

PREFACE

The idea for this monograph suggested itself in September 1983 when President Muḥammad Jaʿfar Numayrī introduced the Islamist laws¹ in the Sudan. What aroused our scholarly interest at the time was not so much Numayrī's attempt to reinstate various domains of the *sharīʿa*, which in itself was neither an innovation nor a surprise, but rather a combination of several factors: the circumstances leading to this legal experiment, its methodology and implementation, its evaluation from the orthodox *sharī* point of view, as well as the experiment's impact on Sudanese society and the reactions it aroused within the Islamic milieu in the country.

Ever since Numayrī reached an agreement of National Reconciliation with the leaders of the Anṣār and the Muslim Brothers in July 1977, a new trend toward Islamization of the legal system became apparent with Dr. Ḥasan al-Turābī, leader of the Muslim Brothers, playing a major role. Similar attempts had been contemplated previously in the independent Sudan, where the idea of reinstating the *sharīʿa* did not cease with the demise of the Mahdist state in 1898. Indeed, on January 15, 1968, the draft of an "Islamic constitution," agreed upon by a special committee of 44 members representing all major political parties and groupings, was presented for approval to the Constituent Assembly. It was, however, never to be promulgated since elections intervened, and when Col. Jaʿfar Numayrī and the Free Officers staged their military coup in May 1969, this draft constitution was shelved alongside many of its predecessors. Moreover, the draft of the "Islamic constitution" was in itself the result of a compromise between the Muslim Brothers, who advocated an Islamic state based on an Islamic constitution, and representatives of a southern, non-Muslim viewpoint promoting total secularization. In consequence, the extent of Islamization of the legal system actualized was fairly limited in scope. One Sudanese scholar skeptical of the Islamic nature of this constitution, wrote: "[. . .] apart from the stipulation of the

¹ Throughout this study the "the September 1983 laws" are designated as "Islamist laws (or statutes or legislation)," to be distinguished from the uncodified Islamic law or *sharīʿa*.

sharīʿa as the primary source of legislation, all references to Islam were rather symbolic.” Others viewed the constitution as a mere first step toward an Islamic state and credited the Muslim Brothers on the committee with a real achievement.² Under the Numayrī regime the promulgation of this constitution was therefore not part of the new regime’s initially secularist and leftist policies.

Our interest was primarily aroused by the following factors. Firstly, it struck us as odd that Numayrī, who owed his initial political successes to his anti-sectarianism, his alliance with a leftist group of officers, and his ability to settle the conflict with the non-Muslim South, was the one to announce the Islamist laws in September 1983, an objective that had eluded all his predecessors. Secondly, the Islamist legislation had been denounced by ex-Prime Minister al-Ṣādiq al-Mahdī, leader of the Anṣar, the largest Muslim sect in the Sudan, as well as by other Muslim leaders and scholars. This, in turn, raised a further question which we will address here, namely whether these new laws really amounted to restoration of the *sharīʿa*, as claimed by Numayrī and his associates, or whether they represent a radical departure, even a distortion, according to al-Ṣādiq al-Mahdī and other Muslim ‘*ulamāʾ*’.³ An even more intriguing question, in this regard, is the extent to which the Mahdist ideology and its legal methodology inspired Numayrī in the experiment of reinstating the *sharīʿa* in the Sudan. A crucial issue here is the role played by Sudanese intellectuals and reformists such as Ḥasan al-Turābī in providing Numayrī with the conceptual framework and legal tools for his experiment. This is more than a merely academic question since the Islamist trend launched by Numayrī has been pursued in one way or another until the present by the Islamist military coalition led by President ‘Umar Ḥasan al-Bashīr.

It is just as well to admit at the outset that, for the time being, we do not have satisfactory answers to all these questions, especially the one concerning the potential impact of the Mahdiyya and its legal methodology. Further research is required in order to attain more definitive results; this is at present being undertaken by Aharon Layish.

In the last analysis, the attempt to reinstate the *sharīʿa* in the Sudan under Numayrī presents the outside observer with an anomaly. Ever since the Muslim world’s encounter with the West in the modern

² Sidahmad, *Politics and Islam*, 103; see also An-Naʿim, *Islamic Constitution*, 329–40.

³ Warburg, *Sharīʿa and Implementation*. For details, see below, IV.1 and V.1.

period, Islamic law has been on the retreat under the impact of secularization and westernization. The influence of the West has manifested itself in the adoption of a wide variety of methods, for instance, in the importation of entire codes in various legal domains, and their application in civil courts outside the control of the *‘ulamā’*, the authorized exponents of the *sharī‘a*. Also, statutory codification (in itself alien to the *sharī‘a* as a jurists’ law) of selected domains of Islamic law, including matters of personal status—the very core of the *sharī‘a*—has been carried out in a patently Western style. Furthermore, the *sharī‘a* judiciary has also been organized along Western patterns entailing, for instance, the collegial composition of the court, a hierarchy of courts, including appeals. Highly significant, in this respect, is the fact that in several Muslim countries, the *sharī‘a* courts’ jurisdiction has been extensively restricted leading, in a few cases, to their complete abolition. The codified Islamic law has been applied in matters of personal status and succession in civil courts, the inevitable result of which has been the exposure of Islamic law to national and secularist legal principles.⁴

Thus the Sudanese experiment in reinstating the *sharī‘a* by codification and statutory legislation became for us a matter of primary interest. Reforms in Islamic law have been introduced by means of *shar‘ī* mechanisms advanced by Modernists of the Muḥammad ‘Abduh school since the turn of the twentieth century. They aimed at conveying the impression of a genuine internal refurbishment of the *sharī‘a*, and even of its introduction by means of *ijtihād*.⁵ In reality, these reforms were first and foremost legislative acts of parliament. The codification of several domains of law, even if they drew their inspiration and thematic content from traditional law, reflected a transition from jurists’ law—developed by independent *‘ulamā’* and *fuqahā’*—to statutory law, anchored in state sanctions. Therefore, modern reforms within the *sharī‘a* by means of statutory codification and legislation should generally be assessed as a development occurring

⁴ Needless to say, the importation of Western codes and their application in civil courts is a development outside the *sharī‘a*. Moreover, the statutory codification of various domains of the *sharī‘a* and its application in Western-oriented *sharī‘a* and civil courts expose the *sharī‘a* to secular legal principles and doctrines. For further discussion of this issue, see below, II.2.1.1.

⁵ The thesis of “the closure of the gate of *ijtihād*” has been recently challenged by Western scholars. See Meron, *Legal Thought in Hanafī Texts*; Hallaq, *Ijtihād Closed?; Islamic Law and Society* 3, no. 2 (1996), special issue on *Ijtihād* and *Taqīd*.

outside the *sharīʿa*. During the Middle Ages, Islam, flourishing and at the peak of its power, succeeded in absorbing legal institutions and principles from a wide variety of sources, and in creating a unique and integral legal system. Whether such an impressive intellectual achievement can be repeated in Islam's ongoing encounter with the West, remains to be seen. Recent trends in the Muslim world show an Islam on the defensive staging an all-out struggle to retain the sovereignty of the *sharīʿa* in the realm of personal status.⁶

The secularization of Islamic law has been part of a general modernist trend entailing extensive reforms of Islamic institutions, sometimes leading to their complete abolition, as in the case of the aforementioned *sharīʿa* courts and that of the family *waqf* in Egypt. Religious functionaries, from the *muftī*—perhaps the most important agent for the development and the vitality of the *sharīʿa*—down to the lowest religious functionaries, have lost their independent status becoming, in effect, civil servants, often integrated into its secularizing apparatus. A similar phenomenon has occurred in the field of education, where secular state schools have often replaced the traditional Muslim ones. This secularization process of course differs from one Muslim country to another, both quantitatively and qualitatively, with Turkey leading the way. Under President Nasser, Egypt also moved in this direction at a more rapid pace than its Arab neighbors, for instance, in the Arabian peninsula, where the status of the *sharīʿa* had remained relatively strong despite important reforms undertaken in the Republic of South Yemen and in Saudi Arabia.⁷

Concurrently, in recent years there have also been instances of a retreat from this secularist stance throughout the Muslim world taking two different forms, both employing the medium of statutory legislation and the jurisprudence of the courts: a. reinstatement of Islamic law, especially the traditional penal law; b. making the validity of statutory provisions contingent on their conformity with the *sharīʿa*. The most striking among the Muslim countries to adopt this trend has been Iran, where the 1979 Islamic revolution brought about a dramatic turnabout in the status of the *sharīʿa* and that of the religious hierarchy. Muslim countries where restoration of Islamic law

⁶ For details, see Coulson, *History*, pt. 3; *idem*, *Conflicts*, ch. 6; Anderson, *Law Reform*, chs. 3–4; Layish, *Modernists*; *idem*, *Mahkama*, 40–42; Layish & Shaham, *Tashrīʿ*.

⁷ Anderson, *Law Reform*, *passim*; Vogel, *Saudi Arabia*, pt. 2; Layish, *Saudi Arabian Legal Reform*.

has been undertaken, with various degrees of radicalism, include, among others, Libya, Pakistan, Sudan, and Egypt. Each of these countries adopted this measure for reasons arising from its own prevailing conditions and, though certain similarities emerge, each has to be examined in the light of its own particular background.

The present joint research has been motivated precisely by the need to foreground these differences. Gabriel Warburg is best known for his numerous studies on the modern history of the Sudan. Of special relevance to the present study is his on-going research on twentieth century neo-Mahdism, as well as his inquiry into the Anglo-Egyptian Condominium and the emergence of the southern problem, which led him in 1989 to study the Islamist laws in the Sudan and to assess their repercussions.⁸ His historical perspective presents the reader with the background essential for an understanding of the modern Islamist movement in the Sudan. Aharon Layish is a social historian with a special interest in the application of the *sharīʿa* in the contemporary Middle East and North Africa as evidenced in legal documents. Over the last three decades he has focussed on interaction between the *sharīʿa* and customary law in tribal societies undergoing sedentarization in the Judean Desert and Libya, and on the institution of the *waqf*. More recently he has undertaken research on the Mahdī's legal methodology in the Sudan and on its application.

The objective of the present study is to assess the Sudanese experiment of reinstating the *sharīʿa* under Numayrī against the relevant historical and political background. It does not purport to be a systematic survey of the extensive Islamist legislation and court decisions that emerged under his regime. The intention rather is to analyze the methods employed in restoring the *sharīʿa* through legislation, legal circulars (*manshūrāt qadāʾiyya*) and judicial practice, as well as their unique patterns of introduction and sources of inspiration. Within this framework, statutory legislation and judicial practice do not represent ends in themselves; they are meant to serve as a medium and illustration for the analysis with a view to evaluating the significance of these methods and their repercussions from the orthodox *sharʿī* point of view.

In our summing up we review the results of the this experiment with respect to Sudanese society. Most of the illustrations are enlisted from the criminal legislation because this domain provides the strongest

⁸ Warburg, *Sharīʿa and Implementation*.

stimulus for the assessment of the interaction between the *sharīʿa* and the pre-1983 statutory legislation. It goes without saying, however, that civil law as well as the law of procedure and evidence are also of focal interest in this study, and Islamist statutes pertaining to these domains are referred to in an analytical context.

Chapter One deals with the historical, political, social, and intellectual background to Numayrī's legal experiment. There can be no doubt that the impact of the nineteenth century Mahdist state played a central role in the rise of sectarian politics during the twentieth century. This in turn led to the predominance of Islamist trends in Sudan since independence, and subsequently to an attempt at Islamization. Chapter Two deals with the Islamization of Sudanese law with special reference to its policy and objectives, the role of Ḥasan al-Turābī's legal methodology in shaping the Islamist legislation, the techniques of reinstating the *sharīʿa*, and the absorption of pre-1983 sources of law in the Islamist legislation. Chapter Three examines the Islamization of the law—both *sharīʿa* and pre-1983—applicable through the courts' jurisprudence with special reference to judicial *ijtihād*. Chapter Four assesses the impact of the Sudanese legal experiment on the uncoded *sharīʿa*, state control of public morals, the status of women and non-Muslims, and the role of the judge as an instrument for implementing Islamist policy. Chapter Five sums up the main features of the Sudanese legal experiment and its results with respect to Sudanese society and the economy.

Sudan is a case of legal pluralism par excellence. Beside the codified and uncoded *sharīʿa*, pre-1983 sources of law such as custom and English-inspired justice, equity and good conscience, as well as judicial precedents still play a vital role in the Islamist legislation. In fact, the tension between the *sharīʿa* and all the other sources of law, anchored in statutes, is the core of the present study. The *sharīʿa*, on the one hand, represents an ultimate legal norm of a divine law, the product of independent jurists; the statutes, on the other hand, are the product of legislature ultimately representing the sovereignty of the nation. This tension is clearly manifested in the “constitutional provision” of the Judgments (Basic Rules) Act [JudA], 1983 (Article 2), which provides, in effect, that the validity of statutory provisions is contingent on their conformity with the uncoded *sharīʿa*.⁹

The same paradox emerges from Article 2 of the Egyptian 1980 constitution which provides that the *sharīʿa* is “the main source of

⁹ See below, II.2.1.3.

legislation” within a legal system that recognizes the exclusivity of the parliament as a body enacting statutes. Bälz suggests three complementary models to define the paradox of legal pluralism; these may be useful also to define the relations between the uncoded *sharīʿa* and the Islamist legislation in the Sudan:

(1) *Normative control of the sharīʿa over statutory provisions* (“supra-legislative norms”). According to this model, the *sharīʿa* is regarded as the “shared source for the validity of all legal rules belonging to the same (legal) order” (“Islamic *Grundnorm*”). In the case of the Egyptian constitutional provision (Article 2), this implies that the *sharīʿa* precedes other constitutional provisions in the hierarchical order of different legal layers.

(2) *Interpenetration of two different or separate legal orders: the sharīʿa and statute (qānūn)*. In Article 2 of the Egyptian constitution, the *sharīʿa* is *incorporated* in the order of statutory legislation, thereby curtailing the legislature’s discretion: in substance, statutory legislation must conform to the *sharīʿa*, but, at the same time, rules deriving from the *sharīʿa* are not valid unless they have been codified within statutory provisions.

(3) *Coexistence of the sharīʿa and statute as two radically autonomous legal orders* each of which implements a social reality of its own. This combination implies that the *sharīʿa* neither exercises “direct influence” over the order of secular law through the establishment of a set of “supra-legislative norms,” nor imposes any extraneous limitations on statutory legislation. On the contrary, the order of secular law maintains its autonomy by constructing a “secular” reading of the codified *sharīʿa*.¹⁰

Which model, if any, fits best the legal experiment of the Sudan? Naturally, this question is addressed in the concluding chapter of this study.¹¹

This study draws primarily on Sudanese sources and has been prepared with the following readership in mind: students of Sudanese history, legal historians, Islamists and students of comparative law.

¹⁰ For further details on these models, see Bälz, *The Secular Reconstruction of Islamic Law*, 231–33. We are indebted to Ruud Peters for drawing our attention to this article.

¹¹ See below, V.1.

We believe that we have produced a balanced study, drawing on our joint expertise, and that our treatment does justice to the questions raised above, hopefully providing some of the answers. We have endeavored to avoid value judgements in our research being well aware that the restoration of the *sharīʿa* and its application in modern times is a controversial issue, both in the Muslim world as well as in the world community. In essence, we portray the Sudanese experiment of reinstating the *sharīʿa* from a purely academic angle and present an analytical assessment of its implementation and consequences.

In order to enable our readers to proceed with maximal ease, a few remarks on some technical points may be useful. The footnotes give only abbreviated titles of the sources quoted; a list of the full titles of primary sources—Islamist statutes, court decisions and archival material—and a second list of the full titles of books and articles referred to, appears at the end of the book. Abbreviations of the most important Islamist statutes and courts are listed after the Preface. In assessing court decisions we have been constrained to use a selection of decisions handed down by the Supreme Court [SupC] and published in *SLJR*. Unfortunately, we have had no access to decisions handed down by other courts. However, decisions of courts of appeal [CAps] were almost daily surveyed in *al-Ṣaḥāfa* and thus we have been able to acquire a fairly accurate idea of the cases dealt with by these courts and some notion of the general trends among the judges applying Islamist statutes and circulars. For the purpose of establishing the doctrines of the uncodified *sharīʿa* on the extensive variety of subjects dealt with by the Islamist statutes, legal circulars, and judicial practice, we have confined ourselves as a rule to the professional and scholarly literature in Arabic and European languages to the extent necessary for a clarification of legal norms in specific domains.

Arabic technical and legal terms are given in transliteration in order to facilitate reference to dictionaries and professional literature. They are explained on their first occurrence in the relevant chapters and in the Glossary of Arabic Legal and Technical Terms at the end of the book. The chapters of the book are marked in the footnotes by Roman numerals. Thus IV.3.2. stands for chapter four, subtitle “Non-muslims.” Finally, unless otherwise indicated, the citations of Qurʾānic verses in English translation are from Pickthall, *Glorious Koran* (see Bibliography).