to be paid by the solidarity group (*´āqila*). If the killer intended the fight *qiṣāṣ* is the punishment.[1505]

A sudden fight and its mitigating effect in Supreme Court decisions

With regard to a possible mitigating effect of a sudden fight two diverging opinions can be found in a Supreme Court decision from 1998.[1506] The Supreme Court judges argued that no mitigating effect could be derived from the *fiqh* when homicide happens as a result of a sudden fight (*al-ma´raka al-mufājiʿa wa athruhā ´alā takhfīf al-jarīma lā aṣl lahu fī al-fiqh al-islāmī*). In the case in question this opinion did not have any impact on the sentence because the judges could not find any evidence that a sudden fight had taken place in the first place. It is obvious, however, that the Supreme Court argues in contradiction with article 132 (2) (h) of the 1991 Criminal Act. Interestingly the same judgment contains a dissenting opinion, which, in this context, has the quality of a non-binding comment, not influencing the decision as such. Thus, the editor of the Sudan Law Journal and Reports (SLJR) points out that the 1991 Criminal Act explicitly recognizes a sudden fight as an element of homicide changing it from

[1503] Compare Ḥassūna (2001), p. 199.
[1504] Ḥassūna (2001), p. 200.
[1505] Ḥassūna (2001), p. 198.
[1506] Government of the Sudan vs. Bītr Dīnq Shūl, SLJR 1998, no.1998/262.

intentional to semi-intentional homicide. The editor further claims that this is congruent with the majority opinion in the *fiqh*.

In a second case from 1999 a sudden fight played a decisive role.[1507] The accused had originally been sentenced to hanging until death (*i´dām shanaqan*) according to article 130, CA91 for having killed his victim by several blows on the head with a stick following a dispute about the land of the victim. The culprit had confessed and the only evidence the court could rely on was this confession and his statements during the trial.

When reviewing the case the Supreme Court concentrated on two main questions: 1. Whether the case could possibly be treated under article 131 (semi-intentional homicide instead of article 130 (intentional homicide) by invoking one of the reasons provided for in this article and 2. Whether the statements of the culprit were acceptable as evidence if there were no other witnesses and no other evidence available. The Supreme Court came to the conclusion that the confession and the subsequent statements of the defendant were – despite some contradictions on minor details – plausible and therefore credible, especially with regard to the sudden fight which had preceded the homicide. As to the second question the Supreme Court stated the conditions under which the testimony of the culprit is acceptable: it must be clear that his testimony is indeed the only evidence available. Further, his testimony must be in conformity with logic and reason and the normal course of events. As to the case at hand the Supreme Court mentions two more factors having led to its decision to amend the applicable article. Firstly, the court reflects on the meaning of the number of blows meted out by the defendant during the sudden fight. It underlines that the mere number of blows is of minor importance. The decisive question is whether the violent means employed have ended the fight and whether the defendant has continued to beat the victim after he had fallen onto the ground. The judge accepted the account of the defendant that he had stopped beating the victim immediately after he had fallen. Secondly, the court takes favorably into account that the defendant himself had informed his family (who in turn informed the police) of the happening. Had he kept quiet - the court reasons - it would have been very difficult to find the culprit, given that the incident had taken place at night. Based on the arguments outlined above the Supreme Court decided in a majority decision to sentence the defendant to a five year prison term under article 131[1508] instead of the original death penalty by hanging. The

[1507] Government of the Sudan vs. ´Alī al-Rīḥ Muḥammad ´Abdallah, SLJR 1999, no. 1999/202.
[1508] The decision does not mention that the applicable article is 131 (2) (h).

decision further specifies that the payment of *diya* is due on the condition that it be obtained through civil jurisdiction. The leading opinion of this decision was accepted by three out of five judges of the respective court. It is noteworthy that the minority opinion held that the defendant had no case in invoking "sudden fight" as a mitigating circumstance. As the judge, formulating the minority opinion, points out, the defendant had repeatedly trespassed onto the land of the victim and had even been sentenced to pay a fine to him. In brief, since both had clashed several times for similar reasons this last, lethal, encounter had not come quite as surprising as the majority of judges had assumed. Further, the mere number of seven blows, some of them causing the lethal skull fracture the victim had died of and the fact that the victim had been twice as old as the killer, induced the two opposing judges to deny any recognition of mitigating circumstances and to support the original death sentence.

Since, as we have outlined above, the *fuqahā'* have not developed a theory of the concept of "sudden fight" in the context of homicide, the judges consequentially do not make any reference to the *fiqh* when they discuss its possible mitigating effects. As mentioned above article 131 (2) (h), CA91 is directly derived from the criminal legislation prior to Islamization. All three codes (24/74/83) had given the explanation that it was immaterial which party had first provoked the other or committed the first assault. This explanation has been omitted in the CA91. At any rate the surviving party was or is, also according to the CA91, guilty of either "culpable homicide not amounting to murder" (Penal Codes 24/74) or of "semi-intentional homicide" (PC 1983 and CA 1991). If one follows the text of the CA91 it is still insignificant whether the victim provoked the perpetrator or vice versa. Those judges who invoke "sudden fight" argue completely in line with the Penal Code 1974 when trying to determine whether the killer had taken undue advantage (i.e. beaten his victim after he had fallen on the ground) or acted in a cruel manner. The decision therefore strongly illustrates the strong connection between the Islamized codes of 1983 and 1991 and their secular predecessors.

5.3.3.4 Homicide under the influence of mental disturbance

Insanity in the Criminal Act 1991

The Criminal Act 1991 explicitly exempts persons incapable of judgment due to permanent or temporary insanity or mental infirmity at the time of the offence from criminal responsibility (article 10, (a)). It must be noted here that the wording as to its content is essentially not

different from its 1925/1974/1983 predecessor codes.[1509] Likewise, none of these codes deemed these persons to have committed an offence at all. Article 131 (2) (i) CA91 further stipulates that "offenders (committing) culpable homicide under the influence of mental, psychological, or nervous disturbance which manifestly affects his ability to control his acts" are deemed to have committed semi-intentional homicide.

Insanity and criminal responsibility in the fiqh

The adult person is considered by the *sharī´a* to be responsible for his (criminal) acts only if he/she is endowed with reason and understanding (*idrāk*) and free to chose (*mukhtār*). If one of these two qualifications is not given then the legal capacity (*taklīf*) disappears.[1510] If an offence is committed by a person deemed to be insane, *idrāk* / reason is not assumed. The defendant thus is not blameworthy, the offence can not be imputed to the offender[1511]and his criminal conviction is thus precluded. The *fuqahā´* know several degrees of insanity or conditions associated with it, the most important are the following:

Losing one's capability to understand (*idrāk*) can be complete (*tāmm*) and permanent (*mustamirr*) and is then called complete insanity (*junūn muṭbiq*). The person suffering of complete insanity is criminally not responsible.[1512]

Further, insanity can be complete and not continuous and is therefore called discontinued or temporary insanity (*junūn mutaqaṭṭi´*). A person thus suffers at times from it and then completely loses his capability to understand. At other times reason returns to this person. The first condition is considered the same as in complete insanity, except that it is temporary. A person who commits a crime during a state of temporary insanity is therefore criminally not responsible as long as this condition lasts. However, once his capability to understand is restored, he is also responsible for crimes committed during this state of recovery.[1513]

[1509] See article 50 (a), PC24 and 1974 and article 50 PC83. The CA91 further lists "sleep", "unconsciousness" (10 (b)) and the "taking of intoxicating substances or drugs (10 (c)) as a result of coercion or necessity" as reasons that make the punishment lapse. The first two reasons were not mentioned by its predecessor codes. In the PC83 this article was changed. Reasons like sleep etc. and drugs/intoxicating substances were not mentioned at all in by this article. Instead it provided for punishment of the person who helped or abetted the insane to commit a crime.

[1510] Ḥassūna (2001), p. 208.

[1511] Peters (2005), p. 20-21. Persons suffering from mental disorders of any kind may possess and inherit. See Ḥassūna (2001), p. 209.

[1512] ´Awda (2001), Vol.1, pp. 585-586. As to the ensuing civil responsibility/financial liability see below.

[1513] ´Awda (2001), Vol.1, p. 586.

Moreover, the *fuqahā`* know the state of partial insanity (*junūn juz`ī*), where a person loses the capacity of understanding related to a certain subject but fully understands anything apart from this subject. Who suffers from partial insanity is not criminally responsible for the domains he does not understand, but responsible in relation to all other aspects where his reason works.[1514]

In connection with insanity a range of other conditions are discussed by the *fuqahā`* and, extrapolating from *fiqh*-based solutions, also by modern legal scholars. Most of these conditions remain untested in the Sudanese courts with regard to their relevance as a defense in insanity cases.[1515]

Thus, the watershed for the legal consequences of all cases of insanity or conditions associated with it is the same. The criminal responsibility ceases if the capacity of comprehension (*idrāk*) is absent.[1516] The *fuqahā´* agree, however, that financial liability persists since it stems from causation and not from the fact that the damage has been caused by fault.[1517] However, they disagree on which kind of *diya* is to be paid in cases of homicide and hurt committed in a state of insanity. Their disagreement is based on differences how the crime of the insane has to be qualified. Mālik, Abū Ḥanīfa and Aḥmad ibn Ḥanbal are of the opinion that the insane can not commit homicide or hurt intentionally and that his deed therefore must be qualified as accidental. Shāfi´ī, in contrast, sees the insane as being able to commit both crimes intentionally. In consequence, both opinions differ with regard to the *diya* to be paid. In intentional crimes the enhanced *diya* (*diya mughallaẓa*) has to be paid out of the perpetrator's own pocket, while in cases of accidental homicide and hurt the lesser *diya* (*diya*

[1514] Partial insanity and temporary insanity can also coincide. Criminal responsibility of the perpetrator nevertheless is the same as in all other cases discussed. If reason had returned to the culprit when he committed the crime he is criminally responsible, otherwise not. See `Awda (2001), Vol.1, pp. 586-587.

[1515] Further - subsumed under insanity in a wider sense and with a bearing on responsibility - is the state of idiocy or feeble-mindedness, dementia (*´uth*). The demented person (*ma´tūh*) is described as someoone who comprehends little (*qalīl al-fahm*), speaks confusedly and generally understands less than average people. He is thus suffering from a lesser degree of insanity. Epilepsia and hysteria are not discussed by the *fuqahā`*, being clinical pictures described for the first time in modern times. However, by way of analogy modern Muslim jurists like ´Abd al-Qādir ´Awda – just like non-Muslim ones - discuss both conditions under insanity. Their criminal responsibility is deemed just like that of the insane if reason/*idrāk* is lost or weak like in the case of the idiot (*ma´tūh*). Both conditions are judged like the person acting under duress (*mukrah*) if the hysterical or the epileptic enjoy reason but have lost their free will (*ikhtiyār*). If they have lost neither reason nor free will they are deemed fully criminally responsible. ´Awda (2001), Vol.2, p. 588. Schizophrenia is treated according to the general pattern. If the condition is such that the defendant does not understand that he is committing a crime he is treated as insane. See ´Awda (2001), Vol.2, pp. 588-589.

[1516] It is interesting to note that contemporary authors like ´Abd al-Qādir ´Awda discuss conditions which have been described in modern times for the first time and place them in a legal context derived from the *fiqh*.

[1517] See Peters (2005), p. 21.

nāqiṣa) is due to be paid by the solidarity group (*´āqila*) of the culprit alone or by the solidarity group and the culprit together.[1518]

From the above it has become obvious that the notions of insanity and diminished responsibility as present in today's CA91 clearly have their roots in the pre-existing penal codes of the colonial and post-colonial eras. However, since various degrees of insanity are also an important subject in the deliberations of the *fuqahā`*, we shall try to determine how far the relevant articles of the Penal Code 1983 and the Criminal Act 1991 concerning insanity are compatible with the regulations of the *fiqh*. As has been shown above the Penal Code 1983 stipulated "capital punishment or *diya*" as punishment for semi-intentional homicide (*qatl shibh al-´amd*). It thus diverged substantially from its predecessor codes by making the capital punishment compulsory in cases where the private prosecutors did not agree to settle for blood money, thus effectively making no difference between intentional and semi-intentional homicide with regard to their punishment. The only difference between the punishment of the two different crimes was the fact that in the case of intentional homicide the private prosecutors were explicitly mentioned while in the case of semi-intentional homicide they were not. It thus remained unclear whether this lacuna was intentional or accidental. It further remained unclear whether it was up to the private prosecutors to claim *diya* and make the capital punishment lapse. At any rate the logical relationship between the crime and its corresponding punishment - here a milder punishment for a lesser crime – had been erased. Apart from the divergence from the example of its predecessors the harsh punishment for semi-intentional homicide was not compatible with the reasoning of the fuqahā` either. While the capital punishment seems unduly harsh *in all cases* of semi-intentional homicide, it certainly does so in the case of someone who is mentally retarded or mentally abnormal. As a matter of fact, our research could not trace any case of a death penalty under article 249 (6), between 1983 and 1991, confirmed by the Supreme Court.

The Criminal Act 1991 thus tried to remedy this flaw of its immediate predecessor by, firstly, stipulating a rather mild prison term of seven years as a *ta´zīr*-punishment, without prejudice to the right to *diya*. While this solution did not answer the relevant question why a mentally retarded perpetrator should go to prison at all – instead of receiving psychiatric treatment – it stayed well below the likewise rather harsh life term stipulated as a maximum punishment in

[1518] ´Awda (2001), Vol.1, p. 594.

the Penal Codes of 1925 and 1974. The lighter punishment also restored the balance between a crime and its punishment up to a certain degree.

Secondly, the wording of 131 (i), CA 1991 was changed, obviously in order to highlight the difference between insanity leading to impunity (article 10 (a) and, in contrast, a state of "mental, psychological, or nervous disturbance", leading to qualifying homicide to be semi-intentional homicide. As noted above, the wording of all predecessor codes was such that there was only a thin line between insanity, permanent or temporary and mental infirmity on the one hand and mental retardation, mental abnormality or a disease of the mind on the other hand. We can thus draw the preliminary conclusion that regarding mental disturbance as a mitigating factor in homicide cases the Criminal Act 1991 not only remedied an important deficiency of its 1983 predecessor. Moreover, by fine-tuning the wording as to clearly distinguish it from insanity it also removed a long-standing source of conceptual confusion which had led to unconvincing judgments in the past.[1519]

The comparison of insanity in the *fiqh* and Sudanese law before and until 1983 has further shown that the relevant articles of the PC83 were a mere translation of their English language predecessors. We have seen that the harsh capital punishment for semi-intentional murder of the mentally retarded was incompatible with the *fiqh*. This obvious flaw has been remedied in the CA91 by making semi-intentional homicide by a mentally or psychologically disturbed person punishable by a *ta´zīr*-punishment (up to seven years in prison) and recognizing the financial liability of the perpetrator. It has been shown above that the *fiqh* clearly envisages the financial indemnification of the victim's heirs in cases of semi-intentional homicide. So far compatibility with the *fiqh* is given. As to the criminal responsibility of the mentally disturbed the situation is more ambiguous. The wording of article 131 (2) (i) can not easily be traced to the different clinical pictures described in the *fiqh*. It rather seems to be an intended improvement on the predecessor codes. Most fittingly it could be equated with the state of mind described in the *fiqh* as "weakness of judgment" (*da´f al-tamyīz*). [1520] The person "weak of judgment" can be likened with someone who is "under the influence of mental,

[1519] Compare Vasdev (1978), pp. 85-127.

[1520] Weakness of judgment (*ḍa´f al-tamyīz*): According to the *fiqh* there is a group of persons whose intelligence and understanding does not reach that of a normal person but is, on the other hand, not as deficient as that of the insane or the idiot. When they commit a crime they are reasonable (*mumayyiz*) and understanding (*mudrik*) and therefore they will not be exempted from punishment according to the *fiqh*. However, some of the *fuqahā´* deem this group to be eligible for a reduction of their punishment, while other commentators want to deter them by a

psychological, or nervous disturbance which manifestly affects his ability to control his acts." However, as we have seen above, in this case as in all other cases associated with insanity, the *fiqh* only acknowledges two possibilities. Either the perpetrator was reasonable (*mudrik*) and free to chose (*mukhtār*) or he had lost one or both of these two qualities. If reason (*idrāk*) was present – and this is the quality in question here – full criminal responsibility ensues, if reason is lost, the perpetrator is criminally not responsible. The concept of diminished responsibility with, as a result, a lesser punishment or a substitute punishment is, according to the overwhelming majority of the *fuqahā´* only admissible in *ta´zīr*-cases and not either in *ḥadd*- or in *qiṣāṣ*-cases as discussed here.[1521] Nevertheless, the Sudanese legislator has stipulated exactly that: diminished criminal responsibility in a case of homicide leading to its qualification as semi-intentional homicide and entailing a diminished punishment. In other words, article 131 (2) (i) CA91 is incompatible with the reasoning of the great majority of the *fuqahā´*.

5.3.4 Accidental homicide in the Criminal Act 1991

Accidental homicide is now defined[1522] as homicide where it is not intentional or semi-intentional homicide and the offender causes it by 1. negligence (*ihmāl*), 2. lack of caution (*qilla iḥtirāz*) or 3. an unlawful act (*fi´l ghair mashrū´*). The punishment introduced by the CA91 for homicide by accident is a prison term not exceeding three years, without prejudice to the right of *diya*.[1523]

The Criminal Act 1991 changes not only the definition of "accidental homicide" and its respective punishment. It also surprisingly restores some concepts of criminal responsibility as defined in its secular predecessor codes (PC24/74). The new definition now includes negligence, which, as we shall remember, was punishable with a prison term of up to two years[1524] – for being the result of a blameworthy act - under the provisions of the PCs25/74,

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harsher punishment. It should be noted though, that the concept of "reduction of punishment" is not admissible in *ḥudūd* and *qiṣāṣ* – cases. See ´Awda (2001), Vol.1, p. 589.

[1521] Compare ´Awda (2001), Vol.1, p. 589.

[1522] See article 132, CA91. It should be mentioned that the official English translation of the CA91 as published in the Arab Law Quarterly generally is correct. However, in some instances, gross errors occured. Thus, the Arabic original *qatl khaṭā´* is translated with "homicide by negligence" which is, as has been shown above, missing the point.

[1523] For a case of accidental homicide confirming the above principles see Government of the Sudan vs. Ḥasan ´Uthmān ´Abd al-Raḥmān, SLJR 1997, no.1997/138.

[1524] Or with fine or both. See article 256, PC74.

but only entailed *diya* under the Islamized PC83. Since accidental killing by negligence or lack of caution only entails *diya* in the majority opinion of the *fuqahā'*, the PC83 already was following closely its prescriptions. By re-introducing a prison term as a possible punishment, the CA91 in fact partially restores penological precepts of the pre-Islamization period. It should be noted, however, that this change could also be justified from a *sharī'a* point of view: *qatl khaṭa'* (i.e. the mere causation of death) entails *diya*, however, if the killer acted unlawfully and by negligence or fault, then the state may impose a *ta'zīr* punishment.

For "accidental homicide by an unlawful act," the CA91 in fact re-introduces article 255, PCs25/74, which, as we have shown above, had been dropped without proper replacement in 1983. This reintroduction, however, differs from its predecessor in that it lowers the threshold of what kind of unlawful act leads to the accidental killing. The PCs25/74 had stipulated that the unlawful act leading to the accidental killing had to be punishable with a prison term of at least one year or more. This threshold was directly connected with and served as a justification of the relatively high prison term of up to ten years for that offence. In other words, while the PCs25/74 punished the offence discussed here rather harshly, the CA91 lowered the threshold, thus accidental killings as a result of a minor offence are now included. At the same time and consequentially it lowered the punishment of such an offence to a prison term of up to three years only (and *diya*).

In conclusion it must be noted that all articles of the PC83 on criminal responsibility where accidental homicide had been inserted (see discussion above) have been removed and unified respectively. In consequence court and government officials who were, under the PC83, financially liable when committing accidental homicide as a result of their functions, now enjoy impunity, as long as the perpetrator "is bound or authorized to do it by law...or...believes in good faith that he is bound or authorized so to do".[1525] The accountability of court and government officials with regard to accidental homicide, which had been introduced by the PC83, has thus been removed, restoring in fact the status quo ante.

5.3.5 Bodily harm

In comparison to 1974 and 1983, the relevant articles with regard to bodily harm have been largely simplified and reduced: five articles suffice in 1991, where the predeccessor codes

[1525] See CA91, article 11 "Performance of duty and exercise of right".

needed 14.[1526] Most, if not all inconsistencies observed in the PC83 with regard to bodily harm have been removed. Thus the notion of semi-intentional causation of wounds is now part of the CA91. The notions of wounds and cutting of limbs have now been unified in one definition. The many variations of hurt the PC74 and the PC83 knew now all fall into one single article.[1527] Concurrently the formula "flogging, fine or prison" with its discretionary character has been eliminated. Instead prison terms according to the gravity of the hurt caused have been reintroduced.

The CA91 distinguishes between wounds (*jarḥ*) and hurt (*adhan*). While the former refers to bodily harm punishable by *qiṣāṣ* or *diya* such as fractures, wounds, loss of an organ, the latter refers to causing pain or disease or hurt caused by poison or drugs and is punishable by a *ta´zīr*-penalty.[1528] Causing wounds is defined as causing another person to lose an organ, a mental function, a sense, a limb, a fracture or a wound in the body.[1529] In analogy to the articles on homicide those on wounds are similarly categorized into intentional, semi-intentional and accidental wounds. No further definitions are given, instead the code refers to the corresponding articles on homicide.[1530] The intentional causing of wounds is punished with retaliation (*qiṣāṣ*), provided all necessary preconditions are satisfied. If this is not the case or *qiṣāṣ* is remitted (by the private prosecutor or for other reasons), the intentional causing of wounds shall be punished with a prison term not exceeding five years or with a fine or both, without prejudice to the right of *diya*.[1531] The same punishments were prescribed with the exception of *qiṣāṣ*, if the crime happened in one of the Southern states.[1532] Again in analogy with homicide no *qiṣāṣ* is applicable in cases of semi-intentional or accidental causing of wounds. The maximum prison term is three years and one year respectively, in both cases without prejudice to the right of *diya*.[1533] The Criminal Act 1991 further specifies the parts of the body and wounds subject to retaliation in a list[1534] and which *diya*, full or partial, is applicable to a specific loss of organ or sense.[1535]

[1526] See articles 271-284 in the PC74 and PC83.
[1527] CA91, article 142 (1) and (2).
[1528] CA91, article 142 (1) and (2).
[1529] CA91, article 138 (1).
[1530] CA91, article 138 (2).
[1531] CA91, article 139 (1).
[1532] CA91, article 139 (2).
[1533] CA91, articles 140 and 141.
[1534] See "first list" attached to the CA91.
[1535] See "second list" attached to the CA91. For a more detailed description, see below chapter 5.3.9 on *diya*.

Most importantly, the CA91 has restored the state's prerogative to punish. The PC83 had treated the intentional and accidental causation of wounds or cutting of a limb exclusively as an affair to be settled between the culprit and the victim. The CA91 has reintroduced *ta´zīr*-punishments, i.e. maximum prison terms, which, as to their length, correspond with the gravity of the crime. Interestingly, the prison term appears before *diya* and therefore is presented as the main punishment. Only in the case of intentional causation of wounds, *qiṣāṣ* is the primary punishment and the *ta´zīr*-punishments becomes applicable if *qiṣāṣ* has been remitted or the conditions for its implementation have not been satisfied.[1536]

5.3.6 Reasons for the remittance of retaliation in the CA91

The CA91 is also much more specific about reasons for the remittance of retaliation. These had not been codified in the PC83, but had been later determined in Criminal Circular 94/83. Several reasons for the remittance of retaliation are stated[1537]: 1. "where the victim or his relative is an off-spring of the offender". It is generally agreed in the *fiqh*, that *qiṣāṣ* is remitted if the perpetrator is an ascendant of the victim.[1538] 2. *qiṣāṣ* is remitted, "where the victim or some of his relatives have pardoned...". This reason for the remittance of *qiṣāṣ* is also in accordance with the general precepts of the *fiqh*. The private prosecutors have the right to pardon the culprit. The foregoing can either be pronounced without quid pro quo or in return for the payment of the *diya* as intended by the *fiqh* or as agreed upon between the two parties, i.e. the perpetrator of the crime and the heirs of the victim. In Sunni *fiqh*[1539] it is enough that only one of the heirs pardons the victim. The right to retaliation of the remaining group of heirs is then automatically transformed into blood money. 3. *qiṣāṣ* is remitted where the offender is becoming insane after the passing of the sentence of retaliation (*qiṣāṣ*) against him.[1540]

[1536] The 1974 provision which made female circumcision punishable and abolished in 1983 has not been reintroduced in 1991.
[1537] Here we are only concerned with the reasons relevant to homicide.
[1538] Ḥassūna (2001), p. 51 and Baradie (1983), p. 137.
[1539] Shi´ite law follows the opposite approach. Retaliation can take place if at least one of the private prosecutors demands it. See Peters (2005), p. 44.
[1540] CA91, article 31 (d).

5.3.7 Multiple retaliation, multiple perpetrators, abetment

The CA91 also summarily regulates the question of multiple retaliation (*ta´addud al-qiṣāṣ*) for the first time. According to article 30, CA91, "an individual shall be executed for a group and a group for an individual". How this article translates into practice remains open. According to the majority view in the *fiqh*, however, in order to establish the criminal responsibility of a group the plaintiff must specify whether the acts were committed simultaneously or in succession. If the perpetrators acted simultaneously and with proven criminal intent and if the acts would have been lethal if perpetrated separately, they can all be sentenced to death. If they acted in succession, the first attacker is responsible of the death of the victim if he dies within one day after the attack. If the victim dies later, criminal responsibility accrues to the last attacker. Here, the Mālikites take a minority point of view. They hold responsible all those who are involved in the crime, whether through directly causing death or through abetment or through assistance. Thus, according to the Mālikites, a group of persons can be sentenced to *qiṣāṣ* for intentional homicide, if they jointly planned and carried out the crime.[1541]

Concerning the treatment of more than one perpetrator in cases of intentional homicide it is useful to take a look at the predecessor codes. Article 259 PC74 had – relatively lightly - punished abetment to murder with a prison term of up to two years, or up to fourteen years if hurt was caused. In its Islamized version of 1983 abetment to suicide was maintained while abetment to murder was omitted as a separately defined crime.[1542] However, the whole section on abetment of the PC74 had been translated in the PC83 and abetment to murder fell under this definition. According to this section, article 84, PC74, and subsequently adopted by the PC83, the abettor to intentional homicide would have faced the same punishment as the actual perpetrator of intentional homicide himself. In other words, by simply translating the wording of the PC74, its successor in 1983 had – inadvertently or by design - adopted the minority opinion of the Mālikite school which, as described above, recognizes joint criminal responsibility, even if a contribution to the crime, if taken separately, would not have led to the death of the victim.

[1541] See Peters (2005), pp. 28-30 and Abū Zahra (1998), Volume 1, pp. 293-297.

[1542] Article 259, PC83 changed titles and now read "Punishment of attempted intentional homicide". It translated the generic text of the old article 259 and added the ubiquitous "flogging, fine or prison" as a punishment. This article is an example of the technically rather dissatisfactory drafting of the new parts of the PC83.

5.4 Conclusion

Our historical analysis has shown that the PC83 and its provisions on homicide had closely followed its predecessor codes. However, the changes made in 1983 have in many cases destroyed the close coherence between crime and punishment. Fine-tuned punishments which had reflected the gravity of the crime had been replaced by summary punishments whose application, i.e. the quantity of lashes, the amount to be paid or the time to be spent in prison, was largely left to the discretion of the judge. Where Islamic punishments had been introduced they were, at times, contradicting the *fiqh*. Where the legislator changed the definitions of a crime often, and at times substantial, discrepancies can be observed with regard to the solutions offered in the *fiqh*. Given these discrepancies it is no surprise that the time between 1983 and 1991 has produced a great number of Supreme Court decisions on homicide. While these decisions could decide individual cases and serve as precedents for similar cases they could not reconcile inherent contradictions and the incoherent character of the changes made in 1983.

In the largely overhauled Criminal Act 1991 most of these incongruities and discrepancies have been addressed. In the majority of cases the Criminal Act 1991 and its provisions on homicide are far closer to precepts found in the *fiqh* than in its predecessor code. However, traces of the pre-Islamization penal codes can still be detected. Crimes, such as heinous murder, were standard rules with regard to *qiṣāṣ* and *diya* do not apply have been abolished altogether, after their application in practice had proven difficult.

The death penalty, i.e. the sentencing and its execution, remained despite Islamization a prerogative of the state. The state executes it by hanging. The heirs of the victim could kill the offender "in the same manner in which he has caused death, if the court deems it appropriate." However, we have not found a single Supreme Court judgment allowing the heirs of a victim to execute the death penalty themselves. While calling the death penalty *qiṣāṣ* its technical execution is in fact not different from non-Muslim countries still applying the death penalty (by hanging). What distinguishes post-Islamization practice from its colonial predecessor is the right of the heirs to pardon or to settle for *diya*, however.

Qiṣāṣ is also restricted with regard to bodily harm. A Supreme Court decision came to the conclusion that in the case of broken bones *qiṣāṣ* is not applicable because equivalence of the fracture inflicted originally and the one which would be the punishment can not be guaranteed. I could not detect any Supreme Court decisions leading to the application of *qiṣāṣ*

for bodily harm.[1543] In my interviews with Supreme Court judges, all my interview partners insisted that *qiṣāṣ* for bodily harm is not being applied and that heirs preferred to receive *diya*.[1544]

The nature of *diya* seems to remain somewhat hazy. While the CA91 lists it under the header "compensation", thus being distinct from penalties, we find Supreme Court decisions in which *diya* is called a punishment (*ʿuqūba*), imposed with the objective of prevention and deterrence.

The legislator has also changed the punishments of intentional and accidental bodily harm. While in 1983 both crimes were treated as an affair to be settled between offender and victim through *qiṣāṣ* or *diya*, in 1991 the legislator reintroduced prison terms as a possible punishment. The state thus reclaimed to some degree his prerogative to punish.

The requirements for the proof of homicide are considerably lower in both, the 1983 and the 1991 codes, in comparison with the requirements found in the *fiqh*.

Thus neither a minimum number of witnesses nor their sex have been specified for criminal cases. The good reputation of a witness is stipulated as a condition, the interpretation of its meaning, however was and is subject to interpretation in the courts. Court cases indeed show that the testimonies of witnesses with a doubtful reputation, e.g. of a drunkard, can be taken into consideration under specific circumstances. The function of the oath has changed with regard to its role in the *fiqh*. Since no minimum number of witnesses is specified in the Evidence Act, the function of the oath is not to replace a missing second witness but to corroborate or decide a case. The promulgation of a *ḥadd*- or *qiṣāṣ*-punishment on the strength of an oath is, however, excluded, according to a Supreme Court ruling. One method to prove homicide that is recognized in the *fiqh*, the *qasāma* procedure, has not been codified at all.

Johansen, giving the example of the Ḥanafite school, has shown how the *ʿuqūbāt*, i.e. the *ḥudūd* and *qiṣāṣ*-crimes, are distinct from other parts of Islamic Criminal Law through their specific procedural law.[1545] Indeed, all schools set the threshold for the proof of crimes entailing *qiṣāṣ* (and for *ḥadd*-crimes) significantly higher than for the proof of other crimes. The Evidence Acts 1983 and 1993 both know distinct rules of proof for *ḥadd*-crimes. As to

[1543] This refers to my main source the SLJR, 1983-2007. There is, however, one exception. The Supreme Court decided that retaliation in the case of a broken tooth is possible. See Government of the Sudan vs. Ḥamza ʿAlī Kutainī, SLJR 1985, no. 1405/188. I do not know whether this decision has been carried out.

[1544] Since it is hard to imagine that heirs always and without exception prefer *diya* from retaliation it can only be speculated how the desired result is being achieved.

crimes punishable by *qiṣāṣ*, however, the same rules apply as in other (non-*ḥadd*/non-*qiṣāṣ*) criminal cases. In other words, *qiṣāṣ* crimes are not distinct from other criminal cases with regard to proof as in the *fiqh* and the requirements for the proof of *qiṣāṣ*-crimes are not higher than for regular crimes.

Certain features of Islamic Criminal Law which are hardly reconcilable with the concept of citizenship have been omitted altogether. Thus the concepts of *ʾiṣma* and *kafāʿa* play hardly a role in the Islamized penal codes and the relevant Supreme Court legislation. Both codes have not stipulated different blood prices for men and women or for Muslims and non-Muslims. While the latter stipulation can be justified with similar opinions in the *fiqh* the legislator has indeed established gender equivalence and equivalence between citizens of different religions with regard to homicide and bodily harm. This is also true for the death penalty. Its execution does not depend on the equivalence between killer and victim. However, the concept of *ʾiṣma* has not disappeared altogether. Thus the Supreme Court decided that the life and property of those who enter Sudan with a visa is inviolable as long as the visa is valid.

A modern interpretation has been given to the notion of *ʾāqila*, the solidarity group. Derived from a Ḥanafite opinion the solidarity group now can be e.g. an insurance company, or, as decided in an important Supreme Court decision, the employer in whose service the crime was committed.

[1545] Johansen (1977).