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

Köndgen, O.A.

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7 The enforcement of Sudanese ICL

7.1. Survey of human rights violations

7.1.1 Equality before the law

Equality before the law is a legal principle under which all persons are subject to the same laws and all are equal before the law. The Universal Declaration of Human Rights (UDHR, article 7) states that "All are equal before the law and are entitled without any discrimination to equal protection of the law". While this principle is all encompassing and concerns religion, ethnicity, nationality, sexual orientation, socio-economic status and more in the specific Sudanese context and with regard to the Sudan's Islamic Criminal Law it is most relevant with regard to gender and religion.[1587] It goes without saying that the latter in the Sudanese context to some degree is connected with the question of ethnicity, since most non-Muslims belong to non-Arab Southern tribes.[1588] Apart from the UDHR, there is a multitude of universal and regional human rights instruments defining the notion of equality before the law.[1589] Further, the ICCPR[1590] (art. 26) reads: "All persons are equal before the law...the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". This ban on discrimination is echoed in the ICESCR[1591], the CRC[1592], the International Convention on the Elimination of All Forms of Racial Discrimination[1593] but also in regional human rights tools such as the African Charter on Human and People's Rights. One of the human rights instruments of relevance in this context is the Convention on the Elimination of All forms of Discrimination against Women` (CEDAW, 1979) to which the Sudan is not party to. CEDAW defines discrimination against women as "...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose or impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political,

[1587] On freedom of religion see following chapter.
[1588] The scope of this work does not allow me to deepen this issue. I am aware of the complexity of all questions related to ethnicity in the Sudan.
[1589] It will not be possible to discuss all of them. I shall limit myself to a selection of those which are relevant to the Sudan, either because the Sudan has ratified or acceeded them or because their accession is under discussion.
[1590] Accession of the Sudan, 18 March 1986.
[1591] Accession of the Sudan, 18 March 1986.
[1592] Ratified by the Sudan, 3 August 1990.
[1593] Accession of the Sudan, 21 March 1977.

economic, social, cultural, civil or any other field" (CEDAW, article 1). CEDAW also calls on state parties to accord women equality with men before the law (Art. 15). With regard to CEDAW, the government argues, in order to explain its refusal to accede, that some of the articles in the convention do not comply with the principles of the *sharī´a*. In January 2001, President al-Bashīr reportedly said that the Sudan would not sign CEDAW because it was held to contradict Sudanese family values.[1594]

Our analysis of Sudanese ICL has shown (see chapter on *zinā*) that women are clearly not treated on an equal footing with men. That women suffer from a severe imbalance is especially evident in the laws pertaining to unlawful sexual intercourse (*zinā*) and its proof as well as rape. All four witnesses of good reputation that are required have to be men. Women are not allowed.[1595] While this requirement is in conformity with the *sharī´a* it contradicts the human rights treaties cited above. We have shown above how the laws on proof of *zinā* are lopsided and discriminatory against women. Especially in cases of rape Sudanese legislation can turn a female victim into the perpetrator of an offence (*zinā*) which is punishable by death. This is the case when the female victim cannot prove rape while being pregnant as a result of it. Here the legislator construes the pregnancy as the result of unlawful sexual intercourse, provided the woman is not married. While Supreme Court case law has tried to mitigate the effects of this legislation clearly discriminating against women, the laws creating this situation have never been changed and remain in the statutes. Adding pregnancy to the methods of proof in cases of unlawful sexual intercourse clearly creates an advantage for men involved in such cases. In the absence of the testimony of the four men of good reputation it simply suffices for men to deny any involvement in the offence. Thus, in judicial practice, men generally have to be released from detention for lack of evidence while a woman in the same case faces charges that could potentially lead to her execution. This legal situation clearly leads to an unequal treatment of men and women under Sudanese criminal law, it undermines a woman's right to bring charges against their rapist and contributes to his impunity. In consequence, the UN Human Rights Committee called upon the Sudan in 2007

[1594] While the Sudan has not yet signed CEDAW, it is important to mention that the Muslim Personal Law Act 1991 is in contradiction with Article 16 of CEDAW, which calls for equal rights of men and women with regard to their rights to enter a marriage out of their free will and equal rights with regard to its dissolution, and with regard to equal rights and responsibilities as parents and concerning guardianship. Tønnessen & Roald (2007), pp. 27-29. On the discussion around an accession to CEDAW in the Sudan, with a focus on (women) Islamists see Tønnessen (2011).

[1595] Evidence Act 1993, article 62 (b).

to "undertake to review its legislation, in particular articles 145 and 149 of the 1991 Criminal Code, so that women are not deterred from reporting rapes by fears that their claims will be associated with the crime of adultery". [1596] Apart from creating a situation of inequality before the law in cases when rape constitutes a criminal offence not related to an armed conflict, the prevalent situation with regard to rape is also in clear contradiction with the prohibition of rape under international human rights law in both international and non-international armed conflicts. Thus, rape is prohibited according to all four Geneva Conventions of 1949. These conventions are binding on the Sudan.[1597] The Geneva Convention IV (article 27) e.g. stipulates that "Women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault".

7.1.2 Freedom of religion [1598]

Religious rights are guaranteed by a variety of international Human Rights Treaties the Sudan is party to such as the International Covenant on Civil and Political Rights (ICCPR)[1599], the International Covenant on Economic, Social and Cultural Rights (ICESCR)[1600], the Convention on the Rights of the Child (CRC)[1601], the International Convention on the Elimination of All Forms of Racial Discrimination[1602] and the Convention on the Prevention and Punishment of the Crime of Genocide.[1603] Especially the ICCPR, based on the Universal Declaration of Human Rights and accessed by the Sudan in 1986, is very specific as to religious rights. Article 18 of the ICCPR stipulates: "1. Everyone has the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and

[1596] Concluding observations of the Human Rights Committee: Sudan, UN Doc.CCPR/C/SDN/CO/3/CRP.1,26 July 2007, para.14 (b).
[1597] See REDRESS (November 2008), p. 15.
[1598] UN Human Rights reports on the Sudan quote numerous violations of the freedom of religion on a de facto level. Such violations include the restriction of church activities, the closure and destruction of churches, the refusal to issue building permits to churches, the denial of travel permits to Sudanese priests to prevent them from evangelizing, forced Islamic missionary work on tribesmen serving in the PDF etc. While all these incidents constitute violations of religious freedom I shall limit myself in this chapter on legislation.
[1599] Accession of the Sudan, 18 March 1986.
[1600] Accession of the Sudan, 18 March 1986.
[1601] Ratified by the Sudan, 3 August 1990.
[1602] Accession of the Sudan, 21 March 1977.
[1603] The Sudan accessed 13 October 2003. Article II of the Convention protects the collective right of a religious group to exist.

teaching. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice." These freedoms to manifest one's religion or belief, however, can be "subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others." (Article 18, 3). As El Tayeb has pointed out the inclusion of the right to change one's religion or belief met with opposition from Muslim countries which wanted to delete it before the adoption of the final text. The result of the preliminary discussion was a compromise formula with the wording "to have or to adopt a religion or belief" which, while being less explicit, still clearly includes the right to change one's religion or belief.[1604] This is also the unanimous opinion of leading commentators and UN rapporteurs.[1605] Further, the International Covenant on Economic, Social and Cultural Rights guarantees to parents the right to determine and ensure religious and moral education for their children (art.13 (3)). The Convention on the Rights of the Child affirms the right of children to freedom of thought, conscience and religion (art. 14 (1)) and their right to belong to a religious minority (art.30). How do these guarantees for the existence and practice of religions and beliefs relate to the Sudan's ICL[1606], being the object of this study? The most blatant contradiction is without doubt the 1991 introduction of apostasy as a crime punishable by death. As mentioned earlier, in the case of Maḥmūd Muḥammad Ṭāhā a Muslim religious leader was executed for alleged apostasy in 1985, without specific stipulation in the existing Penal Code, based on the Judgements Basic Rules Act. This law stipulates that a court must apply *sharī´a* law in the absence of legislation, as was the case here since apostasy was not yet codified. *Sharī´a* must also be applied in the case any legislative provision exists but is not in harmony with *sharī´a*. While the Judgment Basic Rules Act remains in force, the Criminal Act 1991 has introduced apostasy for the first time in modern Sudanese legal history into its statutes, in clear violation of the above mentioned international human rights treaties.[1607] The relevant article clearly only refers to the apostasy of Muslims, the CA91 does not contain any similar stipulation with regard to Christians or other religions. In other words, the Muslim apostate is liable to the death penalty, while apostates of other religions are not punished at all according to the

[1604] El Tayeb (1995), p. 10.
[1605] El Tayeb (1995), pp. 10-11.
[1606] While concentrating on ICL it is worth mentioning that there are other laws discriminating against non-Muslims such as the 1962 Misisionary Act which severely limits proselytizing of Christian churches. No such limitations are imposed on Muslim missionary activities.

Criminal Act 1991. Confronted by the UN Special Rapporteur with regard to the obvious conflict between Sudan's legislation on the one hand and its obligations under ratified Human Rights Treaties, the government of the Sudan replied: "The punishment is inflicted in cases in which apostasy is a cause of harm to the society, while in those cases in which an individual simply changes his religion, the punishment is not to be applied. But it must be remembered that upthreatening (sic!) apostasy is an exceptional case, and the common thing is that apostasy is accompanied by some harmful actions against the society or State…Assuredly, the protection of society is the underlying principle in the punishment for apostasy in the legal system of Islam".[1608] This statement clearly does not address the main concern which is the flagrant contradiction between article 126, CA91 on apostasy and the Sudan's obligation to ensure religious freedom, including the right to change one's religion as included in the ICCPR. It is rather a political statement, and was understood as such by the UN Rapporteur Gáspár Bíró, trying to portray those who make use of their guaranteed rights as being threats to society. Bíró rightly pointed out that article 126 can be used not only against recent converts who wish to reconvert to their old faith but could also serve as a potential threat to majority Muslims who dissent from the official position on religious matters.

Next to introducing apostasy, either by way of an explicit provision or without it, both Islamized penal laws, the Penal Code 1983 and the Criminal Act 1991 discriminate against non-Muslims in different ways. The Penal Code 1983 introduced the full range of *ḥadd* and *qiṣāṣ* provisions, clearly based on only one, though the majority religion, for the entire territory of the Sudan, i.e. including on the one hand the South, mostly inhabited by non-Muslims and also including non-Muslims in the North on the other hand. By exempting the South from *ḥadd* and *qiṣāṣ* punishments the Criminal Act 1991 tried to address the problem but stopped half-way since non-Muslims in the North were still subject to the full range of punishments, at least until the Interim National Constitution of 2005 introduced some measure of protection against Islamic punishments for non-Muslims living in the North. It has also been pointed out that while the South was exempted from the *punishments* the *definitions* of the crime (combined with a separate set of punishments for the South only) stayed as they were.[1609] In other words, while the ICCPR guarantees "freedom of thought, conscience and

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[1607] See chapter 4.6 above.
[1608] UN Document E/CN.4/1992/52 quoted in UN Document E/CN.4/1994/48, p. 23.
[1609] See Kok (1991), pp. 245-246.

religion…(and)…to manifest his religion or belief in worship, observance, practice and teaching", the Islamized criminal law gravely violates the notion of equality of religions inherent in the ICCPRs provisions. Criminal legislation, as well as any other law, based mainly on principles of the *sharī´a* and interpretable only in the light of the *sharī´a* is in a sense a legitimate manifestation of the Islamic faith, its practices and teachings, at least in the eyes of the proponents of such legislation. However, by imposing such legislation on the entire non-Muslim population of the Republic of the Sudan, all adherents of other religions are subject to the manifestation of a religion that is not theirs and are therefore severely discriminated against. We have shown above how the Supreme Court's case law has tried to interpret the existing criminal law in a way as to establish a high degree of equality of citizens. While this approach reduces discrimination in the jurisdiction of the highest court of the country it is also questionable from an Islamic point of view. Moreover, it cannot and does not address multifold discrimination on a de facto level.

7.1.3 Rights of children

The Criminal Act 1991 is in conflict with the Sudan's obligations under article 37 of the Convention on the Rights of the Child. Article 37 CRC provides that "no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Article 27 (2) of the CA91, however, explicitly allows for the application of the death penalty on persons under the age of eighteen in cases of *ḥadd*- and *qiṣāṣ* offences. As to *qiṣāṣ* other than the death penalty the CA91 does not mention that persons under the age of 18 are exempted (articles 28-32) which implicitly allows for the amputation of minors. Further, under the heading "Measures of Welfare and Reform. Measures prescribed for juveniles" the CA91 explicitly allows for the whipping with up to 20 lashes of children between seven and eighteen years of age (art. 47 (b)). The UN Committee on the Rights of Children is strongly opposed to the corporal punishment of children, i.e. persons under the age of eighteen in all settings, including in the justice system. It has clarified that the prohibition of corporal punishment is absolute, and cannot be justified.[1610] The problem that for particular crimes (*ḥadd* / *qiṣāṣ*) the general age limit of 18 is not applicable has been addressed by reports of the UN Committee on the Rights of the Child which said in its 2002 report that it "is concerned that the definition of the child is unclear under Sudanese law and is not in conformity with the principles and

[1610] REDRESS, March 2012, No more cracking of the whip, p. 23.

provisions of the Convention. For example, minimum ages may be determined by arbitrary criteria, such as puberty, and discriminate between girls and boys..."[1611] Closely related to this matter the Committee was concerned that the age of criminal responsibility is too low since children as young as 7 years of age are punishable by detention in a reformatory. The Committee thus recommended, next to raising the minimum age of criminal responsibility, that the Sudan ends the "imposition of corporal punishments, including flogging, amputation and other forms of cruel, inhuman or degrading treatment or punishment, on persons who may have committed crimes while under 18".[1612] The al-Bashīr regime has responded to international criticism, the most specific of which has been coming from the UN Committee on the Rights of the Child, by legislating a "The Child Act 2009".[1613] This new law which defines a large number of rights of children could rectify major concerns of human rights groups and the UN Committee on the Rights of the Child. It seeks to establish a parallel justice system specialized in children, which are defined as any person below the age of eighteen. Child courts, specially trained magistrates and a Children Prosecution Attorneys Bureau are the main pillars of this new system. The law does not mention the term *sharī'a* and makes no reference to it. Instead it clearly specifies that the Child Courts "shall follow the UN Minimum Rules on Juvenile Courts". Most importantly, the Child Act 2009 establishes the principle that "the sentence of whipping is not inflicted on the Child" (art. 77 (d)) and that "the death sentence is not inflicted on the Child" (art.77 (e)). The Child Act is silent on the question of amputations. In general it can be said that, despite important lacunae, the Child Act 2010 is a step into the right direction. However, as long as corresponding sections in the Criminal Act 1991 are not changed it seems unlikely that judges in criminal courts would tacitly follow the Child Act instead of applying the CA91. Indeed, in their October 2010 report on the Sudan the UN Committee criticized that juvenile court system "is not yet fully functional and does not have separate courts and detention facilities for children".[1614] Further,

[1611] See especially "Consideration of reports submitted by states parties under article 44 of the convention: convention on the rights of the child: concluding observations: the Sudan. 9 October 2002. Accessed under http://uhri.ohchr.org/document/index/f5189101-bb3f-4402-966f-456a53057f03.
[1612] Ibid. Article 70 (e).
[1613] Downloadable under http://mpil.de/shared/data/pdf/child_act_2009.pdf. The Child Act 2009 repealed the The Child Act 2004.
[1614] For this and the following quotations in this paragraph see: Consideration of reports submitted by states parties under article 44 of the convention: convention on the rights of the child: concluding observations: the Sudan, article 89. 22 October 2012. Accessed under http://uhri.ohchr.org/document/index/d6d967b8-d6cb-46b5-82ac-4bde15daa28a.

the UN Committee came to the conclusion that the age of criminal responsibility is still determined according to "apparent physical maturity (puberty), rather than actual age". In fact, children, i.e. persons under the age of 18, continued to be executed by way of retribution (*qiṣās*) or by way of *ḥadd*, thus violating articles 6 and 37(a) of the Convention on the Rights of the Child. Further, children were still brought before courts for adults and detained together with adults in prison and while in police custody. Different from what the Child Act 2009 stipulates, children were "routinely dealt with in the absence of their parents or guardians" without "effective oversight of the investigative and judicial processes". The UN Committee report also mentions that female genital mutilation, which is widespread in the Northern Sudan, is not prohibited by the Child Act 2009.[1615] As to caning and flogging, the Child Act prohibits it in schools and also as a judicial punishment. In actual practice, the report is concerned, the flogging of children and other corporal punishments are widely practiced in schools, courts and prisons.[1616]

7.1.4 Cruel, inhuman and degrading penalties

The Sudan is party to a number of international human rights treaties prohibiting torture and other cruel, inhuman or degrading treatment or punishment (CIDTP). These treaties include the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and the Convention on the Rights of the Child (CRC). Further, the Sudan is party to the Convention on the Prevention and Punishment of the Crime of Genocide, the Slavery Convention, and the Convention relating to the Status of Refugees. The Sudan is also party to the International Convention on the Suppression and Punishment of the Crime of Apartheid and the African Charter on Human and Peoples' Rights (ACHPR). The Sudan has signed, but not ratified, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

Thus, Sudanese criminal legislation is clearly in conflict with the country's commitments under Article 7 of the ICCPR, providing that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". Especially *sharī'a*-based punishments such as flogging, stoning, crucifixion, and amputation as stipulated in the 1991 Penal Code plainly

[1615] The Child Act of the Southern Sudan (2008) prohibits the practice.
[1616] Ibid. article 39.

contradict the ICCPR. The UN Human Rights Committee which monitors the adherence of states to the Covenant has clearly stated that article 7 of the ICCPR extends to corporal punishment. It has therefore called on several states, among them the Sudan, to abolish all laws allowing for corporal punishment.[1617] It has further rejected explanations such as the one made by a Sudanese delegation in 2007, which asserted that "flagellation and whipping, for example, were lawful forms of punishment in the Sudan and as such not incompatible with the Covenant".[1618] While I could not find any trace of an execution of stoning, the punishment of flogging is imposed and executed on a regular basis. While Article 14(5) of the ICCPR guarantees the right of appeal, sentences to flogging in accordance with the Security of the Society Law are in practice carried out instantaneously, and without counsel. The Criminal Act (CA) 1991 allows in cases concerning the *ḥudūd* and *qiṣāṣ* the death penalty for individuals below the age of 18, while the ICCPR and the CRC both prohibit death sentences against offenders who have not yet reached the legal age of maturity. Apart from contradictions between the Sudan's obligations under the ICCPR and other human rights covenants and its *sharī´a*-based national legislation, there are many examples of violations of the Sudan's international obligations at a de facto level. In addition to the well-known mass killings and mass rape in Dār Fūr, one of the most blatant human rights violations that has long persisted throughout the country is the recurrent scourge of slavery. Banned by both the ICCPR (Art. 8) and the Slavery Convention, it has nevertheless continued to be practiced with impunity.[1619]

Sudan is also party to the African Convention on Human and People's Rights which states that "...All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishments and treatment shall be prohibited" (art.5). Doebbler v Sudan is the leading case on corporal punishment which has been decided before the African Commission on Human and People's Rights. In this case eight male and female students were convicted to fines and between 25 and 40 lashes for contravening art. 152 of the Criminal Act 1991. Article 152 punishes indecent or immoral conduct or dress. The whipping was meted out in public on the uncovered backs of the female defendants. While the Sudanese government argued that the punishment was justified because the defendants committed acts

[1617] REDRESS, March 2012, No more cracking of the whip, p. 21.
[1618] REDRESS, March 2012, No more cracking of the whip, p. 22.
[1619] Lobban (2001), pp. 31-39.

which are criminal according to Sudanese law, the Commission dismissed this argument. It unequivocally stated that the whippings had violated article 5 and that "there is no right for individuals, and particularly the government of a country to apply physical violence to individuals for offences. Such a right would be tantamount to sanctioning State sponsored torture under the Charter and contrary to the very nature of this human rights treaty".[1620]

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), signed but not ratified by the Sudan, prohibits torture (art.1) and acts of cruel, inhuman or degrading treatment or punishment (art. 16). The monitoring Committee against Torture has taken a clear position the public execution of punishments in general and physically abusive measures such as flogging or caning in particular, e.g. in the case of Indonesia. It is likely that a ratification of the Convention and resulting monitoring would lead to similar concerns in the case of the Sudan.

The Committee on Economic, Social and Cultural Rights, responsible for monitoring the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 2000 was "gravely concerned about the occurrence of flagellation or lashing of women for wearing allegedly indecent dress or for being out in the street after dusk, on the basis of the Public Order Act 1996 (Khartoum), which has seriously limited the freedom of movement and of expression of women.[1621] It therefore asked the government of the Sudan to "...reconsider existing legislation, particularly the 1996 Public Order Act, in order to eliminate discrimination against women...".[1622]

In conclusion, the Sudanese government, since its introduction 1983, has been criticized and continues to be criticized for the application of CIDTP by the monitoring committees of the international conventions and treaties the Sudan is party to. The conventions and treaties as well as comments of the said committees leave no doubt as to the fact that the prohibition of CIDTP is absolute and can neither be derogated from by way of emergency legislation nor is it admissible to enter reservations limiting the scope of the prohibition. Especially the latter has been tried by a variety of countries, including Pakistan and the Sudan, in order to avoid international criticism for human rights violations. It is important to note that the Sudan

[1620] See paragraph 42 of the decision. http://www1.umn.edu/humanrts/africa/comcases/236-2000.html.
[1621] Committee on Economic, Social and Cultural rights, Concluding Observations on Sudan, UN Doc. E/C. 12/1/Add.48,1 September 2000 para. 24. Quoted in REDRESS (March 2012), No more cracking of the whip, p. 32.
[1622] Ibid., p. 32.

resisted all requests by Amnesty International and the relevant UN monitoring bodies to ratify CAT and ICCPR when al-Turābī was Attorney General. While asserting the Sudan's commitment to human rights he resisted ratification because CAT and ICCPR outlaw the application of *ḥadd* punishments. ICCPR and CAT were ratified under the TMC 1985-1986.[1623]

Legal contradictions between the sharī′a *and human rights in national and international law*

Immediately after the 1989 coup, the al-Bashīr regime suspended the 1985 Transitional Constitution and ruled by constitutional decrees enacted by the Revolutionary Command Council (RCC). In relation to this, the Sudan's initial report (1991) to the UN Human Rights Committee lodged a derogation concerning its obligations under the ICCPR:

It became expedient to proclaim a state of emergency with the inevitable derogation from Sudan's obligations under the Covenant on Civil and Political Rights [...] With the achievement of more progress in the peace process and the establishment of the political system, that state of emergency will be naturally lifted and the derogation from Sudan's obligations under the Covenant will be terminated forthwith. Since that 1991 report, first in 1998, and then in 2005, new constitutions have been enacted, the first of which, in turn, has been partially suspended due to the imposition of emergency law in 1999. It is unclear whether with the lifting of the state of emergency in 2005 in most of the Sudan the above derogations have become groundless. The INC of 2005 (see 5.5) does not mention international human rights as a source of legislation. Article 27 states that 'all rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of the Sudan shall be an integral part of the Bill of Rights (i.e. the INC). It is, however, not clear that these international human rights treaties and conventions enjoy the same legal recognition as other articles of the constitution, nor does the INC explicitly mention that these treaties and conventions are enforceable in Sudanese courts.[1624]

In fact, in many instances the INC subjects itself to 'prescribed laws', thus inverting the usual practice of the hierarchy of norms. To date, little progress has been made concerning the

[1623] Kok (1992), p. 189.

[1624] The INC explicitly states that rights described in its chapter II ("Guiding Principles and Directives") are "not by themselves enforcable in a court of law (art. 22)." For a detailed critique of the 2005 Interim National Constitution see "Observations on the Transitional Constitution", The Sudanese Human Rights Quarterly 20 (January 2006).

adjustment of statutory laws in order to make them compliant with the Interim National Constitution and international human rights conventions to which the Sudan is party.

The *ḥadd* offence of apostasy and its respective punishment constitute a violation of Article 18(1) of the ICCPR, which guarantees freedom of thought, conscience, and religion. It is also discriminatory in its differential treatment of adherents of the different faiths. Important *sharī´a*-based stipulations of the CA do not exempt non-Muslims in the northern governorates. Thus, Article 168(1) on armed robbery (*ḥirāba*) provides for the death penalty and/or crucifixion for Muslims and non-Muslims alike. Similarly, Article 171(1) punishes *ḥadd* theft (*sariqa ḥaddiyya*) with amputation of the right hand, irrespective of the faith of the offender. It goes without saying that cruel corporal punishments as such constitute a human rights violation, no matter whether the person sentenced is Muslim or not. In practice non-Muslims in the North are frequently victims of *sharī´a*-based legislation on alcohol-related offences. Thus, the majority of prisoners in the Omdurman Women's Prison were imprisoned for alcohol-related offences. More recently, the Sudanese government seems to have taken measures to rectify this situation.

7.2. Survey of severe *sharī´a* penalties

The analysis of published Supreme Court decisions has shown that most of the more severe corporal punishments, such as single and cross amputations, the death penalty for *zinā* or apostasy and retaliation for bodily harm, have rarely been upheld by the Supreme Court, after the fall of the Numairi regime 1985.[1625] The Supreme Court cases as published in the SLJR give us, however, only part of the picture and it is necessary to match them with the reports of international human rights organizations in order to have an approximate view of the quantitative dimension of ICL application. While floggings and executions are indeed applied large-scale, all other corporal punishments based on the *sharī´a*, do remain on the statutes, are imposed by the lower courts but are then in the majority of cases, it seems, not executed, either because they are scrapped by the Supreme Court or because they are commuted. The

[1625] The following conclusions have been reached on the basis of primary and secondary sources used, i.e. Supreme Court jurisidiction as published in the SLJR, statements made by Supreme Court judges during interviews and AI and HRW annual reports. We cannot be absolutely certain that there are no unpublished cases contrary to the trends described below. Also, the possibility that amputations and executions are carried out in secret cannot be ruled out entirely. In its 1994 report Amnesty International mentioned that in September 1993 a

Sudan's approach to ICL application and the application of severe *sharī´a*-penalties can be compared to some degree to Pakistan's. Similarly, no death sentence by stoning has been carried out in Pakistan and in general, ICL application has been "careful and controlled".[1626] A major difference is, however, that in Pakistan there were only few amputation sentences passed by lower courts, which, in turn, where all quashed by the Federal Shariat Court. In fact the Federal Shariat Court has stated that it will make an effort "not to inflict a ḥadd as long as it may be avoided by all legitimate and established means".[1627] In the Sudan, no such statement of the Supreme Court has become known and the frequency of amputation sentences passed by lower courts seems to be higher than in Pakistan. The possibility to carry out amputations is being kept open, even if the number of amputations is low. I shall now discuss the different punishments one by one.

It has become clear that the Sudan does not execute adulterers by way of stoning. While stoning is the punishment for adultery if the adulterer is *muḥṣan*, in none of the cases discussed in the SLJR it was actually applied. In fact, stoning as a punishment has never been carried out in the Sudan according to all sources available to me.[1628] No execution for homosexual intercourse between males has become known either.

After the downfall of Numairi no death penalties for *zinā* were confirmed by the Supreme Court, as far as we know from the published material at hand. While in the early phase of ICL application pregnancy of the *muḥṣana* served as proof for *zinā*, in later cases the Supreme Court recognized (unproven) claims of rape as *shubha*.[1629] While remaining in the statutes pregnancy can thus only serve as proof for *zinā* if the accused does not cite rape, which would be considered a legal uncertainty (*shubha*), in her defense.

The Supreme Court has also narrowed down the definition of *muḥsan* to the person being legally married at the time of the commitment of *zinā*. It thus considerably reduced the possible application of stoning.

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senior judge had revealed "that punishments provided under Shari´a law had been imposed in secret in prisons: it was not clear whether these included limb amputations and executions". AI, Annual Report 1994.

[1626] See Peters (2005), p. 160. The exeption to this restraint are the blasphemy laws against the Ahmadiyya sect.

[1627] Peters (2005), p. 160.

[1628] The method of execution for *zinā*, stipulated in the Supreme Court cases investigated is not always stoning, but can be hanging as well.

[1629] An example for this reasoning is the case Government of the Sudan vs. Kulthūm Khalīfa ´Ajabnā, SLJR (1992), no. 48/1992.

Zinā cases, even without the de facto application of stoning or the death sentence, do make headlines and do find their way into human rights reports though.[1630] They are normally punished by flogging or the sentence is commuted. For example, in Southern Dār Fūr a 18-year old Dinka woman was sentenced to death by stoning for *zinā* in December 2001. After international protest, the sentence was quashed and the trial court imposed forty lashes which were carried out on the spot without possibility of appeal.[1631] Fluehr-Lobban reports that hospitals have to report to the police any childbirth where the mothers can not indicate the father. The police will then administer 100 lashes to these unmarried women.[1632] This and other evidence from HR sources corroborate that the regime does not wish to execute women – men are hardly ever the victim of these accusations[1633] – for *zinā*, without, however, wanting to let the crime go unpunished. It therefore imposes flogging on the alleged culprits, often administered by Public Order Police after a decision by a Public Order Court and before the case even reaches a regular criminal court. Often the accused do not have access to legal assistance and cannot appeal before the flogging is administered.

As to *ḥirāba*, until 1991 the Supreme Court had to cope with the peculiar situation that *ḥirāba* as such was not codified, while a number of *ta´zīr*-crimes were punishable with punishments normally reserved for *ḥirāba*. The published, rather contradictory, SC decisions thus oscillate between a justification of the flawed 1983 legislation to an outright rejection of *ḥadd*-

[1630] Annual and other reports by international human rights organisations are the single most important and independant source allowing us to compare Supreme Court judgments with the judgments of lower courts. This source, however, has its limits. Amnesty International delegations have had limited access to the Sudan since the inception of the al-Bashīr regime. Nevertheless, a comparison between Amnesty International and Human Rights Watch annual reports shows that the latter reports significantly less amputations and ICL-related cases in general. One can therefore safely assume that had there been continuous observation of the human rights situation in the Sudan by AI and HRW since 1989 more ICL-related cases would have been revealed. AI and HRW reports often do not follow up on cases. We read for example in one report that x persons have been sentenced to amputation. In the following reports however no further details or subsequent developments of the case are reported. It is therefore impossible to say whether these sentences have been carried out or whether the case has been quashed in the Appeal or Supreme Courts. In other words, while AI and HRW reports provide us with valuable information, it is impossible to obtain a comprehensive picture of de facto ICL – application based on these reports.

[1631] Human Rights Watch World Report 2003. For another case see Human Rights Watch World Report 1999 quoting a case of four women facing the death penalty on *zinā*. In 2002 AI reports a death sentence by stoning imposed in Nyala on a 18 year old Dinka woman. The sentence was subsequently reduced to 75 lashes. AI, Annual Report 2003. In 2003 a 14-year old girl who was nine months pregnant was sentenced to 100 lashes, also in Nyala. The sentence was later commuted. AI, Annual Report 2004. In 2007, two women from Dār Fūr were sentenced to be stoned for adultery in Managil Province, Gazira State. According to AI information the sentence was later commuted. AI, Annual Report 2008.

[1632] Fluehr-Lobban, Shari´a and Islamism, chapter 4 (forthcoming).

[1633] In its annual report 1994 Amnesty International relates the case of Peter al-Birish, an Anglican Bishop who received 80 lashes after being convicted of adultery.

punishments for non-*ḥadd* crimes. With the introduction of *ḥirāba* as a clearly defined *ḥadd*-crime in the CA91 SC decisions on *ḥirāba* become scarcer. Neither before nor after 1991 SC decisions indicate a clear tendency with regard to the actual application of *ḥirāba*-related punishments. However, Amnesty International and Human Rights Watch report that amputation, execution and crucifixion[1634] sentences as punishment for *ḥirāba* were indeed, relatively frequently, pronounced by local courts, mainly in Dār Fūr, at times also in Khartoum.[1635] It appears that the higher frequency of *ḥirāba*-related sentences reflect the determination of the authorities to use all means to punish those who commit this massive disturbance of public order.[1636]

It is noteworthy that the majority of the *ḥirāba* cases reported by Amnesty International and Human Rights Watch took place in remote Dār Fūr which has been the scene of long-standing violent confrontations between rebel forces and government-backed militias. While these reports do not disclose the political or criminal background of the cases it is rather likely that the relevant articles of the CA91 are used as a disciplinary tool in a situation of civil strife.

As to amputations for *ḥadd*-theft a large majority has not been confirmed by the Supreme Court, according to the published material. At times the Supreme Court judges went out of

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[1634] It seems that offences other than *ḥirāba* are punished with execution and subsequent crucifixion. Thus, three men of the Masaalit tribe (Dār Fūr) were sentenced to cross-amputation, hanging and crucifixion for having taken part in "tribal clashes" in 1999. See Amnesty International, Annual Report 2000. Unfortunately the report does not reveal which article of the Criminal Act 1991 was applied. One man was sentenced to death and subsequent crucifixion in 1992 for "waging war against the state and illegal possession of firearms". Amnesty International, Annual Report 1993. Again, it is not clear, why crucifixion was to follow hanging. The pertinent article 51 only speaks of the death penalty.

[1635] HRW reports a few cases of public hanging followed by crucifixion in Dār Fūr in 1991 for *ḥirāba*. See HRW World Report 1992. AI reports one case of hanging and subsequent crucifixion in Dār Fūr in 1991. It is unclear whether this case is part of the cases reported by HRW. AI reports that in 1996 ten people were sentenced to cross-amputation for *ḥirāba* in Dār Fūr, while at the same time the Director of Prisons announced that 100 people were waiting for the implementation of the sentences of limb amputation. See AI, Annual Report 1997. Three people were sentenced to cross-amputation for *ḥirāba* in Dār Fūr in 1997. See AI, Annual Report 1998. In 2000 12 sentences of limb amputations passed. It is unclear whether for *ḥirāba* or theft. One of these sentences was executed in Khartoum. AI, Annual Report 2001. In 2001 five cross-amputations for *ḥirāba* were carried out in Kober prison in Khartoum, 19 other men were equally sentenced to cross-amputation. AI, Annual Report 2002. Further, in December 2001, also in Dār Fūr, six men were sentenced to single and cross amputations for *ḥirāba* and illegal possession of unlicensed firearms. See Human Rights Watch World Report 2003. In 2002 the final appeal of five people sentenced in Nyala (Dār Fūr) to cross-amputation and hanging was rejected. AI, Annual Report 2003. In 2003 two men were hanged for *ḥirāba* after having been convicted in Nyala. As of 2005 the Annual Reports of AI and HRW do not report further cross-amputations for *ḥirāba*.

[1636] That the state is determined to punish *ḥirāba* severely is also evident by article 24 (2), CA91. This article stipulates that criminal conspiracy is not deemed an offence unless an attempt is made to commit the offence. However, intentional homicide, *ḥirāba* and offences against the state are not included. In other words, if two or more persons agree to commit any of these crimes, i.e. intentional homicide, *ḥirāba* or a crime agains the state, the fact that they agreed on committing the crime is deemed sufficient to impose the respective punishment. It is not necessary that they made an attempt to actually commit the offence.

their way to avoid amputation. Amnesty International reported that shortly after the introduction of the Criminal Act 1991, in September 1991, three people were sentenced to limb amputation after being convicted for theft. It is not known whether these amputations were carried out.[1637]

Sudan, according to a 2006 statistic, was fifth among the six countries that carried out 91% of all known executions worldwide.[1638] The number of confirmed executions seems to have gone down in the following years. All the judges I interviewed were in favor of the death penalty and strongly believed in its deterrent effect.[1639]

Whenever there are legal heirs the decision will be qualified "execution by way of *qiṣāṣ*" (*i´dām qiṣāṣan*). Whenever intentional homicide is proven and there are no heirs the execution will be carried out anyway according to pertinent SC jurisdiction.[1640] While this difference has no impact on the actual execution method (hanging) in the former case the heirs have the right to either settle for *diya* or pardon the culprit. This principle not only diminishes the total number of executions it also allows for a financial compensation of the heirs of the victim. While paying attention to these individual rights the state, however, secures its prerogative of punishment by determining that execution is always hanging and no *qiṣāṣ* in the sense of "an eye for an eye" is admissible. Further, even if the heirs pardon or settle for a financial compensation the judge can impose a *ta´zīr*-penalty.[1641]

With regard to *qiṣāṣ* for bodily harm, no cases could be found among the investigated SC decisions that ended in retaliation, with one exception. According to interviews with Supreme Court judges they normally end with the payment of *diya*. As shown above, the Supreme Court decided that equivalence in the case of broken bones can not be guaranteed and

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[1637] Amnesty International, Annual Report 1992. This conviction for theft came only a few months after all sentences of amputation imposed before the introduction of the Criminal Act 1991 had been commuted.

[1638] http://deathpenaltyinfo.org/death-penalty-international-perspective#interexec. In the years 2005-2010 Sudan has not been among the first five countries with the highest number of confirmed executions worldwide according to the same source. Reliable numbers of executed death sentences in the Sudan are difficult to find. The website "Death Penalty Worldwide" (http://www.deathpenaltyworldwide.org) estimates that by February 2010 between 310-350 individuals were on death row in the Northern Sudan in addition to another 100 in the Southern Sudan. It should be noted that extra-judicial killings, a current phenomenon in the Sudan, are not included in this statistics.

[1639] Interviews with Supreme Court judges May 2009. In November 1997 the Minister of Justice announced that since 1989 894 death sentences were imposed for murder and armed robbery. Of these 112 were carried out. AI, Annual Report 1997.

[1640] Article 130, CA91 only stipulates two possibilities, i.e. retribution or the remittance of retribution with a subsequent *ta´zīr*-punishment. We can therefore safely assume that in cases where the state executes a person guilty of intentional homicide in the absence of legal heirs, the state assumes the role of heir. According to the classical *fiqh* the state may not pardon the perpetrator in such a situation. Personal communication Ruud Peters.

therefore retaliation is excluded. It is possible that this principle has been extended to bodily harm in general. This assumption is confirmed by the annual reports of AI and HRW that do not report cases of retaliation with regard to bodily harm as from 1989. It should be noted, however, that the Supreme Court does not automatically review *qiṣāṣ*-cases concerning bodily harm.[1642] It can therefore not be excluded that an analysis of judgments of lower courts would lead to a reevaluation of the above findings.

Apart from the Ṭāhā case no execution for apostasy seems to have taken place in the Sudan since 1985. The published decisions of the SLJR do not contain any other apostasy cases nor do Human Rights Watch or Amnesty International report any. This, however, does not mean, that the relevant articles of the CA1991 do not play a role in daily judicial practice. Apostasy, as it is in direct defiance of the official Islamization project of the al-Bashīr regime, is not taken lightly by the authorities and (alleged) offenders will face severe consequences.[1643]

In summary we observe that despite the Supreme Court's reticence in confirming the harsher *sharī´a*-based punishments such as amputations or death penalties for *zinā*, ICL-application as such subsists. While between October 1983 and April 1985 more than 140 amputations were carried out[1644], no amputation sentences seem to have been implemented after the downfall of the Numairi regime until the advent of the al-Bashīr regime. All pending amputation sentences were commuted in 1991. Single and cross-amputations, executions, at times in combination with crucifixion were, however, resumed with the introduction of the Criminal Act 1991. These punishments were mainly imposed for armed robbery (*ḥirāba*). The total number of confirmed cases of carried out amputations is far lower than during the Numairi era. According to the pertinent reports of Amnesty International and Human Rights Watch, the reported number of *implemented* amputations doesn't even reach one per year on average. This contrasts, however, with a higher number of amputation *sentences.*[1645] Since obviously a high percentage of these sentences are not carried out we have to assume that these are either

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[1641] CA91, art. 130 (2).

[1642] Article 181 of the Criminal Procedure Act 1991 only speaks of death and life sentences and amputations that have to be submitted to the Supreme Court for confirmation.

[1643] This is illustrated, among others, by a case from June 2001 when security forces arrested an alleged convert to Christianity and kept him in solitary confinement for three months while reportedly torturing him and demanding him to reconvert to Islam. Human Rights Watch World Report 2002. See also Human Rights Watch World Report 1999 quoting a case of a Nuba teacher living in the North and charged with apostasy.

[1644] AI, The Tears of Orphans, pp. 46-47.

[1645] As mentioned above, e.g. in 1996 the Director of Prisons announced that 100 people were waiting for the implementation of their amputation sentences.

commuted or scrapped by either the Court of Appeal or the Supreme Court. The Supreme Court judges I interviewed argued that many of the *ḥadd* crimes, especially those leading to amputation or stoning, were so difficult to prove that their application was close to impossible. Supreme Court judgments therefore were simply following the spirit of the *sharī´a*.[1646]

Apart from a relatively low number of amputations and crucifixions (of already executed delinquents), ICL application thus subsists mostly with regard to the death penalty for *qiṣāṣ* crimes and flogging.[1647] The latter is mainly administered for alcohol related offences, offences concerning "public morale" such as contraventions against the Islamic dress code, but also for *zinā*. It is important to note that in all three instances women represent the great majority of those accused.[1648] Brewing "marissa", the local Sudanese beer, is a business exercised mainly by Southern women who have no other source of income, while the consumers are mainly Southern men. Both groups are targeted by the Public Order Police and especially Southern women are frequently flogged for contravening the pertinent articles of the Criminal Act 1991.[1649] As in cases of *zinā*, many if not most of these cases do not reach the regular criminal courts, but are instead decided by Public Order Courts. Regular amnesties free hundreds of women serving prison sentences for alcohol related offences. Their places, however, are quickly filled by others. As to enforcing the *ḥijāb* and other features of an imagined proper Islamic dress code, the regime has dimmed down its fervor in the late nineties after a decade of zealous prosecution of women for not wearing the *ḥijāb* or wearing trousers. While these cases might occur more infrequently in recent years, they have not disappeared.[1650]

An offence difficult to assess is false accusation of illegitimate sexual intercourse (*qadhf*). I did not find published SC decisions on *qadhf* nor AI and HRW annual reports that contain *qadhf* cases. Available statistics, however, report 659 court decisions on *qadhf* cases in 2008

[1646] Interviews with different Supreme Court judges, May 2009.
[1647] Flogging and capital punishment punishments were already part of the colonial criminal codes although the nature of capital punishment has changed with the new role conceded to the heirs of the victim.
[1648] In 2010, however, 19 young men received 30 lashes before an audience of 200 people for cross-dressing and wearing make-up. AI, Annual Report 2011.
[1649] AI reported 1993 that in 1992 a Supreme Court judge received 20 lashes in public for drinking alcohol. This is a rather exceptional case. See AI, Annual Report 1993. Alcohol related offences were the most frequent crime of the 2008 crime statistics with 91641 cases decided.
[1650] This has been demonstrated by the case of the Sudanese journalist Lubna al-Hussain who faced 40 lashes in July 2009 for having worn a trouser in a Khartoum restaurant, See AI, Annual Reports 1989-2011.

alone.[1651] *Sharī´a* application is limited mainly geographically and with regard to the social strata it affects. Geographically in the sense that amputations and crucifixion are rarely applied in Greater Khartoum and most other parts of the Sudan. However, they seem to have been applied at a slightly larger scale in Dār Fūr, probably in the context of the outbreak of hostilities between rebels and government-backed militias. With regard to flogging the group most affected are Southern non-Muslims in the North. Here *sharī´a* application obviously serves to discipline a refugee population in and around Khartoum which, for cultural and economic reasons is not willing or able to comply with the Islamist legislation. Southern women are however not the only ones who are in danger of being flogged. Muslim women in Khartoum and other cities of the North also continue to be targeted for improper dress, *zinā* or other offences.

7.3. Survey of legal factors

7.3.1 Development in legislation

The comparison of the two penal codes under scrutiny in this study concludes in a large number of differences. In terms of structure and length the PC83 had still closely followed its 1974 predecessor. The CA91, in contrast, has been streamlined and shortened. Out of 458 articles (1983) became 185 (1991). This streamlining and shortening has been reached mainly by reducing the number of punishable political crimes and by a much more concise drafting. Especially with regard to the Islamized parts of the PC1983, the CA91 is much clearer in its definitions, more precise and concise, and has remedied many of the flaws of its predecessors, moving it closer to the provisions that can be found in the *fiqh* and thus making it more acceptable to those who criticized it from an Islamic point of view. In particular it has done away with the PC83´s controversial combination of *ḥadd* punishments with non-*ḥadd* crimes. These had been codified in order to widen the scope of applicable *ḥadd*-crimes for crimes that can only be associated with *ḥadd*-crimes but do not represent the *ḥadd*-crime itself (as defined in the *fiqh*) and, on the other hand, for attempted *ḥadd*-crimes. The latter receives different treatment in the *fiqh* and should not be punished by punishments reserved for the *ḥadd*-crime itself. Thus, the CA91 has considerably reduced the number of crimes punishable by *ḥadd*-

[1651] Fluehr-Lobban reports in her forthcoming book that in 2003 14 persons were held in Khartoum's Kober prison for *qadhf* according to a 2004 study of the Ahfad University Center for Gender and Development (edited by Balghis Badri).

crimes and basically reduced it to crimes that can be found also in the *fiqh*. At the same time the CA91 has also reduced the applicability of flogging to a large extent. Instead of keeping the arbitrary and unspecific formula "will be punished by flogging, fine and prison", so ubiquitous it has restored the proportionality between the severity of the crime and its punishment. Keeping a reasonable relationship between the graveness of the crime and the severity of the punishment had been one of the important principles of the Penal Code 1974 and had been abandoned to a large degree in the Penal Code 1983. Further, the CA91 has filled the gaps by the PC83 attempting a more comprehensive legislation of ICL. It has thus, e.g., introduced the crime of *ḥirāba*, not codified in 1983, *ridda* (apostasy), equally not explicitly codified in 1983 and blood money (*diya*), which is a central notion of the *fiqh* but had nevertheless been omitted in 1983. That a crime which is derived from the *fiqh* is introduced does not, however, mean that the regime intends its application. Thus the introduction of apostasy has obviously more symbolic than practical value. To have the crime of apostasy in the statutes helps the regime to present itself as the guardian of Islam while its non-application avoids the kind of international and domestic indignation the Numairi regime had to face when it executed Ṭāhā. Until today no execution of the death penalty for apostasy has become known under the CA91. The CA91 has also improved and become much more precise with regard to the death penalty. These can be passed by way of *ḥadd*, *qiṣāṣ* or *ta´zīr* with each of the three categories entailing different rights with regard to a possible pardoning.[1652] In line with the *fiqh*, the CA91 has also introduced for the first time two "schedules" defining limbs and wounds for which there is retribution and the corresponding *diya* payable for the different possibilities of homicide, the loss of limbs and wounds. As to the first schedule it is unclear whether the legislator at the time of drafting the CA91 still had the intention to actually apply *qiṣāṣ* for wounds or whether it was meant to be dead letter right from the start. As mentioned above, retribution for wounds does not seem to be applied, at least the SC decisions researched do not show any evidence that this is the case.

No fundamental development can be detected with regard to the contradictions between ICL and the applicable Sudanese constitutions. Rights guaranteed in the latter are clearly violated by the two codes codifying ICL. With the South of the Sudan now independent a new

[1652] Capital punishment by way of *ḥadd* cannot be pardoned, not even by the president, a capital punishment by way of *qiṣāṣ* can be pardoned by the heirs of the victim and capital punishments by way of *ta´zīr* can be pardoned by the President of the Sudan.

constitution is being discussed in the North and it must be feared that the Bashīr regime will go the opposite way. Instead of legislating a constitution that is in line with International Human Rights Treaties and reforming criminal (and other) law accordingly, the Criminal Act 1991 will most probably stay in place and the new constitution will be giving ample leeway for *fiqh*-based ICL application. While this approach might remedy contradictions in domestic law, however, it will not address the multifold contradictions between International Human Rights Treaties and Sudanese criminal (and other) law(s).

An important development has been the shift from a Penal Code (1983) which was, at least in theory, applicable to all Sudanese throughout the country, to a criminal legislation (1991), that exempted the Southerners of many of the *fiqh*-based punishments. This was still problematic in several ways. While it was presented as a reconciliatory concession by al-Turābī and the regime that seemingly voluntarily addressed Southern concerns it was rather a recognition of the fact that Southern acceptance of ICL application was unattainable and that, moreover, the North was never in sufficient military and political control of the South to be able to efficiently enforce ICL. Further, as mentioned above, only the *punishments* were inapplicable. The *definitions* of the crimes, equally based on the *fiqh*, stayed in place, and while being combined with new punishments, specifically designed for the South, are in conflict with the cultural and social realities in the South. In addition, the CA91 did not address the problem of non-Muslims in the North, who remained, at least until the promulgation of the INC, subjected to ICL. The symbiotic relationship between crime, punishment and procedure as present in the *sharī´a* / *fiqh* has been respected to a higher degree in the case of *ḥadd*-crimes. Here the legislator accepts that the procedural laws render *ḥadd*-crimes very difficult to prove. In the case of *qiṣāṣ*-crimes the situation is different. In cases of homicide and bodily harm the rights of private persons are directly concerned. Here we have observed a distinct shift in Sudanese criminal legislation, brought about by Islamization. The 1925/1974 codes focused mainly on the state´s prerogative to punish. Islamization, however, led to a paradigmatic shift, i.e. to a re-evaluation of the rights of the victim and his heirs. This shift has been reinforced by Supreme Court case law. In the case of bodily harm *qiṣāṣ* is rarely, if ever, applied and victims are encouraged to settle for *diya*. In the case of intentional homicide the victim's heirs can equally settle for blood money or pardon the perpetrator. In both cases, however, the decision on the legal consequences of the crime have not entirely passed into the hands of the victim or his heirs. With the possibility to impose an additional *ta´zīr*-punishment crimes in

that category go neither unpunished nor do they necessarily end with a financial settlement only. In summary, by changing and lowering the standards of proof for *qiṣāṣ*-crimes the Sudanese legislator has, on the one hand, facilitated the application of *qiṣāṣ* in cases of intentional homicide and bodily harm. On the other hand neither the heirs of homicide victims nor the victims of bodily harm can claim more than a theoretical right to inflict on the perpetrator the same kind of death or the same wounds as the victim received. Coming back to the interaction between the *sharī´a*-based parts and its secular environment the latter, by paying much more attention to the rights of the victim and his heirs than in previous legislation, has changed its character as well. An important development of the development of *sharī´a*-application after 1989 is the introduction, on the level of the governorates, of an additional and parallel system of legislation, enforcement and jurisdiction with regard to Public Order and Islamic morale, the Public Order Laws, Police and Courts. All three complement the new Criminal Act 1991 and the existing regular police and jurisdiction in important ways. This parallel system allows the regime to pursue its low frequency application of harsh *sharī´a*-based punishment on the national level while having another powerful disciplinary tool at its disposal. In other words, while the Islamized parts of the Criminal Act 1991 are difficult to handle, due to lengthy procedures and various appeal and review stages, the POL/POC system allows for much faster punishment normally without appeal, let alone review. The POL/POC system is not only faster, its punishments whipping, fines, prison terms, forfeiture and closure of premises are also more suitable to be meted out in a much higher frequency. The POL, by the mere frequency of its application, are a constant reminder of where the boundaries of an Islamic morality, as defined by the state, are.

In summary, the introduction of elements into criminal legislation and procedure that are derived from and based on the *fiqh* has a variety of consequences. Most of all, it leads to a situation where different standards coexist within the same legislation. This development clearly distinguishes ICL from its predecessor codes that did not contain elements based on the *fiqh*. Thus, e.g. the general age of adulthood is not applicable in the case of *ḥadd*-crimes when puberty serves to determine adulthood. The concept of legal uncertainties (*shubha*) averts *ḥadd*-punishments but is not applicable in regular crimes. For *ḥadd*-crimes different standards of proof apply compared to non-*ḥadd* crimes with a further differentiation between *zinā* and other *ḥadd*-crimes etc. Crimes and punishments directly traceable to the *fiqh* are, however, not the majority. Most crimes are crimes which are not very different from those

that can be found in the Penal Code 1974 or its predecessors. In order to integrate them into an Islamic framework they are classified as *ta´zīr*-crimes, punishable by *ta´zīr*-punishments. By subsuming all non-*ḥadd* and non-*qiṣāṣ* crimes under the third classical category of *ta´zīr*, omitted in 1983, the CA91 concludes the Islamization attempt the PC83 had started rather clumsily. And while on the surface all crimes listed in the CA91 fit into one of the three categories *ḥadd* /*qiṣāṣ* /*ta´zīr*, there can be little doubt that the CA91´s relation with the *fiqh*/ the *sharī´a* is far weaker than one might expect. This is mainly due to the largely hybrid nature of the Criminal Act 1991. While stopping short of a "revolution at the level of the principles of jurisprudence" as al-Turābī advocates it, it is clear that a good number of sources and methodological principles suggested by him have indeed been applied when he had the chance to draft a penal legislation in 1988, which was legislated in 1991 with very few changes. Indeed all four Sunni schools serve as sources, next to Qur´an and Sunna. The former are used in a discretionary manner, by way of the eclectic expedient (*takhayyur*), with the principles of *istiḥṣān* and necessity (*ḍarūra*) being the principles that allow for reforms. The memorandum accompanying the CA91 equally mentions a large number of sources and methodologies for the CA91. It reflects in many respects the wide range of possibilities al-Turābī had suggested in his theoretical writings. In both, it remains unclear how much room is reserved to either orthodox elements (the *sharī´a*, the *madhāhib*, Qur´an, Sunna, *ijmā´*, *qiyās* etc.) or potentially modernizing factors (the conditions of the country/*ẓurūf al-bilād*, the latest developments of the time /*mustajidāt al-´aṣr*, *ijthihād*, modern criminal jurisprudence and terminology etc.). Given the avowedly modernist approach al-Turābī professes in his writings, e.g. with regard to the limits of *ijtihād* ("everything can be reviewed..."), he chose to codify a version of ICL, at least with regard to *ḥadd* and *qiṣāṣ* crimes, that finds its inspiration to a large degree in the legal opinions of the *madhāhib*. While being careful not to deviate from its historical models at times al-Turābī´s CA91 even went beyond what its predecessor had introduced (e.g. apostasy). The rectification of the flaws of its predecessor, a suppression of multiple versions of a particular crime and other changes in the legislation did still leave enough possibilities for a harsh application of the law in practice. In other words, that the application of ICL turned out to be much more limited than under Numairi is much less the result of a particular reformist approach in legislation than the consequence of subsequent landmark Supreme Court decisions, which, in turn, is the result of general political guidelines set by the ruling regime. Many of these SC landmark decisions have effectively filled gaps,

given new meaning to *fiqh*-based concepts and thus clearly defined the limits of ICL application.

7.3.2 Development in procedure

Following closely its 1974 predecessor the Code of Criminal Procedure 1983 nevertheless introduced important amendments in order to make it compatible with the Penal Code 1983 and the *sharī´a*. These amendments, however, are more limited in scope than the changes of the respective Penal Code 1983 and are securing that there is no undue interference by higher authorities which might violate principles of the *sharī´a*. Thus, the Sudanese President, who may waive a punishment, commute a sentence or annul a conviction for a specific crime now has none of these wide-ranging powers if they violate the *sharī´a*. Since this means in practice that the president cannot waive e.g. a *ḥadd*-punishment this provision automatically enhances the role of the Supreme Court as the highest and last institution dealing with amputations and executions by way of *ḥadd*. Next to the President also the Attorney General saw his powers limited. While he is allowed to terminate criminal proceedings at any time after the end of the investigation he may not do the same if this violates the *sharī´a*. Both restrictions are further examples, this time with regard to procedure, of how the introduction of *fiqh*-based ICL has created two sets of legal standards which coexist with each other.

The CCP83 has also confirmed an instrument that existed already in colonial times, i.e. circulars, and introduced it into the realm of criminal law. The Chief Justice was authorized to issue criminal circulars which were to specify the school(s) the courts were to follow in their application of the *sharī´a*. This novelty is remarkable for two reasons. It showed that an institution of the colonial *sharī´a* that had proven its value was not only acceptable in the new system as well; its authority was even transferred and expanded into ICL, while criminal circulars before 1983 had only regulated areas of criminal law not related to the *sharī´a*. Further, it shows that the legislators were aware of the many gaps the swift drafting of the new laws had left. Confirming criminal circulars issued by the Chief Justice secured a useful tool that would make it possible to fill the most important gaps of a hasty ICL legislation at a later stage. It also enabled the Chief Justice Yūsuf, who was critical of Numairi´s Courts of Instantaneous Justice and in favor of strengthening the rule of law[1653], to remind the authors

[1653] Compare Zein (1989), p. 212.

of the Penal Code/the Code of Criminal Procedure as well as the judges of the Courts of Instantaneous Justice that the rules of the *fīqh* were by far more complex than what had been legislated. He reminded them through his 1983/84 criminal circulars as well of the fact that the *fiqh* knows for each ḥadd offence a variety of reasons leading to the remittance of the *ḥadd*-punishment.[1654]

The streamlined CPA93[1655] confirms in many respects, but also complements the CPA83, filling its gaps. The President still cannot pardon either individual cases or by way of a general amnesty cases of *ḥadd* or *qiṣāṣ*.[1656] *Ḥadd* and *qiṣāṣ* punishments are likewise exempted from the courts´ prerogative to suspend the execution of judgments on a probation period. Taking into consideration the severity of the punishments, *ḥadd*, *qiṣāṣ*, death penalty and whipping are not be carried out as soon as possible as is the case of all other punishments, irrespective of an appeal.[1657] It must be noted that the law talks here about judgments reached in the regular court system. In practice, whippings are imposed by the POC and carried out by the POP very rapidly, normally without appeal. What is more, *ḥadd* offences such as *zinā* or alcohol consumption very often, if not in the majority of cases, do not enter the regular court system but are decided instead swiftly by POCs. These swift decisions taken by a parallel system have several effects. First of all, the stalling effect of article 190 (2), CPA91, is obviously not taken into account by the POC/POP system. The swift execution of POC judgments are normally not being appealed and since already executed such an appeal would not have any effect on the administration of the punishment anyway. In other words, it is part and parcel of the Public Order system to reclassify at least two, possibly other, *ḥadd* offences as offences that entail *ta´zīr* penalties. Since very few records are kept, legal assistance normally is not granted and the accused are not permitted to prepare their defense, procedural and legal guarantees as stipulated in the CPA91/CA91 are not existent in an important part of the Sudanese justice system. The advantages, as seen from the point of view of the regime, seem obvious. Instead of having a large number of ICL-related cases congesting a slow-going system that guarantees basic rights and procedure, such cases are referred to a parallel system where such guarantees do not exist and the swift execution of *ta´zīr* punishments is a foregone

[1654] It must be noted that Yūsuf, despite his critical views, did not resign from his position until he was replaced in September 1984.
[1655] The 308 articles in 1983 have been reduced to 213 in 1991.
[1656] CPA91, articles 208, 211.
[1657] CPA91, art. 190 (2).

conclusion. This disburdens the regular court system and ensures that punishments are meted out with the desired frequency. As to more severe corporal punishments we now find detailed provisions that are meant to secure proper procedure in cases of amputations ("...the amputated person remains in medical care, paid by the state, until cured"). The health condition of the sentenced person is now taken into consideration in cases of *ḥadd*, *qiṣāṣ* and whipping and if one follows the text the court can suspend execution as it deems fit. There are also clear provisions on how whipping should be carried out, detailing which parts of the body may be hit and which may not and how the lashes are to be administered. The CPA91 thus makes an effort to create clear procedures that prevent abuse and undue cruelty in the execution of ICL-related punishments. However, given the nature of the Public Order parallel system, for the most part unhampered by procedural constraints, such guarantees seem to be of little consequence.

With regard to the above exceptions in cases of *ḥadd*, *qiṣāṣ* and whipping the CPA91, and this is an observation valid for Sudanese criminal legislation in general, creates a two-pronged system. On the one hand there are provisions on crimes, their respective punishments and procedures that pertain to the realm of ICL. They are a minority. On the other hand there are all other crimes, punishments and procedures, the majority, which could be found as well in any pre-Islamization predecessor code or in codes of professedly secular countries. The two realms, however, cannot always be clearly separated. At times both are combined by the legislator for the sake of introducing solutions that better meet the conditions of the country. Procedure, especially the provisions for proof in *ḥadd*-cases and cases of intentional homicide and bodily harm are an area where *sharī´a*-based solutions are in conflict with the realities and requirements of a multi-religious and multi-ethnic nation state such as the Sudan. In order to facilitate convictions with regard to *qiṣāṣ* offences the requirements of proof have been substantially lowered in the EvA83 and the EvA93. Requirements with regard to religion and gender, as provided for in the *fiqh*, have not been introduced. An important effect is that discrimination based on gender and/or religion has been reduced. This approach, which is confirmed by subsequent SC case law, has moved legislation closer to contemporary notions of the equality of citizens in a nation state. Firstly, the Evidence Acts of 1983 and 1993 do not specify that a witness has to be Muslim in *qiṣāṣ*-cases. Thus non-Muslims can testify against Muslims in *qiṣāṣ* cases. Further, they do not stipulate either that two females can replace one male witness. In other words, as a witness in *qiṣāṣ*-cases women are equal to men. Secondly,

in close interplay with the secular[1658] environment it is operating in Sudanese ICL has abandoned the important notion of equivalence (*kafā´a*). By not introducing different blood prices for men and women, Muslims and non-Muslims, the legislator has established equivalence between the sexes and between Muslims and non-Muslims in *qiṣāṣ* cases. The legislator, and this is confirmed by subsequent SC case law, has thus moved the contemporary Sudanese version of ICL closer to modern definitions of citizenship, at least in the important domain of *qiṣāṣ* crimes. At the same time discrimination based on gender and/or religion subsists especially in the domain of proof and punishment of *ḥadd*-crimes. It should be remembered in this context, however, that the death penalty for intentional homicide is executed in significant numbers while the severe corporal punishments for *ḥadd*-crimes such as amputations and executions by way of *ḥadd* are only rarely applied. Thirdly, the legislator has harmonized Sudanese ICL with the requirements of modern notions of citizenship in another aspect. The distinction between persons enjoying inviolability (*´iṣma*) and those whose killing cannot be punished as intentional homicide has not been introduced. Neither Sudanese legislation nor published Supreme Court cases indicate that "unprotected" non-Muslims can be killed with impunity or that heirs of homicide victims can take the life of the killer with impunity. With the non-introduction of the notion of inviolability (*´iṣma*) the legislator has tacitly established an important element of equivalence between Muslims and non-Muslims by ensuring that neither private revenge nor the private execution of those assumed guilty of severe *ḥadd*-crimes has any room in the Sudanese criminal system.

In summary, in the case of *qiṣāṣ*-crimes the standards of proof as suggested in the *fiqh* have been substantially lowered, but also extended, to the level needed for the proof of other, non-ICL, crimes. However, while, on the one hand, *qiṣāṣ*-crimes become easier to prove, their factual application is, on the other hand, reduced to some degree, such as in the case of retaliation for wounds which seems to end routinely with the payment of *diya*. With the secularization of important parts of the procedural law a conviction for a *qiṣāṣ*-crime becomes more likely. The relationship between severe punishment and a high standard of proof has been broken. Altogether the influence of the *fiqh* on Sudanese criminal procedure is strongest

[1658] By "secular" I mean not directly based on notions and concepts that can be found in the Qur´ān or the *fiqh*. Certainly, whatever is not *ḥadd* or *qiṣāṣ* is defined as *ta´zīr*. However, this seems to be a retroactive rationalization. As shown above *ta´zīr*-crimes in the first version of ICL 1983 had not even been mentioned explicitly. As a concept, derived from the *fiqh*, *ta´zīr* was only introduced in 1991. However, despite a

in the proof of *ḥadd*-crimes. Islamic criminal law in the Sudan is, in important areas, cut off from Islamic procedural law that was meant to complement it. Both were intended to form a "working unit". This working unit, with its different requirements for *ḥadd*, *qiṣāṣ* and *ta´zīr*-crimes has only partially been translated into Sudanese criminal legislation.

There is another important development with regard to the CPA91 that needs mentioning. As observed earlier the CAP91 has the power to review any case and is obliged to review all life imprisonment, death and amputation sentences. With the CPA91 it has introduced a further, internal control mechanism, a special circuit of five judges, formed by the Chief Justice when, in his opinion an SC judgment contravenes the *sharī´a* or has erred in its interpretation or application of the law.[1659] The introduction of this circuit is remarkable for several reasons. It gives the Chief Justice the last word even in *sharī´a*-related cases that have already been reviewed by his colleagues. Formerly, the Supreme Court, which supposedly consists of the most qualified and experienced judges the Sudanese judicial system has to offer, reviewed a case once and decided. With the said circuit it is possible to ensure that SC judgments are consistent with the desired official line with regard to *sharī´a*-application. It appears that when the law speaks of "Islamic *sharī´a* ordinances" that may have been contravened it does not want to create a tool with the help of which its entire ICL legislation can be put to test. Cases are rare where SC judges have criticized Sudanese ICL legislation for not being in line with the *sharī´a*. While these cases are infrequent and go back to the early phase of ICL application under Numairi no similar cases have become known under the present regime. With the special circuit in question as a security valve the Chief Justice can ensure that no repeat "internal testing" of the Sudanese version of *sharī´a* takes place.

7.3.3 Supreme Court decisions

This study has highlighted the function of the Supreme Court as a security valve and as a regulatory agency. Warburg and Layish have shown the tendency of lower criminal courts to apply severe *sharī´a*-based punishments with a certain frequency. While there are no statistical studies available as to the frequency of harsh *sharī´a*-based punishments pronounced by lower courts in the period since 1989, it can be safely assumed that the

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reformulation of *ta´zīr* crimes in 1991 and their classification as such, their connection with pre-1983 criminal legislation cannot be denied.

[1659] CPA91, art. 188 (a).

Sudanese judicial system produces such sentences more often than what the regimes would like to see actually applied in practice.[1660] In other words, the Supreme Court has an important function in ensuring that the majority of these sentences are not carried out.[1661] The reasons for either quashing or commuting the decisions of lower courts are mainly two. Either these decisions contain serious legal errors or they are contrary to an undeclared policy of low-level application of severe *ḥadd*-punishments (with the exemption of *ḥirāba*). Sometimes both reasons come together. In the former case quashing or commuting a decision of a lower court is relatively easy. This becomes, however, more difficult a task when the decision of a lower court does not contain obvious legal errors and rather interprets the law in a way that leads to a harsh punishment in a case where the SC has not yet given clear guidance. In such cases the Supreme Court, as the highest court of the Sudan, can offer a different and more authoritative and binding interpretation of the law that renders all differing interpretations of lower courts inadmissible henceforward. As shown in this work more often than not these SC interpretations have the tendency to restrict the application of harsh *sharī´a*-based punishments. Examples are the acceptance of rape as a legal uncertainty remitting the *ḥadd*-punishment for *zinā* or interpreting the term „*muḥṣan*" in a way that excludes divorcees and widows/widowers, thus limiting the number of those who can be potentially sentenced to stoning. The example of rape also shows how the case law of the SC develops over time toward a more lenient[1662] interpretation of the pertinent legislation. It further shows that the SC not only regulates the interpretation of existing legislation, it also functions as a corrective of its own earlier ICL-related case law. Many of the SC decisions are clearly singular decisions on specific topics, deciding a controversial issue in a conclusive manner (as far as we know now). However, there are also SC decisions that are challenged, are subsequently developed and corrected until, it seems, a certain balance has established itself. The last decision on the matter then reflects what the SC judges want to establish as a legal norm that is not in contradiction with the general approach the current regime has chosen to apply. It has to be underlined that the SC is not operating in a political vacuum. Its personnel, its internal

[1660] It must be remembered that the cases published in the SLJR are only a fraction of those that reach the SC for review.
[1661] For the reasons of this policy see chapter 7.2.
[1662] "Lenient" in this context means: the SC tries to avoid the death penalty for *zinā*. It does, however, not mean that the female defendants are not punished. In the cases investigated they generally have languished years in prison before a decision to spare their lives is taken. These years in prison, under the threat of execution, are then declared a *ta´zīr* penalty and the defendants do not receive compensation for the time spent in prison.

statutes and organization, the criminal legislation it has to deal with and its general approach with regard to highly sensitive matters, such as the execution of amputations, crucifixions and stonings, all of this is, no doubt, highly political and therefore subject to regulation by the political sphere. Most of my interview partners underlined their perceived juridical independence and freedom to administer justice according to their own conscience. A clear examination of the above mentioned factors, however, shows the narrow parameters of that independence.

Next to streamlining ICL application according to the wishes of the ruling regime, SC jurisdiction at times has objectives that might be less to the liking of policy makers. Especially in the first phase of ICL application (1983-1991), when due to the superficial drafting and the multifold contradictions and lacunae in the legislation judges urgently needed guidance the Supreme Court had an important role to play. The majority of SC decisions during Numairi´s rule try to make sense of a legislation, that is in many ways in conflict with the *fiqh*, without contradicting the PC83 or pointing at its obvious flaws or openly criticizing it. This approach is not surprising given the pressure the judiciary had to endure in that particular period. We should also not forget that many of the judges still belonged to the old guard that had been trained in the common law tradition and was rather unfamiliar with Islamic law in general. However, it did not limit itself to issuing authoritative interpretations it also, in some rare occasions, had the courage to test the Penal Code against the *sharī´a*, thus questioning the sound drafting and applicability of important parts of the new Penal Code 1983. I have found at least one daring decision that demonstrates great courage of the responsible judges. In this landmark decision on *ḥirāba* /*sariqa* (*ḥaddiyya*) the SC judges took the Judgments Basic Rules Act 1983 (JBRA) and article 458 PC83 seriously, thus testing a group of articles of the PC83 against the *fiqh*.[1663] It came to the conclusion that a *ḥadd*-punishment that is normally reserved for a particular *ḥadd*-crime cannot be imposed if the corresponding crime is not the *ḥadd*-crime the *ḥadd*-punishment is meant for. In other words, if the legislator combines the definition of a *ta´zīr*-crime with a *ḥadd*-punishment it is not

[1663] Art. 2 JBRA stipulates that in "interpreting legislative provisions, the judge shall (a) presume that the legislator did not intend to contradict the *shar´ī* scale of five religious-legal qualifications; (b) interpret the general concepts and discretionary expressions in accordance with the rules, principles, and general spirit of the sharī´a; and (c) interpret the technical terms legal terms and the religious legal expressions in the light of basic principles (*qawā´id uṣūliyya*) and the linguistic rules of the Islamic science of the sharī´a". Article 458 (1) and (5) "instructs the judge...to ascertain that the provision applicable to an offense, especially one entailing a

admissible to impose that *ḥadd*-punishment, even if the crime committed fulfills all the elements specified in its definition. This unique and confronting approach of the Supreme Court questioned not only a whole group of articles of the Penal Code 1983 but in fact the quality of the drafting and its relationship with the *fiqh* in a remarkable way. The SC re-affirmed its professional autonomy when it implicitly spelled out what every legally trained person with some additional knowledge of Islamic law was able to see, i.e. the fact that the Penal Code 1983 was in many ways incompatible with the *fiqh*, that it was poorly drafted and posed multifold problems to the practitioners. Since this new and critical approach was actually published in the SLJR it was obviously meant to guide the lower echelons of the judiciary in their quest for justice. There are, however, also many other, more accommodating examples of how SC judges dealt with the contradictions of the PC83. In the majority of cases SC judges applied ICL without questioning the soundness of how it was codified. It is not clear which direction the lower courts followed in their judgments after the publication of the said decision. Secondly, it is equally remarkable that the SC actually dared to take the JBRA and article 458 seriously and used it as a tool to question and test the logic and applicability of the Penal Code 1983. While on the surface the legislator wanted to ensure that jurisdiction was in line with the *sharī´a*, it can hardly have been his intention that courts use both tools to address all contradictions and incompatibilities with the *fiqh*. This would have led to a situation where parts of the newly legislated Penal Code 1983 would have become inapplicable and more legal confusion would have been the result.

With regard to the Criminal Act 1991 the situation has improved. The CA91 and the legislation accompanying it, as shown, have rectified many of the flaws of their predecessors. However, there are, still a certain number of important incompatibilities with the *fiqh*, especially with regard to its interplay with procedural law. While article 458 has disappeared with the PC83, the JBRA is still in force and could, theoretically be invoked by courts. This, however, does not seem to be the case. In other words, as far as published SC decisions are concerned, and unlike during the first phase of ICL application, the SC judges seem to accept the legislation which is the base of their daily work and do not question its compatibility with the *fiqh*. Given the subsisting contradictions between Sudanese criminal legislation and the *fiqh* there would be ample grounds for invoking the JBRA. That this is not the case can be

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Qur`ānic punishment, conforms to sharī´a standards, and to refrain from interpreting any provision in a manner contravening shar´ī principles". Translation: Layish/Warburg (2002), pp. 168-169.

explained by the fact that the CA91 has moved closer to the *fiqh* on the one hand and the changed legal personnel and better control mechanisms on the other hand.

As to the interpretation methods used by the Supreme Court the investigated court decisions showed that judges normally try to establish the meaning of specific articles or legal terminology by either going back to the relevant legislative sources or by consulting relevant precedents. With regard to issues that are not directly related to ICL these sources are normally the predecessor codes, e.g. the PC83 as the precursor of the CA91 and the PC74 as the precursor of both. At times we even find decisions that quote precedents taken from English law. Whether or not English precedents are quoted is the decision of the judge and not all have a sufficient command of English for that purpose. Without linguistic access to the relevant sources (English precedents, Indian criminal code) developing historical depth in a decision becomes difficult. As to questions that are directly linked with ICL SC judges normally consult either synoptic works such as those authored by ʼAbd al-Qādir ʼAwda and Muḥammad Abū Zahra, consult directly the handbooks of the four Sunni *madhāhib*, either those ascribed to the founding fathers of these schools or other important authorities of the same school or they consult commentaries on a particular school. However, not only the four Sunni schools are taken into consideration, we also find references to other schools, e.g. the Ẓāhirite school, the Zaidite school or the Twelver Shiʼītes. They do quote, of course, the Qurʼan and Sunni *aḥadīth* as well in order to find guidance with regard to a specific legal problem. Similar to the multiple sources criminal legislation draws on the Supreme Court judges thus equally seek guidance in a large variety of Islamic sources that go far beyond the traditional schools that historically were prevalent in the Sudan. This flexibility in interpretation, and in addition the use of *ijtihād*, allow the Supreme Court the finding of creative solutions to complex ICL-related problems. This is even more so the case since the legislator has explicitly legitimized[1664] the use of other sources such as modern criminal jurisprudence and terminology and the taking into consideration of modern developments and the condition the country finds itself in. Next to predecessor codes and the works of the *fuqahāʾ*, we can also observe how over time, since 1983, a body of SC decisions grows, that is ICL-related and increasingly serves as a point of (self-)reference for decisions. This approach,

[1664] See chapter 3.1.1.1.

of course, continues very much the Sudanese pre-1983 tradition which in turn emulates the importance and use of precedents in English law.

Analyzed separately, legislation, procedure and jurisdiction show large differences with regard to potential social and societal acceptability. Legislation and procedure combined can potentially be interpreted in a way leading to a *sharī´a*-application comparable to the high-frequency application of cruel *sharī´a* punishments as practiced during the „revolutionary phase“ under Numairi. However, such “cavalier deployment“ (Sidahmed) of severe *sharī´a*-punishments was not socially acceptable at the time, except for a minority, and probably wouldn’t be so today. Keeping them in the statutes and interpreting them in a way that avoids further societal debates, political conflicts and individual tragedies is certainly socially beneficial in the sense that it is acceptable to the concerned individuals and to society as a whole. By functioning as a corrective to the underlying legislation the Supreme Court certainly makes a decisive contribution to how “the *sharī´a*“ as a whole is being perceived not only within the judiciary but also within society at large. The acceptance of the claim of rape as *shubha* averting the *ḥadd* for *zinā* and the non-applicability of retribution for wounds with the concurrent awarding of blood money are striking examples of how political, individual and societal needs can match. The reduction of discrimination based on gender and/or religion described below are equally evidence to this approach.

In summary the combination of Islamized penal codes, legislation on criminal procedure and the growing body of case law on ICL, whether of the Supreme Court or Criminal Courts of Appeal, creates what we could call a "Sudanese national *sharī´a*". It is national in the sense that it has selected a corpus of solutions, either from the different *madhāhib*, by way of *ijtihād* or by other methods, that is in its methodology as well as in its results unique. We can safely assume that there is no other country that has chosen a similar mix of methods nor is there another country that has reached the same solutions. Both, methods and solutions are specific to the Sudan and it is therefore justified to speak of a national Sudanese *sharī´a*. In fact, with reference to our introductory discussion of the terms *sharī´a* vs. *fiqh* we can state that while policy makers like to use the term *sharī´a* with its connotations of divinity and timelessness, the actual practice of ICL is rather a very human affair. Methods used for finding solutions and the results of these endeavors are the choices of human actors. Both, methods and results, are determined by a very specific political and historical situation and can hardly claim universality. "The *sharī´a*" thus falls apart into as many national versions as there are

countries that are entertaining *sharī´a*-based codifications of Islamic (Criminal) Law. Moreover, as to the national Sudanese version of ICL it cannot even claim to be the result of a clear and unequivocal popular vote. It has been controversial from its inception and continues to be so. While doubtlessly also having its proponents, it is contested within the country by large parts of the opposition and Southerners and it is not without reason that its acceptance has never been tested by way of free elections or a referendum.

7.4. Political and historical factors

Islamic Criminal Law in the Sudan, its introduction, subsequent development and management by various regimes, has to be contextualized and can only be understood in relation to the political developments surrounding it. It was introduced by and had its heyday under a regime that tried to muster popular support through Islamization. Numairi had resorted to the introduction of Islamized legislation when his failed economic policies and the re-ignited conflict in the South of the Sudan had deprived him of much of his credibility and political legitimacy. His regime wanted to prove that it was serious about ICL. It therefore made sure that the harsh corporal punishments of the new Penal Code 1983, which was in fact a superficially Islamized version of its 1974 predecessor, were applied frequently. Despite vocal domestic and foreign protest severe *sharī´a*-punishments, such as amputations, were carried out and many thousands were flogged. With the fall of Numairi´s dictatorship, the political situation changed. However, neither the following military-led interim government nor the democratically elected government of Ṣādiq al-Mahdī were willing or able to either reform ICL or abolish it altogether. The situation of ICL between 1985 and 1989, while the execution of decisions had been suspended, remained in limbo during this period. When, after years of maneuvering, the al-Mahdī government finally envisaged the abolition of ICL, a military coup d´état preempted the move. It soon became clear that the new military regime was in alliance with Ḥasan al-Tūrābī and his Islamist forces who provided the new dictatorship with the necessary ideological trappings. And while the re-introduction of ICL, by way of a reformed and improved criminal legislation, was an important part of their agenda, after twenty years of its application, however, it has become obvious that there are fundamental differences between the first “revolutionary phase” 1983-1985 and the practice of ICL 1991 to present. A “Criminal Bill” project, a 1988 brainchild of the then incumbent Minister of Justice al-Turābī and which had been temporarily shelved in 1989 for lack of

parliamentary acceptance, was reanimated in 1991. Much more diligently drafted, the Criminal Act 1991, is not only a more condensed code than its predecessor of 1983. It also tried to be more faithful to the *fiqh* in its provisions. In brief, it steered clear of most of the flaws of its predecessor and thus, to some degree, preempted criticism from Islamist competitors. Given the fact that the "application of the *sharī´a*" had been part and parcel of the ideological repertoire of the very Islamists that were now in power one could have expected a resolute resumption of *sharī´a* application. However, this is not what happened. *Sharī´a*-based criminal law was applied, but its application, since the military-Islamist regime has assumed power, did and does only lead to a limited number of severe *sharī´a*-penalties actually being carried out. Indeed, there is a remarkable divergence between the rhetoric of the al-Bashīr regime with regard to the importance of the *sharī´a* and the dimmed-down version it chooses to apply. There are several possible explanations for this phenomenon. First of all, the al-Bashīr regime needs ICL ("the *sharī´a*") in the statutes in order to gain legitimacy in the eyes of its followers. Whether or not all the punishments contained in the legislation are actually carried out is of secondary importance in this context. It is not a priority for the regime to apply all possible punishments of ICL with a high frequency, and thus most likely provoking domestic resistance and international protest. Sidahmed has argued that the military-Islamist regime was not concerned with possible Western reactions against *sharī´a* application since Khartoum and Western governments had few relations in the first place. Further, it would not be likely that a more moderate application of the *sharī´a* improves the regime's (few) ties with the West, since Western countries have excellent relations with countries that do apply the *sharī´a* in criminal matters on a regular basis.[1665] I can generally agree with this argument.[1666] It should, however, not be forgotten that the Sudan's choice not to opt for a high-frequency *sharī´a* application is a rational choice based on a variety of factors. Reducing friction with the monitoring bodies of international human rights conventions the Sudan is party to might not be the government's main motive but it is one aspect of several in making such a rational choice as well as calming down domestic opposition and resistance to harsh *sharī´a* punishments with the same approach. Defiant reactions to human rights reports e.g. by Amnesty International indicate that the Sudan

[1665] On this argument see Sidahmed (1997), p. 221.
[1666] E.g. Saudi-Arabia.

government is not immune to international criticism.[1667] As shown above (see chapter on human rights) the Sudan also has to position itself with regard to criticism from monitoring bodies, it does thus not act in a political vacuum as the assumption of lacking ties with the West suggests.

Further, the regime has always stressed that the application of the *sharī´a* is a popular demand of the vast majority of the Sudanese.[1668] Thus, or so the logic goes, "the regime which enacts *sharī´a* is by default an embodiment of this will and its legitimate representative".[1669] This is certainly the argument the Islamist regime has chosen to propagate. It goes without saying that this argument is flawed for several reasons. If the demand by the "Sudanese masses" really were overwhelming the introduction of ICL could easily have been the object of a national referendum. But of course the outcome of such a referendum, short of being rigged, would have been unpredictable and popular approval of the majority would have been less than secure. To the contrary, a democratic vote on the introduction and application of ICL/the *sharī´a* did never take place. Neither a direct one nor did the NIF or any of its predecessors or successors, as the main pressure group for the introduction of the *sharī´a*, ever win elections. Both Islamized penal codes, as well as most other *sharī´a* related laws, were realized by two dictatorial regimes which suppressed all competing voices either objecting the application of the *sharī´a* altogether such as the Southern parties or the secular-minded parties of the North or calling for an alternative version of *sharī´a* such as some of the Islamist parties of the North. As to the NIF and its different manifestations it has shown a tactical approach with regard to its propagation of the *sharī´a*, never losing sight of the higher strategic goal of winning power and control of the state in order to realize its Islamization program. Thus, the NIF and its predecessors used the *sharī´a* question to either take a lead in the discussion or to make their influence felt, whenever the *sharī´a* became a major topic in the national debate. This was the case during the second democratic interlude in 1966/67 when an Islamic constitution was discussed, after "reconciliation" with Numairi when in 1978 a committee reviewed Sudanese laws with regard to their compliance with the *sharī´a*, in 1983/84 when ICL was introduced and finally between 1985 and 1989 when the NIF used the *sharī´a* as the

[1667] See for example "The crododile tears. A response by the Government of Sudan to the highly dramatic book published recently by Amnesty International under the title The Tears of Orphans". Sudan Foundation, London 1997.
[1668] See e.g. the introduction to the CA91 quoted above.
[1669] Sidahmed (1997), p. 222.

decisive argument for or against their joining a coalition government.[1670] In all these debates al-Turābī and his comrades-in-arms were able to use the *sharī´a* question to portray themselves as the party that was the most serious about *sharī´a* application. However, attaining power has always been more important than *sharī´a* application. When between 1978 and 1983 most recommendations of the said committee were not realized, the Muslim Brothers continued to cooperate with and back the dictatorial and increasingly unpopular Numairi regime. When ICL and other *sharī´a*-based laws were introduced in 1983/84 Muslim Brotherhood members manned many of the courts and did not hesitate to play along Numairi´s directives, turning the whole experiment into a very cruel and bloody affair. These MB judges indicted members of the hated SSU, without much success, for corruption in order to demonstrate their impartiality and the justness of the *sharī´a*. Concurrently, the same judges ordered amputations for the theft of trifle amounts. As shown above, the actual practice of ICL application before the downfall of Numairi clearly showed a class bias with the high representatives of the regime receiving small or no punishments for the embezzlement of major government funds. In other words "*sharia* ...laws are interpreted to strike those who encroach on private property and spare those who steal from the public coffer".[1671] Given the state of impunity for high-level corruption in the Sudan under the al-Bashīr regime this class bias is clearly still very much present.

Since the MB and its different political manifestations was never committed to a particular version of the *sharī´a* it was able to apply great flexibility in the presentation of their demands and positions. These ranged from backing (and executing) Numairi´s particularly harsh version of ICL to introducing their own version and limiting its de facto application, with exceptions, to a rather low level. As long as it is "the *sharī´a*", content and approach can vary if it serves the aims of the movement. This flexibility, however, has its limits and it is difficult to conceive either side of the now split movement conceding the abolition of ICL or other *sharī´a*-based parts of the legislation. Next to enhancing its legitimacy the regime, with the help of its rallying cry "*taṭbīq al-sharī´a*", is also drawing a boundary "within which the regime accommodates or excludes other political forces".[1672] While Sidahmed certainly has a point here it must be underlined that on the one hand the regime could probably come to

[1670] Sidahmed (1997), p. 221.
[1671] The Black Book: Imbalance of Power and Wealth in Sudan, March 2004. Accessed 30/07/2004 under http://www.sudanjem.com/english/books/blackbook_part1/20040422_bbone.htm.

terms with the two big sectarian parties with regard to the *sharī´a* question. After all there is a substantial amount of sympathy among both parties for *sharī´a* application and it is not without reason that al-Mahdī was rather hesitant in abolishing the September laws in his time as Prime Minister. On the other hand, *sharī´a* application and the position with regard to this question is only one factor for exclusion or inclusion into the ruling regime and not any longer even a decisive one for that matter. A point in case is the schism of the Islamist movement which took place with and after al-Turābī´s ouster. NCP and PCP have politically more in common than what separates them and it is not known that they have a disagreement on *sharī´a* application. After all, the current version of ICL is a brainchild of al-Turābī. The split between the two parties has completely different reasons which, in turn, cannot be overcome by a common position in this particular question only. Sidahmed´s book which quoted here was published in 1997, thus before al-Turābī´s removal and the split of the movement. At the time this analysis was certainly much more valid, but with the deep rift in the Islamist movement the *sharī´a* issue is not any longer a decisive factor distinguishing between friends and foes.

The combination of Islamized criminal statutes and selective and at times low level ICL application accompanied by pertinent political rhetoric appears to be sufficient to meet the expectations of most of the *sharī´a* proponents in the Sudan. At the same time ICL application in the Sudan is rather rarely in the limelight of international media attention. *Sharī´a* cases are being discussed internationally under specific circumstances, e.g. when a flogging video appears on YouTube or when a journalist is sentenced to flogging and talks to the international press. Such cases, however, are exceptional. A thorough reading of AI and HRW reports leaves no doubts about the abysmal human rights record of the Sudan, especially under the military-Islamist rule of president al-Bashīr, but also under his predecessors Ṣādiq al-Mahdī and Numairi. The contribution of ICL application to this negative record is, however, in the face of war atrocities that have been ongoing for decades, habitual torture and mass extra-judicial killings, rather small. These human rights violations are a direct result of the violent strategies the al-Bashīr regime devises to get the upper hand in the multifold regional conflicts it has inherited and aggravated. On the other hand human rights violations are used to subdue and silence the opposition in the North. On both accounts ICL application

[1672] Sidahmed (1997), p. 222.

has only a very small role to play. It is mainly limited to a small number of *ḥirāba*-cases in Dār Fūr and rarely used, at least with regard to the harsher corporal punishments, in the North.

Present day sharī´a *application is not a recreation of the past*

Our survey has clearly shown that the application of Islamic law before the Condominium cannot serve as a model for modern day application. Modern ICL has in form and content only a very weak connection with its historical predecessors. These were never codified, not embedded in modern legal structures of Western origin and characterized by only a limited knowledge of the *sharī´a*. The claim of some *sharī´a* supporters that modern ICL removes a historical wrong, i.e. the introduction of the Common Law system, and concurrently reinstates an authentic and indigenous system, this claim was not corroborated by this study. Also, the criminal law as applied today, in form and content and despite its (partial) Islamization, is far from being detached from its colonial heritage. The Islamization efforts of the 1980s and the early 1990s changed this to some degree but have made the Sudanese legal system also more hybrid than ever before. The present Sudanese criminal law is indeed new and unprecedented. It relies mainly on Western legislative techniques and on judicial structures that clearly have their roots in the system inherited from the former colonial power. In this sense ICL has been grafted into a secular legal system that is older than the Islamized parts of the legal system and was free from elements that could claim religious legitimacy. ICL in this process undergoes a secularization process with regard to procedure, evidence and the structures of the court system, all of which are governed by an environment that is clearly a remnant of the pre-1983 legal history. The personnel dispensing justice is the secular judge, often trained in secular institutions within or outside of the Sudan and bound by a multitude of rules, regulations and structures that are not following historical models based on the *sharī´a* / *fiqh*. The same is true with regard to the definition and development of ICL which is not any longer in the hands of a class of independent legal theoreticians, the *fuqahā'*. ICL as practiced in the contemporary Sudan is therefore not only very different from the historical *sharī´a* as practiced before the Condominium, it is not even dominating criminal law as such. It is to a large degree shaped by the legal environment that surrounds it and by the political agenda of the regime that has “re”-introduced it. It is the Republic of the Sudan and its institutions which chooses, formulates, applies and develops the law. Outside state institutions there is no

formulation of Islamic law that could ever hope to be codified. In other words the state has not only eliminated all competing voices, religious and political, it has thereby also established a monopoly that claims the right to define what Islamic law is and how to apply it. The result of this process is a national version of, mostly *fiqh*-derived and highly selective ICL, i.e. a version of the *sharī´a* that is limited to a particular nation state, i.e. the Sudan.